

STATE OF NORTH CAROLINA
COUNTY OF WAKE

FILED
IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
2017 DEC 14 File Nos. 16CRS209961, 16CRS209953

STATE OF NORTH CAROLINA

WAKE COUNTY, CSC

v.

MS. CAROL ANDERSON,
MR. DALE HERMAN.

Defendants.

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MOTION AND MEMORANDUM
APPEALING IMPOSITION
OF UNCONSTITUTIONAL COSTS

NOW COMES, Ms. Carol Anderson and Mr. Dale Herman, by and through undersigned counsel and hereby moves this Honorable Court to review the District Court’s imposition of court costs and declare the imposition of the court fees in this case pursuant to N.C. Gen. Stat. §7A-304 unconstitutional under Article IX Section 7 of the North Carolina Constitution.

PROCEDURAL HISTORY

1. Ms. Anderson and Mr. Herman were charged with Second Degree Trespass and Violation of the Rules for State Legislative Building and Legislative Office Building as a result of a Moral Monday protest in the North Carolina General Assembly on May 16, 2016.
2. This matter came on for trial during a Special Session of the Wake County District Criminal Court on January 23, 2017 before the Honorable Judge Joyce Hamilton, Judge Presiding.
3. Ms. Anderson and Mr. Herman were convicted of trespass and appealed to Superior Court. As a part of the penalty, Judge Hamilton imposed the cost of court pursuant to N.C. Gen. Stat. §7A-304.
4. This matter now comes before the Superior Court on the Defendant’s Appeal of Judge Hamilton’s finding of guilt and imposition of a fine and court costs.
5. Ms. Anderson and Mr. Herman contend the imposition of court costs is unconstitutional.

HISTORICAL CONTEXT

Ever since the 2014 events in Ferguson, Missouri, and the subsequent revelation of its misuse of municipal criminal court fees to fund judicial, law enforcement, and other governmental functions, the nation has been alerted to these increasingly common abusive practices within the criminal legal system. The collection of court fines and fees by municipalities to sustain their local governments provide a gross incentive and avenue for abuse, however similar injustices can be found on a statewide level within North Carolina. Unfortunately, in the last several decades the North Carolina General Assembly has placed our state at the forefront of this trend, both by drastically increasing the number and amount of court costs and fees imposed in criminal and traffic cases, and by making it increasingly harder for judges to waive those fees for indigent defendants.

Before describing the landscape of court costs and fees now imposed in criminal cases, it is important to acknowledge one fact that is evident to any judge sitting in the District and Superior Courts of our state in criminal and traffic cases: the defendants who appear in these courts, and upon whom these fees and costs are imposed, are disproportionately poor and minority. Thus, these costs and fees, whatever the motivation of the judge or other court actors who impose them, have a discriminatory impact and are imposed upon that portion of our population that has the least ability to shoulder this financial burden. *See*, Beth A. Wood, Office of the State Auditor, Performance Audit: Judicial Department - Court Ordered Fines, Fees, and Restitution, 20 (2011), <http://www.ncauditor.net/EPSSWeb/Reports/Performance/PER2011-7251.pdf> (stating that criminal defendants come “from a population often representing the very poorest and most destitute in the state”).

The General Assembly has mandated spiraling costs and fees so much so that the

absolute minimum court fee -- the "cost of court" which any convicted defendant is assessed -- has by itself increased by a staggering amount in the last several decades: in 1995 the District Court "cost of court" was \$41. Today it is \$178. In Superior Court the costs have risen from \$48 to \$205 in the same period. As the General Assembly has made clear, the purpose of these increasing financial punishments is to support any and all state functions that the legislators deem appropriate, some related to the judicial system, some removed. Thus, a defendant who has to pay several hundred dollars for his or her day in court is being forced to contribute, for instance, to funds to improve the technology used in the local courthouse, N.C. Gen. Stat. §7A-304(a)(2)(a), retirement funds for state and local law enforcement officers, N.C. Gen. Stat. §7A-304(a)(3) and 3(a), staffing for the Criminal Justice Education and Standards Commission, N.C. Gen. Stat. §7A-304(a)(3)(b).

Further, this minimum "cost of court" fee is supplemented in almost every case by a dizzying array of additional "costs" imposed upon a defendant. An indigent defendant who is entitled to a state appointed lawyer is assessed a mandatory \$60 fee before his or her request will even be considered by the trial judge, N.C. Gen. Stat. §7A-455.1. This fee is in addition to an hourly fee for the lawyer appointed, private or public defender, which will be imposed at the end of the case. A defendant who is too poor to make bail will have the indignity of having to pay a daily charge of \$10 for the privilege of residing in the jail prior to trial, this in addition to having to suffer the widely acknowledged other numerous and harmful collateral consequences of pretrial incarceration, N.C. Gen. Stat. §7A-313. If the defendant is fortunate enough to be released pending trial under the supervision of a pretrial release program, defendant also has to pay for that privilege, albeit only \$15, N.C. Gen. Stat. §7A-304(a)(5). In any case in which the *state* decides to use the services of a state or other crime lab to provide evidence against a

defendant, the defendant is assessed \$600, N.C. Gen. Stat. §7A-304(a)(7), (8) and (8a). If the defendant requires the state to produce an expert to testify about the results of the lab testing, an additional \$600 is tacked on to the total costs, N.C. Gen. Stat. §7A-304(13). And these are only a few of the many fees which can be imposed upon a criminal defendant, a list which is apparently only limited by the imagination of our legislatures in their quest to find ways to shift the costs of running the criminal justice system, and the state, to the poorest among us.

