No. COA21-297 THREE-B DISTRICT

NORTH CAROLINA COURT OF APPEALS

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STATE OF NORTH CAROLINA )

 )

v. ) From Carteret County

 )

JAMES MATTHEW KITCHEN )

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**DEFENDANT-APPELLANT’S BRIEF**

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**INDEX**

[TABLE OF CASES AND AUTHORITIES ii](#_Toc81314862)

[ISSUE PRESENTED 1](#_Toc81314863)

[STATEMENT OF THE CASE 2](#_Toc81314864)

[STATEMENT OF THE GROUNDS FOR APPELLATE REVIEW 2](#_Toc81314865)

[STATEMENT OF THE FACTS 2](#_Toc81314866)

[ARGUMENT 4](#_Toc81314867)

[I. THE TRIAL COURT ERRED BY DENYING MR. KITCHEN’S MOTION TO SUPPRESS THE RECORDS OF THE MEDICAL TREATMENT FORCED UPON HIM. 4](#_Toc81314868)

[CONCLUSION 16](#_Toc81314876)

[CERTIFICATE OF COMPLIANCE WITH RULE 28(J)(2) 17](#_Toc81314877)

[CERTIFICATE OF SERVICE 18](#_Toc81314878)

# TABLE OF CASES AND AUTHORITIES

Cases

*Birchfield v. North Dakota*,
136 S. Ct. 2160 (2016) 11

*Carpenter v. United States*,
138 S. Ct. 2206 (2018) 6, 8

*Doe v. Broderick*,
225 F.3d 440 (4th Cir. 2000) 4, 9

*Ferguson v. City of Charleston*,
532 U.S. 67 (2001) 4, 7

*In Re Superior Court Order*,
315 N.C. 378, 338 S.E.2d 307 (1986) 12

*Missouri v. McNeely*,
569 U.S. 141 (2013) 10

*Riley v. California*,
573 U.S. 373 (2014) 8, 9

*Smith v. Maryland*,
442 U.S. 735 (1979) 6, 10

*State v. Arrington*,
311 N.C. 633, 319 S.E.2d 254, (1984) 14

*State v. Carter*,
322 N.C. 709, 370 S.E.2d 553 (1988) 12, 13

*State v. Elder*,
232 N.C. App. 80, 753 S.E.2d 504 (2014) 13

*State v. Elder*,
368 N.C. 70, 773 S.E.2d 51 (2015) 14

*State v. Grooms*,
353 N.C. 50, 540 S.E.2d 713 (2000) 5

*State v. Hughes,*353 N.C. 200, 539 S.E.2d 625 (2000) 5

*State v. Jackson*,
348 N.C. 644, 503 S.E.2d 101 (1998) 14

*State v. Parson,*250 N.C. App. 142, 791 S.E.2d 528 (2016) 13

*State v. Perry*,
243 N.C. App. 156, 776 S.E.2d 528 (2015) 13

*State v. Romano*,
369 N.C. 678, 800 S.E.2d 644 (2017) 10, 11, 14

*State v. Williams*,
362 N.C. 628, 669 S.E.2d 290 (2008) 5

*United States v. Miller*,
 425 U.S. 435 (1976) 5

Statutes

N.C.G.S. § 7A-27 2

N.C.G.S. § 8-53 3, 4, 11, 12

N.C.G.S. § 15A-244 12

N.C.G.S. § 15A-974 12

N.C.G.S. § 15A-1443 15

N.C.G.S. § 15A-1444 2

N.C.G.S. § 20-16.2 10

Other Authorities

S.L. 2011-6 (H.B. 3) 13

Standards for Privacy of Individually Identifiable Health Information, 65 Fed. Reg. 82,462 (Dec. 28, 2000) 7

Rules

N.C. R. App. P. 10 5

Constitutional Provisions

N.C. Const. art. I, § 20 4, 5, 12, 14

U.S. Const. amend. IV. 4, 5, 12, 14

U.S. Const. amend. XIV. 4

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**DEFENDANT-APPELLANT’S BRIEF**

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# ISSUE PRESENTED

1. Whether the trial court erred by denying Mr. Kitchen’s motion to suppress the medical records of his involuntary commitment obtained without a search warrant?

