Criminal Case Compendium
Covering Significant Cases Decided Nov. 2008 – Mar. 7, 2011
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Contents:

Criminal Procedure

Absolute Impasse

State v. Freeman, __ N.C. App. __, 690 S.E.2d 17 (Mar. 2, 2010). When the defendant and trial counsel reached an absolute impasse regarding the use of a peremptory challenge to strike a juror, the trial court committed reversible error by not requiring counsel to abide by the defendant's wishes. "It was error for the trial court to allow counsel's decision to control when an absolute impasse was reached on this tactical decision, and the matter had been brought to the trial court's attention."

Appeal

Jurisdictional Issues/Failure to Preserve Issue for Appeal

Failure to Object to/Move Strike Evidence

State v. Ray, 364 N.C. 272 (Aug. 27, 2010) (http://www.aoc.state.nc.us/www/public/sc/opinions/2010/pdf/307PA09-1.pdf). Reversing a decision of the court of appeals, __ N.C. App. __, 678 S.E.2d 378 (July 7, 2009) (ordering a new trial in a child sex case on grounds that the trial court erroneously admitted 404(b) evidence pertaining to instances of domestic violence between the defendant and his former girlfriend that occurred 15 years before the incident in question), the court held that although the defendant objected when the State forecast its evidence, by failing to object when the evidence was introduced at trial, the defendant failed to preserve the issue for appellate review.

State v. Potts, __ N.C. App. __, 702 S.E.2d 360 (Dec. 7, 2010) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMC8xMC01MTYtMS5wZGY). (1) Although the defendant made an objection the first time the evidence at issue was elicited from a witness, he failed to preserve the issue for appeal because the same evidence later was admitted without objection. (2) By

failing to object at trial, the defendant failed to preserve the issue of whether the trial court erred by admitting evidence for corroboration.

State v. Wilson, __ N.C. App. __, 700 S.E.2d 148 (Oct. 19, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/100268-1.pdf). The defendant's objection to testimony from one witness did not carry over to testimony elicited from another witness when, among other things, more than 150 pages of trial transcript separated the defendant's objection from the challenged testimony.

State v. Dye, __ N.C. App. __, 700 S.E.2d 135 (Oct. 19, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091574-1.pdf). By failing to move to strike objected-to testimony, the defendant failed to preserve for appellate review the issue whether the evidence was properly admitted.

Failure to Make an Offer of Proof

State v. Bettis, __ N.C. App. __, 698 S.E. 2d 507 (Sept. 7, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091345-1.pdf). Because he did not make an offer of proof at trial, the defendant failed to preserve for appellate review the question whether the trial court erred by excluding evidence regarding guilt of another.

Failure to Preserve Constitutional Issues

State v. Davis, 364 N.C. 297 (Aug. 27, 2010) (http://www.aoc.state.nc.us/www/public/sc/opinions/2010/pdf/320PA09-1.pdf). By failing to raise a constitutional double jeopardy argument at trial, the defendant failed to preserve the argument for appellate review.

State v. Hargrove, __ N.C. App. __, 697 S.E.2d 479 (Aug. 17, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/081538-1.pdf). By failing to object to the declaration of a mistrial in his noncapital case, the defendant failed to preserve his double jeopardy claim.

Failure to Renew Motion to Dismiss

State v. Blackmon, __ N.C. App. __, 702 S.E.2d 833 (Dec. 7, 2010) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMC8xMC00MTctMS5wZGY). Although the defendant moved to dismiss the charges at the close of the State's evidence, he failed to renew the motion at the close of all evidence and therefore waived appellate review of the trial court's denial of his motion to dismiss.

Preserving Issues Regarding Motions to Suppress

State v. Miller, __ N.C. App. __, 696 S.E.2d 542 (July 20, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/090927-1.pdf). The court held that it did not have jurisdiction to hear the defendant's appeal. Although the defendant gave notice of intent to appeal the trial court's adverse ruling on his motion to suppress, he failed to appeal from the judgment of conviction, entered after a guilty plea.

State v. Hudson, __ N.C. App. __, 696 S.E.2d 577 (Aug. 17, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091421-1.pdf). When the defendant's motion to suppress raised only lack of reasonable suspicion for the stop, the defendant failed to preserve other grounds for suppression raised on appeal.

Miscellaneous Issues

State v. Walker, __ N.C. App. __, 694 S.E.2d 484 (June 15, 2010) (online at: http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/090977-1.pdf). The court lacked jurisdiction to consider the defendant's challenge to the trial court's "recommendation" that a civil judgment be entered in the amount of the attorney's fees awarded to the defendant's prior court-appointed counsel where the record did not contain a civil judgment ordering such payment.

State v. Yonce, __ N.C. App. __, 701 S.E.2d 264 (Nov. 2, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091504-1.pdf). The court lacked jurisdiction to consider an appeal when the defendant failed to timely challenge an order revoking his probation. If a trial judge determines that a defendant has willfully violated probation, activates the defendant's suspended sentence, and then stays execution of his or her order, a final judgment has been entered, triggering the defendant's right to seek appellate review of the trial court's decision. In this case, the defendant appealed well after expiration of the fourteen-day appeal period prescribed in the appellate rules.

Errors Preserved Notwithstanding Lack of Objection

State v. Wray, __ N.C. App. __, 698 S.E.2d 137 (Aug. 17, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/090304-1.pdf). The court held that it had jurisdiction to consider the defendant's appeal of a trial court's ruling that he had forfeited his right to counsel, notwithstanding his failure to timely object to the trial court's order.

State v. Boyd, __ N.C. App. __, 701 S.E.2d 255 (Nov. 2, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/100025-1.pdf). Because no objection is required to preserve sentencing issues, the defendant's argument that the trial court improperly calculated his prior record level (by including a drug trafficking conviction) was preserved for appeal.

State v. Blount, __ N.C. App. __, 703 S.E.2d 921 (Jan. 18, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0zNTItMS5wZGY). The issue of restitution is preserved for appellate review even when there was no objection at trial.

State v. Davis, 364 N.C. 297 (Aug. 27, 2010) (http://www.aoc.state.nc.us/www/public/sc/opinions/2010/pdf/320PA09-1.pdf). Notwithstanding his failure to raise at trial a claim that under G.S. 20-141.4(b) the trial court lacked authority to impose punishment for certain motor vehicle crimes, the issue was preserved for appeal. When a trial court acts contrary to a statutory mandate and a defendant suffers prejudice, the right to appeal is preserved, notwithstanding a failure to object at trial.

Harmless Error Review

State v. Bunch, 363 N.C. 841 (Mar. 12, 2010). Applying the harmless error standard to the defendant's claim that his rights under Article I, Section 24 of the North Carolina Constitution were violated when the trial court omitted elements of a crime from its instructions to the jury. On the facts presented, any error that occurred was harmless.

Plain Error Review

State v. Waring, __ N.C. __, 701 S.E.2d 615 (Nov. 5, 2010) (http://www.aoc.state.nc.us/www/public/sc/opinions/2010/pdf/525A07-1.pdf). (1) A capital defendant unsuccessfully moved pretrial for suppression of certain statements that he made to the police. Because the defendant failed to object to the admission of those statements at trial, plain error review applied. (2) The court rejected a capital defendant's argument that the trial court committed plain error by failing to instruct the jury that the same evidence could not be used to support more than one aggravating circumstance. Because the trial court was under no duty to give such an instruction in the absence of a request, plain error review was not available to defendant.

State v. Ross, __ N.C. App. __, 700 S.E.2d 412 (Oct. 19, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091021-1.pdf). Plain error analysis did not apply to the trial court's comments following the jury's indications that it had reached a deadlock. The trial court's comments were discretionary rulings and not jury instructions.

Notice of Appeal

State v. Clayton, __ N.C. App. __, 697 S.E.2d 428 (Aug. 3, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/090987-1.pdf). Following *State v. Brooks*, ___ N.C. App. ___, ___, 693 S.E.2d 204 (2010), and holding that oral notice pursuant to N.C.R. APP. P. 4(a)(1) is insufficient to confer appellate jurisdiction for a defendant's appeal from a trial court order requiring enrollment in satellite-based monitoring (SBM); instead a defendant must give notice of appeal pursuant to N.C.R. APP. P. 3(a), as is proper in a civil action or special proceeding. Although the provisions of Rule 3 are jurisdictional and the defendant failed to comply with the rule, the court treated the defendant's brief as a petition for writ of certiorari and granted the petition to address the merits of his appeal. For similar rulings, see *State v. Oxendine*, __ N.C. App. __, 696 S.E.2d 850 (Aug. 3, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/090858-1.pdf) (citing *Brooks* and concluding that the defendant's oral notice of appeal was insufficient to confer jurisdiction over an appeal from a trial court ruling ordering SBM enrollment; however, the court ex mero motu treated the defendant's brief as a petition for certiorari and granted the petition to address the merits of the appeal); *State v. Williams*, __ N.C. App. __, 700 S.E.2d 774 (Oct. 19, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/100347-1.pdf) (although the defendant's oral notice of appeal of the trial court's ruling that he enroll in lifetime SBM was insufficient, the court granted his petition for certiorari and addressed the merits of his appeal).

State v. Inman, __ N.C. App. __, 696 S.E.2d 567 (Aug. 3, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091151-1.pdf). Over a dissent, the court followed *Brooks* and held that because there was no written notice of appeal, it lacked jurisdiction to consider the defendant's appeal from a trial court order requiring SBM enrollment. The court declined to treat the defendant's appeal as a petition for writ of certiorari. The dissenting opinion would have treated the defendant's appeal as a writ of certiorari and affirmed the trial court's order.

Record on Appeal

In Re R.N., __ N.C. App. __, 696 S.E.2d 898 (Aug. 17, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091406-1.pdf). In an appeal from a delinquency adjudication based on a charge of crime against nature, the court held that defects in the transcript made review impossible and remanded for reconstruction of the record. One count alleged that the juvenile put his penis in the victim's mouth. At trial, when a social worker was asked whether there was penetration, she responded: "[the victim] told me there was *(Indistinct Muttering)* penetration." The court concluded that because it could not determine from this testimony whether penetration occurred, it could not meaningfully review the sufficiency of the evidence. The court vacated the delinquency adjudication and remanded for reconstruction of a record regarding the social worker's testimony.

Certiorari

State v. Blount, __ N.C. App. __, 703 S.E.2d 921 (Jan. 18, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0zNTItMS5wZGY). A defendant seeking review of a trial court's compliance with G.S. 15A-1024 (withdrawal of guilty plea when sentence not in accord with plea arrangement) must obtain grant of a writ of certiorari; a challenge to the procedures for taking a plea does not come within the scope of G.S. 15A-1444, which specifies the grounds for appeals as of right.

Bond Forfeiture

State v. Largent, 197 N.C. App. 614 (June 16, 2009). The trial court properly denied the surety's motion to set aside a bond forfeiture under G.S. 15A-544.5(b)(7) (defendant incarcerated at the time of the failure to appear). The statute refers to a one continuous period of incarceration beginning at the time of the failure to appear and ending no earlier than 10 days after the date that the district attorney is notified of the incarceration. In this case, the period of incarceration was not continuous.

State v. Dunn, __ N.C. App. __, 685 S.E.2d 526 (Nov. 3, 2009). A probation violation was a separate case from the original criminal charges for purposes of G.S. 15A-544.6(f) (providing that no more than two forfeitures may be set aside in any case).

Competency to Stand Trial

State v. Whitted, __ N.C. App. __, __ S.E.2d __ (Feb. 15, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC03MzktMS5wZGY). The trial court erred by failing to sua sponte inquire into the defendant's competency. In light of the defendant's history of mental illness, including paranoid schizophrenia and bipolar disorder, her remarks that her appointed counsel was working for the State and that the trial court wanted her to plead guilty, coupled with her irrational behavior in the courtroom, constituted substantial evidence and created a bona fide doubt as to competency. The court rejected the State's argument that the trial court did in fact inquire into competency when, after defense counsel mentioned that she had recently undergone surgery and was taking pain medication, the trial court asked the defendant and counsel whether the medication was impairing her ability to understand the proceedings or her decision to reject the plea bargain offered by the State. Both replied in the negative. The trial court also asked the defendant about her ability to read and write and whether she understood the charges against her. However, this inquiry pertained only to effects of the pain medication. More importantly, it was not timely given that the defendant's refusal to

return to the courtroom and resulting outbursts occurred two days later. The court remanded for a determination of whether a meaningful retrospective competency hearing could be held.

Counsel Issues

Conflict of Interest

State v. Choudhry, __ N.C. App. __, 697 S.E.2d 504 (Aug. 17, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/090773-1.pdf). Over a dissent, the court held that the trial court did not err by failing to conduct an evidentiary hearing concerning defense counsel's possible conflict of interest due to prior representation, in unrelated matters, of a person who appeared in a crime scene videotape. When the prosecutor brought the matter to the trial court's attention, the trial court conducted a hearing and fully advised the defendant of the facts underlying the potential conflict and gave him the opportunity to express his views. In light of this, the court held that the defendant waived any possible conflict of interest. The dissenting judge believed that the trial court's inquiry did not fully inform the defendant of the potential conflict of interest and that the defendant's waiver was not knowing, intelligent, and voluntary.

Competency of Defendant to Waive Right to Counsel

State v. Lane, 362 N.C. 667 (Dec. 12, 2008). Remanding for consideration under *Indiana v. Edwards*, 128 S. Ct. 2379 (2008), as to whether the trial judge should have exercised discretion to deny the defendant's request to represent himself. *Edwards* held that states may require counsel to represent defendants who are competent to stand trial but who suffer from severe mental illness to the extent that they are not competent to represent themselves at trial.

State v. Reid, __ N.C. App. __, 693 S.E.2d 227 (May 18, 2010). The trial court did not err in allowing the defendant to represent himself after complying with the requirements of G.S. 15A-1242. The court rejected the defendant's argument that his conduct during a pre-trial hearing and at trial indicated that he was mentally ill and not able to represent himself, concluding that the defendant's conduct did not reflect mental illness, delusional thinking, or a lack of capacity to carry out self-representation under *Indiana v. Edwards*, 128 S. Ct. 2379 (2008).

Waiver of Right to Counsel

State v. Paterson, __ N.C. App. __, 703 S.E.2d 755 (Dec. 21, 2010) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMC8xMC00NDYtMS5wZGY). (1) The defendant's waiver of counsel was sufficient even though a box on the waiver form was left blank and the form was executed before the court advised the defendant of the charges and the range of punishment. Citing *State v. Heatwole*, 344 N.C. 1, 18 (1996), and *State v. Fulp*, 355 N.C. 171, 177 (2002), the court first concluded that a waiver of counsel form is not required and any deficiency in the form will not render the waiver invalid, if the waiver was knowing, intelligent, and voluntary. Next, the court concluded that the waiver was not invalid because the trial court failed to go over the charges and potential punishments prior to the defendant signing the waiver form. The trial court discussed the charges and potential punishments with the defendant the following day, and defendant confirmed his desire to represent himself in open court. Although the waiver form requires the trial judge to certify that he or she informed the defendant of the charges and punishments, given that the form is not mandatory, no prejudice occurs when the trial court does, in fact, provide that information in accordance with the statute and the defendant subsequently asserts the right to proceed pro se. (2) The trial court conducted an

adequate inquiry under G.S. 15A-1242. The court noted that there is no mandatory formula for complying with the statute. Here, the trial judge explicitly informed the defendant of his right to counsel and the process to secure a court-appointed attorney; the defendant acknowledged that he understood his rights after being repeatedly asked whether he understood them and whether he was sure that he wanted to waive counsel; the judge informed him of the charges and potential punishments; and the judge explained that he would be treated the same at trial regardless of whether he had an attorney. The trial court's colloquies at the calendar call and before trial, coupled with the defendant's repeated assertion that he wished to represent himself, demonstrate that the defendant clearly and unequivocally expressed his desire to proceed *pro se* and that such expression was made knowingly, intelligently, and voluntarily.

State v. McLeod, __ N.C. App. __, 682 S.E.2d 396 (July 7, 2009). Trial court erred by allowing the defendant to dismiss counsel and proceed pro se mid-trial without making the inquiry required by G.S. 15A-1242.

State v. Wheeler, __ N.C. App. __, 688 S.E.2d 51 (Jan. 19, 2010). The trial court's action denying the defendant's mid-trial request to discharge counsel and proceed pro se was not an abuse of discretion and did not infringe on the defendant's right to self-representation. Prior to trial, the defendant waived his right to counsel and standby counsel was appointed. Thereafter, he informed the trial court that he wished standby counsel to select the jury. The trial court allowed the defendant's request, informing the defendant that he would not be permitted to discharge counsel again. The defendant accepted the trial court's conditions and stated that he wished to proceed with counsel. After the jury had been selected and the trial had begun, the defendant once again attempted to discharge counsel. The trial court denied the defendant's request, noting that the defendant already had discharged four or five lawyers and had been uncooperative with appointed counsel.

In Re Watson, __ N.C. App. __, __ S.E.2d __ (Feb. 15, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0zNjUtMS5wZGY). (1) Because the trial court failed to comply with the statutory mandates of G.S. 15A-1242, 122C-268(d), and IDS Rule 1.6, the respondent's waiver of counsel in his involuntary commitment hearing was ineffective. The court adopted language from *State v. Moore*, 362 N.C. 319, 327-28 (2008), endorsing a fourteen-question checklist for taking a waiver of counsel. [Author's note: this same checklist appears in the Superior Court Judges On-Line Bench Book (The "Survival Guide") at: http://www.sog.unc.edu/faculty/smithjess/documents/CounselIssues.pdf]. The court also noted with approval language from an Arizona case suggesting the proper inquiry in involuntary commitment cases. (2) The fact that the respondent had standby counsel did not cure the improper waiver of counsel.

Forfeiture of the Right to Counsel

State v. Wray, __ N.C. App. __, 698 S.E.2d 137 (Aug. 17, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/090304-1.pdf). The trial court erred by ruling that the defendant forfeited his right to counsel. The defendant's first lawyer was allowed to withdraw because of a breakdown in the attorney-client relationship. His second lawyer withdrew on grounds of conflict of interest. The defendant's third lawyer was allowed to withdraw after the defendant complained that counsel had not promptly visited him and had "talked hateful" to his wife and after counsel reported that the defendant accused him of conspiring with the prosecutor and contradicted everything the lawyer said. The trial court appointed Mr. Ditz and warned the defendant that failure to cooperate with Ditz would result in a forfeiture of the right to counsel. After the defendant indicated that

he did not want to be represented by Ditz, the trial court explained that the defendant either could accept representation by Ditz or proceed pro se. The defendant rejected these choices and asked for new counsel. When Ditz subsequently moved to withdraw, the trial court allowed the motion and found that the defendant had forfeited his right to counsel. On appeal, the court recognized "a presumption against the casual forfeiture" of constitutional rights and noted that forfeiture should be restricted cases of "severe misconduct." The court held that the record did not support the trial court's finding of forfeiture because: (1) it suggested that while the defendant was competent to be tried, under *Indiana v. Edwards,* 554 U.S. 164 (2008), he may have lacked the capacity to represent himself; (2) Ditz had represented the defendant in prior cases without problem; (3) the record did not establish serious misconduct required to support a forfeiture (the court noted that there was no evidence that the defendant used profanity in court, threatened counsel or court personnel, was abusive, or was otherwise inappropriate); (4) evidence of the defendant's misbehavior created doubt as to his competence; and (5) the defendant was given no opportunity to be heard or participate in the forfeiture hearing.

State v. Boyd, __ N.C. App. __, 697 S.E.2d 392 (July 20, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/100051-1.pdf). Defendant's forfeiture of his right to counsel did not carry over to his resentencing, held after a successful appeal. To determine the life of a forfeiture of counsel the court adopted the standard for life of a waiver of counsel (a waiver is good and sufficient until the proceedings are terminated or the defendant makes it known that he or she desires to withdraw the waiver). Applying this standard, the court found that "a break in the period of forfeiture occurred" when the defendant accepted the appointment of counsel (the Appellate Defender) for the appeal of his initial conviction. The court noted in dicta that the defendant's statement at resentencing that he did not want to be represented and his refusal to sign a written waiver did not constitute a new forfeiture. Because the initial forfeiture did not carry through to the resentencing and because the trial judge did not procure a waiver of counsel under G.S. 15A-1242 at the resentencing, the defendant's right to counsel was violated.

State v. Boyd, __ N.C. App. __, 682 S.E.2d 463 (Sept. 15, 2009). Holding that the defendant willfully obstructed and delayed court proceedings by refusing to cooperate with his appointed attorneys and insisting that his case would not be tried; he thus forfeited his right to counsel. The defendant's lack of cooperation lead to the withdrawal of both of his court-appointed attorneys. His original appointed counsel was allowed to withdraw over disagreements with the defendant including counsel's refusal to file a motion for recusal of the trial judge on grounds that various judges were in collusion to fix the trial. In his first motion to withdraw, the defendant's next lawyer stated that the defendant did not want him as counsel and that he could not effectively communicate with the defendant. In his second motion to withdraw, counsel stated that the defendant had been "totally uncooperative" such that counsel "was unable to prepare any type of defense to the charges." Further, the defendant repeatedly told counsel that his case was not going to be tried.

Hybrid Representation

State v. Williams, 363 N.C. 689 (Dec. 11, 2009). The trial court did not err by failing to rule on the defendant's pro se motions, made when the defendant was represented by counsel.

Representation by Non-Lawyer

State v. Sullivan, __ N.C. App. __, 687 S.E.2d 504 (Dec. 22, 2009). A defendant does not have a right to be represented by someone who is not a lawyer.

Removal of Counsel

State v. Williams, 363 N.C. 689 (Dec. 11, 2009). In a capital case, the trial court did not err by removing second-chair counsel, who was re-appointed by Indigent Defense Services, after having been allowed to withdraw by the trial court. Nor did the trial court err by failing to ex mero motu conduct a hearing on an unspecified conflict of interest between the defendant and counsel that was never raised by the defendant.

Substitute Counsel

State v. Covington, __ N.C. App. __, 696 S.E.2d 183 (July 6, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091291-1.pdf). The trial court did not abuse its discretion by denying the defendant's request for substitute counsel where there was no evidence that the defendant's constitutional right to counsel was violated. The defendant waived the right to appointed counsel and retained an attorney. The day after the jury was impaneled for trial the defendant requested substitute counsel, asserting that counsel had not communicated enough with him, that the defendant was unaware the case would be tried that day, and that he had concerns about counsel's strategy, particularly counsel's advice that the defendant not testify. None of these concerns constituted a violation of the defendant's constitutional right to counsel.

Corpus Delecti Rule

State v. Smith, 362 N.C. 583 (Dec. 12, 2008). Under the corpus delecti rule, there was insufficient evidence independent of the defendant's extrajudicial confession to sustain a conviction for first-degree sexual offense; however, there was sufficient evidence to support an indecent liberties conviction. Note: under the rule, the state may not rely solely on the extrajudicial confession of a defendant, but must produce substantial independent corroborative evidence that supports the facts underlying the confession.

State v. Blue, __ N.C. App. __, 699 S.E.2d 661 (Oct. 5, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091717-1.pdf). Applying the corpus delicti rule (State may not rely solely on the extrajudicial confession of a defendant, but must produce substantial independent corroborative evidence) the court held that the State produced substantial independent corroborative evidence to show that a robbery and rape occurred. As to the robbery, aspects of the defendant's confession were corroborated with physical evidence found at the scene (weapons, etc.) and by the medical examiner's opinion testimony (regarding cause of death and strangulation). As to the rape, the victim's body was partially nude, an autopsy revealed injury to her vagina, rape kit samples showed spermatozoa, and a forensic analysis showed that defendant could not be excluded as a contributor of the weaker DNA profile.

Discovery and Related Issues

State v. Wright, __ N.C. App. __, __ S.E.2d __ (Mar. 1, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC04NTQtMS5wZGY). The defendant was not entitled to a new trial on grounds that the SBI Crime Lab refused to test four hair and fiber lifts taken from an item of clothing. The defendant did not argue that the prosecutor failed to make the lifts available to him for testing. In fact, one of the defendant's previous attorneys made a motion for independent testing of the clothing item and received the results of the testing. Because police do not have a constitutional duty to perform particular tests on crime scene evidence, no error occurred.

State v. Ellis, __ N.C. App. __, 696 S.E.2d 536 (July 20, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/090869-1.pdf). The trial court did not abuse its discretion by denying the defendant's motion to continue because of the State's alleged discovery violation. Although the State provided the defendant with a copy the robbery victim's pre-trial written statement and a composite sketch of the perpetrator based on the victim's description, the defendant argued that the State violated its continuing duty to disclose by failing to inform the defense of the victim's statement, made on the morning of trial, that she recognized the defendant as the robber when he entered in the courtroom. After the victim identified the defendant as the perpetrator, the defense moved to continue to obtain an eyewitness identification expert. Finding no abuse of discretion, the court relied, in part, on the timing of the events and that the defendant could have anticipated that the victim would be able to identify the defendant.

State v. Williams, 362 N.C. 628 (Dec. 12, 2008). The trial judge properly dismissed a charge of felony assault on a government officer under G.S. 15A-954(a)(4) where the defendant established that the state flagrantly violated his constitutional rights and irreparably prejudiced preparation of the defense. The state willfully destroyed material evidence favorable to the defense. The destroyed evidence consisted of two photographs of the defendant that were displayed in the prosecutor's office, one taken of the defendant before the events in question, another taken after the events in question. The defendant was uninjured in the first photograph, which was captioned "Before he sued the D.A.'s office;" the defendant was injured in the second photograph, which was "After he sued the D.A.'s office."

Cone v. Bell, 129 S. Ct. 1769 (April 28, 2009). Although exculpatory evidence suppressed by the state was immaterial to the jury's finding of guilt, it might have affected the jury's decision to recommend a death sentence. The defendant offered an insanity defense based on his habitual use of an excessive amount of drugs and their affect on his behavior during the commission of the offenses. After the defendant was convicted and sentenced to death, it was discovered that the state had suppressed exculpatory evidence concerning the defendant's drug use The Court remanded to the federal habeas trial court for a full review of the suppressed evidence and its effect on sentencing.

Van de Kamp v. Goldstein, 129 S. Ct. 855 (Jan. 26, 2009). Supervisory prosecutors were entitled to absolute immunity in connection with the plaintiff's claims that prosecutors failed to disclose impeachment material due to the failure to train prosecutors, failure to supervise prosecutors, or failure to establish an information system in the district attorney's office containing potential impeachment material about informants. The plaintiff, whose murder conviction was later reversed, had sued prosecutors under § 1983 for the alleged suppression of potential impeachment information that could have been used against a state's witness in the defendant's murder trial. The conviction was allegedly based in critical part on the testimony of this witness, who was a jailhouse informant and had previously received reduced sentences for providing prosecutors with favorable testimony in other cases.

State v. Rainey, 198 N.C. App. 427 (Aug. 4, 2009). A witness testified at trial that the defendant made the following statement about the victim during the robbery: "I hope this spic is dead." The court rejected the defendant's argument that the evidence should have been excluded because of a discovery violation. The State provided information prior to trial that the witness had stated that "they hated Mexicans" and there was no unfair surprise.

State v. Remley, __ N.C. App. __, 686 S.E.2d 160 (Nov. 17, 2009). The trial court did not abuse its discretion by granting a recess instead of dismissing the charges or barring admission of the defendant's

statement to the police, when that statement was not provided to the defense until the second day of trial in violation of the criminal discovery rules. When making its ruling, the trial court said that it would "consider anything else that may be requested," short of dismissal or exclusion of the evidence, but the defense did not request other sanctions or remedies.

State v. Flint, __ N.C. App. __, 682 S.E.2d 443 (Sept. 15, 2009). The trial court did not abuse its discretion in denying the defendant's motion to continue alleging that the defendant did not receive discovery at a reasonable time prior to trial where the defendant never made a motion for discovery and there was no written discovery agreement and thus the State was not required to provide discovery pursuant to G.S. 15A-903(a)(1). The trial court did not abuse its discretion in allowing a witness named Karen Holman to testify when her name allegedly was listed on the State's witness list as Karen Holbrook where the defendant never made a motion for discovery and there was no written discovery agreement, even if such a motion had been made, the trial judge had discretion under the statute to permit any undisclosed witness to testify, and the witness's testimony served only to authenticate a videotape.

State v. Graham, __ N.C. App. __, 683 S.E.2d 437 (Oct. 6, 2009). The trial court did not abuse its discretion by denying the defendant's motion to bar the State from introducing forensic evidence related to his vehicle where the police impounded his vehicle during the investigation, but subsequently lost it. The State's evidence suggested that soil from the defendant's car matched soil where the victims were found. The State preserved the soil samples, the defendant had access to them and presented expert testimony
that the soil was not a unique match, the defense informed the jury that the police lost the vehicle, and there was no evidence of bad faith by the police.

State v. Small, __ N.C. App. __, 689 S.E.2d 444 (Dec. 8, 2009). The trial court did not err by denying the defendant's motion to dismiss the charges and her motion in limine, both of which asserted that the State violated the discovery rules by failing to provide her with the victim's pretrial statement to the prosecutor. The victim made a statement to the police at the time of the crime. In a later statement to the prosecutor, the victim recounted the same details regarding the crime but said that he did not remember speaking to the police at the crime scene. The victim's account of the incident, including his identification of the defendant as the perpetrator, remained consistent. Even though the victim told the prosecutor that he did not remember making a statement to the police at the scene, this was not significantly new or different information triggering a duty on the part of the State to disclose the statement.

Double Jeopardy

Bobby v. Bies, 129 S. Ct. 2145 (June 1, 2009). Nearly ten years before the U.S. Supreme Court's decision in *Atkins v. Virginia,* 536 U.S. 304 (2002) (Eighth Amendment bars execution of mentally retarded defendants), the defendant was tried for murder and other crimes. The defendant was found guilty and, after being instructed to weigh mitigating circumstances (including evidence of the defendant's borderline mental retardation) against aggravating circumstances, the jury recommended a sentence of death. On direct review, the state supreme court noted that the defendant's mild to borderline mental retardation deserved some weight in mitigation but affirmed the conviction. However, on federal habeas, the Sixth Circuit upheld a lower court order vacating the death sentence, concluding that double jeopardy precluded an *Atkins* hearing on the defendant's mental retardation. The U.S. Supreme Court reversed, holding that double jeopardy did not preclude an *Atkins* hearing on mental retardation.

Yeager v. United States, 129 S. Ct. 2360 (June 18, 2009). An apparent inconsistency between a jury's

verdict of acquittal on some counts and its failure to return a verdict on other counts does not affect the preclusive force of the acquittals under the double jeopardy clause. In this case, the defendant was charged with both fraud and insider trading. The charges were related in that the fraud counts involved a determination of whether the defendant possessed insider information. The jury acquitted on the fraud counts but hung on the insider trading counts. After the trial court declared a mistrial on the insider trading counts, the government obtained a new indictment on some of those counts. The Court reasoned that the Double Jeopardy Clause precludes the government from relitigating any issue that was necessarily decided by a jury's acquittal in a prior proceeding. The fact of the apparent inconsistency in the jury's verdict was immaterial because hung counts are not relevant to the issue preclusion analysis. If, in acquitting on the fraud counts, the jury concluded that the defendant did not possess insider information, the government would be barred from prosecuting the defendant again for insider information.

Renico v. Lett, 130 S. Ct. 1855 (May 3, 2010). The Michigan Supreme Court's decision concluding that the defendant's double jeopardy rights were not violated by a second prosecution after a mistrial on grounds of jury deadlock was not an unreasonable application of federal law. The state high court had elaborated on the standard for manifest necessity and noted the broad deference to be given to trial court judges; it had found no abuse of discretion in light of the length of the deliberations after a short and uncomplicated trial, a jury note suggesting heated discussion, and the foreperson's statement that the jury would be unable to reach a verdict. In light of these circumstances, it was reasonable for that court to determine that the trial judge had exercised sound discretion.

State v. Rahaman, __ N.C. App. __, 688 S.E.2d 58 (Jan. 19, 2010). The trial court did not err by denying the defendant's pre-trial motion to dismiss a charge of felonious possession of stolen property on double jeopardy grounds. Although the defendant was indicted for felony possession of stolen property (a Toyota truck) under G.S. 14-71.1, at the first trial, the jury was instructed on felony possession of a stolen motor vehicle under G.S. 20-106. The defendant was found guilty and he successfully appealed on grounds that the trial judge erred by instructing the jury on an offense not charged in the indictment. When the defendant was retried for felony possession of stolen property, he moved to dismiss on double jeopardy grounds, arguing that by failing to instruct on felony possession of stolen property, the trial court effectively dismissed that charge and that dismissal constituted an acquittal. Relying on prior case law, the court agreed that the trial court effectively dismissed the crime of possession of stolen property. However, the court went on to hold that this effective dismissal did not amount to an acquittal for double jeopardy purposes because it was not a dismissal for insufficient evidence.

State v. Hargrove, __ N.C. App. __, 697 S.E.2d 479 (Aug. 17, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/081538-1.pdf). Because the defendant failed to object to the declaration of a mistrial in his noncapital case, he failed to preserve his double jeopardy claim.

DWI Procedure

Pretrial Detention

State v. Daniel, __ N.C. App. __, 702 S.E.2d 306 (Dec. 7, 2010) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMC8wOS0xMjY0LTEucGRm). Over a dissent, the court held that the trial court did not err by denying the defendant's *Knoll* motion in an impaired driving case in which the defendant was detained for almost 24 hours. The court upheld the trial court's finding that an individual who appeared to take responsibility for the defendant was not a sober

responsible adult; a police officer smelled alcohol on the individual's breath and the individual indicated that he had been drinking. The only statutory violation alleged was a failure to release to a sober, responsible adult, but the individual who appeared was not a sober, responsible adult. The trial court's conclusions that no violation occurred or alternatively that the defendant failed to show irreparable prejudice was supported by the evidence. The defendant was advised that she could request an attorney or other witness to observe her Intoxilyzer test but she declined to request a witness. Also, the individual who appeared was allowed to see the defendant within 25 minutes of her exiting the magistrate's office, to meet personally with the defendant, and to talk with and observe the defendant for approximately eight minutes.

Motions Practice

State v. Fowler, 197 N.C. App. 1 (May 19, 2009). A defendant, charged with DWI, made a pretrial motion in district court under G.S. 20-38.6(a) alleging that there was no probable cause for his arrest. The district court entered a preliminary finding granting the motion under G.S. 20-38.6(f) and ordering dismissal of the charge. When the state appealed to superior court under G.S. 20-38.7(a), that court found that the district court's conclusions of law granting the motion to dismiss were based on findings of fact cited in its order. It also concluded that G.S. 20-38.6 and 20-38.7, which allow the state to appeal pretrial motions from district to superior court for DWI cases, violated various constitutional provisions. The superior court remanded to district court for the entry of an order consistent with the superior court's findings. The state gave notice of appeal and filed a petition for a writ of certiorari to the North Carolina Court of Appeals. (1) The court ruled that the state did not have a right to appeal the superior court's order to the court of appeals. The order was interlocutory and did not grant the defendant's motion to dismiss. However, it granted the state's petition for certiorari to review the issues. (2) The court rejected the defendant's constitutional and other challenges to G.S. 20-38.6(a) (requires defendant to submit motion to suppress or dismiss pretrial), 20-38.6(f) (requires district court to enter written findings of fact and conclusions of law concerning defendant's pretrial motion and prohibits court from entering final judgment granting the defendant's pretrial motion until after state has opportunity to appeal to superior court), and 20-38.7(a) (allows state to appeal to superior court district court's preliminary finding indicating it would grant defendant's pretrial motion). (3) The court stated that the legislature's intent was to grant the state a right to appeal to superior court only from a district court's preliminary determination indicating that it would grant a defendant's *pretrial* motion to suppress evidence or dismiss DWI charges which (i) is made and decided before jeopardy has attached (before the first witness is sworn for trial), and (ii) is entirely unrelated to the sufficiency of evidence concerning an element of the offense or the defendant's guilt or innocence. The court opined that the legislature intended pretrial motions to suppress evidence or dismiss charges under G.S. 20-38.6(a) to address only procedural matters including, but not limited to, delays in the processing of a defendant, limitations on a defendant's access to witnesses, and challenges to chemical test results. Separately, the court noted that G.S. 20-38.7(a) does not specify a time by which the state must appeal the district court's preliminary finding to grant a motion to suppress or to dismiss. The court indicated that an appeal must be taken and perfected within a reasonable time, which depends on the circumstances of the case. (4) Based on the record, the court inferred that the district court not only considered whether the officer had probable cause to arrest the defendant but also preliminarily determined whether there was insufficient evidence for the state to proceed against the defendant for DWI (the court noted that a motion to dismiss for insufficiency of evidence cannot be made pretrial). Because there was no indication that the state had an opportunity to present its evidence, the superior court erred when it concluded that it appeared that the district court's conclusions of law granting the motion to dismiss were based on findings of fact cited in the district court's order. Accordingly, the court remanded to superior court with instructions to remand to district court for a final order granting the defendant's

motion to suppress evidence of his arrest for lack of probable cause. Only after the state has had an opportunity to establish a prima facie case may a motion to dismiss for insufficient evidence be made by the defendant and considered by the trial court, unless the state elects to dismiss the DWI charge. When the district court enters its final order on remand granting the defendant's pretrial motion to suppress, the state will have no further right to appeal from that order.

State v. Palmer, 197 N.C. App. 201 (May 19, 2009). The state's notice of appeal to superior court of the district court's preliminary notice of its intention to grant the defendant's motion to suppress in a DWI case was properly perfected. The court cited *Fowler* (discussed above), and noted that the procedures in G.S. 15A-1432(b) are a guide but not binding; an appeal must be taken and perfected within a reasonable time, which depends on the circumstances of each case.

State v. Mangino, __ N.C. App. __, 683 S.E.2d 779 (Oct. 20, 2009). Following *Fowler*, discussed above, and holding that G.S. 20-38.6(f) does not violate the defendant's substantive due process, procedural due process or equal protection rights. Also finding no violation of the constitutional provision on separation of powers.

State v. Rackley, __ N.C. App. __, 684 S.E.2d 475 (Oct. 20, 2009). Following *Fowler*, discussed above, and dismissing as interlocutory the State's appeal from a decision by the superior court indicating its agreement with the district court's pretrial indication pursuant to G.S. 20-38.6(f).

Intoxilyzer Results

State v. Shockley, __ N.C. App. __, 689 S.E.2d 455 (Aug. 8, 2009). Following *State v. White*, 84 N.C. App. 11 (1987), and holding that under the pre-December 1, 2006 version of G.S. 20-139.1(b3), the trial court did not err by admitting evidence of the lesser of the defendant's sequential, consecutive Intoxilyzer results, even though the defendant provided an invalid sample between the two tested samples.

Willful Refusal

Steinkrause v. Tatum, __ N.C. App. __, 689 S.E.2d 379 (Dec. 8, 2009), *aff'd,* 364 N.C. 419 (Oct. 8, 2010). On the facts, the trial judge did not err in concluding that the petitioner willfully refused to submit to a breath test.

Revocation

Lee v. Gore, __ N.C. App. __, 698 S.E.2d 179 (Aug. 17, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/090370-2.pdf). After a rehearing, the court issued a new opinion, over a dissent, superseding and replacing its prior opinion. *See* Lee v. Gore, __ N.C. App. __, 688 S.E.2d 374 (Jan. 19, 2010). The court rejected the DMV's implicit argument that a suspension of driving privileges can occur based on a refusal to submit to chemical analysis in the absence of willfulness. As in its prior decision, the court held that form DHHS 3908 is not a substitute for a properly executed affidavit required by G.S. 20-16.2(c1). The court noted that form DHHS 3908 or other relevant documents may be attached to a properly executed affidavit but held "that the affidavit, in whatever form submitted, must indicate that a person's refusal to submit to chemical analysis was willful." Because the officer here testified that he did not check the box indicating that there was a willful refusal before executing the affidavit, the requirements of G.S. 20-16.2(c1) were not satisfied. Construing G.S. 20-16.2, the court held that before the DMV can revoke a person's driving privileges, it must receive

a properly executed affidavit that meets all of the requirements in G.S. 20-16.2(c1). Given this, the DMV had no authority to revoke the Petitioner's license and there was no authority for a DMV review hearing or appellate review in the superior court. The court remanded for reinstatement of the Petitioner's driving privileges. For a more detailed discussion of this case, see the blog post here.

Hartman v. Robertson, __ N.C. App. __, 703 S.E.2d 811 (Dec. 21, 2010) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMC8xMC02MzYtMS5wZGY). (1) In an appeal of a driver's license revocation under G.S. 20-16.2(e), the court declined to consider the defendant's argument that the officer lacked reasonable and articulable suspicion to stop his vehicle. Reasonable and articulable suspicion for the stop is not relevant to determinations in connection with a license revocation; the only inquiry with respect to the officer, the court explained, is that he or she have reasonable grounds to believe that the person has committed an implied consent offense. Here, the evidence supported that conclusion. (2) The exclusionary rule does not apply in a civil license revocation proceeding.

Extending the Session

State v. Hunt, 198 N.C. App. 488 (Aug. 4, 2009). Although the trial judge did not enter a formal order extending the session, the judgment was not null and void. The trial judge repeatedly announced that it was recessing court and the defendant made no objection at the time. On these facts there was sufficient compliance with G.S. 15-167.

Habitual Felon

See "Habitual Felon" under "Criminal Procedure," "Indictment Issues," "Specific Offenses" for cases pertaining to indictment issues.

State v. Eaton, __ N.C. App. __, __ S.E.2d __ (Mar. 1, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8wOS0xNTg2LTEucGRm). A defendant may be sentenced as a habitual felon for an underlying felony of drug trafficking.

State v. Lackey, __ N.C. App. __, 693 S.E.2d 218 (May 18, 2010). Rejecting the defendant's argument that his sentence of 84-110 months in prison for possession of cocaine as a habitual felon constituted cruel and unusual punishment.

State v. Flint, __ N.C. App. __, 682 S.E.2d 443 (Sept. 15, 2009). Although a habitual felon indictment may be returned before, after, or simultaneously with a substantive felony indictment, it is improper where it is issued before the substantive felony even occurred.

State v. Haymond, __ N.C. App. __, 691 S.E.2d 108 (April 6, 2010). Trial judge could have could have consolidated into a single judgment multiple offenses, all of which were elevated to a Class C because of habitual felon status.

Inconsistent and Mutually Exclusive Offenses

State v. Mumford , 364 N.C. 394 (Oct. 8, 2010) (http://www.aoc.state.nc.us/www/public/sc/opinions/2010/pdf/32PA10-1.pdf). The court reversed *State v. Mumford,* __ N.C. App. __, 688 S.E.2d 458 (Jan. 5, 2010), and held that because a not guilty verdict under G.S. 20-138.1 (impaired driving) and a guilty verdict under G.S. 20-141.4(a3) (felony serious

injury by vehicle) were merely inconsistent, the trial court did not err by accepting the verdict where it was supported with sufficient evidence. To require reversal, the verdicts would have to be both inconsistent and legally contradictory, also referred to as mutually exclusive verdicts (for example, guilty verdicts of embezzlement and obtaining property by false pretenses; the verdicts are mutually exclusive because property cannot be obtained simultaneously pursuant to both lawful and unlawful means). The court overruled *State v. Perry*, 305 N.C. 225 (1982) (affirming a decision to vacate a sentence for felonious larceny when the jury returned a guilty verdict for felonious larceny but a not guilty verdict of breaking or entering), and *State v. Holloway*, 265 N.C. 581 (1965) (per curiam) (ordering a new trial when the defendant was found guilty of felonious larceny, but was acquitted of breaking or entering and no evidence was presented at trial to prove the value of the stolen goods), to the extent they were inconsistent with its holding.

State v. Melvin, __ N.C. __, __ S.E.2d __ (Dec. 20, 2010) (http://appellate.nccourts.org/opinions/?c=1&pdf=MjAxMC8zODJQQTA5LTEucGRm). Reversing the court of appeals in ___ N.C. App. ___, 682 S.E.2d 238 (2009) (the trial court committed plain error by failing to instruct the jury that it could convict the defendant of either first-degree murder or accessory after the fact to murder, but not both), the court held that although the trial court erred by failing to give the instruction at issue, no plain error occurred. Citing its recent decision in *State v. Mumford*, 364 N.C. 394, 398-402 (2010), the court held that because guilty verdicts of first-degree murder and accessory after the fact to that murder would be legally inconsistent and contradictory, a defendant may not be punished for both. The court went on to explain that mutually exclusive offenses may be joined for trial; if substantial evidence supports each offense, both should be submitted to the jury with an instruction that the defendant only may be convicted of one of the offenses, but not both. Having found error, the court went on to conclude that no plain error occurred in light of the overwhelming evidence of guilt, the fact that the jury found the defendant guilty of both offenses, suggesting that it would have convicted him of the more serious offense, had it been required to choose between charges, and that the trial judge arrested judgment on the accessory after the fact conviction.

State v. Blackmon, __ N.C. App. __, 702 S.E.2d 833 (Dec. 7, 2010) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMC8xMC00MTctMS5wZGY). The trial court properly denied the defendant's motion for judgment notwithstanding the verdict based on inconsistent verdicts. The jury found the defendant guilty of felonious larceny after a breaking or entering and of being a habitual felon but deadlocked on a breaking or entering charge. Citing, *State v. Mumford* , 364 N.C. 394 (Oct. 8, 2010) (http://www.aoc.state.nc.us/www/public/sc/opinions/2010/pdf/32PA10-1.pdf), the court held that the verdicts were merely inconsistent and not mutually exclusive.

State v. Johnson, __ N.C. App. __, 702 S.E.2d 547 (Dec. 7, 2010) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMC8xMC01MTktMS5wZGY). Guilty verdicts of breaking or entering and discharging a firearm into occupied property were not mutually exclusive. The defendant argued that he could not both be in the building and shooting into the building at the same time. The court rejected this argument noting that the offenses occurred in succession, the defendant would be guilty of the discharging offense regardless of whether or not he was standing on a screened-in porch at the time, and that in any event the defendant was not in the building when he was standing on the porch.

State v. Cole, __ N.C. App. __, 681 S.E.2d 423 (Aug. 18, 2009). The trial court did not err in accepting seemingly inconsistent verdicts of guilty of misdemeanor assault with a deadly weapon and not guilty of possession of a firearm by a felon.

Indictment Issues
General Matters
Date of Offense

In Re A.W., __ N.C. App. __, __ S.E.2d __ (Feb. 15, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC03MTMtMS5wZGY). There was no fatal variance between a juvenile delinquency petition for indecent liberties alleging an offense date of November 14, 2008, and the evidence which showed an offense date of November 7-9, 2008. The juvenile failed to show that his ability to present an adequate defense was prejudiced by the variance.

State v. Hueto, 195 N.C. App. 67 (Jan. 20, 2009). No fatal variance between the period of time alleged in the indictment and the evidence introduced at trial. The defendant was indicted on six counts of statutory rape: two counts each for the months of June, August, and September 2004. Assuming that the victim's testimony was insufficient to prove that the defendant had sex with her twice in August, the court held that the state nevertheless presented sufficient evidence that the defendant had sex with her at least six times between June 2004 and August 12, 2004, including at least four times in July.

State v. Pettigrew, __ N.C. App. __, 693 S.E.2d 698 (June 1, 2010) (available at: http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091226-1.pdf). In a child sex case, there was substantial evidence that the defendant abused the victim during the period alleged in the indictment and specified in the bill of particulars (Feb. 1, 2001 – Nov. 20, 2001) and at a time when the defendant was sixteen years old and thus could be charged as an adult. The evidence showed that the defendant abused the victim for a period of years that included the period alleged and that the defendant, who turned sixteen on January 23, 2001, was sixteen during the entire time frame alleged. Relying on the substantial evidence of acts committed while the defendant was sixteen, the court also rejected the defendant's argument that by charging that the alleged acts occurred "on or about" February 1, 2001 – November 20, 2001, the indictment could have encompassed acts committed before he turned sixteen.

Delay in Obtaining Indictment

State v. Martin, 195 N.C. App. 43 (Jan. 20, 2009). No due process violation resulted from the delay between commission of the offenses (2000) and issuance of the indictments (2007). Although the department of social services possessed the incriminating photos and instituted an action to terminate parental rights in 2001, the department did not then share the photos or report evidence of abuse to law enforcement or the district attorney. Law enforcement was not informed about the photos until 2007. The department's delay was not attributable to the state.

Short Form Indictments

State v. Freeman, __ N.C. App. __, 690 S.E.2d 17 (Mar. 2, 2010). Short-form murder indictment put the defendant on notice that the State might proceed on a theory of felony-murder.

State v. Thomas, 196 N.C. App. 523 (May 5, 2009). The trial court did not err by denying the defendant's request to submit the lesser offense of assault on a female when the defendant was charged with rape using the statutory short form indictment. The defense to rape was consent. The defendant argued on appeal that the jury could have found that the rape was consensual but that an assault on a female had occurred. The court rejected that argument reasoning that the acts that the defendant offered in support of

assault on a female occurred separately from those constituting rape.

Names

Generally

State v. Johnson, __ N.C. App. __, 690 S.E.2d 707 (Mar. 2, 2010). No fatal variance where an indictment charging sale and delivery of a controlled substance alleged that the sale was made to "Detective Dunabro." The evidence at trial showed that the detective had gotten married and was known by the name Amy Gaulden. Because Detective Dunabro and Amy Gaulden were the same person, known by both a married and maiden name, the indictment sufficiently identified the purchaser. The court noted that "[w]here different names are alleged to relate to the same person, the question is one of identity and is exclusively for the jury to decide."

Victim's Name

State v. McKoy, 196 N.C. App. 650 (May 5, 2009). Rape and sexual offense indictments were not fatally defective when they identified the victim solely by her initials, "RTB." The defendant was not confused regarding the victim's identity; because the victim testified at trial and identified herself in open court, the defendant was protected from double jeopardy.

In Re M.S., __ N.C. App. __, 681 S.E.2d 441 (Aug. 18, 2009). Distinguishing *McKoy* (discussed immediately above), the court held that juvenile petitions alleging that the juvenile committed first-degree sexual offense were defective because they failed to name a victim. The petitions referenced the victim as "a child," without alleging the victims' names.

