Joint Supreme Court and Court of Appeals Judicial Education Program

April 12, 2019
NC Judicial Center, Raleigh, N.C.

Friday, April 12

8:45 am	**Check In/Breakfast**
9:00am	**Welcome and Opening Remarks**
9:15am	**Same-Sex Marriage: The Impact on Child Custody and Parentage Determinations** Cheryl Howell, Professor of Public Law and Government, UNC School of Government
10:15am	**Break**
10:30am	**Termination of Parental Rights** Sara DePasquale, Assistant Professor of Public Law and Government, UNC School of Government
12:00am	**Lunch**
1:00pm	**Standing Issues in Zoning Cases** David Owens, Gladys Hall Coates Professor of Public Law and Government, UNC School of Government
2:00pm	**Break**
2:15pm	**Criminal Law Update and Supreme Court Criminal Review** Shea Denning, Professor of Public Law and Government, UNC School of Government
3:15pm	**Break**
3:30pm	**Workers Compensation: Role of the Industrial Commission and Role of the Courts** Justice Robin Hudson, NC Supreme Court
4:30pm	**Closing Comments**
4:45pm	**Complete Evaluations & Adjourn**

This program will have 5.5 hours of instruction, all of which will qualify for general continuing judicial education credit under Rule II.C of Continuing Judicial Education.

Any breakfast or lunch provided as part of this program is paid for by the Administrative Office of the Courts. When claiming reimbursement for expenses for this program, the portion of the daily travel allowance allocated for these breakfasts or lunches may not be claimed.

Custody and Same-Sex Marriage

Cheryl Howell

April 2019

UNC SCHOOL OF GOVERNMENT

Consider:

- Same-sex female couple who live together – Ann and Susan – decide Ann will have a child
- Ann becomes pregnant using an anonymous sperm donor
- Ann and Susan continue to live together following birth of the child, sharing living expenses and childcare responsibilities
- When child is 6 years old, Ann and Susan separate
- Susan files for custody when Ann restricts Susan's time with the child

UNC

We have case law.....

- *Mason v. Dwinnell*, 190 NC App 209 (2008)
- *Estroff v. Chaterjee*, 190 NC App 61 (2008)
- *Heatzig v. MacLean*, 191 NC App 451 (2008)
- *Boseman v. Jarrell*, 364 NC 537 (2010)
  - See SOG Bulletin "Third Party Custody" https://www.sog.unc.edu/sites/www.sog.unc.edu/files/reports/flb25.pdf

UNC

Mason, Estroff and Boseman

- The "nature of the relationship" between the parties is not relevant nor determinative
  - Court stated it is "immaterial" that parties could not marry or adopt a child together
- When custody dispute is between a parent and a non-parent *Price v. Howard*, 346 NC 68 (1997), controls
- Parent has constitutional right to exclusive custody

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Mason, Estroff and *Boseman*

- Parent can waive constitutional protection by engaging in conduct inconsistent with her protected status
- Conduct inconsistent with protected status:
  - Creating a "parent-like" relationship between child and non-parent, and
  - Intending that relationship to be permanent, and
  - Ceding a portion of parent's exclusive rights to the non-parent without intending that sharing of rights will be temporary
- *Cf. Mason* (waiver found) & *Estroff* (no waiver)

UNC

Custody rights are not parental rights

- When parent waives constitutional protection, court can apply best interest to determine *custody*
- Alternative theories – such as *de facto* parent and parent by estoppel – "have not been recognized in North Carolina"
  - *Seyboth v. Seyboth*, 147 NC App 63 (2001)
  - *Estroff v. Chaterjee*, 190 NC App 61 (2008)
- "District court in NC is without authority to confer parental status upon a person who is not the biological parent of a child. The sole means of creating the legal relationship of parent and child is [adoption]."
  - *Heatzig v. MacLean*, 191 NC App 451 (2008)

UNC

What about bio dad?

- There is no statute or case law addressing anonymous sperm donors in NC
  - *In re Guardianship of I.H.*, 834 A.2d 922, 927 (Me. 2003)(anonymous donor does not need to be served)
- There is no statute or case law indicating a parent is a 'necessary party' to a custody case
  - A parent must be provided notice before custody determination is made unless TPR.
    - GS 50A-205
  - *Mason, Estroff* and *Boseman* do not mention the bio father at all.
    - Dispute to be resolved is between the parties only

UNC

Consider:

- Same-sex female **married couple** – Ann and Susan – decide Ann will have a child
- Ann becomes pregnant using an anonymous sperm donor
- Ann and Susan are married when the child is born and continue to live together following birth of the child, sharing living expenses and childcare responsibilities
- When child is 6 years old, Ann and Susan separate
- Susan files for custody when Ann restricts Susan's time with the child

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Obergefell v. Hodges, 135 S.Ct. 2584 (2015)

- The right to marry is a fundamental liberty interest protected by the Due Process and Equal Protection Clauses of the 14th Amendment and couples of the same-sex cannot be deprived of the right to marry
- State marriage laws are invalid to the extent they exclude same-sex couples from civil marriage **on the same terms and conditions as opposite-sex couples**
- States must recognize a lawful same-sex marriage performed in another state

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Paven v. Smith, 137 S.Ct. 2075 (2017)

- *Obergefell* provides that a State may not "exclude same-sex couples from civil marriage on the same terms and conditions as opposite-sex couples"
- *Obergefell* requires States to provide same-sex couples "the constellation of benefits that the States have linked to marriage."
- State statute that requires that the name of a mother's male spouse be added to birth certificate of child born during their marriage must be interpreted to require that the name of the mother's female spouse be added to birth certificate of a child born during their marriage.

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Custody and Parentage - Summary

- If both spouses are legal parents, custody is determined using best interest test
  - *Owenby v. Young*, 357 NC 142 (2003)
- If neither spouse is a legal parent, custody is determined using best interest test
  - *Owenby v. Young*, 357 NC 142 (2003)
- If one spouse is a legal parent but the other is not, parent has constitutional right to exclusive custody unless that parent has acted inconsistent with her/his protected status
  - *See Seyboth v. Seyboth*, 147 NC App 63 (2001)

UNC

Consider:

- Same-sex female **married couple** – Ann and Susan – decide Ann will have a child
- Ann becomes pregnant using an anonymous sperm donor
- Ann and Susan are married when the child is born and continue to live together following birth of the child, sharing living expenses and childcare responsibilities
- When child is 6 years old, Ann and Susan separate
- Susan files for custody when Ann restricts Susan's time with the child

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Is Susan a legal parent?

- **§ 49A-1. Status of child born as a result of artificial insemination.**
  - Any child or children born as the result of heterologous artificial insemination shall be considered at law in all respects the same as a naturally conceived legitimate child of the husband and wife requesting and consenting in writing to the use of such technique. (1971, c. 260.)
  - ***heterologous insemination is a medical procedure where sperm from donor who is not the husband or regular partner of the mother is inseminated into mother

UNC

Similar statutes in other states

- Artificial insemination statutes similar to GS 49A-1 have been interpreted to make mother's same-sex spouse the child's parent
  - *Della Corte v. Ramirez*, 961 NE2d 601(Mass. Appellate Court 2012)
  - *Shineovich and Kemp v. Shineovich*, 214 P.3rd 29 (Oregon Appellate Court 2009)("There appears to be no reason to allow heterosexual couples to bypass adoption by mutually consenting to artificial insemination but not permitting same-sex couples to do so.")

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G.S. 12-3, amended effective July 12, 2017

- Added two definitions:
  - (16) "Husband and Wife" and similar terms. - The words "husband and wife," "wife and husband," "man and wife," "woman and husband," "husband or wife," "wife or husband," "man or wife," "woman or husband," or other terms suggesting two individuals who are then lawfully married to each other shall be construed to include any two individuals who are then lawfully married to each other.
  - (17) "Widow" and "Widower." - The words "widow" and "widower" mean the surviving spouse of a deceased individual.

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Susan and Ann??

- If they used heterologous artificial insemination
  - Pursuant to GS 49A-1, Susan is a parent
  - Custody determined using best interest test
- What if Susan and Ann did not use a medical procedure?
  - "heterologous insemination" is a medical procedure

UNC

When GS 49A-1 is not available....

- **Common law presumption**
  - When a child is born to a married woman, the law presumes the child to be legitimate
    - *Wright v. Wright*, 281 NC 159 (1972)
    - *Eubanks v. Eubanks*, 273 NC 189 (1968)
  - Legitimate means child is the biological child of the husband (spouse)
  - This presumption (normally) is rebutted by facts and circumstances – including blood tests – that show presumed parent is not the natural parent

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Common law presumption

- Does *Obergefell* and *Paven* require that we apply the presumption to all married couples?
- *See*
  - *McLaughlin v. Jones*, (Arizona Supreme Court 2017)
    - Statutory presumption must be applied to same-sex couples
    - Biological parent estopped from rebutting presumption
  - *Christopher YY v. Jessica ZZ*, 159 A.D.3rd 18 (N.Y. 3d Division 2018)
    - Statutory presumption must be applied to same-sex couples
    - Presumption cannot be rebutted solely with proof of the biological fact that a child cannot be the product of the same-gender parents
    - Need clear and convincing evidence that child is not entitled to legal status as "the product of the marriage".

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Assume the presumption applies...

- Susan and Ann are presumed to be the parents of the child
- Best interest applies to determine custody
- Can Ann rebut the presumption by showing Susan is not biologically related to the child?
  - *See Jones v. Patience*, 121 NC App 434 (1996)

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If Susan is not a parent.....

- No best interest test to decide custody unless Ann has waived her constitutional right to custody
- Did Ann act inconsistent with her protected status?
  - *See Boseman*
  - *See Mason*
  - *Cf. Estroff*

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Consider.....

- Child born to Ann while Susan and Ann are married
- Ann dies
- Ann's mother files action seeking custody and/or visitation
- ?????

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Is Susan a parent?

- If so, grandmother must prove Susan waived her constitutional right to exclusive custody
  - Did GS 49A-1 make Susan a parent ???
  - If not, common law presumption may apply
    - How can third party rebut??
- If Susan is not a parent, court can apply best interest test to determine whether grandmother should have custody and/or visitation

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Adoption

- GS 48-4-100 *et. seq.* authorizes step-parent adoptions
- "Step-parent":
  - "an individual who is the spouse of a parent of a child but is *not the legal parent* of the child."
  - GS 48-1-101
  - See 2 blog posts:
    - https://canons.sog.unc.edu/same-sex-marriage-and-adoptions-of-a-minor-by-a-stepparent/
    - https://civil.sog.unc.edu/adoptions-and-sperm-donors/
- Adoptive parent is a legal parent for all purposes
  - In custody dispute between biological parent and an adoptive parent, best interest test applies

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Consider .....

- Andrew and Samuel are married when they decide Andrew will father a child
- Validity of surrogacy contracts in NC????
- Can Samuel ever be a parent?
  - GS 49A-1 will not apply
  - No common law presumption
  - Adoption is possible
- If Samual is a non-parent:
  - Apply *Mason*, *Estroff* and *Boseman* to resolve custody dispute between Andrew and Sam

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Uniform Parentage Act

- Promulgated by the Uniform Laws Commissioners
  - 1973, 2002 and 2017
- Creates a series pf presumptions to establish the parentage of a child
  - Biology is not always controlling
- Recognizes *de facto* parents
- Establishes parentage of children born through the use of assisted reproductive technologies
  - Donors are not parents
  - Intent of parties controls
- Authorizes and regulates surrogacy agreements

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Big Changes to Appeals of A/N/D – TPR Orders Designated in G.S. 7B-1001

On January 1, 2019, the process to appeal abuse, neglect, dependency (A/N/D) and termination of parental rights (TPR) orders designated in G.S. 7B-1001 changed significantly. Amendments to G.S. 7B-1001 now require that some orders be appealed directly to the NC Supreme Court, bypassing the Court of Appeals (COA). Other orders have new notice of appeal and timing requirements. Amendments to the North Carolina Rules of Appellate Procedure (Rules) also became effective on January 1st and impact appeals of all orders including those designated in G.S. 7B-1001.

Last week, I attended the Supreme Court's CLE program, "Information about Termination of Parental Rights Cases and the Rules of Appellate Procedure." As I listened to the justices and other speakers, I started to hear David Bowie singing "ch-ch-ch-changes." There are a lot of changes and procedures that you need to know.

The Statute: G.S. 7B-1001

Through G.S. 7B-1001, the Juvenile Code specifies 6 types of final orders entered in A/N/D and TPR cases that are subject to appeal. There are no changes to the types of orders that may be appealed. But, the procedural requirements for two types of those designated appealable orders have changed.

1. Termination of Parental Rights (G.S. 7B-1001(a1)(1))

An order that grants or denies a TPR must be appealed directly to the Supreme Court.

2. Elimination of Reunification with a Parent as a Permanent Plan (G.S. 7B-1001(a)(5)a., (a1)(2)), (a2)

A parent may appeal a permanency planning order entered under G.S. 7B-906.2(b) that eliminates reunification with him or her as a permanent plan ("906.2(b) order"). Because a TPR may be necessary when reunification is eliminated as a permanent plan, there is a delay in when a parent may appeal a 906.2(b) order. That delay is 65 days from when the 906.2(b) order has been entered and served. This 65-day time period replaces the pre-January 1st time period of 180 days from the -906.2(b) order.

Missing this shortened appellate time period to initiate the TPR could have a significant impact on the underlying A/N/D action. When there is a pending appeal, the district court retains jurisdiction but cannot proceed with a TPR. G.S. 7B-1003(b)(1). Stay tuned for my next blog post to learn more about the trial court's jurisdiction when an appeal under G.S. 7B-1001 is pending.

If a TPR is not initiated in that 65-day time period, the parent may appeal the 906.2(b) order within 30 days from the expiration of that 65-day time period. The notice of appeal must be filed between 66 and 95 days after the 906.2(b) order is entered and served. A notice of appeal filed before that time period expires is likely to result in dismissal without prejudice (*see* In re D.K.H., 184 N.C. App. 289 (2007)) and after that time period is likely to result in dismissal with prejudice due to untimeliness (G.S. 7B-1001(a)(5)a.3.; *see* In re A.R., 238 N.C. App. 302 (2014)). The appeal is heard by the COA.

If a TPR petition or motion is filed within that 65-day time period, the appeal of the 906.2(b) order is delayed until after the TPR is heard and granted. The 906.2(b) and TPR orders are then appealed together, before the Supreme Court, when the notice requirements for both appeals have been properly met. It appears that a 906.2(b) order is not an appealable order when a TPR is denied unless it meets the criteria of another order designated in G.S. 7B-1001. *See* In re E.G.M., 230 N.C. App. 196 (2013). However, it is unclear as to whether a delayed appeal in that circumstance would be permitted or dismissed as untimely and which appellate court, if any, has jurisdiction to hear the appeal.

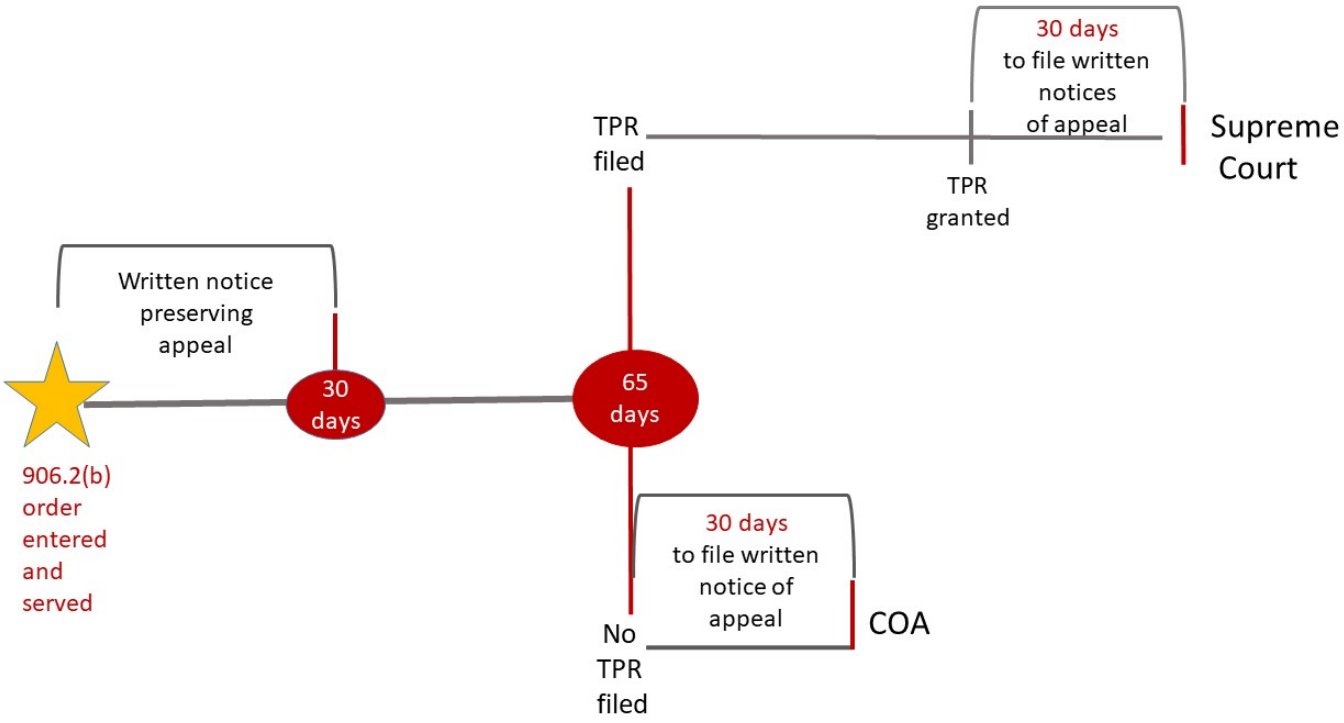
Additional amendments involve notice requirements.