# STATEMENT OF THE CASE

This case was tried at the 9 November 2020 session of Carteret County Superior Court, before the Honorable Joshua Willey, Jr., on indictments alleging habitual driving while impaired and habitual felon. (R pp 2-8, T p 1). On 12 November 2020, the jury convicted Mr. Kitchen of habitual driving while impaired and he pleaded guilty to having attained the status of habitual felon. (R pp 89-93). The trial court imposed a term of 144 to 185 months imprisonment. (R pp 98-99). From judgment entered, Mr. Kitchen gave oral notice of appeal in open court and filed written notice of appeal. (R pp 100-02).

# STATEMENT OF THE GROUNDS FOR APPELLATE REVIEW

Appeal from final judgment of Carteret County Superior Court. N.C.G.S. § 7A-27(b) and N.C.G.S. § 15A-1444(a). Out of an abundance of caution, should this Court find the oral and written notices of appeal were deficient, undersigned counsel has also filed a petition for a writ of certiorari contemporaneous with this brief.

# STATEMENT OF THE FACTS

On 1 May 2017, Mr. Kitchen was arrested on suspicion of driving while impaired. (T p 245). Throughout the entire encounter with officers, Mr. Kitchen acted erratically. (T pp 246, 254-55, 265, 266). When Mr. Kitchen was brought to the jail, in handcuffs and under arrest, the jail insisted he be taken to the hospital and evaluated prior to being processed, due to his erratic behavior. (T p 264). Still in handcuffs and still under arrest, police took him to the hospital. (T p 266). The hospital “had [to give] him some medicine to calm him down.” (T p 267). Mr. Kitchen was involuntarily committed after a magistrate found there was evidence to support Mr. Kitchen being mentally ill and dangerous to himself or others. (St. Ex. 11A). Mr. Kitchen did not sign any of the paperwork authorizing his treatment. (St. Ex. 11A). Mr. Kitchen was restrained while at the hospital under the control of officers. (St. Ex. 11A).

On 19 June 2020 and 22 June 2020, the State filed motions under N.C.G.S. § 8-53 for Mr. Kitchen’s medical records for the purpose of obtaining the test results showing his alcohol level. (R pp 12-17).

The 60-plus pages of medical records from Mr. Kitchen’s involuntary commitment—detailing psychological assessments, past diagnoses, and details about every part of Mr. Kitchen’s physical and mental state—were ordered released to the State based on their motion and a finding the records were “necessary to the administration of justice.” (R pp 12-18).

Mr. Kitchen filed a motion to suppress the medical records based on 1) the failure of the State to submit an affidavit to provide the evidentiary support for the motion for the records, and 2) that obtaining the records required probable cause under both the United States Constitution and the North Carolina Constitution. (R pp 26-29).

The trial court denied the defendant’s motion to suppress. (T p 35). The medical records were admitted and noted an alcohol level of 151 mg/dL. Expert Paul Glover testified this amount is properly converted to .12 grams per 100 mL of whole blood. (T p 386; St. Ex. 12). The medical records further noted that Mr. Kitchen was “positive” for marijuana and that he admitted to drinking. (St. Ex. 11A).

# ARGUMENT

## THE TRIAL COURT ERRED BY DENYING MR. KITCHEN’S MOTION TO SUPPRESS THE RECORDS OF THE MEDICAL TREATMENT FORCED UPON HIM.

The United States Supreme Court has recognized there is a reasonable expectation of privacy in medical records, as has the Fourth Circuit.
*Ferguson v. City of Charleston*, 532 U.S. 67 (2001);
*Doe v. Broderick*, 225 F.3d 440, 451 (4th Cir. 2000). Mr. Kitchen’s medical records were obtained by the State through the use of a motion and order under N.C.G.S. § 8-53, which requires only a finding that the records are “necessary in the proper administration of justice.” This was despite his privacy interests in the records and the specific facts that the records were only created as a direct result of the police forcibly taking Mr. Kitchen to the hospital, and then a magistrate determining he should be involuntarily committed. These actions violated Mr. Kitchen’s rights under the Fourth Amendment to the United States Constitution, made applicable to the States through the Fourteenth Amendment, and Article I, Section 20 of the North Carolina Constitution.