Theoretically, of course, many, but not all, of the costs and fees may be waived for an indigent defendant, although only after all of the affected agencies are given notice and the opportunity to be heard and a judge makes a written order, supported by findings of fact and conclusions of law, that there is "just cause" to waive or reduce costs and fees. N.C. Gen. Stat. §7A-304(a). A number of fees, however, including the \$60 charge for requesting an appointed lawyer, are specifically delimited as "non-waivable." But the mandatory nature of the costs and fees in North Carolina goes far beyond those "non-waivable" fees, for the North Carolina General Assembly, in the last few years, has enacted a number of statutes which impose almost insuperable obstacles for any judge who wants to waive or reduce costs and fees for a criminal defendant.

First, in 2014 the General Assembly passed a law which required the Administrative Office of the Courts to provide the legislature an annual report detailing which judges, by name, granted cost and fee waivers and listing the number of cases in which the individual judge did so, N.C. Gen. Stat. §7A-350. This measure was openly and expressly passed in an attempt to deter judges from waiving or reducing costs and fees, no matter how deserving the defendant. However, deeming insufficient this effort at deterring judges' from fairly assessing the need for waiving costs and fees for indigent defendants, the 2017 General Assembly also contrived a

unique, almost impossible to overcome obstacle for any judge who would consider waiving court costs and fees for even the poorest defendant, amending N.C. Gen. Stat. § 7A-304 to read: “[n]o court may waive or remit all or part of any court fines or costs without providing notice and opportunity to be heard by all government entities directly affected.” Given the multiplicity of entities which now receive a portion of court fees, including the Indigent Defense Commission, the North Carolina Department of Justice, the State Treasurer, and on and on, this requirement is both absurd and insurmountable. Its only purpose is to put a stop to any and all waivers of costs and fees for indigent defendants, no matter how unable an individual defendant may be to pay the sums demanded.

This motion is not the place to discuss in detail the myriad harmful, even disastrous, impacts this war on indigent criminal defendants entails: the spiraling debt caused by interest assessments and penalties for non-payment; the criminal and civil penalties visited upon those too poor to pay; the conversion of criminal justice debt into civil judgment leading to the garnishment of already meagre paychecks and further disabilities; rearrests for failure to pay; and, ominously, the inevitable rebirth of debtors’ prisons at the end of the line. All of this raises serious questions about the fairness of our criminal justice system, and about its promise of justice for all. It also suggests that our criminal justice system fails to comport with basic constitutional norms, including the guarantees of equal protection, due process, the prohibition against excessive fines, and the right to counsel. All of these matters will undoubtedly be raised in future motions. The issue before the Court today however, is a simpler matter, for the citizens of North Carolina, more than 150 years ago, made a decision, enshrined in Article IX, Section 7 of our state's Constitution, which prohibits the use of financial penalties imposed in criminal cases to fund the Courts and requires that money to go to the schools.

AUTHORITY

Article IX, Section 7(a) of the North Carolina Constitution provides in pertinent part that

“the clear proceeds of all penalties and forfeitures and of all fines collected ... for any breach of the penal laws of the State, shall belong to and remain in the several counties, and shall be faithfully appropriated and used exclusively for maintaining free public schools.” *Id.* (Emphasis added)

Cases interpreting this provision have held that the determination of whether a particular payment falls under the ambit of Article IX, Section 7 is not controlled by how the legislature has labeled the payment. Rather, the question is whether the payment is punitive, in which case it falls under the ambit of Article IX, Section 7, or remedial, in which case it does not. Case law has further established that defendants cannot be made to pay the overhead of law enforcement or the court system, but can be required to pay case-specific expenses.

Because the provisions defendant is challenging are punitive and require defendants to pay the general overhead of law enforcement and the court system, these provisions are unconstitutional and cannot be imposed against the defendant.

Article I, Section 19 of the North Carolina Constitution provides in pertinent part that “No person shall be ... deprived of his ... property, but by the law of the land.” Because the provisions defendant is challenging are unconstitutional and are not rationally related to a *valid* state purpose, the imposition of these categories of court costs against the defendant violates his rights under the law of the land clause.

CONTROLLING CASE LAW

Article IX, Section 7 of the North Carolina Constitution has been interpreted in a series of cases which bear directly on the constitutionality of the challenged items of court costs. Perhaps the most important of these cases is (1) *Shore v. Edmisten*, 290 N.C. 628, 227 S.E.2d 553 (1976). Other relevant cases include (2) *Cauble v. Asheville*, 314 N.C. 598, 336 S.E.2d 59 (1985), (3)

State v. Johnson, 124 N.C.App. 462, 478 S.E.2d 16 (1996), and (4) *North Carolina School Boards Assoc. v. Moore*, 359 N.C. 474, 614 S.E.2d 504 (2005). Most recently, the Court of Appeals decided (5) *Richmond County Board of Education v. Cowell*, __ N.C.App. __, 776 S.E.2d 244 (2015).