First, a parent must preserve his or her right to appeal the 906.2(b) order in writing within 30 days after the order is entered and served. The statute does not identify who must sign the notice: the parent and/or his or her GAL (if any), the parent's attorney (if any), or both the parent and attorney.

Second, a written notice of appeal of the 906.2(b) order must be timely filed. Of special note is the new requirement that in a combined 906.2(b) and TPR appeal, there must now be two separate written notices of appeal - one for each order. Simply identifying the 906.2(b) order as an issue in the record of the TPR appeal is no longer sufficient to appeal the 906.2(b) order. Both notices of appeal must be signed by the appealing party and their attorney unless the appellant is the juvenile, in which case the GAL attorney advocate signs.

These new written notice requirements are significant changes for the appellant. The NC Office of the Parent Defender at IDS has created forms for a notice to preserve the appeal of a 906.2(b) order and notices of appeal that you can access here.

For Visual Learners: The new 906.2(b) appeal procedures



The North Carolina Rules of Appellate Procedure (Rules)

Effective January 1st, through a 58-page order, the Supreme Court amended 13 of the Rules and created a new one, Rule 42. You can access the order here. You'll notice it's color coded so that you can easily see the changes, and Appendix A is a helpful timetable summary. Although the Rules impact all appeals, there are significant changes that apply to appeals of A/N/D and TPR orders. Here are some highlights.

Rule 3.1, Review of Cases Governed by Subchapter I of the Juvenile Code, has been reorganized into different subsections and completely rewritten, starting with the title. Redundancies with other Rules have been eliminated such that provisions of the general Rules also apply to Rule 3.1 appeals. These appeals are expedited, but some of the timing requirements are different because the number of days or the triggering event to start counting changed. The transcriptionist now must electronically deliver the transcript to each party in the appeal. If there is no agreement on the proposed record, Rule 11(c) applies, which is the method for settling records on appeal in other types of cases. Four new subsections (1) impose a word limit on briefs in these cases including those filed in the Supreme Court, (2) explicitly disfavor motions for extensions of any time requirements in these cases due to the need to expeditiously resolve these appeals, (3) require electronic filing (even in the COA) absent good cause, and (4) address the role of trial counsel in assisting appellant counsel with the record.

Rule 42, Protecting Identities – Sealed Items and Identification Numbers, is new. It replaces all the references to protecting identities and sealing information that was scattered throughout the various Rules, so you will no longer see any redundancies. Rule 42 is composed of 5 subsections. Items that are sealed in the trial tribunal will remain sealed in the appellate courts. Four types of appeals are sealed by operation of Rule 42(b), including appeals under G.S. 7B-1001 and appeals filed under G.S. 7A-27 that involve a sexual offense committed against a minor. This latter appeal would apply to an order entered pursuant to G.S. 7B-323 regarding placement on the Responsible Individuals List (RIL) when sexual abuse is alleged. Counsel may move to have the appellate court seal an item that is not sealed in the trial tribunal or by operation of Rule (e.g., RIL grounds of "serious neglect" or abuse other than sexual abuse). The item will be sealed pending the appellate court's determination of the motion. Notice and labeling requirements of sealed items and documents are imposed. In cases that are not sealed, certain identification numbers (e.g., social security, driver's license) must be excluded or redacted from documents filed with the appellate court unless necessary for the disposition of the appeal. This may arise with a separate civil custody order that is entered via G.S. 7B-911 and is appealed.

Other Rules, specifically Rules 3, 4, 9, 11, 12, 13, 18, 26, 28, 30, 37, and 41, were also amended. One potential pitfall identified in the CLE was the amendment to Rule 13(a). Now, an appellant must file and serve his/her brief within 30 days after the record of appeal has been filed with the appellate court, and no longer includes when the record is mailed to the parties. Rule 30(a)(2) makes it clear that counsel must use the juvenile's initials or pseudonym and not the juvenile's name during oral argument.

BEWARE: If you have the 2019 North Carolina Rules of Court book, it has the Rules that were in effect before January 1, 2019. You can access the most current Rules on the Supreme Court page of the North Carolina Judicial Branch website, here.

Inviting Feedback: At the CLE, Justices Hudson and Ervin explained the long process the court undertook to prepare for its new responsibility for hearing TPR and certain 906.2(b) appeals, including the need to amend the Rules. Input from various stakeholders that are internal and external to the court was sought and obtained. They recognized that as these cases are heard, there may be a need for future Rules amendments. The court encourages feedback on how the Rules are working from those who are involved with these cases. You can

- email rules@sc.nccourts.org,
- contact the Appellate Rules Committee, or
- contact the Appellate Practice Section of the NC Bar Association.

Demystifying the Internal Supreme Court Process

Justice Ervin explained the decision-making process of the Supreme Court, which differs from the COA given that there are more decision-makers involved – 7 justices rather than 3-judge panels in

the COA. There are internal circulating deadlines and conferences of the justices.

Oral argument

Rule 3.1 cases will have a different process than other Supreme Court appeals regarding oral argument, which will not occur in every Rule 3.1 case. After the record and briefs are filed, each Rule 3.1 case will be assigned to a justice who is responsible for reviewing the case, determining if oral argument is needed, and making a recommendation for conference regarding oral argument. A party may request oral argument on the Appeal Information Statement but must explain why the case merits oral argument (it should not be done as a matter of course in every case). There is no set criteria for determining whether oral argument will be permitted and no benchmark for how many cases should be orally argued. The decision will be made on a case-by-case basis given the facts and circumstances. If oral argument is granted, it will be calendared. The Rules regarding oral argument apply, including the requirement that the child's name not be used.

Decision-Making

If there is an oral argument, that afternoon the justices conference to discuss the case. A justice is assigned for writing and circulating a draft opinion. If there was no oral argument, the case is assigned to a member of the court who circulates a draft opinion. In either situation, after a draft opinion is circulated, a conference of all the members of the court is held. There, the justices have an opportunity to discuss and comment on the draft opinion. If recommended, opinions can be recirculated. If there is a dissent or concurrence, internal circulating deadlines are set before the next conference.

Publication

All the Rule 3.1 opinions will be published. It's not yet known what the opinions will look like. It is anticipated that the opinions will be published on the same release date of other Supreme Court opinions, which is not the routine first and third Tuesday of each month used by the COA. The intent is to not have the length of the appeal be materially different from the timing of an appeal heard in the COA.

Take Aways

If you have an appeal, make sure you read the amended statute and Rules. Do not rely on your 2019 Rules of Court book or this blog post. Accept the Supreme Court's invitation to provide feedback on how the Rules are working in these cases.

Standing Issues in Zoning Cases

Joint Supreme Court and Court of Appeals
Judicial Education Program

April 12, 2019

David W. Owens
School of Government, UNC-CH

I. General Principles

A party seeking judicial review of a land development regulatory decision must have standing.[1] If the plaintiff in a suit challenging a decision does not establish that he or she has standing, the superior court has no subject matter jurisdiction to hear the case.

Since standing is a jurisdictional requirement, it must be alleged when the action is brought. A petition for a writ of certiorari or a claim for a declaratory judgment must contain allegations to support the standing of the entity filing the action.[2] The burden of establishing

1. "The gist of the question of standing is whether the party seeking relief has alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentations of issues upon which the court so largely depends for illumination of difficult constitutional questions." Stanley v. Dep't of Conservation & Dev., 284 N.C. 1, 28, 199 S.E.2d 641, 650 (1973) (quoting Flast v. Cohen, 392 U.S. 83, 99 (1968) (internal quotations omitted)).

2. A plaintiff may, with good cause, be allowed to amend a defective petition for judicial review to add requisite allegations regarding standing. In *Darnell v. Town of Franklin*, 131 N.C. App. 846, 508 S.E.2d 841 (1998), the plaintiff appeared before the town's board of adjustment and town council to object to a setback variance for an adjoining property owner. Upon issuance of the variance, the plaintiff filed a petition for writ of certiorari seeking judicial review of the variance decision. The petition stated that the plaintiff was an adversely affected property owner but contained no allegations specifying how the plaintiff was aggrieved by the decision. The town moved to dismiss for lack of subject matter jurisdiction. While that motion was under advisement, the plaintiff sought to amend her pleadings to add specific allegations of harm. The court held that while the initial petition was deficient, the plaintiff had clearly established in the hearings before the town boards that she was

standing is on the party bringing the action.[3] When making a standing determination, the court applies a de novo review and views the allegations as true and the record in the light most favorable to the non-moving party.[4] Where all parties are represented by counsel and no objection to standing is made at either the quasi-judicial hearing or the superior court's review of a petition for certiorari, the question of standing will not be considered on appeal.[5]

The general rule on standing, as set forth by the United States Supreme Court in *Lujan v. Defenders of Wildlife*,[6] is that the "irreducible constitutional minimum" of standing contains three elements:

1) "injury in fact"-- an invasion of a legally protected interest that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical;
2) the injury is fairly traceable to the challenged action of the defendant; and
3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.[7]

North Carolina courts generally apply this basic test for both zoning regulations[8] and other development regulations.[9]

The North Carolina statutes do not explicitly address the impact of jurisdictional boundaries on standing. In *Good Neighbors of South Davidson v. Town of Denton*,[10] the court took special note of the fact that those complaining of improper spot zoning were located outside of the jurisdiction of the offending town and had no political recourse regarding the challenged legislative zoning decisions. In the quasi-judicial context, the fact that affected property is

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affected by the action in a manner distinct from the rest of the community. Therefore the trial court should have allowed her to amend the petition under G.S.1A-1, Rule 15(a).

3. Thrash Ltd. Partnership v. Cnty. Of Buncombe, 195 N.C. App. 678, 680, 673 S.E.2d 706, 708 (2009); Neuse River Found. v. Smithfield Foods, 155 N.C. App. 110, 113, 574 S.E.2d 48, 51, *review denied*, 356 N.C. 675, 577 S.E.2d 628 (2003).

4. Mangum v. Raleigh Bd. of Adjustment, 362 N.C. 640, 644, 669 S.E.2d 279, 283 (2008); McMillan v. Town of Tryon, 200 N.C. App. 282, 287–88, 683 S.E.2d 743, 746–47 (2009).

5. Little River, LLC v. Lee County, ___ N.C. App. ___, ___, 809 S.E.2d 42, 47 (2017).

6. 504 U.S. 555 (1992).

7. 504 U.S. 555, 560–61 (1992). The constitutional basis of the requirement is Article III. U.S. Constitution.

8. Morgan v. Nash Cnty., 224 N.C. App. 60, 65, 735 S.E.2d 615, 619 (2012), *review denied*, 366 N.C. 561, 738 S.E.2d 379 (2013).

9. Marriott v. Chatham Cnty., 187 N.C. App. 491, 654 S.E.2d 13 (2007), *review denied*, 362 N.C. 472, 666 S.E.2d 122 (2008). In *Neuse River Foundation, Inc. v. Smithfield Foods, Inc.*, 155 N.C. App. 110, 574 S.E.2d 48 (2002), *review denied*, 356 N.C. 675, 577 S.E.2d 628 (2003), an appeal brought under the highly analogous Administrative Procedure Act, the court held that the plaintiff had to allege (1) injury in fact to a protected interest that cannot be considered merged in the general public right, (2) causation, and (3) a proper or individualized form of relief. The court found that injury to aesthetic or recreational interests alone cannot confer standing on an environmental plaintiff as this is within the general public right.

10. 355 N.C. 254, 559 S.E.2d 768 (2002). Most other states take the view that being in a neighboring jurisdiction does not affect standing. *See, e.g.*, Scott v. City of Indian Wells, 492 P.2d 1137 (Cal. 1972); Moore v. City of Middleton, 975 N.E.2d 977 (Ohio 2012). Out of state neighbors were found to have standing in Abel v. Planning and Zoning Comm'n of Town of New Caanan, 998 A.2d 1149 (Conn. 2010).

outside of the jurisdiction of the decision-making jurisdiction has no bearing on whether or not the property will suffer special damages.

II. The Zoning Context

Judicial review of zoning and other local development regulation decisions arise in two contexts – review of legislative decisions and review of quasi-judicial decisions. Although the cases historically applied modestly different formulations of the test for standing to review legislative zoning decisions, quasi-judicial decisions, and other development regulations, the standards are for the most part analogous.[11]

A. Legislative Decisions

These appeals seek judicial review of the legislative decision of a city or county governing board to adopt, amend, or repeal the zoning regulation. These challenges typically contest the statutory authority to adopt the challenged regulation, its constitutionality, or whether statutorily mandated procedures for legislative zoning decisions were followed.

In addition to challenges regarding the provisions of the ordinance text, site-specific legislative decisions are also subject to judicial review. The zoning map, which assigns property to particular zoning districts, is a part of the zoning ordinance. A decision to change the zoning classification for an individual parcel of land – a "rezoning" -- is a legislative decision. These individual rezonings may be challenged, such as an allegation of approval of an inadequate plan consistency statement or other procedural irregularity or that the rezoning constitutes illegal spot or contract zoning.

Challenges to legislative land use regulatory decisions are brought under the declaratory judgment statute. A legislative regulatory decision is not reviewable upon a writ of certiorari.[12]

As with other aspects of zoning case law, the standing requirement for a personal interest or a direct adverse impact has antecedents in nuisance law. The rule requiring special and peculiar damages to recover from injury resulting from a public nuisance was a part of state law on public nuisances long before zoning. The court in *McManus v. Southern Railway Co*., a 1909 case involving a neighbor seeking damages resulting from a neighboring abandoned rock quarry in Charlotte, held, "It is very generally held, uniformly so far as we have examined, both here and elsewhere, that in order for a private citizen to sustain an action, by reason of a public nuisance, he must establish some damage or injury special and peculiar to himself, and differing in kind and degree from that suffered in common with the general public."[13]

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11. *See, e.g*., The Cherry Community Organization v. City of Charlotte, ____ N.C. App. ___, ___, 809 S.E.2d 397, ___, *review denied*, ___ N.C. ___, 812 S.E.2d 850 (2018).

12. *In re* Markham, 259 N.C. 566, 569, 131 S.E.2d 329, 332, *cert. denied*, 375 U.S. 931 (1963); Massey v. City of Charlotte, 145 N.C. App. 345, 355, 550 S.E.2d 838, 845, *review denied*, 354 N.C. 219, 554 S.E.2d 342 (2001).

13. 150 N.C. 655, 64 S.E. 766, 768 (1909). In an early case involving a claim for damages to fisheries resulting from construction of a mill dam on the Neuse River, the court in 1815 held, "Hence, for any of those acts which are in nature of a public nuisance, no individual is entitled to an action, unless he has received an extraordinary and particular damage, not common to the rest of the citizens." Dunn v. Stone, 4 N.C. 241, 242 (1815). In a more contemporary application of this rule, in *Hampton v. N. C. Pulp Co*. the court held an individual could only bring a claim against a public nuisance if they had an injury "that cannot be considered merged in the general public right." 223 N.C. 535, 543-44, 27 S.E.2d 538, 544 (1943). The suit was brought by a commercial

A citizen or a taxpayer may not file a lawsuit as a member of the general public to bring a conceptual challenge to a legislative decision.[14] The rule for standing to challenge legislative decisions was initially set forth in *Taylor v. City of Raleigh*.[15] In *Taylor*, a challenge to a rezoning, annexation, and sewer line condemnation was brought by neighbors separated from the rezoned area by a 45-acre buffer area that was not rezoned. The court held that challenges to legislative zoning decisions could be brought only by "*a person who [had] a specific personal and legal interest in the subject matter affected by the zoning ordinance and who [was] directly and adversely affected thereby*."[16] The court held that the plaintiffs lacked standing given the "minimal" effect of the rezoning on them. In reaching this conclusion the court considered: (1) the modest additional uses allowed in the new district (the change was from R-4 to R-6, which allowed for increased density but not a substantial change in the type of uses); (2) the distance of the rezoned property from the plaintiffs' property (none of the challengers owned adjacent property, the closest piece being one-half mile from the rezoned property); and (3) the manner in which the plaintiffs had participated in the city's consideration of the matter (they had not protested before the lawsuit).[17]

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fisherman claiming the plaintiff's pulp mill at Plymouth damaged the Roanoke River fisheries and thus his established fishery business and the value of his riparian property. The court found he had standing to bring the action given the alleged damage to his established business.

14. For example, a challenge to Durham County's initial zoning ordinance brought by a group of citizens before enforcement of that ordinance was dismissed in *Fox v. Board of Comm'rs*, 244 N.C. 497, 94 S.E.2d 482 (1956). The court ruled that, rather than going forward with building and then challenging the denial, the applicant had to follow procedures for appealing a permit denial to the board of adjustment and then make subsequent judicial appeal. The court found that "[p]laintiffs cannot present an abstract question and obtain an adjudication in the nature of an advisory opinion." *Id.* at 500, 94 S.E.2d at 485. Enactment of the ordinance can be enough in and of itself to create a genuine controversy for standing purposes, as, for example, when an amortization provision is adopted requiring removal of an existing land use.