Punishment

State v. Curry, __ N.C. App. __, 692 S.E.2d 129 (April 20, 2010). Indictment alleging that the defendant discharged a barreled weapon into an occupied residence properly charged the Class D version of this felony (shooting into occupied dwelling or occupied conveyance in operation) even though it erroneously listed the punishment as the Class E version (shooting into occupied property).

Specific Offenses

Accessory After the Fact

State v. Cole, __ N.C. App. __, 703 S.E.2d 842 (Jan. 4, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xMzktMS5wZGY). An indictment charging accessory after the fact to first-degree murder was sufficient to support a conviction of accessory after the fact to second-degree murder. The indictment alleged that a felony was committed, that the defendant knew that the person he assisted committed that felony, and that he rendered personal assistance to the felon; it thus provided adequate notice to prepare a defense and protect against double jeopardy.

Conspiracy

State v. Pringle, __ N.C. App. __, 694 S.E.2d 505 (June 15, 2010). When a conspiracy indictment names specific individuals with whom the defendant is alleged to have conspired and the evidence shows the defendant may have conspired with others, it is error for the trial court to instruct the jury that it may find

the defendant guilty based upon an agreement with persons not named in the indictment. However, the jury instruction need not specifically name the individuals with whom the defendant was alleged to have conspired as long as the instruction comports with the material allegations in the indictment and the evidence at trial. In this case, the indictment alleged that the defendant conspired with Jimon Dollard and an unidentified male. The trial court instructed the jury that it could find the defendant guilty if he conspired with "at least one other person." The evidence showed that the defendant and two other men conspired to commit robbery. One of the other men was identified by testifying officers as Jimon Dollard. The third man evaded capture and was never identified. Although the instruction did not limit the conspiracy to those named in the indictment, it was in accord with the material allegations in the indictment and the evidence presented at trial and there was no error.

Assault

In Re D.S., 197 N.C. App. 598 (June 16, 2009). No fatal variance occurred when a juvenile petition alleged that the juvenile assaulted the victim with his hands and the evidence established that he touched her with an object.

Assault by Strangulation

State v. Williams, __ N.C. App. __, 689 S.E.2d 412 (Dec. 8, 2009). Even if there was a fatal variance between the indictment, which alleged that the defendant accomplished the strangulation by placing his hands on the victim's neck, and the evidence at trial, the variance was immaterial because the allegation regarding the method of strangulation was surplusage.

Assault on Government Officer

State v. Noel, __ N.C. App. __, 690 S.E.2d 10 (Mar. 2, 2010). Indictment charging assault on a government officer under G.S. 14-33(c)(4) need not allege the specific duty the officer was performing and if it does, it is surplusage.

State v. Roman, __ N.C. App. __, 692 S.E.2d 431 (May 4, 2010). There was no fatal variance between a warrant charging assault on a government officer under G.S. 14-33(c)(4) and the evidence at trial. The warrant charged that the assault occurred while the officer was discharging the duty of arresting the defendant for communicating threats but at trial the officer testified that the assault occurred when he was arresting the defendant for being intoxicated and disruptive in public. The pivotal element was whether the assault occurred while the officer was discharging his duties; what crime the arrest was for is immaterial.

Malicious Conduct by Prisoner

State v. Noel, __ N.C. App. __, 690 S.E.2d 10 (Mar. 2, 2010). Indictment charging malicious conduct by prisoner under G.S. 14-258.4 need not allege the specific duty the officer was performing and if it does, it is surplusage.

Child Abuse

State v. Lark, 198 N.C. App. 82 (July 7, 2009). An indictment charging felony child abuse by sexual act under G.S. 14-318.4(a2) is not required to allege the particular sexual act committed. Language in the

indictment specifying the sexual act as anal intercourse was surplusage.

Indecent Liberties

State v. Carter, __ N.C. App. __, __ S.E.2d __ (Mar. 1, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC02NDgtMS5wZGY). In an indecent liberties case, the trial judge's jury instructions were supported by the indictment. The indictment tracked the statute and did not allege an evidentiary basis for the charge. The jury instructions, which identified the defendant's conduct as placing his penis between the child's feet, was a clarification of the evidence for the jury.

Injury to Real Property

State v. Lilly, 195 N.C. App. 697 (Mar. 17, 2009). No fatal variance between an indictment charging injury to real property and the evidence at trial. The indictment incorrectly described the lessee of the real property as its owner. The indictment was sufficient because it identified the lawful possessor of the property.

Kidnapping

State v. Yarborough, 198 N.C. App. 22 (July 7, 2009). Although a kidnapping indictment need not allege the felony intended, if it does, the State is bound by that allegation. Here, the indictment alleged confinement and restraint for the purpose of committing murder, but the evidence showed that the confinement or restraint was for the purpose of a committing a robbery. The State was bound by the allegation and had to prove the confinement and restraint was for the purposes of premeditated and deliberate murder (it could not rely on felony-murder).

Larceny

State v. McNeill, __ N.C. App. __, __ S.E.2d __ (Mar. 1, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC00NTYtMS5wZGY). An indictment for felonious larceny that failed to allege ownership in the stolen handgun was fatally defective.

State v. Patterson, 194 N.C. App. 608 (Jan 6, 2009). Larceny indictment alleging victim's name as "First Baptist Church of Robbinsville" was fatally defective because it did not indicate that the church was a legal entity capable of owning property.

State v. Gayton-Barbossa, 197 N.C. App. 129 (May 19, 2009). Fatal variance in larceny indictment alleging that the stolen gun belonged to an individual named Minear and the evidence showing that it belonged to and was stolen from a home owned by an individual named Leggett. Minear had no special property interest in the gun even though the gun was kept in a bedroom occupied by both women.

Burglary and Related Offenses

State v. McCormick, __ N.C. App. __, 693 S.E.2d 195 (May 18, 2010). No fatal variance existed when a burglary indictment alleged that defendant broke and entered "the dwelling house of Lisa McCormick located at 407 Ward's Branch Road, Sugar Grove Watauga County" but the evidence at trial indicated that the house number was 317, not 407. On this point, the court followed *State v. Davis*, 282 N.C. 107

(1972) (no fatal variance where indictment alleged that the defendant broke and entered "the dwelling house of Nina Ruth Baker located at 840 Washington Drive, Fayetteville, North Carolina," but the evidence showed that Ruth Baker lived at 830 Washington Drive). The court also held that the burglary indictment was not defective on grounds that it failed to allege that the breaking and entering occurred without consent. Following, *State v. Pennell*, 54 N.C. App. 252 (1981), the court held that the indictment language alleging that the defendant "unlawfully and willfully did feloniously break and enter" implied a lack of consent.

State v. Chillo, __ N.C. App. __, __ S.E.2d __ (Dec. 21, 2010) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMC8xMC02MjItMS5wZGY). (1) An indictment for breaking or entering a motor vehicle alleging that the vehicle was the personal property of "D.L. Peterson Trust" was not defective for failing to allege that the victim was a legal entity capable of owning property. The indictment alleged ownership in a trust, a legal entity capable of owning property. (2) Because the State indicted the defendant for breaking or entering a motor vehicle with intent to commit larceny therein, it was bound by that allegation and had to prove that the defendant intended to commit larceny.

State v. Clagon, __ N.C. App. __, 700 S.E.2d 89 (Oct. 5, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/100299-1.pdf). A burglary indictment does not need to identify the felony that the defendant intended to commit inside the dwelling.

State v. Clark, __ N.C. App. __, 702 S.E.2d 324 (Dec. 7, 2010) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMC8xMC0yMzUtMS5wZGY). (1) Although the State is not required to allege the felony or larceny intended in an indictment charging breaking or entering a vehicle, if it does so, it will be bound by that allegation. (2) An indictment properly alleges the fifth element of breaking and entering a motor vehicle—with intent to commit a felony or larceny therein—by alleging that the defendant intended to steal the same motor vehicle.

Weapons Offenses

Carrying Concealed

State v. Bollinger, 361 N.C. 251 (May 1, 2009). No fatal variance between indictment and the evidence in a carrying a concealed weapon case. After an officer discovered that the defendant was carrying knives and metallic knuckles, the defendant was charged with carrying a concealed weapon. The indictment identified the weapon as "a Metallic set of Knuckles." The trial court instructed the jury concerning "one or more knives." The court, per curiam and without an opinion, summarily affirmed the ruling of the North Carolina Court of Appeals that the charging language, "a Metallic set of Knuckles," was unnecessary surplusage, and even assuming the trial court erred in instructing on a weapon not alleged in the charge, no prejudicial error required a reversal where there was evidence that the defendant possessed knives.

Discharging Weapon Into Property

State v. Curry, __ N.C. App. __, 692 S.E.2d 129 (April 20, 2010). Fact that indictment charging discharging a barreled weapon into an occupied dwelling used the term "residence" instead of the statutory term "dwelling" did not result in a lack of notice to the defendant as to the relevant charge.

Felon in Possession

State v. Taylor, __ N.C. App. __, 691 S.E.2d 755 (April 20, 2010). Felon in possession indictment that listed the wrong date for the prior felony conviction was not defective, nor was there a fatal variance on this basis (indictment alleged prior conviction date of December 8, 1992 but judgment for the prior conviction that was introduced at trial was dated December 18, 1992).

Possession of Weapons on School Grounds

In Re J.C., __ N.C. App. __, 695 S.E. 2d 168 (July 6, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/100031-1.pdf). A juvenile petition sufficiently alleged that the juvenile was delinquent for possession of a weapon on school grounds in violation of G.S. 14-269.2(d). The petition alleged that the juvenile possessed an "other weapon," specified as a "steel link from chain." The evidence showed that the juvenile possessed a 3/8-inch thick steel bar forming a C-shaped "link" about 3 inches long and 1½ inches wide. The link closed with a ½-inch thick bolt and the object weighed at least 1 pound. The juvenile could slide his fingers through the link so that 3-4 inches of the bar could be held securely across his knuckles and used as a weapon. Finding the petition sufficient the court stated: "the item . . . is sufficiently equivalent to what the General Assembly intended to be recognized as 'metallic knuckles' under [the statute]."

Drug Offenses

Drug Name

State v. LePage, __ N.C. App. __, 693 S.E.2d 157 (May 18, 2010). Indictments charging the defendant with drug crimes and identifying the controlled substance as "BENZODIAZEPINES, which is included in Schedule IV of the North Carolina Controlled Substances Act[.]" were defective. Benzodiazepines is not listed in Schedule IV. Additionally, benzodiazepine describes a category of drugs, some of which are listed in Schedule IV and some of which are not.

Sale and Delivery of a Controlled Substance

State v. Johnson, __ N.C. App. __, 690 S.E.2d 707 (Mar. 2, 2010). No fatal variance where an indictment charging sale and delivery of a controlled substance alleged that the sale was made to "Detective Dunabro." The evidence at trial showed that the detective had since gotten married and was known by the name Amy Gaulden. Because Detective Dunabro and Amy Gaulden were the same person, known by both married and maiden name, the indictment sufficiently identified the purchaser. The court noted that "[w]here different names are alleged to relate to the same person, the question is one of identity and is exclusively for the jury to decide."

Manufacture of a Controlled Substance

State v. Hinson, 354 N.C. 414 (Oct. 8, 2010) (http://www.aoc.state.nc.us/www/public/sc/opinions/2010/pdf/176A10-1.pdf). For the reasons stated in the dissenting opinion below, the court reversed *State v. Hinson*, __ N.C. App. __, 691 S.E.2d 63 (April 6, 2010). The defendant was indicted for manufacturing methamphetamine by "chemically combining and synthesizing precursor chemicals to create methamphetamine." However, the trial judge instructed the jury that it could find the defendant guilty if it found that he produced, prepared, propagated, compounded, converted or processed methamphetamine, either by extraction from substances of natural origin or by chemical synthesis. The court of appeals held, over a dissent, that this was plain error as it

allowed the jury to convict on theories not charged in the indictment. The dissenting judge concluded that while the trial court's instructions used slightly different words than the indictment, the import of both the indictment and the charge were the same. The dissent reasoned that the manufacture of methamphetamine is accomplished by the chemical combination of precursor elements to create methamphetamine and that the charge to the jury, construed contextually as a whole, was correct.

Maintaining a Dwelling

State v. Garnett, __ N.C. App. __, __ S.E.2d __ (Feb. 15, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xMTEtMS5wZGY). Theories included in the trial judge's jury instructions were supported by the indictment. The indictment charged the defendant with maintaining a dwelling "for keeping *and* selling a controlled substance." The trial court instructed the jury on maintaining a dwelling "for keeping *or* selling marijuana." The use of the conjunctive "and" in the indictment did not require the State to prove both theories alleged.

Habitual Impaired Driving

State v. White, __ N.C. App. __, 689 S.E.2d 595 (Feb. 16, 2010). The trial court did not err by allowing the State to amend a habitual impairing driving indictment that mistakenly alleged a seven-year look-back period (instead of the current ten-year look-back), where all of the prior convictions alleged in the indictment fell within the ten-year period. The language regarding the seven-year look-back was surplusage.

Fraud & Forgery

State v. Moore, __ N.C. App. __, __ S.E.2d __ (Feb. 15, 2011) http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC03NjQtMS5wZGY). Stating in dicta that an indictment alleging obtaining property by false pretenses need not identify a specific victim.

State v. Guarascio, __ N.C. App. __, 696 S.E.2d 704 (July 20, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/090883-1.pdf). There was no fatal variance between a forgery indictment and the evidence presented at trial. The indictment charged the defendant with forgery of "an order drawn on a government unit, STATE OF NORTH CAROLINA, which is described as follows: NORTH CAROLINA UNIFORM CITATION." The evidence showed that the defendant, who was not a law enforcement officer, issued citations to several individuals. The court rejected the defendant's arguments that the citations were not "orders" and were not "drawn on a government unit" because he worked for a private police entity.

G.S. 14-3 Misdemeanor Sentencing Enhancement

State v. Blount, __ N.C. App. __, 703 S.E.2d 921 (Jan. 18, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0zNTItMS5wZGY). An obstruction of justice indictment properly charged a felony when it alleged that the act was done "with deceit and intent to interfere with justice." G.S. 14-3(b) provides that a misdemeanor receives elevated punishment when done with "deceit and intent to defraud." The language "deceit and intent to interfere with justice" adequately put the defendant on notice that the State intended to seek a felony conviction. Additionally, the indictment alleged that the defendant acted "feloniously."

Waiver of Fatal Variance Issue

State v. Curry, __ N.C. App. __, 692 S.E.2d 129 (April 20, 2010). On appeal, the defendant argued that there was a fatal variance between the indictment charging him with possession of a firearm and the evidence introduced at trial. Specifically, the defendant argued there was a variance as to the type of weapon possessed. By failing at the trial level to raise fatal variance or argue generally about insufficiency of the evidence as to the weapon used, the defendant waived this issue for purposes of appeal.

No Waiver of Fatal Defect

State v. Blount, __ N.C. App. __, 703 S.E.2d 921 (Jan. 18, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0zNTItMS5wZGY). A defendant may challenge the sufficiency of an indictment even after pleading guilty to the charge at issue.

Retrial

State v. Rahaman, __ N.C. App. __, 688 S.E.2d 58 (Jan. 19, 2010). Citing *State v. Johnson*, 9 N.C. App. 253 (1970), and noting in dicta that the granting of a motion to dismiss due to a material fatal variance between the indictment and the proof presented at trial does not preclude a retrial for the offense alleged on a proper indictment.

Interpreters

State v. Mohamed, __ N.C. App. __, 696 S.E.2d 724 (July 20, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/090943-1.pdf). The court rejected the defendant's claim that inadequacies with his trial interpreters violated his constitutional rights. The court held that because the defendant did not challenge the adequacy of the interpreters at trial, the issue was waived on appeal and that plain error review did not apply. The court further held that because the defendant selected the interpreters, he could not complain about their adequacy. Finally, the court concluded that the record did not reveal inadequacies, given the interpreters' limited role and the lack of translation difficulties.

Involuntary Commitment

In Re Hayes, __ N.C. App. __, 681 S.E.2d 395 (Aug. 18, 2009). At a recommitment hearing for an involuntarily-committed respondent based on a verdict of not guilty by reason of insanity, the trial court may order conditional release as an alternative to unconditional release or recommitment.

Joinder

State v. Anderson, 362 N.C. 90 (Dec. 16, 2008). The trial court did not abuse its discretion in granting the state's motion to join ten counts of third-degree sexual exploitation of a minor and ten counts of second-degree sexual exploitation of a minor with an appeal for trial de novo of misdemeanor peeping.

State v. Guarascio, __ N.C. App. __, 696 S.E.2d 704 (July 20, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/090883-1.pdf). The trial court did not err by joining charges of impersonating a law enforcement officer and felony forgery that occurred in March

2006 with charges of impersonating a law enforcement officer that occurred in April 2006. The offenses occurred approximately one month apart. Additionally, on both occasions the defendant acted as a law enforcement officer (interrogating individuals and writing citations for underage drinking), notified the minors' family members that they were in his custody for underage drinking, and identified himself as a law enforcement officer to family members. His actions evidence a scheme or plan to act under the guise of apparent authority as a law enforcement officer to interrogate, belittle, and intimidate minors.

State v. Peterson, __ N.C. App. __, 695 S.E.2d 835 (July 20, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/090365-1.pdf). The trial court did not abuse its discretion by joining charges of felony assault with a deadly weapon and possession of stolen firearms. There was a sufficient transactional connection (a firearm that was the basis of the firearm charge was used in the assault) and joinder did not prejudicially hinder the defendant's ability to receive a fair trial.

Judge

Expression of Opinion

State v. Springs, __ N.C. App. __, 683 S.E.2d 432 (Oct. 6, 2009). The trial judge impermissibly expressed an opinion during the defendant's testimony that tended to discredit the defense theory and required a new trial. In this drug case, the defense's principal theory was that the defendant did not possess the controlled substance and paraphernalia because her boyfriend brought the items to her apartment while she was at work. During her testimony, the defendant was questioned about how often her boyfriend went to her apartment. The State objected. The trial court sustained the objection, and stated: "Let's move on to another area. He has no involvement with these charges."

State v. Jackson, __ N.C. App. __, 688 S.E.2d 766 (Feb. 16, 2010). The trial court did not err by using the word "victim" in the jury charge in a child sex offense case.

Judgment

State v. Kerrin, __ N.C. App. __, 703 S.E.2d 816 (Jan. 4, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8wOS0xMTUzLTEucGRm). In a criminal case, entry of judgment occurs when a judge announces the ruling in open court or signs the judgment containing the ruling and files it with the clerk. A trial judge is not required to announce all of the findings and details of its judgment in open court, provided they are included in the signed judgment filed with the clerk. Based on these rules, a written order on form AOC-CR-317 (Forfeiture of Licensing Privileges Felony Probation Revocation) was not invalid for failure to announce the order's details in open court.

Jury Argument

Comment on Defendant's Failure to Testify

State v. Anderson, __ N.C. App. __, 684 S.E.2d 450 (Oct. 6, 2009). The prosecutor did not improperly comment on the defendant's failure to testify by pointing out to the jury in closing that the defense had not put on any mental health evidence as forecasted in its opening statement; however, the court disapproved of the prosecutor's statement that this constituted "[b]roken promises from the defense." The prosecutor did not comment on the defendant' failure to testify by stating in closing that there was no evidence regarding accident.

State v. Graham, __ N.C. App. __, 683 S.E.2d 437 (Oct. 6, 2009). The prosecutor's comments during closing did not constitute a reference to the defendant's failure to testify; the comments responded to direct attacks on the State's witnesses and pertained to the defendant's failure to produce witnesses or exculpatory evidence.

Comment Suggesting that Witness or Defendant Is Lying

State v. Hunter, __ N.C. App. __, 703 S.E.2d 776 (Dec. 21, 2010) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMC8xMC00ODMtMS5wZGY). The prosecutor's characterization of the defendant's statements as lies, while "clearly improper," did not require reversal. The court noted that the trial court's admonition to the prosecutor not to so characterize the defendant's statements neutralized the improper argument.

State v. Sanders, __ N.C. App. __, 687 S.E.2d 531 (Jan. 5, 2010). The trial court did not err by failing to intervene ex mero motu when, in closing argument, the prosecutor suggested that the defendant was lying. The comments were not so grossly improper as to constitute reversible error.

Comment Attacking Integrity of Counsel and Suggesting Witness Changed Story After Speaking With a Lawyer

State v. Riley, __ N.C. App. __, 688 S.E.2d 477 (Feb. 2, 2010). Prosecutor's comment during jury argument was improper. The comment attacked the integrity of defense counsel and was based on speculation that the defendant changed his story after speaking with his lawyer.

Comments Regarding Facts and Proceedings of Prior Case

State v. Simmons, __ N.C. App. __, 698 S.E.2d 95 (July 20, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/090862-1.pdf). The trial court abused its discretion when it allowed the prosecutor, in closing argument and over the defendant's objection, to compare the defendant's impaired driving case to a previous impaired driving case litigated by the prosecutor. The prosecutor discussed the facts of the case, indicated that the jury had returned a guilty verdict, and quoted from the appellate decision finding no reversible error. Reversed for a new trial.

Comparing Defendant to an Animal

State v. Oakes, __ N.C. App. __, 703 S.E.2d 476 (Jan. 4, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8wOS0xMjgwLTEucGRm). The prosecutor's statements during closing argument were not so grossly improper as to require the trial court to intervene ex mero motu. Although disapproving a prosecutor's comparisons between criminal defendants and animals, the court concluded that the prosecutor's statements equating the defendant's actions to a hunting tiger were not grossly improper; the statements helped to explain the State's theory of premeditated and deliberate murder.

Disparaging the Opponent's Case

State v. Waring, __ N.C. __, 701 S.E.2d 615 (Nov. 5, 2010) (http://www.aoc.state.nc.us/www/public/sc/opinions/2010/pdf/525A07-1.pdf). The trial court did not err

by failing to intervene ex mero motu during closing argument in the sentencing phase of a capital trial when the prosecutor asserted that defense counsel's mitigation case was a "lie" based on "half-truths" and omitted information.

Disparaging a Witness

State v. Waring, __ N.C. __, 701 S.E.2d 615 (Nov. 5, 2010) (http://www.aoc.state.nc.us/www/public/sc/opinions/2010/pdf/525A07-1.pdf). The trial court did not err by failing to intervene ex mero motu during closing argument in the sentencing phase of a capital trial when the prosecutor used the words "laugh, laugh" when impeaching the credibility of a defense expert.

Expression of Personal Beliefs

State v. Waring, __ N.C. __, 701 S.E.2d 615 (Nov. 5, 2010) (http://www.aoc.state.nc.us/www/public/sc/opinions/2010/pdf/525A07-1.pdf). (1) No gross impropriety occurred in closing argument in the guilt-innocence phase of a capital trial when the prosecutor (a) improperly expressed his personal belief that there was overwhelming evidence of guilt; (b) improperly injected his personal opinion that a stab wound to the victim's neck showed intent. (2) The trial court did not err by failing to intervene ex mero motu during closing argument in the sentencing phase of a capital trial when the prosecutor improperly injected his personal beliefs, repeatedly using the words, "I think" and "I believe." (3) The collective impact of these arguments did not constitute reversible error.

Regarding Aggravating Factors

State v. Lopez, 363 N.C. 535 (Aug. 28, 2009). The trial judge abused her discretion in overruling a defense objection to the State's jury argument regarding the effect of an aggravating factor on the sentence. Although the jury's understanding of aggravating factors is relevant to sentencing, the prosecutor's argument introduced error because it was inaccurate and misleading. The court indicated that consistent with G.S. 7A-97, parties may explain to a jury the reasons why it is being asked to consider aggravating factors and may discuss and illustrate the general effect of finding such factors, such as the fact that a finding of an aggravating factor may allow the trial court to impose a more severe sentence or that the court may find mitigating factors and impose a more lenient sentence.

Right to Final Argument

State v. English, 194 N.C. App. 314 (Dec. 16, 2008). The trial judge erred in denying the defendant final jury argument. The defendant did not introduce evidence under Rule 10 of the General Rules of Practice when cross-examining an officer. Defense counsel referred to the contents of the officer's report when cross-examining the officer. However, the officer's testimony on cross-examination did not present "new matter" to the jury when considered with the state's direct examination of the officer.

Miscellaneous Cases

State v. Waring, __ N.C. __, 701 S.E.2d 615 (Nov. 5, 2010) (http://www.aoc.state.nc.us/www/public/sc/opinions/2010/pdf/525A07-1.pdf). (1) No gross impropriety occurred in closing argument in the guilt-innocence phase of a capital trial when the prosecutor (a) asserted that a mark on the victim's forehead was caused by the defendant's shoe and evidence supported the statement; (b) suggested that the defendant's accomplice committed burglary at the victim's home; the

comment only referred the accomplice, neither the defendant nor the accomplice were charged with burglary, and the trial court did not instruct the jury to consider burglary; or (c) suggested that the victim was killed to eliminate her as a witness when the argument was a reasonable extrapolation of the evidence made in the context of explaining mental state. (2) The trial court did not err by failing to intervene ex mero motu during the State's opening statement during the sentencing phase of a capital trial when the prosecutor stated that the "victim and the victim's loved ones would not be heard from." According to the defendant, the statement inflamed and misled the jury. The prosecutor's statement described the nature of the proceeding and provided the jury a forecast of what to expect. (3) The trial court did not err by failing to intervene ex mero motu during closing argument in the sentencing phase of a capital trial when the prosecutor (a) made statements regarding evidence of aggravating circumstances; the court rejected the argument that the prosecutor asked the jury to use the same evidence to find more than one aggravating circumstance; (b) properly used a neighbor's experience to convey the victim's suffering and nature of the crime; (c) offered a hypothetical conversation with the victim's father; (d) referred to "gang life" to indicate lawlessness and unstrained behavior, and not as a reference to the defendant being in a gang or that the killing was gang-related; also the prosecutor's statements were supported by evidence about the defendant's connection to gangs.

State v. Wright, __ N.C. App. __, __ S.E.2d __ (Mar. 1, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC04NTQtMS5wZGY). The court rejected the defendant's argument that plain error occurred when the prosecutor misrepresented the results of the SBI Crime Lab phenolphthalein blood tests. At trial, a SBI agent explained that a positive test result would provide an indication that blood could be present. On cross-examination, he noted that certain plant and commercially produced chemicals may give a positive result. The defendant argued that the prosecutor misrepresented the results of the phenolphthalein blood tests during closing argument by stating that the agent tested the clothes and they tested positive for blood. Based on the agent's testimony, this argument was proper.

State v. Mills, __ N.C. App. __, 696 S.E.2d 742 (July 20, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091144-1.pdf). The trial court did not abuse its discretion by denying the defendant's mistrial motion based on the prosecutor's closing statement. During closing arguments in this murder case, defense counsel stated that "a murder occurred" at the scene in question. In his own closing, the prosecutor stated that he agreed with this statement by defense counsel. Although finding no abuse of discretion, the court "remind[ed] the prosecutor that the State's interest in a criminal prosecution is not that it shall win a case, but that justice shall be done."

Jury Deliberations

Judge's Entry into Jury Room

State v. Ross, __ N.C. App. __, 700 S.E.2d 412 (Oct. 19, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091021-1.pdf). The trial court's entry into the jury room during deliberations to determine the jury's progress was not subject to plain error review. However, the court admonished the trial court that it should refrain from such conduct "to avoid the possibility of improperly influencing the jury and to avoid disruptions in the juror's deliberation process."

Jury's Request for Transcripts

State v. Starr, __ N.C. App. __, 703 S.E.2d 876 (Jan. 4, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC03NTItMS5wZGY). (1) Although the

trial judge did not explicitly state that he was denying, in his discretion, the jury's request to review testimony, the judge instructed the jurors to rely on their recollection of the evidence that they heard and therefore properly exercised its discretion in denying the request. (2) When defense counsel consents to the trial court's communication with the jury in a manner other than in the courtroom, the defendant waives his right to appeal the issue. Here, although the trial judge failed to bring the jurors to the courtroom in response to their request to review testimony and instead instructed them from the jury room door, prior to doing so he asked for and received counsel's permission to instruct at the jury room door.

State v. Long, 196 N.C. App. 22 (April 7, 2009). The trial court erred in not exercising its discretion when denying the jury's request for transcripts of testimony of the victim and the defendant.

State v. Ross, __ N.C. App. __, 700 S.E.2d 412 (Oct. 19, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091021-1.pdf). The bailiff's delivery of an exhibit to the jury, with an instruction from the trial judge that it would need to be returned to the trial court did not prejudice the defendant, even though the trial court violated G.S. 15A-1233(a) by failing to bring the jury into the courtroom when the jury's asked to review the exhibit. As to the instruction delivered by the bailiff, the court distinguished prior case law, in part, because the communication did not pertain to matters material to the case.

Jury Instructions

Providing Jury With Written Copy of Instructions

State v. Haire, __ N.C. App. __, 697 S.E.2d 396 (July 20, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/100037-1.pdf). The trial court did not abuse its discretion by declining to provide the jury with a written copy of the jury instructions when asked to do so by the jury.

Failure to Request Instruction in Writing

State v. Starr, __ N.C. App. __, 703 S.E.2d 876 (Jan. 4, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC03NTItMS5wZGY). In an assault on a firefighter with a firearm case, the trial court did not err by denying the defendant's request for a jury instruction on the elements of assault where the defendant failed to submit his requested instruction in writing.

State v. Bivens, __ N.C. App. __, 693 S.E.2d 378 (June 1, 2010) (available at: http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/090483-1.pdf). In a counterfeit controlled substance case, the trial court did not err by failing to give a jury instruction where the defense failed to submit the special instruction in writing.

Alibi

State v. Smith, __ N.C. App. __, 696 S.E.2d 904 (Aug. 17, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091640-1.pdf). In a murder case, the trial court did not err by denying the defendant's request for an alibi instruction. The alibi defense rested on the defendant's testimony that he did not injure the child victim and that he left the child unattended in a bathtub for an extended period of time while meeting with someone else. The court concluded that this testimony was merely incidental to the defendant's denial that he harmed the child and did not warrant an

alibi instruction. The testimony did not show that the defendant was somewhere which would have made it impossible for him to have been the perpetrator, given that the precise timing of the incident was not determined and the defendant had exclusive custody of the child before his death.

Allen Charge

State v. Price, __ N.C. App. __, 684 S.E.2d 911 (Nov. 17, 2009). The court upheld the language in N.C. Criminal Pattern Jury Instruction 101.40, instructing the jury that "it is your duty to do whatever you can to reach a verdict."

State v. Walters, __ N.C. App. __, 703 S.E.2d 493 (Jan. 4, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0yODEtMS5wZGY). Upon being notified that the jury was deadlocked, the trial judge did not err by giving an *Allen* instruction pursuant to N.C. Crim. Pattern Jury Instruction 101.40 and not G.S. 15A-1235, as requested by the defendant. Because there was no discrepancy between the pattern instruction and G.S. 15A-1235, it was not an abuse of discretion for the trial court to use the pattern instruction.

State v. Ross, __ N.C. App. __, 700 S.E.2d 412 (Oct. 19, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091021-1.pdf). The trial court did not abuse its discretion by failing to give an *Allen* instruction after the jury reported for the third time that it was deadlocked when the trial judge had given such an instruction 45 minutes earlier.

State v. Lackey, __ N.C. App. __, 693 S.E.2d 218 (May 18, 2010). The trial judge did not abuse his discretion in giving an *Allen* instruction. After an hour of deliberation, the jury foreman sent a note stating that the jury was not able to render a verdict and were split 11-1. The trial court recalled the jury to the courtroom and, with the consent of the prosecutor and defendant, instructed the jury in accordance with N.C.P.I. Criminal Charge 101.40, failure of the jury to reach a verdict. The jury then returned to deliberate for 30 minutes before the trial judge recessed court for the evening. The next morning, before the jury retired to continue deliberations, the trial court again gave the *Allen* instruction.

Flight

State v. Lawrence, __ N.C. App. __, __ S.E.2d __ (Mar. 1, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0zNDgtMS5wZGY). The evidence was sufficient to warrant an instruction on flight. During the first robbery attempt, the defendant and a co-conspirator fled from a deputy sheriff. During the second attempt, the defendant fled from an armed neighbor. After learning of the defendant's name and address, an officer canvassed the neighborhood, looking for the defendant. The defendant was later arrested in another state.

State v. Bonilla, __ N.C. App. __, __ S.E.2d __ (Feb. 15, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0zNTEtMS5wZGY). In a kidnapping, sexual assault, and murder case, the trial court did not err by instructing the jury on flight. The defendant and an accomplice left the victims bound, placed a two-by-four across the inside of the apartment door, hindering access from the outside, and exited through a window. Despite the fact that the defendant lived at the apartment, there was no indication he ever returned. Although a warrant for the defendant's arrest was issued immediately, ten years passed before the defendant was extradited.

State v. Bettis, __ N.C. App. __, 698 S.E. 2d 507 (Sept. 7, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091345-1.pdf). There was sufficient evidence to support an instruction on flight. A masked man robbed a store and left in a light-colored sedan. Shortly thereafter, an officer saw a vehicle matching this description and a high speed chase ensued. The vehicle was owned by the defendant. The driver abandoned the vehicle; a mask and a gun were found inside. Although the defendant initially reported that his car was stolen, he later admitted that his report was false. The court rejected the defendant's argument that the instruction was improper because there was only circumstantial evidence that defendant was the person who fled the scene.

State v. Rainey, 198 N.C. App. 427 (Aug. 4, 2009). The trial judge did not err by instructing on flight where the defendant failed to appear for a court date in the case.

Willfully

State v. Breathette, __ N.C. App. __, 690 S.E.2d 1 (Mar. 2, 2010). In an indecent liberties case where the defendant alleged that she did not know the victim's age, the trial court did not err by declining the defendant's proposed instruction on willfulness which would have instructed that willfully means something more than an intention to commit the offense and implies committing the offense purposefully and designed in violation of the law. Instead, the trial court instructed that willfully meant that the act was done purposefully and without justification or excuse. Although not given verbatim, the defendant's instruction was given in substance.

In Response to Notes from the Jury

State v. Price, __ N.C. App. __, 684 S.E.2d 911 (Nov. 17, 2009). The trial court did err by failing to ex mero motu investigate the competency of a juror after the juror sent two notes to the trial court during deliberations. After the juror sent a note saying that the juror could not convict on circumstantial evidence alone, the trial judge re-instructed the whole jury on circumstantial evidence and reasonable doubt. After resuming deliberations, the juror sent another note saying that the juror could not apply the law as instructed and asked to be removed. The trial judge responded by informing the jury that the law prohibits replacing a juror once deliberations have begun, sending the jury to lunch, and after lunch, giving the jury an *Allen* charge. The court found no abuse of discretion and noted that if the judge had questioned the juror, the trial judge would have been in the position of instructing an individual juror in violation of the defendant's right to a unanimous verdict.

Instructing Less Than Full Jury in Violation of Right to Unanimous Verdict

State v. Wilson, 363 N.C. 478 (Aug. 28, 2009). The trial court violated the defendant's constitutional right to a unanimous verdict by instructing the jury foreperson during recorded and unrecorded bench conferences, out of the presence of the other jurors. The error was preserved for appeal notwithstanding the defendant's failure to object at trial.

State v. Price, __ N.C. App. __, 684 S.E.2d 911 (Nov. 17, 2009). The trial court did err by failing to ex mero motu investigate the competency of a juror after the juror sent two notes to the trial court during deliberations. After the juror sent a note saying that the juror could not convict on circumstantial evidence alone, the trial judge re-instructed the whole jury on circumstantial evidence and reasonable doubt. After resuming deliberations, the juror sent another note saying that the juror could not apply the law as instructed and asked to be removed. The trial judge responded by informing the jury that the law prohibits

replacing a juror once deliberations have begun, sending the jury to lunch, and after lunch, giving the jury an *Allen* charge. The court found no abuse of discretion and noted that if the judge had questioned the juror, the trial judge would have been in the position of instructing an individual juror in violation of the defendant's right to a unanimous verdict.

Involuntary Manslaughter

State v. Davis, 198 N.C. App. 443 (Aug. 4, 2009). The defendant's right to a unanimous verdict was not violated when the trial judge instructed the jury that it could find culpable negligence based on several possible motor vehicle violations (driving left of center, exceeding the posted speed limit, *or* passing in a no passing zone), if such violation was accompanied by a reckless disregard for the probable consequences, or was a willful, wanton or intentional violation of one or more of these traffic laws.

Lesser Included Offenses

State v. Wiggins, __ N.C. App. __, __ S.E.2d __ (Mar. 1, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC00NTAtMS5wZGY). In a murder case, the trial court did not commit plain error by failing to instruct the jury on the lesser-included offense of second-degree murder. For reasons discussed in the opinion, the evidence showed that the defendant acted with premeditation and deliberation.

State v. Clark, __ N.C. App. __, 689 S.E.2d 553 (Dec. 8, 2009). In a case in which the defendant was convicted, among other things, of assault with a deadly weapon on a governmental official, the trial court committed plain error by failing to instruct the jury on the lesser included offense of misdemeanor assault on a government official. Because the trial court did not conclude as matter of law that the weapon was a deadly one, but rather left the issue for the jury to decide, it should have instructed on the lesser included non-deadly weapon offense.

State v. Bedford, __ N.C. App. __, 702 S.E.2d 522 (Dec. 7, 2010) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMC8xMC0yNTUtMS5wZGY). The trial court did not err by declining to instruct the jury on second-degree murder when no evidence negated the State's evidence of first-degree murder. The defendant argued that the evidence showed that he killed the victim in a "frenzied, crack-fueled explosion" of a long-simmering "rage of jealousy." However, the court noted, premeditation and deliberation do not imply a lack of passion, anger or emotion. Nor, the court noted, does the defendant's possible drug intoxication support an inference that he did not premeditate and deliberate. The State presented evidence of the defendant's conduct and statements before the killing, including threats towards the victim; ill-will and previous difficulties between the parties; lethal blows rendered after the victim had been felled and rendered helpless; the brutality of the killing; and the extreme nature and number of the victim's wounds.

Sex Crimes

State v. Smith, 362 N.C. 583 (Dec. 12, 2008). When instructing on indecent liberties, the trial judge is not required to specifically identify the acts that constitute the charge.

State v. Treadway, __ N.C. App. __, 702 S.E.2d 335 (Dec. 7, 2010) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMC8xMC0yODctMS5wZGY). In a child sexual offense case in which the indictment specified digital penetration and the evidence supported that

allegation, the trial court was not required to instruct the jury that it only could find the defendant guilty if the State proved the specific sex act stated in the indictment.

Miscellaneous Issues

State v. Owens, __ N.C. App. __, 695 S.E.2d 823 (July 6, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091441-1.pdf). In a case involving a charge of possession of implements of housebreaking, the trial court erred by instructing the jury that bolt cutters, vice grips, channel lock pliers, flashlights, screwdrivers, a hacksaw, and a ratchet and socket are implements of housebreaking. The instruction was tantamount to a peremptory instruction that the tools at issue were implements of housebreaking. However, the error was not plain error.

Jury Misconduct

State v. Patino, __ N.C. App. __, 699 S.E.2d 678 (Oct. 5, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/100201-1.pdf). The trial court did not abuse its discretion by failing to conduct an inquiry into allegations of jury misconduct or by denying the defendant's motion for a new trial. The day after the verdict was delivered in the defendant's sexual battery trial and at the sentencing hearing, defense counsel moved for a new trial, arguing that several jurors had admitted looking up, on the Internet during trial, legal terms (sexual gratification, reasonable doubt, intent, etc.) and the sexual battery statute. The trial court did not conduct any further inquiry and denied defendant's motion. Because definitions of legal terms are not extraneous information under Evidence Rule 606 and did not implicate defendant's constitutional right to confront witnesses against him, the allegations were not proper matters for an inquiry by the trial court.

State v. Boyd, __ N.C. App. __, 701 S.E.2d 255 (Nov. 2, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/100025-1.pdf). The trial court did not abuse its discretion by denying a defense motion to dismiss a juror, made after the juror sent a letter to the trial judge requesting to see a DVD that had been played the previous day in court and stating that she thought the defendant's accent was fabricated. Despite being presented with only a suspicion of potential misconduct, the court made inquiry and determined that the juror had not made up her mind as to guilt or innocence and that she was willing to listen to the remainder of the evidence before considering guilt or innocence. The juror did not indicate that she was unable to accept a particular defense or penalty or abide by the presumption of innocence. Nothing suggested that the juror had spoken with other jurors about her thoughts, shared the note with anyone, or participated in any kind of misconduct. Given the trial court's examination, it was not required to allow the defense to examine the juror.

Jury Selection

Fair Cross Section Claims

Berghuis v. Smith, 559 U.S. __ (Mar. 30, 2010). The state supreme court did not unreasonably apply clearly established federal law with respect to the defendant's claim that the method of jury selection violated his sixth amendment right to be tried by an impartial jury drawn from sources reflecting a fair cross-section of the community. The state supreme court assumed that African-Americans were underrepresented in venires from which juries were selected but went on to conclude that the defendant had not shown the third prong of the *Duren* prima facie case for fair cross section claims: that the underrepresentation was due to systemic exclusion of the group in the jury-selection process. The Court expressly declined to address the methods or methods by which underrepresentation is appropriately

measured. For a more detailed discussion of this case, see the blog post at: http://sogweb.sog.unc.edu/blogs/ncclaw/?p=1175

Batson **Issues**

Rivera v. Illinois, 129 S. Ct. 1446 (March 31, 2009). During a state murder trial, the defendant was denied the opportunity to exercise a peremptory challenge against a female juror because the trial judge erroneously, but in good faith, believed that the defendant's use of a peremptory challenge violated *Batson*. The Due Process Clause does not require an automatic reversal of a conviction when a state trial court committed a good-faith error in denying the defendant's peremptory challenge of a juror and all jurors seated in the trial were qualified and unbiased.

Thaler v. Haynes, 559 U.S. __ (Feb. 22, 2010). When an explanation for a peremptory challenge is based on a prospective juror's demeanor, the trial judge should consider, among other things, any observations the judge made of the prospective juror's demeanor during the voir dire. However, no previous decisions of the Court have held that a demeanor-based explanation must be rejected if the judge did not observe or cannot recall the prospective juror's demeanor.

State v. Waring, __ N.C. __, 701 S.E.2d 615 (Nov. 5, 2010) (http://www.aoc.state.nc.us/www/public/sc/opinions/2010/pdf/525A07-1.pdf). (1) The trial court did not err in denying a capital defendant's *Batson* challenge when the defendant failed to established a prima facie case that the prosecutor's use of a peremptory challenge against Juror Rogers, an African-American female, was motivated by race. Because Ms. Rogers was the first prospective juror peremptorily challenged, there was no pattern of disproportionate use of challenges against African-Americans. Ms. Rogers was the only juror who stated, when first asked, that she was personally opposed to the death penalty. (2) The trial court did not err in denying a capital defendant's *Batson* challenge to the State's peremptory challenge of a second juror. There did not appear to be a systematic effort by the State to prevent African-Americans from serving when the State accepted 50% of African-American prospective jurors. The prosecutor's race-neutral reasons were that the juror had not formulated views on the death penalty, did not read the newspaper or watch the news, had been charged with a felony, and gave information regarding disposition of that charge that was inconsistent with AOC records. Considering these reasons in the context of the prosecutor's examination of similarly situated whites who were not peremptorily challenged, the court found they were not pretextual and that race was not a significant factor in the strike. (3) The court rejected the defendant's argument that a remand was required for further findings of fact under *Snyder v. Louisiana,* 552 U.S. 472 (2008). Unlike in *Snyder,* the case at hand did not involve peremptory challenges involving demeanor or other intangible observations that cannot be gleaned from the record. However, the court stated that "[c]onsistent with *Snyder*, we encourage the trial courts to make findings . . . to elucidate aspects of the jury selection process that are not preserved on the cold record so that review of such subjective factors as nervousness will be possible."

State v. Headen, __ N.C. App. __, 697 S.E.2d 407 (Aug. 3, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/090606-1.pdf). The trial court did not err by overruling the defendant's *Batson* objection to the State's peremptory challenge of an African-American juror. The defendant, who is African-American, was tried for murder. In response to the defendant's *Batson* objection, the prosecutor explained to the trial court that the juror was challenged because he was heavily tattooed and dressed in baggy, low hanging jeans decorated with a blood-red colored splatter. The prosecutor expressed concern over what the juror chose to wear to court and "his choice of applying . . . that much ink." The court found the State's reason for striking the juror to be race-

neutral. It also held that the trial court did not err by finding that the defendant failed to prove purposeful discrimination. The court determined that the defendant's statistical evidence was not helpful because the jury pool contained only one or two African-Americans. Although defense counsel had suggested to the trial court that there were "racial overtones" in the defendant's prior trials, no evidence of this was presented. The court also rejected the defendant's argument that the State's explanation for excluding the juror was pretextual. Finally, the court noted that both the victim and the defendant were African-American, the State asked no racially motivated questions, the State's method of questioning the juror did not differ from its method of questioning other jurors, the State used only two peremptory challenges and contemporaneously challenged both a black and white prospective juror, the defendant left unresolved the question whether one of the jurors accepted by the State was African-American, and the defendant failed to show that any other prospective jurors wore clothing or had tattooing similar to that displayed by the juror in question.

Peremptories

State v. Thomas, 195 N.C. App. 593 (Mar. 3, 2009), *stay granted*, 676 S.E.2d 307 (N.C. Mar. 19, 2009). The trial court erred by denying the defendant the opportunity to use his one remaining peremptory challenge after voir dire was reopened. After the jury was impaneled, the judge learned that a seated juror had attempted to contact an employee in the district attorney's office before impanelment. The trial judge reopened voir dire, questioned the juror, allowed the parties to do so as well, but denied the defendant's request to remove the juror. The court of appeals noted that after a jury has been impaneled, further challenge of a juror is in the trial court's discretion. However, once the trial court reopens examination of a juror, each party has an absolute right to exercise any remaining peremptory challenges.

Challenges for Cause

State v. Simmons, __ N.C. App. __, 698 S.E.2d 95 (July 20, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/090862-1.pdf). In an impaired driving case, the trial court did not abuse its discretion by allowing the State's challenge for cause of a juror while denying a defense challenge for cause of another juror. The juror challenged by the State had a pending impaired driving case in the county and admitted to consuming alcohol at least three times a week, and stated that despite his pending charge, he could be fair and impartial. The juror challenged by the defense was employed with a local university police department as a traffic officer. He had issued many traffic citations, worked closely with the District Attorney's office to prosecute those and other traffic cases, including impaired driving cases, and had never testified for the defense. He indicated that he could be fair and impartial. Distinguishing *State v. Lee*, 292 N.C. 617 (1977), the court noted that the juror challenged by the defense did not have a personal relationship with any officer involved in the case and never indicated he might not be able to be fair and impartial. The court rejected the notion that a juror must be excused solely on the grounds of a close relationship with law enforcement.

Right to an Impartial Jury

Skilling v. United States, 561 U.S. __ (June 24, 2010) (http://www.supremecourt.gov/opinions/09pdf/08-1394.pdf). The defendant was tried for various federal crimes in connection with the collapse of Enron. The Court held that the defendant's Sixth Amendment right to trial by an impartial jury was not violated when the federal district court denied the defendant's motion to change venue because of pretrial publicity. The Court distinguished the case at hand from previous decisions and concluded that given the community's population (Houston, Texas), the nature of the news stories about the defendant, the lapse in

time between Enron's collapse and the trial, and the fact that the jury acquitted the defendant of a number of counts, a presumption of juror prejudice was not warranted. The Court went on to conclude that actual prejudice did not infect the jury, given the voir dire process.

Voir Dire

State v. Maness, 363 N.C. 261 (June 18, 2009). Trial court did not err in sustaining the prosecutor's objection to an improper stake-out question by the defense. Defense counsel wanted to ask the juror in this capital case whether the juror could, if convinced that life imprisonment was the appropriate penalty, return such a verdict even if the other jurors were of a different opinion.

State v. Johnson, __ N.C. App. __, __ S.E.2d __ (Mar. 1, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0yNi0xLnBkZg). The trial court did not improperly limit the defendant's voir dire questioning with respect to assessing the credibility of witnesses and the jurors' ability to follow the law on reasonable doubt. Because the trial judge properly sustained the State's objections to the defendant's questions, no abuse of discretion occurred. Even if any error occurred, the defendant suffered no prejudice.

Mistrial

State v. Dye, __ N.C. App. __, 700 S.E.2d 135 (Oct. 19, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091574-1.pdf). The trial court did not abuse its discretion by denying the defendant's mistrial motion, made after the jury returned guilty verdicts. The motion was based on the fact that the child victim in this sexual assault case twice interrupted defense counsel's closing argument. After the initial interruption, the trial court, out of the jury's presence, instructed the victim to remain quiet. After her second outburst, the victim was removed from the courtroom. Additionally, the trial provided the defendant with an opportunity to request remedial measures, including mistrial, an invitation that was declined until after the verdict was returned.

State v. Sanders, __ N.C. App. __, 687 S.E.2d 531 (Jan. 5, 2010). The trial court did not abuse its discretion by denying the defendant's mistrial motion made after the State twice violated a court order forbidding any mention of polygraph examinations. The court disapproved of the State's action in submitting to the jury unredacted exhibits containing references to a polygraph examination but noted that the exhibits did not contain any evidence of the results of such examination.

Motions

Motion to Continue

State v. Banks, __ N.C. App. __, __ S.E.2d __ (Mar. 1, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8wOS0xMTUwLTEucGRm). The trial court's denial of a motion to continue in a murder case did not violate the defendant's right to due process and effective assistance of counsel. The defendant asserted that he did not realize that certain items of physical evidence were shell casings found in defendant's room until the eve of trial and thus was unable to procure independent testing of the casings and the murder weapon. Even though the relevant forensic report was delivered to the defendant in 2008, the defendant did not file additional discovery requests until February 3, 2009, followed by *Brady* and *Kyles* motions on February 11, 2009. The trial court afforded the defendant an opportunity to have a forensic examination done during trial but the defendant declined to do so. The defendant was not entitled to a presumption of prejudice on grounds that denial of

the motion created made it so that no lawyer could provide effective assistance. The defendant's argument that had he been given additional time, an independent examination *might* have shown that the casings were not fired by the murder weapon was insufficient to establish the requisite prejudice.