(1) *Shore v. Edmisten*

Shore v. Edmisten arose from a declaratory judgment action in which the Clerk of Court sought a declaratory judgment regarding how to dispose of money collected in thirty-four criminal cases in Guilford County, and designated in those judgments as being collected for disbursement to various state and local agencies. Ultimately, the Supreme Court held that the money collected in thirty-three of the thirty-four cases amounted to punishment and therefore fell under the ambit of Article IX, Section 7 and had to be remitted to the school board. In reaching this determination, the Court in *Shore* made a number of important observations shedding light on the application of Article IX, Section 7. First, the Court noted that “any statute purporting to give what are in reality fines either to an individual or to another governmental agency [i.e., not a school board] violates this constitutional provision.” *Shore*, 290 N.C. at 633, 227 S.E.2d at 558. In reaching this determination, “the label given by the judge (or the legislature) is not determinative.” *Id.* (parenthetical phrase in original). The Court went on to explain that a governmental agency other than a school board can properly be made the recipient of restitution in criminal cases “where the offense charged results in particular damage or loss to it over and above its normal operating costs.” *Id.* at 633-34, 227 S.E.2d at 559. By way of example, the Court explained that a defendant may be required to reimburse the State for court appointed counsel. *Id.* at 634, 227 S.E.2d at 559. In contrast, “[i]t would not, however, be reasonable to require the defendant to pay the State’s overhead attributable to the normal costs of prosecuting

him.” *Id.*

After describing these general principles, the Court in *Shore* described four of the judgments at issue with specificity. In one case, the trial court ordered restitution to reimburse the Greensboro Police Department Vice Division for money spent to purchase the drugs which were the subject of the charge. This, the Court held, was appropriately characterized as restitution and therefore did not fall under the ambit of Article IX, Section 7. *Id.* at 636-37, 227 S.E.2d at 560-61. In another case, the trial court ordered restitution, but did not specify the intended recipient. The Court held that this was “in effect a fine and that the clerk should pay the money to the county for the school fund.” *Id.* at 638, 227 S.E.2d at 561. In another case, the trial court order a payment of \$50 to Guilford Technical Institute as a condition of a deferral under N.C. Gen. Stat. § 90-96. Noting that nothing in the record supported this payment and that it was unlikely that Guilford Technical Institute could possibly be an aggrieved party in the case, the Court held that this payment had to be treated as a fine “which must go to the public schools.” *Id.* at 638, 227 S.E.2d at 561-62. Next, the Court addressed a conviction for possession on non-tax-paid liquor in which the trial court had ordered the defendant to pay \$500 “for the use and benefit of the Vice Squad of the High Point Police Department *for continued enforcement.*” *Id.* at 638, 227 S.E.2d at 562 (emphasis in original). The Court explained that a trial court could not order a defendant to pay for continued law enforcement, and held that this payment “was a ‘fine’ payable under the constitution only to the schools.” *Id.* at 638-39, 227 S.E.2d at 562. Finally, the Court noted that the remaining thirty judgments were similar to the three it had specifically described in which the payments in question had to be treated as fines and remitted to the school fund, rather than to other recipients. *Id.* at 639, 227 S.E.2d at 562.

(2) *Cauble v. Asheville*

Cauble v. Asheville addressed the disposition of fees collected by the city of Asheville for overtime parking, in violation of the city's parking ordinance. Initially, the Court reaffirmed, over a dissent, its holding from an earlier decision in the same case that overtime parking in violation of the city ordinance constituted a violation of "the penal laws of the State." *Cauble*, 314 N.C. at 601-02, 336 S.E.2d at 62 (citation omitted). Next, the Court addressed the question of how to determine the "clear proceeds" of the fines, as required under Article IX, Section 7. After reviewing older cases, the Court explained that the "clear proceeds" meant the total sum collected less only the administrative costs of collecting the fines. The Court further explained that

the costs of collection do not include the costs associated with enforcing the ordinance ... If we were to take the position that the costs of enforcing the penal laws of the State were a part of the collection of fines imposed by the laws, there could never be any *clear proceeds* of such fines to be used for the support of the public schools. This would itself contravene ... Article IX, Section 7 of the North Carolina Constitution[.]

Id. at 605-06, 336 S.E.2d at 64.

(3) *State v. Johnson*

Next, in *State v. Johnson*, the defendant, who had been convicted of possession of cocaine, challenged a requirement that he repay the State \$100 for the expense of analyzing the cocaine found in his possession. At that time, the repayment was authorized by N.C. Gen. Stat. § 90-95.3(b) and was labeled as "restitution."¹ The defendant relied on the portion of *Shore* which provided that "it would not ... be reasonable to require the defendant to pay the State's overhead attributable to the normal costs of prosecuting him." *Johnson*, 124 N.C.App. at 470, 478 S.E.2d

¹ Subsequent to *Johnson*, the legislature relabeled the repayment of laboratory fees to the State Crime Lab in criminal cases as a species of court costs, rather than as restitution. These fees are now governed by N.C. Gen. Stat. § 7A-304(a)(7). See, Session Law 2002-126, ss. 29A.8(a) and 29A.8(b). The amount of the repayment has increased to \$600.