15. 290 N.C. 608, 227 S.E.2d 576 (1976). This case involved a challenge to Raleigh's annexation and rezoning of a 39.89-acre tract. For additional statements of the standing test for legislative zoning decisions, see *Grace Baptist Church v. City of Oxford*, 320 N.C. 439, 444, 358 S.E.2d 372, 375 (1987) (holding that a plaintiff must "produce evidence that he has sustained an injury or is in immediate danger of sustaining an injury as a result of enforcement" of the ordinance in order to have standing to challenge the constitutionality of a zoning ordinance provision), *Godfrey v. Zoning Board of Adjustment*, 317 N.C. 51, 344 S.E.2d 272 (1986), *Blades v. City of Raleigh*, 280 N.C. 531, 544, 187 S.E.2d 35, 42 (1972) ("owners of property in the adjoining area affected by the ordinance" have standing), *Zopfi v. City of Wilmington*, 273 N.C. 430, 160 S.E.2d 325 (1968), *Templeton v. Town of Boone*, 208 N.C. App. 50, 701 S.E.2d 709 (2010), *Musi v. Town of Shallotte*, 200 N.C. App. 379, 684 S.E.2d 892 (2009), and *Village Creek Property Owners' Ass'n v. Town of Edenton*, 135 N.C. App. 482, 520 S.E.2d 793 (1999).

16. *Taylor*, 290 N.C. at 620, 227 S.E.2d at 583 (emphasis added). An earlier case, *City of Shelby v. Lackey*, 236 N.C. 369, 72 S.E.2d 757 (1952), held that if the complaint failed to show how a neighbor would be affected by the zoning decision (e.g., whether he or she was a town citizen or property owner or what the nature of injury was), he or she should not be accepted as party plaintiff.

17. Other states also use multiple factors in assessing standing in this context. See, e.g., Reynolds v. Dittmer, 312 N.W.2d 75 (Iowa Ct. App. 1981) (consider proximity, character of neighborhood, type of zoning change, and statutory rights of notice of hearing).

B. "Quasi-judicial Decisions

Appeals of quasi-judicial land use regulatory decisions are reviewed by the superior court in proceedings in the nature of certiorari.[18] In most instances, judicial appeals of administrative land use decisions will also be in the nature of certiorari. The initial appeal of the administrative staff decision goes to the board of adjustment, a necessary step to exhaust administrative remedies prior to judicial review. The board of adjustment's quasi-judicial determination of that appeal is then the subject of the judicial review.[19]

The rule for standing to challenge quasi-judicial decisions is similar to the one applicable to legislative decisions though it also has a statutory dimension that adds greater specificity.

G.S. 160A-393(d)[20] defines who can file a petition for writ of certiorari to review a quasi-judicial land use regulatory decision. This section specifies three categories of entities with standing to bring these judicial appeals:

1) Those who applied for approval or who have a property interest in the project or property subject to the application.[21] This includes all persons with a legally

18. In 2009 the General Assembly codified most of the provisions for judicial review of quasi-judicial zoning decisions as G.S. 160A-393. G.S. 153A-349 makes this section applicable to appeals of county quasi-judicial zoning decisions. *Also see* G.S. 153A-345(e2) and 160A-388(e2). An appeal of a decision not to consider an application for a quasi-judicial permit due to an incomplete application must also be made in the nature of certiorari. Northfield Dev. Co., Inc. v. City of Burlington, 165 N.C. App. 885, 599 S.E.2d 921, *review denied*, 359 N.C. 191, 607 S.E.2d 278 (2004). Appeals of quasi-judicial decisions made under other development ordinances (such as subdivision regulations) are reviewed in the same manner. G.S. 160A-377 and 153A-336. In *Hemphill-Nolan v. Town of Weddington*, 153 N.C. App. 144, 568 S.E.2d 887 (2002), which involved denial of a variance for a cul-de-sac length limit in a subdivision ordinance, the court held that the superior court has discretion to grant a writ of certiorari "in proper cases" and that this was such a case.

19. Administrative decisions under zoning ordinances are appealed first to the board of adjustment, and the board's decision can subsequently be appealed to superior court in the nature of certiorari. G.S. 153A-345(e); 160A-388(e), -393(b)(3).

20. G.S. 160A-388(b1), applicable to cities and counties, provides that any person with standing under G.S. 160A0393(d) may make an appeal to the board of adjustment. G.S. 160A-400.9(e) similarly provides that an "aggrieved party" has standing to appeal a historic preservation commission's decision on a certificate of appropriateness to the board of adjustment and subsequently on to superior courtPrior to the adoption of G.S. 160A-393, the court held that the provision granting the county authority to appeal to the board of adjustment also provided standing for judicial appeals. Cook v. Union Cnty. Zoning Bd. of Adjustment, 185 N.C. App. 582, 588–89, 649 S.E.2d 458, 464–65 (2007). Section 7 of the Standard State Zoning Enabling Act, upon which the North Carolina zoning enabling act was modeled, provided that judicial review of quasi-judicial decisions could be made not only by "persons aggrieved" and the unit of government, but also by any taxpayer. U.S. DEP'T OF COMMERCE, A STANDARD STATE ZONING ENABLING ACT (1924). A minority of states included that broad authorization of standing. North Carolina was not among them.

21. Prior to adoption of this section in 2009, the law was not entirely clear as to how far this category extended beyond the owner of the fee interest in the property. The court held in *Humble Oil & Refining Co. v. Board of Aldermen*, 284 N.C. 458, 202 S.E.2d 129 (1974), that an option holder who had exercised his option subject to the necessary permits being obtained to develop the property had standing to participate in a review of those zoning permits. In *Habitat for Humanity of Moore County, Inc. v. Board of Commissioners of the Town of Pinebluff*, 187 N.C. App. 764, 653 S.E.2d 886 (2007), the ordinance specifically allowed conditional use permit applications and subdivision plats to be submitted by landowners, their agents, or persons who have contracted to purchase the property. The plaintiff organization's director testified at the permit hearing that his group had an option to purchase, and the council found the application to be complete. The court held that this was sufficient to establish standing for the plaintiff to file the application and pursue the appeal. *See also* Cox v.

defined interest in the property, including not only an ownership interest but also a leasehold interest, an option to purchase the property, or an interest created by an easement, restriction, or covenant.

2) The local government whose board made the decision being appealed.
3) Other persons who will suffer "*special damages*" as a result of the decision.

The "special damages" requirement codifies the rule initially set forth in *Jackson v. Guilford County Board of Adjustment.*[22] This case involved a special use permit (termed a "special exception" by that ordinance) granted by Guilford County for a 25-unit mobile home park. The Court set forth the following test for assessing standing for quasi-judicial zoning decisions:

> The mere fact that one's proposed lawful use of his own land will diminish the value of adjoining or nearby lands of another does not give to such other person a standing to maintain an action, or other legal proceeding, to prevent such use. If, however, the proposed use is unlawful, as where it is prohibited by a valid zoning ordinance, the owner of adjoining or nearby lands, who will sustain *special damage* from the proposed use through a reduction in the value of his own property, does have a standing to maintain such proceeding. . . . If, however, that which purports to be an amendment is, itself, invalid, the prohibition upon the use remains in effect. In that event, the owner of other land, who will be *specifically damaged* by such proposed use, has standing to maintain a proceeding in court to prevent it.[23]

The cases cited by the court as authority on this standing rule were both challenges to legislative zoning decisions,[24] illustrating that the distinction between legislative and quasi-judicial standing rules has always been rather fluid.

III. Complicating Factors in Review of Quasi-Judicial Zoning Decisions

Three factors complicate the standing issue analysis in judicial review of quasi-judicial decisions.

First, quasi-judicial proceedings at the board level are less formal that court proceedings. The boundary between a witness and a party with standing is very often not explicitly addressed by the board making the decision. It is common for boards to allow neighbors and other interested persons to testify at the evidentiary hearing without being formally qualified as a

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Hancock, 160 N.C. App. 473, 586 S.E.2d 500 (2003) ("prospective vendee" is real party in interest in special use permit application and litigation). Similarly, the court of appeals had held that a person bound by contract to purchase the land in question also has standing. Deffet Rentals, Inc. v. City of Burlington, 27 N.C. App. 361, 219 S.E.2d 223 (1975). By contrast, the Supreme Court held that a mere optionee did not have standing. Lee v. Bd. of Adjustment, 226 N.C. 107, 37 S.E.2d 128 (1946). Also, in *Wil-Hol Corp. v. Marshall*, 71 N.C. App. 611, 322 S.E.2d 655 (1984), the court ruled that the estranged wife of a month-to-month lessee whose lease had been terminated had no interest in property sufficient to confer standing to challenge the applicability of a zoning ordinance.

22. 275 N.C. 155, 166 S.E.2d 78 (1969).

23. *Id.* at 161, 166 S.E.2d at 82–83 (citations omitted, emphasis added*).*

24. Harrington & Co. v. Renner, 236 N.C. 321, 72 S.E.2d 838 (1952) and Zopfi v. City of Wilmington, 273 N.C. 430, 160 S.E.2d 325 (1968).

party. Typically, after the applicant presents their case, the presiding officer allows anyone to present relevant evidence.[25] A board will typically require formal intervention only if the person wants to call witnesses, cross-examine witness, object to evidence, or otherwise act as a party.[26] It is very common for neither the applicant nor complaining neighbors to be represented by counsel at the evidentiary hearing.[27] Without counsel, evidence supporting standing or objections regarding standing are often not presented and the board often makes no ruling on standing. While the superior court's review of quasi-judicial decisions is based on the record before the board, G.S. 160A-393(j) allows the trial court in its discretion to allow the record to be supplemented with affidavits, testimony, or documentary evidence regarding standing. This is primarily needed when the administrative hearing record is devoid of evidence on standing.

Second, standing is however sometimes raised and determined by the board making the quasi-judicial decision. If standing is contested in a quasi-judicial matter, the board making the decision, not the zoning administrator, makes the initial determination on standing.[28] The hearing record may contain evidence submitted to the board and its factual findings regarding standing. The decision on standing by the board is subject to de novo review by both the superior court and the appellate courts.

Third, the issue of adverse impacts on property value is frequently not only an issue affecting standing, for some quasi-judicial decisions that is also the key substantive issue that determines the outcome of the application. Most zoning ordinances provide for special use permits. Virtually every ordinance includes as one of the standards for the special use permit that that it will not cause a significant adverse impact on neighboring property values.[29] Whether

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25. See, e.g., Little River, LLC v. Lee County, ___ N.C. App. ___, ___, 809 S.E.2d 42, 47 (2017). In this case the ordinance explicitly allowed "any person" to appear as a witness and offer testimony at the quasi-judicial hearing. This is a common practice in North Carolina. The question of whether that person has standing to otherwise participate in the hearing only rarely arises in practice.

26. It is not necessary for those seeking judicial review to have formally intervened in the quasi-judicial hearing. Cook v. Union Cnty. Zoning Bd. of Adjustment, 185 N.C. App. 582, 591, 649 S.E.2d 458, 466 (2007) (adjoining neighbors challenging a special use permit for a Wal-Mart).

27. In a 2006 SOG survey of all North Carolina cities and counties with zoning, half of the responding jurisdictions reported that attorney rarely or never appeared at hearings on special use permits to represent either the applicants or opponents. Another third of the jurisdictions reported attorneys only occasionally appeared. Only fifteen percent of the jurisdictions reported counsel regularly appeared at these hearings. DAVID W. OWENS, SPECIAL USE PERMITS IN NORTH CAROLINA ZONING (April 2007).

28. Morningstar Marinas/Eaton Ferry, LLC v. Warren County, 368 N.C. 360, 777 S.E.2d 733 (2015). The court concluded that the statutory directive that the zoning administrator "shall forthwith transmit to the board" the papers constituting the administrative record creates a purely ministerial task for the officer, with the board to make the legal decision on standing. G.S. 153A-345(b) at the time of this decision. A similar directive is now in the zoning statutes at G.S. 160A-388(b)(5).

29. For example, see *Piney Mountain Neighborhood Ass'n v. Town of Chapel Hill*, 63 N.C. App. 244, 304 S.E.2d 251 (1983). The case involved neighbors challenging a special use permit issued for an affordable housing project. The court found an allegation that members live in affected area and will potentially suffer adverse property value impacts was sufficient to confer standing, while upholding issuance of the permit that required a finding that the project would maintain or enhance the value of neighboring properties. Likewise, the court in *C.C. and J. Enterprises, Inc. v. City of Asheville*, 132 N.C. App. 550512 S.E.2d 766 (1999), found the neighborhood association challenging issuance of a special use permit for a multi-family project had made a sufficiently particularized and supported allegation of property value impact to have standing, even though the court ruled there was insufficient evidence to deny the permit on these grounds.

there was sufficient competent, material, and substantial evidence in the hearing record to support a finding regarding property value impacts is subject to a whole record review on appeal.

The interplay between the question of whether there is a sufficient showing of property value impact to qualify for standing for judicial review and the question of whether there is sufficient substantial evidence in the quasi-judicial hearing record to support the finding made by the board regarding property value impacts is a source of some confusion among practitioners and trial courts. Both are mixed questions of fact and law, both address the same substantive issue, but they arise in different times and contexts and are subject to different judicial review standards.

IV. Nature of Injury

A variety of potential injuries have been held to support standing to appeal both legislative and quasi-judicial zoning decisions. These range from having an ownership interest in property affected by the decision, owning nearby property that is affected by the decision, and owning property that may suffer harm to its value, use, or enjoyment as a result of the contested decision. The zoning cases on standing, most of which pre-date *Lujan*, focus on the degree and nature of potential injury and whether the alleged injuries are sufficiently peculiar to the person claiming standing.

A. Ownership Interest in Affected Property

Simply owning property that is affected by a zoning regulation is sufficient to establish standing in three settings: (1) when making a facial constitutional challenge; (2) a challenge based upon a failure to follow mandated procedures in ordinance adoption: and (3) when challenging a quasi-judicial decision regarding the use or development of the property.

Thrash Ltd. Partnership v. County of Buncombe[30] involved a facial challenge to the validity of an ordinance regulating multifamily dwellings that established different standards depending on the elevation of the property involved. The court held the plaintiff, who had not filed an application to develop, had standing to challenge the procedures by which the ordinance was adopted. The fact that the plaintiff owned land that was subject to the regulations was sufficient for a facial challenge. The court distinguished such a facial challenge from a challenge based on a claim that the ordinance was arbitrary or violated equal protection or some other constitutional principle. The court applied this same standing analysis in a companion case, which challenged the process by which the county initially amended its zoning ordinance to extend it from partial county zoning to countywide coverage.[31]

In "as applied" challenges, in addition to owning an interest in affected property, a particular application of the ordinance[32] or an immediate danger of injury is needed for standing.

30. 195 N.C. App. 727, 673 S.E.2d 689 (2009). The rules at issue limited density, the height of buildings, parking standards, road construction, and the area of land disturbance. The ordinance was adopted using the procedures for a general police power ordinance rather than those required for a zoning ordinance.

31. Thrash Ltd. P'ship v. Cnty. of Buncombe, 195 N.C. App. 678, 673 S.E.2d 706 (2009).

32. Andrews v. Alamance Cnty., 132 N.C. App. 811, 513 S.E.2d 349 (1999) (holding that a landowner had no standing to challenge the constitutionality of a mobile home park ordinance where no site plan or subdivision

In *Grace Baptist Church v. City of Oxford*,[33] the plaintiff church challenged a zoning requirement that its parking lot be paved on a variety of constitutional and statutory authority grounds. The court held that to have standing for an "as applied" constitutional challenge, the litigant "must produce evidence that he has sustained an injury or is in immediate danger of sustaining an injury as a result of enforcement of the challenged ordinance."[34] In *Templeton v. Town of Boone*,[35] the court similarly held that for a challenge based on statutory authority of procedures, establishment of ownership of land affected by the challenged ordinance is sufficient for standing, while a plaintiff must show an injury in fact or an immediate danger of injury as a result of enforcement for an "as applied" constitutional challenge.[36]

G.S. 160A-393(d) specifically provides standing to appeal a quasi-judicial decision to the owner of the affected property a person who has an option to purchase that property, and the person who made the application that is being contested.[37]

Ownership of less than a fee interest may be sufficient for standing purposes. In *Budd v. Davie County*,[38] the court held that an adjacent and nearby property owner who has easement interest in part of the land being rezoned has standing to challenge a rezoning. In *Deffet Rentals, Inc. v. City of Burlington*,[39] the court held an optionee who is bound by contract to purchase the land subject to the contested interpretation has standing. In *Northfield Dev. Co. v. City of Burlington*,[40] the court found standing to challenge a rezoning where the plaintiff no longer owned the property in question, but the sales price of the property was reduced because the rezoning was not adopted by a specified date.[41]

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plat had been filed, no steps had been taken to develop the property, and no permits of any kind had been applied for or denied).

33. 320 N.C. 439, 358 S.E.2d 372 (1987).

34. *Id*. at 444, 358 S.E.2d at 375, citing Town of Atlantic Beach v. Young, 307 N.C. 422, 298 S.E.2d 686, *appeal dismissed*, 462 U.S. 1101 (1983). The court noted that an allegation of intended future enforcement would be insufficient to confer standing. However, in this litigation the city's answer asked for an order for the church to cease use of the property until it came into compliance with the ordinance and the trial court found the city intended to enforce the provision. The court held this was sufficient to show "immediate danger" of injury for standing purposes.