State v. Wright, __ N.C. App. __, __ S.E.2d __ (Mar. 1, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC04NTQtMS5wZGY). The trial court did not abuse its discretion by denying the defendant's motion to continue to test certain hair and fiber lifts from an item of clothing. The defendant had six months to prepare for trial and obtain independent testing, but waited until the day of trial to file his motion, in violation G.S. 15A-952(c). This failure to file the motion to continue within the required time period constituted a waiver of the motion. Also, because the item had already been DNA tested by the State, the lifts were not the only physical evidence obtained.

State v. Flint, __ N.C. App. __, 682 S.E.2d 443 (Sept. 15, 2009). The trial court did not abuse its discretion in denying a motion to continue asserting that the State provided discovery at a late date. The defendant failed to show that additional time was necessary for the preparation of a defense.

State v. Wright, __ N.C. App. __, 685 S.E.2d 109 (Nov. 3, 2009). The trial court did not violate the defendant's due process rights by denying the defendant's motion to continue, which had asserted that pretrial publicity had the potential to prejudice the jury pool and deprive the defendant of a fair trial. No evidence regarding pretrial publicity was in the record and even if it had been, the record showed that publicity did not improperly influence the jury.

Motion to Dismiss

For cases dealing with motions to dismiss and the sufficiency of the evidence as to elements of the crime, see Criminal Offenses, below.

State v. Buddington, __ N.C. App. __, __ S.E.2d __ (Mar. 1, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0yODYtMS5wZGY). The trial court erred by granting the defendant's motion to dismiss a charge of felon in possession of a firearm on grounds that the statute was unconstitutional as applied to him. The defendant's motion was unverified, trial court heard no evidence, and there were no clear stipulations to the facts. To prevail in a motion to dismiss on an as applied challenge to the statute, the defense must present evidence allowing the trial court to make findings of fact regarding the type of felony convictions and whether they involved violence or threat of violence; the remoteness of the convictions; the felon's history of law abiding conduct since the crime; the felon's history of responsible, lawful firearm possession during a period when possession was not prohibited; and the felon's assiduous and proactive compliance with amendments to the statute.

State v. Banks, __ N.C. App. __, __ S.E.2d __ (Mar. 1, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8wOS0xMTUwLTEucGRm). The evidence was sufficient to establish that the defendant perpetrated the murder. The defendant was jealous of the victim and made numerous threats toward him; four spent casings found in his bedroom were fired from the murder weapon; on the day of the murder, the victim got into a vehicle that matched a description of the defendant's vehicle; and a fiber consistent with the victim's jacket was recovered from the defendant's vehicle.

State v. Hill, __ N.C. App. __, __ S.E.2d __ (Mar. 1, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0zOTktMS5wZGY). Over a dissent, the court held that the evidence was sufficient to establish that the defendant acted in concert with another to commit robbery. After robbing Mr. Jones at an ATM, the robber ran to a two-toned maroon and silver or purple and white GMC pickup truck driven by another person. After robbing Mr. Cole four hours later at an ATM, the robber ran towards a parking lot where Cole found a maroon and silver GMC truck. Mr. Cole asked the driver if he had seen a man running from the ATM. The driver gave inconsistent responses and told Cole that he had an appointment at 10:40 p.m. Cole obtained the truck's license plate number and the defendant was found driving the vehicle near where Cole was robbed. The vehicle was owned by Mr. Webb, a suspect in the Jones robbery. This is substantial evidence that the defendant was waiting for an accomplice and that the two acted in concert to commit the robberies.

State v. McNeill, __ N.C. App. __, __ S.E.2d __ (Mar. 1, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC00NTYtMS5wZGY). The State presented sufficient evidence that the defendant perpetrated a breaking and entering. The resident saw the defendant break into her home, the getaway vehicle was registered to the defendant, the resident knew the defendant from prior interactions, a gun was taken from the home, and the defendant knew that the resident possessed the gun.

State v. Lowry, 198 N.C. App. 457 (Aug. 4, 2009). Where the State's evidence in this murder case showed both motive and opportunity, it was sufficient to survive a motion to dismiss on the issue of whether the defendant was the perpetrator.

State v. Pastuer, __ N.C. App. __, 697 S.E.2d 381 (July 20, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091432-1.pdf). The trial court erred by denying the defendant's motion to dismiss a charge alleging that he murdered his wife. The State's case was based entirely on circumstantial evidence. Distinguishing *State v. Lowry* (discussed above), and another case, the court held that although the State may have introduced sufficient evidence of motive, evidence of the defendant's opportunity and ability to commit the crime was insufficient to show that he was the perpetrator. No evidence put the defendant at the scene. Although a trail of footprints bearing the victim's blood was found at her home and her blood was found on the bottom of one of the defendant's shoes, the State failed to present substantial evidence that the victim's DNA could only have gotten on the defendant's shoe at the time of the murder. Evidence that the defendant was seen walking down a highway sometime around the victim's disappearance and that her body was later found in the vicinity did not supply substantial evidence that he was the perpetrator.

State v. Boyd, __ N.C. App. __, __ S.E.2d __ (Feb. 1, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8wOS0xNjY2LTEucGRm). In a robbery case, the trial court did not err by denying the defendant's motion to dismiss where there was substantial evidence that the defendant was the perpetrator. The victim, who knew the defendant well, identified the defendant's voice as that of his assailant; identified his assailant as a black man with a lazy eye, two characteristics consistent with the defendant's appearance; consistently identified the defendant as his assailant; and had a high level of certainty with regard to this identification.

State v. Hunter, __ N.C. App. __, 703 S.E.2d 776 (Dec. 21, 2010) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMC8xMC00ODMtMS5wZGY). There was sufficient evidence that the defendant perpetrated a murder when, among other things, cuts on the defendant's hands were visible more than 10 days after the murder; neither the defendant's nor the

victim's DNA could be excluded from a DNA sample from the scene; DNA from blood stains on the defendant's jeans matched the victim's DNA; and 22 shoe prints found in blood in the victim's residence were consistent with the defendant's shoes.

State v. Szucs, __ N.C. App. __, 701 S.E.2d 362 (Nov. 2, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/100305-1.pdf). In a case involving felonious breaking or entering, larceny, and possession of stolen goods, the State presented sufficient evidence identifying the defendant as the perpetrator. The evidence showed that although the defendant did not know the victim, she found his truck in her driveway with the engine running; the victim observed a man matching the defendant's description holding electronic equipment subsequently determined to have been stolen; the man dropped the electronic equipment and jumped over a fence; a police dog tracked the man's scent through muddy terrain and lost the trail near Thermal Road; a canine officer observed fresh slide marks in the mud; the defendant was found on Thermal Road with muddy pants and shoes and in possession of a Leatherman tool, which could have been used to open the door of the residence; the defendant had approximately $30.00 in loose change, which could have been taken from the residence; and when police apprehended an accomplice, the defendant's roommate and known associate, he had the victim's electronic device in his possession.

State v. Blackmon, __ N.C. App. __, 702 S.E.2d 833 (Dec. 7, 2010) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMC8xMC00MTctMS5wZGY). Evidence of felonious larceny and breaking or entering was sufficient to survive a motion to dismiss. The victim's computer tower was left outside the victim's house after a break-in. A fingerprint from the tower matched the defendant's print. The tower was in full view of the victim's back door and anyone inspecting the equipment would be able to see broken glass in the back door. There was no path behind the house and the victim did not know defendant or give him permission to be at her house.

Suppression Motions

State v. Baker, __ N.C. App. __, 702 S.E.2d 825 (Dec. 7, 2010) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMC8xMC05OC0xLnBkZg). The trial court erred by failing to make findings of fact and conclusions of law in connection with its denial of the defendant's motion to suppress. When a trial court's failure to make findings of fact and conclusions of law is assigned as error, the trial court's ruling on a motion to suppress is fully reviewable for a determination as to whether (1) the trial court provided the rationale for its ruling from the bench; and (2) there was a material conflict in the evidence presented at the suppression hearing. If a reviewing court concludes that both criteria are met, then the findings of fact are implied by the trial court's denial of the motion to suppress and will be binding on appeal, if supported by competent evidence. If a reviewing court concludes that either of the criteria is not met, then a trial court's failure to make findings of fact and conclusions of law is reversible error. A material conflict in the evidence exists when evidence presented by one party controverts evidence presented by an opposing party such that the outcome of the matter is likely to be affected. Turning to the case at hand, the court held that the defendant had presented evidence that controverts the State's evidence as to whether a seizure occurred. Because there was a material conflict in the evidence, the trial court's failure to make findings of fact and conclusions of law is fatal to the validity of its ruling. The court reversed and remanded for findings of fact and conclusions of law. The court noted that even when there is no material conflict in the evidence, the better practice is for the trial court to make findings of fact.

State v. Rollins, __ N.C. App. __, 682 S.E.2d 411 (Sept. 15, 2009). Remanding for a new suppression

hearing where the trial court failed to provide any basis or rationale for its denial of the defendant's suppression motion. The court "again urge[d] the trial courts . . . to remember 'it is always the better practice to find all facts upon which the admissibility of the evidence depends.'"

State v. Wade, 198 N.C. App. 257 (July 21, 2009). The trial court did not abuse its discretion by denying the defendant's motion to renew his suppression motion in light of an officer's trial testimony. There was no additional relevant information discovered during trial that required reconsideration of the motion to suppress.

State v. Reavis, __ N.C. App. __, 700 S.E.2d 33 (Sept. 21, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091425-1.pdf). The defendant's motion to suppress his statement made during a police interview was untimely. The motion was not made until trial and there was no argument that the State failed to disclose evidence of the interview or statement in a timely manner.

State v. Paige, __ N.C. App. __, 689 S.E.2d 193 (Feb. 16, 2010). The defendant's motion to suppress was untimely where the defendant had approximately seven weeks of notice that the State intended to use the evidence, well more than the required 20 working days.

State v. Hernandez, __ N.C. App. __, 704 S.E.2d 55 (Dec. 21, 2010). Any alleged violation of the New Jersey constitution in connection with a stop in that state leading to charges in North Carolina, provided no basis for the suppression of evidence in a North Carolina court.

Pleas

Factual Basis

State v. Flint, __ N.C. App. __, 682 S.E.2d 443 (Sept. 15, 2009). Holding, over a dissent, that there was an inadequate factual basis for some of the pleaded-to felonies. While the transcript of plea addressed 68 felony charges plus a habitual felon indictment, the trial court relied solely on the State's factual basis document, which addressed only 47 charges. The transcript of plea form could not provide the factual basis for the plea. Nor could the indictments serve this purpose where they did not appear to have been before the trial judge at the time of the plea.

State v. Salvetti, __ N.C. App. __, 687 S.E.2d 698 (Jan. 19, 2010). There was an adequate factual basis for the defendant's *Alford* plea in a child abuse case based on starvation where the trial court heard evidence from a DSS attorney, the victim, and the defendant's expert witness.

Motion to Withdraw a Plea

State v. Chery, __ N.C. App. __, 691 S.E.2d 40 (April 6, 2010). The trial court did not err by denying the defendant's motion to withdraw his plea, made before sentencing. The fact that the plea was a no contest or *Alford* plea did not establish an assertion of legal innocence for purposes of the *State v. Handy* analysis that applies to pre-sentencing plea withdrawal requests. Although the defendant testified at a co-defendant's trial that he did not agree to take part in the crime, that testimony was negated by his stipulation to the factual basis for his plea and argument for a mitigated sentence based on acceptance of responsibility. The court also concluded that the State's uncontested proffer of the factual basis at the defendant's plea hearing was strong and that the fact that the co-defendant was acquitted at trial was irrelevant to the analysis. The court held that based on the full colloquy accompanying the plea, it was

voluntarily entered. It also rejected the defendant's argument that an alleged misrepresentation by his original retained counsel caused him to enter the plea when such counsel later was discharged and the defendant was represented by new counsel at the time of the plea. Although the defendant sought to withdraw his plea only nine days after its entry, this factor did not weigh in favor of withdrawal where the defendant executed the plea transcript approximately 3½ months before the plea was entered and never waivered in this decision.

State v. Watkins, 195 N.C. App. 215 (Feb. 3, 2009). The trial court did not err in denying the defendant's motion to withdraw his plea before sentencing; no fair and just reason supported the motion.

State v. Salvetti, __ N.C. App. __, 687 S.E.2d 698 (Jan. 19, 2010). The trial court did not err in denying the defendant's motion to withdraw a plea, made after sentencing. Such pleas should be granted only to avoid manifest injustice, which was not shown on the facts presented.

Plea Agreements

State v. Smith, 193 N.C. App. 739 (Nov. 18, 2008) (Dec. 5, 2008). The defendant's plea had to be vacated where the plea agreement included a term that the defendant had a right to appeal an adverse ruling on a pretrial motion but the pretrial motion was not subject to appellate review.

When Sentence Not in Accord With Plea Agreement

State v. Blount, __ N.C. App. __, 703 S.E.2d 921 (Jan. 18, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0zNTItMS5wZGY). The trial court did not violate G.S. 15A-1024 (withdrawal of guilty plea when sentence not in accord with plea arrangement) by sentencing the defendant in the presumptive range. Under G.S. 15A-1024, if the trial court decides to impose a sentence other than that provided in a plea agreement, the court must inform the defendant of its decision and that he or she may withdraw the plea; if the defendant chooses to withdraw, the court must grant a continuance until the next court session. Although the defendant characterized the agreement as requiring sentencing in the mitigated range, the court found that his interpretation was not supported by the plain language of the plea arrangement, which stated only that the State "shall not object to punishment in the mitigated range."

Plea Colloquy

State v. Bare, 197 N.C. App. 461 (June 16, 2009). When taking a plea, a judge is not required to inform a defendant of possible imposition of sex offender satellite-based monitoring (SBM). Such a statement is not required by G.S. 15A-1022. Nor is SBM a direct consequence of a plea.

State v. Anderson, 198 N.C. App. 201 (July 7, 2009). Following *Bare* (discussed above).

State v. Salvetti, __ N.C. App. __, 687 S.E.2d 698 (Jan. 19, 2010). The defendant, who had entered an *Alford* plea, was not prejudiced by the trial judge's failure to inform him of his right to remain silent, the maximum possible sentence, and that if he pleaded guilty he would be treated as guilty even if he did not admit guilt. (In addition to the trial court's failure to verbally inform the defendant of the maximum sentence, a worksheet attached to the signed Transcript of Plea form incorrectly stated the maximum sentence as 89 months; the correct maximum was 98 months). The court further held that based on the questions that were posed, the trial judge properly determined that the plea was a product of the

defendant's informed choice.

Boykin Claims

State v. Szucs, __ N.C. App. __, 701 S.E.2d 362 (Nov. 2, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/100305-1.pdf). The defendant's plea to habitual felon was valid based on the totality of the circumstances. Although the trial court informed the defendant that the plea would elevate punishment for the underlying offenses from Class H to Class C, it did not inform the defendant of the minimum and maximum sentences associated with habitual felon status.

State v. Mohamed, __ N.C. App. __, 696 S.E.2d 724 (July 20, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/090943-1.pdf). The inclusion of an incorrect file number on the caption of a transcript of plea was a clerical error that did not invalidate a plea to obtaining property by false pretenses where the plea was taken in compliance with G.S. 15A-1022 and the body of the form referenced the correct file number. The incorrect file number related to an armed robbery charge against the defendant.

Improper Pressure

State v. Salvetti, __ N.C. App. __, 687 S.E.2d 698 (Jan. 19, 2010). The prosecutor's offer of a package deal in which the defendant's wife would get a plea deal if the defendant pleaded guilty did not constitute improper pressure within the meaning of G.S. 15A-1021(b). Although special care may be required to determine the voluntariness of package deal pleas, the court's inquiry into voluntariness was sufficient in this case.

Satellite-Based Monitoring (SBM) & Pleas

State v. Bare, 197 N.C. App. 461 (June 16, 2009). When taking a plea, a judge is not required to inform a defendant of possible imposition of sex offender SBM. Such a statement is not required by G.S. 15A-1022. Nor is SBM a direct consequence of a plea.

State v. Wagoner, ___ N.C. App. ___, 683 S.E.2d 391 (Sept. 1, 2009), *aff'd,* 364 N.C. 422 (Oct. 8, 2010). In a case in which there was a dissenting opinion, the court rejected the defendant's argument that the trial court erred in imposing SBM when SBM was not addressed in the defendant's plea agreement with the State.

Trial in the Defendant's Absence

State v. McNeill, __ N.C. App. __, __ S.E.2d __ (Mar. 1, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC00NTYtMS5wZGY). The trial court did not err when, after the defendant failed to appear during trial, he explained to the jury that the trial would proceed in the defendant's absence. The trial judge instructed the jury that the defendant's absence was of no concern with regard to its job of hearing the evidence and rendering a fair and impartial verdict.

State v. Whitted, __ N.C. App. __, __ S.E.2d __ (Feb. 15, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC03MzktMS5wZGY). (1) The trial court did not err by failing to instruct the jury about the defendant's absence from the habitual felon phase of

the trial. Because the trial court did not order the defendant removed from the courtroom, G.S. 15A-1032 did not apply. Rather, the defendant asked to be removed. (2) The trial court did not err by accepting the defendant's oral waiver of her right to be present during portions of her trial.

Sentencing

Active Sentence

State v. Miller, __ N.C. App. __, 695 S.E.2d 149 (July 6, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091193-1.pdf). Under the Structured Sentencing Act a trial judge does not have authority to allow a defendant to serve an active sentence on nonconsecutive days, such as on weekends only.

Aggravating Factors/Sentence

State v. Gillespie, __ N.C. App. __, __ S.E.2d __ (Mar. 1, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC03OTgtMS5wZGY). Where the trial court determined that one aggravating factor (heinous, atrocious or cruel) outweighed multiple mitigating factors, it acted within its discretion in sentencing the defendant in the aggravated range.

State v. Mackey, __ N.C. App. __, __ S.E.2d __ (Jan. 4, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8wOS0xMzgyLTEucGRm). The defendant was improperly sentenced in the aggravated range when the State did not provide proper notice of its intent to present evidence of aggravating factors as required by G.S. 15A-1340.16(a6). The court rejected the State's argument that a letter regarding plea negotiations sent by the State to the defendant provided timely and sufficient notice of its intent to prove aggravating factors.

State v. Anderson, __ N.C. App. __, 684 S.E.2d 450 (Oct. 6, 2009). Rejecting the defendant's argument that the trial court erred by not holding a separate sentencing proceeding for aggravating factors.

State v. Davis, __ N.C. App. __, 702 S.E.2d 507 (Nov. 16, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091537-1.pdf). The trial court did not violate G.S. 15A-1340.16(d) (evidence necessary to prove an element of the offense may not be used to prove any factor in aggravation) by submitting, in connection with assault with a deadly weapon charges, the aggravating factor that the defendant "knowingly created a great risk of death to more than one person by means of a weapon or device which would normally be hazardous to the lives of more than one person." The court reasoned that for the assault charges the State was not required to prove that the defendant used a weapon or device which would normally be hazardous to the lives of more than one person.

State v. Sellars, 363 N.C. 112 (Mar. 20, 2009). The court affirmed a ruling of the North Carolina Court of Appeals finding no error in the defendant's trial and sentence. However, it rejected the implication in the court of appeals' opinion that a jury's determination that a defendant is not insane resolves the presence or absence of the statutory aggravating factor, G.S. 15A-1340.16(d)(8) (knowingly creating great risk of death to more than one person by weapon normally hazardous to lives of more than one person). Nor does a jury's finding that a defendant is not insane automatically render any *Blakely* error concerning this aggravating factor harmless beyond a reasonable doubt. However, the court examined the evidence and determined that the trial judge's finding of the aggravating factor was harmless beyond a reasonable doubt.

State v. Hunter, __ N.C. App. __, 703 S.E.2d 776 (Dec. 21, 2010) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMC8xMC00ODMtMS5wZGY). The evidence was sufficient to support the aggravating factor that the offense committed was especially heinous, atrocious, or cruel. The defendant assaulted his 72-year-old grandmother, stabbing her, striking her in the head, strangling her, and impaling her with a golf club shaft eight inches into her back and chest.

State v. Blakeman, __ N.C. App. __, 688 S.E.2d 525 (Feb. 2, 2010). In a sexual assault case involving a 13-year-old victim, the evidence was insufficient to establish aggravating factor G.S. 15A-1340.16(d)(15) (took advantage of a position of trust or confidence, including a domestic relationship). The defendant was the stepfather of the victim's friend. The victim required parental permission to spend the night with her friend, and had done so not more than ten times. There was no evidence that the victim's mother had arranged for the defendant to care for the victim on a regular basis, or that the defendant had any role in the victim's life other than being her friend's stepfather. There was no evidence suggesting that the victim, who lived nearby, would have relied on the defendant for help in an emergency, rather than going home. There was no evidence of a familial relationship between the victim and the defendant, that they had a close personal relationship, or that the victim relied on the defendant for any physical or emotional care. The evidence showed only that the victim "trusted" the defendant in the same way she might "trust" any adult parent of a friend.

State v. Rivens, 198 N.C. App. 130 (July 7, 2009). There was sufficient evidence to establish the aggravating factor that the defendant had previously been adjudicated delinquent for an offense that would be a B2 felony if it had been committed by an adult. The evidence of that prior adjudication was a Transcript of Admission from the juvenile proceeding, not the Juvenile Adjudication Order or Disposition/Commitment Order. Under G.S. 15A-1131(b), a person has been convicted when he or she has been adjudged guilty or has entered a guilty plea. An admission by a juvenile, like that recorded in a Transcript of Admission is equivalent to a guilty plea.

Mitigating Factors/Sentence

State v. Garnett, __ N.C. App. __, __ S.E.2d __ (Feb. 15, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xMTEtMS5wZGY). The trial court did not abuse its discretion by refusing the defendant's request for a mitigated sentence despite uncontroverted evidence of mitigating circumstances. The defendant offered uncontroverted evidence of mitigating factors and the trial court considered this evidence during the sentencing hearing. That the trial court did not, however, find any mitigating factors and chose to sentence the defendant in the presumptive range was within its discretion.

State v. Simonovich, __ N.C. App. __, 688 S.E.2d 67 (Jan. 19, 2010). The trial court did not err by failing to find the G.S. 15A-1340.16(e)(8) mitigating factor that the defendant acted under strong provocation or that the relationship between the defendant and the victim was otherwise extenuating. As to an extenuating relationship, the evidence showed only that the victim (who was the defendant's wife) repeatedly had extra-marital sexual relationships and that the couple fought about that behavior. As to provocation, there was no evidence that the victim physically threatened or challenged the defendant in any way; the only threat she made was to commit further adultery and to report the defendant as an abuser.

State v. Davis, __ N.C. App. __, __696 S.E.2d 917__ (Aug. 17, 2010)

(http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091589-1.pdf). The trial court did not abuse its discretion by failing to find mitigating factors. As to acceptance of responsibility, the court found that although the defendant apologized for her actions, her statement did not lead to the "sole inference that [s]he accepted [and that] [s]he was answerable for the result of [her] criminal conduct." Although defense counsel argued other mitigating factors, no supporting evidence was presented to establish them. Finally, although the defendant alleged that a drug addiction compelled her to commit the offenses, the court noted that drug addiction is not *per se* a statutorily enumerated mitigating factor and in any event, the defendant did not present any evidence on this issue at sentencing.

Extraordinary Mitigation

State v. Riley, __ N.C. App. __, 688 S.E.2d 477 (Feb. 2, 2010). The trial court abused its discretion by determining that two normal mitigating factors, without additional facts being present, constituted extraordinary mitigation.

Blakely Issues

Oregon v. Ice, 129 S. Ct. 711 (Jan. 14, 2009). *Apprendi*, and later rulings do not provide a Sixth Amendment right to jury trial under an Oregon law that requires findings of fact to support a judge's decision to impose consecutive sentences. The Court made clear that states such as North Carolina, which do not require a judge to make findings of fact to impose consecutive sentences, are not required to provide a defendant with a jury trial on the consecutive sentences issue.

State v. Jacobs, __ N.C. App. __, 688 S.E.2d 726 (Jan. 19, 2010). Trial judge's *Blakely* error with respect to aggravating factors was not harmless and required a new sentencing hearing.

State v. Shaw, __ N.C. App. __, 700 S.E.2d 62 (Oct. 5, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091096-1.pdf). The court rejected the defendant's argument that the trial court took into account a non-statutory aggravating factor neither stipulated to nor found by the jury beyond a reasonable doubt. The defendant's argument was based on the trial court's comments that (1) the defendant could have been tried for premeditated first degree murder and (2) "the State . . . made a significant concession . . . allowing [him] to plead second-degree murder." When taken in context, these comments were merely responses to those made by defense counsel.

Consolidated Offenses

State v. Jacobs, __ N.C. App. __, 688 S.E.2d 726 (Jan. 19, 2010). G.S. 15A-1340.15(b) requires that when offenses are consolidated for judgment, the trial judge must enter a sentence for the most serious offense.

DWI Sentencing

State v. Green, __ N.C. App. __, __ S.E.2d __ (Mar. 1, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC04NC0xLnBkZg0). No *Blakely* error occurred in the defendant's sentence for impaired driving. The trial court found two aggravating factors, two factors in mitigation, and imposed a level four punishment. The level four punishment was

tantamount to a sentence within the presumptive range, so that the trial court did not enhance defendant's sentence even after finding aggravating factors. Therefore, *Blakely* is not implicated.

State v. Dalton, 197 N.C. App. 392 (June 2, 2009). G.S. 20-179(a1)(1) (requiring the state, in an appeal to superior court, to give notice of grossly aggravating factors) only applies to offenses committed on or after the effective date of the enacting legislation, December 1, 2006.

Expunction

State v. Frazier, __ N.C. App. __, 697 S.E.2d 467 (Aug. 3, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/100019-1.pdf). The trial court erred by applying G.S. 14-50.30 and expunging the defendant's conviction for an offense occurring on February 6, 1995. At the time, the statute only applied to offenses occurring on or after December 1, 2008.

Gang Offenses

State v. Dubose, __ N.C. App. __, 702 S.E.2d 330 (Dec. 7, 2010) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMC8xMC0yMTMtMS5wZGY). The trial court erred by making a determination under G.S. 14-50.25 that the offenses involved criminal street gang activity outside of defendant's presence and without giving him an opportunity to be heard; vacating and remanding for a new sentencing hearing. A finding of criminal street gang activity was a "substantive change" in the judgments that must be made in defendant's presence and with an opportunity to be heard.

Impermissibly Based on Exercise of Rights

State v. Pinkerton, __ N.C. __, __ S.E.2d __ (Feb. 4, 2011) (http://appellate.nccourts.org/opinions/?c=1&pdf=MjAxMS8zMjFBMTAtMS5wZGY=). In a per curiam opinion, the court reversed, for the reasons stated in the dissenting opinion below, the decision of the court of appeals in *State v. Pinkerton*, __ N.C. App. __, 697 S.E.2d 1 (July 20, 2010). The court of appeals had held, over a dissent, that when sentencing the defendant in a child sexual assault case, the trial court impermissibly considered the defendant's exercise of his right to trial by jury. After the jury returned a guilty verdict and the defendant was afforded the right to allocution, the trial court stated that "if you truly cared–if you had one ounce of care in your heart about that child–you wouldn't have put that child through this." Instead, according to the trial court, defendant "would have pled guilty, and you didn't." The trial court stated: "I'm not punishing you for not pleading guilty . . . I would have rewarded you for pleading guilty." The dissenting judge found no indication of improper motivation by the trial court judge in imposing the defendant's sentence.

State v. Haymond, __ N.C. App. __, 691 S.E.2d 108 (April 6, 2010). Ordering a new sentencing hearing where there was a reasonable inference that the trial judge ran the defendant's ten felony sentences consecutively in part because of the defendant's rejection of a plea offer and insistence on going to trial. Even though the sentences were elevated to Class C felonies because of habitual felon status, the trial judge could have consolidated them into a single judgment. At a pretrial hearing and in response to an offer by the prosecutor to recommend a ten-year sentence, the defendant asked the trial court to consider a sentence of five years in prison and five years of probation. The trial court responded saying, "So I'm just telling you up front that the offer the State made is probably the best thing." The defendant declined the state's offer, went to trial, and was convicted. At sentencing, the trial judge stated: "[w]ay back when we dealt with that plea different times and, you know, you told me . . . what you wanted to do, and I told you

that the best offer you're gonna get was that ten-year thing, you know." This statement created an inference arises that the trial court based its sentence at least in part on defendant's failure to accept the State's plea offer.

State v. Anderson, 362 N.C. App. 90 (Dec. 16, 2008). Rejecting the defendant's argument that the trial court imposed a greater sentence because the defendant chose to proceed to trial rather than plead guilty. At a conference between the judge, prosecutor, and defense counsel, the judge commented that if the parties were engaged in plea discussions, he would be amenable to a probationary sentence. Defense counsel objected to the judge's comments, stating that it could be inferred that the judge would be less likely to give the defendant probation if he did not plead guilty. The judge stated that he had not meant to make any such implication, but rather to encourage the parties to enter plea negotiations. The defendant failed to show that it can be reasonably inferred that the defendant's sentence was improperly based, even in part, on his insistence on a jury trial.

Juveniles

Graham v. Florida, 560 U.S. __ (May 17, 2010). The Eighth Amendment's Cruel and Unusual Punishments Clause does not permit a juvenile offender to be sentenced to life in prison without the possibility of parole for a non-homicide crime. For a more detailed discussion of this case, see http://sogweb.sog.unc.edu/blogs/ncclaw/?p=1285

State v. Pettigrew, __ N.C. App. __, 693 S.E.2d 698 (June 1, 2010) (available at: http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091226-1.pdf). The defendant, who was sixteen years old when he committed the sexual offenses at issue, was sentenced to 32 to 40 years imprisonment. The court held that the sentence did not violate the constitutional prohibitions against cruel and unusual punishment.

Merger Rule

State v. Blymyer, __ N.C. App. __, 695 S.E.2d 525 (July 6, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091722-1.pdf). The trial court erred by consolidating for judgment convictions for first-degree murder and robbery with a dangerous weapon where the jury did not specify whether it had found the defendant guilty of first-degree murder based on premeditation and deliberation or on felony-murder. In this situation, the robbery merged with the murder.

Misdemeanors

Limit on Consecutive Sentences

State v. Remley, __ N.C. App. __, 686 S.E.2d 160 (Nov. 17, 2009). The trial court violated G.S. 15A-1340.22(a) when it imposed a consecutive sentence on multiple misdemeanor convictions that was more than twice that allowed for the most serious misdemeanor, a Class 1 misdemeanor. The statute provides, in part, that if the trial court imposes consecutive sentences for two or more misdemeanors and the most serious offense is a Class A1, Class 1, or Class 2 misdemeanor, the total length of the sentences may not exceed twice the maximum sentence authorized for the most serious offense.

Prejudice Enhancement

State v. Brown, __ N.C. App. __, 689 S.E.2d 210 (Feb. 16, 2010). Prejudice enhancement in G.S. 14-3(c) was properly applied where the defendant, a white male, assaulted another white male because of the victim's interracial relationship with a black female.

Post-Release Supervision

State v. Harris, 198 N.C. App. 371 (July 21, 2009). The trial court did not err in ordering that an indigent defendant reimburse the State for the costs of providing a transcript of the defendant's prior trial as a condition of post-release supervision.

Prayer for Judgment Continued

State v. Craven, __ N.C. App. __, 696 S.E.2d 750 (July 20, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091138-1.pdf). The court had jurisdiction to enter judgment on a PJC. The defendant was indicted on August 7, 2006, and entered a guilty plea on January 22, 2007, when a PJC was entered, from term to term. Judgment was entered on March 13, 2009. Because the defendant never requested sentencing, he consented to continuation of sentencing and the two-year delay was not unreasonable.

State v. Popp, 197 N.C. App. 226 (May 19, 2009). The following conditions went beyond requirements to obey the law and transformed a PJC into a final judgment: abide by a curfew, complete high school, enroll in an institution of higher learning or join the armed forces, cooperate with random drug testing, complete 100 hours of community service, remain employed, and write a letter of apology.

Presumptive Range Sentencing

State v. Whitted, __ N.C. App. __, __ S.E.2d __ (Feb. 15, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC03MzktMS5wZGY). The trial judge's comments about the judgment and conviction form did not suggest that it incorrectly thought that it could not impose a sentence in the presumptive range when aggravating and mitigating factors were in equipoise.

Prior Record Level
Substantially Similar Offense

State v. Wright, __ N.C. App. __, __ S.E.2d __ (Mar. 1, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC04NTQtMS5wZGY). Since the State failed to demonstrate the substantial similarity of out-of-state New York and Connecticut convictions to North Carolina crimes and the trial court failed to determine whether the out-of-state convictions were substantially similar to North Carolina offenses, a resentencing was required. The State neither provided copies of the applicable Connecticut and New York statutes, nor provided a comparison of their provisions to the criminal laws of North Carolina. Also, the trial court did not analyze or determine whether the out-of-state convictions were substantially similar to North Carolina offenses.

State v. Armstrong, __ N.C. App. __, 691 S.E.2d 433 (April 20, 2010). For purposes of assigning one prior record level point for out-of-state misdemeanors that are substantially similar to a North Carolina A1 or 1 misdemeanor, North Carolina impaired driving is a Class 1 misdemeanor. Thus, the trial court did not err by assigning one prior record level point to each out-of-state impaired driving conviction. The

state presented sufficient evidence that the out-of-state convictions were misdemeanors in the other state.

All Elements of Current Offense Included in Prior Conviction

State v. Ford, 195 N.C. App. 321 (Feb. 3, 2009). The defendant was convicted of attempted felony larceny and then pled guilty to being a habitual felon. The defendant previously had been convicted of felony larceny. That the judge properly found one point under G.S. 15A-1340.14(b)(6) (all elements of current offense are included in offense for which defendant was previously convicted) in calculating prior record level. Attempted felony larceny is a lesser-included offense of felony larceny regardless of the theory of felony larceny. It was irrelevant that the defendant's prior felony larceny convictions did not include the element that the defendant took property valued over $1,000.

State v. Williams, __ N.C. App. __, 684 S.E.2d 898 (Nov. 3, 2009). Following *Ford*, discussed above, and holding that the trial court properly assigned a prior record level point based on the fact that all elements of the offense at issue−delivery of a controlled substance, cocaine−were included in a prior conviction for delivery of a controlled substance, marijuana.

Ex Post Facto Issues

State v. Watkins, 195 N.C. App. 215 (Feb 3, 2009). There was no ex post facto violation in determining the defendant's prior record level when prior record level points were calculated using the classification of the prior offense at the time of sentencing (Class G felony) rather than the lower classification in place when the defendant was convicted of the prior (Class H felony).

Habitual Felon

State v. Flint, __ N.C. App. __, 682 S.E.2d 443 (Sept. 15, 2009). When calculating prior record level points for a new felony, points may be assigned based on a prior substantive felony supporting a prior habitual felon conviction, but not based on the prior habitual felon conviction itself.

Multiple Offenses in One Court Week

State v. Fair, __ N.C. App. __, 695 S.E.2d 514 (July 6, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091381-1.pdf). On appeal, a defendant is bound by his or her stipulation to the existence of a prior conviction. However, even if a defendant has stipulated to his or her prior record level, the defendant still may appeal the propriety of counting a stipulated-to conviction for purposes of calculating prior record level points. In this case, the trial court erred by counting, for prior record level purposes, two convictions in a single week of court in violation of G.S. 15A-1340.14(d).

Proof Issues & Stipulations

State v. Bethea, __ N.C. App. __, 694 S.E.2d 451 (June 15, 2010) (online at: http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/090833-1.pdf). The defendant was properly assigned two prior record level points for a federal felony. The State presented a prior record level worksheet, signed by defense counsel, indicating that the defendant had two points for the federal conviction. During a hearing, the prosecutor asked defense counsel if the defendant stipulated to having two points and defense counsel responded: "Judge, I saw one conviction on the worksheet. [The

defendant] has agreed that's him. Two points." Defense counsel made no objection to the worksheet. When the defendant was asked by counsel if he wanted to say anything, the defendant responded, "No, sir." The worksheet, defense counsel's remark, and defendant's failure to dispute the existence of his out-of-state conviction are sufficient to prove that the prior conviction exists, that the defendant is the person named in the prior conviction, and that the prior offense carried two points.

State v. Lee, 193 N.C. App. 748 (Nov. 18, 2008). The defendant's stipulation that a New Jersey conviction was substantially similar to a North Carolina offense for prior record level points was ineffective. The "substantially similar" issue is a question of law that must be determined by a judge.

State v. Bohler, 198 N.C. App. 631 (Aug. 4, 2009). The defendant's stipulation that certain out-of-state convictions were substantially similar to specified North Carolina offenses was ineffective. However, the defendant could stipulate that the out-of-state convictions occurred and that they were either felonies or misdemeanors under the other state's law, for purposes of assigning prior record level points. Based on the stipulation in this case, the defendant's out-of-state convictions could be counted for prior record level purposes using the "default" classifications in G.S. 15A-1340.14(e).

State v. Henderson, __ N.C. App. __, 689 S.E.2d 462 (Dec. 8, 2009). A defendant's stipulation to the existence of out-of-state convictions and their classification as felonies or misdemeanors can support a "default" classification for prior record level purposes. However, a stipulation to substantial similarity is ineffective, as that issue is a matter of law that must be determined by the judge.

State v. Hussey, 194 N.C. App. 516 (Dec. 16, 2008). A stipulation signed by the prosecutor and defense counsel in Section III of AOC-CR-600 (prior record level worksheet) supported the judge's finding regarding prior record level. The court distinguished a prior case on grounds that the current version of the form includes a stipulation to prior record level.

State v. Boyd, __ N.C. App. __, 701 S.E.2d 255 (Nov. 2, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/100025-1.pdf). The State's evidence regarding the defendant's prior record level was insufficient. The State offered only an in-court statement by the prosecutor and the prior record level worksheet. The court rejected the State's argument that the prior record level was agreed to by stipulation, noting that defense counsel objected to the worksheet and to two listed convictions.

State v. Jacobs, __ N.C. App. __, 688 S.E.2d 112 (Feb. 2, 2010). The trial court erred by sentencing the defendant at prior record level VI. Although the prosecutor submitted a Felony Sentencing Worksheet (AOC-CR-600), there was no stipulation, either in writing on the worksheet or orally by the defendant. The court noted that the relevant form now includes signature lines for the prosecutor and either the defendant or defense counsel to acknowledge their stipulation to prior conviction level but that this revision seems to have gone unnoticed.

State v. Fortney, __ N.C. App. __, 687 S.E.2d 518 (Jan. 5, 2010). A printout from the FBI's National Crime Information Center (NCIC) contained sufficient identifying information to prove, by a preponderance of the evidence, that the defendant was the subject of the report and the perpetrator of the offenses specified in it. The printout listed the defendant's prior convictions as well as his name, date of birth, sex, race, and height. Because the printout included the defendant's weight, eye and hair color, scars, and tattoos, the trial court could compare those characteristics to those of the defendant. Additionally, the State tendered an official document from another state detailing one of the convictions

listed in the NCIC printout. Although missing the defendant's year of birth and social security number, that document was consistent in other respects with the NCIC printout.

State v. Best, __ N.C. App. __, 690 S.E.2d 58 (Mar. 2, 2010). A printed copy of a screen-shot from the N.C. Administrative Office of the Courts (AOC) computerized criminal record system showing the defendant's prior conviction is sufficient to prove the defendant's prior conviction under G.S. 15A-1340.14(f)(3). Additionally, the information in the printout provides sufficient identifying information with respect to the defendant to give it the indicia of reliability to prove the prior conviction under subsection (f)(4).

Harmless Error

State v. Blount, __ N.C. App. __, 703 S.E.2d 921 (Jan. 18, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0zNTItMS5wZGY). Although the trial court incorrectly determined that the defendant had a total of 8 prior record level points rather than six, the error was harmless. The defendant was assigned to prior record level III, which requires 5-8 points. A correct calculation of defendant's points would have placed him in the same level.

Probation

State v. Crowder, __ N.C. App. __, 704 S.E.2d 13 (Dec. 21, 2010) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMC8wOS0xMzY0LTEucGRm). (1) The trial court abused its discretion by revoking the defendant's probation when the State failed to present evidence that he violated the condition of probation that he "not reside in a household with a minor child." Although the trial court interpreted the term "reside" to mean that the defendant could not have children anywhere around him, *State v. Strickland*, 169 N.C. App. 193 (2005), construed that term much more narrowly, establishing that the condition is not violated simply when a defendant sees or visits with a child. Because the evidence showed only that the defendant was visiting with his fiancée's child, it was insufficient to establish a violation. (2) The trial court improperly revoked the defendant's probation for violating conditions that he not (a) socialize or communicate with minors unless accompanied by an approved adult; or (b) be alone with a minor without approval. The conditions were not included in the written judgments and there was no evidence that the defendant ever was provided written notice of them. As such, they were not valid conditions of probation.

State v. Mauck, __ N.C. App. __, 694 S.E.2d 481 (June 15, 2010) (online at: http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091042-1.pdf). The trial court had jurisdiction to revoke the defendant's probation. In 2003, the defendant was convicted in Haywood County and placed on probation. In 2007, the defendant's probation was modified in Buncombe County. In 2009, it was revoked in Buncombe County. Appealing the revocation, the defendant argued that under G.S. 15A-1344(a), Buncombe County was not a proper place to hold the probation violation hearing. The court held that the 2007 Buncombe County modification made that county a place "where the sentence of probation was imposed," and thus a proper place to hold a violation hearing.

State v. Hubbard, 198 N.C. App. 154 (July 7, 2009). Although the probation report might have been ambiguous regarding the condition allegedly violated, because the report set forth the specific facts at issue (later established at the revocation hearing), the report gave the defendant sufficient notice of the alleged violation, as required by G.S. 15A-1345(e). The State presented sufficient evidence that the defendant violated a special condition of probation requiring compliance with the rules of intensive

probation. The State's evidence included testimony by probation officers that they informed the defendant of his curfew and their need to communicate with him during curfew checks, and that compliance with curfew meant that the defendant could not be intoxicated in his home. During a curfew check, the defendant was so drunk that he could not walk; later that evening the defendant was drunk and disruptive, to the extent that his girlfriend was afraid to enter the residence.

State v. Black, 197 N.C. App. 373 (June 2, 2009). Holding, in a case decided under the old version of G.S. 15A-1344(f), that the trial court lacked jurisdiction to hold a probation revocation hearing where the state failed to make reasonable efforts to notify the defendant and to hold the hearing before the period of probation expired.

State v. Willis, __ N.C. App. __, 680 S.E.2d 772 (Aug. 18, 2009). Although a trial court has authority under G.S. 15A-1344(d) to modify conditions of probation, modifications only may be made after notice and a hearing, and if good cause is shown. Although one modification made in this case was permissible as a clerical change, a second modification was substantive and was invalid as it was made without notice and a hearing.

State v. Riley, __ N.C. App. __, 688 S.E.2d 477 (Feb. 2, 2010). The trial judge violated G.S. 15A-1351 by imposing a period of special probation that exceeded ¼ of the maximum sentence of imprisonment imposed. The trial judge also violated G.S. 15A-1343.2 by imposing a term of probation greater than 36 months without making the required specific findings supporting the period imposed.

State v. Yonce, __ N.C. App. __, 701 S.E.2d 264 (Nov. 2, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091504-1.pdf). (1) The court lacked jurisdiction to consider an appeal when the defendant failed to timely challenge an order revoking his probation. If a trial judge determines that a defendant has willfully violated probation, activates the defendant's suspended sentence, and then stays execution of his or her order, a final judgment has been entered, triggering the defendant's right to seek appellate review of the trial court's decision. In this case, the defendant appealed well after expiration of the fourteen-day appeal period prescribed in the appellate rules. (2) The trial court did not abuse its discretion by declining to further stay another judge's order finding a probation violation for failure to pay restitution and activating the sentence but staying execution of the order when the defendant presented no evidence of an inability to pay.

State v. Kerrin, __ N.C. App. __, 703 S.E.2d 816 (Jan. 4, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8wOS0xMTUzLTEucGRm). (1) The trial court improperly ordered a forfeiture of the defendant's licensing privileges without making a finding of fact required by G.S. 15A-1331A that the defendant failed to make reasonable efforts to comply with the conditions of her probation. The court noted that form AOC-CR-317 does not contain a section specifically designated for the required finding and encouraged revision of the form to add this required finding. (2) The term of the forfeiture exceeded statutory limits. A trial court revoking probation may order a license forfeiture under G.S. 15A-1331A(b)(2) at any time during the probation term, but the term of forfeiture cannot exceed the original probation term set by the sentencing court at the time of conviction. The defendant was placed on 24 months probation by the sentencing court, to end on December 15, 2009. His probation was revoked on April 1, 2009, eight months before his probation was set to expire, and the trial court ordered the forfeiture for 24 months from the date of revocation. Because the forfeiture term extended beyond the defendant's original probation, it was invalid. The court encouraged further revision of AOC-CR-317 (specifically the following note: "*The 'Beginning Date' is the date of the entry of this judgment, and the 'Ending Date' is the date of the end of the full probationary*

term imposed at the time of conviction.") "to clarify this issue and perhaps avoid future errors based upon misinterpretation of the form."

Restitution

State v. Mumford , 364 N.C. 394 (Oct. 8, 2010) (http://www.aoc.state.nc.us/www/public/sc/opinions/2010/pdf/32PA10-1.pdf). The court reversed *State v. Mumford,* __ N.C. App. __, 688 S.E.2d 458 (Jan. 5, 2010) (trial court erred in its order requiring the defendant to pay restitution; vacating that portion of the trial court's order), and held that although the trial court erred by ordering the defendant to pay restitution when the defendant did not stipulate or otherwise unequivocally agree to the amount of restitution ordered, the error was not prejudicial. As to prejudice, the court reasoned: "[A]t the time the judgment is collected, defendant cannot be made to pay more than what is actually owed, that is, the amount actually due to the various entities that provided medical treatment to defendant's victims. Because defendant will pay the lesser of the actual amount owed or the amount ordered by the trial court, there is no prejudice to defendant."

State v. Elkins, __ N.C. App. __, __ S.E.2d __ (Mar. 1, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC05MTYtMS5wZGY). The restitution order was not supported by evidence presented at trial or sentencing. The prosecutor's unsworn statement regarding the amount of restitution was insufficient to support the order.

State v. McNeil, __ N.C. App. __, __ S.E.2d __ (Mar. 1, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC00NTYtMS5wZGY). The trial court committed reversible error by ordering the defendant to pay restitution when the State presented no evidence to support the award. Although there was evidence that the victim's home was damaged during the breaking and entering, there was no evidence as to the cost of the damage.

State v. Moore, __ N.C. App. __, __ S.E.2d __ (Feb. 15, 2011) http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC03NjQtMS5wZGY). (1) In an obtaining property by false pretenses case, the victim need not be identified in the indictment in order to receive restitution. (2) In a case in which the defendant obtained property by false pretenses when he received money for rental of a house that he did not own or have the right to rent, the homeowner was harmed as a direct and proximate cause of the defendant's actions. (3) Over a dissent, the court held that the evidence was insufficient to support an award of restitution in the amount of $39,332.49. Although the victim had testified that a "repair person" estimated that repairs would cost "[t]hirty-something thousand dollars," this was merely a guess or conjecture. The only record mention of $39,332.49 is on the restitution worksheet, which cannot support the award of restitution.

State v. Best, 196 N.C. App. 220 (April 7, 2009). The trial court erred in ordering restitution to the murder victims' families when there was no direct and proximate causal link between the defendant's actions and harm caused to those families. The defendant was convicted as an accessory after the fact to murder and none of the defendant's actions obstructed the murder investigation or assisted the principals in evading detection, arrest, or punishment.

State v. Blount, __ N.C. App. __, 703 S.E.2d 921 (Jan. 18, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0zNTItMS5wZGY). Because no evidence was presented in support of restitution and the defendant did not stipulate to the amount, the trial court erred by ordering restitution. During sentencing, the prosecutor presented a restitution worksheet

requesting restitution for the victim to compensate for stolen items. The victim did not testify, no additional documentation was submitted, and there was no stipulation to the worksheet.

State v. Swann, 197 N.C. App. 221 (May 19, 2009). Restitution of $510 was not supported by the evidence. The prosecutor had presented a restitution worksheet stating that the victim sought $510 in restitution. The worksheet was not supported by documentation, the victim did not testify, and the defendant did not stipulate to the amount. The prosecutor's statement that the amount represented "additional repairs and medical expenses" was insufficient to support the award.

State v. Mauer, __ N.C. App. __, 688 S.E.2d 774 (Feb. 16, 2010). The trial court erred by ordering restitution where no evidence was presented supporting the restitution worksheet. The defendant's silence when the trial court orally entered judgment cannot constitute a stipulation to restitution.

State v. Dallas, __ N.C. App. __, 695 S.E.2d 474 (July 6, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/090644-1.pdf). In a larceny of motor vehicle case, the restitution award was not supported by competent evidence. Restitution must be supported by evidence adduced at trial or at sentencing; the unsworn statement of the prosecutor is insufficient to support restitution. In this case, the trial court ordered the defendant to pay $8,277.00 in restitution based on an unverified worksheet submitted by the State. However, the evidence at trial showed that the value of the stolen items was $1,200.00 - $1,400.00.

State v. Davis, __ N.C. App. __, 696 S.E.2d 917 (Aug. 17, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091589-1.pdf). The evidence was insufficient to support a restitution award. The State conceded that it did not introduce evidence to support the restitution request. However, it argued that the defendant stipulated to the amount of restitution when she stipulated to the factual basis for the plea and that the specific amounts of restitution owed were incorporated into the stipulated factual basis by reference to the restitution worksheets submitted to the court. The court rejected these arguments, concluding that a restitution worksheet, unsupported by testimony or documentation, cannot support a restitution order and that the defendant did not stipulate to the amounts awarded.