at 21, quoting *Shore*. The *Johnson* opinion repeatedly characterizes this portion of *Shore* as dicta,² but nevertheless explains why the reimbursement for lab fees in drug cases is not overhead but, rather, represents reimbursement for case-specific expenses. The Court explained that “the overhead faced by a court and the particular costs it experiences in prosecuting individual cases may be viewed as distinctly separate items.” *Id.* at 470, 478 S.E.2d at 21-22. Quoting Webster’s Dictionary, the Court defined “overhead” as “those general charges or expenses in a business which cannot be charged up as belonging exclusively to any particular part of the work or product.” *Id.* at 470, 478 S.E.2d at 22 (citation omitted). The laboratory fees did not constitute overhead, because “the cost of analyzing drugs is incurred by the prosecution only in connection with particular cases.” *Id.* at 472, 478 S.E.2d at 22. The Court concluded that “the burden [N.C. Gen. Stat. §90-95.3(b)] imposes bears a direct relation to the cost of prosecuting the individual defendant.” *Id.* at 474, 478 S.E.2d at 24.3

(4) *North Carolina School Boards Assoc., et al. v. Moore, et al.*

In *N.C. School Boards Assoc. v. Moore*, our Supreme Court addressed the application of Article IX, Section 7 of the North Carolina constitution to a variety of civil fines and penalties collected by various governmental agencies for violation of the State’s penal laws. In the course of addressing numerous categories of fines or penalties, the Court set out a variety of principles for determining when an assessment falls within the scope of Article IX, Section 7. First, the Court adhered to its prior cases explaining that the label affixed to a particular payment is not determinative, but added that the label is still of some value in deciding whether the payment comes within the purview of Article IX, Section 7. *N.C. School Boards*, 359 N.C. at 488, 614

² As discussed more fully below, in *N.C. School Boards Assoc.*, our Supreme Court subsequently characterized this portion of *Shore* as part of the holding of the case.

³ To be clear, the opinion in *State v. Johnson* does not expressly mention Article IX, Section 7. Rather, it interprets and applies portions of *Shore* which explain the application of Article IX, Section 7.

S.E.2d at 512. The Court explained that regardless of the label, a required payment falls under Article IX, Section 7 if the

payment is punitive rather than remedial in nature and is intended to penalize the wrongdoer rather than compensate a particular party.... [If so] the monetary payments are penal in nature and accrue to the State regardless of whether the legislature labels the payment a penalty, forfeiture or fine or whether the proceeding is civil or criminal.

Id. at 485-86, 614 S.E.2d at 511, quoting *Mussallam v. Mussallam*, 321 N.C. 504, 509, 364 S.E.2d 364, 366-67 (1988). Of critical importance here, although *Mussallam* addressed a forfeiture in a civil proceeding, the Court then related the punitive/remedial distinction to its holding in *Shore v. Edmisten*, which addressed money collected pursuant to judgments in criminal cases. Specifically, the Court explained that

in *Shore v. Edmisten*, this Court **held** that payments attributable to the general costs of investigation and prosecution of a citizen's unlawful conduct may not be considered "remedial" for purposes of *Article IX, Section 7*. The Court stated that

... It would not however be reasonable to require the defendant to pay the State's overhead attributable to the normal costs of prosecuting him.

N.C. School Boards Assoc., 359 N.C. at 491, 614 S.E.2d at 514 (pinpoint citation to *Shore* omitted, bolded emphasis added). This passage from *N.C. School Boards Assoc.* demonstrates that the Court of Appeals was incorrect in *Johnson* to describe the above-quoted portion of *Shore* as dicta. It also clearly establishes that any payment, regardless of label, which purports to require a defendant to pay the general overhead of the State's investigation and prosecution of the defendant's wrongdoing falls within the purview of Article IX, Section 7.

Applying these principles to the specific categories of payments at issue, the Court in *N.C. School Boards Assoc* first held that penalties assessed by the Department of Revenue for late filings, underpayments and other failures to comply with the tax code are punitive and fall

within the scope of Article IX, Section 7. In reaching this holding, the Court expressly declined to apply federal cases holding that analogous federal tax penalties are remedial for purposes of double jeopardy and excessive fines analysis. *Id.* at 488-91, 614 S.E.2d at 513-15. Next, the Court held that the excise tax assessed on controlled substances under N.C. Gen. Stat. §105-113.105 *et seq.* is a legitimate tax on highly profitable and otherwise untaxed unlawful commerce, rather than constituting punishment for wrongdoing, and is therefore remedial and does not fall under Article IX, Section 7. The Court did, however, note that the penalty provisions for non-payment of the excise tax are punitive and do fall under Article IX, Section 7. *Id.* at 492-94, 614 S.E.2d at 515-16.

The Court also held that money collected by schools in the University of North Carolina (UNC) system as civil penalties for traffic and parking violations on campus were punitive and therefore governed by Article IX, Section 7. In reaching this conclusion, the Court reversed the opinion below, which held that because the monies were placed in a trust fund for campus parking, traffic and transportation uses, the payments were remedial rather than punitive. *Id.* at 494-7, 614 S.E.2d at 516-18. The Court explained that

the gist of defendants' contention is that the intended use of the payments ... renders them remedial, not punitive. Defendants are correct that this Court has not explicitly stated that the intended use of the payments cannot be considered in determining whether the payment is remedial, but this analysis is not required when the determinative factor is whether the purpose of the civil penalty is punitive in nature or is intended to compensate a party for its loss.

Id. at 496, 614 S.E.2d at 517. On the other hand, the Court held that money collected by UNC schools for lost, damaged or late-returned library materials are remedial and therefore not governed by Article IX, Section 7. The Court noted that unlike failing to pay for parking, returning library materials late is not a violation of law. The Court also observed that a library patron could usually keep the materials without charge simply by renewing the checkout. As a

result, “the late fee is in the nature of a user fee designed to manage the collection, as opposed to a penalty.” *Id.* at 497-99, 614 S.E.2d at 518-19.