### Standard of Review and Preservation

A trial court's conclusions of law in ruling on a motion to suppress evidence are reviewable *de novo*. *See State v. Hughes,* 353 N.C. 200, 208, 539 S.E.2d 625, 631 (2000)."Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment" for that of the trial court. *State v. Williams*, 362 N.C. 628, 632-33, 669 S.E.2d 290, 294 (2008)
.

Mr. Kitchen filed a pretrial motion to suppress and objected to the evidence being admitted during the trial. (R pp 26-36, T pp 22-35, 373). Therefore, the issue is preserved. N.C. R. App. P. 10(a)(1), *State v. Grooms*, 353 N.C. 50, 65, 540 S.E.2d 713, 723 (2000)
.

### Allowing the State to Obtain Private Medical Records Without a Warrant Violates the Fourth Amendment and Article 1, Section 20 of the North Carolina Constitution.

The Fourth Amendment guarantees “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.” U.S. Const. amend. IV. Similarly, Article I, Section 20 of the North Carolina Constitution prohibits searches “without evidence.” Generally, the Fourth Amendment is not implicated when “the issuance of a subpoena to a third party” is used, “even if a criminal prosecution is contemplated at the time of the subpoena is issued.” *United States v. Miller*, 425 U.S. 435, 444 (1976)
 (emphasis added). This is commonly referred to as the third party doctrine. In most circumstances, “a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties.” *Smith v. Maryland*, 442 U.S. 735, 743–44 (1979)
.

However, “[w]hen an individual ‘seeks to preserve something as private,’ and his expectation of privacy is ‘one that society is prepared to recognize as reasonable,’ we have held that official intrusion into that private sphere generally qualifies as a search and requires a warrant supported by probable cause.” *Carpenter v. United States*, 138 S. Ct. 2206, 2213 (2018)
 (quoting *Smith,* 442 U.S. at 740). In *Carpenter,* the Supreme Court of the United States recently held that the third party doctrine does not apply “where the suspect has a legitimate privacy interest in records held by a third party.” 138 S. Ct. at 2222. The *Carpenter* Court found that “the unique nature of cell phone location information” ultimately “provides an intimate window into a person’s life.” *Id.* at 2220, 2217. The Court held that the historical cell site location information in cell phone records was subject to Fourth Amendment protections. *Id.* at 2223. The Court differentiated this type of data from other types of data held by third parties using some specific factors. *Id*. at 2217–20, 2223. Those factors clearly apply to medical records as well.

1. **Medical Records Are of a “Deeply Revealing Nature.”**

Well before *Carpenter*, the United States Supreme Court asserted there was a “reasonable expectation of privacy enjoyed by the typical patient undergoing diagnostic tests in a hospital”–“that the results of those tests will not be shared with nonmedical personnel without her consent.” *Ferguson,* 532 U.S. at 78.

It is well accepted that the information in medical records is sensitive and protected. Since the late 1990s, there have been federal standards regarding privacy in medical records under the Health Insurance Portability and Accountability Act (HIPAA). “The provision of high-quality health care requires the exchange of personal, often-sensitive information between an individual and a skilled practitioner. Vital to that interaction is the patient’s ability to trust that the information shared will be protected and kept confidential.” Standards for Privacy of Individually Identifiable Health Information, 65 Fed. Reg. 82,462, 82,463 (Dec. 28, 2000). The Department of Health and Human Services specifically referenced the Fourth Amendment when discussing purpose of the HIPAA Privacy Rule, explaining

the Fourth Amendment suggests enduring values in American law that relate to privacy. The need for security of ‘‘persons’’ is consistent with obtaining patient consent before performing invasive medical procedures. The need for security in ‘‘papers and effects’’ underscores the importance of protecting information about the person, contained in sources such as personal diaries, medical records, or elsewhere.

*Id.* at 82,464.