Trafficking Offenses

State v. Nunez, __ N.C. App. __, 693 S.E.2d 223 (May 18, 2010). The trial judge had discretion whether to run two drug trafficking sentences imposed at the same time concurrently or consecutively. G.S. 90-95(h) provides that, "[s]entences imposed pursuant to this subsection shall run consecutively with and shall commence at the expiration of any sentence being served by the person sentenced hereunder." This means that if the defendant is already serving a sentence, the new sentence must run consecutively to that sentence. It does not mean that when a defendant is convicted of multiple trafficking offenses at a term of court that those sentences, as a matter of law, must run consecutively to each other.

Appeal

State v. Ziglar, __ N.C. App. __, __ S.E.2d __ (Feb. 1, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC04MzktMS5wZGY=). Because the defendant was sentenced in the presumptive range, he was not entitled to an appeal as a matter of right on the issue whether his sentence was supported by the evidence. Furthermore, the defendant did not petition for review by way of a writ of certiorari.

Resentencing

Prohibition on More Severe Sentence After Appeal or Collateral Attack

State v. Daniels, __ N.C. App. __, 691 S.E.2d 78 (April 6, 2010). After being found guilty of first-degree rape and first-degree kidnapping, the defendant was sentenced to consecutive terms of 307-378 months for the rape and 133-169 for the kidnapping. On appeal, the court held that the trial judge erred by allowing the same sexual assault to serve as the basis for the rape and first-degree kidnapping convictions. The court remanded for a new sentencing hearing, instructing the trial judge to either arrest judgment on first-degree kidnapping and resentence on second-degree kidnapping, or arrest judgment on first-degree rape and resentence on first-degree kidnapping. The trial judge chose the first option, resentencing the defendant to 370-453 months for first-degree rape and to a consecutive term of 46-65 months for second-degree kidnapping. The resentencing violated G.S. 15A-1335 because the trial court imposed a more severe sentence for the rape conviction after the defendant's successful appeal. The court rejected the State's argument that when applying G.S. 15A-1335, the court should consider whether the aggregated new sentences are greater than the aggregated original sentences.

Application of Credits Against Sentence

Jones v. Keller, 364 N.C. 249 (Aug. 27, 2010) (http://www.aoc.state.nc.us/www/public/sc/opinions/2010/pdf/518PA09-1.pdf). The trial court erred by granting the petitioner habeas corpus relief from incarceration on the grounds that he had accumulated various credits against his life sentence, imposed on September 27, 1976. The petitioner had argued that when his good time, gain time, and merit time were credited to his life sentence, which was statutorily defined as a sentence of 80 years, he was entitled to unconditional release. The court rejected that argument, concluding that DOC allowed credits to the petitioner's sentence only for limited purposes that did not include calculating an unconditional release date. DOC had asserted that it recorded gain and merit time for the petitioner in the event that his sentence was commuted, at which time they would be applied to calculate a release date; DOC asserted that good time was awarded solely to allow him to move to the least restrictive custody grade and to calculate a parole eligibility date. The court found that the limitations imposed by DOC on these credits were statutorily and constitutionally permissible and that, therefore, the petitioner's detention was lawful. The court also rejected the petitioner's ex post facto and equal protection arguments.

Brown v. North Carolina DOC, 364 N.C. 319 (Aug. 27, 2010) (http://www.aoc.state.nc.us/www/public/sc/opinions/2010/pdf/517PA09-1.pdf). For the reasons stated in *Jones* (discussed above), the court held that the trial court erred by granting the petitioner habeas corpus relief from incarceration on the grounds that she had accumulated various credits against her life sentence.

Sequestration

State v. Patino, __ N.C. App. __, 699 S.E.2d 678 (Oct. 5, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/100201-1.pdf). The trial court did not abuse its discretion by denying the defendant's motion to sequester the State's witnesses. In support of sequestration, defense counsel argued that there were a number of witnesses and that they might have forgotten about the incident. The court noted that neither of these reasons typically supports a sequestration order and that counsel did not explain or give specific reasons to suspect that the State's

witnesses would be influenced by each other's testimony. The court also held that a trial court is not required to explain or defend a ruling on a motion to sequester.

Sex Offenders
Reportable Convictions
Child Abduction

State v. Stanley, __ N.C. App. __, 697 S.E.2d 389 (July 20, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091263-1.pdf). A conviction for abduction of a child under G.S. 14-41 triggers registration requirements if the offense is committed against a minor and the person committing the offense is not the minor's parent. The court held that as used in G.S. 14-208.6(1i), the term parent includes only a biological or adoptive parent, not one who "acts as a parent" or is a stepparent.

Satellite-Based Monitoring (SBM)
Bring Back Hearing

State v. Cowan, __ N.C. App. __, 700 S.E.2d 239 (Sept. 21, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091415-1.pdf). G.S. 14-208.40B (procedure for determining SBM eligibility when eligibility was not determined when judgment was imposed) applies to SBM proceedings initiated after December 1, 2007, even if those proceedings involve offenders who had been sentenced or had committed the offenses that resulted in SBM eligibility before that date. The defendant received a probationary sentence for solicitation of indecent liberties on August 30, 2007 and thus was subject to SBM requirements, which apply to any offender sentenced to intermediate punishment on or after August 16, 2006. He challenged the trial court's later order requiring him to enroll in SBM, arguing that G.S. 14-208.40B did not apply to offenses committed prior to December 1, 2007, the statute's effective date.

Constitutionality
Ex Post Facto

State v. Bowditch, 364 N.C. 335 (Oct. 8, 2010) (http://www.aoc.state.nc.us/www/public/sc/opinions/2010/pdf/448PA09-1.pdf). Subjecting defendants to satellite-based monitoring (SBM) does not violate the constitutional prohibition against ex post facto laws. The defendants all pleaded guilty to multiple counts of taking indecent liberties with a child; all of the offenses occurred before the SBM statutes took effect. The defendants challenged their eligibility for SBM, arguing that their participation would violate prohibitions against ex post facto laws. The court rejected this argument, concluding that the SBM program was not intended to be criminal punishment and is not punitive in purpose or effect. The court first determined that in enacting the SBM program, the General Assembly's intention was to enact a civil, regulatory scheme, not to impose criminal punishment. It further concluded that, applying the *Mendoza-Martinez* factors, the SMB program is not so punitive either in purpose or effect as to negate the General Assembly's civil intent. For related cases, see *State v. Wagoner*, 364 N.C. 422 (Oct. 8, 2010) (http://www.aoc.state.nc.us/www/public/sc/opinions/2010/pdf/396A09-1.pdf) (for the reasons stated in *Bowditch*, the court affirmed *State v. Wagoner*, ___ N.C. App. ___, 683 S.E.2d 391 (Sept. 1, 2009) (holding, over a dissent, that requiring the defendant to enroll in SBM does not violate the constitutional prohibition against ex post facto law or double jeopardy)); *State v. Morrow*, 364 N.C. 424 (Oct. 8, 2010) (http://www.aoc.state.nc.us/www/public/sc/opinions/2010/pdf/461A09-1.pdf). For the reasons stated in

Bowditch, the court affirmed *State v. Morrow*, __ N.C. App. __, 683 S.E.2d 754 (Oct. 6, 2009) (concluding, over a dissent, that the SBM statute does not violate the ex post facto clause)); *State v. Vogt*, 364 N.C. 425 (Oct. 8, 2010) (http://www.aoc.state.nc.us/www/public/sc/opinions/2010/pdf/465A09-1.pdf) (for the reasons stated in *Bowditch*, the court affirmed *State v. Vogt*, __ N.C. App. __, 685 S.E.2d 23 (Nov. 3, 2009) (concluding, over a dissent, that the SBM statute does not violate the ex post facto clause)); *State v. Hagerman*, 364 N.C. 423 (Oct. 8, 2010) (http://www.aoc.state.nc.us/www/public/sc/opinions/2010/pdf/491A09-1.pdf) (for the reasons stated in *Bowditch*, the court affirmed *State v. Hagerman*, __ N.C. App. __, 685 S.E.2d 153 (Nov. 3, 2009) (rejecting the defendant's *Apprendi* challenge to SBM; reasoning that because SBM is a civil remedy, it did not increase the maximum penalty for the crime)). For post-*Bowditch* Court of Appeals cases reaching the same conclusion, see *State v. Williams*, __ N.C. App. __, 700 S.E.2d 774 (Oct. 19, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/100347-1.pdf) (court rejected the defendant's arguments that SBM violates prohibitions against ex post facto and double jeopardy). For pre-*Bowditch* Court of Appeals cases holding that SBM does not violate the ex post facto clause, see *State v. Bare*, 197 N.C. App. 461 (June 16, 2009); *State v. Bowlin*, 693 S.E.2d 234 (May 18, 2010); *State v. Cowan*, __ N.C. App. __, 700 S.E.2d 239 (Sept. 21, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091415-1.pdf).

Double Jeopardy

State v. Anderson, 198 N.C. App. 201 (July 7, 2009). Because SBM is civil in nature, its imposition does not violate a defendant's right to be free from double jeopardy.

State v. Williams, __ N.C. App. __, 700 S.E.2d 774 (Oct. 19, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/100347-1.pdf). Following prior case law, the court rejected the defendant's arguments that SBM violates prohibitions against ex post facto and double jeopardy.

Vagueness

State v. McCravey, __ N.C. App. __, 692 S.E.2d 409 (May 4, 2010). The statutory definition of an aggravated offense in G.S. 14-208.6(1a) is not unconstitutionally vague for failure to define the term "use of force."

Notice of Proceeding

State v. Wooten, 194 N.C. App. 524 (Dec. 16, 2008). Affirming the trial court's order requiring the defendant to enroll in SBM for life as a recidivist based on convictions for indecent liberties with a minor in 1989 and 2006. The defendant's bring-back hearing was held in January, 2008, days before his release from prison. The defendant argued that the court lacked jurisdiction to hold the bring-back hearing because he did not receive notice of the hearing in the manner set out in G.S. 14-208.40B(b), that is, by certified mail "sent to the address provided by the offender pursuant to G.S. 14-208.7 [the sex offender registration statute]." Notice in this manner would have been impossible, because the defendant had not been released from prison and had not established a registration address. The court held that the failure to follow the precise letter of the statute's notice provisions was not a jurisdictional error.

State v. Stines, __ N.C. App. __, 683 S.E.2d 411 (Oct. 6, 2009). Requiring enrollment in the SBM program deprives an offender of a significant liberty interest, triggering procedural due process

protections. The State violated the defendant's procedural due process rights by failing to give him sufficient notice in advance of the SBM hearing of the basis for the DOC's preliminary determination that he met the criteria for enrollment in the SBM program. G.S. 14-208.40B requires the DOC to notify the offender, in advance of the SBM hearing, of the basis for its determination that the offender falls within one of the categories in G.S. 14-208.40(a), making the offender subject to enrollment in the SBM program.

State v. Cowan, __ N.C. App. __, 700 S.E.2d 239 (Sept. 21, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091415-1.pdf). The defendant did not receive adequate notice of the basis for the Department of Correction's preliminary determination that he should be required to enroll in SBM under the version of G.S. 14-208.40B(b) applicable to the defendant's case. Specifically the notice failed to specify the category set out in G.S. 14-208.40(a) into which the Department had determined that the defendant fell or to briefly state the factual basis for its conclusion.

Aggravated Offense

State v. Treadway, __ N.C. App. __, 702 S.E.2d 335 (Dec. 7, 2010) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMC8xMC0yODctMS5wZGY). Following *State v. Phillips*, __ N.C. App. __, 691 S.E.2d 104 (2010), the court held that first-degree sexual offense under G.S. 14-27.4(a)(1) (child victim under 13) is not an aggravated offense for purposes of SBM. To be an aggravated offense, the child must be less than 12 years old; "a child under the age of 13 is not necessarily also a child less than 12 years old." The court reversed and remanded for consideration of whether the defendant is a sexually violent predator, a recidivist, or whether his conviction involved the physical, mental, or sexual abuse of a minor, and based on the risk assessment performed by the Department of Correction, defendant requires the highest possible level of supervision and monitoring.

State v. Davison, __ N.C. App. __, 689 S.E.2d 510 (Dec. 8, 2009). Remanding for failure to properly conduct the SBM determination, as outlined in the court's opinion. The court also held that when determining whether an offense is an aggravated offense for purposes of SBM, the trial court may look only at the elements of the conviction offense and may not consider the facts supporting the conviction.

State v. McCravey, __ N.C. App. __, 692 S.E.2d 409 (May 4, 2010). Applying the "elements test," second-degree rape committed by force and against the victim's will is an aggravated offense triggering lifetime SBM.

State v. Oxendine, __ N.C. App. __, 696 S.E.2d 850 (Aug. 3, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/090858-1.pdf). Following *McCravey*, the court granted the State's petition for writ of certiorari and remanded for entry of an order requiring lifetime SBM enrollment on the basis of the defendant's second-degree rape conviction, which involved a mentally disabled victim. A concurring opinion agreed that the second-degree rape conviction was an aggravated offense, but not as a direct result of *McCravey*.

State v. Phillips, __ N.C. App. __, 691 S.E.2d 104 (April 6, 2010). Following *Davison* and holding that when considering whether a pleaded-to offense is an aggravated one for purposes of SBM, the trial court may look only to the elements of the offense, and not at the factual basis for the plea. In this case, the defendant pleaded guilty to felonious child abuse by the commission of a sexual act in violation of G.S. 14-318.4(a2) and taking indecent liberties with a child. Following *Singleton* and holding that

notwithstanding the factual basis for the plea, taking indecent liberties was not an aggravated offense. The court went on to hold that considering the elements only, the trial court erred when it determined that the defendant's conviction for felonious child abuse by the commission of any sexual act under G.S. 14-318.4(a2) was an aggravated offense.

State v. Brooks, __ N.C. App. __, 693 S.E.2d 204 (May 18, 2010). Sexual battery is not an aggravated offense for the purposes of SBM.

State v. Singleton, __ N.C. App. __, 689 S.E.2d 562 (Jan. 5, 2010). Following *Davison* and holding that the pleaded-to offense of indecent liberties was not an aggravated offense under the elements test.

State v. King, __ N.C. App. __, 693 S.E.2d 168 (May 18, 2010). Following *Singleton* and holding that indecent liberties is not an aggravated offense.

Recidivist

State v. Wooten, 194 N.C. App. 524 (Dec. 16, 2008). Affirming the trial court's order requiring the defendant to enroll in SBM for life as a recidivist based on convictions for indecent liberties with a minor in 1989 and 2006. The defendant argued that his 1989 conviction for indecent liberties should not qualify him as a recidivist because that conviction was not itself reportable (convictions for indecent liberties are reportable for those convicted or released from a penal institution on or after January 1, 1996). The court held that a prior conviction need only be "described" in the statute defining reportable offenses. Thus, a prior conviction can qualify a person as a recidivist no matter how far back in time it occurred. The court also concluded that the defendant had not properly preserved the claim that SBM violates ex post facto.

Offense Involving Physical, Mental of Sexual Abuse of Minor

State v. Smith, __ N.C. App. __, 687 S.E.2d 525 (Jan. 5, 2010). Statutory rape constitutes an offense involving the physical, mental, or sexual abuse of a minor. Once the trial judge determines that the defendant has been convicted of such an offense, the trial judge should order the DOC to perform a risk assessment. The trial court then must decide, based on the risk assessment and any other evidence presented, whether defendant requires "the highest possible level of supervision and monitoring." If the trial court determines that the defendant requires such supervision and monitoring, then the court must order the offender to enroll in SBM for a period of time specified by the court.

State v. Cowan, __ N.C. App. __, 700 S.E.2d 239 (Sept. 21, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091415-1.pdf). Assuming without deciding that an elements-based approach should be used when determining eligibility for SBM under G.S. 14-208.40(a)(2), the trial court did not err by requiring the defendant, who had pleaded guilty to solicitation of indecent liberties, to enroll in SBM on the grounds that the offense involved the physical, mental, or sexual abuse of a minor. Interpreting the word "involve," the court concluded that eligibility for SBM under G.S. 14-208.40(a)(2) includes both completed acts and acts that create a substantial risk that such abuse will occur. The court determined that an attempt to take an indecent liberty has "within or as part of itself" the physical, mental, or sexual abuse of a minor. It concluded that although solicitation of an indecent liberty need not involve the commission of the completed crime, an effort to "counsel, entice, or induce" another to commit that crime also creates a substantial risk that the "physical, mental, or sexual abuse of a minor" will occur, so that such a solicitation has the sexual abuse of a minor "as a "necessary accompaniment."

Highest Level of Supervision and Monitoring

State v. Kilby, 198 N.C. App. 363 (July 21, 2009). The trial judge erred in concluding that the defendant required the highest possible level of supervision and monitoring when the Department of Correction risk assessment found that the defendant posed only a moderate risk and trial judge made no findings of fact that would support its conclusion beyond those stated on form AOC-CR-616.

State v. Causby, __ N.C. App. __, 683 S.E.2d 262 (Sept. 15, 2009). Following *Kilby* (discussed immediately above), on similar facts.

State v. Oxendine, __ N.C. App. __, 696 S.E.2d 850 (Aug. 3, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/090858-1.pdf). Following *Kilby* and *Causby*, the court held that the trial court erroneously determined that the defendant required the highest level of supervision and monitoring. The Static 99 concluded that the defendant posed a low risk of re-offending and no other evidence supported the trial court's determination.

State v. Morrow, __ N.C. App. __, 683 S.E.2d 754 (Oct. 6, 2009), *aff'd,* 364 N.C. 424 (Oct. 8, 2010). In determining whether the defendant requires the highest possible level of supervision and monitoring, the trial court may consider any evidence relevant to the defendant's risk and is not limited to the DOC's risk assessment. Because evidence supporting a finding of high risk was presented in a probation revocation hearing held the same day (the defendant admitted that he failed to attend several sexual abuse treatment program sessions), the court remanded for an evidentiary hearing as to the defendant's risk.

State v. King, __ N.C. App. __, 693 S.E.2d 168 (May 18, 2010). Remanding for a determination of whether the defendant required the highest level of supervision and monitoring. Although the DOC's risk assessment indicated that the defendant was a moderate risk, there was evidence that he had violated six conditions of probation, including failure to be at home for two home visits, failure to pay his monetary obligation, failure to obtain approval before moving, failure to report his new address and update the sex offender registry, failure to enroll in and attend sex offender treatment, and failure to inform his supervising officer of his whereabouts, leading to the conclusion that he had absconded supervision. Noting that in *Morrow* (discussed above), the probation revocation hearing and the SBM hearing were held on the same day and before the same judge and in this case they were held at different times, the court found that distinction irrelevant. It stated: "The trial court can consider the number and frequency of defendant's probation violations as well as the nature of the conditions violated in making its determination. In particular, defendant's violations of failing to report his residence address and to update the sex offender registry as well as his failure to enroll in and attend sex offender treatment could support a finding that defendant poses a higher level of risk and is thus in need of SBM."

Period of SBM Set by the Court

State v. Morrow, __ N.C. App. __, 683 S.E.2d 754 (Oct. 6, 2009) *aff'd,* 364 N.C. 424 (Oct. 8, 2010). It was error for the trial court to order that the defendant enroll in SBM for a period of 7-10 years; G.S. 14-208.40B(c) requires the trial court to set a definite period of time for SBM enrollment.

State v. Smith, __ N.C. App. __, 687 S.E.2d 525 (Jan. 5, 2010). Once the trial judge determines that the defendant has been convicted of such an offense, the trial judge should order the DOC to perform a risk assessment. The trial court then must decide, based on the risk assessment and any other evidence

presented, whether defendant requires "the highest possible level of supervision and monitoring." If the trial court determines that the defendant requires such supervision and monitoring, then the court must order the offender to enroll in SBM for a period of time specified by the court.

State v. Cowan, __ N.C. App. __, 700 S.E.2d 239 (Sept. 21, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091415-1.pdf). The trial court erred in requiring lifetime SBM under G.S. 14-208.40(a)(2); that provision subjects a person to SBM for a term of years.

Jurisdiction

State v. Miller, __ N.C. App. __, __ S.E.2d __ (Feb. 1, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC05MTEtMS5wZGY=). (1) The district court lacked subject matter jurisdiction to order the defendant to enroll in satellite-based monitoring (SBM) after a district court conviction for misdemeanor attempted sexual battery. G.S. 14-208.40B(b) requires that SBM hearings be held in superior court for the county in which the offender resides. (2) The superior court lacked subject matter jurisdiction to order the defendant to enroll in SBM after a de novo hearing on the district court's order than the defendant enroll. Hearings on SBM eligibility are civil proceedings. Pursuant to G.S. 7A-27(c), an appeal from a final judgment in a civil action in district court lies in the court of appeals, not in the superior court.

State v. Clayton, __ N.C. App. __, 697 S.E.2d 428 (Aug. 3, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/090987-1.pdf). Because the trial court previously held a hearing pursuant to G.S. 14-208.40B (SBM determination after sentencing) and determined that the defendant was not required to enroll in SBM, the trial court lacked jurisdiction to later hold a second SBM hearing on the same reportable conviction. In this case, the defendant was summoned for the second SBM hearing after a probation violation. The trial court required the defendant to enroll in SBM based on the fact that his probation violation was sexual in nature. The court reasoned that a probation violation is not a crime and cannot constitute a new reportable conviction.

Appeal

State v. Singleton, __ N.C. App. __, 689 S.E.2d 562 (Jan. 5, 2010). Because a SBM order is a final judgment from the superior court, the Court of Appeals has jurisdiction to consider appeals from SBM monitoring determinations under G.S. 14-208.40B pursuant to G.S. 7A-27.

State v. Brooks, __ N.C. App. __, 693 S.E.2d 204 (May 18, 2010). A defendant's appeal from a trial court's order requiring enrollment in SBM for life is a civil matter. Thus, oral notice of appeal pursuant to N.C.R. App. P. 4(a)(1) is insufficient to confer jurisdiction on the court of appeals. Instead, a defendant must give notice of appeal pursuant to N.C.R. App. P. 3(a) as is proper "in a civil action or special proceeding[.]" For related cases, compare *State v. Clayton,* __ N.C. App. __, 697 S.E.2d 428 (Aug. 3, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/090987-1.pdf) (following *Brooks* and treating the defendant's brief as a petition for writ of certiorari and granted the petition to address the merits of his appeal); *State v. Oxendine,* __ N.C. App. __, 696 S.E.2d 850 (Aug. 3, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/090858-1.pdf) (same); *State v. Cowan,* __ N.C. App. __, 700 S.E.2d 239 (Sept. 21, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091415-1.pdf) (same); *State v. May,* __ N.C. App. __, 700 S.E.2d 42 (Sept. 21, 2010)

(http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/100140-1.pdf) (same); *State v. Williams*, __ N.C. App. __, 700 S.E.2d 774 (Oct. 19, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/100347-1.pdf) (same), with *State v. Inman*, __ N.C. App. __, 696 S.E.2d 567 (Aug. 3, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091151-1.pdf) (over a dissent, the court followed *Brooks* and held that because there was no written notice of appeal, it lacked jurisdiction to consider the defendant's appeal from a trial court order requiring SBM enrollment; the court declined to treat the defendant's appeal as a petition for writ of certiorari; the dissenting opinion would have treated the defendant's appeal as a writ of certiorari and affirmed the trial court's order.

Civil Commitment

United States v. Comstock, 560 U.S. __ (May 17, 2010). The Court upheld the federal government's power to civilly commit a mentally ill, sexually dangerous federal prisoner beyond the date the prisoner would otherwise be released from prison. For a more detailed discussion of this case, see http://sogweb.sog.unc.edu/blogs/ncclaw/?p=1283

Spectators in the Courtroom

State v. Dean, 196 N.C. App. 180 (April 7, 2009). The trial court did not abuse its discretion in ordering the removal of four spectators in a gang-related murder trial. Jurors had expressed concern for their safety, as jurors had in the first trial of this case. The trial court found that the spectators were talking in the courtroom in violation of a pretrial order and had not followed orders of the court.

Speedy Trial

Vermont v. Brillon, 129 S. Ct. 1283 (Mar. 9, 2009). Delay caused by appointed defense counsel or a public defender is not attributable to the state in determining whether a defendant's speedy trial right was violated, unless the delay resulted from a systemic breakdown in the public defender system.

State v. Graham, __ N.C. App. __, 683 S.E.2d 437 (Oct. 6, 2009). Concluding that the defendant's claim of pre-indictment delay was not covered by the Speedy Trial clause; reviewing the defendant's claim of pre-indictment delay as a violation of due process and finding no prejudice.

Use of Defendant's Silence at Trial

State v. Adu, 195 N.C. App. 269 (Feb. 3, 2009). The trial court erred in allowing the state to question the defendant about his failure to make a statement to law enforcement and to reference the defendant's silence in closing argument.

State v. Jackson, __ N.C. App. __, 691 S.E.2d 133 (Feb. 16, 2010). Although the State may use a defendant's pre-arrest silence for impeachment purposes at trial, once the defendant has been arrested and advised of his or her *Miranda* rights, the State's use of the defendant's silence at trial violates the right against self-incrimination. Even if the State impermissibly used the defendant's post-arrest silence against him at trial, the error was harmless beyond a reasonable doubt.

State v. Mendoza, __ N.C. App. __, 698 S.E.2d 170 (Aug. 17, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/090327-1.pdf). The trial court erred by

allowing the State to introduce evidence, during its case in chief, of the defendant's pre-arrest and post-arrest, pre-*Miranda* warnings silence. The only permissible purpose for such evidence is impeachment; since the defendant had not yet testified when the State presented the evidence, the testimony could not have been used for that purpose. Also, the State's use of the defendant's post-arrest, post-*Miranda* warnings silence was forbidden for any purpose. However, the court concluded that there was no plain error given the substantial evidence pointing to guilt.

State v. Smith, __ N.C. App. __, 696 S.E.2d 904 (Aug. 17, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091640-1.pdf). The trial court did not improperly allow use of the defendant's post-arrest silence when it allowed the State to impeach him with his failure to provide information about an alleged meeting with a drug dealer. In this murder case, the defendant claimed that the child victim drowned in a bathtub while the defendant met with the dealer. The defendant's pre-trial statements to the police never mentioned the meeting. The court held that because the defendant waived his rights and made pre-trial statements to the police, the case did not involve the use of post-arrest silence for impeachment. Rather, it involved only the evidentiary issue of impeachment with a prior inconsistent statement.

Venue

Skilling v. United States, 561 U.S. __ (June 24, 2010) (http://www.supremecourt.gov/opinions/09pdf/08-1394.pdf). The defendant was tried for various federal crimes in connection with the collapse of Enron. The Court held that the defendant's Sixth Amendment right to trial by an impartial jury was not violated when the federal district court denied the defendant's motion to change venue because of pretrial publicity. The Court distinguished the case at hand from previous decisions and concluded that given the community's population (Houston, Texas), the nature of the news stories about the defendant, the lapse in time between Enron's collapse and the trial, and the fact that the jury acquitted the defendant of a number of counts, a presumption of juror prejudice was not warranted. The Court went on to conclude that actual prejudice did not infect the jury, given the voir dire process.

Verdict

Generally

State v. Douglas, 197 N.C. App. 215 (May 19, 2009). Ordering a new trial because of a defective verdict form. On the verdict form, the jury answered "Yes" to each of these questions: "Did the defendant possess cocaine, a controlled substance, with the intent to sell or deliver it? Did the defendant sell cocaine, a controlled substance, to Officer Eugene Ramos?" Because the verdict form did not include the words "guilty" or "not guilty," the jury did not fulfill its constitutional responsibility to make an actual finding of defendant's guilt. The verdict form only required the jury to make factual findings on the essential elements of the crimes; it thus was a "true special verdict" and could not support the judgment.

Partial Verdict

State v. Sargeant, __ N.C. App. __, 696 S.E.2d 786 (Aug. 3, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/090262-1.pdf). Over a dissent, the court held that by taking a partial verdict, the trial court violated the defendant's state constitutional right to a unanimous verdict and that the error was not harmless beyond a reasonable doubt. The defendant was convicted of first-degree murder, first-degree kidnapping, robbery with a dangerous weapon, and burning of personal property. At the end of the first day of deliberations, the jury had not reached a unanimous

decision as to each of the charges. The trial court asked the jury to submit verdict sheets for any of the charges for which it had unanimously found the defendant guilty. The trial court then received the jury's verdicts finding the defendant guilty of first-degree kidnapping, robbery with a dangerous weapon, and burning of personal property, as well as first-degree murder on the bases of both felony murder and lying in wait. The only issue left for the jury to decide was whether the defendant was guilty of first-degree murder on the basis of premeditation and deliberation. The next morning, the court gave the jury a new verdict sheet asking only whether the defendant was guilty of first-degree murder on the basis of premeditation and deliberation. The jury returned a guilty verdict later that day. The trial court erred by taking a verdict as to lying in wait and felony murder when the jury had not yet agreed on premeditation and deliberation. Premeditation and deliberation, felony murder, and lying in wait are not crimes, but rather theories of first-degree murder. The trial court cannot take a verdict on a theory. Therefore, the trial court erred by taking partial verdicts on theories of first-degree murder. Because the State had not proved that the error was not harmless beyond a reasonable doubt, the court ordered a new trial on the murder charge.

Polling the Jury

State v. Hunt, 198 N.C. App. 488 (Aug. 4, 2009). The clerk was not required to question the jurors separately about each of the two offenses; the polling was proper when the clerk posed one question about both offenses, to each juror individually.

State v. Lackey, __ N.C. App. __, 693 S.E.2d 218 (May 18, 2010). Based on the facts of the case, the clerk properly polled the jury in accordance with G.S. 15A-1238.

Evidence

404(b) Evidence

Evidence Admissible

State v. Locklear, 363 N.C. 438 (Aug. 28. 2009). In this capital murder case, the trial court did not err in admitting evidence that the defendant committed another murder 32 months earlier. Evidence of the prior murder was admitted to show knowledge, plan, opportunity, modus operandi, and motive. The court found the two crimes sufficiently similar and rejected the defendant's argument that because the trial court declined to join the offenses for trial, they lacked the necessary similarity. The court noted that remoteness is less significant when the prior bad act is used to show intent, motive, knowledge, or lack of accident and that it generally goes to weight not admissibility.

State v. Jacobs, 363 N.C. 815 (Mar. 12, 2010). In a murder and attempted armed robbery trial, the trial court erred when it excluded the defendant's proposed testimony that he knew of certain violent acts by the victim and that the victim had spent time in prison. This evidence was relevant to the defendant's claim of self-defense to the murder charge and to his contention that he did not form the requisite intent for attempted armed robbery because "there is a greater disincentive to rob someone who has been to prison or committed violent acts." The evidence was admissible under Rule 404(b) because it related to the defendant's state of mind. The court also held that certified copies of the victim's convictions were admissible under Rule 404(b) because they served the proper purpose of corroborating the defendant's testimony that the victim was a violent person who had been incarcerated. *State v. Wilkerson*, 148 N.C. App. 310, *rev'd per curiam,* 356 N.C. 418 (2002) (bare fact of the defendant's conviction, even if offered for a proper Rule 404(b) purpose, must be excluded under Rule 403), did not require exclusion of the certified copies of the victim's convictions. Unlike evidence of the defendant's conviction, evidence of

certified copies of the victim's convictions does not encourage the jury to acquit or convict on an improper basis.

State v. Register, __ N.C. App. __, 698 S.E. 2d 464 (Sept. 7, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/090629-1.pdf). In a child sexual abuse case involving a female victim, the trial court did not err by allowing testimony from four individuals (three females and one male) that the defendant sexually abused them when they were children. The events occurred 14, 21, and 27 years prior to the abuse at issue. Citing *State v. Jacob*, 113 N.C. App. 605 (1994), and *State v. Frazier*, 121 N.C. App. 1 (1995), the court rejected the defendant's argument that the evidence lacked sufficient temporal proximity to the events in question. The challenged testimony, showing common plan, established a strikingly similar pattern of sexually abusive behavior by the defendant over a period of 31 years in that: the defendant was married to each of the witnesses' mothers or aunt; the victims were prepubescent; the incidents occurred when the defendant's wife was at work and he was watching the children; and the abuse involved fondling, fellatio, or cunnilingus, mostly taking place in the defendant's wife's bed. Although there was a significant gap in time between the last abuse and the events in question, that gap was the result of defendant's not having access to children related to his wife and thus did not preclude admission under Rule 404(b). Finally, the court held that trial judge did not abuse his discretion by admitting this evidence under Rule 403.

State v. Mohamed, __ N.C. App. __, 696 S.E.2d 724 (July 20, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/090943-1.pdf). In an armed robbery case, evidence of the defendant's involvement in another robbery was properly admitted under Rule 404(b). In both instances, the victims were robbed of their credit or debit cards by one or more handgun-wielding individuals with African accents, which were then used by the defendant to purchase gas at the same gas station within a very short period of time. The evidence was admissible to prove a common plan or scheme and identity. The court further held that the trial court did not abuse its discretion by failing to exclude the evidence under Rule 403.

State v. Mobley, ___ N.C. App. ___, 684 S.E.2d 508 (Nov. 3, 2009). The trial court did not abuse its discretion by admitting, to show identification, intent, and modus operandi, a bad act that occurred 2 ½ years after the crime at issue. Bad acts that occur subsequent to the offense being tried are admissible under Rule 404(b). When the evidence is admitted to show intent and modus operandi, remoteness becomes less important.

State v. Dean, 196 N.C. App. 180 (April 7, 2009). In a murder case, evidence of an assault committed by the defendant two days before the murder was admissible to show identity when ballistics evidence showed that the same weapon was used in both the murder and the assault. The court rejected the defendant's argument that the probative value of the prior assault was diminished because of the dissimilarity of the incidents.

State v. Maready, 362 N.C. 614 (Dec. 12, 2008). The defendant was convicted of second-degree murder involving impaired driving. No plain error occurred when the trial judge admitted, under Rule 404(b), the defendant's prior traffic-related convictions that were more than sixteen years old. The court rejected the implication that it previously had adopted a bright line rule that it was plain error to admit traffic-related convictions that occurred more than sixteen years before the date of a second-degree vehicular murder. Of the defendant's six previous DWI convictions, four occurred in the sixteen years before the events at issue, including one within six months of the event at issue. Those convictions "constitute part of a clear and consistent pattern of criminality highly probative of his mental state." Although temporal proximity is

relevant to the assessments of probative value under 404(b), remoteness generally affects the weight of the evidence, not its admissibility, especially when the prior conduct tends to show state of mind as opposed to common scheme or plan.

State v. Blymyer, __ N.C. App. __, 695 S.E.2d 525 (July 6, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091722-1.pdf). In a murder and armed robbery case, the trial court did not commit plain error by admitting 404(b) evidence that the defendant broke into and stole from two houses near the time of the victim's death. The evidence was relevant to illustrate the defendant's motive for stealing from the victim—to support an addiction to prescription pain killers.

State v. Madures, __ N.C. App. __, 678 S.E.2d 361 (July 7, 2009). In a trial for assault on a law enforcement officer and resisting and obstructing, the trial court properly admitted evidence relating to the defendant's earlier domestic disturbance arrest. The same officer involved in the present offenses handled the earlier arrest, and at the time had told the defendant's mother to call him if there were additional problems. It was the defendant's mother's call that brought the officers to the residence on the date in question. Thus, the fact of the earlier arrest helped to provide a complete picture of the events for the jury. The court also held that the trial court did not abuse its discretion in admitting the defendant's statement to the police after his arrest while he was being transported to the jail. The court found that the defendant's argumentative statements showed both his intent to assault or resist officers as well as absence of mistake.

State v. Hargrave, 198 N.C. App. 579 (Aug, 4, 2009). Evidence of that the defendant drove with a revoked license *after* his arrest for several crimes, including driving while license revoked, which lead to the prosecution at issue, was admissible under Rule 404(b) to show that he knowingly drove with a revoked license.

State v. Graham, __ N.C. App. __, 683 S.E.2d 437 (Oct. 6, 2009). The trial court properly admitted evidence of the defendant's prior assault on a murder victim when the evidence showed that the defendant wanted to prevent the victim from testifying against him in the assault trial; the prior bad act showed motive, malice, hatred, ill-will and intent. There was no abuse of discretion in the 403 balancing with respect to this highly probative evidence.

State v. Paddock, __ N.C. App. __, 696 S.E.2d 529 (June 1, 2010) (available at: http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/090538-1.pdf). In a case in which the defendant was found guilty of felonious child abuse inflicting serious bodily injury and first-degree murder, the trial court did not abuse its discretion by admitting 404(b) evidence showing that the defendant engaged in continual and systematic abuse of her other children to show a common plan, scheme, system or design to inflict cruel suffering for the purpose of punishment, persuasion, and sadistic pleasure; motive; malice; intent; and lack of accident.

Evidence Inadmissible

State v. Davis, __ N.C. App. __, 702 S.E.2d 507 (Nov. 16, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091537-1.pdf). The trial court committed prejudicial error by admitting, under rule 404(b), the defendant's prior impaired driving convictions to show malice for purposes of a second-degree murder charge. Three of the defendant's four prior impaired driving convictions occurred eighteen or nineteen years prior to the accident at issue and one occurred

two years prior. Given the sixteen-year gap between the older convictions and the more recent one, the court held that there was not a clear and consistent pattern of criminality and that the older convictions were too remote to be admissible under rule 404(b).

State v. Ward, __ N.C. App. __, 681 S.E. 2d 354 (Aug. 18, 2009). The trial court erred in admitting 404(b) evidence obtained as a result of an earlier arrest when the earlier charges were dismissed for insufficient evidence and the probative value of the evidence depended on the defendant's having committed those offenses. The court distinguished cases where several items are seized from a defendant at one time but the defendant is tried separately for possession of the various items; in this context, evidence may be admissible even if there has been an earlier acquittal, if the evidence forms an integral and natural part of an account of the present crime.

State v. Webb, 197 N.C. App. 619 (June 16, 2009). In a child sexual abuse case, 404(b) evidence that the defendant abused two witnesses 21 and 31 years ago was improperly admitted. In light the fact that the prior incidents were decades old, more was required in terms of similarity than that the victims were young girls in the defendant's care, the incidents happened in the defendant's home, and the defendant told the victims not to report his behavior.

Authentication

State v. Elkins, __ N.C. App. __, __ S.E.2d __ (Mar. 1, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC05MTYtMS5wZGY). The trial court erred by allowing the State to introduce three photographs, which were part of a surveillance video, when the photographs were not properly authenticated. However, given the evidence of guilt, no plain error occurred.

State v. Mobley, __ N.C. App. __, 696 S.E.2d 862 (Aug. 3, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/090975-1.pdf). The trial court did not abuse its discretion by concluding that an audio recording of a booking-area phone call was properly authenticated under Rule 901 as having been made by the defendant. The State's authentication evidence showed: (1) the call was made to the same phone number as later calls made using the defendant's jail positive identification number; (2) the voice of the caller was similar to later calls placed from the jail using the defendant's jail positive identification number; (3) a witness familiar with the defendant's voice identified the defendant as the caller; (4) the caller identified himself as "Little Renny" and the defendant's name is Renny Mobley; and (5) the caller discussed circumstances similar to those involved with the defendant's arrest.

Best Evidence Rule

State v. Haas, __ N.C. App. __, 688 S.E.2d 98 (Feb. 2, 2010). Where an audio recording of a prior juvenile proceeding was available to all parties and the content of the recording was not in question, Rule 1002 was not violated by the admission of a written transcript of the proceeding.

Character of Victim

State v. Jacobs, 363 N.C. 815 (Mar. 12, 2010). In a murder and attempted armed robbery trial, the trial court erred when it excluded the defendant's proposed testimony that he knew of certain violent acts by the victim and that the victim's time in prison. This evidence was relevant to the defendant's claim of

self-defense to the murder charge and to his contention that he did not form the requisite intent for attempted armed robbery because "there is a greater disincentive to rob someone who has been to prison or committed violent acts." The evidence was admissible under Rule 404(b) because it related to the defendant's state of mind.

State v. Buie, 194 N.C. App. 725 (Jan. 1, 2009). The trial judge erred under Rule 404(a)(2) in allowing the state to offer evidence of the victim's good character. The court concluded that the defense had not offered evidence of the victim's bad character, even though defense counsel had forecast evidence of the victim's bad character in an opening statement.

Competency of Witnesses

State v. Carter, __ N.C. App. __, __ S.E.2d __ (Mar. 1, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC02NDgtMS5wZGY). The trial court did not abuse its discretion in determining that a four-year-old child sexual assault victim was competent to testify. The child was 2½ years old at the time the incident occurred. At trial, the child was non-responsive to some questions and gave contradictory responses to others.

State v. Forte, __ N.C. App. __, 698 S.E. 2d 745 (Sept. 7, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091591-1.pdf). The trial court did not abuse its discretion by finding an elderly victim to be competent. The witness correctly testified to his full name and birth date and where he lived. He was able to correctly identify family members, the defendant, and his own signature. He understood that he was at the courthouse, that a trial was occurring, and his duty to tell the truth. His testimony also demonstrated his ability to tell the truth from a lie. Noting that some of his answers were ambiguous and vague and that he was unable to answer some questions, the court concluded that it would not be unusual for an elderly person to have some difficulty in responding coherently to all of the voir dire questions.

Corroboration

State v. Johnson, __ N.C. App. __, __ S.E.2d __ (Mar. 1, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0yNi0xLnBkZg). A witness's written statement, admitted to corroborate his trial testimony, was not hearsay. The statement was generally consistent with the witness's trial testimony. Any points of difference were slight, only affecting credibility, or permissible because they added new or additional information that strengthened and added credibility to the witness's testimony.

State v. Walker, __ N.C. App. __, 694 S.E.2d 484 (June 15, 2010) (online at: http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/090977-1.pdf). A witness's out-of-court statement to an officer was properly admitted to corroborate her trial testimony. Although the witness's out-of-court statement contained information not included in her in-court testimony, the out-of-court statement was generally consistent with her trial testimony and the trial court gave an appropriate limiting instruction.

State v. Cook, 195 N.C. App. 230 (Feb. 3, 2009). Officer's testimony relating an incident of digital penetration described to him by the victim was properly admitted to corroborate victim's testimony, even though the victim did not mention the incident in her testimony. The victim testified that the first time she remembered the defendant touching her was in the "summer time of 2002" and that he touched her other

times including incidents in December 2003 and July 2004. The victim's established a course of sexual misconduct by defendant and the officer testified to an incident within defendant's course of conduct that did not directly contradict the victim's testimony. The officer's testimony sufficiently strengthened the victim's testimony to warrant its admission as corroborative evidence.

State v. Horton, __ N.C. App. __, 682 S.E.2d 754 (Sept. 15, 2009). In a child sexual assault case, prior statements of the victim made to an expert witness regarding "grooming" techniques employed by the defendant were properly admitted to corroborate the victim's trial testimony. Although the prior statements provided new or additional information, they tended to strengthen the child's testimony that she had been sexually abused by the defendant.

Crawford Issues

Substitute Analyst and Related Cases

Melendez-Diaz v. Massachusetts, 557 U.S. __, 129 S. Ct. 2527 (June 25, 2009). Forensic laboratory reports are testimonial and thus subject to the rule of *Crawford v. Washington*, 541 U.S. 36 (2004). For a detailed analysis of this case, see the paper entitled "*Melendez-Diaz* & the Admissibility of Forensic Laboratory Reports & Chemical Analyst Affidavits in North Carolina Post-*Crawford,"* posted online at: http://www.sog.unc.edu/programs/crimlaw/faculty.htm

State v. Locklear, 363 N.C. 438 (Aug. 28, 2009). A *Crawford* violation occurred when the trial court admitted opinion testimony of two non-testifying experts regarding a victim's cause of death and identity. The testimony was admitted through the Chief Medical Examiner, an expert in forensic pathology, who appeared to have read the reports of the non-testifying experts into evidence, rather than testifying to an independent opinion based on facts or data reasonable relied upon by experts in the field. For a more detailed discussion of this case, see my blog post on point, available online at: http://sogweb.sog.unc.edu/blogs/ncclaw/?p=673

State v. Williams, __ N.C. App. __, 702 S.E.2d 233 (Dec. 7, 2010) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMC8xMC01OC0xLnBkZg). The defendant's confrontation clause rights were violated when a substitute analyst testified about a non-testifying expert's report identifying a substance as a controlled substance. Forensic chemist Ann Charlesworth detailed lab processes for testing substances. Specifically, analysts conduct a preliminary color test and then extract a small amount of the substance to put with a solvent in a GC Mass Spec instrument. Charlesworth testified that in this case a color test was done twice and a GC Mass Spec test was done once. She testified that these are the same tests that she and other experts in her field reasonably rely upon when forming an opinion as to the weight and nature of substances. Charlesworth explained that the GC Mass Spec generates a graphical result which a forensic chemist must interpret. Chemists look at retention time, which is specific for each chemical substance, and the graphical result from the GC Mass Spec, to see how well the graph matches the known standard for the substance. Once a chemist completes an analysis, the case is peer reviewed. Explaining peer review, Charlesworth indicated that she looks at the worksheet, the description of the item, its weight, and the tests conducted; she looks at the printouts from the GC Mass Spec and interprets them to see if she agrees with the chemist's results; and she examines the report to make sure it appears correct. Charlesworth conducted the same type of review on the substance at issue that she would have done for a peer review. She agreed with the original forensic chemist, DeeAnne Johnson, "that from the printouts from the GC Mass Spec that the cocaine did come out, and it chemically matche[d] with the cocaine standard . . . in [the] library." On cross-examination, she acknowledged that she did not analyze the substance, was not present when the tests were run, and did

not generate her own report. Rather, she explained that it was her role to assure that Johnson followed the protocol and procedures to correctly analyze the substance. On this record, the court concluded that Charlesworth did not offer an independent opinion but rather merely summarized Johnson's report; admission of this testimony was reversible error.

State v. Garnett, __ N.C. App. __, __ S.E.2d __ (Feb. 15, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xMTEtMS5wZGY). Holding, in a drug case, that although the trial court erred by allowing the State's expert witness to testify as to the identity and weight of the "leafy green plant substance" where the expert's testimony was based on analysis performed by a non-testifying forensic analyst, the error was not prejudicial in light of the overwhelming evidence of guilt. With regard to the *Crawford* substitute analyst issue, the court found the case indistinguishable from *State v. Williams*, __ N.C. App. __, 703 S.E.2d 233, No. 10-58 (Dec. 7, 2010), *temporary stay allowed*, __ N.C. __, __ S.E.2d __ (Dec. 20, 2010).

State v. Hurt, __ N.C. App. __, 702 S.E.2d 82 (Nov. 16, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/090442-1.pdf). Applying *Crawford* to a non-capital *Blakely* sentencing hearing in a murder case, the court held that *Melendez-Diaz* prohibited the introduction of reports by non-testifying forensic analysts. The evidence at issue came from Special Agent Barker, an expert forensic biologist and serologist with the State Bureau of Investigation (SBI) and Special Agent Freeman with the SBI DNA unit. Barker testified that Special Agent Todd tested the evidence for the presence of blood and other bodily fluids and prepared a lab report of his results. Barker testified that Todd identified blood on the defendant's clothing and on a cigarette butt. Freeman testified that former SBI Special Agent Spittle performed DNA testing on several items and testified to the results of Spittle's analysis, including his conclusion that DNA on the defendant's clothing matched the victim's DNA profile. Freeman also testified that the saliva-end of the cigarette found at the crime scene matched the defendant's DNA. The court held that the reports at issue were testimonial under *Melendez-Diaz.* Noting that *Melendez-Diaz* would not bar admissibility if the reports merely provided a basis for the testifying experts' independent opinions, the court concluded that the reports were not limited to this permissible function. Although both Barker and Freeman performed peer review of the reports at issue, neither took part in any testing nor performed any independent analysis. In a footnote, the court distinguished this evidence from the testimony of Dr. Lantz, a forensic pathologist. Lantz testified regarding an autopsy done by former forensic pathologist Dr. Winston. Lantz testified to the wounds described in the final autopsy diagnosis and to his opinion that six of the wounds hit vital organs and could have been fatal. He opined that because of the nature of the wounds, it might have taken several minutes for the victim to lose consciousness and several more minutes to die. The court noted that Lantz's opinion regarding the wounds' impact and the time for loss of consciousness "was clearly based, not on the report at all, but on his own independent experience as a pathologist."

State v. Brewington, __ N.C. App. __, 693 S.E.2d 182 (May 18, 2010). The trial court committed reversible error by allowing a substitute analyst to testify to an opinion that a substance was cocaine. For a more detailed discussion of this case, see my blog post online at: http://sogweb.sog.unc.edu/blogs/ncclaw/?p=1291

State v. Craven, __ N.C. App. __, 696 S.E.2d 750 (July 20, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091138-1.pdf). Following *State v. Brewington* (discussed above), the court held that the defendant's confrontation clause rights were violated when the trial court allowed a substitute analyst to testify that a substance was cocaine, based on testing done and reports prepared by non-testifying analysts. Even though the State had offered lay

testimony by a cocaine user that the substance was cocaine, the court concluded that the error was not harmless beyond a reasonable doubt, reasoning that a lay opinion would not have the same effect on the jury as an expert opinion.

State v. Mobley, ___ N.C. App. ___, 684 S.E.2d 508 (Nov. 3, 2009). No *Crawford* violation occurred when a substitute analyst testified to her own expert opinion, formed after reviewing data and reports prepared by non-testifying expert. For a more detailed discussion of this case, see my blog post on point, available online at: http://sogweb.sog.unc.edu/blogs/ncclaw/?p=830

State v. Hough, __ N.C. App. __, 690 S.E.2d 285 (Mar. 2, 2010). Distinguishing *Locklear* and *Galindo* and following *Mobley* to hold that no *Crawford* violation occurred when reports done by non-testifying analyst as to composition and weight of controlled substances were admitted as the basis of a testifying expert's opinion on those matters. The testifying expert performed the peer review of the underlying reports and the underlying reports were offered not for their truth but as the basis of the testifying expert's opinion. The court was careful to note that "It is not our position that every 'peer review' will suffice to establish that the testifying expert is testifying to his or her own expert opinion."