35. 208 N.C. App. 50, 701 S.E.2d 709 (2010). A concurring in part and dissenting in part opinion in this case would have held an allegation of actual or threatened enforcement is only required for an as applied constitutional challenge but not for a facial constitutional challenge.

36. However, when the challenged ordinance only applies to some properties (here land with a steep slope), there must be an allegation that the property owned by the plaintiff in fact qualifies for coverage by the challenged ordinance.

37. This statute also provides standing to the local government making the decision, other persons with special damages, and some associations whose members have individual standing.

38. 116 N.C. App. 168, 171, 447 S.E.2d 449, 451, *review denied*, 338 N.C. 667, 453 S.E.2d 174 (1994).

39. 27 N.C. App. 361, 219 S.E.2d 223 (1975).

40. 136 N.C. App. 272, 282, 523 S.E.2d 743, 749 (2000). The sales price of the affected property was $126,280 less because the property had not been rezoned by the date specified in the sales contract.

41. By contrast, in *Lee v. Board of Adjustment* 226 N.C. 107, 37 S.E.2d 128 (1946), the court held that a person with an option to purchase, but who has not yet exercised that option, does not have standing to appeal a variance

The court has held that where an appellant fails to present an allegation or evidence that they are owners of property affected by a zoning officer's interpretation, they do not have standing to appeal that interpretation.[42]

B. Proximity to Affected Property

Mere proximity of land ownership to the directly affected property is insufficient.[43] While there is a statutory mandate that adjacent property owners be notified of both proposed rezonings legislative hearings and quasi-judicial evidentiary hearings,[44] adjacent owners do not have statutory standing for judicial review of those decisions.

In the review of a legislative decision, the court in *Morgan v. Nash County*[45] noted that while adjoining property status is not essential to standing, proximity is a factor. The City of Wilson was one of the challengers to a decision by Nash County to rezone property. The city's property was some three and one-half miles from the rezoned property, which the court deemed too remote to support a claim of standing.

In the quasi-judicial context, in *Smith v. Forsyth County Board of Adjustment*,[46] an adjacent owner sought to challenge an ordinance interpretation allowing a new church and associated athletic fields. The board of adjustment had upheld a staff determination that the proposed church in Clemmons was a "neighborhood" scale church rather than a larger "community church" and a staff determination that no buffer was required around an associated athletic field. The court held that the plaintiff had failed to establish that she was a "person

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denial as they do not yet have a right to develop the property. The statutes now confer standing to appeal a quasi-judicial decision to an option holder. G.S. 160A-393(d)(1).

42. Pigford v. Bd. of Adjustment, 49 N.C. App. 181, 270 S.E.2d 535 (1980), review denied, 301 N.C. 722, 274 S.E.2d 230 (1981).

43. Other states split on the question of whether proximity in and of itself is sufficient for standing. See, e.g., Anundson v. City of Chi., 44 Ill. 2d 491, 496, 256 N.E.2d 1, 3–4 (1970) (any adjoining owner has standing); Anderson v. Swanson, 534 A.2d 1286, 1288 (Me. 1987) (abutters with some other allegation of injury have standing); Bryniarski v. Montgomery Cnty. Bd. of Appeals, 247 Md. 137, 145, 230 A.2d 289, 294 (1967) (adjoining and nearby property owners have prima facie special damages); Marashlian v. Zoning Bd. of Appeals, 421 Mass. 719, 721, 660 N.E.2d 369, 372 (1996) (abutters required to receive notice of hearing have a rebuttable presumption that they are persons aggrieved); Kalakowski v. John A. Russell Corp., 137 Vt. 219, 222, 401 A.2d 906, 908 (1979) (statute provides standing for those "in the immediate neighborhood").

44. The owner of the affected property and the owners of all abutting properties must be mailed a notice of the hearing on a proposed zoning map amendment. G.S. 153A-343(a), 160A-384(a). Similarly, the land owner and all abutting land owners must be mailed a notice of the evidentiary hearng on quasi-judicial matters. G.S. 160A-388(a2).

45. 224 N.C. App. 60, 735 S.E.2d 615 (2012), *review denied*, 366 N.C. 561, 738 S.E.2d 379 (2013). The standing of the neighboring property owners who were also plaintiffs was upheld by the trial court and not challenged on appeal.

46. 186 N.C. App. 651, 652 S.E.2d 355 (2007). The petitioner also argued that she had standing under the 1947 local act granting Forsyth County zoning authority. That act allowed appeals to superior court by any taxpayer. However, that act limited appeals *to* the board of adjustment to "persons aggrieved." Without an allegation of special damages, there was thus no standing to appeal to the board of adjustment and if that board had no subject matter jurisdiction, there could be no appeal of its decision to the courts. See also Casper v. Chatham Cnty., 186 N.C. App. 456, 651 S.E.2d 299 (2007) (neighboring landowners sought to challenge a conditional use permit for a retail use).

aggrieved" with standing to appeal to the board of adjustment, as an allegation of mere proximity, absent an allegation of special damages distinct from the community, is insufficient to establish standing. In this case, the petitioner had not alleged the permitted development would decrease the value of her property.

Earlier cases have similar holdings. In *Sarda v. City/County of Durham Board of Adjustment*,[47] the court held an allegation that petitioner resided 400 yards away from paintball playing field that received a special use permit was insufficient alone to establish standing absent allegation of special damages. In *Lloyd v. Town of Chapel Hill*,[48] the court held an allegation of owning property in immediate vicinity of properties granted variances to build single family homes within a conservation buffer area, without any other showing of special damages distinct from community at large, was insufficient to establish standing of neighbors. In *Heery v. Town of Highlands Zoning Board of Adjustment*,[49] the court held a showing of special damages distinct from those incurred by the rest of the community was required for neighbors' standing to appeal granting of special use permit for multifamily housing.

C. Other Protected Interest

In *Byron v. Synco Properties, Inc.*,[50] neighbors challenging a rezoning raised facial constitutional challenges and a statutory interpretation issue regarding the repeal of the statutory zoning protest petition (which required a supermajority of the city council to adopt a zoning map amendment if a qualifying protest had been filed). None of the plaintiffs owned property sufficiently close to the rezoned property to have been eligible to file a protest petition if it had not been repealed. As they had no interest protected by that statute, they were not "directly and adversely affected" by the repeal or interpretation of the statute and thus had no standing to challenge its repeal or interpretation.[51]

D. Property Value Diminution

The most common way of establishing standing is a credible allegation that the activity, if approved, would diminish the value of the property of the person claiming standing. The harm, however, must be property specific as an alleged diminution of property values in the neighborhood or larger community is insufficient to confer standing.[52] This requirement is discussed below in the section of particularization of injury.

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47. 156 N.C. App. 213, 575 S.E.2d 829 (2003).

48. 127 N.C. App. 347, 489 S.E.2d 898 (1997).

49. 61 N.C. App. 612, 300 S.E.2d 869 (1983).

50. ___ N.C. App. ___, 813 S.E.2d 455 (2018).

51. As they could not have availed themselves of the protest petition statute and it was not their property being rezoned, the court held the plaintiffs also had no constitutionally protected interests affected by the challenged rezoning process, only a generalized grievance. With no immediate danger of a direct injury to a constitutionally protected right, they had no standing to raise a constitutional challenge. *See also* Grace Baptist Church v. City of Oxford, 320 N.C. 439, 444, 358 S.E.2d 372, 375 (1987); Coventry Woods Neighborhood Ass'n, Inc. v. City of Charlotte, 202 N.C. App.247, 257, 688 S.E.2d 538, 545 (2010); Wake Cares, Inc. v. Wake Cnty. Bd. of Educ., 190 N.C. App. 1, 11, 660 S.E.2d 217, 223 (2008) (plaintiff must be directly and adversely affected by a statute to have standing for a declaratory judgment action challenging the construction or validity of the statute)..

52. Cherry v. Wiesner**,** 245 N.C. App. 339, 781 S.E.2d 871, *review denied*, 369 N.C. 33, 792 S.E.2d 779 (2016).

E. Other Adverse Impact

While earlier cases suggested that a negative property value impact was necessary in order to establish special damages,[53] other potential injury to the use and enjoyment of nearby property can suffice to establish standing. These other factors also usually affect property value, but they may independently establish standing without the necessity of showing how they would affect property values.

In *Mangum v. Raleigh Board of Adjustment*,[54] two adjacent owners and an additional neighboring business owner challenged a special use permit issued for an adult entertainment establishment. The court found that allegations of parking, stormwater, and crime problems are sufficient to establish "special damages" and that a plaintiff is not required to also show that property values would be reduced as a result of the permitted development. In *Kentallen, Inc. v. Town of Hillsborough*,[55] the court found no standing for an adjacent owner, holding an allegation that plaintiff is the owner of adjoining property is insufficient to confer standing without an allegation relating to whether and in what respect that land would be adversely affected. The court noted this usually involves a pecuniary loss, but traffic and noise impacts, a fire hazard, or loss of light and air may also suffice.

Other cases address various adverse impacts that establish standing, but in many of these cases adverse property value impact was also alleged. *Fort v. County of Cumberland*[56] involved a challenge to an ordinance interpretation allowing a shooting range. The court held an allegation of increased noise, threat to groundwater quality and personal safety, and adverse property value impacts was sufficient to confer standing to neighbors. *Sanchez v. Town of Beaufort*[57] involved review of a certificate of appropriateness issued by the local historical commission for construction of a residence directly across the street from plaintiff. The court held the alleged violation of historic guidelines, loss of waterfront views, and depreciated property value were sufficient to confer standing. In *Murdock v. Chatham County*,[58] the plaintiffs alleged adverse impacts on their property from the lights, noise, and stormwater runoff from the site should the project proposed be built. In *Taylor Home v. City of Charlotte*,[59] the court found standing where

53. The proposition that showing of a reduction in property value is an essential element of standing is noted in the dissent in *Mangum v. City of Raleigh*, concluding that such a rule "lends itself to objective, consistent, and fair application, gives property owners predictability, and discourages frivolous litigation." 362 N.C. 640, 669 S.E.2d 279, 285 (2008).

54. 362 N.C. 640, 669 S.E.2d 279 (2008).

55. 110 N.C. App. 767, 431 S.E.2d 231 (1993). In this case an adjacent owner contended an expansion to a nonconforming metal storage building would be aesthetically unpleasant and thus harm his property.

56. 218 N.C. App. 401, 721 S.E.2d 350, *review denied*, 366 N.C. 401 (2012). *See also* Bailey & Assocs., Inc. v. Wilmington Bd. of Adjustment, 202 N.C. App. 177, 689 S.E.2d 576 (2010) (allowing neighbors standing to intervene on similar grounds).

57. 211 N.C. App. 574, 710 S.E.2d 350, *review denied*, 365 N.C. 349, 718 S.E.2d 152 (2011)

58. 198 N.C. App. 309, 679 S.E.2d 850 (2009), *review denied*, 363 N.C. 806, 690 S.E.2d 705 (2010). The neighbors also presented affidavits from an appraiser and a real estate agent regarding likely adverse impacts on property values.

59. 116 N.C. App. 188, 447 S.E.2d 438 (1994). Adjacent owners were challenging permits for an AIDS home in a residential area. The court noted the petition for review must allege the manner in which the value or enjoyment of the petitioner's property has been or will be adversely affected.

the allegations included both adverse property value impacts (supported by a letter from an appraiser) and testimony regarding the impacts of traffic on safety (the proposed group home was at the end of a cul-de-sac in a single-family neighborhood). In *McMillan v. Town of Tryon*,[60] the court found standing for a neighbor's challenge of a special use permit based on the neighbor's testimony at the quasi-judicial hearing regarding children walking in the street creating a public safety concern and the impacts of increased stormwater, noise, and traffic on the adjacent property.

When the allegation of injury is purely aesthetic, without a showing of either potential injury to property value or concrete harms such as vandalism, safety concerns, littering, trespass, parking, stormwater, noise, or lighting, the courts have been cautious about finding standing.[61] However, protection of aesthetics is clearly a legitimate objective of land use regulation.[62] A clear showing of particularized harm to an aesthetic interest that is designed to be protected by an ordinance should qualify for standing.

V. Particularization of Injury

Cases addressing standing for appeals regarding legislative and quasi-judicial zoning decisions have emphasized that injury alone is insufficient. The injury to the individual claiming standing must be more than that suffered by the community at large.[63]

A. Legislative decisions

In *Ring v. Moore County*,[64] the court applied the *Taylor* standard to find a lack of standing. Owners of a chicken farm across the road challenged a rezoning that would have doubled the permissible residential density on neighboring land.[65] The plaintiff alleged the increased residential density would increase traffic, noise, light pollution, and the "virtual certainty" of complaints about the odors, dust, and feathers from their adjacent poultry farm. The court held the plaintiff had failed to show an actual or imminent, concrete, particularized injury, noting the rezoning did not change permitted uses and the allegation of future neighbor conflicts was only conjecture. The court distinguished *Thrash*, noting there the plaintiff owned land that would be subject to the challenged regulation as opposed to owning neighboring land in this case.

60. 200 N.C. App. 282, 287–88, 683 S.E.2d 743, 746–47 (2009).

61. Cherry v. Wiesner**,** 245 N.C. App. 339, 781 S.E.2d 871, *review denied*, 369 N.C. 33, 792 S.E.2d 779 (2016) (neighbor across the street contending new home violated historic district standards); Kentallen, Inc. v. Town of Hillsborough, 110 N.C. App. 767, 431 S.E.2d 231 (1993) (neighbor objecting to unsightly addition to metal storage building).

62. State v. Jones, 305 N.C. 520, 290 S.E.2d 675 (1982) (upholding junkyard screening ordinance); A-S-P Assoc. v. City of Raleigh, 298 N.C. 207, 258 S.E.2d 444 (1979) (upholding historic district ordinance).

63. Federal courts also consider prudential standing, asking whether the claim is sufficiently individualized to ensure effective judicial review. Elk Grove Unified School Dist. v. Newdow, 542 U.S. 1, 11 (2004).

64. ___ N.C. App. ___, 809 S.E.2d 11 (2017).

65. The rezoning allowed the 108-acre tract to be developed with 20,000 sq. ft. residential lots rather than the 40,000 sq. ft. minimum lot size under the original zoning.

In *Davis v. City of Archdale*,[66] a challenge by neighbors to the annexation and rezoning of two parcels, the court applied the *Taylor* standard to rule that the alleged diminution of property values due to increased traffic and increased demands on overburdened utilities did not result in "special damages" distinct from those incurred by the rest of the community.[67]

B. Quasi-judicial

The alleged harm must be property specific. An alleged diminution of property values in the larger community is insufficient to confer standing. In *Cherry v. Wiesner*[68] the neighbor directly across the street challenged a certificate of appropriateness issued for a new residential structure, alleging it violated the historic district guidelines. The court held an alleged diminution in value for all homes in the historic district does not confer standing. To constitute the requisite "special damages," the alleged injury must be particular to the property involved.

In *Cook v. Union County Zoning Board of Adjustment*, [69] the court held the complaining neighbors had standing. The evidence in the hearing record showed that the residents of a subdivision adjacent to a proposed Wal-Mart would suffer damages to their property that are unique in character and quantity and distinct from those inflicted on the community at large.

The boundary between a community wide impact, which is insufficient, and a property specific impact, which is sufficient, is not precise and must be addressed on a case by case basis. The impact need not be unique to the property, as other nearby owners may also suffer the same property value, traffic, noise, or other impact. As in *Cook*, a number of neighbors may be sufficiently impacted to have standing. However, at some point "neighborhood" impacts become "community" impacts and not sufficiently particularized, as in *Cherry*.

V. Evidence Needed to Support Allegation of Injury

If standing is challenged, evidence must be presented to support standing in order to survive a motion to dismiss or a motion for summary judgment. An allegation of damages alone is insufficient[70] as the facts to support the potential injury must also be alleged.[71]

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66. 81 N.C. App. 505, 344 S.E.2d 369 (1986).

67. The court of appeals has noted in dicta that status as an adjoining or nearby owner, even without an allegation of a reduction in property value, might be sufficient to confer standing in a challenge to a legislative zoning decision in a declaratory judgment action. Concerned Citizens of Downtown Asheville v. Bd. of Adjustment, 94 N.C. App. 364, 366, 380 S.E.2d 130, 132 (1989).

68. 245 N.C. App. 339, 781 S.E.2d 871, *review denied*, 369 N.C. 33, 792 S.E.2d 779 (2016). The court noted the holdings on standing in several older cases required a similar particularization of harm allegation, citing *Lloyd v. Town of Chapel Hill*, 127 N.C. App. 347, 489 S.E.2d 898, 900 (1997), *Kentallen, Inc. v. Town of Hillsborough*, 110 N.C. App. 767, 431 S.E.2d 231 (1993), and *Davis v. City of Archdale* 81 N.C. App. 505, 344 S.E.2d 369 (1986).

69. 185 N.C. App. 582, 649 S.E.2d 458 (2007). The alleged harm included a reduction in the value of their properties.

70. Lloyd v. Town of Chapel Hill, 127 N.C. App. 347, 351, 489 S.E.2d 898, 900 (1997) (vague, general allegation of property value impacts inadequate).