 Just as the *Carpenter* Court was concerned about the ability of cell phones to track “nearly exactly the movements of his owner” and the invasiveness of this information, medical records contain information even more deeply private and revealing. 138 S. Ct. at 2218.

1. **Medical Records are Extensive in Their “Depth, Breadth, and Comprehensive Reach,” and Their Collection “Inescapable and Automatic.”**

In the information era, the United States Supreme Court has recognized the need to update and extend its Fourth Amendment jurisprudence given the advancements and pervasive use of technology, the vast amount of sensitive data contained therein, and the reasonable expectation of privacy in the modern world. *See, e.g.,*
*Riley v. California*, 573 U.S. 373 (2014) (extending the warrant requirement to searches of cell phones) and *Carpenter,* 138 S. Ct. 2206 (requiring search warrants for obtaining cell-site location information). If cell phone content and cell-site location information is deemed sufficiently sensitive to be subject to the protections of the Fourth Amendment, then surely the intimate information contained in medical records is as well. Indeed, the United States Supreme Court affirmed that was the case before the ubiquity of cell phones and cell-site location information in *Ferguson*, 532 U.S. 67.

As asserted above, the Supreme Court has established that medical patients enjoy a reasonable expectation of privacy such that their medical information “will not be shared with nonmedical personnel” absent their consent. *Ferguson*, 532 U.S. at 78. The Fourth Circuit Court of Appeals, recognizing that medical records contain “intimate and private details that people do not wish to have disclose [and] expect to remain private,” has likewise held that individuals have a reasonable expectation of privacy in their medical records and files that is protected by the Fourth Amendment. *Doe v. Broderick*, 225 F.3d 440, 451 (4th Cir. 2000).

Medical care, like the use of a cell phone, is “such a pervasive and insistent part of daily life,” one cannot simply avoid it. *Riley,* 573 U.S. at 385 (2014). And once one accesses medical treatment, even for the most minor of afflictions, a vat of records will be generated.

In this case, the records of the short hospital stay of Mr. Kitchen span over 60 pages. (St. Ex. 11A). They include a psychological assessment, test results, commitment paperwork, information about Mr. Kitchen’s past diagnosis of being “bipolar,” ECG printouts, medications administered, and even what type of diet he was given while there. (St. Ex. 11A). No aspect of his physical or mental condition considered over the course of his stay is excluded from the records.

Just like cell site location information, medical records’ “depth, breadth, and comprehensive reach, and the inescapable and automatic nature of its collection” place them in a different category from most records held by third parties. *Carpenter,* 138 S. Ct. at 2223.

### Allowing the State to Obtain Medical Records Without a Warrant that Exist Only Due to Forceable Medical Treatment Violates the Fourth Amendment.

The third party doctrine, which would have to apply for the State to be exempted from needing a warrant for the medical records, requires that the reduction in privacy results when the person “*voluntarily* turns [information] over to third parties.” *Smith*, 442 U.S. at 743–44 (emphasis added).

In this case, nothing was provided to the third party voluntarily. Mr. Kitchen was arrested, taken in handcuffs to the hospital, where he did not sign a consent form and was treated pursuant to an *involuntary* commitment order. The reasoning and holdings of *Ferguson* and *Roe* logically extend to this case: sensitive medical information and files obtained through non-consensual means and turned over to law enforcement without a warrant violates the letter and spirit of the Fourth Amendment.

### Allowing the State to Obtain Medical Records Without a Warrant Provides a Work Around to *Missouri v. McNeely*, 569 U.S. 141 (2013) and *State v. Romano*, 369 N.C. 678, 800 S.E.2d 644 (2017).

In *McNeely,* the Supreme Court of the United States held that the dissipating nature of alcohol in the blood stream does not create a *per se* exigency exception to the warrant requirement. 569 U.S. 141. In *State v. Romano,* our Supreme Court applied *McNeely* to N.C.G.S. § 20-16.2(b), which statutorily authorizes law enforcement to obtain a blood draw from an unconscious person if there is reasonable suspicion to believe the person has committed an implied-consent offense. 369 N.C. at 682, 800 S.E.2d at 647. The *Romano* Court found this was a “per se categorical exception to the warrant requirement” and therefore, unconstitutional. 369 N.C. at 691, 800 S.E.2d at 652. Ultimately, the *Romano* Court held that “blood draws may only be performed after either obtaining a warrant, obtaining valid consent from the defendant, or under exigent circumstances with probable cause.” 369 N.C. at 692, 800 S.E.2d at 653.