State v. Galindo, __ N.C. App. __, 683 S.E.2d 785 (Oct. 20, 2009). A *Crawford* violation occurred when the State's expert gave an opinion, in a drug trafficking case, as to the weight of the cocaine at issue, based "solely" on a laboratory report by a non-testifying analyst. For a more detailed discussion of this case, see my blog post on point, available online at: http://sogweb.sog.unc.edu/blogs/ncclaw/?p=797

State v. Brennan, __ N.C. App. __, 692 S.E.2d 427 (May 4, 2010). Applying *Locklear* and *Mobley*, both discussed above, the court concluded that testimony of a substitute analyst identifying a substance as cocaine base violated the defendant's confrontation clause rights. The court characterized the substitute analyst's testimony as "merely reporting the results of [non-testifying] experts." Rather than conduct her own independent review, the testifying analyst's review "consisted entirely of testifying in accordance with what the underlying report indicated." For more discussion of this case, see the blog post at http://sogweb.sog.unc.edu/blogs/ncclaw/?p=1252

State v. Grady, __ N.C. App. __, 696 S.E.2d 885 (Aug. 17, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/090823-1.pdf). Even if the defendant's confrontation clause rights were violated when the trial court allowed a substitute analyst to testify regarding DNA testing done by a non-testifying analyst, the error was harmless beyond a reasonable doubt.

State v. Blue, __ N.C. App. __, 699 S.E.2d 661 (Oct. 5, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091717-1.pdf). The trial court did not err by allowing the Chief Medical Examiner to testify regarding an autopsy of a murder victim when the Medical Examiner was one of three individuals who participated in the actual autopsy. The Medical Examiner testified to his own observations, provided information rationally based on his own perceptions, and did not testify regarding anyone else's declarations or findings.

State v. Jones, __ N.C. App. __, 703 S.E.2d 772 (Dec. 21, 2010) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMC8xMC00NzUtMS5wZGY). In a drug case, the trial court committed plain error by admitting a report of a non-testifying crime lab technician, detailing the chemical analysis performed and the technician's conclusion that the substance was cocaine.

Notice and Demand Statutes

State v. Steele, __ N.C. App. __, 689 S.E.2d 155 (Jan. 5, 2010). The court upheld the constitutionality of G.S. 90-95(g)'s notice and demand statute for forensic laboratory reports in drug cases. Since the defendant failed to object after the State gave notice of its intent to introduce the report without the presence of the analyst, the defendant waived his Confrontation Clause rights.

State v. Blackwell, __ N.C. App. __, 699 S.E.2d 474 (Sept. 21, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091476-1.pdf). The court ordered a new trial in a drug case in which the trial court admitted laboratory reports regarding the identity, nature, and quantity of the controlled substances where the State had not complied with the notice and demand provisions in G.S. 90-95(g) and (g1). Instead of sending notice directly to the defendant, who was *pro se*, the State sent notice to a lawyer who was not representing the defendant at the time.

Testimonial/Nontestimonial Distinction

Michigan v. Bryant, 562 U.S. __ (Feb. 28, 2011). Justice Sotomayor, writing for the Court, held that a mortally wounded shooting victim's statements to first-responding officers were non-testimonial under *Crawford*. In the early morning, Detroit police officers responded to a radio dispatch that a man had been shot. When they arrived at the scene, the victim was lying on the ground at a gas station. He had a gunshot wound to his abdomen, appeared to be in great pain, and had difficulty speaking. The officers asked the victim what happened, who had shot him, and where the shooting occurred. The victim said that the defendant shot him about 25 minutes earlier at the defendant's house. The officers' 5-10 minute conversation with the victim ended when emergency medical personnel arrived. The victim died within hours. At trial, the victim's statements to the responding officers were admitted and the defendant was found guilty of, among other things, murder.

The Court held that because the statements were non-testimonial, no violation of confrontation rights occurred. The Court noted that unlike its previous decisions in *Davis* and *Hammon*, the present case involved a non-domestic dispute, a victim found in a public location suffering from a fatal gunshot wound, and a situation where the perpetrator's location was unknown. Thus, it indicated, "we confront for the first time circumstances in which the 'ongoing emergency' . . . extends beyond an initial victim to a potential threat to the responding police and the public at large." Slip Op. at 12. This new scenario, the Court noted, "requires us to provide additional clarification . . . to what *Davis* meant by 'the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency.'" *Id.* It concluded that when determining whether this is the primary purpose of an interrogation, a court must objectively evaluate the circumstances in which the encounter occurs and the parties' statements and actions. *Id.* It explained that the existence of an ongoing emergency "is among the most important circumstances informing the 'primary purpose' of an interrogation." *Id.* at 14. As to the statements and actions of those involved, the Court concluded that the inquiry must focus on both the declarant and the interrogator.

Applying this analysis to the case at hand, the Court began by examining the circumstances of the interrogation to determine if an ongoing emergency existed. Relying on the fact that the victim said nothing to indicate that the shooting was purely a private dispute or that the threat from the shooter had ended, the Court found that the emergency was broader than those at issue in *Davis* and *Hammon*, encompassing a threat to the police and the public. *Id.* at 27. The Court also found it significant that a gun was involved. *Id.* "At bottom," it concluded, "there was an ongoing emergency here where an armed shooter, whose motive for and location after the shooting were unknown, had mortally wounded [the victim] within a few blocks and a few minutes of the location where the police found [the victim]." *Id.*

The Court continued, determining that given the circumstances of the emergency, it could not say that a person in the victim's situation would have had the primary purpose of establishing past facts relevant to a criminal prosecution. *Id.* at 29. As to the motivations of the police, the Court concluded that they solicited information from the victim to meet the ongoing emergency. *Id.* at 30. Finally, it found that the informality of the situation and interrogation further supported the conclusion that the victim's statements were non-testimonial.

Justice Thomas concurred in the judgment, agreeing that the statements were non-testimonial but resting his conclusion on the lack of formality that attended them. Justices Scalia and Ginsburg dissented. Justice Kagan took no part in the consideration or decision of the case.

State v. Batchelor, __ N.C. App. __, 690 S.E.2d 53 (Mar. 2, 2010). Statements of a non-testifying informant to a police officer were non-testimonial when offered not for the truth of the matter asserted but rather to explain the officer's actions.

Burden of Producing the Witness

Briscoe v. Virginia, 559 U.S. __ (Jan. 25, 2010). Certiorari was granted in this case four days after the Court decided *Melendez-Diaz.* The case presented the following question: If a state allows a prosecutor to introduce a certificate of a forensic laboratory analysis, without presenting the testimony of the analyst who prepared the certificate, does the state avoid violating the Confrontation Clause by providing that the accused has a right to call the analyst as his or her own witness? The Court's two-sentence per curiam decision vacated and remanded for "further proceedings not inconsistent with the opinion in *Melendez-Diaz."*

Applicability to Sentencing Proceedings

State v. Hurt, __ N.C. App. __, 702 S.E.2d 82 (Nov. 16, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/090442-1.pdf). *Crawford* and the confrontation clause applies to all "*Blakely*" sentencing proceedings in which a jury makes the determination of a fact or facts that, if found, increase the defendant's sentence beyond the statutory maximum. Because the trial court's admission of testimonial hearsay evidence during the defendant's non-capital sentencing proceeding violated the defendant's confrontation rights. The defendant pleaded guilty to second-degree murder. At the sentencing hearing, the jury found the aggravating factor that the murder was especially heinous, atrocious, or cruel and the trial judge sentenced the defendant in the aggravated range. The court distinguished *State v. Sings*, 182 N.C. App. 162 (2007) (declining to apply the confrontation clause in a non-capital sentencing hearing), on the basis that it involved a sentencing based on the defendant's stipulation to aggravating factors not a *Blakely* sentencing hearing and limited that decision's holding to its facts. The court explained that its rationale for applying *Crawford* to non-capital *Blakely* sentencing proceedings "mirrors the justification for securing the right to confrontation in the capital sentencing context," a right already recognized by the North Carolina Supreme Court. It stated: both the penalty phase of a capital case and a *Blakely* sentencing hearing in a non-capital case require the State to prove an element to a jury beyond a reasonable doubt, and without a finding of an aggravating factor by the trier of fact, the presumptive sentence is the maximum sentence that can be imposed for the crime. It continued: "Where confrontation rights apply in one context, they should apply equally to the other." Noting that other cases have held that the confrontation clause does not apply in non-capital sentencing, the court followed *State v. Rodriguez*, 754 N.W.2d 672 (Minn. 2008), to hold otherwise. The court also noted that its opinion "has no effect on the established inapplicability of other evidence rules at sentencing."

Cross-Examination, Impeachment, and Opening the Door

State v. Waring, __ N.C. __, 701 S.E.2d 615 (Nov. 5, 2010) (http://www.aoc.state.nc.us/www/public/sc/opinions/2010/pdf/525A07-1.pdf). (1) In the guilt phase of a capital trial, the trial court did not err by limiting the defendant's recross-examination of law enforcement officers about whether an alleged accomplice cooperated with the police. The defendant failed to establish how the accomplice's cooperation was relevant to the defendant's guilt. Furthermore, the State's questioning did not elicit responses that required explanation or rebuttal or otherwise opened the door for the defendant's questions. (2) In the sentencing phase of a capital trial, the trial court did not abuse its discretion by overruling the defendant's objection to the State's cross-examination of a defense expert seeking to elicit a concession that other experts might disagree with his opinions regarding whether the defendant was malingering. (3) In the sentencing phase of a capital trial, the trial court did not err by failing to intervene ex mero motu when the prosecutor asked the defendant's expert witness whether he was ethically obligated to record the defendant's test results on a score sheet and about the defendant's scores in the scale for violence potential.

State v. Banks, __ N.C. App. __, __ S.E.2d __ (Mar. 1, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8wOS0xMTUwLTEucGRm). Because the witness admitted having made a prior statement to the police, it was not error to allow the State to impeach her with the prior inconsistent statement when she claimed not to remember what she had said and the trial court gave a limiting instruction. The court distinguished the case from one in which the witness denies having made the prior statement. Even if use of the prior inconsistent statement was error, no prejudice resulted.

State v. Carter, __ N.C. App. __, __ S.E.2d __ (Mar. 1, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC02NDgtMS5wZGY). Any error in connection with the admission of statements elicited from a witness on cross-examination was invited. The defendant, having invited error, waived all right to appellate review, including plain error review.

State v. Wilson, 197 N.C. App. 154 (May 19, 2009). Once a witness denies having made a prior inconsistent statement, a party may not introduce the prior statement in an attempt to discredit the witness because the prior statement concerns only a collateral matter, i.e., whether the statement was ever made. Here, the defendant cross-examined a witness named Morgan regarding statements Morgan supposedly made to a person named Daughtridge. Morgan admitted making some statements to Daughtridge but denied telling Daughtridge, among other things that the victim had a gun on the day of the shooting. The defendant argued that he should have been allowed to impeach Morgan by introducing a tape recording of a statement Daughtridge gave to the police in which she said that Morgan told her that the victim had a gun on the day of the shooting. Under Rule 608(b), the defendant was limited to Morgan's answers on cross-examination.

State v. Smith, __ N.C. App. __, 696 S.E.2d 904 (Aug. 17, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091640-1.pdf). The State properly impeached the defendant with prior inconsistent statements. In this murder case, the defendant claimed that the child victim drowned in a bathtub while the defendant met with a drug dealer. Although the defendant gave statements prior to trial, he never mentioned that meeting. At trial, the State attempted to impeach him with this fact. The court noted that to qualify as inconsistent, the prior statement must have eliminated "a material circumstance presently testified to which would have been natural to mention in

the prior statement." The court noted that the defendant voluntarily gave the police varying explanations for why the child stopped breathing (he threw up and then stopped breathing after falling asleep; he drowned in the tub). An alleged meeting while the child was in the tub would have been natural to include in these prior statements. Thus, the court concluded, his prior inconsistent statements were properly used for impeachment.

State v. Choudhry, __ N.C. App. __, 697 S.E.2d 504 (Aug. 17, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/090773-1.pdf). Because the State did not offer a portion of a co-defendant's inadmissible hearsay statement into evidence, it did not open the door to admission of the statement. The only evidence in the State's case pertaining to the statement was an officer's testimony recounting the defendant's response after being informed that the co-defendant had made a statement to the police.

State v. Ligon, __ N.C. App. __, 697 S.E.2d 481 (Aug. 17, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/090747-1.pdf). In a sexual exploitation of a minor and indecent liberties case, the court held that the defendant opened the door to admission of hearsay statements by the child victim and her babysitter.

State v. Reavis, __ N.C. App. __, 700 S.E.2d 33 (Sept. 21, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091425-1.pdf). The defendant opened the door to the State's cross-examination of a defense expert regarding prior offenses. On direct examination, the defendant's psychiatric expert reviewed the defendant's history of mental illness, including mention of his time in prison in 1996 for robbery. Defense counsel presented evidence as to defendant's time in prison, the year of the crime, the type of crime, defendant's time on probation, and a probation violation which returned him to prison. On cross-examination, the State questioned the expert about the defendant's time in prison, the defendant's previous "pleas which ultimately sent [defendant] to prison[,]" and the exact dates and times of the incidents, one of which led to the defendant's incarceration. The defendant raised no objection until the State presented police reports from the defendant's prior robbery conviction. Because the expert had testified about the robbery, the State could inquire into his knowledge of the events which led to the conviction.

State v. Boyd, __ N.C. App. __, __ S.E.2d __ (Feb. 1, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8wOS0xNjY2LTEucGRm). Although some portion of a videotape of the defendant's interrogation was inadmissible, the defendant opened the door to the evidence by, among other things, referencing the content of the interview in his own testimony.

State v. Gabriel, __ N.C. App. __, 700 S.E.2d 127 (Oct. 19, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091669-1.pdf). The trial court did not err by admitting a witness's out of court statements. When a State's witness gave trial testimony inconsistent with his prior statements to the police, the State cross-examined him regarding his prior statements. After the witness denied making the statements, the trial court overruled a defense objection and admitted, for purposes of impeachment by the State, a transcript of the witness's prior statements. (1) The court rejected the argument that this constituted improper use of extrinsic evidence for impeachment. The rule against using extrinsic evidence to impeach a witness on collateral matters prohibits the introduction of the substance of a prior statement to impeach a witness's denial that he or she made the prior statement because the truth or falsity of that denial was a collateral matter. However, when the witness not only denies making the prior statements but also testifies inconsistently with them, the rule does not prohibit impeaching a witness's inconsistent testimony with the substance of the prior statements. Here, the

substance of the witness's prior statements properly was admitted to impeach his inconsistent testimony, not his denial. (2) The court rejected the defendant's argument that the State used the guise of impeaching its own witness as subterfuge for admitting otherwise inadmissible evidence. Distinguishing prior case law, the court noted that the trial judge gave an appropriate limiting instruction, the evidence was important to the State's case, and nothing suggested that the State expected the witness's testimony.

State v. Treadway, __ N.C. App. __, 702 S.E.2d 335 (Dec. 7, 2010) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMC8xMC0yODctMS5wZGY). The defendant could not complain of the victim's hearsay statements related by an expert witness in the area of child mental health when the defendant elicited these statements on cross-examination.

Demonstrations and Experiments

State v. Witherspoon, __ N.C. App. __, 681 S.E.2d 348 (Aug. 18, 2009). Use of a mannequin's head and a newly-purchased couch to refute the defendant's version of the events on the day she shot her husband was properly allowed as a demonstration. Because the evidence did not constitute an experiment, the State did not have to show that the circumstances were substantially similar to those at the time of the actual shooting. As a demonstration, the evidence was admissible because it was relevant (it was probative of premeditation) and not unfairly prejudicial.

State v. Anderson, __ N.C. App. __, 684 S.E.2d 450 (Oct. 6, 2009). The State laid a proper foundation to establish the relevancy of a demonstration by an expert witness who used a doll to illustrate how shaken baby syndrome occurs and the amount of force necessary to cause the victim's injuries, where a demonstration of how the injuries were inflicted was relevant to defendant's intent to harm the victim. The demonstration did not have to be substantially similar to the manner in which the crime occurred because that standard applies to experiments, not demonstrations. Finally the demonstration was not unduly prejudicial and would not cause the jury decide the case on emotion.

Direct Examination

State v. Streater, __ N.C. App. __, 678 S.E.2d 367 (July 7, 2009). The trial court erred when it allowed the State to question its witness on direct examination about whether she had told the truth.

State v. Wade, 198 N.C. App. 257 (July 21, 2009). The trial judge erred by overruling defense counsel's objection to a question posed by the prosecutor to a State's witness alluding to the fact that a superior court judge had found that there was probable cause to search the defendant. The court reiterated the rule that a trial judge's legal determination on evidence made in a hearing outside of the jury's presence should not be disclosed to the jury.

Hearsay

Non-Hearsay

State v. Banks, __ N.C. App. __, __ S.E.2d __ (Mar. 1, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8wOS0xMTUwLTEucGRm). An officer's testimony as to a witness' response when asked if she knew what had happened to the murder weapon was not hearsay. The statement was not offered for the truth of the matter asserted but rather to explain what actions the officer took next (contacting his supervisor and locating the gun). Although other hearsay evidence was erroneously admitted, no prejudice resulted.

State v. Elkins, __ N.C. App. __, __ S.E.2d __ (Mar. 1, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC05MTYtMS5wZGY). Statements offered to explain a witness's subsequent actions were not offered for the truth of the matter asserted and not hearsay.

State v. Johnson, __ N.C. App. __, __ S.E.2d __ (Mar. 1, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0yNi0xLnBkZg). A witness's written statement, admitted to corroborate his trial testimony, was not hearsay. The statement was generally consistent with the witness's trial testimony. Any points of difference were slight, only affecting credibility, or were permissible because they added new or additional information that strengthened and added credibility to the witness's testimony.

State v. Hough, __ N.C. App. __, 690 S.E.2d 285 (Mar. 2, 2010). Reports by a non-testifying analyst as to composition and weight of controlled substances were not hearsay when they were admitted not for their truth but as the basis of a testifying expert's opinion on those matters.

State v. Treadway, __ N.C. App. __, 702 S.E.2d 335 (Dec. 7, 2010) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMC8xMC0yODctMS5wZGY). (1) In a child sexual assault case, the trial court did not commit plain error by allowing a witness to testify about her step-granddaughter's statements. The evidence was properly admitted for the non-hearsay purpose of explaining the witness's subsequent conduct of relaying the information to the victim's parents so that medical treatment could be obtained. Also, the victim's statements corroborated her trial testimony. (2) The trial court did not commit plain error by allowing an expert in clinical social work to relate the victim's statements to her when the statements corroborated the victim's trial testimony.

Hearsay Exceptions

Rule 803(1) – Present Sense Impression

State v. Capers, __ N.C. App. __, 704 S.E.2d 39 (Dec. 21, 2010) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMC8wOS0xNjEzLTEucGRm). A victim's statement to his mother, made in the emergency room approximately 50 minutes after a shooting and identifying the defendant as the shooter, was a present sense impression under Rule 803(1). The time period between the shooting and the statement was sufficiently brief. The court noted that the focus of events during the gap in time was on saving the victim's life, thereby reducing the likelihood of deliberate or conscious misrepresentation.

Rule 803(3) -- Then-Existing Mental, Emotional or Physical condition

State v. Hernandez, __ N.C. App. __, 688 S.E.2d 522 (Feb. 2, 2010). A murder victim's statements to her mother were properly admitted under the Rule 803(3) exception for then-existing mental, emotional or physical condition. The victim told her mother that she wanted to leave the defendant because he was wanted in another jurisdiction for attempting to harm the mother of his child; the victim also told her mother that she previously had tried to leave the defendant but that he had stalked and physically attacked her. The statements indicate difficulties in the relationship prior to the murder and are admissible to show the victim's state of mind.

Rule 803(5) -- Recorded Recollection

State v. Wilson, 197 N.C. App. 154 (May 19, 2009). An audio recording can be admitted under the Rule 803(5) exception for recorded recollection. However, the statement at issue was not admissible under this exception because the witness did not recall making the statement and when asked whether she fabricated it, the witness testified that because of her mental state she was "liable to say anything."

Rule 803(8) -- Public Records

State v. McLean, __ N.C. App. __, 695 S.E.2d 813 (July 6, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091602-1.pdf). Information in a police department database linking the defendant's name to her photograph fell within the Rule 803(8) public records hearsay exception. After an undercover officer engaged in a drug buy from the defendant, he selected the defendant's photograph from an array presented to him by a fellow officer. The fellow officer then cross-referenced the photograph in the database and determined that the person identified was the defendant. This evidence was admitted at trial. The court noted that although the Rule 803(8) exception excludes matters observed by officers and other law enforcement personnel regarding a crime scene or apprehension of the accused, it allows for admission of public records of purely ministerial observations, such as fingerprinting and photographing a suspect, and cataloguing a judgment and sentence. The court concluded that the photographs in the police department's database were taken and compiled as a routine procedure following an arrest and were not indicative of anything more than that the person photographed has been arrested. It concluded: "photographing an arrested suspect is a routine and unambiguous record that Rule 803(8) was designed to cover. Absent evidence to the contrary, there is no reason to suspect the reliability of these records, as they are not subject to the same potential subjectivity that may imbue the observations of a police officer in the course of an investigation."

Rule 803(17) – Market Quotations, Tabulations, Etc.

State v. Dallas, __ N.C. App. __, 695 S.E.2d 474 (July 6, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/090644-1.pdf). In a larceny of motor vehicle case, the court held that the Kelley Blue Book and the NADA pricing guide fall within the Rule 803(17) hearsay exception for "[m]arket quotations, tabulations, lists, directories, or other published compilations, generally used and relied upon by the public or by persons in particular occupations." Those items were use to establish the value of the motor vehicles stolen.

Rule 804(3) – Statement Against Interest

State v. Choudhry, __ N.C. App. __, 697 S.E.2d 504 (Aug. 17, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/090773-1.pdf). The trial court did not abuse its discretion by sustaining the State's objection to a defense proffer of a co-defendant's hearsay statement indicating that he and the defendant acted in self-defense. The statement was not admissible under Rule 804(b)(3) (statement against interest exception). To be admissible under that rule, (1) the statement must be against the declarant's interest, and (2) corroborating circumstances must indicate its trustworthiness. As to the second prong, there must be an independent, non-hearsay indication of trustworthiness. There was no issue about whether the statement satisfied the first prong. However, as to the second, there was no corroborating evidence. Furthermore, the co-defendant had a motive to lie: he was he friends with the defendant, married to the defendant's sister, and had an incentive to exculpate himself. Nor was the statement admissible under the Rule 804(b)(5) catchall exception. Applying the

traditional six-part residual exception analysis, the court concluded that, for the reasons noted above, the statement lacked circumstantial guarantees of trustworthiness.

Residual Exception

State v. Sargeant, __ N.C. App. __, 696 S.E.2d 786 (Aug. 3, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/090262-1.pdf). Over a dissent, the court ordered a new trial on grounds that the trial court erred by excluding defense evidence of an accomplice's hearsay statement, proffered under the residual hearsay exception. The court noted that the only factor in dispute under the six-factor residual exception *Triplett* test was the circumstantial guarantees of trustworthiness factor. To evaluate that factor, a court must assess, among other things, (1) the declarant's personal knowledge of the underlying event; (2) the declarant's motivation to speak the truth; (3) whether the declarant recanted; and (4) the reason for the declarant's unavailability. In this case, it was clear that the declarant had personal knowledge. However, for reasons discussed in the opinion, the court held that the trial court erred with respect to its findings as to factors (2) – (4) and by assessing the trustworthiness of the statement by comparing it to other evidence presented at trial.

State v. Choudhry, __ N.C. App. __, 697 S.E.2d 504 (Aug. 17, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/090773-1.pdf). The trial court did not abuse its discretion by sustaining the State's objection to a defense proffer of a co-defendant's hearsay statement indicating that he and the defendant acted in self-defense. The statement was not admissible under Rule 804(b)(3) (statement against interest exception). To be admissible under that rule, (1) the statement must be against the declarant's interest, and (2) corroborating circumstances must indicate its trustworthiness. As to the second prong, there must be an independent, non-hearsay indication of trustworthiness. There was no issue about whether the statement satisfied the first prong. However, as to the second, there was no corroborating evidence. Furthermore, the co-defendant had a motive to lie: he was he friends with the defendant, married to the defendant's sister, and had an incentive to exculpate himself. Nor was the statement admissible under the Rule 804(b)(5) catchall exception. Applying the traditional six-part residual exception analysis, the court concluded that, for the reasons noted above, the statement lacked circumstantial guarantees of trustworthiness.

Judicial Notice

State v. McCormick, __ N.C. App. __, 693 S.E.2d 195 (May 18, 2010). In a burglary case, the trial court properly took judicial notice of the time of sunset and of civil sunset as established by the Naval Observatory and instructed the jury that it "may, but is not required to, accept as conclusive any fact judicially noticed."

Objections

State v. Carter, __ N.C. App. __, __ S.E.2d __ (Mar. 1, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC02NDgtMS5wZGY). When the defendant failed to object to a question until after the witness responded, the objection was waived by the defendant's failure to move to strike the answer.

State v. Boyd, __ N.C. App. __, __ S.E.2d __ (Feb. 1, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8wOS0xNjY2LTEucGRm). By objecting only on the basis that the subject matter of questioning had been "covered" the previous day, the defense

failed to preserve other grounds for exclusion of the evidence and plain error review applied.

Opinions
Expert Opinions
Child Victim Cases

State v. Treadway, __ N.C. App. __, 702 S.E.2d 335 (Dec. 7, 2010) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMC8xMC0yODctMS5wZGY). The trial court erred when it allowed the State's expert in clinical social work to testify that she had diagnosed the victim with sexual abuse when there was no physical evidence consistent with abuse. However, the error did not constitute plain error given other evidence in the case.

State v. Jennings, __ N.C. App. __, 704 S.E.2d 556 (Jan. 18, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC01MDMtMS5wZGY). The trial court did not err by allowing the State's expert in family medicine to testify that if there had been a tear in the victim's hymen, it probably would have healed by the time the expert saw the victim. The testimony explained that the lack of physical findings indicative of sexual abuse did not negate the victim's allegations of abuse and was not an impermissible opinion as to the victim's credibility. Even if error occurred, it was not prejudicial in light of overwhelming evidence of guilt.

State v. Livengood, __ N.C. App. __, 698 S.E. 2d 496 (Sept. 7, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091414-1.pdf). In a child sexual abuse case, the trial court did not abuse its discretion by overruling a defense objection to a response by the State's expert. On direct examination, the expert testified that the child's physical examination revealed no signs of trauma to the hymen. On cross-examination, she opined, without objection, that her physical findings could be consistent with rape or with no rape. On recross-examination, defense counsel asked: "And the medical aspects of this case physically are that there are no showings of any rape; correct?" The witness responded: "There's no physical findings which do not rule out her disclosure, sir." The trial judge overruled a defense objection to this response. The court rejected the defendant's argument that the expert's answer impermissibly commented on the victim's credibility, concluding that the expert's response was consistent with her prior testimony that her physical findings were consistent with rape or no rape.

State v. Register, __ N.C. App. __, 698 S.E. 2d 464 (Sept. 7, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/090629-1.pdf). The trial court erred by denying the defendant's motion to strike a response by the State's expert witness in a child sexual abuse case. During cross-examination, defense counsel asked whether the victim told the expert that she had been penetrated. The expert responded: "She described the rubbing; and, I would say that, as far as vaginal penetration, since the oral penetration — well, I'm not discussing that. I mean, I felt that that was very graphic and believable." The testimony was not responsive to the question and was opinion testimony on the victim's credibility. The court rejected the State's argument that the statement was offered as a basis of the expert's opinion. However, the court found that the error was harmless.

State v. Streater, ___ N.C. App. ___, 678 S.E.2d 367 (July 7, 2009). The state's expert pediatrician was improperly allowed to testify that his findings were consistent with a history of anal penetration received from the child victim where no physical evidence supported the diagnosis. The expert was properly allowed to testify that victim's history of vaginal penetration was consistent with his findings, which included physical evidence supporting a diagnosis of sexual intercourse. The expert's testimony that his

findings were consistent with the victim's allegations that the defendant perpetrated the abuse was improper where there was no foundation for the testimony that the defendant was the one who committed the acts.

State v. Webb, 197 N.C. App. 619 (June 16, 2009). In child sexual abuse case, it was error to allow the state's expert, a child psychologist, to testify that he believed that the victim had been exposed to sexual abuse. The expert's statement pertained to the victim's credibility; it apparently was unsupported by clinical evidence.

State v. Horton, __ N.C. App. __, 682 S.E.2d 754 (Sept. 15, 2009). Prejudicial error occurred warranting a new trial when the trial court overruled an objection to testimony of a witness who was qualified as an expert in the treatment of sexually abused children. After recounting a detailed description of an alleged sexual assault provided to her by the victim, the State asked the witness: "As far as treatment for victims . . . why would that detail be significant?" The witness responded: "[W]hen children provide those types of specific details it enhances their credibility." The witness's statement was an impermissible opinion regarding credibility. Additionally, it was error to allow the witness to testify that the child "had more likely than not been sexually abused," where there was no physical evidence of abuse; such a statement exceeded permissible opinion testimony that a child has characteristics consistent with abused children.

State v. Ray, __ N.C. App. __, 678 S.E.2d 378 (July 7, 2009), *reversed on other grounds*, 364 N.C. 272 (Aug. 27, 2010) (http://www.aoc.state.nc.us/www/public/sc/opinions/2010/pdf/307PA09-1.pdf). The trial court did not err in admitting the State's expert witness's testimony that the results of his examination of the victim were consistent with a child who had been sexually abused; the expert did not testify that abuse had in fact occurred and did not comment on the victim's credibility.

State v. Paddock, __ N.C. App. __, 696 S.E.2d 529 (June 1, 2010) (available at: http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/090538-1.pdf). In a case in which the defendant was found guilty of felonious child abuse inflicting serious bodily injury and first-degree murder, the trial court did not err by admitting testimony of the State's expert in the field of developmental and forensic pediatrics. Based on a review of photographs, reports, and other materials, the expert testified that she found the histories of the older children very consistent as eyewitnesses to what the younger children described. She also testified about ritualistic and sadistic abuse and torture, stating that torture occurs when a person "takes total control and totally dominates a person's behavior and most the [sic] basic of behaviors are taken control of. Those basic behaviors are eating, eliminating and sleeping." As an example, she described binding a child at night, placing duct tape over the mouth, and then placing furniture on the child for the purpose of immobilization. The expert stated that she was not testifying to a legal definition of torture but was defining the term based on her medical expertise. She testified that one sibling suffered from sadistic abuse and torture; another from sadistic abuse, ritualistic abuse, and torture; and a third from sadistic abuse and torture. The jury was instructed to consider this testimony for the limited purpose for which it was admitted under Rule 404(b). Additionally, the trial court instructed the jury that torture was a "course of conduct by one who intentionally inflicts grievous pain and suffering upon another for the purpose of punishment, persuasion or sadistic pleasure." The expert's testimony was not inadmissible opinion testimony on the credibility of the children and admission of the expert's testimony regarding the use of the word torture was not an abuse of discretion.

Drug Cases

State v. Ward, 364 N.C. 133 (June 17, 2010)

(http://www.aoc.state.nc.us/www/public/sc/opinions/2010/pdf/365PA09-1.pdf). In a drug case, the trial court abused its discretion by allowing the State's expert in chemical analyses of drugs and forensic chemistry to identify the pills at issue as controlled substances when the expert's method of making that identification consisted of a visual inspection and comparison with information in Micromedex literature, a publication used by doctors in hospitals and pharmacies to identify prescription medicines. The court concluded that the expert's proffered method of proof was not sufficiently reliable under the first prong of the *Howerton/Goode* analysis. It concluded: "Unless the State establishes before the trial court that another method of identification is sufficient to establish the identity of the controlled substance beyond a reasonable doubt, some form of scientifically valid chemical analysis is required." The court limited its holding to Rule 702 and stated that it "does not affect visual identification techniques employed by law enforcement for other purposes, such as conducting criminal investigations." Finally, the court indicated that "common sense limits this holding regarding the scope of the chemical analysis that must be performed." It noted that in the case at issue, the State submitted sixteen batches of over four hundred tablets to the laboratory, and that "a chemical analysis of each individual tablet is not necessary." In this regard, the court reasoned that the "SBI maintains standard operating procedures for chemically analyzing batches of evidence, and the propriety of those procedures is not at issue here. A chemical analysis is required in this context, but its scope may be dictated by whatever sample is sufficient to make a reliable determination of the chemical composition of the batch of evidence under consideration."

State v. Garnett, __ N.C. App. __, __ S.E.2d __ (Feb. 15, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xMTEtMS5wZGY). An expert in forensic chemistry properly made an in-court visual identification of marijuana. Citing *State v. Fletcher*, 92 N.C. App. 50, 57 (1988), but not mentioning *State v. Ward*, 364 N.C. 133 (June 17, 2010), the court noted that it had previously held that a police officer experienced in the identification of marijuana may testify to a visual identification.

State v. Dobbs, __ N.C. App. __, 702 S.E.2d 349 (Dec. 7, 2010) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMC8xMC0zODgtMS5wZGY). The trial court did not err by denying the defendant's motion to dismiss a charge of trafficking by sale or delivery in more than four grams and less than fourteen grams of Dihydrocodeinone when the State's expert sufficiently identified the substance at issue as a controlled substance. Special Agent Aharon testified as an expert in chemical analysis. She compared the eight tablets at issue with information contained in a pharmaceutical database and found that each was similar in coloration and had an identical pharmaceutical imprint; the pharmaceutical database indicated that the tablets consisted of hydrocodone and acetaminophen. Agent Aharon performed a confirmatory test on one of the tablets, using a gas chromatograph mass spectrometer. This test revealed that the tablet was an opiate derivative. The tablets weighed a total of 8.5 grams. Relying on *State v. Ward*, 364 N.C. 133 (2010), the defendant argued that because the State cannot rely upon a visual inspection to identify a substance as a controlled substance, the State was required to test a sufficient number of pills to reach the minimum weight threshold for a trafficking offense. The court concluded that even if the issue had been properly preserved, the defendant's argument was without merit, citing *State v. Myers*, 61 N.C. App. 554, 556 (1983) (a chemical analysis test of a portion of pills, coupled with a visual inspection of the rest for consistency, supported a conviction for trafficking in 10,000 or more tablets of methaqualone).

State v. Meadows, __ N.C. App. __, 687 S.E.2d 305 (Jan. 5, 2010). A new trial was required in a drug case where the trial court erred by admitting expert testimony as to the identity of the controlled substance when that testimony was based on the results of a NarTest machine. Applying *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440 (2004), the court held that the State failed to demonstrate the reliability of the NarTest

machine.

State v. Brunson, __ N.C. App. __, 693 S.E.2d 390 (June 1, 2010) (available at: http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/090976-1.pdf). Holding that the trial court committed plain error by admitting the testimony of the State's expert chemist witness that the substance at issue was hydrocodone, an opium derivative. The State's expert used a Micromedics database of pharmaceutical preparations to identify the pills at issue according to their markings, color, and shape but did no chemical analysis on the pills. Note that although this decision was issued before the North Carolina Supreme Court decided *Ward* (discussed above), it is consistent with that case.

Impaired Driving

State v. Green, __ N.C. App. __, __ S.E.2d __ (Mar. 1, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC04NC0xLnBkZg). (1) In an impaired driving case, the trial court did not abuse its discretion by allowing the State's witness to testify as an expert in pharmacology and physiology. Based on his knowledge, skill, experience, training, and education, the witness was better informed than the jury about the subject of alcohol as it relates to human physiology and pharmacology. (2) The court rejected the defendant's argument that the trial court erred by allowing the expert to give opinion testimony regarding the defendant's post-driving consumption of alcohol on grounds that such testimony was an opinion about the truthfulness of the defendant's statement that he consumed wine after returning home. The court concluded that because the expert's testimony was not opinion testimony concerning credibility, the trial court did not err by allowing the expert to testify as to how the defendant's calculated blood alcohol content would have been altered by the defendant's stated post-driving consumption; the expert's statements assisted the jury in determining whether the defendant's blood alcohol content at the time of the accident was in excess of the legal limit. (3) The trial court did not abuse its discretion by admitting the expert's opinion testimony regarding retrograde extrapolation in a case where the defendant asserted that he consumed alcohol after driving. The defendant's assertions of post-driving alcohol consumption went to the weight of the expert's testimony, not its admissibility.

State v. Davis, __ N.C. App. __, 702 S.E.2d 507 (Nov. 16, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091537-1.pdf). The trial court committed reversible error by allowing the State's expert to use "odor analysis" as a baseline for his opinion as to the defendant's blood-alcohol level (BAC) at the time of the accident, formed using retrograde extrapolation. When the defendant reported to the police department more than ten hours after the accident, she was met by an officer. Although the officer did not perform any tests on the defendant, he detected an odor of alcohol on her breath. The expert based his retrograde extrapolation analysis on the officer's report of smelling alcohol on the defendant's breath. He testified that based on "look[ing] at some papers, some texts, where the concentration of alcohol that is detectable by the human nose has been measured[,]" the lowest BAC that is detectable by odor alone is 0.02. He used this baseline for his retrograde extrapolation and opined that at the time of the accident, the defendant had a BAC of 0.18. The court noted that because odor analysis is a novel scientific theory, an unestablished technique, or a compelling new perspective on otherwise settled theories or techniques, it must be accompanied by sufficient indices of reliability. Although the expert testified that "there are published values for the concentrations of alcohol that humans . . . can detect with their nose," he did not specify which texts provided this information, nor were those texts presented at trial. Furthermore, there was no evidence that the expert performed any independent verification of an odor analysis or that he had ever submitted his methodology for peer review. Thus, the court concluded, the method of proof lacked the required indices of reliability. The

court also noted that while G.S. 20-139.1 sets out a thorough set of procedures governing chemical analyses of breath, blood, and urine, the odor analysis lacked any of the rigorous standards applied under that provision. It concluded that the expert's retrograde extrapolation was not supported by a reliable method of proof, that the odor analysis was so unreliable that the trial court's decision was manifestly unsupported by reason, and that the trial court abused its discretion in admitting this testimony.

State v. Armstrong, __ N.C. App. __, 691 S.E.2d 433 (April 20, 2010). In a DWI/homicide case, the trial court erred by allowing a state's witness to testify about ingredients and effect of Narcan. Although the state proffered the testimony as lay opinion, it was actually expert testimony. When the state called the witness, it elicited extensive testimony regarding his training and experience and the witness testified that Narcan contains no alcohol and has no effect on blood-alcohol content. Because the witness offered expert testimony and because the state did not notify the defendant during discovery that it intended to offer this expert witness, the trial court erred by allowing him to testify as such. However, the error was not prejudicial.

Generally

State v. Waring, __ N.C. __, 701 S.E.2d 615 (Nov. 5, 2010) (http://www.aoc.state.nc.us/www/public/sc/opinions/2010/pdf/525A07-1.pdf). The trial court properly sustained the State's objection to the defendant's attempt to introduce opinion testimony regarding his IQ from a special education teacher who met the defendant when he was eleven years old. Because the witness had not been tendered as an expert, her speculation as to IQ ranges was inadmissible.

State v. Jennings, __ N.C. App. __, 704 S.E.2d 556 (Jan. 18, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC01MDMtMS5wZGY). (1) The trial court did not err by allowing the State's expert in family medicine to testify that if there had been a tear in the victim's hymen, it probably would have healed by the time the expert saw the victim. The testimony explained that the lack of physical findings indicative of sexual abuse did not negate the victim's allegations of abuse and was not an impermissible opinion as to the victim's credibility. Even if error occurred, it was not prejudicial in light of overwhelming evidence of guilt. (2) The trial court did not err by allowing the State's expert in forensic computer examination to testify that individuals normally try to hide proof of their criminal activity, do not normally save incriminating computer conversations, the defendant would have had time to dispose of incriminating material, and that someone who sets up a site for improper purposes typically would not include their real statistics. Law enforcement officers may testify as experts about the practices criminals use in concealing their identity or criminal activity. The testimony properly explained why, despite the victim's testimony that she and defendant routinely communicated through instant messaging and a web page and that defendant took digital photographs of her during sex, no evidence of these communications or photographs were recovered from defendant's computer equipment, camera, or storage devices. Even if error occurred, it was not prejudicial in light of overwhelming evidence of guilt.

State v. Crandell, __ N.C. App. __, 702 S.E.2d 352 (Dec. 7, 2010) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMC8xMC00MzktMS5wZGY). In a murder case involving a shooting, the trial court did not commit plain error by allowing a Special Agent with the State Bureau of Investigation to testify as an expert in the field of bullet identification, when his testimony was based on sufficiently reliable methods of proof in the area of bullet identification, he was qualified as an expert in that area, and the testimony was relevant. The trial court was not required to make a formal

finding as to a witness' qualification to testify as an expert because such a finding is implicit in the court's admission of the testimony in question.

State v. Smart, 195 N.C. App. 752 (Mar. 17, 2009). Rule 702(a1) obviates the state's need to prove that the horizontal gaze nystagmus testing method is sufficiently reliable.

State v. Hargrave, 198 N.C. App. 579 (Aug. 4, 2009). A laboratory technician who testified that substances found by law enforcement officers contained cocaine was properly qualified as an expert even though she did not possess an advanced degree.

Lay Opinions

Foundation

State v. Ziglar, __ N.C. App. __, __ S.E.2d __ (Feb. 1, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC04MzktMS5wZGY). In a felony death by vehicle case, the trial court did not abuse its discretion by sustaining the State's objection when defense counsel asked the defendant whether he would have been able to stop the vehicle if it had working brakes. Because a lay opinion must be rationally based on the witness's perception, for the defendant's opinion to be admissible, some foundational evidence was required to show that he had, at some point, perceived his ability, while highly intoxicated, to slow down the vehicle as it went through the curve at an excessive speed. However, there was no evidence that the defendant ever had perceived his ability to stop the car under the hypothetical circumstances.

Drug Cases

State v. Llamas-Hernandez, 363 N.C. 8 (Feb. 6, 2009). The court, per curiam and without an opinion, reversed the ruling of the North Carolina Court of Appeals and held, for the reasons stated in the dissenting opinion below, that the trial judge erred in allowing a detective to offer a lay opinion that 55 grams of a white powder was cocaine. The officer's identification of the powder as cocaine was based solely on the detective's visual observations. There was no testimony why the officer believed that the white powder was cocaine other than his extensive experience in handling drug cases. There was no testimony about any distinguishing characteristics of the white powder, such as its taste or texture.

State v. Jones, __ N.C. App. __, 703 S.E.2d 772 (Dec. 21, 2010) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMC8xMC00NzUtMS5wZGY). The trial court committed plain error by allowing an officer to identify a substance, using visual identification, as crack cocaine. Citing *State v. Ward*, 364 N.C. 133, 142-43 (2010), and other cases, the court concluded that visual identification, even by a trained police officer with four years of experience, is insufficient to establish that a substance is a controlled substance. Note: it is not clear in this case whether the officer was giving lay or expert opinion.

State v. Williams, __ N.C. App. __, 702 S.E.2d 233 (Dec. 7, 2010) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMC8xMC01OC0xLnBkZg). Lay testimony by an officer that a substance is crack cocaine is insufficient to establish that the substance is cocaine. "The State must . . . present evidence as to the chemical makeup of the substance."

State v. Nabors, __ N.C. App. __, 700 S.E.2d 153 (Oct. 19, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/100176-1.pdf). The trial court erred by

denying the defendant's motion to dismiss drug charges when the sole evidence that the substance at issue was crack cocaine consisted of lay opinion testimony from the charging police officer and an undercover informant based on visual observation. The court held that *State v. Ward*, 364 N.C. 133 (2010), calls into question "the continuing viability" of *State v. Freeman*, 185 N.C. App. 408 (2007) (officer can give a lay opinion that substance was crack cocaine), and requires that in order to prove that a substance is a controlled substance, the State must present expert witness testimony based on a scientifically valid chemical analysis and not mere visual inspection.

State v. Meadows, __ N.C. App. __, 687 S.E.2d 305 (Jan. 5, 2010). Citing *Ward*, discussed above under expert opinions, the court held that the trial judge erred by allowing a police officer to testify that he "collected what [he] believe[d] to be crack cocaine." Controlled substances defined in terms of their chemical composition only can be identified by the use of a chemical analysis rather than through the use of lay testimony based on visual inspection.

State v. Davis, __ N.C. App. __, 688 S.E.2d 829 (Feb. 16, 2010). Not mentioning *Meadows*, discussed above, and stating that notwithstanding *Llamas-Hernandez* (discussed above), *State v. Freeman*, 185 N.C. App. 408 (2007), stands for the proposition that an officer may offer a lay opinion that a substance is crack cocaine.

State v. Hargrave, 198 N.C. App. 579 (Aug. 4, 2009). The trial judge did not err by allowing officers to give lay opinion testimony that the cocaine at issue was packaged as if for sale and that the total amount of money and the number of twenty-dollar bills found on the defendant were indicative of drug sales. The officers' testimony was based on their personal knowledge of drug practices, through training and experience.

In Re D.L.D, __ N.C. App. __, 694 S.E.2d 395 (April 20, 2010). The trial court did not err by admitting lay opinion testimony from an officer regarding whether, based on his experience in narcotics, he knew if it was common for a person selling drugs to have possession of both money and drugs. Officer also gave an opinion about whether a drug dealer would have a low amount of inventory and a high amount of money or vice versa. The testimony was based on the officer's personal experience and was helpful to the determination of whether the juvenile was selling drugs.

DWI Cases

State v. Armstrong, __ N.C. App. __, 691 S.E.2d 433 (April 20, 2010). In a DWI/homicide case, the trial court erred by allowing a state's witness to testify about ingredients and effect of Narcan. Although the state proffered the testimony as lay opinion, it actually was expert testimony. When the state called the witness, it elicited extensive testimony regarding his training and experience and the witness testified that Narcan contains no alcohol and has no effect on blood-alcohol content. Because the witness offered expert testimony and because the state did not notify the defendant during discovery that it intended to offer this expert witness, the trial court erred by allowing him to testify as such. However, the error was not prejudicial.

Ballistics

State v. Crandell, __ N.C. App. __, 702 S.E.2d 352 (Dec. 7, 2010) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMC8xMC00MzktMS5wZGY). In a murder case involving a shooting, the trial court did not abuse its discretion by allowing a detective to give lay opinion

testimony concerning the calibers of bullets recovered at the crime scene. The detective testified that as a result of officer training, he was able to recognize the calibers of weapons and ammunition. The detective's testimony was based upon on his own personal experience and observations relating to various calibers of weapons, and was admissible under Rule 701.

Accident Reconstruction

State v. Maready, __ N.C. App. __, 695 S.E.2d 771 (July 6, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/070171-2.pdf). It was error to allow officers, who were not proffered as experts in accident reconstruction and who did not witness the car accident in question, to testify to their opinions that the defendant was at fault based on their examination of the accident scene. The court stated: "Accident reconstruction opinion testimony may only be admitted by experts, who have proven to the trial court's satisfaction that they have a superior ability to form conclusions based upon the evidence gathered from the scene of the accident than does the jury." However, the court went on to find that the error did not rise to the level of plain error.

Contents of Surveillance Video or Photographs

State v. Belk, __ N.C. App. __, 689 S.E.2d 439 (Dec. 8, 2009). The trial court committed reversible error by allowing a police officer to give a lay opinion identifying the defendant as the person depicted in a surveillance video. The officer only saw the defendant a few times, all of which involved minimal contact. Although the officer may have been familiar with the defendant's "distinctive" profile, there was no basis for the trial court to conclude that the officer was more likely than the jury correctly to identify the defendant as the person in the video. There was is no evidence that the defendant altered his appearance between the time of the incident and the trial or that the individual depicted in the footage was wearing a disguise and the video was of high quality.

State v. Buie, 194 N.C. App. 725 (Jan. 6, 2009). The trial judge erred in allowing a detective to offer lay opinion testimony regarding whether what was depicted in crime scene surveillance videos was consistent with the victim's testimony. For example, the detective was impermissibly allowed to testify that the videotapes showed a car door being opened, a car door being closed, and a vehicle driving away. The court found that the officer's testimony was neither a shorthand statement of facts nor based on firsthand knowledge.

State v. Ligon, __ N.C. App. __, 697 S.E.2d 481 (Aug. 17, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/090747-1.pdf). In a sexual exploitation of a minor and indecent liberties case, the trial court did not err by allowing lay opinion testimony regarding photographs of a five-year-old child that formed the basis for the charges. None of the witnesses perceived the behavior depicted; instead they formed opinions based on their perceptions of the photographs. In one set of statements to which the defendant failed to object at trial, the witnesses stated that the photographs were "disturbing," "graphic," "of a sexual nature involving children," "objectionable," "concerning" to the witness, and that the defendant pulled away the minor's pant leg to get a "shot into the vaginal area." As to these statements, any error did not rise to the level of plain error. However the defendant did object to a statement in the Police Incident report stating that the photo "has the juvenile's female private's [sic] showing." At to this statement, the court held that the trial court did not abuse its discretion by admitting this testimony as a shorthand statement of fact.

Value of Stolen Item

State v. Rahaman, __ N.C. App. __, 688 S.E.2d 58 (Jan. 19, 2010). The trial court did not abuse its discretion by allowing an officer to give a lay opinion as to the value of a stolen Toyota truck in a felony possession trial. The officer had worked as a car salesman, was very familiar with Toyotas, and routinely valued vehicles as a police officer. He also spent approximately three hours taking inventory of the truck.

Miscellaneous Cases

State v. Williams, 363 N.C. 689 (Dec. 11, 2009). An officer's testimony that a substance found on a vehicle looked like residue from a car wash explained the officer's observations about spots on the vehicle and was not a lay opinion. The officer properly testified to a lay opinion that (1) the victims were not shot in the vehicle, when that opinion was rationally based on the officer's observations regarding a lack of pooling blood in or around the vehicle, a lack of shell casings in or around the car, very little blood spatter in the vehicle, and no holes or projectiles found inside or outside the vehicle; (2) one of the victim was "winched in" the vehicle using rope found in the vehicle, when that opinion was based upon his perception of blood patterns, the location of the vehicle, and the positioning of and tension on the rope on the seat and the victim's hands; and (3) the victims were dragged through the grass at the defendant's residence, when that opinion was based on his observations at the defendant's residence and his experience in luminol testing.