71. Casper v. Chatham Cnty., 186 N.C. App. 456, 651 S.E.2d 299 (2007) (finding no standing for neighbors' appeal of concurrent rezoning and issuance of a conditional use permit for a neighborhood-scale commercial project).

It is not necessary to show that injury has in fact already occurred. The judicial challenge is often to a zoning decision that has not yet been implemented and the action is brought to forestall future damage if the decision were to be carried out. However, a showing of immediate or threatened injury is required.[72]

The facts supporting standing may be established by affidavits or testimony. In *Murdock v. Chatham County*,[73] the plaintiffs alleged in their complaint that they owned land adjoining the larger tract at issue in the case and presented evidence about the adverse impacts on their property from the lights, noise, and stormwater runoff from the site should the project proposed be built. The court held this was sufficient to establish the requisite special damages.[74] In *Allen v. City of Burlington Board of Adjustment*,[75] a neighboring property owner who appealed the zoning administrator's determination that a special use permit was not required for a community kitchen and a homeless shelter. The neighbor was held to have established special damages through his own testimony.[76]

The limitation to use of competent, expert testimony to show property value impacts that applies to evidentiary findings relative to meeting the standards of the ordinance is not applicable to an allegation of property value impacts for standing purposes.[77]

For quasi-judicial matters, the evidence to support standing is typically produced in the application for review by the board of adjustment or at the board's evidentiary hearing and is thus part of the hearing record subject to judicial review.

While the superior court's review is based on the record before the board, G.S. 160A-393(j) allows the trial court to allow the record to be supplemented with affidavits, testimony, or documentary evidence regarding standing if the hearing record is not adequate to resolve standing questions. This is often needed because the parties may well have not been represented by counsel at the evidentiary hearing on a quasi-judicial matter or the standing issue may not have been raised or addressed by the board hearing the matter. In these situations the hearing record is often devoid of evidence addressing standing. Whether the hearing record may be supplemented is in the discretion of the trial judge. Where the application for review before the quasi-judicial board specifically asks the person seeking review to explain how they are an

72. Mangum v. Raleigh Bd. of Adjustment, 362 N.C. 640, 642-43, 669 S.E.2d 279, 282 (2008).

73. 198 N.C. App. 309, 679 S.E.2d 850 (2009), *review denied*, 363 N.C. 806, 690 S.E.2d 705 (2010). The plaintiffs also submitted affidavits from an appraiser and a real estate agent stating that the project would make the neighboring properties less attractive to potential purchasers. *See also* McMillan v. Town of Tryon, 200 N.C. App. 282, 287–88, 683 S.E.2d 743, 746–47 (2009) (neighbor's testimony at hearing regarding children walking in the street, impacts of increased stormwater, noise, and traffic were sufficient to establish standing to challenge conditional use permit).

74. The court noted the general standard of G.S. 1A-1, Rule 8(a)(1) for "notice pleading" in civil matters that pleadings should be liberally construed and are sufficient if sufficient notice to allow the adverse party to understand the nature of the claim and to prepare for trial.

75. 100 N.C. App. 615, 397 S.E.2d 657 (1990).

76. The court further held that the opposing party's presentation of expert testimony about the appropriateness of the proposed use did not negate the adjoin owner's testimony.

77. Fort v. Cumberland County, 218 N.C. App. 401, 405, 721 S.E.2d 352, 354, *review denied*, 366 N.C. 401 (2012). The court noted the limitation on competent evidence for a substantive finding of fact is in G.S. 160A-393(k), not in the subsection on standing, G.S. 160A-393(d).

aggrieved party, the person was represented by counsel, and the board discussed a standing objection, it is not an abuse of discretion for the trial court to refuse to allow the record to be supplemented with additional evidence on standing.[78]

The elements of standing go beyond pleading. Since they are an "indispensable part of the plaintiff's case, each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, i.e., with the manner and degree of evidence required at the successive stages of the litigation."[79]

Cherry Community Organization v. City of Charlotte[80] illustrates how the level of detail and evidentiary support for an allegation of special damages becomes more demanding as a case proceeds. The plaintiff nonprofit organization (or its members) owned immediately adjacent property to a proposed rezoning that would allow a mixed use development (offices, retail, hotel, and eight townhouses). The court held that while the plaintiff's pleadings contained an allegation of special damages sufficient to defeat a motion to dismiss, the failure to produce any evidence to support the allegation of special damages warranted summary judgment for the city. The court held that a party may not rest on mere allegations in their pleadings, but must by affidavits or otherwise set forth specific facts to support those assertions. A concurring opinion would have found standing existed, but then uphold summary judgment because the plaintiff failed to forecast competent evidence to support a finding of special damages, which is a justiciable issue.

VI. Traceability and Redress

In addition to establishing a specific, particularized injury, the person claiming standing must show that the injury is fairly traceable to the challenged action. Two North Carolina cases illustrate this element of standing.

In *Morgan v. Nash County*,[81] neighbors and the City of Wilson challenged the county's rezoning of a rural parcel to accommodate construction of a potential chicken processing plant. If the plant were constructed, it would have used a sprayfield located several miles away from the plant for disposal the facility's treated wastewater. A sprayfield was already a permitted use of that tract so it was not a part of the contested rezoning. The city asserted that since its water supply was in the same watershed as the proposed sprayfield, the potential contamination occasioned by the location of the sprayfield was sufficient potential injury to invoke standing. The court disagreed, noting that this parcel could already be used as a sprayfield by the chicken processing plant or some other business. Since invalidation of the contested rezoning would not prevent that potential use as a sprayfield, the alleged injury would not be redressed by a favorable decision and thus the city did not have standing under the *Lujan* standard. The court

78. Cherry v. Wiesner, 245 N.C. App. 339, ___, 781 S.E.2d 871, 881-82, *review denied*, 369 N.C. 33, 792 S.E.2d 779 (2016).

79. Lujan v. Defenders of Wildlife, 504 U.S. 55, 561 (1992), quoted with approval by Neuse River Foundation, Inc. v. Smithfield Foods, Inc. 155 N.C. App. 110, 113, 574 S.E. 2d 48, 51 (2002).

80. ___ N.C. App. ___, 809 S.E.2d 397, *review denied*, ___ N.C. ___, 812 S.E.2d 850 (2018). The court in *Lujan* recognized that general allegations of harm may suffice at the pleading stage given a presumption that the general allegations "embrace those specific facts that are necessary to support the claim." 504 U.S. 555, 561 (1992).

81. 224 N.C. App. 60, 735 S.E.2d 615 (2012), *review denied*, 366 N.C. 561, 738 S.E.2d 379 (2013).

held that since a sprayfield would be subject to state and federal effluent standards and monitoring, the alleged injury was conjectural rather than actual or imminent. The court similarly found the allegations nor would this constitute a "direct" injury under the *Taylor* since the contested rezoning did not in fact authorize use of the sprayfield site for waste disposal (that use being already permitted there).

In *Marriott v. Chatham County*,[82] a county ordinance allowed environmental impact statements to be required for some development approvals. The county approved several large developments on tracts adjacent to parcels owned by the plaintiffs without requiring an environmental impact statement. The plaintiffs sought to enjoin development of the property until the county amended its ordinance to provide minimum criteria for when an impact statement would be required and sought a writ of mandamus to compel the county to make these amendments. The court noted that an ordinance allowing an impact statement but providing no minimum criteria for when a statement is required is invalid. Since the ordinance as written is invalid and the court has no authority to order the ordinance amended, there is no likelihood the plaintiff's injury could be redressed by a favorable decision and thus no standing.

VII. Associational Standing

It is relatively common for a group, such as a neighborhood association, to seek to initiate or intervene as a party in a judicial challenge to a land use regulatory decision. This scenario presents the question of when the group itself, as distinct from its individual members, can be a party in zoning litigation.[83]

In some situations it is clear that there is no standing for a particular group. An association seeking standing must as a threshold matter establish its legal existence. Failure to establish the legal existence of the group will result in dismissal of the group as a party.[84] If the group has been formally incorporated, such as by securing legal status as a nonprofit corporation, it must state that in its complaint.[85] If the group is an unincorporated nonprofit association, it may generally assert a claim in its name on behalf of its members "if one or more of them have standing to assert a claim in their own right, the interests the nonprofit association seeks to protect are germane to its purposes, and neither the claim asserted nor the relief requested requires the participation of a member or a person referred to as a 'member' by the nonprofit

82. 187 N.C. App. 491, 654 S.E.2d 13 (2007), *review denied*, 362 N.C. 472, 666 S.E.2d 122 (2008).

83. Case law on this point is mixed nationally, but the trend is toward granting organizations standing in a representational capacity. DANIEL R. MANDELKER AND MICHAEL ALLAN WOLF, LAND USE LAW § 8.06 (6th ed. 2018). *See, e.g.*, Tri-Cnty. Concerned Citizens, Inc. v. Bd. of Cnty. Comm'rs, 32 Kan. App. 2d 1168, 95 P.3d 1012 (2004); Douglaston Civic Ass'n v. Galvin, 36 N.Y. 2d 1, 364 N.Y.S.2d 830, 324 N.E.2d 317 (1974).

84. N. Iredell Neighbors for Rural Life v. Iredell Cnty., 196 N.C. App. 68, 674 S.E.2d 436, *review denied*, 363 N.C. 582, 682 S.E.2d 385 (2009).

85. "Any party not a natural person shall make an affirmative averment showing its legal existence and capacity to sue." G.S. 1A-1, Rule 9(a).

association."[86] If the unincorporated group is not a nonprofit association, it must have recorded a certificate of its activities with the county register of deeds in the county where it operates.[87]

If none of the individual members of a group have standing, the group does not have standing, as some member of the group must show actual harm in order to be aggrieved.[88]

A variety of zoning cases in North Carolina—some involving legislative zoning decisions and others quasi-judicial decisions—have allowed a group standing if some of its individual members had standing.

In *River Birch Associates v. City of Raleigh,*[89] the court noted that to have standing, the "complaining association or *one* of its members must suffer some immediate or threatened injury."[90] The court stated the general rule for associational standing as follows:

> An association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.[91]

The court reaffirmed use of this analytic approach to associational standing in *Willowmere Community Association, Inc. v. City of Charlotte*,[92] where the court found

86. G.S. 59B-8(b). *See also* G.S. 1-69.1

87. G.S. 66-68. G.S. 1-69.1(a)(3) requires that the specific location of the recordation of this certificate must be included in the complaint of such an unincorporated association.

88. Concerned Citizens of Downtown Asheville v. Bd. of Adjustment, 94 N.C. App. 364, 380 S.E.2d 130 (1989). *See also* Friends of Lincoln Lake v. Town of Lincoln, 2010 ME 78, 2 A.3d 284 (group has no standing to appeal permit for wind power project where no showing of particularized injury to member of group has been made).

89. 326 N.C. 100, 130, 388 S.E.2d 538, 555 (1990) (emphasis added). *See also* C.C. & J. Enters., Inc. v. City of Asheville, 132 N.C. App. 550, 512 S.E.2d 766, *review dismissed as improvidently granted*, 351 N.C. 97, 521 S.E.2d 117 (1999) (proper to allow an adjoining neighborhood association to intervene, as they had alleged special damages (reduced property values) to qualify as an aggrieved party); Piney Mountain Neighborhood Ass'n v. Town of Chapel Hill, 63 N.C. App. 244, 304 S.E.2d 251 (1983). *See generally* Creek Pointe Homeowners' Ass'n v. Happ, 146 N.C. App. 159, 552 S.E.2d 220 (2001), *review denied*, 356 N.C. 161, 568 S.E.2d 191 (2002).

90. 326 N.C. 100, 130, 388 S.E.2d 538, 555 (emphasis added).

91. *Id.* The N.C. Supreme Court took this standard from *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333, 343 (1977), and cited with approval *Warth v. Seldin*, 422 U.S. 490 (1975) (while holding no standing for plaintiffs challenging alleged exclusionary zoning of suburb, court noted that standing of one member confers standing on associational group). *See also* Sierra Club v. Morton, 405 U.S. 727 (1972) (if a member of the group suffers harm, the group has associational standing). The standard for associational standing is also discussed, but not decided, in *Wake Cares, Inc. v. Wake County Board of Education*, 190 N.C. App. 1, 9–10, 660 S.E.2d 217, 222–23 (2008), where the court held that the plaintiff association did not attempt to meet any of the standards for associational standing.

92. ___ N.C. ___, 809 S.E.2d 218 (2018). The court of appeals had found no standing due to the associations' failure to adhere strictly to their own bylaws regarding the process to authorize their boards to initiate litigation. The Supreme Court held that a corporate litigant is not required to affirmatively plead or prove its compliance with its internal rules and bylaws relating to the decision to sue.

neighboring homeowners' associations had standing to challenge a rezoning to allow multifamily housing on land adjoining the neighborhoods.[93]

There remains, however, some uncertainty regarding associational standing to challenge legislative zoning decisions. In *Northeast Concerned Citizens v. City of Hickory*,[94] the plaintiff group challenged a rezoning. The court held that contrary to the general rules on associational standing, since in a zoning context a person must have a specific personal and legal interest in the subject matter to have standing, in zoning cases a corporation must have either an interest itself or *all* of its members/shareholders must have such an interest.[95] The majority distinguished *River Birch Associates* as setting a general rule on associational standing and applying it to the unfair or deceptive trade practices element of that suit, while contending that zoning cases have a more demanding standing standard.[96] The *Northeast Concerned Citizens* concurrence would not have required each member of the association to have individual standing.[97]

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93. In *State Employees Ass'n of North Carolina, Inc. v. North Carolina*, 154 N.C. App. 207, 573 S.E.2d 525 (2002), the court denied associational standing where all members of the group did not have standing. The dissent, largely relying on *River Birch Associates*, would have allowed standing for the association where a member had standing. In a per curiam opinion, the supreme court approved the views set forth in the dissent. *State Emps. Ass'n*, 357 N.C. 239, 580 S.E.2d 693 (2003). *See also* N.C. Forestry Ass'n v. N.C. Dep't of Env't & Natural Res., 357 N.C. 640, 588 S.E.2d 880 (2003) (holding trade association had standing to appeal a determination that new or expanding wood chip mills were excluded from coverage under a general timber products industry permit).

94. 143 N.C. App. 272, 545 S.E.2d 768, *review denied*, 253 N.C. 526, 549 S.E.2d 220 (2001). *See also* Landfall Group v. Landfall Club, Inc., 117 N.C. App. 270, 450 S.E.2d 513 (1994).

95. The record in the case indicated that at most only twelve of the plaintiff nonprofit corporation's 114 members had such an interest.

96. The *Northeast Concerned Citizens* court concluded in a footnote that the standing requirements laid out in *Taylor*—a specific and personal interest in the matter with a direct, adverse effect on the person—set a standing requirement for zoning challenges that is different from and more stringent than more general standards for associational standing in other contexts. *Northeast Concerned Citizens*, 143 N.C. App. at 277 n.1, 545 S.E.2d at 772 n.1. However, the *River Birch* decision involved application of development ordinance requirements (authority to require transfers of required open space to a homeowners' association, effect of preliminary plat approval on dedications and vested rights, dedication of open space as a regulatory taking) and the standing of the association was assumed and not discussed by the court. 326 N.C. 100, 128, 388 S.E.2d 538, 554. The *River Birch* decision concluded with a holding that the association did not have standing to prosecute the fraud and unfair trade practice claims. *Id.* at 129–30, 388 S.E.2d at 555–56.

97. The concurring opinion suggested using the following factors to determine if an association should have standing:

> (1) the capacity of the organization to assume an adversary position;
>
> (2) the size and composition of the organization as reflecting a position fairly representative of the community or interests which it seeks to protect;
>
> (3) the adverse effect of the decision sought to be reviewed on the group represented by the organization as within the zone of interests sought to be protected; and
>
> (4) whether full participating membership in the representative organization is open to all residents and property owners in the relevant neighborhood.

143 N.C. App. at 280, 545 S.E.2d at 774. The quoted proposed standard on associational standing is taken from *Douglaston Civic Ass'n v. Galvin*, 324 N.E.2d 317, 321 (N.Y. 1974).

The question of associational standing in appeals of quasi-judicial decisions was clarified in 2009 by the enactment of G.S. 160A-393(d). It provides that neighborhood associations and associations organized to protect and foster the interests of the neighborhood or local area have standing, provided at least one of the members of the association would have individual standing and the association was not created in response to the particular development that is the subject of the appeal.

VIII. Intervention

The rules for intervention in a judicial challenge to a quasi-judicial decision are set by G.S. 160A-393(h). The statute provides that Rule 24 of the Rules of Civil Procedure is to be applied, provided the applicant and persons with a property interest in the subject property can intervene as a matter of right and others must demonstrate that they would have had standing to initiate the proceeding.