(5) *Richmond County Board of Education v. Cowell, et al.*

The most recent case addressing Article IX, Section 7 is *Richmond County Board of Education v. Cowell, et al.*, ___ N.C. App. ___, 776 S.E.2d 244 (2015). In *Richmond Cnty. Bd. of Educ.*, the Court of Appeals held that N.C. Gen. Stat. § 7A-304(a)(4b)4 violates Article IX, Section 75 of the North Carolina Constitution. *Id.*, 776 S.E.2d at 246. At the time, N.C. Gen. Stat. § 7A-304(a)(4b) assessed \$50.00 in court costs for all offenses arising under N.C. Gen. Stat. Chapter 20 and resulting in a conviction for improper equipment. The statute further directed that this sum was to be remitted to the State Misdemeanor Confinement Fund. *Id.*, 776 S.E.2d at 248. After reviewing the case law interpreting Article IX, Section 7, the Court held that despite the fact that “the General Assembly has affixed the label ‘cost’ to this surcharge, suggesting that it is remedial[,] ... the \$50.00 surcharge *is* punitive, rather than remedial, in nature.” *Id.*, 776 S.E.2d at 248 (emphasis in original). The Court explained that it

is “plain *and* clear,” here, that the \$50.00 surcharge is not remedial because the revenue generated therefrom is not used to reimburse the State for an expense incurred because of improper equipment violations. Instead, the revenue is used to house prisoners ... and imprisonment is not even a possible punishment for the commission of an improper equipment offense[.]

Id., 776 S.E.2d at 248-49 (emphasis in original). The Court held that because the \$50.00 surcharge in court costs under N.C. Gen. Stat. § 7A-304(a)(4b) is punitive rather than remedial,

4 Subsequent to the *Richmond County* decision, the legislature amended N.C. Gen. Stat. § 7A-304(a)(4b) by remitting the \$50.00 assessment to the State Treasurer for “additional support of the General Court of Justice. See, Session Law 2015-241, s. 18A.11.

5 As explained in *N.C. School Boards Assoc.*, Article IX, Section 7 of the North Carolina Constitution was amended effective January 1, 2005. The amendment divided this section into subsections (a) and (b). See, 359 N.C. at 481, fn. 1, 614 S.E.2d at 508, fn.1. The original provisions contained in Article IX, Section 7 are now contained in Section 7(a). The amendment does not affect any of the issues or legal arguments presented in this motion and memorandum. For consistency and ease of reading, the relevant provisions will be referred to throughout this document as Article IX, Section 7.

“our General Assembly *exceeded its constitutional powers by enacting legislation* which directs that the revenue from the \$50.00 surcharge ... be remitted to the State Confinement Fund to pay for the housing of prisoners.” *Id.*, 776 S.E.2d at 246 (emphasis added).

Richmond Cnty. Bd. of Educ. is critically important for several reasons. It appears to be the first, and so far only, case to apply the punitive/remedial distinction to a payment expressly designated by the legislature as a cost of court in N.C. Gen. Stat. § 7A-304 and to directly hold that a specifically enumerated category of “Costs in Criminal Actions”⁶ violates Article IX, Section 7. Also, as noted above, the opinion expressly states that enacting the statute exceeded the legislature’s constitutional authority. A statute that is beyond the power of the legislature to enact is facially void, and cannot be enforced. *See, generally, Bond v. United States*, ___ U.S. ___, 131 S.Ct. 2355, 180 L.Ed.2d 269 (2011) (holding that a defendant in a criminal case had standing to argue that the statute under which she was prosecuted was unconstitutional under any constitutional theory, and reversing the 3rd Circuit, which had ruled that only states, not individual litigants, have standing to argue that a statute violates the 10th amendment); *Id.*, 131 S.Ct. at 2368, 180 L.Ed.2d at 284 (Ginsburg, J., concurring) (“a law ‘beyond the power of congress,’ for any reason, is ‘no law at all.’” (citation omitted)).

ANALYSIS

When the line of cases described above is considered as a whole, the following governing principles can be seen:

A. General Principles

First, any monetary assessment against a defendant in a criminal case which is punitive, i.e., which is intended to punish the defendant, falls within the ambit of Article IX, Section 7 of

⁶*Richmond Cnty. Bd. of Educ.* makes the point that improper equipment violations are infractions rather than criminal offenses. Nevertheless, “Costs in Criminal Actions” is the caption to N.C. Gen. Stat. § 7A-304.

the North Carolina Constitution and must be considered the equivalent of a fine which must go to fund the public schools. A payment intended to compensate an aggrieved party, however, is considered remedial and may be remitted to the aggrieved party. In determining whether a particular assessment is punitive or remedial, the label attached to the assessment is not determinative, although it may be considered. Also, the fact that the payments involved are earmarked for a purpose that is generally beneficial and generally related to the defendant's wrongdoing will not convert a punitive assessment to a remedial one.

Second, it is improper to require a defendant in a criminal case to repay the State for the overhead of investigating and prosecuting the defendant's wrongful conduct; any such assessment is considered punitive rather than remedial and falls within the coverage of Article IX, Section 7. On the other hand, a monetary assessment designed to recoup a case-specific expense over and above general overhead is permissible, and such an assessment may be remitted to the governmental agency which incurred the expense, rather than the school fund, without violating Article IX, Section 7.