State v. Elkins, __ N.C. App. __, __ S.E.2d __ (Mar. 1, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC05MTYtMS5wZGY). Although Rule 704 allows admission of lay opinion evidence on ultimate issues, the lay opinion offered was inadmissible under Rule 701 because it was not helpful to the jury. In this case, a detective was asked: After you received this information from the hospital, what were your next steps? Were you building a case at this point? He answered: "I felt like I was building a solid case. [The defendant] was, indeed, the offender in this case." However, the error did not constitute plain error.

On Credibility

See also cases cited under Opinions, Expert Opinions, Child Victim Cases

State v. Ligon, __ N.C. App. __, 697 S.E.2d 481 (Aug. 17, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/090747-1.pdf). In a sexual exploitation of a minor and indecent liberties case, the court rejected the defendant's argument that a testifying detective's statement that the defendant's explanation of the events was not consistent with photographic evidence constituted an improper opinion as to credibility of a witness. The court concluded that no improper vouching occurred.

State v. Dye, __ N.C. App. __, 700 S.E.2d 135 (Oct. 19, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091574-1.pdf). In a child sexual assault case, the court held that even assuming that the State's medical expert's testimony regarding "secondary gain" improperly vouched for the victim's credibility, the error did not rise to the level of plain error.

On Legal Issues

State v. Cole, __ N.C. App. __, 703 S.E.2d 842 (Jan. 4, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xMzktMS5wZGY). No plain error

occurred when a detective testified that after his evaluation of the scene, he determined that the case involved a robbery and resulting homicide. The court rejected the defendant's argument that the trial court improperly allowed the detective to give a legal opinion, concluding that the detective merely was testifying about police procedure.

Personal Knowledge

State v. Elkins, __ N.C. App. __, __ S.E.2d __ (Mar. 1, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC05MTYtMS5wZGY). In an armed robbery case, a store clerk's testimony that he thought the defendant had a gun was not inadmissible speculation or conjecture. Based on his observations, the clerk believed that the defendant had a gun because the defendant was hiding his arm under his jacket. The clerk's perception was rationally based on his firsthand observation of the defendant and was more than mere speculation or conjecture.

Privileges

State v. Watkins, 195 N.C. App. 215 (Feb. 3, 2009). Conversation between the defendant and his lawyer was not privileged because the defendant told his lawyer the information with the intention that it be conveyed to the prosecutor. At a hearing on the defendant's motion to withdraw his guilty plea, the defendant's former attorney, who had represented the defendant during plea negotiations, testified over the defendant's objection. Former counsel testified about a meeting in which the defendant provided former counsel with information to be relayed to the prosecutor to show what testimony the defendant could offer against his co-defendants.

State v. Rollins, 363 N.C. 232 (May 1, 2009). Marital communications privilege does not protect conversations between a husband and wife that occur in the public visiting areas of state correctional facilities. No reasonable expectation of privacy exists in those places.

State v. Terry, __ N.C. App. __, 699 S.E.2d 671 (Oct. 5, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/100009-1.pdf). The marital privilege did not apply when the parties did not have a reasonable expectation of privacy of their conversation, which occurred after they were arrested and in an interview room at the sheriff's department. Warning signs indicated that the premises were under audio and visual surveillance and there were cameras and recording devices throughout the department.

Rape Shield

State v. Cook, 195 N.C. App. 230 (Feb. 3, 2009). The trial judge did not err under Rule 412 in excluding evidence of the victim's prior sexual activity with a boy named C.T. and with her boyfriend. As to the activity with C.T., the defendant failed to offer evidence that it occurred during the in camera hearing (when the victim denied having sex with C.T.), or at trial. Additionally, the defendant failed to establish the relevance of the sexual activity when it allegedly occurred shortly before the incidents at issue but the victim's scarring indicated sexual activity that had occurred a month or more earlier. As to the sexual activity with the boyfriend, the defendant failed to present evidence during the in camera hearing that the activity could have caused the victim's internal scarring.

State v. Adu, 195 N.C. App. 269 (Feb. 3, 2009). In a child sex case, the defendant proffered evidence of a third person's sexual abuse of the victim as an alternative explanation for the victim's physical trauma.

The trial judge properly excluded this evidence under Rule 412(b)(2) because it did not show that the third person's abuse involved penetration and thus an alternative explanation for the trauma to the victim's vaginal area.

Relevancy

Context Evidence

State v. Peterson, __ N.C. App. __, 695 S.E.2d 835 (July 20, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/090365-1.pdf). Evidence of events leading up to the assault in question was relevant to complete the story of the crime.

Flight

State v. Capers, __ N.C. App. __, 704 S.E.2d 39 (Dec. 21, 2010) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMC8wOS0xNjEzLTEucGRm). The defendant's statement to an arresting officer that if the officer had come later the defendant "would have been gone and you would have never saw me again," was relevant as an implicit admission of guilt.

Photographs

State v. Blymyer, __ N.C. App. __, 695 S.E.2d 525 (July 6, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091722-1.pdf). The trial court did not commit plain error under Rules 401 or 403 by admitting photographs of the murder victim's body. The trial court admitted 28 photographs and diagrams of the interior of the home where the victim was found, 12 of which depicted the victim's body. The trial court also admitted 11 autopsy photographs. An officer used the first set of photos to illustrate the position and condition of the victim's body and injuries sustained. A forensic pathology expert testified to his observations while performing the autopsy and the photographs illustrated the condition of the body as it was received and during the course of the autopsy. The photographs had probative value and that value, in conjunction with testimony by the officer and the expert was not substantially outweighed by their prejudicial effect.

Weapons

State v. Samuel, __ N.C. App. __, 693 S.E.2d 662 (May 4, 2010). In an armed robbery case, admission of evidence of two guns found in the defendant's home was reversible error where "not a scintilla of evidence link[ed] either of the guns to the crimes charged."

Miscellaneous Cases on Relevancy

State v. Espinoza-Valenzuela, __ N.C. App. __, 692 S.E.2d 145 (April 20, 2010). In a child sexual abuse case, evidence of the defendant's prior violence towards the victims' mother, with whom he lived, was relevant to show why the victims were afraid to report the sexual abuse and to refute the defendant's assertion that the victims' mother was pressuring the victims to make allegations in order to get the defendant out of the house. Evidence that the victims' mother had been sexually abused as a child was relevant to explain why she delayed notifying authorities after the victims told her about the abuse and to rebut the defendant's assertion that the victims were lying because their mother did not immediately report their allegations.

State v. Ross, __ N.C. App. __, 700 S.E.2d 412 (Oct. 19, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091021-1.pdf). In the habitual felon phase of the defendant's trial, questions and answers contained in the Transcript of Plea form for the predicate felony pertaining to whether, at the time of the plea, the defendant was under the influence of alcohol or drugs and his use of such substances were irrelevant. Although admission of this evidence did not result in prejudice, the court noted that "*preferred method* for proving a prior conviction includes the introduction of the judgment," not the transcript of plea.

Limits on Relevancy
Rule 403

State v. Jacobs, 363 N.C. 815 (Mar. 12, 2010). *State v. Wilkerson*, 148 N.C. App. 310, *rev'd per curiam,* 356 N.C. 418 (2002) (bare fact of the defendant's conviction, even if offered for a proper Rule 404(b) purpose, must be excluded under Rule 403), did not require exclusion of certified copies of the victim's convictions. Unlike evidence of the defendant's conviction, evidence of the victim's convictions does not encourage the jury to acquit or convict on an improper basis.

State v. Waring, __ N.C. __, 701 S.E.2d 615 (Nov. 5, 2010) (http://www.aoc.state.nc.us/www/public/sc/opinions/2010/pdf/525A07-1.pdf). In a capital murder case, the trial court did not abuse its discretion by allowing the State to introduce for illustrative purposes 18 autopsy photographs of the victim. Cynthia Gardner, M.D. testified regarding her autopsy findings, identified the autopsy photos, and said they accurately depicted the body, would help her explain the location of the injuries, and accurately depicted the injuries to which Dr. Gardner had testified. The photos were relevant and probative, not unnecessarily repetitive, not unduly gruesome or inflammatory, and illustrated both Gardner's testimony and the defendant's statement to the investigators.

State v. Gomez, __ N.C. App. __, __ S.E.2d __ (Feb. 15, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xNTEtMS5wZGY). The trial court did not abuse its discretion under Rule 403 by admitting a recording of phone calls between the defendant and other persons that were entirely in Spanish. The defendant argued that because there was one Spanish-speaking juror, the jurors should have been required to consider only the certified English translation of the recording.

State v. Walters, __ N.C. App. __, 703 S.E.2d 493 (Jan. 4, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0yODEtMS5wZGY). The trial court did not abuse its discretion under Rule 403 by admitting, for purposes of corroboration, a testifying witness's prior consistent statement. The court noted that although the statement was prejudicial to the defendant's case, mere prejudice is not the determining factor under Rule 403; rather, the issue is whether unfair prejudice substantially outweighs the probative value.

State v. Capers, __ N.C. App. __, 704 S.E.2d 39 (Dec. 21, 2010) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMC8wOS0xNjEzLTEucGRm). The trial court did not abuse its discretion under Rule 403 by admitting the defendant's statement to an arresting officer that if the officer had come later the defendant "would have been gone and you would have never saw me again."

State v. Bedford, __ N.C. App. __, 702 S.E.2d 522 (Dec. 7, 2010) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMC8xMC0yNTUtMS5wZGY). In a murder case

in which the victim suffered many distinct injuries to different parts of her body, the trial court did not abuse its discretion by admitting photographs of the victim's body, even though the defendant offered to stipulate to cause of death. Two of the photos were taken of the victim's body just after being removed from a grave and were used to illustrate the testimony of officers who unearthed the body. Eighteen color photographs of the victim's decomposing body were used to illustrate the testimony of the pathologist who did the autopsy and were projected onto a six-foot by eight-foot screen.

State v. Miller, 197 N.C. App. 78 (May 19, 2009). Trial judge was not required to view a DVD before ruling on a Rule 403 objection to portions of an interview of the defendant contained on it. Trial judge did not abuse his discretion by refusing to redact portions of the DVD. However, the court "encourage[d] trial courts to review the content of recorded interviews before publishing them to the jury to ensure that all out-of-court statements contained therein are either admissible for a valid nonhearsay purpose or as an exception to the hearsay rule in order to safeguard against an end-run around the evidentiary and constitutional proscriptions against the admission of hearsay." The court also "remind[ed] trial courts that the questions police pose during suspect interviews may contain false accusations, inherently unreliable, unconfirmed or false statements, and inflammatory remarks that constitute legitimate points of inquiry during a police investigation, but that would otherwise be inadmissible in open court." It continued: "[A]s such, the wholesale publication of a recording of a police interview to the jury, especially law enforcement's investigatory questions, might very well violate the proscriptions against admitting hearsay or Rule 403. In such instances, trial courts would need to redact or exclude the problematic portions of law enforcement's investigatory questions/statements."

State v. Cook, 195 N.C. App. 230 (Feb 3, 2009). The trial judge did not err under Rule 403 in excluding evidence of the victim's alleged false accusation that another person had raped her. The circumstances surrounding that accusation were different from those at issue in the trial and the evidence could have caused confusion.

State v. Crandell, __ N.C. App. __, 702 S.E.2d 352 (Dec. 7, 2010) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMC8xMC00MzktMS5wZGY). In a murder case involving a shooting, the trial court did not abuse its discretion by allowing a detective to give lay opinion testimony concerning the calibers of bullets recovered at the crime scene. Although the testimony was prejudicial, the trial judge correctly ruled that its probative value (helping the jury understand the physical evidence) was not substantially outweighed by the degree of prejudice.

State v. Blymyer, __ N.C. App. __, 695 S.E.2d 525 (July 6, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091722-1.pdf). The trial court did not commit plain error under Rules 401 or 403 by admitting photographs of the murder victim's body. The trial court admitted 28 photographs and diagrams of the interior of the home where the victim was found, 12 of which depicted the victim's body. The trial court also admitted 11 autopsy photographs. An officer used the first set of photos to illustrate the position and condition of the victim's body and injuries sustained. A forensic pathology expert testified to his observations while performing the autopsy and the photographs illustrated the condition of the body as it was received and during the course of the autopsy. The photographs had probative value and that value, in conjunction with testimony by the officer and the expert was not substantially outweighed by their prejudicial effect.

State v. Stitt, __ N.C. App. __, 689 S.E.2d 539 (Dec. 8, 2009). The trial court did not err in admitting four objected-to photographs of the crime scene where the defendant did not did not object to 23 other crime scene photographs, the four objected-to photographs depicted different perspectives of the scene and

focused on different pieces of evidence, the State used the photographs in conjunction with testimony for illustrative purposes only, and the photographs were not used to inflame the jury's passions.

State v. Fortney, __ N.C. App. __, 687 S.E.2d 518 (Jan. 5, 2010). Following *State v. Little*, 191 N.C. App. 655 (2008), and *State v. Jackson*, 139 N.C. App. 721 (2000), and holding that the trial court did not abuse its discretion by allowing the State to introduce evidence of the defendant's prior conviction in a felon in possession case where the defendant had offered to stipulate to the prior felony. The prior conviction, first-degree rape, was not substantially similar to the charged offenses so as to create a danger that the jury might generalize the defendant's earlier bad act into a bad character and raise the odds that he perpetrated the charged offenses of drug possession, possession of a firearm by a felon, and carrying a concealed weapon.

State v. Kirby, __ N.C. App. __, 697 S.E.2d 496 (Aug. 17, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091631-1.pdf). In a homicide case in which the defendant asserted self-defense, the trial court did not abuse its discretion by admitting evidence that the defendant had been selling drugs in the vicinity of the shooting and was affiliated with a gang. The evidence showed that both the defendant and the victim were gang members. The court held that gang affiliation and selling drugs were relevant to show that the defendant could have had a different objective in mind when the altercation took place and could refute the defendant's claim of self-defense.

Pleas and Plea Discussions

State v. Haymond, __ N.C. App. _, 691 S.E.2d 108 (April 6, 2010). Admission of the defendant's statements did not violate Evidence Rule 410 where it did not appear that the defendant thought that he was negotiating a plea with the prosecuting attorney or with the prosecutor's express authority when he made the statements at a court hearing. Instead, the statements were made in the course of the defendant's various requests to the trial court.

State v. Riley, __ N.C. App. __, 688 S.E.2d 477 (Feb. 2, 2010). G.S. 15A-1025 (the fact that the defendant or counsel and the prosecutor engaged in plea discussions or made a plea arrangement may not be received in evidence) was violated when the prosecutor asked the defendant whether he was charged with misdemeanor larceny as a result of a plea bargain.

Refreshing Recollection

State v. Black, __ N.C. App. __, 678 S.E.2d 689 (July 7, 2009). The trial court did not abuse its discretion in admitting a witness's refreshed recollection. The witness's testimony was not merely a recitation of the refreshing memorandum. The witness testified to some of the relevant events before being shown a transcript of his police interview. After being shown the transcript, the witness was equivocal about whether he made the statements recorded in it. However, after hearing an audio tape of the interview out of the presence of the jury, the witness said that his memory was refreshed. He then testified in detail regarding the night in question, apparently without reference to the interview transcript. Where, as here, there is doubt about whether about whether the witness was testifying from his or her own recollection, the testimony is admissible, in the trial court's discretion.

Stipulations

State v. Huey, __ N.C. App. __, 694 S.E.2d 410 (June 15, 2010) (online at:

http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/090496-1.pdf). The defendant moved to suppress on grounds that an officer stopped him without reasonable suspicion. At a hearing on the suppression motion, the State stipulated that the officer knew, at the time of the stop, that the robbery suspects the officer was looking for were approximately 18 years old. The defendant was 51 years old. However, at the hearing, the officer gave testimony contradicting this stipulation and indicating that he did not learn of the suspects' age until after he had arrested the defendant. The court concluded that the stipulation was binding on the State, even though the defendant made no objection when the officer testified.

Vouching for the Credibility of a Victim

State v. Giddens, __ N.C. App. __, 681 S.E.2d 504 (Aug. 18, 2009), *aff'd,* 363 N.C. 826 (Mar. 12, 2010). Holding, over a dissent, that plain error occurred in a child sex case when the trial court admitted the testimony of a child protective services investigator. The investigator testified that the Department of Social Services (DSS) had "substantiated" the defendant as the perpetrator and that the evidence she gathered caused DSS personnel to believe that the abuse alleged by the victims occurred. Case law holds that a witness may not vouch for the credibility of a victim.

Admissibility of Chemical Test Results in an Impaired Driving Case

State v. Simmons, __ N.C. App. __, 698 S.E.2d 95 (July 20, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/090862-1.pdf). The trial court did not err by denying the defendant's motion to suppress the results of the chemical analysis performed on the defendant's breath with the Intoxilyzer 5000 on grounds that preventative maintenance was not performed on the machine at least every 4 months as required by the Department of Health and Human Services. Preventive maintenance was performed on July 14, 2006 and December 5, 2006. The court concluded that although the defendant's argument might have had merit if the chemical analysis had occurred after November 14, 2006 (4 months after the July maintenance) and before December 5, 2006, it failed because the analysis at issue was done only 23 days after the December maintenance.

Miscellaneous Cases

State v. Dallas, __ N.C. App. __, 695 S.E.2d 474 (July 6, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/090644-1.pdf). In a larceny of motor vehicle case, the court rejected the defendant's argument that testimony by the vehicle owners regarding the value of the stolen vehicles invaded the province of the jury as fact-finder, stating: "the owner of property is competent to testify as to the value of his own property even though his knowledge on the subject would not qualify him as a witness were he not the owner."

State v. Capers, __ N.C. App. __, 704 S.E.2d 39 (Dec. 21, 2010) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMC8wOS0xNjEzLTEucGRm). The trial court properly admitted testimony that the defendant was handcuffed and shackled when he was arrested. The court declined to extend *State v. Tolley*, 290 N.C. 349, 365 (1976) ("a defendant in a criminal case is entitled to appear at trial free from all bonds or shackles except in extraordinary instances"), concluding that *Tolley* applies when the jury sees the defendant shackled at trial, not to prohibit the jury from hearing evidence that a defendant was previously handcuffed and shackled. The defendant had asserted that the relevant testimony violated his due process rights.

Arrest, Search, and Investigation

Abandoned Property

State v. Eaton, __ N.C. App. __, __ S.E.2d __ (Mar. 1, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8wOS0xNTg2LTEucGRm). Because the defendant had not been seized when he discarded a plastic baggie beside a public road, the baggie was abandoned property in which the defendant no longer retained a reasonable expectation of privacy. As such, no Fourth Amendment violation occurred when an officer obtained the baggie.

Arrests and Investigatory Stops

Arrests

Generally

State v. Mello, __ N.C. App. __, 684 S.E.2d 477 (Nov. 3, 2009). A provision in a city ordinance prohibiting loitering for the purpose of engaging in drug-related activity and allowing the police to arrest in the absence of probable cause violated the Fourth Amendment.

Probable Cause for Arrest

Steinkrause v. Tatum, __ N.C. __, __ S.E.2d __ (Oct. 8, 2010) (http://www.aoc.state.nc.us/www/public/sc/opinions/2010/pdf/18A10-1.pdf). The court affirmed per curiam *Steinkrause v. Tatum*, __ N.C. App. __, 689 S.E.2d 379 (Dec. 8, 2009) (holding, over a dissent, that there was probable cause to arrest the defendant for impaired driving in light of the severity of the one-car accident coupled with an odor of alcohol).

State v. Washington, ___ N.C. App. ___, 668 S.E.2d 622 (Nov. 18, 2008). There was probable cause to arrest the defendant for resisting, delaying, and obstructing when the defendant fled from an officer who was properly making an investigatory stop. Although the investigatory stop was not justified by the fact that a passenger in the defendant's car was wanted on several outstanding warrants, it was justified by the fact that the defendant was driving a car that had no insurance and with an expired registration plate. It was immaterial that the officer had not explained the proper basis for the stop before the defendant fled.

Based on Order for Arrest

State v. Banner, __ N.C. App. __, __ S.E.2d __ (Nov. 2, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/100123-1.pdf). Provided the underlying charges that form the basis for an order for arrest (OFA) for failure to appear remain unresolved at the time the OFA is executed, the OFA is not invalid and an arrest made pursuant to it is not unconstitutional merely because a clerk or judicial official failed to recall the OFA after learning that it was issued erroneously. On February 22, 2007, the defendant was cited to appear in Wilkes County Court for various motor vehicle offenses ("Wilkes County charges"). On June 7, 2007 he was convicted in Caldwell County of unrelated charges ("unrelated charges") and sent to prison. When a court date was set on the Wilkes County charges, the defendant failed to appear because he was still in prison on the unrelated charges and no writ was issued to secure his presence. The court issued an OFA for the failure to appear. When the defendant was scheduled to be released from prison on the unrelated charges, DOC employees asked the Wilkes County clerk's office to recall the OFA, explaining defendant had been incarcerated when it was issued. However, the OFA was not recalled and on October 1, 2007, the defendant was arrested pursuant to that order, having previously been released from prison. When he was searched incident to arrest,

officers found marijuana and cocaine on his person. The court rejected the defendant's argument that the OFA was invalid because the Wilkes County clerk failed to recall it as requested, concluding that because the underlying charges had not been resolved at the time of arrest, no automatic recall occurred. The court further noted that even if good cause to recall existed, recall was not mandatory and therefore failure to recall did not nullify the OFA. Thus, the officers were entitled to rely on it, and no independent probable cause was required to arrest the defendant. The court declined to resolve the issue of whether there is a good faith exception to Article I, Section 20 of the state Constitution.

Seizure

State v. Icard, 363 N.C. 303 (June 18, 2009). Under the totality circumstances, the defendant was seized by officers and the resulting search of her purse was illegal. The officers mounted a show of authority when (1) an officer, who was armed and in uniform, initiated the encounter, telling the defendant, an occupant of a parked truck, that the area was known for drug crimes and prostitution; (2) the officer called for backup assistance; (3) the officer initially illuminated the truck with blue lights; (4) a second officer illuminated the defendant's side of the truck with take-down lights; (5) the first officer opened the defendant's door, giving her no choice but to respond to him; and (6) the officer instructed the defendant to exit the truck and bring her purse. A reasonable person in defendant's place would not have believed that she was free to leave or otherwise terminate the encounter and thus the trial court erred when it concluded that the defendant's interaction with the officers was consensual.

State v. Eaton, __ N.C. App. __, __ S.E.2d __ (Mar. 1, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8wOS0xNTg2LTEucGRm). Citing *California v. Hodari D*, 499 U.S. 621 (1991), the court held that the defendant was not seized when he dropped a plastic baggie containing controlled substances. An officer was patrolling at night in an area where illegal drugs were often sold, used, and maintained. When the officer observed five people standing in the middle of an intersection, he turned on his blue lights, and the five people dispersed in different directions. When the officer asked them to come back, all but the defendant complied. When the officer repeated his request to the defendant, the defendant stopped, turned, and discarded the baggie before complying with the officer's show of authority by submitting to the officer's request.

State v. Morton, __ N.C. App. __, 679 S.E.2d 437 (July 21, 2009), *reversed on other grounds*, __ N.C. __ (Dec. 11, 2009). No seizure occurred when officers approached the defendant and asked to speak with him regarding a shooting. The defendant submitted to questioning without physical force or show of authority by the police; the officers did not raise their weapons or activate their blue lights.

State v. Williams, __ N.C. App. __, __ S.E.2d __ (December 22, 2009). An encounter between the defendant and an officer did not constitute a seizure. The officer parked his patrol car on the opposite side of the street from the defendant's parked car; thus, the officer did not physically block the defendant's vehicle from leaving. The officer did not activate his siren or blue lights, and there was no evidence that he removed his gun from its holster, or used any language or displayed a demeanor suggesting that the defendant was not free to leave. A reasonable person would have felt free to disregard the officer and go about his or her business; as such the encounter was entirely consensual.

Stops

Generally

State v. Mewborn, __ N.C. App. __, __ S.E.2d __ (Nov. 3, 2009). No stop occurred when the defendant

began to run away as the officers exited their vehicle. The defendant did not stop or submit to the officers' authority at this time.

Reasonable Suspicion for Stop

State v. Mello, __ N.C. __, __ S.E.2d __ (Oct. 8, 2010) (http://www.aoc.state.nc.us/www/public/sc/opinions/2010/pdf/490A09-1.pdf). The court affirmed per curiam *State v. Mello,* __ N.C. App. __, __ S.E.2d __ (Nov. 3, 2009) (holding, over a dissent, that reasonable suspicion supported a vehicle stop; while in a drug-ridden area, an officer observed two individuals approach and insert their hands into the defendant's car; after the officer became suspicious and approached the group, the two pedestrians fled, and the defendant began to drive off).

State v. Huey, __ N.C. App. __, __ S.E.2d __ (June 15, 2010) (online at: http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/090496-1.pdf). An officer lacked reasonable suspicion for a stop. The State stipulated that the officer knew, at the time of the stop, that the robbery suspects the officer was looking for were approximately 18 years old. The defendant was 51 years old at the time of the stop. Even if the officer could not initially tell the defendant's age, once the officer was face-to-face with the defendant, he should have been able to tell that the defendant was much older than 18. In any event, as soon as the defendant handed the officer his identification card with his birth date, the officer knew that the defendant did not match the description of the suspects and the interaction should have ended.

State v. Mewborn, __ N.C. App. __, __ S.E.2d __ (Nov. 3, 2009). Because the defendant was not stopped until after he ran away from the officers, his flight could be considered in determining that there was reasonable suspicion to stop.

State v. Williams, ___ N.C. App. ___, 673 S.E.2d 394 (Mar. 3, 2009). An officer had reasonable suspicion to stop and frisk the defendant. The officer saw the defendant, who substantially matched a "be on the lookout" report following a robbery, a few blocks from the crime scene, only minutes after the crime occurred and travelling in the same direction as the robber. The defendant froze when confronted by the officer and initially refused to remove his hands from his pockets.

State v. McRae, __ N.C. App. __, __ S.E.2d __ (April 6, 2010). The officer had reasonable suspicion to stop when the officer saw the defendant commit a violation of G.S. 20-154(a) (driver must give signal when turning whenever the operation of any other vehicle may be affected by such movement). Because the defendant was driving in medium traffic, a short distance in front of the officer, the defendant's failure to signal could have affected another vehicle.

Handcuffing and Other Restrictions During Stops

State v. Carrouthers, __ N.C. App. __, __ S.E.2d __ (Oct. 20, 2009). The trial court applied the wrong legal standard when granting the defendant's motion to suppress. The trial court held that an arrest occurred when the defendant was handcuffed by an officer, and the arrest was not supported by probable cause. The trial court should have determined whether special circumstances existed that would have justified the officer's use of handcuffs as the least intrusive means reasonable necessary to carry out the purpose of the investigative stop. The court remanded for the required determination.

Pretextual Stops

State v. Ford, __ N.C. App. __, __ S.E.2d __ (Dec. 21, 2010) (http://appellate.nccourts.org/opinions/?c=2&pdf=2010/10-470-1.pdf). Citing *Whren v. United States*, 517 U.S. 806, 813 (1996), the court rejected the defendant's argument that a stop for an alleged violation of G.S. 20-129(d) (motor vehicle's rear plate must be lit so that it can be read from a distance of 50 feet) was pretextual. Under *Whren*, the reasonableness of a traffic stop does not depend on the actual motivations of the individual officers involved.

Tips

Anonymous Tips

State v. Garcia, __ N.C. App. __, 677 S.E.2d 555 (June 16, 2009). Anonymous informant's tips combined with officers' corroboration provided reasonable suspicion for a stop. The anonymous tips provided specific information of possessing and selling marijuana, including the specific location of such activity (a shed at the defendant's residence). The tips were buttressed by officers' knowledge of the defendant's history of police contacts for narcotics and firearms offenses, verification that the defendant lived at the residence, and subsequent surveillance of the residence. During surveillance an officer observed individuals come and go and observed the defendant remove a large bag from the shed and place it in a vehicle. Other officers then followed the defendant in the vehicle to a location known for drug activity.

State v. Peele, ___ N.C. App. ___, 672 S.E.2d 717 (May 5, 2009). See the discussion of this case, below, under Vehicle Stops.

State v. Johnson, __ N.C. App. __, __ S.E.2d __ (June 1, 2010) (available at: http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/090908-1.pdf). An anonymous tip lacked a sufficient indicia of reliability to justify the warrantless stop. The anonymous tip reported that a black male wearing a white t-shirt and blue shorts was selling illegal narcotics and guns at the corner of Pitts and Birch Streets in the Happy Hill Garden housing community. The caller said the sales were occurring out of a blue Mitsubishi, license plate WT 3456. The caller refused to provide a name, the police had no means of tracking him or her down, and the officers did not know how the caller obtained the information. Prior to the officers' arrival in the Happy Hill neighborhood, the tipster called back and stated that the suspect had just left the area, but would return shortly. Due to construction, the neighborhood had only two entrances. Officers stationed themselves at each entrance and observed a blue Mitsubishi enter the neighborhood. The car had a license plate WTH 3453 and was driven by a black male wearing a white t-shirt. After the officers learned that the registered owner's driver's license was suspended, they stopped the vehicle. The court concluded that while the tip included identifying details of a person and car allegedly engaged in illegal activity, it offered few details of the alleged crime, no information regarding the informant's basis of knowledge, and scant information to predict the future behavior of the alleged perpetrator. Given the limited details provided, and the officers' failure to corroborate the tip's allegations of illegal activity, the tip lacked sufficient indicia of reliability to justify the warrantless stop. The court noted that although the officers lawfully stopped the vehicle after discovering that the registered owner's driver's license was suspended, because nothing in the tip involved a revoked driver's license, the scope of the stop should have been limited to a determination of whether the license was suspended.

Confidential Informant Tips

State v. Crowell, __ N.C. App. __, __ S.E.2d __ (June 1, 2010) (available at: http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/090635-1.pdf). A tip from a confidential informant had a sufficient indicia of reliability to support a stop of the defendant's vehicle where the evidence showed that: (1) a confidential informant who had previously provided reliable information told police that the defendant would be transporting cocaine that day and described the vehicle defendant would be driving; (2) the informant indicated to police that he had seen cocaine in defendant's possession; (3) a car matching the informant's description arrived at the designated location at the approximate time indicated by the informant; and (4) the informant, waiting at the specified location, called police to confirm that the driver was the defendant.

State v. Brown, __ N.C. App. __, __ S.E.2d __ (Aug. 18, 2009). A detailed tip by an individual, who originally called the police anonymously but then identified himself and met with the police in person, was sufficiently corroborated by the police to establish probable cause to arrest the defendant.

State v. Evans, __ N.C. App. __, __ S.E.2d __ (December 22, 2009). Information from a confidential informant provided probable cause. The informant told an officer that a cocaine delivery would occur that evening. The informant had provided information to the officer 15-20 times over the previous month; six of those occasions led to arrests; at least once, the informant's information served as the basis for a search warrant; and the officer once used the informant to make an undercover drug buy. The informant provided information about the vehicle that would be used to deliver the drugs, the route the vehicle would take, its destination, and the exact time it arrived at its destination. The informant provided specific information about the vehicle's occupants including the names of the driver and the passenger, a detailed description of the passenger, and where the controlled substance would be on the passenger's person. All of this information was accurate.

State v. McRae, __ N.C. App. __, __ S.E.2d __ (April 6, 2010). In a drug case, a tip from a confidential informant provided reasonable suspicion justifying the stop where the relevant information was known by the officer requesting the stop but not by the officer conducting the stop. The confidential informant had worked with the officer on several occasions, had provided reliable information in the past that lead to the arrest of drug offenders, and gave the officer specific information (including the defendant's name, the type of car he would be driving, the location where he would be driving, and the amount and type of controlled substance that he would have in his possession).

Other Tips

State v. Maready, 362 N.C. 614 (Dec. 12, 2008). See the discussion of this case, below, under Vehicle Stops.

State v. Allen, __ N.C. App. __, 676 S.E.2d 519 (May, 19, 2009). See the discussion of this case, below, under Vehicle Stops.

State v. Hudgins, ___ N.C. App. ___, 672 S.E.2d 717 (Feb. 17, 2009). See the discussion of this case, below, under Vehicle Stops.

Vehicle Stops

Reasonable Suspicion for Stop

Arizona v. Johnson, 129 S. Ct. 781 (Jan. 26, 2009). Summarizing existing law, the Court noted that a

"stop and frisk" is constitutionally permissible if: (1) the stop is lawful; and (2) the officer reasonably suspects that the person stopped is armed and dangerous. It noted that that in an on-the-street encounter, the first requirement—a lawful stop—is met when the officer reasonably suspects that the person is committing or has committed a criminal offense. The Court held that in a traffic stop setting, the first requirement—a lawful stop—is met whenever it is lawful for the police to detain an automobile and its occupants pending inquiry into a vehicular violation. The police do not need to have cause to believe that any occupant of the vehicle is involved in criminal activity. Also, an officer may ask about matters unrelated to the stop provided that those questions do not measurably extend the duration of the stop. The Court further held that to justify a frisk of the driver or a passenger during a lawful stop, the police must believe that the person is armed and dangerous.

State v. Maready, 362 N.C. 614 (Dec. 12, 2008). Reasonable suspicion supported the officer's stop of a vehicle in a case in which the defendant was convicted of second-degree murder and other charges involving a vehicle crash and impaired driving. Officers saw an intoxicated man stumble across the road and enter a Honda. They then were flagged down by a vehicle that they observed driving in front of the Honda. The vehicle's driver, who was distraught, told them that the driver of the Honda had been running stop signs and stop lights. The officers conducted an investigatory stop of the Honda, and the defendant was driving. The court considered the following facts as supporting the indicia of reliability of the informant's tip: the tipster had been driving in front of the Honda and thus had firsthand knowledge of the reported traffic violations; the driver's own especially cautious driving and apparent distress were consistent with what one would expect of a person who had observed erratic driving; the driver approached the officers in person and gave them information close in time and place to the scene of the alleged violations, with little time to fabricate; and because the tip was made face-to-face, the driver was not entirely anonymous.

State v. Chlopek, __ N.C. App. __, __ S.E.2d __ (Jan. 18, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=2011/10-766-1.pdf). An officer lacked reasonable suspicion to stop the defendant's vehicle. Around midnight, officers were conducting a traffic stop at Olde Waverly Place, a partially developed subdivision. While doing so, an officer noticed the defendant's construction vehicle enter the subdivision and proceed to an undeveloped section. Although officers had been put on notice of copper thefts from subdivisions under construction in the county, no such thefts had been reported in Olde Waverly Place. When the defendant exited the subdivision 20-30 minutes later, his vehicle was stopped. The officer did not articulate any specific facts about the vehicle or how it was driven which would justify the stop; the fact that there had been numerous copper thefts in the county did not support the stop.

State v. Williams, __ N.C. App. __, __ S.E.2d __ (Jan. 18, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=2011/09-1656-1.pdf). Officers had reasonable suspicion to stop a vehicle in which the defendant was a passenger based on the officers' good faith belief that the driver had a revoked license and information about the defendant's drug sales provided by three informants. Two of the informants were confidential informants who had provided good information in the past. The third was a patron of the hotel where the drug sales allegedly occurred and met with an officer face-to-face. Additionally, officers corroborated the informants' information. As such, the informants' information provided a sufficient indicia of reliability. The officer's mistake about who was driving the vehicle was reasonable, under the circumstances.

State v. Ford, __ N.C. App. __, __ S.E.2d __ (Dec. 21, 2010) (http://appellate.nccourts.org/opinions/?c=2&pdf=2010/10-470-1.pdf). The trial court properly denied the

defendant's motion to suppress when officers had reasonable suspicion to believe that the defendant committed a traffic violation supporting the traffic stop. The stop was premised on the defendant's alleged violation of G.S. 20-129(d), requiring that a motor vehicle's rear plate be lit so that under normal atmospheric conditions it can be read from a distance of 50 feet. The trial court found that normal conditions existed when officers pulled behind the vehicle; officers were unable to read the license plate with patrol car's lights on; when the patrol car's lights were turned off, the plate was not visible within the statutory requirement; and officers cited the defendant for the violation. The defendant's evidence that the vehicle, a rental car, was "fine" when rented did not controvert the officer's testimony that the tag was not sufficiently illuminated on the night of the stop.

State v. Allen, __ N.C. App. __, 676 S.E.2d 519 (May, 19, 2009). Reasonable suspicion existed for a stop. An assault victim reported to a responding officer that the perpetrator was a tall white male who left in a small dark car driven by a blonde, white female. The officer saw a small, light-colored vehicle travelling away from the scene; driver was a blonde female. The driver abruptly turned into a parking lot and drove quickly over rough pavement. When the officer approached, the defendant was leaning on the vehicle and appeared intoxicated. Although there was a passenger in the car, the officer could not determine if the passenger was male or female. The officer questioned the defendant, determined that she was not involved in the assault, but arrested her for impaired driving. The court held that although there was no information in the record about the victim's identity, this was not an anonymous tip case; it was a face-to-face encounter with an officer that carried a higher indicia of reliability than an anonymous tip. Additionally, the officer's actions were not based solely on the tip. The officer observed the defendant's "hurried actions," it appeared that the defendant was trying to avoid the officer, and the defendant was in the proximity of the crime scene. Even though the defendant's vehicle did not match the description given by the victim, the totality of the circumstances supported a finding of reasonable suspicion.

State v. Hudgins, ___ N.C. App. ___, 672 S.E.2d 717 (Feb. 17, 2009). Following *Maready* (discussed above) and holding that there was reasonable suspicion to stop the defendant's vehicle. At 2:55 am, a man called the police and reported that his car was being followed by a man with a gun. The caller reported that he was in the vicinity of a specific intersection. The caller remained on the line and described the vehicle following him, and gave updates on his location. The caller was directed to a specific location, so that an officer could meet him. When the vehicles arrived, they matched the descriptions provided by the caller. The officer stopped the vehicles. The caller identified the driver of the other vehicle as the man who had been following him and drove away without identifying himself. The officer ended up arresting the driver of the other vehicle for DWI. No weapon was found. The court held that there were indicia of reliability similar to those that existed in *Maready*: (1) the caller telephoned police and remained on the telephone for approximately eight minutes; (2) the caller provided specific information about the vehicle that was following him and their location; (3) the caller carefully followed the dispatcher's instructions, which allowed the officer to intercept the vehicles; (4) defendant followed the caller over a peculiar and circuitous route between 2 and 3 a.m.; (5) the caller remained on the scene long enough to identify defendant to the officer; and (6) by calling on a cell phone and remaining at the scene, caller placed his anonymity at risk.

State v. Peele, ___ N.C. App. ___, 675 S.E.2d 682 (May 5, 2009), *stay allowed*, 363 N.C. 379 (May 20, 2009). Neither an anonymous tip nor an officer's observation of the vehicle weaning once in its lane provided reasonable suspicion to stop the vehicle in this DWI case. At approximately 7:50 p.m., an officer responded to a dispatch concerning "a possible careless and reckless, D.W.I., headed towards the Holiday Inn intersection." The vehicle was described as a burgundy Chevrolet pickup truck. The officer immediately arrived at the intersection and saw a burgundy Chevrolet pickup truck. After following the

truck for about 1/10 of a mile and seeing the truck weave once in its lane once, the officer stopped the truck. Although the anonymous tip accurately described the vehicle and its location, it provided no way for officer to test its credibility. Neither the tip nor the officer's observation, alone or together established reasonable suspicion to stop.

State v. Fields, ___ N.C. App. ___, 673 S.E.2d 765 (Mar. 17, 2009). No reasonable suspicion existed for the stop. Around 4:00 p.m., an officer followed the defendant's vehicle for about 1 1/2 miles. After the officer saw the defendant's vehicle swerve to the white line on the right side of the traffic lane three times, the officer stopped the vehicle for impaired driving. The court noted that the officer did not observe the defendant violating any laws, such as driving above or below the speed limit, the hour of the stop was not unusual, and there was no evidence that the defendant was near any places to purchase alcohol.

State v. Simmons, __ N.C. App. __, __ S.E.2d __ (July 20, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/090862-1.pdf). Distinguishing *State v. Fields* (discussed above), the court held that reasonable suspicion existed to support the stop. The defendant was not only weaving within his lane, but also was weaving across and outside the lanes of travel, and at one point ran off the road.

State v. Hudson, __ N.C. App. __, __ S.E.2d __ (Aug. 17, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091421-1.pdf). An officer had reasonable suspicion to stop the defendant's vehicle after the officer observed the vehicle twice cross the center line of I-95 and pull back over the fog line.

State v. Hopper, __ N.C. App. __, __ S.E.2d __ (July 6, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091211-1.pdf). The trial court properly concluded that an officer had reasonable suspicion to believe that the defendant was committing a traffic violation when he saw the defendant driving on a public street while using his windshield wipers in inclement weather but not having his taillights on. The trial court's conclusion that the street at issue was a public one was supported by competent evidence, even though conflicting evidence had been presented. The court noted that its conclusion that the officer correctly believed that the street was a public one distinguished the case from those holding that an officer's mistaken belief that a defendant had committed a traffic violation is constitutionally insufficient to support a traffic stop.

Duration of Stop

State v. Hernandez, __ N.C. App. __, __ S.E.2d __ (Dec. 21, 2010) (http://appellate.nccourts.org/opinions/?c=2&pdf=2010/10-178-1.pdf). The trial court properly denied a motion to suppress asserting that a vehicle stop was improperly prolonged. An officer stopped the truck after observing it follow too closely and make erratic lane changes. The occupants were detained until a Spanish language consent to search form could be brought to the location. The defendant challenged as unconstitutional this detention, which lasted approximately one hour and ten minutes. The court distinguished cases cited by the defendant, explaining that in both, vehicle occupants were detained after the original purpose of the initial investigative detention had been addressed and the officer attempted to justify an additional period of detention solely on the basis of the driver's nervousness or uncertainty about travel details, a basis held not to provide a reasonable suspicion that criminal activity was afoot. Here, however, since none of the occupants had a driver's license or other identification, the officer could not issue a citation and resolve the initial stop. Because the challenged delay occurred when the officer was attempting to address issues arising from the initial stop, the court determined that it need not address

whether the officer had a reasonable suspicion of criminal activity sufficient to justify a prolonged detention. Nevertheless, the court went on to conclude that even if the officer was required to have such a suspicion in order to justify the detention, the facts supported the existence of such a suspicion. Specifically: (a) the driver did not have a license or registration; (b) a man was in the truck bed covered by a blanket; (c) the defendant handed the driver a license belonging to the defendant's brother; (d) the occupants gave inconsistent stories about their travel that were confusing given the truck's location and direction of travel; (e) no occupant produced identification or a driver's license; (f) the men had no luggage despite the fact that they were traveling from North Carolina to New York; and (g) the driver had tattoos associated with criminal gang activity.

Extending the Stop

State v. Hernandez, __ N.C. App. __, __ S.E.2d __ (Dec. 21, 2010) (http://appellate.nccourts.org/opinions/?c=2&pdf=2010/10-178-1.pdf). The trial court properly denied a motion to suppress asserting that a vehicle stop was improperly prolonged. An officer stopped the truck after observing it follow too closely and make erratic lane changes. The occupants were detained until a Spanish language consent to search form could be brought to the location. The defendant challenged as unconstitutional this detention, which lasted approximately one hour and ten minutes. The court distinguished cases cited by the defendant, explaining that in both, vehicle occupants were detained after the original purpose of the initial investigative detention had been addressed and the officer attempted to justify an additional period of detention solely on the basis of the driver's nervousness or uncertainty about travel details, a basis held not to provide a reasonable suspicion that criminal activity was afoot. Here, however, since none of the occupants had a driver's license or other identification, the officer could not issue a citation and resolve the initial stop. Because the challenged delay occurred when the officer was attempting to address issues arising from the initial stop, the court determined that it need not address whether the officer had a reasonable suspicion of criminal activity sufficient to justify a prolonged detention. Nevertheless, the court went on to conclude that even if the officer was required to have such a suspicion in order to justify the detention, the facts supported the existence of such a suspicion. Specifically: (a) the driver did not have a license or registration; (b) a man was in the truck bed covered by a blanket; (c) the defendant handed the driver a license belonging to the defendant's brother; (d) the occupants gave inconsistent stories about their travel that were confusing given the truck's location and direction of travel; (e) no occupant produced identification or a driver's license; (f) the men had no luggage despite the fact that they were traveling from North Carolina to New York; and (g) the driver had tattoos associated with criminal gang activity.

State v. Hodges, ___ N.C. App. ___, 672 S.E.2d 724 (Feb. 17, 2009). Reasonable suspicion supported prolonging the detention of the defendant after the officer returned his license and the car rental contract and issued him a verbal warning for speeding. The defendant misidentified his passenger and was nervous. Additionally other officers had informed the officer that they had been conducting narcotics surveillance on the vehicle; that they had observed passenger appear to put something under his seat which might be drugs or a weapon; and that the officer should be careful in conducting the traffic stop.

State v. Jackson, __ N.C. App. __, __ S.E.2d __ (Aug. 18, 2009). There were no grounds providing reasonable and articulable suspicion for extending a vehicle stop once the original purpose of the stop (suspicion that the driver was operating the vehicle without a license) had been addressed. After the officer verified that the driver had a valid license, she extended the stop by asking whether there was anything illegal in the vehicle, and the defendant gave consent to search the vehicle. The encounter did not become consensual after the officer verified that the driver was licensed. Although such an encounter

could have become consensual if the officer had returned the driver's license and registration, here there was no evidence that the driver's documentation was returned. Because the extended detention was unconstitutional, the driver's consent was ineffective to justify the search of the vehicle and the weapon and drugs found were fruits of the poisonous tree.

Standing

State v. Hernandez, __ N.C. App. __, __ S.E.2d __ (Dec. 21, 2010) (http://appellate.nccourts.org/opinions/?c=2&pdf=2010/10-178-1.pdf). As a passenger in a vehicle that was stopped, the defendant had standing to challenge the stop.

State v. Hodges, ___ N.C. App. ___, 672 S.E.2d 724 (Feb. 17, 2009). By telling the officer that he had to ask the passenger for permission to search the vehicle, the defendant-driver waived any standing that he might have had to challenge the passenger's consent to the search.

State v. Jackson, __ N.C. App. __, __ S.E.2d __ (Aug. 18, 2009). A passenger in a vehicle that has been stopped by the police has standing to challenge the constitutionality of the vehicle stop.

Checkpoints

State v. Jarrett, __ N.C. App. __, __ S.E.2d __ (May 4, 2010). The vehicle checkpoint did not violate the defendant's Fourth Amendment rights. The primary programmatic purpose of the checkpoint—to determine if drivers were complying with drivers license laws and to deter citizens from violating these laws—was a lawful one. Additionally, the checkpoint itself was reasonable, based on the gravity of the public concerns served by the seizure, the degree to which the seizure advanced the public interest, and the severity of the interference with individual liberty. The court also held that the officer had reasonable, articulable suspicion to continue to detain the 18-year-old defendant after he produced a valid license and registration and thus satisfied the primary purpose of the vehicle checkpoint. Specifically, when the officer approached the car, he saw an aluminum can between the driver's and passenger's seat, and the passenger was attempting to conceal the can. When the officer asked what was in the can, the defendant raised it, revealing a beer can.

State v. Corpening, __ N.C. App. __, __ S.E.2d __ (Oct. 6, 2009). Declining to consider the defendant's challenge to the constitutionality of a vehicle checkpoint where officers did not stop the defendant's vehicle as a part of the checkpoint but rather approached it after the defendant parked it on the street about 100-200 feet from the checkpoint.

Consent

Implied Consent

State v. McLeod, __ N.C. App. __, __ S.E.2d __ (July 7, 2009). Officers had implied consent to search a residence occupied by the defendant and his mother. After the defendant's mother told the officers that the defendant had a gun in the residence, the defendant confirmed that to be true and told the officers where it was located. The defendant and his mother gave consent by their words and actions for the officers to enter the residence and seize the weapon.

State v. Troy, __ N.C. App. __, __ S.E.2d __ (July 21, 2009). The defendant gave implied consent to the recording of three-way telephone calls in which he participated while in an out-of-state detention center.

Although the defendant did not receive a recorded message when the three-way calls were made informing him that the calls were being monitored and recorded, he was so informed when he placed two other calls days before the three-way calls at issue were made.

Third-Party Consent

State v. Washburn, __ N.C. App. __, __ S.E.2d __ (Nov. 17, 2009). Police officers lawfully were present in a common hallway outside of the defendant's individual storage unit. The hallway was open to those with an access code and invited guests, the manager previously had given the police department its own access code to the facility, and facility manager gave the officers permission on the day in question to access the common area with a drug dog, which subsequently alerted on the defendant's unit.

Voluntariness of Consent

State v. Medina, __ N.C. App. __, __ S.E.2d __ (July 20, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/100071-1.pdf). A warrantless search of the defendant's car was valid on grounds of consent. The court rejected the defendant's argument that his consent was invalid because the officer who procured it was not fluent in Spanish. The court noted that the defendant was non-responsive to initial questions posed in English, but that he responded when spoken to in Spanish. The officer asked simple questions about weapons or drugs and when he gestured to the car and asked to "look," the defendant nodded in the affirmative. Although not fluent in Spanish, the officer had Spanish instruction in high school and college and the two conversed entirely in Spanish for periods of up to 30 minutes. The officer asked open ended-questions which the defendant answered appropriately. The defendant never indicated that he did not understand a question. The court also rejected the defendant's argument that his consent was invalid because the officer wore a sidearm while seeking the consent, concluding that the mere presence of a holstered sidearm does not render consent involuntary.