Rule 24 generally provides that to intervene by right a person must show a statutory right to do so or show: (1) an interest in the property or transaction involved; (2) that disposition of the matter will as a practical matter affect that interest; and (3) that the person's interest is not adequately represented by the existing parties.[98]

Rule 24 also provides for permissive intervention. In *Procter v. City of Raleigh Board of Adjustment*,[99] neighbors had participated in a board of adjustment case and the board upheld the staff interpretation of the ordinance favored by the neighbors. Given the city's defense of the board decision in the trial court, the neighbors did not seek to intervene. When the city decided not to appeal an adverse trial court ruling, the neighbors sought to intervene to pursue appellate court review. The trial court rejected the motion to intervene as not timely. The court of appeals reversed, concluding that the extraordinary and unusual circumstances of the case made intervention timely under Rule 24(a)(2). The court found that the neighbors had an interest in the transaction, an alleged practical impairment of that interest, and inadequate representation by the

98. Bailey & Assocs., Inc. v. Wilmington Bd. of Adjustment, 202 N.C. App. 177, 689 S.E.2d 576 (2010). *See generally* Holly Ridge Assocs., LLC v. N.C. Dep't of Env't & Natural Res., 361 N.C. 531, 648 S.E.2d 830 (2007); High Rock Lake Partners, LLC v. N.C. Dep't of Transp., 204 N.C. App. 55, 693 S.E.2d 361, *review denied*, 364 N.C. 325, (2010) (owner of property must be allowed to intervene as real party in interest in challenge to conditions imposed on a driveway permit application made by previous owner who subsequently assigned all rights to the landowner).

In a case decided prior to the adoption of G.S. 160A-393 in 2009, the plaintiff filed suit challenging denial of a conditional use permit for a single-family development. Neighbors sought to intervene in support of the board's denial, alleging that significant traffic increases as a result of a conditional use permit issuance would adversely affect their property values. The neighbors also alleged that the applicant and board intended to settle the suit by issuing the permit and sought a stay to prevent such action pending the outcome of the appeal. The trial court denied the motion to intervene on the basis that the neighbors did not have standing under the "special damages" test. The court held that appellate review was not mooted by the settlement between the plaintiff and the board and that Rule 24 (rather than the special damages or aggrieved person standard) governs intervention in all civil actions. Councill v. Town of Boone Bd. of Adjustment, 146 N.C. App. 103, 551 S.E.2d 907 (2001). In *Lloyd v. Town of Chapel Hill*, 127 N.C. App. 347, 489 S.E.2d 898 (1997), the court applied the special damages test rather than Rule 24 to determine whether a party could intervene.

99. 133 N.C. App. 181, 514 S.E.2d 745 (1999).

existing parties (and that the city's appeals had been adequate representation prior to the city's decision not to appeal the trial court's adverse ruling).

Supreme Court Rules that Obtaining Cell Site Location Information Is a Search

Author : Jeff Welty

Categories : Search and Seizure, Uncategorized

Tagged as : carpenter, cell phone tracking, cell site location information, CSLI, fourth amendment, reasonable expectation of privacy, search, supreme court, third party doctrine

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On Friday, the Supreme Court issued a long-awaited opinion in *Carpenter v. United States*. The Court held that when law enforcement obtains long-term cell site location information from a suspect's service provider, it conducts a Fourth Amendment search that normally requires a warrant. Although the majority opinion states that it "is a narrow one," the dissenting Justices and some scholars see it as a seismic shift that may have many aftershocks. I'll summarize the case and then use former Secretary of Defense Donald Rumsfeld's famous approach to address the "known knowns," the "known unknowns," and the "unknown unknowns" after *Carpenter.*

Facts. Carpenter was suspected of participating in a series of store robberies in Michigan and Ohio. The FBI sought and obtained two court orders requiring Carpenter's cell phone service providers to produce records about Carpenter's account, including cell site location information. One order covered 152 days, though for reasons not given in the opinion, the service provider only produced records for 127 days. The second order covered seven days, but the service provider only produced records for two days. The cell site location information put Carpenter in the vicinity of several robberies and became important evidence against him.

Procedural history. Carpenter moved to suppress the records, arguing that he had a reasonable expectation of privacy in the records and in the location information that they revealed; that the FBI had therefore engaged in a search, for Fourth Amendment purposes, when agents obtained the records; and that the agents had acted without a warrant or an exception to the warrant requirement and so had violated the Fourth Amendment. It is important to note that the agents had obtained the orders under 18 U.S.C. § 2703(d), which allows investigators to get a court order for telecommunication records when they can provide "specific and articulable facts showing that there are reasonable grounds to believe that the . . . records or other information sought[] are relevant and material to an ongoing criminal investigation." The "specific and articulable facts" standard is something like reasonable suspicion, so it's less than probable cause and the orders weren't the functional equivalent of a warrant.

The trial court denied Carpenter's motion. He went to trial, was convicted, was sentenced to over 100 years in prison, and appealed. The Sixth Circuit affirmed, ruling that Carpenter had no reasonable expectation of privacy in the cell site location information because he had shared that information with the service providers in the course of using his phone. In other words, the third party doctrine applied to cell site location information just as the Supreme Court has ruled that it applies to bank records, *see United States v. Miller*, 425 U.S. 435 (1976), and pen register information, *see Smith v. Maryland*, 442 U.S. 735 (1979). Several other federal courts of appeals had decided similar cases in similar ways. Carpenter sought and obtained Supreme Court review.

Majority opinion. Chief Justice Roberts wrote the majority opinion reversing the Sixth Circuit, joined by Justices Breyer, Ginsburg, Sotomayor, and Kagan. He wrote that "requests for cell-site records lie at the intersection of two lines of cases." One set of cases concern the third party doctrine -- as noted above, the idea that when a person voluntarily shares information with a third party, the person loses any reasonable expectation of privacy in the information. The other set of cases concern "a person's expectation of privacy in his physical location and movements." Of particular significance on this front was was *United States v. Jones*, 565 U.S. 400 (2012), a GPS

tracking case in which five Justices expressed concern that long-term electronic location tracking might intrude upon the subject's reasonable expectation of privacy. (The Court actually decided that case on the basis that installing the tracking device on a suspect's vehicle was a search, and the Court as a whole didn't reach the expectation of privacy issue.)

Viewing the issue through the above-described lens, the majority determined that the third-party doctrine isn't absolute and that law enforcement access to cell site location information is such a severe threat to privacy that the third-party doctrine shouldn't be extended to cover it. The Court noted that such information offers "an all-encompassing record of the holder's whereabouts" and "provides an intimate window into a person's life." Therefore, the Court reasoned:

Given the unique nature of cell phone location records, the fact that the information is held by a third party does not by itself overcome the user's claim to Fourth Amendment protection. Whether the Government employs its own surveillance technology as in *Jones* or leverages the technology of a wireless carrier, we hold that an individual maintains a legitimate expectation of privacy in the record of his physical movements as captured through CSLI. The location information obtained from Carpenter's wireless carriers was the product of a search.

Because accessing CSLI is a search, the majority concluded, law enforcement needs a warrant, or an exception to the warrant requirement, to collect it. The FBI didn't have one, so it violated the Fourth Amendment. The Court remanded the case to the Sixth Circuit, presumably to consider questions like whether suppression is an appropriate remedy given that the officers acted in conformity with then-existing case law and the pertinent federal statute.

Dissents. The four dissenting Justices each produced a dissent. Justice Kennedy focused mainly on the third-party doctrine, arguing that the records were the providers' business records and that Carpenter therefore had no expectation of privacy in them. Justice Thomas argued that the entire "reasonable expectation of privacy" framework from *Katz v. United States*, 389 U.S. 347 (1967), is inconsistent with the text and original meaning of the Fourth Amendment. In his view, the proper analysis would focus on whether officers invaded any property interest in Carpenter's "papers" or "effects," which he thought plain that they did not. Justice Alito, among other points, contended that obtaining documents using compulsory process -- namely, a court order requiring the service provider to produce certain records -- rather than by officers' own rummaging and inspection is not a "search." Justice Gorsuch wrote a rather informal and conversational opinion, generally endorsing the idea that the Fourth Amendment requires a property-based, not privacy-based, analysis. Together, the opinions cover 119 pages and made for an interesting weekend of reading.

Known knowns. A few impacts of the Court's decision are plain.

- Obtaining long term, historical CSLI is a search and requires a warrant unless an exception to the warrant requirement, such as exigent circumstances, exists. This effectively reverses *State v. Perry*, 243 N.C.App. 156 (2015).
- Obtaining financial records and pen register information from third party institutions like banks and service providers remains covered by the third-party doctrine and is not a search. The majority is clear that the third-party doctrine survives, and that *Smith* and *Miller* continue to govern, at a bare minimum, the types of information at issue in each of those cases.

Known unknowns. *Carpenter* also leaves some obvious question marks:

- What about short-term historical CSLI? Footnote three of the majority opinion observes that the Court "need not decide whether there is a limited period for which the Government may obtain an individual's historical CSLI free from Fourth Amendment scrutiny, and if so, how long that period might be. It is sufficient for our purposes today to hold that accessing seven days of CSLI constitutes a Fourth Amendment search." Future cases involving shorter time periods may present the issue that the Court sidestepped.
- What about real-time CSLI? The majority likewise expressly declined to offer any opinion about whether the

real-time collection of CSLI constitutes a search.
- Finally, what about "tower dumps"? Again, the majority refused to express a view regarding this technique, which provides a snapshot of all the cell phones that connected to a given tower within a specific window of time, usually the time that a particular crime took place.

A cautious officer seeking any of these sorts of information may wish to do so using a warrant or the functional equivalent, such as a court order based on full probable cause. Indeed, my impression is that most agencies in North Carolina are already following this practice. Similarly, a defendant in any case involving information of this kind may wish to assert a Fourth Amendment claim if the information was obtained under a lower standard than probable cause.

Unknown unknowns. *Carpenter* laid bare some very deep disagreements about the Fourth Amendment, including the extent to which it was intended to protects privacy as opposed to property, and the extent to which *Katz* and the third-party doctrine are correct interpretations. It was a 5-4 decision and a single retirement, or change of heart, could change the entire direction of the Court. But even if the Court marches off along the path set by *Carpenter*, it seems likely that it will reach some unexpected destinations. The dissenting Justices certainly think that it will. For example, Justice Kennedy accused the majority of drawing an "unprincipled and unworkable line" between categories of third-party records that will "cause confusion" in application:

[T]he Court's holding is premised on cell-site records being a "distinct category of information" from other business records. But the Court does not explain what makes something a distinct category of information. Whether credit card records are distinct from bank records; whether payment records from digital wallet applications are distinct from either; whether the electronic bank records available today are distinct from the paper and microfilm records at issue in *Miller*; or whether cell-phone call records are distinct from the home-phone call records at issue in *Smith*, are just a few of the difficult questions that require answers.

Indeed, in the age of big data, third parties collect and maintain vast troves of information about individuals and I am certain that future cases will test the logic and implications of *Carpenter* in contexts that I haven't even begun to imagine. But just to illustrate the potential range of issues that might be raised, I will note that I can readily imagine questions about the following:

- Records of an individual's search and browsing histories and social media interactions. These arguably constitute something akin to an individual's online "location" and they have the potential to reveal a great deal of personal information.
- Medical and genetic records pertaining to an individual. Sometimes these will be protected by the physician-patient privilege, but not always -- Justice Gorsuch's opinion offers the example of a person's DNA profile on 23andme.
- Photographs and videos stored on third-party servers. These files often reveal private moments, and may contain metadata indicating the time and location at which they were captured. Thus, a sufficiently extensive photo stream may allow investigators to, in the words of Chief Justice Roberts, "retrospective[ly] . . . access . . . a category of information otherwise unknowable" and "travel back in time to retrace a person's whereabouts" and even activities.
- Data collected through license plate readers, pole-mounted cameras, persistent aerial surveillance, and similar techniques. Although the majority notes that it does not "call into question conventional surveillance techniques and tools, such as security cameras," *future litigants* are likely to call those techniques into question. And while the short-term use of a single tool may not intrude on a reasonable expectation of privacy, perhaps a tipping point can be reached beyond which the collective impact of multiple surveillance approaches constitutes a search.
- Data collected by data brokers, private companies that aggregate data from myriad sources to come up with comprehensive pictures of individuals' demographics and preferences. If some of the news stories about data brokers are accurate, these companies have amazingly detailed information. Could it be a "search" for an officer to access a suspect's profile or dossier?

Further reading. Professor Orin Kerr is the leading scholar in this area, and various articles of his were cited in four of the five opinions. He's blogging about the case at the Volokh Conspiracy. His first post is here. Jessie Smith's preview of the case is in this prior post.

Further discussion. I would love to hear others' perspectives on this case and its implications. Please share your view in the comments -- or send me an email directly if you prefer.

Carpenter, Search Warrants, and Court Orders Based on Probable Cause

Author : Jeff Welty

Categories : Uncategorized

Tagged as : carpenter, court order, CSLI, search warrant

Date : July 30, 2018

In *Carpenter v. United States*, __ U.S. __, __ S.Ct. __, 2018 WL 3073916 (June 22, 2018), the Supreme Court ruled that when the government obtains long-term, historical cell site location information (CSLI) about a person, it conducts a Fourth Amendment search and so "the Government must generally obtain a warrant supported by probable cause before acquiring such records." I previously blogged about *Carpenter* here.

That post referenced the possibility of using a court order supported by probable cause in lieu of a search warrant. The idea behind that suggestion was that some of the statutory execution procedures associated with search warrants are an awkward fit for this type of order. For example, G.S. 15A-252 requires that an officer executing a warrant must "read the warrant and give a copy of the warrant application . . . to the person to be searched, or the person in apparent control of the premises . . . to be searched." In a case involving CSLI, is the officer supposed to read the warrant to Verizon? Or to the suspect, even though he or she will not be present at the search? But since I wrote my prior post, I've been asked several times whether using a court order based on probable cause in place of a search warrant would really be permissible. This post attempts to answer that question.

No constitutional problem with using a court order. The case law consistently holds that a court order is the constitutional equivalent of a search warrant so long as the court order (1) is issued by a neutral judicial official; (2) is based on a finding of probable cause; and (3) complies with the particularity requirement. Using the term "order" instead of the term "warrant" is merely a semantic difference, and the rules regarding execution, inventory, return, and the like, are generally statutory rather than constitutional in nature. *See United States v. Sykes*, 2016 WL 8291220 (E.D.N.C. Aug. 22, 2016) (unpublished), M&R adopted, 2016 WL 6882839 (E.D.N.C. Nov. 22, 2016) (unpublished) (considering whether "the state court orders that authorized GPS location tracking [of suspects' phones] were the functional equivalent of search warrants supported by probable cause," and finding that at least one was not as it was not supported by probable cause and lacked particularity; in the course of the discussion the court stated that "it is not material whether the applications were for orders as opposed to warrants," and that "[t]he Supreme Court has interpreted the Fourth Amendment to establish only three requirements for warrants: (1) they must be issued by neutral, disinterested magistrates; (2) supported by probable cause; and (3) particularly describe the place to be searched and the things to be seized," citing Dalia v. United States, 441 U.S. 238 (1979)); *Keeylen v. State*, 14 N.E.3d 865 (Ind. 2014) (ruling that court orders authorizing the installation and monitoring of a GPS tracking device violated the Fourth Amendment because they did not contain findings of probable cause; "it is not dispositive that the trial court's authorizations were not labeled 'warrants'"; however, the "defining features of a search warrant" include issuance by a judicial officer, upon a finding of probable cause, and with a particular description of the place to be searched and the things to be seized; the orders in this case appeared to have been issued "on less than probable cause"); *Com. v. Burgos*, 64 A.3d 641 (Penn. Super. Ct. 2013) (ruling that court orders authorizing the installation and monitoring of a GPS tracking device "serve[d] as the functional equivalent of traditional search warrants," where they were "approved and issued by the judiciary . . . [and] allow[ed] an investigating officer to conduct a search . . . upon a showing of the requisite level of suspicion," namely, probable cause; the court reversed a lower court's determination that the orders were not equivalent to warrants because, for example, they did not require execution within 48 hours). So I don't think there's any constitutional impediment to using a court order based on probable cause.

Lack of statutory framework for using a court order. A potential problem with the use of court orders based on probable cause is that there is no clear statutory authorization for them. Obviously, the search warrant statutes authorize the issuance of search warrants, not other kinds of court orders. And while the federal Stored Communications Act does provide for the issuance of court orders, see 18 U.S.C. § 2703(d), that provision addresses less-than-probable-cause orders, not full probable caused orders to be used in lieu of a search warrant. The lack of a statutory framework isn't necessarily fatal to the use of court orders, as the state supreme court has recognized courts' inherent authority to issue investigative court orders when appropriate. *See In re Superior Court Order Dated April 8, 1983*, 315 N.C. 378 (1986) ("[W]hile there is no statutory provision either authorizing or prohibiting orders of the type here involved, such authority exists in the inherent power of the court to act when the interests of justice so require."). Still, the lack of statutory authorization may be a reason to prefer a search warrant over a court order when it is feasible to use the former.

Conclusion. All in all, I lean towards using a search warrant rather than a court order when feasible, out of an abundance of caution. But there are still circumstances where a court order may be a better fit. For example, when an investigator is seeking access to real-time CSLI, and the suspect is still at large and engaged in criminal activity, the execution requirements associated with a search warrant may be so inappropriate that a court order is a more appropriate choice. (As a reminder, by its terms, *Carpenter* governs only the collection of long-term historical CSLI, but I think it's prudent for investigators to act on the assumption that it may be extended to real-time CSLI collection.) As always, I'd be interested in others' thoughts about this matter.

Timbs v. Indiana: Excessive Fines Clause Applies to the States

Author : Jamie Markham

Categories : Sentencing, Uncategorized

Tagged as : civil forfeiture, costs, court costs, fees, fines, forfeiture, Timbs v. Indiana

Date : February 21, 2019

The Supreme Court decided Timbs v. Indiana yesterday, holding that the Eighth Amendment's Excessive Fines Clause is an incorporated protection applicable to the states under the Fourteenth Amendment. What does the decision mean for North Carolina?