The Supreme Court of the United States has recognized that a blood draw implicates privacy concerns, as blood draws are intrusive and provide data beyond just alcohol content. *Birchfield v. North Dakota*, 136 S. Ct. 2160, 2178 (2016)
. If officers are aware they can get not just an alcohol level, but also other medical information, testing information, admissions of a defendant, and other information that may be inculpatory from hospital records on the minimal standards and efforts required by N.C.G.S. § 8-53, what do these cases actually protect? By using hospital treatment, in this case forceable hospital treatment, the State can collect far more information and data than a search warrant for blood would ever give them, on a lower standard. Law enforcement could just start taking people to the hospital, committing them when necessary, and later filing these motions for the medical records.

In order to safeguard the privacy interests these cases seek to protect, the State should not be permitted to utilize N.C.G.S. § 8-53 to obtain medical records for prosecutorial purposes absent a warrant.

### The Order in This Case Was Not a Search Warrant

The State could have sought a search warrant for Mr. Kitchen’s medical records. Instead, the district attorney sought an order under N.C.G.S. § 8-53 for “records . . . . related to treatment on May1, 2017 through May 2, 2017.” (R p 18). This is not a search warrant. An application for a search warrant must be made “upon oath or affirmation.” N.C.G.S. § 15A-244; N.C. Const. art. I, § 20; U.S. Const. amend IV. Neither the motion nor the order disclosed any sworn facts upon which the judge could exercise the independent judicial function required by law. The motion did not include an affidavit, was not sworn, and there is no evidence that anyone appeared under oath before the judge as required by *In Re Superior Court Order*, 315 N.C. 378, 338 S.E.2d 307 (1986)
. The motion refers to information coming from “officers” without ever naming them. (R pp 15-16).

### The “Good Faith” Exception Does Not Apply

“The preservation of the right to be protected from unreasonable search and seizure guaranteed by our state constitution demands that the courts of this state not condone violations thereof by admitting the fruits of illegal searches into evidence.” *State v. Carter*, 322 N.C. 709, 719, 370 S.E.2d 553, 559 (1988)
. Since our Supreme Court found the federal good faith exception does not apply in North Carolina, there was an amendment to N.C.G.S. § 15A-974, adding “[e]vidence shall not be suppressed under this subdivision if the person committing the violation of the provision or provisions under this Chapter acted under the objectively reasonable, good faith belief that the actions were lawful.” The legislature appeared to recognize this amendment was in conflict with the constitutional holding of *Carter,* and thus expressly “request[ed] that the North Carolina Supreme Court reconsider, and overrule, its holding in *Carter* that the good faith exception to the exclusionary rule which exists under federal law does not apply under North Carolina State law.” S.L. 2011-6 (H.B. 3).

Since that time, the majority opinions of published cases have distinguished between violations of state and federal constitutional claims. *See, e.g., State v. Parson,* 250 N.C. App. 142, 156, 791 S.E.2d 528, 539 (2016) (“Our Supreme Court has held that no good faith exception exists to the exclusionary rule for violations of the North Carolina Constitution.”); *State v. Perry*, 243 N.C. App. 156, 176, 776 S.E.2d 528, 542 (2015)
 (holding the good faith exception applied in a case involving only Fourth Amendment claims).

While the legislature invited the North Carolina Supreme Court to review *Carter,* it has not. *State v. Elder* provided an opportunity, with the divided Court of Appeals partially holding that *Carter* prevents the application of the good faith exception to claims under the State Constitution. *State v. Elder*, 232 N.C. App. 80, 92, 753 S.E.2d 504
, 512, *writ allowed*, 367 N.C. 323, 755 S.E.2d 607 (2014), *and aff'd as modified*, 368 N.C. 70, 773 S.E.2d 51 (2015). However, the North Carolina Supreme Court affirmed without directly addressing the good faith exception. *State v. Elder*, 368 N.C. 70, 75, 773 S.E.2d 51, 54 (2015)
.