State v. Kuegel, ___ N.C. App. ___, 672 S.E.2d 97 (Feb. 3, 2009). The defendant's consent to search his residence was voluntary, even though it was induced by an officer's false statements. After receiving information that the defendant was selling marijuana and cocaine from his apartment, an officer went to the apartment to conduct a knock and talk. The officer untruthfully told the defendant that he had conducted surveillance of the apartment, saw a lot of people coming and going, stopped their cars after they left the neighborhood, and each time recovered either marijuana or cocaine. The exchange continued and the defendant gave consent to search. Based on the totality of circumstances, the consent was voluntary.

State v. Stover, __ N.C. App. __, __ S.E.2d __ (Nov. 3, 2009). The evidence supported the trial court's conclusion that the defendant voluntarily consented to a search of his home. Although an officer aimed his gun at the defendant when he thought that the defendant was attempting to flee, the officer promptly lowered the gun. While the officers kicked down the door, they did not immediately handcuff the defendant. Rather, the defendant sat in his living room and conversed freely with the officers, and one officer escorted him to a neighbor's house to obtain child care. The defendant consented to a search of his house when asked after a protective sweep was completed.

State v. Boyd, __ N.C. App. __, __ S.E.2d __ (Nov. 2, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/100025-1.pdf). The defendant voluntarily consented to allow officers to take a saliva sample for DNA testing. The defendant was told that the

sample could be used to exonerate him in ongoing investigations of break-ins and assaults on women that occurred in Charlotte in 1998. The defendant argued that because the detective failed to inform him of all of the charges that were being investigated—specifically, rape and sexual assault—his consent was involuntary. Following *State v. Barkley*, 144 N.C. App. 514 (2001), the court rejected this argument. The court concluded that the consent was voluntary even though the defendant did not know that the assaults were of a sexual nature and that a reasonable person in the defendant's position would have understood that the DNA could be used generally for investigative purposes.

Scope of Consent

State v. Hagin, __ N.C. App. __, __ S.E.2d __ (April 20, 2010). By consenting to a search of all personal and real property at 19 Doc Wyatt Road, the defendant consented to a search of an outbuilding within the curtilage of the residence. The defendant's failure to object when the outbuilding was searched suggests that he believed that the outbuilding was within the scope of his consent. For a more detailed analysis of this case, see the blog post at: http://sogweb.sog.unc.edu/blogs/ncclaw/?p=1227

Dog Sniff

State v. Washburn, __ N.C. App. __, __ S.E.2d __ (Nov. 17, 2009). Use of a dog by officers to sweep the common area of a storage facility, altering them to the presence of drugs in the defendant's storage unit, did not implicate a legitimate privacy interest protected by the Fourth Amendment.

Exclusionary Rule

Herring v. United States, 129 S. Ct. 695 (Jan. 14, 2009). The exclusionary rule does not require the exclusion of evidence found during a search incident to arrest when the officer reasonably believed that there was an outstanding warrant but that belief was wrong because of a negligent bookkeeping error by another police employee. An officer arrested the defendant based on an outstanding arrest warrant listed in a neighboring county sheriff's computer database. A search incident to arrest discovered drugs and a gun, which formed the basis for criminal charges. Minutes after the search was completed, it became known that the warrant had been recalled but that a law enforcement official had negligently failed to record the recall in the system. The Court reasoned that the exclusionary rule is not an individual right and that it applies only where it will result in appreciable deterrence. Additionally, the benefits of deterrence must outweigh the social costs of exclusion of the evidence. An important part of the calculation is the culpability of the law enforcement conduct. Thus, the abuses that gave rise to the exclusionary rule featured intentional conduct that was patently unconstitutional. An error that arises from nonrecurring and attenuated negligence is far removed from the core concerns that lead to adoption of the rule. The Court concluded: "To trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system. . . . [T]he . . . rule serves to deter deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence." The negligence in recordkeeping at issue, the Court held, did not rise to that level. Finally the Court noted that not all recordkeeping errors are immune from the exclusionary rule: "[i]f the police have been shown to be reckless in maintaining a warrant system, or to have knowingly made false entries to lay the groundwork for future false arrests, exclusion would be . . . justified . . . ."

State v. Barron, __ N.C. App. __, __ S.E.2d __ (Mar. 2, 2010). Even if the defendant was arrested without probable cause, his subsequent criminal conduct of giving the officers a false name, date of birth,

and social security number need not be suppressed. "The exclusionary rule does not operate to exclude evidence of crimes committed subsequent to an illegal search and seizure."

Hartman v. Robertson, __ N.C. App. __, __ S.E.2d __ (Dec. 21, 2010) (http://appellate.nccourts.org/opinions/?c=2&pdf=2010/10-636-1.pdf). The exclusionary rule does not apply in a civil license revocation proceeding.

Exigent Circumstances

Michigan v. Fisher, __ S. Ct. __ (Dec. 7, 2009). An officer's entry into a home without a warrant was reasonable under the emergency aid doctrine. Responding to a report of a disturbance, a couple directed officers to a house where a man was "going crazy." A pickup in the driveway had a smashed front, there were damaged fence posts along the side of the property, and the home had three broken windows, with the glass still on the ground outside. The officers saw blood on the pickup and on clothes inside the truck, as well as on one of the doors to the house. They could see the defendant screaming and throwing things inside the home. The back door was locked and a couch blocked the front door. The Court concluded that it would be objectively reasonable to believe that the defendant's projectiles might have a human target (such as a spouse or a child), or that the defendant would hurt himself in the course of his rage.

State v. Williams, __ N.C. App. __, __ S.E.2d __ (Jan. 18, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=2011/09-1656-1.pdf). Probable cause and exigent circumstances supported an officer's warrantless search of the defendant's mouth by grabbing him around the throat, pushing him onto the hood of a vehicle, and demanding that he spit out whatever he was trying to swallow. Probable cause to believe that the defendant possessed illegal drugs and was attempting to destroy them was supported by information from three reliable informants, the fact that the defendant's vehicle was covered in talcum powder, which is used to mask the odor of drugs, while conducting a consent search of the defendant's person, the defendant attempted to swallow something, and that other suspects had attempted to swallow drugs in the officer's presence. Exigent circumstances existed because the defendant attempted to swallow four packages of cocaine, which could have endangered his health.

State v. Cline, __ N.C. App. __, __ S.E.2d __ (July 20, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/100007-1.pdf). Exigent circumstances existed for an officer to make a warrantless entry into the defendant's home to ascertain whether someone inside was in need of immediate assistance or under threat of serious injury. The officer was summoned after motorists discovered a young, naked, unattended toddler on the side of a major highway. The officer was able to determine that the child was the defendant's son with reasonable certainty and that the defendant resided at the premises in question. When the officer knocked and banged on front door, he received no response. The officer found the back door ajar. It would have taken the officer approximately two hours to get a search warrant for the premises.

State v. Fuller, ___ N.C. App. ___, 674 S.E.2d 824 (April 21, 2009). Exigent circumstances supported officers' warrantless entry into a mobile home to arrest the defendant pursuant to an outstanding warrant. The officers knew that the defendant previously absconded from a probation violation hearing and thus was a flight risk, that defendant had previously engaged in violent behavior and was normally armed, and when they announced their presence, they watched, through a window, as the defendant disappeared from view. The officers reasonably believed that the defendant was attempting to escape and presented a danger to the officers and others in the home.

State v. Stover, __ N.C. App. __, __ S.E.2d __ (Nov. 3, 2009). Exigent circumstances justified officers' entry into a home. The officers were told by an informant told that she bought marijuana at the house. When they approached for a knock and talk, they detected a strong odor of marijuana, and saw the defendant with his upper body partially out of a window. The possible flight by the defendant and concern with destruction of evidence given the smell provided exigent circumstances.

State v. Fletcher, __ N.C. App. __, __ S.E.2d __ (Jan. 19, 2010). G.S. 20-139.1(d1) (providing that in order to proceed with a non-consensual blood test without a warrant, there must be probable cause and the officer must have a reasonable belief that a delay in testing would result in dissipation of the person's blood alcohol content), codifies exigent circumstances with respect to impaired driving and is constitutional. Competent evidence supported the trial court's conclusions that the officer had a reasonable belief that a delay in testing would result in dissipation of the defendant's blood alcohol content and that exigent circumstances existed; the facts showed, in part, that obtaining a warrant to procure the blood would have caused a two to three hour delay.

Frisk

State v. Morton, 363 N.C. 737 (Dec. 11, 2009). For reasons stated in a dissent to the opinion below, the North Carolina Supreme Court reversed a Court of Appeals ruling that the trial judge erred in concluding that a frisk was justified because officers had reasonable suspicion to believe that the defendant was armed or dangerous. The dissent had concluded that, under the totality of the circumstances, the officers had reasonable suspicion to frisk the defendant for officer safety.

State v. Morton, __ N.C. App. __, __ S.E.2d __ (June 15, 2010) (online at: http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/081020-2.pdf). On remand from the case annotated immediately above, the court held that officers did not exceed the scope of the frisk by confiscating a digital scale from the defendant's pocket. An officer testified that he knew the object was a digital scale based on his pat-down without manipulation of the object and that individuals often carry such scales in order to weigh controlled substances. When asked, the defendant confirmed that the object was a scale. These facts in conjunction with informant tips that the defendant was engaging in the sale of illegal drugs are sufficient to support the trial court's conclusion that the officer was reasonable and justified in seizing the scale.

State v. Miller, __ N.C. App. __, 678 S.E.2d 802 (July 7, 2009). An officer had reasonable suspicion to frisk the defendant after stopping him for a traffic violation. Even though the officer could see something in the defendant's clenched right hand, the defendant stated that he had nothing in his hand; the defendant appeared to be attempting to physically evade the officer; the defendant continually refused to show the officer what was in his hand; and the defendant raised his fist, suggesting an intent to strike the officer.

State v. King, __ N.C. App. __, __ S.E.2d __ (Aug. 17, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091659-1.pdf). An officer had reasonable suspicion to believe that the defendant was armed and dangerous justifying a pat-down frisk. Around midnight, the officer stopped the defendant's vehicle after determining that the tag was registered to a different car; prior to the stop, the defendant and his passenger had looked oddly at the officer. After the stop, the defendant held his hands out of the window, volunteered that he had a gun, which was loaded, and when exiting the vehicle, removed his coat, even though it was cold outside. At this point, the pat down occurred. The court rejected the defendant's argument that his efforts to show that he did not pose a threat obviated the need for the pat down. It also rejected the defendant's argument that the discovery of

the gun could not support a reasonable suspicion that he still might be armed and dangerous; instead the court concluded that the confirmed presence of a weapon is a compelling factor justifying a frisk, even where that weapon is secured and out of the defendant's reach. Additionally, the officer was entitled to formulate "common-sense conclusions," based upon an observed pattern that one weapon often signals the presence other weapons, in believing that the defendant, who had already called the officer's attention to one readily visible weapon, might be armed.

Identification of Defendant

In Courtroom

State v. Hussey, ___ N.C. App. ___, 669 S.E.2d 864 (Dec. 16, 2008). An armed robbery victim's identification of the defendant in the courtroom did not violate due process. When contacted prior to trial for a photo lineup, the victim had refused to view the pictures. The victim saw the defendant for the first time since the robbery at issue when the victim saw him sitting in the courtroom immediately prior to trial. This identification, without law enforcement involvement or suggestion, was not impermissibly suggestive.

Pretrial Line-Up

State v. Rainey, __ N.C. App. __, __ S.E.2d __ (Aug. 4, 2009). Pretrial photographic line-ups were not suggestive, on the facts.

Show Ups

State v. Rawls, __ N.C. App. __, __ S.E.2d __ (Oct. 19, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091029-1.pdf). (1) The Eyewitness Identification Reform Act, G.S. 15A-284.52, does not apply to show ups. (2) Although a show up procedure was unduly suggestive, there was no substantial likelihood of irreparable misidentification and thus the trial judge did not err by denying a motion to suppress the victim's pretrial identification. The show up was unduly suggestive when an officer told the witness beforehand that "they think they found the guy," and at the show up, the defendant was detained and several officers were present. However, there was no substantial likelihood of irreparable misidentification when, although only having viewed the suspects for a short time, the witness looked "dead at" the suspect and made eye contact with him from a table's length away during daylight hours with nothing obstructing her, the show up occurred fifteen minutes later, and the witness was "positive" about her identification of the three suspects, as "she could not forget their faces."

Informants

Disclosure of Confidential Informant's Identity

State v. Dark, __ N.C. App. __, __ S.E.2d __ (June 15, 2010) (online at: http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091287-1.pdf). The trial court did not err by denying the defendant's motion to disclose the identity of a confidential informant in a drug case. The informant set up a drug transaction between an officer and the defendant, accompanied the officer during the transaction, but was not involved in it. When deciding whether disclosure of a confidential informant's identity is warranted, the trial court must balance the government's need to protect an informant's identity (to promote disclosure of crimes) with the defendant's right to present his or her case. However, the trial court is not required to engage in balancing until the defendant makes a sufficient

showing that the circumstances mandate disclosure. Factors weighing in favor of disclosure are that the informer was a participant in the crime, and that the evidence contradicts on material facts that the informant could clarify. Factors weighing against disclosure include whether the defendant admits culpability, offers no defense on the merits, and whether evidence independent of the informer's testimony establishes guilt. Here, only the informant's presence and role in arranging the transaction favor disclosure. The defendant failed to forecast how the informant's identity could provide useful information to clarify any contradiction in the evidence. Moreover, the informant's testimony was not admitted at trial; instead, the officers' testimony established guilt. The defendant did not carry his burden of showing that the facts mandate disclosure of the informant's identity.

Interrogation
Voluntariness of Statement

State v. Bordeaux, __ N.C. App. __, __ S.E.2d __ (Nov. 2, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091484-1.pdf). The trial court properly suppressed the defendant's confession on grounds that it was involuntary. Although the defendant received *Miranda* warnings, interviewing officers, during a custodial interrogation, suggested that the defendant was involved in an ongoing murder investigation, knowing that to be untrue. The officers promised to testify on the defendant's behalf and these promises aroused in the defendant a hope of more lenient punishment. The officers also promised that if the defendant confessed, he might be able to pursue his plans to attend community college.

State v. Hunter, __ N.C. App. __, __ S.E.2d __ (Dec. 21, 2010) (http://appellate.nccourts.org/opinions/?c=2&pdf=2010/10-483-1.pdf). The court rejected the defendant's argument that because he was under the influence of cocaine he did not knowingly, intelligently, and understandingly waive his *Miranda* rights or make a statement to the police. Because the defendant was not under the influence of any impairing substance and answered questions appropriately, the fact that he ingested crack cocaine several hours prior was not sufficient to invalidate the trial court's finding that his statements were freely and voluntarily made. At 11:40 pm, unarmed agents woke the defendant in his cell and brought him to an interrogation room, where the defendant was not restrained. The defendant was responsive to instructions and was fully advised of his *Miranda* rights; he nodded affirmatively to each right and at 11:46 pm, signed a *Miranda* rights form. When asked whether he was under the influence of any alcohol or drugs, the defendant indicated that he was not but that he had used crack cocaine, at around 1:00 or 2:00 pm that day. He responded to questions appropriately. An agent compiled a written summary, which the defendant was given to read and make changes. Both the defendant and the agent signed the document at around 2:41 am. The agents thanked the defendant for cooperating and the defendant indicated that he was glad to "get all of this off [his] chest." On these facts, the defendant's statements were free and voluntary; no promises were made to him, and he was not coerced in any way. He was knowledgeable of his circumstances and cognizant of the meaning of his words.

Miranda
Miranda Warnings

Florida v. Powell, 559 U.S. __ (Feb. 23, 2010). Advice by law enforcement officers that the defendant had "the right to talk to a lawyer before answering any of [the law enforcement officers'] questions" and that he could invoke this right "at any time . . . during th[e] interview," satisfied *Miranda*'s requirement that the defendant be informed of the right to consult with a lawyer and have the lawyer present during the interrogation. Although the warnings were not as clear as they could have been, they were sufficiently

comprehensive and comprehensible when given a commonsense reading. The Court cited the standard warnings used by the FBI as "exemplary," but declined to require that precise formulation to meet *Miranda*'s requirements.

State v. Mohamed, __ N.C. App. __, __ S.E.2d __ (July 20, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/090943-1.pdf). The trial court did not commit plain error by failing to exclude the defendant's statements to investigating officers after his arrest. The defendant had argued that because of his limited command of English, the *Miranda* warnings were inadequate and he did not freely and voluntarily waive his *Miranda* rights. The court determined that there was ample evidence to support a conclusion that the defendant's English skills sufficiently enabled him to understand the *Miranda* warnings that were read to him. Among other things, the court referenced the defendant's ability to comply with an officer's instructions and the fact that he wrote his confession in English. The court also concluded that the evidence was sufficient to permit a finding that the defendant's command of English was sufficient to permit him to knowingly and intelligently waive his *Miranda* rights, referencing, among other things, his command of conversational English and the fact that he never asked for an interpreter.

Meaning of "Custodial"

In Re J.D.B., __ N.C. __, __ S.E.2d __ (Dec. 11, 2009), *cert. granted*, 2010 WL 2215447 (U.S. 2010). A juvenile was not in custody when he made incriminating statements to law enforcement officers at school and thus was not entitled to the protections of G.S. 7B-2101 and *Miranda*. For a student to be deemed to be in custody at school, the officers must subject the student to a restraint on freedom of movement that goes well beyond the restraints that characterize the school environment in general. Here, the juvenile was escorted from class to a conference room, the school resource officer had minimal involvement in the questioning, the juvenile was not restrained, no one guarded at the door, the investigator asked the juvenile if he would agree to answer questions, indicating that responses were not required. After an initial confession, the investigator informed the juvenile that the juvenile did not need to speak with him and was free to leave, and the juvenile did so when the interview concluded. The court rejected the juvenile's argument that in the custody analysis, consideration should be given to the juvenile's age and status as a special education student; the court reiterated that the custody inquiry is an objective test.

State v. Waring, __ N.C. __, __ S.E.2d __ (Nov. 5, 2010) (http://www.aoc.state.nc.us/www/public/sc/opinions/2010/pdf/525A07-1.pdf). A capital defendant was not in custody when he admitted that he stabbed the victim. Considering the totality of the circumstances, the defendant is an adult with prior criminal justice system experience; the officer who first approached the defendant told him that he was being detained until detectives arrived but that he was not under arrest; when the detectives arrived and told him that he was not under arrest, the defendant voluntarily agreed to go to the police station; the defendant was never restrained and was left alone in the interview room with the door unlocked and no guard; he was given several bathroom breaks and offered food and drink; the defendant was cooperative; the detectives did not raise their voices, use threats, or make promises; the defendant was never misled, deceived, or confronted with false evidence; once the defendant admitted his involvement in the killing, the interview ended and he was given his *Miranda* rights. Although the first officer told the defendant that he was "detained," he also told the defendant he was not under arrest. Any custody associated with the detention ended when the defendant voluntarily accompanied detectives, who confirmed that he was not under arrest. The defendant's inability to leave the interview room without supervision or escort did not suggest custody; the defendant was in a non-public area of the station and

prevention of unsupervised roaming in such a space would not cause a reasonable person to think that a formal arrest had occurred.

State v. Allen, ___ N.C. App. ___, ___ S.E.2d ___ (Nov. 3, 2009). The defendant was not in custody while being treated at a hospital. Case law suggests that the following factors should be considered when determining whether questioning in a hospital constitutes a custodial interrogation: whether the defendant was free to go; whether the defendant was coherent in thought and speech, and not under the influence of drugs or alcohol; and whether officers intended to arrest the defendant. Additionally, courts have distinguished between questioning that is accusatory and that which is investigatory. On the facts presented, the defendant was not in custody. As to separate statements made by the defendant at the police station, the court held that although interrogation must cease once the accused invokes the right to counsel and may not be resumed without an attorney present, an exception exists where, as here, the defendant initiates further communication.

State v. Little, __ N.C. App. __, __ S.E.2d __ (May 4, 2010). The proper standard for determining whether a person was in custody for purposes of *Miranda* is not whether one would feel free to leave but whether there was indicia of formal arrest. On the facts presented, there was no indicia of arrest.

Meaning of "Interrogation"

State v. Herrera, ___ N.C. App. ___, 672 S.E.2d 71 (Feb. 3, 2009). The police did not impermissibly interrogate the defendant after he requested a lawyer by offering to allow him to speak with his grandmother by speaker phone. Once the defendant stated that he wished to have a lawyer, all interrogation ceased. However, before leaving for the magistrate's office, an interpreter who had been working with the police, informed an officer that he had promised to let the defendant's grandmother know when the defendant was in custody. The officer allowed the interpreter to use a speaker phone to call the grandmother to so inform the grandmother. When the interpreter asked the defendant if he wanted to speak with his grandmother, the defendant responded affirmatively. While on the phone with his grandmother, the defendant admitted that he did the acts charged. The grandmother urged him to tell the police everything. Thereafter, the defendant indicated that he wanted to make a statement, was given *Miranda* warnings, waived his rights, and made a statement confessing to the crime.

State v. Stover, __ N.C. App. __, __ S.E.2d __ (Nov. 3, 2009). Officers did not interrogate the defendant within the meaning of *Miranda*. An officer asked the defendant to explain why he was hanging out of a window of a house that officers had approached on an informant's tip that she bought marijuana there. The defendant responded, "Man, I've got some weed." When the officer asked if that was the only reason for the defendant's behavior, the defendant made further incriminating statements. Additional statements made by the defendant were unsolicited.

In Re D.L.D, __ N.C. App. __, __ S.E.2d __ (April 20, 2010). The trial judge properly determined that a juvenile's statements, made after an officer's search of his person revealed cash, were admissible. The juvenile's stated that the cash was not from selling drugs and that it was his mother's rent money. The statement was unsolicited and spontaneous.

State v. Clodfelter, __ N.C. App. __, __ S.E.2d __ (Mar. 16, 2010). Defendant's mother was not acting as an agent of the police when, at the request of officers, she asked her son to tell the truth about his involvement in the crime. This occurred in a room at the police station, with officers present.

State v. Hensley, __ N.C. App. __, __ S.E.2d __ (Jan. 5, 2010). The defendant was subject to interrogation within the meaning of *Miranda* when he made incriminating statements to a detective. The detective should have known that his conduct was likely to elicit an incriminating response when, after telling the defendant that their conversation would not be on the record, the detective turned discussion to the defendant's cooperation with the investigation. Also, the detective knew that the defendant was particularly susceptible to an appeal to the defendant's relationship with the detective, based on prior dealings with the defendant, and that the defendant was still under the effects of an attempted overdose on prescription medication and alcohol. Additionally the defendant testified that he knew that the detective was trying to get him to talk.

In Re L.I., __ N.C. App. __, __ S.E.2d __ (July 6, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091306-1.pdf). A juvenile's statement, made while in custody, was the product interrogation and not a voluntary, spontaneous statement. The trial court thus erred by denying the juvenile's motion to suppress the statement, since the juvenile had not advised her of her rights under *Miranda* and G.S. 7B-2101(a). The juvenile was a passenger in a vehicle stopped by an officer. When the officer ordered the juvenile out of the vehicle, he asked, "[Where is] the marijuana I know you have[?]" After handcuffing and placing juvenile in the back of the patrol car, the officer told her that he was going to "take her downtown" and that "if [she] t[ook] drugs into the jail it[] [would be] an additional charge." The juvenile later told the officer that she had marijuana and that it was in her coat pocket. The court went on to hold that the trial judge did not err by admitting the seized marijuana. Rejecting the juvenile's argument that the contraband must be excluded as fruit of the poisonous tree, the court concluded that because there was no coercion, the exclusionary rule does not preclude the admission of physical evidence obtained as a result of a *Miranda* violation. Although the juvenile was in custody at the time of her statement and her *Miranda* rights were violated, the court found no coercion, noting that there was no evidence that the juvenile was deceived, held incommunicado, threatened or intimidated, promised anything, or interrogated for an unreasonable period of time; nor was there evidence that the juvenile was under the influence of drugs or alcohol or that her mental condition was such that she was vulnerable to manipulation.

Assertion of *Miranda* Rights
Right to Remain Silent

Berghuis v. Thompkins, 560 U.S. __ (June 1, 2010) (available at: http://www.supremecourt.gov/opinions/09pdf/08-1470.pdf). The defendant was arrested in connection with a shooting that left one victim dead and another injured. At the start of their interrogation of the defendant, officers presented him with a written notification of his constitutional rights, which contained *Miranda* warnings. During the three-hour interrogation, the defendant never said that he wanted to remain silent, did not want to talk with the police, or he wanted a lawyer. Although he was largely silent, he gave a limited number of verbal answers, such as "yeah," "no," and "I don't know," and on occasion he responded by nodding his head. After two hours and forty-five minutes, the defendant was asked whether he believed in God and whether he prayed to God. When he answered in the affirmative, he was asked, "Do you pray to God to forgive you for shooting that boy down?" The defendant answered "yes," and the interrogation ended shortly thereafter. The Court rejected the defendant's argument that his answers to the officers' questions were inadmissible because he had invoked his privilege to remain silent by not saying anything for a sufficient period of time such that the interrogation should have ceased before he made his inculpatory statements. Noting that in order to invoke the *Miranda* right to counsel, a defendant must do so unambiguously, the Court determined that there is no reason to adopt a different standard for determining when an accused has invoked the *Miranda* right to remain silent. It held that in the case

before it, the defendant's silence did not constitute an invocation of the right to remain silent. The Court went on to hold that the defendant knowingly and voluntarily waived his right to remain silent when he answered the officers' questions. The Court clarified that a waiver may be implied through the defendant's silence, coupled with an understanding of rights, and a course of conduct indicating waiver. In this case, the Court concluded that there was no basis to find that the defendant did not understand his rights, his answer to the question about praying to God for forgiveness for the shooting was a course of conduct indicating waiver, and there was no evidence that his statement was coerced. Finally, the Court rejected the defendant's argument that the police were not allowed to question him until they first obtained a waiver as inconsistent with the rule that a waiver can be inferred from the actions and words of the person interrogated.

State v. Waring, __ N.C. __, __ S.E.2d __ (Nov. 5, 2010) (http://www.aoc.state.nc.us/www/public/sc/opinions/2010/pdf/525A07-1.pdf). The court rejected the defendant's argument that by telling officers that he did not want to snitch on anyone and declining to reveal the name of his accomplice, the defendant invoked his right to remain silent requiring that all interrogation cease.

State v. Bordeaux, __ N.C. App. __, __ S.E.2d __ (Nov. 2, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091484-1.pdf). Citing *Berghuis v. Thompkins*, __ U.S. __, 176 L. Ed. 2d 1098 (2010), the court held that the defendant's silence or refusal to answer the officers' questions was not an invocation of the right to remain silent.

Waiver of *Miranda* Rights Generally

State v. Brown, __ N.C. App. __, __ S.E.2d __ (June 15, 2010) (online at: http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091213-1.pdf). A SBI Agent's testimony at the suppression hearing supported the trial court's finding that the Agent advised the defendant of his *Miranda* rights, read each statement on the *Miranda* form and asked the defendant if he understood them, put check marks on the list by each statement as he went through indicating that the defendant had assented, and then twice confirmed that the defendant understood all of the rights read to him. The totality of the circumstances fully supports the trial court's conclusion that the defendant's waiver of *Miranda* rights was made freely, voluntarily, and understandingly.

State v. Medina, __ N.C. App. __, __ S.E.2d __ (July 20, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/100071-1.pdf). The defendant's waiver of *Miranda* rights was valid where *Miranda* warnings were given by an officer who was not fluent in Spanish. The officer communicated effectively with the defendant in Spanish, notwithstanding the lack of fluency. The defendant gave clear, logical, and appropriate responses to questions. Also, when the officer informed the defendant of his *Miranda* rights, he did not translate English to Spanish but rather read aloud the Spanish version of the waiver of rights form. Even if the defendant did not understand the officer, the defendant read each right, written in Spanish, initialed next to each right, and signed the form indicating that he understood his rights. The court noted that officers are not required to orally apprise a defendant of *Miranda* rights to effectuate a valid waiver.

State v. Mohamed, __ N.C. App. __, __ S.E.2d __ (July 20, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/090943-1.pdf). The trial court did not commit plain error by failing to exclude the defendant's statements to investigating officers after his

arrest. The defendant had argued that because of his limited command of English, the *Miranda* warnings were inadequate and he did not freely and voluntarily waive his *Miranda* rights. The court determined that there was ample evidence to support a conclusion that the defendant's English skills sufficiently enabled him to understand the *Miranda* warnings that were read to him. Among other things, the court referenced the defendant's ability to comply with an officer's instructions and the fact that he wrote his confession in English. The court also concluded that the evidence was sufficient to permit a finding that the defendant's command of English was sufficient to permit him to knowingly and intelligently waive his *Miranda* rights, referencing, among other things, his command of conversational English and the fact that he never asked for an interpreter.

Waiver of the Right to Remain Silent

Berghuis v. Thompkins, 560 U.S. __ (June 1, 2010) (available at: http://www.supremecourt.gov/opinions/09pdf/08-1470.pdf). The defendant was arrested in connection with a shooting that left one victim dead and another injured. At the start of their interrogation of the defendant, officers presented him with a written notification of his constitutional rights, which contained *Miranda* warnings. During the three-hour interrogation, the defendant never said that he wanted to remain silent, did not want to talk with the police, or he wanted a lawyer. Although he was largely silent, he gave a limited number of verbal answers, such as "yeah," "no," and "I don't know," and on occasion he responded by nodding his head. After two hours and forty-five minutes, the defendant was asked whether he believed in God and whether he prayed to God. When he answered in the affirmative, he was asked, "Do you pray to God to forgive you for shooting that boy down?" The defendant answered "yes," and the interrogation ended shortly thereafter. The Court rejected the defendant's argument that his answers to the officers' questions were inadmissible because he had invoked his privilege to remain silent by not saying anything for a sufficient period of time such that the interrogation should have ceased before he made his inculpatory statements. Noting that in order to invoke the *Miranda* right to counsel, a defendant must do so unambiguously, the Court determined that there is no reason to adopt a different standard for determining when an accused has invoked the *Miranda* right to remain silent. It held that in the case before it, the defendant's silence did not constitute an invocation of the right to remain silent. The Court went on to hold that the defendant knowingly and voluntarily waived his right to remain silent when he answered the officers' questions. The Court clarified that a waiver may be implied through the defendant's silence, coupled with an understanding of rights, and a course of conduct indicating waiver. In this case, the Court concluded that there was no basis to find that the defendant did not understand his rights, his answer to the question about praying to God for forgiveness for the shooting was a course of conduct indicating waiver, and there was no evidence that his statement was coerced. Finally, the Court rejected the defendant's argument that the police were not allowed to question him until they first obtained a waiver as inconsistent with the rule that a waiver can be inferred from the actions and words of the person interrogated.

Re-Interrogation After an Assertion of Rights
Break in custody

Maryland v. Shatzer, 559 U.S. __ (Feb. 24, 2010). The Court held that a 2½ year break in custody ended the presumption of involuntariness established in *Edwards v. Arizona*, 451 U.S. 477 (1981) (when a defendant invokes the right to have counsel present during a custodial interrogation, a valid waiver of that right cannot be established by showing that the defendant responded to further police-initiated custodial interrogation even if the defendant has been advised of his *Miranda* rights; the defendant is not subject to further interrogation until counsel has been provided or the defendant initiates further communications

with the police). The defendant was initially interrogated about a sexual assault while in prison serving time for an unrelated crime. After *Miranda* rights were given, he declined to be interviewed without counsel, the interview ended, and the defendant was released back into the prison's general population. 2½ years later another officer interviewed the defendant in prison about the same sexual assault. After the officer read the defendant his *Miranda* rights, the defendant waived those rights in writing and made incriminating statements. At trial, the defendant unsuccessfully tried to suppress his statements pursuant to *Edwards.* The Court concluded: "The protections offered by *Miranda*, which we have deemed sufficient to ensure that the police respect the suspect's desire to have an attorney present the first time police interrogate him, adequately ensure that result when a suspect who initially requested counsel is reinterrogated after a break in custody that is of sufficient duration to dissipate its coercive effects." The Court went on to set a 14-day break in custody as the bright line rule for when the *Edwards* protection terminates. It also concluded that the defendant's release back into the general prison population to continue serving a sentence for an unrelated conviction constituted a break in *Miranda* custody.

Defendant's Initiation of Communication

State v. Moses, __ N.C. App. __, __ S.E.2d __ (July 20, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091468-1.pdf). The trial court did not err by denying the defendant's motion to suppress where, although the defendant initially invoked his *Miranda* right to counsel during a custodial interrogation, he later reinitiated conversation with the officer. The defendant was not under the influence of impairing substances, no promises or threats were made to him, and the defendant was again fully advised of and waived his *Miranda* rights before he made the statement at issue.

Sixth Amendment Right to Counsel

Montejo v. Louisiana, 129 S. Ct. 2079 (May 26, 2009). The defendant was arrested for murder, waived his *Miranda* rights, and gave statements in response to officers' interrogation. He was brought before a judge for a preliminary hearing, who ordered that the defendant be held without bond and appointed counsel to represent him. Later that day, two officers visited the defendant in prison and asked him to accompany them to locate the murder weapon. He was again read his *Miranda* rights and agreed to go with the officers. During the trip, he wrote an inculpatory letter of apology to the murder victim's widow. Only on his return did the defendant finally meet his court-appointed attorney. The issue before the Court was whether the letter of apology was erroneously admitted in violation of the defendant's Sixth Amendment right to counsel. In *Michigan v. Jackson*, 475 U.S. 625 (1986), the Court had ruled that when a defendant requests counsel at an arraignment or similar proceeding at which the Sixth Amendment right to counsel attaches, an officer is thereafter prohibited under the Sixth Amendment from initiating interrogation. In this case, the defendant was appointed counsel as a matter of course per state law; no specific request for counsel was made. Instead of deciding whether *Jackson* barred the officers from initiating interrogation of the defendant after counsel was appointed, the Court overruled *Jackson.* Thus, it now appears that the Sixth Amendment is not violated when officers interrogate a defendant after the defendant has requested counsel, provided a waiver of the right to counsel is obtained. The Court hinted that a standard *Miranda* waiver will suffice to waive both the Fifth Amendment right to counsel and Sixth Amendment right to counsel. The Court remanded the case to the state court to determine unresolved factual and legal issues. Note that after *Montejo*, a defendant's 5th Amendment right to counsel under *Miranda* for custodial interrogations remains intact.

Offense Specific Right

State v. Williams, __ N.C. App. __, __ S.E.2d __ (Feb. 1, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC01NzEtMS5wZGY=). No violation of the defendant's sixth amendment right to counsel occurred when detectives interviewed him on new charges when he was in custody on other unrelated charges. The sixth amendment right to counsel is offense specific and had not attached for the new crimes.

Request for a Lawyer

State v. Dix, ___ N.C. App. ___, 669 S.E.2d 25 (Dec. 2, 2008). The defendant's statement, "I'm probably gonna have to have a lawyer," was not an invocation of his right to counsel. The defendant had already expressed a desire to tell his side of the story and was asked to wait until they got to the station. Notwithstanding this, he gave a brief unsolicited statement to one officer while en route to the station, and this statement was relayed to the questioning officer. The questioning officer reasonably expected the defendant to continue their former conversation and proceed with the statement he apparently wished to make. Thus, when the defendant made the remark, the officer was understandably unsure of the defendant's purpose, and followed up with an attempt to clarify the defendant's intentions, at which point the defendant agreed to talk.

State v. Little, __ N.C. App. __, __ S.E.2d __ (May 4, 2010). When the defendant asked, "Do I need an attorney?" the officer responded, "are you asking for one?" The defendant failed to respond and continued telling the officer about the shooting. The defendant did not unambiguously request a lawyer.

Admissibility of Statements Made in Violation of 6th Amendment Right to Counsel

Kansas v. Ventris, 129 U.S. 1841 (April 29, 2009). The defendant's incriminating statement to a jailhouse informant, obtained in violation of the defendant's Sixth Amendment right to counsel, was admissible on rebuttal to impeach the defendant's trial testimony that conflicted with statement. The statement would not have been admissible during the state's presentation of evidence in its case-in-chief.

Juveniles

In Re J.D.B., __ N.C. __, __ S.E.2d __ (Dec. 11, 2009), *cert. granted*, 2010 WL 2215447 (U.S. 2010). A juvenile was not in custody when he made incriminating statements to law enforcement officers at school and thus was not entitled to the protections of G.S. 7B-2101 and *Miranda*. For a student to be in custody at school, officers must subject the student to a restraint on freedom of movement going well beyond the restraints characterizes the school environment in general. The juvenile was escorted from class to a conference room, the school resource officer had minimal involvement in the questioning, the juvenile was not restrained, no one guarded at the door, and the investigator asked the juvenile if he would answer questions, indicating that responses were not required. After an initial confession, the investigator told the juvenile that the juvenile did not need to speak with him and was free to leave, and the juvenile did so when the interview ended. The court rejected the juvenile's argument that in the custody analysis, consideration should be given to the juvenile's age and status as a special education student; the court reiterated that the custody inquiry is an objective test.

State v. Williams, __ N.C. App. __, __ S.E.2d __ (Feb. 1, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC01NzEtMS5wZGY=). The trial court

did not err by denying the defendant's motion to suppress statements made during a police interrogation where no violation of G.S. 7B-2101 occurred. The defendant, a 17-year-old juvenile, was already in custody on unrelated charges at the time he was brought to an interview room for questioning. When the defendant invoked his right to have his mother present during questioning, the detectives ceased all questioning. After the detectives had trouble determining how to contact the defendant's mother, they returned to the room and asked the defendant how to reach her. The defendant then asked them when he would be able to talk to them about the new charges (robbery and murder) and explained that the detectives had "misunderstood" him when he requested the presence of his mother for questioning. He explained that he only wanted his mother present for questioning related to the charges for which he was already in custody, not the new crimes of robbery and murder. Although the defendant initially invoked his right to have his mother present during his custodial interrogation, he thereafter initiated further communication with the detectives; that communication was not the result of any further interrogation by the detectives. The defendant voluntarily and knowingly waived his rights.

In Re K.D.L., __ N.C. App. __, __ S.E.2d __ (Oct. 19, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091653-1.pdf). The trial court erred by denying a juvenile's motion to suppress when the juvenile's confession was made in the course of custodial interrogation but without the warnings required by *Miranda* and G.S. 7B-2101(a), and without being apprised of and afforded his right to have a parent present. Following *In re J.D.B.*, 363 N.C. 664 (2009), *cert. granted*, 2010 WL 2215447 (U.S. 2010), the court concluded that when determining whether in-school questioning amounted to a custodial interrogation, the juvenile's age was not relevant. The court found that that the juvenile was in custody, noting that he knew that he was suspected of a crime, he was questioned by a school official for about six hours, mostly in the presence of an armed police officer, and he was frisked by the officer and transported in the officer's vehicle to the principal's office where he remained alone with the officer until the principal arrived. Although the officer was not with the juvenile at all times, the juvenile was never told that he was free to leave. Furthermore, the court held that although the principal, not the officer, asked the questions, an interrogation occurred, noting that the officer's conduct significantly increased the likelihood that the juvenile would produce an incriminating response to the principal's questioning. The court concluded that the officer's near-constant supervision of the juvenile's interrogation and "active listening" could cause a reasonable person to believe that the principal's interrogation was done in concert with the officer or that the person would endure harsher criminal punishment for failing to answer.

In Re M.L.T.H., ___ N.C. App. ___, ___ S.E.2d ___ (Nov. 3, 2009). The trial court erred by denying the juvenile's motion to suppress his incriminating statement where the juvenile's waiver was not made "knowingly, willingly, and understandingly." The juvenile was not properly advised of his right to have a parent, guardian, or custodian present during questioning. After being told that he had a "right to have a parent, guardian, custodian, or any other person present," the juvenile elected to have his brother present. The brother was not a parent, guardian or custodian.

Recording of Interview

State v. Williams, __ N.C. App. __, __ S.E.2d __ (Feb. 1, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC01NzEtMS5wZGY=). The trial court did not err by denying the defendant's motion to suppress asserting that his interrogation was not electronically recorded in compliance with G.S. 15A-211. The statute applies to interrogations occurring on or after March 1, 2008; the interrogation at issue occurred more than one year before that date.

Jurisdiction of Officers

State v. Scruggs, __ N.C. App. __, __ S.E.2d __ (Mar. 1, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC05MjEtMS5wZGY). Even if a stop and arrest of the defendant by campus police officers while off campus violated G.S. 15A-402(f), the violation was not substantial. The stop and arrest were constitutional and the officers were acting within the scope of their mutual aid agreement with the relevant municipality.

Parker v. Hyatt, ___ N.C. App. ___, 675 S.E.2d 109 (April 21, 2009). A wildlife enforcement officer had authority under G.S. 113-136(d) to stop the plaintiff's vehicle for impaired driving and to arrest her for that offense. Driving while impaired satisfies the statutory language, "a threat to public peace and order which would tend to subvert the authority of the State if ignored."

Police Power

State v. Yencer, __ N.C. App. __, __ S.E.2d __ (Aug. 17, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/090001-1.pdf). A Davidson College Police Department officer who arrested the defendant for impaired and reckless driving had no authority to do so. Applying precedent, the court held that because Davidson College is a religious institution, delegation of state police power to Davidson's campus police force pursuant to G.S. 74G was unconstitutional under the Establishment Clause of the First Amendment. The court "urge[d]" the North Carolina Supreme Court to grant a petition for discretionary review.

Plain Feel

State v. Williams, ___ N.C. App. ___, 673 S.E.2d 394 (Mar. 3, 2009). Remanding for a determination of whether the officer had probable cause to seize a crack cocaine cookie during a frisk, where the trial court improperly applied a standard of reasonable suspicion to the plain feel doctrine.

Plain View

State v. Carter, __ N.C. App. __, __ S.E.2d __ (Sept. 15, 2009). Holding that the plain view exception to the warrantless arrest rule did not apply. When the officer approached the defendant's vehicle from the passenger side to ask about an old and worn temporary tag, he inadvertently noticed several whole papers in plain view on the passenger seat. The officer then returned to his cruiser to call for backup. When the officer came back to the defendant's vehicle to arrest the defendant, the previously intact papers had been torn to pieces. Under the plain view doctrine, police may seize contraband or evidence if (1) the officer was in a place where the officer had a right to be when the evidence was discovered; (2) the evidence was discovered inadvertently; and (3) it was immediately apparent to the police that the items observed were evidence of a crime or contraband. The court found that the first two prongs of the test were satisfied but that the third prong was not. It concluded that the officer's suspicion that the defendant was trying to conceal information on the papers was not sufficient to bypass the warrant requirement.

Plain Smell

State v. Corpening, __ N.C. App. __, __ S.E.2d __ (Oct. 6, 2009). The plain smell of marijuana emanating from the defendant's vehicle provided sufficient probable cause to support a search.

State v. Stover, __ N.C. App. __, __ S.E.2d __ (Nov. 3, 2009). Officers had probable cause to enter a home and do a protective sweep when an informant told them that she bought marijuana at the house and, as they approached the house for a knock and talk, they detected a strong odor of marijuana.

Random Drug Testing

Jones v. Graham County Board of Education, __ N.C. App. __, 677 S.E.2d 171 (June 2, 2009). County Board of Education policy mandating random, suspicionless drug and alcohol testing of all Board employees violated the N.C. Constitutional protection against unreasonable searches and seizures. The policy could not be justified as a "special needs search." The court determined that the policy was "remarkably intrusive," that Board employees did not have a reduced expectation of privacy by virtue of their employment in a public school system, and that there was no evidence of a concrete problem that the policy was designed to prevent. It concluded: "[c]onsidering and balancing all the circumstances, . . . the employees' acknowledged privacy interests outweigh the Board's interest . . . ."

Search Warrants

Probable Cause - Generally

State v. Washburn, __ N.C. App. __, __ S.E.2d __ (Nov. 17, 2009). A positive alert for drugs by a specially trained drug dog provides probable cause to search the area or item where the dog alerts.

State v. Haymond, __ N.C. App. __, __ S.E.2d __ (April 6, 2010). An affidavit was sufficient to establish probable cause to believe that stolen items would be found in the defendant's home, notwithstanding alleged omissions by the officer.

State v. Hinson, __ N.C. App. __, __ S.E.2d __ (April 6, 2010), *reversed on other grounds* __ N.C. __, __ S.E.2d __ (Oct. 8, 2010). An informant's observations of methamphetamine production and materials at the location in question and an officer's opinion that, based on his experience, an ongoing drug production operation was present supplied probable cause supporting issuance of the warrant.

Informants' Tips

State v. Washburn, __ N.C. App. __, __ S.E.2d __ (Nov. 17, 2009). The fact that an officer who received the tip at issue had been receiving accurate information from the informant for nearly thirteen years sufficiently established the informant's reliability. The affidavit sufficiently described the source of the informant's information as a waitress who had been involved with the defendant. The reliability of the information was further established by an officer's independent investigation.

Staleness of Information

State v. Hinson, __ N.C. App. __, __ S.E.2d __ (April 6, 2010), *reversed on other grounds* __ N.C. __, __ S.E.2d __ (Oct. 8, 2010). Rejecting the defendant's argument that information relied upon by officers to establish probable cause was stale. Although certain information provided by an informant was three weeks old, other information pertained to the informant's observations made only one day before the application for the warrant was submitted. Also an officer opined, based on his experience, that an ongoing drug production operation was present at the location.

Identification of Place to be Searched

State v. Hunter, __ N.C. App. __, __ S.E.2d __ (Dec. 21, 2010) (http://appellate.nccourts.org/opinions/?c=2&pdf=2010/10-483-1.pdf). The court rejected the defendant's argument that a search warrant executed at a residence was invalid because the application and warrant referenced an incorrect street address. Although the numerical portion of the street address was incorrect, the warrant was sufficient because it contained a correct description of the residence.

Executing
Knock and Announce

State v. Terry, __ N.C. App. __, __ S.E.2d __ (Oct. 5, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/100009-1.pdf). In a drug case, officers properly knocked and announced their presence when executing a search warrant. The court rejected the defendant's argument that the period of time between the knock and announcement and the entry into the house was too short. It concluded that because the search warrant was based on information that marijuana was being sold from the house and because that drug could be disposed of easily and quickly, the brief delay between notice and entry was reasonable.

Searches
Incident to Arrest

Arizona v. Gant, 129 S. Ct. 1710 (April 21, 2009). Holding that officers may search a vehicle incident to arrest only if (1) the arrestee is unsecured and within reaching distance of the passenger compartment when the search is conducted; or (2) it is reasonable to believe that evidence relevant to the crime of arrest might be found in the vehicle. For more complete analysis of this ruling, see the online paper available at http://www.sog.unc.edu/programs/crimlaw/arizonagantbyfarb.pdf.

State v. Mbacke, __ N.C. App. __, __ S.E.2d __ (Jan. 4, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=2011/09-1395-1.pdf). Over a dissent, the court held that a search of the defendant's vehicle after he was arrested for carrying a concealed weapon violated *Gant.* The court rejected the State's argument that the search was justified under *Gant* because the officers had reason to believe that they would find evidence in the vehicle supporting the crime of arrest, stating: "we find it unreasonable to believe an officer will find in, or even need to seek from, a defendant's vehicle further evidence of carrying a concealed weapon when the officer has found the defendant off the defendant's own premises and carrying a weapon which is concealed about his person."

State v. Foy, __ N.C. App. __, __ S.E.2d __ (Dec. 21, 2010) (http://appellate.nccourts.org/opinions/?c=2&pdf=2010/10-331-1.pdf). The trial court erred by suppressing evidence obtained pursuant to a search incident to arrest. After stopping the defendant's vehicle, an officer decided not to charge him with impaired driving but to allow the defendant to have someone pick him up. The defendant consented to the officer to retrieving a cell phone from the vehicle. While doing that, the officer saw a weapon and charged the defendant with carrying a concealed weapon. Following the arrest, officers searched the defendant's vehicle, finding addition contraband, which was suppressed by the trial court. The court noted that under *Arizona v. Gant*, 556 U.S. ___, 173 L. Ed. 2d 485 (2009), officers may search a vehicle incident to arrest only if the arrestee is within reaching distance of the passenger compartment at the time of the search or if it is reasonable to believe the vehicle contains evidence of the offense of arrest. When these justifications are absent, a search of the vehicle will be unreasonable unless police obtain a warrant or show that another exception to the warrant requirement

applies. Citing *State v. Toledo*, ___ N.C. App. ___, 693 S.E.2d 201 (2010), the court held that having arrested the defendant for carrying a concealed weapon, it was reasonable for the officer to believe that the vehicle contained additional offense-related contraband, within the meaning of the second *Gant* exception.

State v. Carter, __ N.C. App. __, __ S.E.2d __ (Sept. 15, 2009). Applying *Gant* (discussed immediately above) and holding that the trial court erred by denying the defendant's motion to suppress evidence (papers) obtained during a warrantless search of his vehicle subsequent to his arrest for driving with an expired registration and failing to notify the DMV of an address change. Because the defendant had been removed from the vehicle, handcuffed, and was sitting on a curb when the search occurred, there was no reason to believe that he was within reaching distance or otherwise able to access the passenger compartment of the vehicle. Additionally, there was no evidence that the arresting officer believed that the papers were related to the charged offenses and furthermore, it would be unreasonable to think that papers seen on the passenger seat of the car were related to those offenses.

State v. Johnson, __ N.C. App. __, __ S.E.2d __ (June 1, 2010) (available at: http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/090908-1.pdf). The defendant's Fourth Amendment rights were violated when the police searched his vehicle incident to his arrest for driving with a revoked driver's license. Under *Gant* (discussed above), the officers could not reasonably have believed that evidence of the defendant's driving while license suspended might have been found in the car. Additionally, because the defendant was in the police car when the officers conducted the search, he could not have accessed the vehicle's passenger compartment at the time of the searched.