Third, the provisions of Article IX, Section 7 restrict the legislature, not merely trial courts imposing judgments in individual cases. If a statute directs that an assessment which is punitive be remitted to any recipient other than the public schools, the statute violates Article IX, Section 7.

B. Analysis of each subsection of N.C. Gen. Stat. §7A-304

When the various subsections of N.C. Gen. Stat. §7A-304(a) are examined in light of principles set out in the cases discussed above, it is clear that several of the subsections violate Article IX, Section 7 of the North Carolina Constitution. Specifically, subsections (2), (2a), (2b – repealed effective 7/1/2015), (3), (3a), (3b), (4), (4a), (4b), (6), (9) and (10) all violate Article IX,

Section 7. The remaining subsections appear to represent case-specific expenses that may be assessed without violating Article IX, Section 7. Addressing the subsections in order:

Subsection (1) – this subsection assesses \$5.00 in court costs for the service of criminal process in a case, to be remitted to the County or Municipality whose officer served the process. This assessment represents a reimbursement for case-specific expenses and does not violate Article IX, Section 7. Indeed, this subsection may represent the quintessential example of an appropriate court cost assessment that does not violate Article IX, Section 7.

Subsection (2) – this subsection assesses costs of \$12.00 in District Court and \$30.00 in Superior Court to be remitted to the County for the use of courtroom and other judicial facilities. The purpose of this assessment is to pay for the overhead of operating the Court system. Because this assessment represents general overhead, rather than recoupment for a case-specific expense, it must be considered punitive rather than remedial. As a result, this subsection violates Article IX, Section 7.

Subsection (2a) – this subsection assesses \$4.00 in court costs, to be credited to the Court Information Technology Fund, to upgrade, maintain, and operate judicial and courthouse telecommunications and data connectivity.⁷ This assessment applies to the general overhead of running the court system, rather than recoupment for a case-specific expense, and must therefore be considered punitive rather than remedial. As a result, this subsection violates Article IX, Section 7.

Subsection (2b) – This subsection was repealed by S.L. 2015-241 §18A-11. This session law was enacted on September 18, 2015 and became effective July 1, 2015. The effective date provision of S.L. 2015-241, §33.7 does not expressly discuss the applicability of the session law to cases already pending on that date. This section formerly assessed \$18.00 in costs to the Statewide Misdemeanor Confinement Fund for “the maintenance of misdemeanors in county jails.” To whatever extent this subsection continues to apply to offenses committed before the effective date of S.L. 2015-241, this subsection violates Article IX, Section 7 for the same reasons that the Court of Appeals held in *Richmond County Board of Educ.* that subsection (4b) violated Article IX, Section 7.

Subsections (3) and (3a) – These subsections assess \$6.25 and \$1.25 respectively to fund retirement and insurance benefits for State and local law enforcement officers and pensions for Sheriffs. Funding benefits for law enforcement officers is part of the general overhead of investigating wrongdoing, not a case-specific expense. As such, these

⁷ See, S.L. 2015-241 §18A-23.(b), which changed the designated purpose of this assessment from “phone systems” to “telecommunications and data connectivity.”

provisions must be considered punitive rather than remedial, and these subsections therefore violate Article IX, Section 7.

Subsection (3b) – This subsection assesses \$2.00 to fund the Criminal Justice Education and Standards Commission. Training and certifying law enforcement officers is part of the general overhead of investigating wrongdoing, not a case-specific expense. As such, this provision must be considered punitive rather than remedial, and therefore violates Article IX, Section 7.

Subsection (4) – This subsection assesses costs of \$147.50 in District Court and \$154.50 in Superior Court to be remitted to the State Treasurer for “support of the General Court of Justice.” Of this amount, the Treasurer is directed to remit \$1.50 and \$0.95 to the State Bar to fund Legal Services and Domestic Violence Victim Assistance programs, respectively. None of these assessments are earmarked to reimburse the State for any case-specific expenses. Rather, all of the money assessed under this subsection is intended to fund the court system generally, as well as the two specific programs identified within the subsection. Because these assessments represent general overhead, rather than recoupment for any case-specific expenses, they must be considered punitive rather than remedial. As a result, this subsection violates Article IX, Section 7.

It may be noted that the assessment for District Court in subsection (4) “for the support of the General Court of Justice” was increased in S.L. 2015-241 s. 18A.11 by the same amount, \$18.00, that was eliminated as a cost to be remitted to the State Misdemeanor Confinement Fund by the repeal of subsection (2b). Another portion of S.L. 2015-241 allocates \$22,500,000 to the State Misdemeanor Confinement Fund to replace the assessment from subsection (2b), noting that “This fund was previously supported by court costs that were transferred directly to the fund.” See, H.B. 97 Joint Conference Committee Report at I 5 (item 30), which is incorporated by reference by S.L. 2015-241, s. 33.2.(a). This legislative sleight-of-hand further demonstrates that the money collected under this subsection is intended to pay for general overhead of the criminal justice system.

Subsection (4a) – this subsection assesses an additional \$10.00 in court costs to be remitted to the State Treasurer in all cases arising under N.C. Gen. Stat. Chapter 20. This assessment is not earmarked for reimbursement of any case-specific expenses that apply uniquely to Chapter 20 offenses. Rather, the assessment is intended for the general support of the court system, *i.e.*, overhead. As a result, this subsection violates Article IX, Section 7.