In *Timbs*, an Indiana state court defendant pleaded guilty to drug and theft crimes. He was ordered to pay costs and fees of $1,203. The State also brought a civil suit for forfeiture of his $42,000 Land Rover, alleging that it was used to facilitate the crime. The court hearing that suit agreed that the car had been used in the crime, but decided that forfeiture of a $42,000 SUV would be "grossly disproportionate to the gravity of Timbs's offense, and hence unconstitutional under the Eighth Amendment's Excessive Fines Clause." Slip op. at 2. The Indiana Supreme Court reversed—but not because it disagreed that the forfeiture was excessive. Rather, the court reversed because the trial court decision was premised on the Excessive Fines Clause of the United States Constitution. And that clause, the state high court said, had not been incorporated to the states and thus constrained only federal actions. *Id.*

The Supreme Court of the United States granted certiorari.

A unanimous Court (unanimous in the result, at least) concluded that the Excessive Fines Clause is incorporated to the states. Writing for the court, Justice Ginsburg worked her way from Magna Carta to today to demonstrate that prohibition on excessive fines is "fundamental to our scheme of ordered liberty." The need to be vigilant against excessive fines is especially important, she wrote, because they aren't self-limiting: "fines are a source of revenue[, whereas] other forms of punishment cost a State money." Slip op. at 6 (quoting Harmelin v. Michigan, 501 U.S. 957 (1991)). And so, the Court held, the clause is incorporated.

The Court didn't engage with Indiana's argument that the clause, if incorporated, would still not apply to a civil property forfeiture like the one at issue in Timbs's case. Indiana did not make that argument below, and so the issue was not properly before the Court. The Court did note, however, that under existing precedent, the Excessive Fines Clause does apply to civil in rem forfeitures when they are at least partially punitive. Austin v. United States, 509 U.S. 602 (1993).

Given the case's procedural posture, the Court also didn't have to reach the ultimate question of whether a $40,000 forfeiture was grossly disproportionate for a crime punishable by a $10,000 maximum fine. (For what it's worth, nobody seemed to bat an eye at the other $1,203 of costs and fees.)

Justice Thomas concurred in the result, but wrote a separate opinion saying he would have held the ban on excessive fines was incorporated through the Fourteenth Amendment's Privileges or Immunities Clause, not its Due Process Clause. Justice Gorsuch wrote a similar concurrence, although he joined the opinion of the Court in full.

So what is the significance of *Timbs* going forward?

Well, first of all, it's not every day that a provision in the Bill of Rights is incorporated against the states. Selective incorporation has been a long arc. Disagreement on the theory and policy behind it has divided some of our nation's

most respected judges and lawyers. It gets to fundamental questions of federalism, and the extent to which we trust the states to advance individual rights—or create "opportunity for reforms in legal process designed for extending the area of freedom." Adamson v. California, 332 U.S. 46, 67 (Frankfurter, J., concurring).

Despite its historical significance, *Timbs* may not be all that helpful to many criminal defendants. After all, all 50 states already limit excessive fines in their own constitutions—including North Carolina. N.C. Const., Art. I, sec. 27. And North Carolina's courts have already used the federal constitutional framework when applying our state excessive fines provision. *See* State v Sanford Video & News, Inc., 146 N.C. App. 554 (2001) ("As the wording of the clause under our North Carolina Constitution is identical to that of the United States Constitution, our analysis is the same under both provisions."). Indeed, in the North Carolina cases where defendants have raised excessive fines challenges under both the state and federal constitutional provisions, the court appears to have considered both challenges simultaneously and identically. *See id.*; *see also* State v. Zubiena, __ N.C. App. __, 796 S.E.2d 40 (2016).

Sanford Video & News is worth a closer look to see that analysis in action. In that case, the court of appeals upheld a $50,000 fine imposed as the punishment for a corporation convicted of Class H disseminating obscenity. The court concluded that the fine was not "grossly disproportionate" under the test set forth by the Supreme Court in *United States v. Bajakajian*, 524 U.S. 321 (1998) (holding a $357,144 forfeiture grossly disproportionate to the defendant's crime of attempting to leave the United States without reporting more than $10,000 in currency, and therefore unconstitutional), when the crime was a felony, and one through which the defendant corporation obtained money (for selling two adult magazines to an undercover officer). *Sanford Video & News*, 146 N.C. App. at 559. The court also noted that the fine was not excessive compared to the financial resources of the corporation. *Id.* at 559–60 ("With its financial resources, a lesser fine may have been seen as an "acceptable price" of conducting business and therefore not a deterrent."). So, the case applies a federal Eighth Amendment framework in a way that sets a pretty high bar for gross disproportionality.

Even if *Timbs* doesn't amount to a revolution in excessive fines jurisprudence, there is surely language in the case—from a unanimous Court—that defendants may find helpful in all sorts of challenges to monetary obligations. *E.g.*, Slip op. at 6 ("Exorbitant tolls undermine other constitutional liberties. . . . Even absent a political motive, fines may be employed in a measure out of accord with the penal goals of retribution and deterrence . . . .") (citation omitted)). And the case will certainly be leveraged in civil asset forfeiture cases—which are not as much of a fixture in North Carolina as they are in some states, but they do exist, as Jeff discussed here, and Shea discussed here.

At a minimum the case brings additional attention to fines and fees, an important issue for which momentum for reform appears to be building. It's one of the topics of discussion at the School of Government's upcoming Criminal Justice Summit in March. And I'll be hosting a fines and fees workshop at the School at the end of May.

What Last Week's Supreme Court Opinion May Tell Us about the Current Court

Author : Jeff Welty

Categories : Procedure, Sentencing, Uncategorized

Tagged as : capital cases, death penalty, intellectual disability, moore, supreme court

Date : February 25, 2019

Last week, the Supreme Court issued a per curiam opinion summarily reversing the Texas Court of Criminal appeals and finding that a death row inmate has an intellectual disability. The case doesn't break new doctrinal ground but it offers some possible insights about how several Justices on the newly constituted Court are positioned on capital cases.

The case. The case is Moore v. Texas. It began when the defendant shot a grocery store clerk in the head during a robbery. The defendant was tried capitally and was sentenced to death. On collateral review, he contended that he had an intellectual disability and so was not eligible for the death penalty, and a Texas trial court agreed. The Texas Court of Criminal Appeals reversed, applying a standard partly of its own creation that focused on factors like whether the defendant could formulate plans and could respond competently to questions. In 2017, the Supreme Court reviewed the case, found that the standard applied by the Court of Criminal Appeals was improper, and remanded with instructions to abide by clinically accepted standards regarding what constitutes an intellectual disability. I blogged about the 2017 litigation here.

The Texas Court of Criminal appeals, stating that it was applying the clinical definition of intellectual disability, again ruled that the defendant was not intellectually disabled. The Supreme Court granted certiorari and reversed per curiam without oral argument. It found that the Texas appellate court had, in "too many instances . . . repeat[ed] the analysis we previously found wanting," relying on the clinically insignificant factors that it had purportedly disavowed. The high court did not give the Texas appellate court a third bite at the apple, instead concluding that "Moore has shown he is a person with intellectual disability" and remanding for further proceedings consistent with that decision.

The lineups. The lineups of Justices in 2017 and in 2019 are interesting.

- Justices Ginsburg, Kagan, Sotomayor, and Breyer voted for Moore both times, while Justices Alito and Thomas voted against him both times.
- Justice Kennedy voted for Moore in 2017, and his replacement, Justice Kavanaugh, apparently voted for Moore in 2019. (More on Justice Kavanaugh's vote below.)
- Justice Scalia voted against Moore in 2017, and his replacement, Justice Gorsuch, voted against him in 2019.
- Chief Justice Roberts voted against Moore in 2017, writing a stinging dissent criticizing the majority for tying the Eighth Amendment so closely to medical and clinical standards. Yet in 2019, he voted for Moore, concurring in the per curiam opinion and writing separately to say that while the 2017 opinion does not set a clear standard for intellectual disability, "it is easy to see that the Texas Court of Criminal Appeals misapplied" the 2017 precedent in this instance.

The insights. The voting lineups are interesting for at least two reasons. First, this case is another piece of evidence that Chief Justice Roberts is an "institutionalist," committed to stare decisis and reluctant to risk the Court's credibility by changing directions too quickly, and/or is near the ideological center of the Court. Similar lessons may be draw from his decision to join the Court's liberal Justices in granting a stay in the abortion case that came before the case two weeks ago, and in *National Federation of Independent Business v. Sebelius*, 567 U.S. 519 (2012), the Obamacare

case.

The second point of interest concerns Justice Kavanaugh's vote. It is not noted in the opinion, which suggests that he voted with the majority, as the normal practice apparently is for Justices dissenting from per curiam opinions to do so in signed opinions. As described above, that would put Justice Kavanaugh in line with Justice Kennedy on this case. More generally, it would suggest that Justice Kavanaugh's vote may be in play in future contested capital cases, just as Justice Kennedy's often was.

U.S. Supreme Court Grants Review on Issue of Implied Consent

Author : Shea Denning

Categories : Motor Vehicles, Procedure

Tagged as : 20-16.2, Birchfield v. North Dakota, DWI, implied consent, state v. mitchell, State v. Romano, unconscious

Date : January 30, 2019

The United States Supreme Court granted certiorari a few weeks ago to consider whether a state statute authorizing the withdrawal of blood from an unconscious driver suspected of impaired driving provides an exception to the Fourth Amendment warrant requirement. The case, State v. Mitchell, arose in Wisconsin, but the issue may sound familiar to practitioners in North Carolina. Our state supreme court held in *State v. Romano*, 369 N.C. 678 (2017) (discussed here) that the warrantless withdrawal of blood from an unconscious DWI suspect pursuant to state statute when there was no exigency violated the Fourth Amendment. The Supreme Court of Wisconsin reached a different conclusion in *Mitchell*. The case provides the United States Supreme Court with an opportunity to tie up the ends it left loose in *Birchfield v. North Dakota*, ___ U.S. ___, 136 S. Ct. 2160 (2016) by clarifying how implied consent laws authorizing blood draws without a suspect's consent do or do not comport with the Fourth Amendment.

Facts in *Mitchell*. Law enforcement officers began looking for Gerald Mitchell one May afternoon in 2013 after receiving a call that he was driving while impaired. An officer found Mitchell walking near a beach a short time later. Mitchell was "wet, shirtless and covered in sand." *State v. Mitchell*, 914 N.W.2d 151, 154 (Wis. 2018). In addition, his speech was slurred and he "had difficulty maintaining his balance." Id. Mitchell admitted to drinking before he drove. In fact, he said that he parked near the beach because he was "too drunk to drive." *Id.* Mitchell blew into a portable breath test, which registered a .24. The officer arrested Mitchell for impaired driving and began to drive him to the police station. Mitchell's condition worsened during the drive. After it became clear Mitchell would not be able to perform a breath test, the officer decided to take him to a nearby hospital for a blood draw. Mitchell was unconscious by the time they arrived. The officer took Mitchell inside in a wheelchair, read the statutory implied consent rights to an unresponsive Mitchell, and directed hospital personnel to withdraw Mitchell's blood. Mitchell's blood sample was analyzed and showed an alcohol concentration of 0.22.

Procedural history. At Mitchell's trial for driving while impaired, he moved to suppress the results of the blood test, alleging that the warrantless blood draw violated his Fourth Amendment rights. The State argued that Mitchell

consented to the blood draw by driving on Wisconsin roadways, citing provisions of the state's implied consent laws that said as much. The trial court denied the motion to suppress. Mitchell was convicted of impaired driving and appealed. The Wisconsin Supreme Court affirmed Mitchell's conviction by a 5-2 margin, though no single opinion commanded a majority. The justices disagreed about how the principles announced in *Birchfield* applied to blood draws carried out pursuant to implied consent statutes that carried only civil penalties.

What did *Birchfield* say again? In *Birchfield*, the United States Supreme Court considered the constitutionality of implied consent testing schemes that imposed criminal penalties for a suspect's refusal to submit to testing. The Court determined that breath tests were a permissible search incident to arrest. Officers do not need a warrant to carry out such a search and defendants have no right to refuse. Thus, a defendant may be criminally punished for refusing a breath test.

Birchfield determined, however, that blood tests are different. They are far more intrusive than breath tests and thus are ***not*** permissible as searches incident to arrest. As for the statutory schemes that imply a defendant's consent, the court explained that the consequences to which motorists may be deemed to have consented by driving on public roads must be reasonable. And deeming a driver to have consented to a blood test under threat of criminal prosecution is not a reasonable requirement.

Birchfield did not squarely address the issue of whether warrantless blood testing could be justified based on a driver's legally implied consent to testing under a statutory scheme that imposed only civil penalties. On the one hand, it cautioned that nothing it said should be construed to cast doubt on implied consent laws that imposed civil rather than criminal penalties for refusing to be tested. On the other hand, the court's analysis of whether chemical testing is a permissible search incident to arrest and its remand for a determination regarding the voluntariness of one defendant's consent suggest that consent is to be determined based on the totality of all the circumstances rather than by a legal construct that implies a driver's consent to such testing.

Back to *Mitchell*. The three opinions from the Wisconsin Supreme Court in *Mitchell* were founded on the justices' differing interpretations of *Birchfield*.

The three justices who wrote the lead opinion stated that "[b]y driving in Wisconsin, Mitchell consented to have samples of his breath, blood or urine taken by a law enforcement officer who had probable cause to believe he was intoxicated, unless he withdrew that consent." 914 N.W.2d at 162. Mitchell's consent was voluntary, they reasoned, because it was statutorily provided for in a heavily regulated sphere, because Mitchell drove after having consumed enough alcohol to support probable cause to arrest him for impaired driving, and because Mitchell forfeited the opportunity to withdraw his consent by drinking so much alcohol that he lost consciousness.

Two concurring justices rejected the idea that the State could enact a statute legislating a suspect's consent to warrantless testing. These justices nevertheless joined the lead opinion's mandate affirming Mitchell's conviction. They reasoned that the availability of a less-intrusive breath test was central to *Birchfield*'s holding: When the less intrusive test is not available, the calculus about whether a blood test is reasonable changes. The concurring justices thus concluded that a warrantless blood draw may be performed when a person is arrested for impaired driving, is unconscious, and there is a risk of losing evidence due to the body's metabolism of alcohol.

The dissenting justices stated that implied consent was not actual consent and that the lead opinion had attempted to create a statutory per se exception to the Fourth Amendment's warrant requirement. *Birchfield*'s holding that a blood test could not be administered as a search incident to arrest was inconsistent, said the dissenters, with the lead opinion's view that implied consent statutes could permit blood tests as a search incident to the arrest of an unconscious person for impaired driving.

Impact in NC. As I previously mentioned, the North Carolina Supreme Court determined in *State v. Romano*, 369 N.C. 678 (2017), that the warrantless withdrawal of blood from an unconscious impaired driving suspect violated the Fourth

Amendment, notwithstanding G.S. 20-16.2(b), which authorizes a law enforcement officer who has reasonable grounds to believe that an unconscious person has committed an implied-consent offense to direct the taking of a blood sample from the person. Because the circumstances in *Mitchell* are on all fours with those in *Romano*, the United States Supreme Court's decision in *Mitchell* likely will either affirm *Romano*'s reasoning or invite reconsideration of its holding and the law enforcement practices it affected.

Stay tuned to this channel for further updates.

Supreme Court Criminal Review

Shea Denning, School of Government
April 1, 2019

Opinions

Search and Seizure

Carpenter v. United States, 585 U.S. ___, 138 S. Ct. 2206 (2018)

Holding: *A person has a legitimate expectation of privacy in the record of his or her physical movements as captured through cell-site location information. To obtain historical cell-site location information from a wireless carrier, the government generally must obtain a warrant supported by probable cause.*

Facts. Carpenter was charged federally for his role in a string of robberies of Radio Shack and T-Mobile stores in Michigan and Ohio. The government obtained two orders under the Stored Communications Act based on a showing of less than probable cause directing the wireless carriers for Carpenter's mobile phone to disclose cell-site location information for his phone for 152 days and 7 days, respectively. The wireless carriers produced records spanning 127 days and 2 days. The government used these records at trial to show that Carpenter was "'right where the . . . robbery was at the exact time of the robbery.'" 138 S. Ct. at 2213. Carpenter was convicted and sentenced to more than 100 years in prison.

Procedural history. Carpenter moved before trial to suppress the cell-site data provided by the phone companies, arguing that the government's obtaining of the records violated the Fourth Amendment because they were obtained without a warrant supported by probable cause. The district court denied the motion and the Court of Appeals for the Sixth Circuit affirmed, holding that the records were not entitled to Fourth Amendment protection as they were third party business records containing information that the defendant had voluntarily shared with his wireless carrier. The United States Supreme Court reversed, determining that the government's acquisition of the cell-site records was a search within the meaning of the Fourth Amendment.

Analysis. The Court explained that requests for cell-site records lie at the intersection of a person's expectation of privacy in his or her physical location and movements and the third party doctrine, which holds that there is no legitimate expectation of privacy in information a person voluntarily shares with a third party.