Here, Mr. Kitchen based his suppression motion on both the state and federal constitutions. Article I, Section 20 of the North Carolina Constitution “prohibits unreasonable searches and seizures” like the Fourth Amendment. *State v. Arrington*, 311 N.C. 633, 643, 319 S.E.2d 254, 260 (1984)
. Our Supreme Court has recognized that “the United States Constitution provides a constitutional floor of fundamental rights guaranteed all citizens of the United States, while the state constitutions frequently give citizens of individual states basic rights in addition to those guaranteed by the United States Constitution.” *State v. Jackson*, 348 N.C. 644, 648, 503 S.E.2d 101, 103 (1998)
.

Therefore, the failure of the State to obtain a search warrant is also a violation of Article 1, Section 20 of the North Carolina Constitution and is not subject to the good faith exception.

Further, the State failed to raise any good faith claim in the trial court and therefore should be precluded from raising it now. *See, Romano,* 369 N.C. at 693–94, 800 S.E.2d at 654 (“The State had the opportunity at the suppression hearing to argue that the good faith exception to the exclusionary rule should apply if the court determined that the officer's actions were unconstitutional, but the State failed to raise the argument.”).

### Prejudice

 The State cannot show that the error was harmless beyond a reasonable doubt. N.C.G.S. § 15A-1443(b).

 First, the State had to attest, and the trial court had to find that the records were “necessary and relevant to this case and that it is necessary to the proper administration of justice.” (R p 16). The trial court found that “the proper administration of justice *requires* that these records be provided to the State of North Carolina.” (R p 18) (emphasis added). The State’s attestation and the trial court’s finding reflects the belief of both that the records were of fundamental importance and relevance to the case.

 Indeed, the centrality of the medical records is evidenced in the State’s closing argument. The State focused heavily on the medical records, not just as evidence of a test result, but to discredit any alternative, mental health explanation for Mr. Kitchen’s behavior:

You have his medical records. I gave those to you. They were admitted into evidence. So you know he wasn't having some type of medical episode that could have caused this behavior. His aggressiveness and belligerent nature suddenly appear when he realizes he's going to jail, and then it suddenly goes away when he sobers up.

It wasn't a medical issue and it wasn't a mental health issue. He was impaired.

His medical records were admitted into evidence and it's because he went to the hospital that we have actual evidence of what his alcohol concentration was, since he refused the breath test.

(T p 434).

 Therefore, the State, who in the trial court asserted the records were “necessary,” cannot show now that their admission was harmless beyond a reasonable doubt.

# CONCLUSION

For the foregoing reasons and authorities, Mr. Kitchen, the Defendant-Appellant herein, respectfully requests this Court to vacate his convictions in this matter and reverse the trial court’s order denying his motion to suppress.

Respectfully submitted this, the 1st day of September, 2021.

 Electronically Submitted

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# CERTIFICATE OF COMPLIANCE WITH RULE 28(J)(2)

I hereby certify that Defendant-Appellant's Brief is in compliance with Rule 28(j)(2) of the North Carolina Rules of Appellate Procedure in that it is printed in thirteen-point Century Schoolbook font and the body of the brief, including footnotes and citations, contains no more than 8,750 words as indicated by Microsoft Word, the program used to prepare the brief.

This, the 1st day of September, 2021.

 Electronically Submitted

 Kellie Mannette

 Attorney for Defendant-Appellant

# CERTIFICATE OF SERVICE

I hereby certify that the original Defendant-Appellant’s Brief has been duly filed, pursuant to Rule 26, by electronic means with the Clerk of the North Carolina Court of Appeals.

I further certify that a copy of the foregoing Brief has been served upon Neil Dalton, Special Deputy Attorney General, by sending it electronically to the following current email address, ndalton@ncdoj.gov.

This, the 1st day of September, 2021.

 Electronically Submitted

 Kellie Mannette

 Attorney for Defendant-Appellant