Subsection (4b) – this is the subsection that was found unconstitutional in *Richmond County School Board*. This subsection was subsequently amended in S.L. 2015-241 §18A.11. It now provides for an assessment of \$50.00 to be remitted to the State Treasurer for

“additional support of the General Court of Justice” in all cases arising out of Chapter 20 offenses and resulting in a conviction for improper equipment. Because this assessment is earmarked for general support of the court system and not to reimburse any case-specific expense applicable to improper equipment violations, the amendment to this subsection does not cure the constitutional violation found in *Richmond County School Board* and this assessment is still punitive rather than remedial. Moreover, it is readily apparent that this provision is punitive in the sense that it is specifically intended as additional punishment for defendants as a *quid pro quo* designed to partially offset the benefits of having moving violations under Chapter 20 reduced to improper equipment violations. For these reasons, this subsection violates Article IX, Section 7.

Subsection (5) – this subsection assesses \$15.00 in court costs to be remitted to counties providing pretrial release services, to be assessed only in cases in which the defendant has been accepted and released to a pretrial services agency. This is a case-specific reimbursement and does not violate Article IX, Section 7.

Subsection (6) – this subsection assesses costs to be remitted to the State Treasurer in the amount of \$200.00 in any case in which the defendant fails to appear or otherwise dispose of the case within 20 days of the scheduled appearance, and in the amount of \$50.00 when a defendant fails to comply with the monetary portions of a judgment within 40 days of the date specified in the judgment. These fees represent additional punishment for defendants who fail to appear or fail to pay money required under a judgment. The assessments are not tethered to the cost of bringing defendants who failed to appear back before the court or collecting payments from defendants who failed to pay, and are not remitted to the law enforcement agencies or other entities whose officers perform the work involved. As such, they cannot be considered as case-specific expenses that are remedial rather than punitive. As a result, this subsection violates Article IX, Section 7.

Subsections (7), (8) and (8a) – these subsections assess \$600.00 in court costs for the services of the State Crime Laboratory, local law enforcement laboratories, and private hospital laboratories under contract with a prosecutorial district. These costs are assessed only in cases in which certain categories of forensic laboratory analysis are performed. These assessments represent recoupment of case-specific expenses which may be considered remedial rather than punitive and therefore not in violation of Article IX, Section 7. *State v. Johnson* remains controlling authority that these subsections are not unconstitutional, even though the specific statutory authorization for these fees has changed since *Johnson* was decided.

Subsection (9) – this subsection assesses \$2.00 in court costs to support the State DNA Database

and DNA Databank. This cost does not apply to infractions. Because this category of court cost is assessed against defendants convicted of crimes other than those listed in N.C. Gen. Stat. § 15A-266.3A(f) and (g) (listing offenses for which DNA samples are taken upon arrest for inclusion in the DNA database and the DNA databank), this cost cannot be considered a case-specific recoupment and must be considered punitive, at least with respect to defendants convicted of offenses other than those listed in N.C. Gen. Stat. § 15A-266.3A(f) and (g). As a result, this subsection violates Article IX, Section 7 on its face or, at least, as applied to defendants convicted of offenses other than those listed in N.C. Gen. Stat. § 15A-266.3A(f) and (g).

Subsection (10) – this subsection assesses \$100.00 in court costs to be remitted to the State Treasurer for the support of the General Court of Justice in cases where the defendant is convicted of Driving While Impaired or certain other implied consent offenses. As with subsections (4), (4a), (4b) (as amended) and (6), this money applies to the general support of the court system (i.e., overhead), and is not earmarked as a recoupment for any case-related expenses specifically related to implied consent offenses. Moreover, it is apparent that this additional assessment is intended as extra punishment for defendants convicted of Driving While Impaired and related implied consent offenses. For these reasons, this subsection violates Article IX, Section 7.

Subsections (11), (12) and (13) – these subsections assess \$600.00 for the services of expert witnesses testifying to the results of certain categories of laboratory analysis performed by the witness. These costs are only assessed in cases in which the expert testifies about the chemical or forensic analysis in the defendant’s trial. These categories of court cost represent recoupment of case specific expenses. Although these categories of costs did not exist when *State v. Johnson* was decided, the reasoning of *Johnson* would seem to apply equally to these categories of costs. As a result, these subsections do not violate Article IX, Section 7.

As a result of Article IX, Section 7, all of the costs assessed Mr. Herman and Ms. Anderson are unconstitutional in violation of Article IX, Section 7.

C. The subsections of N.C. Gen. Stat. §7A-304 are not severable

The portions of the various subsections of N.C. Gen. Stat. §7A-304 which designate the recipient agencies for each category of assessed costs are not severable from the portions assessing costs against the Mr. Herman and Ms. Anderson.