With respect Fourth Amendment protections against too permeating a police surveillance, *Carpenter* cited the Court's holding in *United States v. Jones*, 565 U.S. 400 (2012), that the attachment of a GPS device to a person's vehicle and the subsequent use of that device to track the vehicle's movements was a search within the meaning of the Fourth Amendment. While *Jones* was based on the government's physical trespass of the vehicle, *Carpenter* noted that five justices agreed that related privacy concerns would be raised by long-term GPS monitoring even absent the trespass.

As for the third-party doctrine, the Court declined to extend its reach to cell-site records, which because they provide an all-encompassing record of the cell phone holder's whereabouts are a "qualitatively different category of . . . records" than those previously ruled covered by the doctrine. 138 S. Ct. at

2216-17. The Court noted that when the government tracks the location of a cell phone it achieves "near perfect surveillance, as if it had attached an ankle monitor to the phone's user." *Id.* at 2218. And, the Court said that because wireless companies retained the records for years, the government can travel back in time to retrace a person's whereabouts. "Only the few without cell phones could escape this tireless and absolute surveillance." *Id.*

Thus, the government's acquisition of these records is a Fourth Amendment search that, absent exigent circumstances, requires a warrant supported by probable cause.

Limiting language. The Court said its decision was "narrow" and that it was not expressing a view on matters such as real-time CSLI or tower dumps. *Id.* at 2220. It also said it was not disturbing the application of the third party doctrine to "conventional surveillance techniques and tools, such as security cameras." *Id.*

Excessive Fines

Timbs v. Indiana, 586 U.S. ___, 139 S. Ct. 682 (2019).

Holding: *The Excessive Fines Clause of the Eighth Amendment is incorporated by the Due Process Clause of the Fourteenth Amendment and thus applies to state impositions.*

Facts. Tyson Timbs pled guilty in Indiana state court to dealing in a controlled substance and conspiracy to commit theft. He was sentenced to one year of home detention and five years of probation and was ordered to pay fees and costs of $1,203. The State brought a civil suit for forfeiture of Timbs' Land Rover SUV, which he had purchased for about $42,000, using money he received from an insurance policy when his father died. Even though it determined that Timbs had used the vehicle to transport heroin, the trial court denied the requested forfeiture on the basis that it would be grossly disproportionate to the gravity of Timbs' offense. The Illinois Supreme Court reversed, holding that the Excessive Fines Clause constrained only federal actions. The United States Supreme Court reversed.

Analysis. A Bill of Rights protection is incorporated if it is fundamental to the nation's scheme of ordered liberty or deeply rooted in American history and tradition. The Excessive Fines Clause of the Eighth Amendment is both. The protection provided by the clause can be traced to the Magna Carta which required that economic sanctions be proportional to the wrong and not be so large as to deprive an offender of his livelihood. In 1787, the constitutions of eight states forbade excessive fines. By 1868, when the Fourteenth Amendment was ratified, the constitutions of 35 of the 37 states prohibited excessive fines. Acknowledgement of the right remains widespread. All fifty states have a constitutional provision prohibiting excessive fines directly or requiring proportionality. Thus, protection against excessive fines has been a constant shield throughout Anglo-American history.

That protection is necessary because excessive fines undermine liberty. Following the Civil War, Southern states enacted Black Codes that imposed draconian fines for violating broad proscriptions on vagrancy and other offenses. When newly freed slaves were unable to pay imposed fines, States often demanded involuntary labor instead.

Exorbitant tolls undermine other constitutional liberties. Excessive fines can be used to retaliate against or chill the speech of political enemies. Even absent a political motive, fines may be used in a measure that is out of accord with the penal goals of retribution and deterrence because fines are a source of revenue while other forms of punishment costs the State money.

The historical and logical case for concluding that the Fourteenth Amendment incorporates the Excessive Fines Claus is, the court stated, overwhelming.

The court rejected Indiana's argument that the Clause does not apply to its use of civil in rem forfeitures, citing its holding in *Austin v. United States*, 509 U.S. 602 (1993), that civil in rem forfeitures fall within the Clause's protection when they are at least partially punitive.

Ineffective Assistance of Counsel

Garza v. Idaho, 586 U.S. ___, 139 S. Ct. 738 (2019)

Holding: *The Supreme Court held in Roe v. Flores-Ortega, 528 U.S. 470 (2000), that when an attorney's deficient performance costs a defendant an appeal that the defendant would have otherwise pursued, prejudice to the defendant should be presumed "with no further showing from the defendant of the merits of his underlying claims." Id. at 484. The Court in Garza determined that this presumptive prejudice rule applies even when a defendant pleads guilty and signs an appeal waiver.*

Facts. Gilberto Garza , Jr. signed plea agreements in 2015, and each waived his right to appeal. The trial court accepted the plea agreement and sentenced Garza accordingly. After sentencing, Garza told his attorney on multiple occasions that he wanted to appeal. Garza's trial counsel did not, however, file a notice of appeal. Instead, counsel told Garza that the appeal was problematic because of the waiver. The time for appealing expired.

Four months after sentencing, Garza sought relief in Idaho state court, alleging that his trial counsel rendered ineffective assistance by failing to file notices of appeal. The Idaho trial court denied relief, and the Idaho Supreme Court affirmed. The state supreme court ruled that Garza, given the appeal waivers, needed to show both deficient performance and resulting prejudice and concluded that he could not. The United States Supreme Court reversed.

Analysis. The Sixth Amendment guarantees criminal defendants the right to counsel, which includes the right to the effective assistance of counsel. Under *Strickland v. Washington*, 466 U.S. 668 (1984), a defendant who claims ineffective assistance of counsel must prove (1) that counsel's representation fell below an objective standard of reasonableness, and (2) that the deficiency was prejudicial to the defense. In certain Sixth Amendment contexts, however, prejudice is presumed. Deficient performance that deprives a defendant of an appeal he otherwise would have taken is one of those circumstances.

Because no appeal waiver is absolute, a defendant who has signed an appeal waiver does not by directing counsel to file a notice of appeal, necessarily undertake a quixotic or frivolous quest." 139 S.Ct. at 745. In addition, filing a notice of appeal is a ministerial task that does not impose a great burden on trial counsel and is within the defendant's prerogative.

Garza's attorney rendered deficient performance by not filing the notice of appeal in light of Garza's clear requests. As for the prejudice prong of the *Strickland* test, *Flores-Ortega* established that to succeed in an ineffective-assistance claim in this context, the defendant must simply show that his counsel's constitutionally deficient performance deprived him of an appeal that he otherwise would have taken. Courts are to presume prejudice with no further showing from the defendant regarding the merits of his underlying claims.

Because there was no dispute here that Garza wished to appeal, the Court determined that direct application of *Flores-Ortega*'s language resolved the case. *Flores-Ortega* also involved a lawyer who forfeited an appellate proceeding by failing to file a notice of appeal. Given that prejudice is presumed when a defendant is denied counsel at a critical stage, *Flores-Ortega* explained that it makes even greater sense to presume prejudice when counsel's deficiency forfeits an appellate proceeding altogether.

The *Garza* Court concluded that this rationale applied just as well to its facts for two reasons. First, Garza retained a right to appeal at least some issues despite the waivers he signed. The Court said it had made clear that when deficient counsel causes the loss of an entire proceeding, it will not bend the presumption-of-prejudice rule based simply on a particular defendant's poor prospects for success.

Second, the defendant in *Flores-Ortega* did not sign an appeal waiver but did plead guilty, thereby reducing the scope of potentially appealable issues. Thus, the Garza Court reasoned, *Flores-Ortega* presented at most a difference of degree, not kind, and prescribed a presumption of prejudice regardless of how many appellate claims were foreclosed.

Death Penalty

Madison v. Alabama, 586 U.S. ___, 139 S. Ct. 718 (2019)

Holding: *The Eighth Amendment does not forbid executing a prisoner who shows that a mental disorder has left him without any memory of committing his crimes. A person lacking such a memory may still be able to understand the reasons for his sentence. The Eighth Amendment applies similarly to a prisoner suffering from dementia as one experiencing psychotic delusions because either condition may or may not impede the requisite comprehension of the punishment.*

Facts. Vernon Madison was sentenced to death for murdering a police officer in 1985.

Madison's mental condition sharply deteriorated while he was on death row. He suffered major strokes in 2015 and 2016 and has been diagnosed with vascular dementia, which has resulted in cognitive impairment and memory loss. Madison claims that he can no longer recollect committing the crime for which he has been sentenced to die.

Procedural history. After his 2016 stroke, Madison petitioned the trial court for a stay of execution on the basis that he no longer understood the status of his case or the nature of his conviction and sentence. Madison said that he could not independently recall the facts of the offense for which he had been convicted. Alabama countered that Madison understood why he was to be executed even if he had no memory of committing the crime. The State further argued that Madison could not qualify as

incompetent because he did not suffer from psychosis or delusions. Madison and the State cited expert reports from psychologists that supported their positions.

The trial court found Madison competent to be executed. Madison had failed to show, the court reasoned, that he did not rationally understand the punishment he was about to suffer and why he was about to suffer it. The court further determined that the evidence failed to show that Madison was delusional.

Madison then unsuccessfully sought habeas relief in federal court. When Alabama set an execution date in 2018, Madison returned to state court to argue again that his mental condition precluded the State from going forward. In his petition, Madison reiterated the facts and arguments he had previously presented. But Madison also claimed that since that court's earlier decision (1) he had suffered further cognitive decline and (2) a state board had suspended the license of the psychologist upon whose report the State had relied, thus discrediting his prior testimony. Alabama again argued that Madison could be executed, stating that he was not delusional or psychotic and asserting that neither memory impairment nor dementia rendered him incompetent to be executed. The state court again found Madison competent. The Supreme Court issued a stay and granted Madison's petition for certiorari review.

Analysis. The Supreme Court held in *Ford v. Wainwright*, 477 U.S. 399 (1986), that the Eighth Amendment's ban on cruel and unusual punishments precludes executing a prisoner who has "lost his sanity" after sentencing. *Id.* at 406. The Court in *Panetti* v. *Quarterman*, 551 U.S. 930 (2007) clarified that the critical question for determining whether a prisoner is competent to be executed is whether the "prisoner's mental state is so distorted by a mental illness" that he lacks a "rational understanding" of "the State's rationale for [his] execution." *Id.* at 958–959.

Memory Loss. *Panetti* does not, the Court reasoned, prohibit executing Madison merely because he cannot remember committing his crime. *Panetti* is concerned with whether a person understands why the State seeks capital punishment for a crime, not the person's memory of the crime itself. *Panetti* reasoned that execution has no retributive value when a prisoner cannot appreciate the meaning of a community's judgment. But a person who can no longer remember a crime may still be able to "recognize the retributive message society intends to convey with a death sentence." 139 S. Ct. at 727.

It also "'offends humanity to execute a person so wracked by mental illness that he cannot comprehend the 'meaning and purpose of the punishment.'" *Id.* Yet the offense to morality is less when the person's mental disorder causes "nothing more than episodic memory loss." *Id.* Moral values, the court explained, do not exempt the simply forgetful from punishment, whatever the neurological reason for their lack of recall.

Nevertheless, memory loss still may factor into the rational understanding analysis. It may combine with other mental deficiencies to deprive a person of the capacity to comprehend why the State is exacting death as punishment. When that occurs, the *Panetti* standard prohibits execution.

Type of mental disorder. Because the competency standard set out in *Panetti* focuses on whether a mental disorder has deprived the prisoner of the ability to rationally understand why the State is seeking execution, the court reasoned that no particular form of mental illness is required. Dementia, like a delusional disorder, can cause deterioration and cognitive decline that prevents a person from rationally understanding his or her punishment.

Remand. The Court remanded the case to state court for consideration of whether Madison can reach a rational understanding of why the State wants to execute him.

Moore v. Texas, 586 U.S. ___, 139 S. Ct. 666 (2019) (per curiam)

Holding: *The petitioner, Bobby James Moore, has shown he is a person with intellectual disability and thus is ineligible for the death penalty.*

Facts. This was the second time Moore's case was considered by the Supreme Court. On the first occasion, the Supreme Court vacated the decision of the Texas Court of Criminal Appeals and remanded the case, identifying several errors in the appeals court's analysis of whether the petitioner was intellectually disabled. *Moore v. Texas*, 581 U.S. ___, 137 S. Ct. 1039 (2017) (*Moore I*). The appeals court reconsidered the matter but reached the same conclusion. The Supreme Court again granted review and reversed.

Analysis. The Texas Court of Criminal Appeals' reconsideration of the case following *Moore I* repeated the analysis that the Supreme Court previously found wanting. It again relied less on the adaptive deficits the trial court identified than upon Moore's apparent adaptive strengths and failed to discuss evidence relied upon by the trial court. It also relied heavily upon Moore's adaptive improvements notwithstanding the Supreme Court's caution in *Moore I* against relying on prison-based development. The appeals court's findings ignored *Moore I*'s recognition that a personality disorder or mental health issue is not evidence that a person does not also have an intellectual disability. And finally, though the appellate court said it was not relying on impermissible "*Briseno* evidentiary factors," it appeared to have used those factors in reaching its conclusion. 139 S. Ct. at 671.

Bucklew v. Precythe, 587 U.S. ___, ___ S.Ct. ___ (2019)

Holding: *To prevail on a method of execution claim alleging the infliction of unconstitutionally cruel pain, the petitioner must identify an alternative that is feasible, readily implemented, and in fact significantly reduces a substantial risk of severe pain. This rule governs as applied as well as facial constitutional challenges.*

Facts. Russell Bucklew was convicted of murder and sentenced to death. He sought a stay of execution challenging the State of Missouri's lethal injection protocol as unconstitutional as applied to him. Bucklew alleged that the protocol would cause him severe pain because he suffers from a disease called cavernous hemangioma, which causes vascular tumors to grow in his head, neck and throat. Bucklew said that this condition could prevent the pentobarbital the State used in lethal injections from circulating properly in his body; that the use of a chemical dye to flush the intravenous line could cause his blood pressure to spike and his tumors to rupture; and that pentobarbital could interact adversely with his other medications. The district court rejected Bucklew's claim and Court of Appeals for the Eighth Circuit affirmed. The day Bucklew was scheduled to be executed, the Supreme Court granted a stay and agreed to hear his case.

Analysis. The Court first considered whether the requirement that a prisoner challenging a method of execution under the Eighth Amendment identify an alternative that is feasible, readily implemented and in fact significantly reduces a substantial risk of severe pain governs *as applied* as well as *facial* constitutional challenges. To answer this question, the Court examined the original and historical

understanding of the Eighth Amendment as well as precedent imposing this standard for facial constitutional challenges.

The Court explained that the Constitution allows capital punishment, which was standard punishment for serious crimes at the time of the nation's founding. Rather than forbidding capital punishment, the Eighth Amendment speaks to how States may carry out that punishment, prohibiting methods that are cruel, meaning that they intensify the sentence of death by adding of terror, pain, or disgrace, and are unusual, meaning that the methods have fallen out of use. The Eighth Amendment was understood at the time of its adoption to permit hangings, which, though more humane than some Old World punishments, did not guarantee a quick and painless death. Hanging presumably was not questioned because, in contrast with punishments like burning or disemboweling, it was not intended to be painful. Thus, the Court reasoned, the Eighth Amendment does not guarantee a painless death.

The Chief Justice's opinion in *Baze v. Rees*, 553 U.S. 35 (2008), which the Court held to be controlling in *Glossip v. Gross*, 576 U.S. ___ (2015), requires a prisoner challenging a method of execution as cruel and unusual to show a feasible and readily implemented alternative that would significantly reduce a substantial risk of severe pain and that the State has refused to adopt without a legitimated penological reason. Bucklew's argument that he should not have to prove an alternative method in his as applied challenge was, the Court held, foreclosed by precedent and was inconsistent with the original and historical understanding of the Eighth Amendment on which that precedent is based. Determining whether a punishment superadds pain well beyond that needed to carry out a sentence of death requires a comparison to available alternatives, and not, the Court stated, an abstract exercise in categorical classification.

Next the court turned to whether Bucklew had identified a viable alternative method. Bucklew proposed execution by nitrogen hypoxia, but did not present evidence on how the gas should be administered or the protocols for an execution by this method. And the State showed a legitimate reason for declining to switch to this method: no execution has ever been carried out in the United States using nitrogen gas. In addition, Bucklew failed to present any evidence demonstrating that adoption of this method would significantly reduce a substantial risk of severe pain.

Pending Cases

Mitchell v. Wisconsin, NO. 18-6210

QUESTION PRESENTED: In both *Missouri v. McNeely* and *Birchfield v. North Dakota*, this Court referred approvingly to "implied-consent laws that impose civil penalties and evidentiary consequences on motorists who refuse to comply" with tests for alcohol or drugs when they have been arrested on suspicion of driving while intoxicated. 569 U.S. at 141, 161 (2013); 136 S. Ct. 2160, 2185 (2016). But a majority of states, including Wisconsin, have implied-consent laws that do something else entirely: they authorize blood draws without a warrant, without exigency, and without the assent of the motorist, under a variety of circumstances-most commonly when the motorist is unconscious. State appellate courts have sharply divided on whether such laws comport with the Fourth Amendment.

The question presented is: Whether a statute authorizing a blood draw from an unconscious motorist provides an exception to the Fourth Amendment warrant requirement.

Gamble v. United States, No. 17-646

QUESTION PRESENTED*:* Whether the Court should overrule the "separate sovereigns" exception to the double jeopardy clause.