Richmond Cnty. Bd. of Educ. involved a lawsuit between a local school board and the

State Treasurer over the disposition of funds which had already been collected, presumably without objection, from defendants convicted of improper equipment. As such, the holding only directly addressed the constitutionality of the portion of N. C. Gen. Stat. § 7A-304(a)(4b) which directed that the \$50.00 surcharge be remitted to the State Misdemeanor Confinement Fund, not the portion of the subsection which directed that the surcharge be assessed against defendants in the first place. When a portion of a statute violates the constitution, the question of whether the statute as a whole must be deemed unconstitutional depends on whether the offending portion of the statute is severable from the remainder. This issue was most recently addressed by our Supreme Court in *King v. Town of Chapel Hill*, 367 N.C. 400, 758 S.E.2d 364 (2014). As the Court explained, the question turns on whether the remainder of the statute can fulfill its intended purpose absent the invalid portion of the statute. ““When the statute ... could be given effect had the invalid portion never been included, it will be given such effect if it is apparent that the legislative body, had it known of the invalidity of the one portion, would have enacted the remainder alone.”” *Id.* at 409-10, 758 S.E.2d at 372, quoting *Jackson v. Guilford Cnty. Bd. of Adjust.*, 275 N.C. 155, 168, 166 S.E.2d 78, 87 (1969).

N.C. Gen. Stat. § 7A-304 is entitled “Costs in criminal actions.” This statute is clearly intended to fund the criminal justice system, not the public school system. The statute is designed to collect court costs from defendants convicted of crime in order to shift a portion of the expense of running the criminal justice system from the general fund of the State Treasury to persons convicted of crimes and infractions. With respect to the categories of court costs identified above which apply towards the general overhead of running the criminal justice system, or which are otherwise punitive in nature, however, this simply is not a purpose that can be accomplished without violating Article IX, Section 7 of the North Carolina Constitution.

If the portions of the subsections of § 7A-304(a) which direct punitive assessments to be remitted to the State Treasury or other governmental agencies were excised from those subsections, but the costs were still assessed against defendants and were then remitted to the public school fund, the effect would be to convert those subsections from court costs into mandatory fines. This is manifestly not the intent of the legislature in enacting the various categories of court costs. Because the money collected would not actually be applied to fund the criminal justice system, the statute would wholly fail to fulfill the intended purpose of shifting the cost of maintaining the criminal justice system from the treasury to convicted defendants. The North Carolina Constitution, as expressing the will of the People of North Carolina, requires these funds to go to local free schools.

For these reasons, the portions of each of the subsections of N.C. Gen. Stat. § 7A-304(a) discussed above which dictate that punitive assessments be remitted to entities other than the public school fund, in violation of Article IX, Section 7, cannot be severed from the portions of those subsections requiring that those costs be assessed against defendants in the first place.

D. The recently enacted amendment requiring notice to affected agencies prior to waiving court costs is also unconstitutional.

As a result of Article IX, Section 7, the recently enacted amendment to this statute requiring notice to the various agencies is also unconstitutional, as these agencies are not entitled to the proceeds identified in the statute. The recently effective provision of N.C. Gen. Stat. § 7A-304(a) is also unconstitutional:

No court may waive or remit all or part of any court fines or costs without providing notice and opportunity to be heard by all government entities directly affected. The court shall provide notice to the government entities directly affected of (i) the date and time of the hearing and (ii) the right to be heard and make an objection to the remission or waiver of all or part of the order of court costs at least 15 days prior to hearing. Notice shall be made to the government

entities affected by first-class mail to the address provided for receipt of court costs paid pursuant to the order.

Since the funds collected pursuant to N.C. Gen. Stat. § 7A-304(a) should go to the schools, and not the various entities and agencies set forth in the statute, they do not deserve notice of a Judge's intention to waive the court costs. Requiring notice to these agencies under these circumstances is also unconstitutional.

CONCLUSION

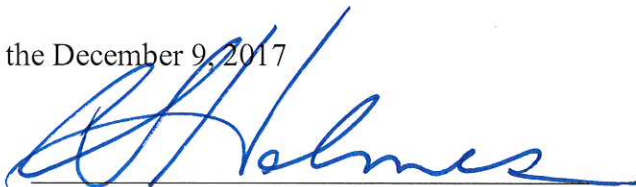
The legislature has violated the North Carolina Constitution by directing payments of fees, penalties and forfeitures toward the funding of the Courts instead of the funding of the local free schools. As a result, the statute imposing court costs has no force or effect, was void *ab initio*, and cannot be enforced. In addition, the recently enacted notice requirement to entities and agencies in the context of waiving court costs is also unconstitutional.

WHEREFORE Ms. Anderson and Mr. Herman petition this Court to:

- (1) Declare the District Court's imposition of court costs pursuant to N.C. Gen. Stat. §7A-304 unconstitutional and the recently enacted notice requirement to agencies receiving funds is also unconstitutional;
- (2) prohibit the imposition of court costs in the present case;
- (3) For any other relief that the Court deems just and in the interests of justice.

Respectfully submitted this the December 9, 2017

By:



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CERTIFICATE OF SERVICE

I hereby certify that on the date below, I served the foregoing motion and memorandum upon the State of North Carolina, Wake County District Attorney, and the Court by email. A hard copy to be filed with the Clerk of Court December 11, 2017 and served by hand delivery to the Wake County District Attorneys' Office and Wake County Judge's Chambers.

Honorable Superior Court Judge Carl R. Fox
Email: Carl.R.Fox@nccourts.org

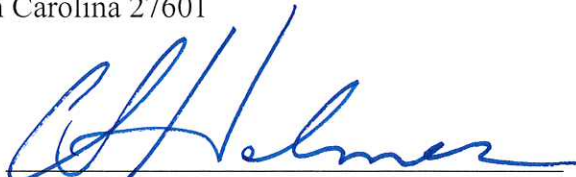
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This date December 9, 2017

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