State v. Toledo, __ N.C. App. __, __ S.E.2d __ (May 18, 2010). A search of a tire found in the undercarriage of the defendant's vehicle was proper. An officer stopped the defendant for following too closely. The officer asked for and received consent to search the vehicle. During the consent search, the officer performed a "ping test" on a tire found inside the vehicle. When the ping test revealed a strong odor of marijuana, the officer arrested the defendant and searched the rest of the vehicle. At that point, the officer found a second tire located in the vehicle's undercarriage, which also contained marijuana. The search was justified because (1) the discovery of marijuana in the first tire gave the officer probable cause to believe that the vehicle was being used to transport marijuana and therefore the officer had probable cause to search any part of the vehicle that may have contained marijuana and (2) it was reasonable to believe that the vehicle contained evidence of the crime of arrest under *Gant*.

State v. Wilkerson, ___ N.C. ___, ___ S.E.2d ___ (Aug. 28, 2009). Seizure and search of the defendant's cell phone was proper as a search incident to arrest. The defendant was arrested for two murders shortly after they were committed. While in custody, he received a cell phone call, at which point the seizure occurred.

Of Students

Safford Unified School District v. Redding, 557 U.S. __, 129 S. Ct. 2633 (June 25, 2009). Although school officials had reasonable suspicion to search a middle school student's backpack and outer clothing for pills, they violated the Fourth Amendment when they required her to pull out her bra and underwear. After learning that the student might have prescription strength and over-the-counter pain relief pills, school officials searched her backpack but found no pills. A school nurse then had her remove her outer clothing, pull her bra and shake it, and pull out the elastic on her underpants, exposing her breasts and pelvic area to some degree. No pills were found. Because there was no indication that the drugs presented

a danger to students or were concealed in her undergarments, the officials did not have sufficient justification to require the students to pull out her bra and underpants. However, the school officials were protected from civil liability by qualified immunity.

In Re D.L.D, __ N.C. App. __, __ S.E.2d __ (April 20, 2010). The reasonableness standard of *New Jersey v. T.L.O.*, 469 U.S. 325 (1985), applied to a search of a student by an officer assigned to the school. The officer was working in conjunction with and at the direction of the assistant principal to maintain a safe and educational environment. For the reasons discussed in the opinion, the search satisfied the two-pronged inquiry for determining reasonableness: (1) whether the action was justified at its inception; and (2) whether the search as conducted was reasonably related in scope to the circumstances which justified the interference in the first place.

Of Vehicles

State v. Simmons, __ N.C. App. __, __ S.E.2d __ (Jan. 5, 2010). Standing alone, the defendant's statement that a plastic bag in his car contained "cigar guts" did not establish probable cause to search the defendant's vehicle. Although the officer testified that gutted cigars had become a popular means of consuming controlled substances, that evidence established a link between hollowed out cigars and marijuana, not between loose tobacco and marijuana. There was no evidence that the defendant was stopped in a drug-ridden area, at an unusual time of day, or that the officer had any basis, apart from the defendant's statements, for believing that the defendant possessed marijuana.

State v. Toledo, __ N.C. App. __, __ S.E.2d __ (May 18, 2010). A search of a tire found in the undercarriage of the defendant's vehicle was proper. An officer stopped the defendant for following too closely. The officer asked for and received consent to search the vehicle. During the consent search, the officer performed a "ping test" on a tire found inside the vehicle. When the ping test revealed a strong odor of marijuana, the officer arrested the defendant and searched the rest of the vehicle. At that point, the officer found a second tire located in the vehicle's undercarriage, which also contained marijuana. The search was justified because the discovery of marijuana in the first tire gave the officer probable cause to believe that the vehicle was being used to transport marijuana and therefore the officer had probable cause to search any part of the vehicle that may have contained marijuana.

Strip Searches

State v. Battle, __ N.C. App. __, __ S.E.2d __ (Feb. 16, 2010). A roadside strip search was unreasonable. The search was a strip search, even though the defendant's pants and underwear were not completely removed or lowered. Although the officer made an effort to shield the defendant from view, the search was a "roadside" strip search, distinguished from a private one. Roadside strip searches require probable cause and exigent circumstances, and no exigent circumstances existed here. Note that although a majority of the three-judge panel agreed that the strip search was unconstitutional, a majority did not agree as to why this was so.

Probable Cause to Search

State v. Morton, __ N.C. App. __, __ S.E.2d __ (June 15, 2010) (online at: http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/081020-2.pdf). There was probable cause supporting a warrantless search of the defendant. During a pat-down, an officer felt a digital scale in the defendant's pocket and the defendant confirmed the nature of the object. The officer was justified in

concluding that the scale was contraband given informant tips that defendant was selling drugs. Additionally, the defendant was coming from the area in which the informants claimed he was selling drugs, and he was acting nervously. The defendant did not challenge the trial court's conclusion that exigent circumstances were present.

State v. Williams, __ N.C. App. __, __ S.E.2d __ (Jan. 18, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=2011/09-1656-1.pdf). Probable cause and exigent circumstances supported an officer's warrantless search of the defendant's mouth by grabbing him around the throat, pushing him onto the hood of a vehicle, and demanding that he spit out whatever he was trying to swallow. Probable cause to believe that the defendant possessed illegal drugs and was attempting to destroy them was supported by information from three reliable informants, the fact that the defendant's vehicle was covered in talcum powder, which is used to mask the odor of drugs, while conducting a consent search of the defendant's person, the defendant attempted to swallow something, and that other suspects had attempted to swallow drugs in the officer's presence. Exigent circumstances existed because the defendant attempted to swallow four packages of cocaine, which could have endangered his health.

Government Employer Searches

City of Ontario v. Quon, 560 U.S. __ (June 17, 2010). Because a search of a government employee's text messages sent and received on a government-issued pager was reasonable, there was no violation of Fourth Amendment rights.

Standing

State v. Mackey, __ N.C. App. __, __ S.E.2d __ (Jan. 4, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=2011/09-1382-1.pdf). The defendant had no standing to challenge a search of a vehicle when he was a passenger, did not own the vehicle, and asserted no possessory interest in it or its contents.

State v. Jackson, __ N.C. App. __, __ S.E.2d __ (Aug. 18, 2009). A passenger in a vehicle that has been stopped by the police has standing to challenge the constitutionality of the vehicle stop.

State v. Stitt, __ N.C. App. __, __ S.E.2d __ (Dec. 8, 2009). The defendant did not have standing to assert a Fourth Amendment violation regarding cellular telephone records where there was no evidence that the defendant had an ownership interest in the telephones or had been given a possessory interest by the legal owner of the telephones. Mere possession of the telephones was insufficient to establish standing.

Telephone Records

State v. Stitt, __ N.C. App. __, __ S.E.2d __ (Dec. 8, 2009). Even if the State did not fully comply with 18 U.S.C. § 2703(d) of the Stored Communications Act, which governs disclosure of customer communications or records, there is no suppression remedy for a violation; the statute only provides for a civil remedy.

Vienna Convention

State v. Herrera, ___ N.C. App. ___, 672 S.E.2d 71 (Feb. 3, 2009). A violation of the Vienna Convention on Consular Relations (requiring notification to arrested foreign national of right to have consul of

national's country notified of arrest) does not require suppression of a confession.

Wiretapping

Wright v. Town of Zebulon, __ N.C. App. __, __ S.E.2d __ (Feb. 16, 2010). Police department did not act "willfully" within the meaning of the North Carolina Electronic Surveillance Act (NCESA) by monitoring an officer's conversations in his patrol car in response to information that the officer was engaging in misconduct. As used in the NCESA, the term requires that the act be done with a bad purpose or without justifiable excuse. Where, as here, the monitoring is done to ensure public safety, it is not done with a bad purpose or without justifiable excuse.

Criminal Offenses

States of Mind

Transferred Intent

State v. Goode, __ N.C. App. __, 677 S.E.2d 507 (June 16, 2009). An instruction on transferred intent was proper in connection with a charge of attempted first-degree murder of victim B where the evidence showed that B was injured during the defendant's attack on victim A, undertaken with a specific intent to kill A.

State v. Small, __ N.C. App. __, __ S.E.2d __ (Dec. 8, 2009). The doctrine of transferred intent permits the conviction of a defendant for discharging a weapon into occupied property when the defendant intended to shoot a person but instead shot into property that he or she knew was occupied.

State v. Crandell, __ N.C. App. __, __ S.E.2d __ (Dec. 7, 2010) (http://appellate.nccourts.org/opinions/?c=2&pdf=2010/10-439-1.pdf). There was sufficient evidence of premeditation and deliberation when, after having a confrontation with an individual named Thomas, the defendant happened upon Thomas and without provocation began firing at him, resulting in the death of the victim, an innocent bystander. Citing the doctrine of transferred intent, the court noted that "malice or intent follows the bullet."

Participants in Crime

Acting in Concert

State v. Waring, __ N.C. __, __ S.E.2d __ (Nov. 5, 2010) (http://www.aoc.state.nc.us/www/public/sc/opinions/2010/pdf/525A07-1.pdf). In a capital case involving two perpetrators, the court rejected the defendant's argument that the State should have been obligated to prove that the defendant himself had the requisite intent. The trial court properly instructed on acting in concert with respect to the murder charge, in accordance with *State v. Barnes*, 345 N.C. 184 (1998).

State v. Hill, __ N.C. App. __, __ S.E.2d __ (Mar. 1, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0zOTktMS5wZGY). In a case in which there was a dissenting opinion, the court held that there was sufficient evidence that the defendant acted in concert with another to commit a robbery. The evidence showed that he was not present at the ATM where the money was taken, but was parked nearby in a getaway vehicle.

State v. Clagon, __ N.C. App. __, __ S.E.2d __ (Oct. 5, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/100299-1.pdf). The court rejected the

defendant's argument that to convict of burglary by acting in concert the State was required to show that the defendant had the specific intent that one of her accomplices would assault the victim with deadly weapon. The State's evidence, showing that the defendant forcibly entered the residence accompanied by two men carrying guns and another person, armed with an axe, who immediately asked where the victim was located, was sufficient evidence that an assault on the victim was in pursuance of a common purpose or as a natural or probable consequence thereof.

State v. Gabriel, __ N.C. App. __, __ S.E.2d __ (Oct. 19, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091669-1.pdf). There was sufficient evidence of acting in concert with respect to a murder and felony assault, notwithstanding the defendant's exculpatory statement that he "got caught in the middle" of the events in question. Other evidence permitted a reasonable inference that the defendant and an accomplice were shooting at the victims pursuant to a shared or common purpose.

General Crimes

Accessory After the Fact

State v. Cole, __ N.C. App. __, __ S.E.2d __ (Jan. 4, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=2011/10-139-1.pdf). (1) The State presented sufficient evidence of accessory after the fact to a second-degree murder perpetrated by Stevons. After Stevons shot the victim, the defendant drove Stevons away from the scene. The victim later died. The court rejected the defendant's argument that because he gave aid after the victim had been wounded but before the victim died, he did not know that Stevons had committed murder. It concluded that because the defendant knew that Stevons shot the victim at close range, a jury could reasonably infer that the defendant knew that the shot was fatal. (2) The State presented sufficient evidence of accessory after the fact to armed robbery when it showed both that an armed robbery occurred and that the defendant rendered aid after the crime was completed. The court rejected the defendant's argument that the robbery was not complete until the defendant arrived at a safe place, concluding that a taking is complete once the thief succeeds in removing the stolen property from the victim's possession. (3) Although a mere presence instruction may be appropriate for aiding and abetting or accessory before the fact, such an instruction is not proper for accessory after the fact and thus the trial judge did not err by declining to give this instruction.

State v. Best, 193 N.C. App. 220 (April 7, 2009). Double jeopardy prohibited convictions of both accessory after fact to first-degree murder and accessory after the fact to first-degree kidnapping when the jury could have found that accessory after fact of first-degree murder was based solely on kidnapping under the felony murder rule. The jury's verdict did not indicate whether it found first-degree murder based on premeditation and deliberation or felony murder based on first-degree kidnapping, or both. The court arrested judgment on the defendant's convictions of accessory after the fact to first-degree kidnapping, reasoning that if a defendant cannot be convicted of felony murder and the underlying felony, a defendant could not be convicted of accessory after the fact to felony murder and accessory after the fact to the underlying felony.

State v. Keller, __ N.C. App. __, 680 S.E.2d 212 (Aug. 4, 2009). A defendant may not be convicted of second-degree murder and accessory after the fact to first-degree murder. The offenses are mutually exclusive.

State v. McGee, __ N.C. App. __, 676 S.E.2d 662 (June 2, 2009). The defendant could be convicted of accessory after the fact to assault with a deadly weapon with intent to kill inflicting serious injury even if

the principal pled guilty to a lesser offense of that assault.

Conspiracy

State v. Lawrence, __ N.C. App. __, __ S.E.2d __ (Mar. 1, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0zNDgtMS5wZGY). (1) The evidence was insufficient to support two charges of conspiracy to commit armed robbery. Having failed to achieve the objective of the conspiracy on their first attempt, the defendant and his co-conspirators returned the next day to try again. When the State charges separate conspiracies, it must prove not only the existence of at least two agreements, but also that they were separate. There is no bright-line test for whether multiple conspiracies exist. The essential question is the nature of the agreement(s), but factors such as time intervals, participants, objectives, and number of meetings must be considered. Applying this analysis, the court concluded that only one agreement existed. In both attempts, the intended victim and participants were the same; the time interval between the two attempts was approximately 36 hours; on the second attempt the group did not agree to a new plan; and while the co-conspirators considered robbing a different victim, that only was a back-up plan. The court rejected the State's argument that because the co-conspirators met after the first attempt, acquired additional materials, made slight modifications on how to execute their plan, and briefly considered robbing a different victim, they abandoned their first conspiracy and formed a second one. (2) The trial judge committed plain error by failing to instruct the jury on all elements of conspiracy to commit armed robbery. The judge instructed the jury that armed robbery involved a taking from the person or presence of another while using or in the possession of a firearm. The judge failed to instruct on the element of use of the weapon to threaten or endanger the life of the victim.

State v. Boyd, __ N.C. App. __, __ S.E.2d __ (Feb. 1, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8wOS0xNjY2LTEucGRm). In a conspiracy to commit robbery case, the evidence was sufficient to establish a mutual, implied understanding between the defendant and another man to rob the victim. The other man drove the defendant to intercept the victim; the defendant wore a ski mask and had a gun; after the defendant hesitated to act, the other person assaulted the victim and took his money; and the two got into the car and departed.

State v. Dubose, __ N.C. App. __, __ S.E.2d __ (Dec. 7, 2010) (http://appellate.nccourts.org/opinions/?c=2&pdf=2010/10-213-1.pdf). The trial court did not err by denying the defendant's motion to dismiss a charge of conspiracy to discharge a firearm into occupied property. The defendant, Ray, Johnson, and Phelps left a high school basketball game because of the presence of rival gang members. As they left, the defendant suggested that he was going to kill someone. A gun was retrieved from underneath the driver's side seat of Johnson's vehicle and Johnson let Ray drive and the defendant to sit in the front because the two "were about to do something." Ray and the defendant argued over who was going to shoot the victim but in the end Ray drove by the gym and the defendant fired twice at the victim, who was standing in front of the gym. The court rejected the defendant's argument that the evidence failed to show an agreement to discharge the firearm into occupied property, noting that the group understood and impliedly agreed that the defendant would shoot the victim as they drove by, the victim was standing by the gym doors, and there was a substantial likelihood that the bullets would enter or hit the gym.

State v. Sanders, __ N.C. App. __, __ S.E.2d __ (Nov. 16, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/100233-1.pdf). Evidence of the words and actions of the defendant and others, when viewed collectively, provided sufficient evidence of an

implied agreement to assault the victim. The court noted that the spontaneity of the plan did not defeat the conspiracy and that a meeting of the minds can occur when a party accepts an offer by actions.

State v. Robledo, ___ N.C. App. ___, 668 S.E.2d 91 (Nov. 4, 2008). There was sufficient evidence to support the defendant's conviction of conspiracy to traffic in marijuana; the fact that the state took a voluntary dismissal of the conspiracy charge against the co-conspirator was irrelevant to that determination.

Attempt

State v. Lawrence, __ N.C. App. __, __ S.E.2d __ (Mar. 1, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0zNDgtMS5wZGY). (1) The evidence was sufficient to prove attempted kidnapping. To prove an overt act for that crime, the State need not prove that the defendant was in the presence of his intended victim. In this case, the defendant and his accomplices stole get-away cars and acquired cell phones, jump suits, masks, zip ties, gasoline, and guns. Additionally, the defendant hid in the woods behind the home of his intended victim, waiting for her to appear, fleeing only upon the arrival of officers and armed neighbors. (2) The court rejected the defendant's argument that the evidence of attempted kidnapping was insufficient because the restraint he intended to use on his victim was inherent to his intended robbery of her. The defendant planned to intercept the victim outside of her home and force her back into the house at gunpoint, bind her hands so that she could not move, and threaten to douse her with gasoline if she did not cooperate. These additional acts of restraint by force and threat provided substantial evidence that the defendant's intended actions would have exposed the victim to greater danger than that inherent in the armed robbery itself. (3) The court rejected the defendant's argument that to prove an overt act for attempted robbery the State had to prove that the defendant was in the presence of his intended victim. For the reasons stated in (1), above, the court found that there was sufficient evidence of an overt act. (4) The court rejected the defendant's argument that because the evidence failed to show that he and his co-conspirators entered the property in question, they could not have attempted to enter her residence.

Overbreadth and Vagueness

State v. Mello, __ N.C. App. __, __ S.E.2d __ (Nov. 3, 2009). A city ordinance prohibiting loitering for the purpose of engaging in drug-related activity is unconstitutionally overbroad. Additionally, one subsection of the ordinance is void for vagueness, and another provision violates the Fourth Amendment by allowing the police to arrest in the absence of probable cause.

First Amendment Issues

United States v. Stevens, __ U.S. __ (No. 08-769) (April 20, 2010). Federal statute enacted to criminalize the commercial creation, sale, or possession of certain depictions of animal cruelty was substantially overbroad and violated the First Amendment.

Snyder v. Phelps, 562 U.S. __ (Mar. 2, 2010). The First Amendment shields members of a church from tort liability for picketing near a soldier's funeral. A jury held members of the Westboro Baptist Church liable for millions of dollars in damages for picketing near a soldier's funeral service. The picket signs reflected the church's view that the United States is overly tolerant of sin and that God kills American soldiers as punishment. The picketing occurred in Maryland. Although that state now has a criminal statute in effect restricting picketing at funerals, the statute was not in effect at the time the conduct at

issue arose. Noting that statute and that other jurisdictions have enacted similar provisions, the Court stated: "To the extent these laws are content neutral, they raise very different questions from the tort verdict at issue in this case. Maryland's law, however, was not in effect at the time of the events at issue here, so we have no occasion to consider how it might apply to facts such as those before us, or whether it or other similar regulations are constitutional." Slip Op. at 11. [**Author's note**: In North Carolina, G.S. 14-288.4(a)(8), criminalizes disorderly conduct at funerals, including military funerals. In a prosecution for conduct prohibited by that statute, the issue that the U.S. Supreme Court did not have occasion to address may be presented for decision].

Homicide

Premeditation and Deliberation

State v. Bonilla, __ N.C. App. __, __ S.E.2d __ (Feb. 15, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0zNTEtMS5wZGY). In a first-degree murder case, there was sufficient evidence of premeditation, deliberation, and intent to kill. After the defendant and an accomplice beat and kicked the victim, they hog-tied him so severely that his spine was fractured, and put tissue in his mouth. Due to the severe arching of his back, the victim suffered a fracture in his thoracic spine and died from a combination of suffocation and strangulation.

State v. Blue, __ N.C. App. __, __ S.E.2d __ (Oct. 5, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091717-1.pdf). (1) The defendant's statement that he formed the intent to kill the victim and contemplated whether he would be caught before he began the attack was sufficient evidence that he formed the intent to kill in a cool state of blood for purposes of a first-degree murder charge. (2) The court rejected the defendant's argument that his evidence of alcohol and crack cocaine induced intoxication negated the possibility of premeditation and deliberation as a matter of law.

Malice

State v. Parlee, __ N.C. App. __, __ S.E.2d __ (Jan. 4, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=2011/10-497-1.pdf). There was sufficient evidence to survive a motion to dismiss in a case in which the defendant was charged with second-degree murder under G.S. 14-17 for having a proximately caused a murder by the unlawful distribution and ingestion of Oxymorphone. There was sufficient evidence of malice where the victim and a friend approached the defendant to purchase prescription medication, the defendant sold them an Oxymorphone pill for $20.00, telling them that it was "pretty strong pain medication[,]" and not to take a whole pill or "do anything destructive with it." The defendant also told a friend that he liked Oxymorphone because it "messe[d]" him up. The jury could have reasonably inferred that the defendant knew Oxymorphone was an inherently dangerous drug and that he acted with malice when he supplied the pill.

State v. Hunter, __ N.C. App. __, __ S.E.2d __ (Dec. 21, 2010) (http://appellate.nccourts.org/opinions/?c=2&pdf=2010/10-483-1.pdf). There was sufficient evidence of malice in a first-degree murder case. The intentional use of a deadly weapon which proximately results in death gives rise to the presumption of malice. Here, the victim was stabbed in the torso with a golf club shaft, which entered the body from the back near the base of her neck downward and forward toward the center of her chest to a depth of eight inches, where it perforated her aorta just above her heart; she was stabbed with a knife to a depth of three inches; her face sustained blunt force trauma consistent with being

struck with a clothes iron; and there was evidence she was strangled. The perforation by the golf club shaft was fatal.

State v. Tellez, __ N.C. App. __, __ S.E.2d __ (Nov. 3, 2009). There was sufficient evidence of malice to sustain a second-degree murder conviction where the defendant drove recklessly, drank alcohol before and while operating a motor vehicle, had prior convictions for impaired driving and driving while license revoked, and fled and engaged in elusive behavior after the accident.

State v. Mack, __ N.C. App. __, __ S.E.2d __ (Aug. 17, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/090672-1.pdf). There was sufficient evidence of malice in a second-degree murder case involving a vehicle accident. The defendant, whose license was revoked, drove extremely dangerously in order to evade arrest for breaking and entering and larceny. When an officer attempted to stop the defendant, he fled, driving more than 90 miles per hour, running a red light, and traveling the wrong way on a highway — all with the vehicle's trunk open and with a passenger pinned by a large television and unable to exit the vehicle.

State v. Neville, __ N.C. App. __, __ S.E.2d __ (Jan. 19, 2010). There was sufficient evidence of malice to support a second-degree murder conviction in a case where the defendant ran over a four-year-old child. When she hit the victim, the defendant was angry and not exhibiting self-control; the defendant's vehicle created "acceleration marks" and was operating properly; the defendant had an "evil look"; and the yard was dark, several small children were present, and the defendant did not know where the children were when she started her car.

Proximate Cause

State v. Parlee, __ N.C. App. __, __ S.E.2d __ (Jan. 4, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=2011/10-497-1.pdf). There was sufficient evidence to survive a motion to dismiss in a case in which the defendant was charged with second-degree murder under G.S. 14-17 for having a proximately caused a murder by the unlawful distribution and ingestion of Oxymorphone. There was sufficient evidence that the defendant's sale of the pill was a proximate cause of death where the defendant unlawfully sold the pill to the two friends, who later split it in half and consumed it; the victim was pronounced dead the next morning, and cause of death was acute Oxymorphone overdose.

Felony-Murder

State v. Freeman, __ N.C. App. __, __ S.E.2d __ (Mar. 2, 2010). The trial court properly submitted felony-murder to the jury based on underlying felony of attempted sale of a controlled substance with the use of a deadly weapon. The defendant and an accomplice delivered cocaine to the victim. Approximately one week later, they went to the victim's residence to collect the money owed for the cocaine and at this point, the victim was killed. At the time of the shooting, the defendant was engaged in an attempted sale of cocaine (although the cocaine had been delivered, the sale was not consummated because payment had not been made) and there was no break in the chain of events between the attempted sale and the murder.

Jury Instructions

State v. Simonovich, __ N.C. App. __, __ S.E.2d __ (Jan. 19, 2010). The trial court did not err by denying the defendant's request for a voluntary manslaughter instruction. Although the defendant knew that his

wife was having sex with other men and she threatened to continue this behavior, the defendant did not find her in the act of intercourse with another or under circumstances clearly indicating that the act had just been completed. Additionally, the defendant testified that he strangled his wife to quiet her.

Multiple Convictions/Lesser Included Offenses

State v. Parlee, __ N.C. App. __, __ S.E.2d __ (Jan. 4, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=2011/10-497-1.pdf). For purposes of double jeopardy, a second-degree murder conviction based on unlawful distribution of and ingestion of a controlled substance was not the same offense as sale or delivery of a controlled substance to a juvenile or possession with intent to sell or deliver a controlled substance.

State v. Davis, __ N.C. App. __, 680 S.E.2d 239 (Aug. 4, 2009). A defendant may not be sentenced for both involuntary manslaughter and felony death by vehicle arising out of the same death. A defendant may not be sentenced for both felony death by vehicle and impaired driving arising out of the same incident. However, a defendant may be sentenced for both involuntary manslaughter and impaired driving.

State v. Armstrong, __ N.C. App. __, __ S.E.2d __ (April 20, 2010). A defendant may be convicted for both second-degree murder (for which the evidence of malice was the fact that the defendant drove while impaired and had prior convictions for impaired driving) and impaired driving.

Assaults

Assault

State v. Starr, __ N.C. App. __, __ S.E.2d __ (Jan. 4, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=2011/10-752-1.pdf). In a case involving assault on a firefighter with a firearm, there was sufficient evidence that the defendant committed an assault. To constitute an assault, it is not necessary that the victim be placed in fear; it is enough if the act was sufficient to put a person of reasonable firmness in apprehension of immediate bodily harm. "It is an assault, without regard to the aggressor's intention, to fire a gun at another or in the direction in which he is standing." Here, the defendant shot twice at his door while firefighters were attempting to force it open and fired again in the direction of the firefighters after they forced entry. The defendant knew that people were outside the door and shot the door to send a warning.

State v. Corbett, ___ N.C. App. ___, 675 S.E.2d 150 (April 21, 2009). Assault is not a lesser-included offense of sexual battery.

Assault by Strangulation

State v. Williams, __ N.C. App. __, __ S.E.2d __ (Dec. 8, 2009). (1) The evidence was sufficient to establish assault by strangulation; the victim told an officer that she felt that the defendant was trying to crush her throat, that he pushed down on her neck with his foot, that she thought he was trying to "chok[e] her out" or make her go unconscious, and that she thought she was going to die. (2) Even if the offenses are not the same under the *Blockburger* test, the statutory language, "[u]nless the conduct is covered under some other provision of law providing greater punishment," prohibits sentencing a defendant for this offense and a more serious offense based on the same conduct.

Culpable Negligence

State v. Davis, __ N.C. App. __, 678 S.E.2d 385 (July 7, 2009). Committing a violation of G.S. 20-138.1 (impaired driving) constitutes culpable negligence as a matter of law sufficient to establish the requisite intent for assault with a deadly weapon inflicting serious injury.

Deadly Weapon

State v. Walker, __ N.C. App. __, __ S.E.2d __ (June 15, 2010) (online at: http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/090977-1.pdf). The evidence was sufficient to establish that the knife used in the assault was a deadly weapon where a witness testified that the knife was three inches long and the victim sustained significant injuries.

State v. Liggons, ___ N.C. App. ___, 670 S.E.2d 333 (Jan. 6, 2009). The defendant and his accomplice discussed intentionally forcing drivers off the road in order to rob them and one of them then deliberately threw a very large rock or concrete chunk through the driver's side windshield of the victim's automobile as it was approaching at approximately 55 or 60 miles per hour. The size of the rock and the manner in which it was used establishes that it was a deadly weapon.

*State v. Wallace***,** ___ N.C. App. ___, 676 S.E.2d 922 (June 2, 2009). The defendant and an accomplice, both female, assaulted a male with fists and tree limbs. The two females individually, but not collectively, weighed less than the male victim, and both were shorter than him. They both were convicted of assault with a deadly weapon inflicting serious injury. The court ruled that the evidence was sufficient to prove that the fists and the tree limbs were deadly weapons.

State v. Clark, __ N.C. App. __, __ S.E. 2d __ (Dec. 8, 2009). The vehicle at issue was not a deadly weapon as a matter of law where there was no evidence that the vehicle was moving at a high speed and given the victim's lack of significant injury and the lack of damage to the other vehicle involved, a jury could conclude that the vehicle was not aimed directly at the victim and that the impact was more of a glancing contact.

State v. Williams, __ N.C. App. __, __ S.E.2d __ (Dec. 8, 2009). There was sufficient evidence that the defendant's hands were a deadly weapon as to one victim when the evidence showed that the defendant was a big, stocky man, probably larger than the victim, who was a female and a likely user of crack cocaine, and the victim sustained serious injuries. There was sufficient evidence that the defendant's hands were a deadly weapon as to another victim when the evidence showed that the victim was a small-framed, pregnant woman with a cocaine addiction and the defendant used his hands to throw her onto the concrete floor, cracking her head open, and put his hands around her neck.

Intent

State v. Maready, __ N.C. App. __, __ S.E.2d __ (July 6, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/070171-2.pdf). The trial judge committed prejudicial error with respect to its instruction on the intent element for the charges of assault with a deadly weapon, in a case in which a vehicle was the deadly weapon. In order for a jury to convict of assault with a deadly weapon, it must find that it was the defendant's actual intent to strike the victim with his vehicle, or that the defendant acted with culpable negligence from which intent may be implied. Because the trial court's instruction erroneously could have allowed the jury to convict without a finding

of either actual intent or culpable negligence, reversible error occurred.

Intent to Kill

State v. Wright, __ N.C. App. __, __ S.E.2d __ (Mar. 1, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC04NTQtMS5wZGY). The trial court did not err by failing to instruct the jury on the lesser-included offense of assault with a deadly weapon inflicting serious injury to the charge of assault with a deadly weapon with intent to kill inflicting serious injury. The defendant broke into a trailer in the middle of the night and used an iron pipe to repeatedly beat in the head an unarmed, naked victim, who had just woken up.

State v. Liggons, ___ N.C. App. ___, 670 S.E.2d 333 (Jan. 6, 2009). There was sufficient evidence of an intent to kill and the weapon used was deadly as a matter of law. The defendant was convicted of assault with a deadly weapon with intent to kill inflicting serious injury and other offenses. There was sufficient evidence of an intent to kill where the defendant and his accomplice discussed intentionally forcing drivers off the road in order to rob them and one of them then deliberately threw a very large rock or concrete chunk through the driver's side windshield of the victim's automobile as it was approaching at approximately 55 or 60 miles per hour. The court concluded that it is easily foreseeable that such deliberate action could result in death, either from the impact of the rock on or a resulting automobile accident.

Serious Injury

State v. Wright, __ N.C. App. __, __ S.E.2d __ (Mar. 1, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC04NTQtMS5wZGY). The trial court did not err by failing to instruct on the lesser-included offense of assault with a deadly weapon to the charge on assault with a deadly weapon inflicting serious injury. After a beating by the defendant, the victim received hospital treatment, had contusions and bruises on her knee, could not walk for about a week and a half, and her knee still hurt at the time of trial.

State v. Walker, __ N.C. App. __, __ S.E.2d __ (June 15, 2010) (online at: http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/090977-1.pdf). The evidence was sufficient to establish serious injury where the defendant had a three-inch knife during the assault; the victim bled "a lot" from his wounds, dripping blood throughout the bedroom, bathroom, and kitchen; the victim was on the floor in pain and spitting up blood when the officer arrived; the victim was stabbed or cut 8 or 9 times and had wounds on his lip, back, and arm; the victim was removed by stretcher to the emergency room, where he remained for 12 hours, receiving a chest tube to drain blood, stitches in his back and arm, and was placed on a ventilator because of a lung puncture; the victim received pain medication for approximately one week; and at trial the victim still had visible scars on his lip, arm, and back.

Serious Bodily Injury

State v. Rouse, __ N.C. App. __, __ S.E.2d __ (July 21, 2009). There was sufficient evidence that a 70-year-old victim suffered from a protracted condition causing extreme pain supporting a charge of assault inflicting serious bodily injury when the facts showed: the victim had dried blood on her lips and in her nostrils and abdominal pain; she had a bruise and swelling over her left collarbone limiting movement of

her shoulder, and a broken collarbone, requiring a sling; she had cuts in her hand requiring stitches; she received morphine immediately and was prescribed additional pain medicine; she had to return to the emergency room 2 days later due to an infection in the sutured hand, requiring re-stitching and antibiotics; a nurse was unable to use a speculum while gathering a rape kit because the victim was in too much pain.

State v. Williams, __ N.C. App. __, __ S.E.2d __ (Dec. 8, 2009). (1) There was sufficient evidence of serious bodily injury with respect to one victim where the victim suffered a cracked pelvic bone, a broken rib, torn ligaments in her back, a deep cut over her left eye, and was unable to have sex for seven months; the eye injury developed an infection that lasted months and was never completely cured; the incident left a scar above the victim's eye, amounting to permanent disfigurement; there was sufficient evidence of serious bodily injury as to another victim where the victim sustained a puncture wound to the back of her scalp and a parietal scalp hematoma and she went into premature labor as a result of the attack. (2) There was insufficient evidence of serious bodily injury as to another victim where the evidence showed that the victim received a vicious beating but did not show that her injuries placed her at substantial risk of death; although her ribs were "sore" five months later, there was no evidence that she experienced "extreme pain" in addition to the "protracted condition." (4) Based on the language in G.S. 14-32.4(b) providing that "[u]nless the conduct is covered under some other provision of law providing greater punishment," the court held that a defendant may not be sentenced to assault by strangulation and a more serious offense based on the same conduct. Because the statutory language in G.S. 14-32.4(a) proscribing assault inflicting serious bodily injury contains the same language, the same analysis likely would apply to that offense.

Discharging a Barreled Weapon or Firearm into Occupied Property

State v. Small, __ N.C. App. __, __ S.E.2d __ (Dec. 8, 2009). Only a barreled weapon must meet the velocity requirements of G.S. 14-34.1(a) (capable of discharging shot, bullets, pellets, or other missiles at a muzzle velocity of at least 600 feet per second); a firearm does not.

Malicious Conduct By Prisoner

State v. Noel, __ N.C. App. __, __ S.E.2d __ (Mar. 2, 2010). The evidence was sufficient to establish that the defendant emitted bodily fluids where it showed that he spit on an officer. The evidence was sufficient to show that the defendant acted knowingly and willfully where the defendant was uncooperative with the officers, was belligerent towards them, and immediately before the spitting, said to an approaching officer: "F--k you, n----r. I ain't got nothing. You ain't got nothing on me." The evidence was sufficient to show that the defendant was in custody when he was handcuffed and seated on a curb, numerous officers were present, and the defendant was told that he was not free to leave.

Multiple Convictions

State v. Williams, __ N.C. App. __, 689 S.E.2d 412 (Dec. 8, 2009). A defendant may not be convicted of assault with a deadly weapon inflicting serious injury and assault inflicting serious bodily injury arising out of the same conduct.

Relation to Sexual Battery

State v. Corbett, ___ N.C. App. ___, 675 S.E.2d 150 (April 21, 2009). Assault is not a lesser-included offense of sexual battery.

Secret Assault

State v. Wright, __ N.C. App. __, __ S.E.2d __ (Mar. 1, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC04NTQtMS5wZGY). The evidence was insufficient to establish that a secret assault occurred. In the middle of the night, the victim heard a noise and looked up to see someone standing in the bedroom doorway. The victim jumped on the person and hit him with a chair. The victim was aware of the defendant's presence and purpose before the assault began. In fact, he started defending himself before the defendant's assault was initiated.

State v. Holcombe, __ N.C. App. __, __ S.E.2d __ (April 20, 2010). The evidence was insufficient to support a conviction where the state failed to produce evidence that the assault was done in a secret manner. To satisfy this element, the state must offer evidence showing that the victim is caught unaware.

Threats, Harassment, Stalking & Violation of Domestic Violence Protective Orders

State v. Byrd. 363 N.C. 214 (May 1, 2009). Reversing the court of appeals and holding that a temporary restraining order (TRO) entered pursuant to Rule 65(b) of the N.C. Rules of Civil Procedure on a motion alleging acts of domestic violence in an action for divorce from bed and board was not a valid domestic violence protective order as defined by Chapter 50B and was not entered after a hearing by the court or with consent of the parties. Thus, the TRO could not support imposition of the punishment enhancement prescribed by G.S. 50B-4.1(d).

State v. Wooten, __ N.C. App. __, __ S.E.2d __ (Aug. 17, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091551-1.pdf). The evidence was sufficient to sustain a stalking conviction where it showed that the defendant sent five facsimile messages to the victim's workplace but the first four did not contain a direct threat. In this regard, the court noted, the case "diverges from those instances in which our courts historically have applied the stalking statute." Among other things, the faxes called the victim, Danny Keel, "Mr. Keel-a-Nigger," referenced the defendant having purchased a shotgun, and mentioned his daughter, who was living away from home, by first name.

State v. Van Pelt, __ N.C. App. __, __ S.E. 2d __ (Sept. 7, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091361-1.pdf). In a prosecution under the prior version of the stalking statute, there was sufficient evidence to sustain a conviction. The court rejected the defendant's argument that the evidence showed communications to persons other than the alleged victim on all but one occasion, concluding that all of the communications were directed to the victim. The defendant harassed the victim by written communications, pager, and phone with no legitimate purpose. The communications were directed to the victim, including those to his office staff, made with the request that they be conveyed to the victim. The harassment placed the victim in fear as evidenced by his testimony, his actions in having his staff make sure the office doors were locked and ensuring the outside lights were working along with encouraging them to walk in "twos" to their cars, his wife's testimony of his demeanor during and after his phone call with the defendant, his late night phone call to a police officer, his action in taking out a restraining order, and his visit to his children's school to speak with teachers and counselors and to have them removed from the school's website. The victim's fears were reasonable given the defendant's odd behavior exhibiting a pattern of escalation.

State v. Van Pelt, __ N.C. App. __, __ S.E. 2d __ (Sept. 7, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091361-1.pdf). The evidence was sufficient to establish that the defendant violated G.S. 14-196(a)(3) by making harassing phone calls. The defendant repeatedly called the victim at work to annoy and harass him. It was not necessary for the State to show that defendant actually spoke with the victim.

Sexual Assaults, Sex Offender Registration, and Related Offenses

Age Difference Between Defendant and Victim for Sexual Assaults

State v. Faulk, __ N.C. App. __, __ S.E.2d __ (Sept. 15, 2009). In a case charging offenses under G.S. 14-27.7A (statutory rape or sexual offense of person who is 13, 14, or 15 years old), the court held that the trial judge misapplied the "birthday rule" (a person reaches a certain age on his or her birthday and remains that age until his or her next birthday) to the calculation of the age difference between the defendant and the victim. The defendant's and victim's ages at the time in question were 19 years, 7 months, and 5 days and 15 years, 2 months, and 8 days respectively. Applying the birthday rule, the trial court concluded that the defendant was 19 at the time in question and that the victim was 15, making the age difference 4 years, when the relevant statute required it to be more than 4 years. The appellate court concluded that the statutory element of more than 4 years but less than 6 years means 4 years 0 days to 6 years 0 days, "or anywhere in the range of 1460 days to 2190 days."

Crime Against Nature

In Re R.N., __ N.C. App. __, __ S.E.2d __ (Aug. 17, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091406-1.pdf). The trial court erred by denying the juvenile's motion to dismiss a charge of crime against nature; as to a second charge alleging the same offense, defects in the transcript made appellate review impossible. The first count alleged that the juvenile licked the victim's genital area. The evidence established that the juvenile licked her private, put his mouth on her private area, and "touch[ed] . . . on her private parts." Citing, *State v. Whittemore*, 255 N.C. 583 (1961), the court held that the evidence was insufficient to establish penetration. As to the second count, alleging that the juvenile put his penis in the victim's mouth, the evidence showed that the juvenile forced the victim's head down to his private and that she saw his private area. Under *Whittemore*, this was insufficient evidence of penetration. However, when a social worker was asked whether there was penetration, she responded: "[the victim] told me there was *(Indistinct Muttering)* penetration." The court concluded that because it could not determine from this testimony whether penetration occurred, it could not meaningfully review the sufficiency of the evidence. The court vacated the adjudication and remanded for a hearing to reconstruct the social worker's testimony.

Indecent Liberties

State v. Carter, __ N.C. App. __, __ S.E.2d __ (Mar. 1, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC02NDgtMS5wZGY). The evidence was sufficient to establish indecent liberties. The child reported being touched in her genital and rectal area by a male. The victim's mother testified that she found the victim alone with the defendant on several occasions, and the victim's testimony was corroborated by her consistent statements to others.

In Re A.W., __ N.C. App. __, __ S.E.2d __ (Feb. 15, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC03MTMtMS5wZGY). The court

rejected the juvenile's argument that the evidence was insufficient to establish indecent liberties in that it failed to show that he acted with a purpose to arouse or gratify his sexual desires. The facts showed that: the juvenile was thirteen and the victim was ten years younger; the juvenile told the victim that the juvenile's private parts "taste like candy," and had the victim lick his penis; approximately eleven months prior, the juvenile admitted to having performed fellatio on a four-year-old male relative. The court concluded that the juvenile's age and maturity, the age disparity between him and the victim, coupled with the inducement he employed to convince the victim to perform the act and the suggestion of his prior sexual activity before this event, was sufficient evidence of maturity and intent to show the required element of "for the purpose of arousing or gratifying sexual desire."

State v. Breathette, __ N.C. App. __, __ S.E.2d __ (Mar. 2, 2010). Mistake of age is not a defense to the crime of indecent liberties. The trial court did not err by instructing the jury that the term willfully meant that the act was done purposefully and without justification or excuse. This instruction "largely mirrors" the North Carolina Supreme Court's definition of willfully, which is "the wrongful doing of an act without justification or excuse, or the commission of an act purposely and deliberately in violation of law."

State v. McClary, __ N.C. App. __, 679 S.E.2d 414 (July 7, 2009). There was sufficient evidence to survive a motion to dismiss where it showed that the defendant gave the child a letter containing sexually graphic language for the purpose of soliciting sexual intercourse and oral sex for money. Additionally, the jury could reasonably infer that the defendant's acts of writing and delivering the letter to the child were taken for the purpose of arousing and gratifying sexual desire.

State v. Smith, 362 N.C. 583 (Dec. 12, 2008). The trial judge did not commit plain error in the jury instruction on indecent liberties. When instructing on indecent liberties, the trial judge is not required to specifically identify the acts that constitute the charge.

State v. Coleman, ___ N.C. App. ___, 684 S.E.2d 513 (Nov. 3, 2009). The court held that the (1) defendant, who had a custodial relationship with the child, committed an indecent liberty when he watched the child engage in sexual activity with another person and facilitated that activity; and (2) defendant's two acts−touching the child's breasts and watching and facilitating her sexual encounter with another person−supported two convictions.

Failure to Register/Notify of Address or Other Change

State v. Abshire, 363 N.C. 322 (June 18, 2009). Rejecting an interpretation of the term "address" as meaning where a person resides and receives mail or other communication, the North Carolina Supreme Court held that the term carries the "ordinary meaning of describing or indicating the location where someone lives"; as such, the court concluded, the word indicates a person's residence, whether permanent or temporary. The court went on to hold that the state presented sufficient evidence to establish that the defendant changed her address, thus triggering the reporting requirement.

State v. Worley, __ N.C. App. __, 679 S.E.2d 857 (July 21, 2009). The trial court did not err in denying the defendant's motion to dismiss a charge of failure to notify of a change of address within 10 days where the evidence showed, at a minimum, that the defendant ceased to reside at his last listed reported address on or before August 10th, but did not submit a change of address form until September 16th. The court noted that individuals required to notify the sheriff of a change address must do so, even if the change of address is temporary; it rejected the defendant's contention that there may be times when a

registered sex offender lacks a reportable address, such as when the person has no permanent abode.

State v. Braswell, __ N.C. App. __, __ S.E.2d __ (May 4, 2010). The trial court erred by denying the defendant's motion to dismiss the charge of failing to register as a sex offender by failing to verify his address. In order to be convicted for failure to return the verification form, a defendant must actually have received the form. In this case, the evidence was uncontroverted that the defendant never received the form.

Mentally Disabled Victim

In Re A.W., __ N.C. App. __, __ S.E.2d __ (Feb. 15, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC03MTMtMS5wZGY). The evidence was insufficient to sustain an adjudication of delinquency based on a violation of G.S. 14-27.5 (second-degree sexual offense). On appeal, the State conceded that there was no evidence that the victim was mentally disabled, mentally incapacitated, or physically helpless.

State v. Williams, __ N.C. App. __, __ S.E. 2d __ (Sept. 7, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/100011-1.pdf). In a sexual offense case, there was sufficient evidence that the victim, an adult with 58 I.Q., was mentally disabled and that the defendant knew or should reasonably have known this. (1) Because the parties agreed that the victim was capable of appraising the nature of his conduct and of communicating an unwillingness to submit to a sexual act (he told the defendant he did not want to do the act), the issue on the mentally disabled element was whether the victim was substantially capable of resisting a sexual act. The victim was mildly mentally retarded. He had difficulty expressing himself verbally, was able to read very simple words and solve very simple math problems, and had difficulty answering questions about social abilities and daily tasks. He needed daily assistance with cooking and personal hygiene. Notwithstanding the victim's communication of his unwillingness to receive oral sex, the defendant completed the sexual act, allowing an inference that the victim was unable to resist. (2) There was sufficient evidence that the defendant knew or should have known that the victim was mentally disabled. An officer testified that within three minutes of talking with the victim, it was obvious that he had some deficits. By contrast, the defendant appeared normal and healthy. While the defendant had a driver's license, held regular jobs, took care of the victim's mother, could connect a VCR, and could read "somewhat," the victim could not drive, never held a regular job, could cook only in a microwave, had to be reminded to brush his teeth, did not know how to connect a VCR, and could not read. Moreover, the defendant had sufficient opportunity to get to know the victim, having dated the victim's mother for thirteen years and having spent many nights at the mother's house, where the victim lived.

Rape

State v. Lawrence, 363 N.C. 118 (Mar. 20, 2009). The court, per curiam and without an opinion, affirmed the ruling of the court of appeals that there was substantial evidence that the defendant displayed an article which the victim reasonably believed to be a dangerous or deadly weapon. The evidence showed that the defendant grabbed the victim, told her that he was going to kill her and reached into his pocket to get something; although the victim did not see if the item was a knife or a gun, she saw something shiny and silver that she believed to be a knife.

Sexual Battery

State v. Patino, __ N.C. App. __, __ S.E.2d __ (Oct. 5, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/100201-1.pdf). In a sexual battery case, the evidence was sufficient to establish that the defendant grabbed the victim's crotch for the purpose of sexual arousal, sexual gratification, or sexual abuse. The defendant previously had asked the victim for her phone number and for a date, and had brushed against her thigh in such a manner that the victim reported the incident to her supervisor and was instructed not to be alone with the defendant.

State v. Corbett, ___ N.C. App. ___, 675 S.E.2d 150 (April 21, 2009). Assault is not a lesser-included offense of sexual battery.

Sexual Offense

State v. Bonilla, __ N.C. App. __, __ S.E.2d __ (Feb. 15, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0zNTEtMS5wZGY). The trial court did not commit plain error by instructing the jury that it could consider whether or not the use of a bottle constituted a deadly weapon during the commission of a sexual offense. The defendant and his accomplice, after tying the victim's hands and feet, shoved a rag into his mouth, pulled his pants down, and inserted a bottle into his rectum. The victim thought that he was going to die and an emergency room nurse found a tear in the victim's anal wall accompanied by "serious drainage."

State v. Crocker, __ N.C. App. __, 676 S.E.2d 658 (June 2, 2009). The evidence was sufficient of a sexual offense where the child victim testified that the defendant reached beneath her shorts and touched between "the skin type area" in "[t]he area that you pee out of" and that he would rub against a pressure point causing her pain and to feel faint. A medical expert testified that because of the complaint of pain, the victim's description was "more suggestive of touching . . . on the inside."

State v. Williams, __ N.C. App. __, __ S.E.2d __ (Dec. 8, 2009). The defendant was properly convicted of two counts of sexual offense when the evidence showed that the victim awoke to find the defendant's hands in her vagina and in her rectum at the same time.

Sexual Activity by a Custodian

State v. Coleman, ___ N.C. App. ___, ___ S.E.2d ___ (Nov. 3, 2009). The court held that (1) the defendant, who was employed by a corporation at its boys' group home location was a custodian of the victim, who lived at the corporation's girls' group home location; and (2) the State need not prove that the defendant knew that he was the victim's custodian.

Solicitation of a Child by Computer

State v. Fraley, __ N.C. App. __, __ S.E.2d __ (Feb. 16, 2010). The defendant advised or enticed an officer posing as a child to meet the defendant, on the facts presented. The court noted that since the terms advise and entice were not defined by the statute, the General Assembly is presumed to have used the words to convey their natural and ordinary meaning.

Kidnapping

Without Consent

State v. Williams, __ N.C. App. __, __ S.E.2d __ (Dec. 8, 2009). The removal of the victim was without

her consent when the defendant induced the victim to enter his car on the pretext of paying her money in exchange for sex, but his real intent was to assault her; a reasonable mind could conclude that had the victim known of such intent, she would not have consented to have been moved by the defendant.

Confinement

State v. Yarborough, __ N.C. App. __, 679 S.E.2d 397 (July 7, 2009). There was sufficient evidence of confinement where the defendant entered a trailer, brandished a loaded shotgun, and ordered everyone to lie down. It was immaterial that the victim did not comply with the defendant's order to lie down.

For Purpose of Terrorizing

State v. Bonilla, __ N.C. App. __, __ S.E.2d __ (Feb. 15, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0zNTEtMS5wZGY). (1) The evidence was sufficient to establish that the defendant confined and restrained Victims Alvarez and Cortes for the purpose of terrorizing them and doing them serious bodily harm. The evidence was sufficient to establish a purpose of terrorizing Alvarez when the defendant beat and kicked Alvarez repeatedly while wrestling him to the floor; the defendant bound Alvarez's hands and feet and placed a rag in his mouth; the defendant and an accomplice threatened to kill Alvarez; the defendant pulled Alvarez's pants down, and the accomplice forced a bottle into his rectum; and Alvarez testified that he thought he was going to die. There was sufficient evidence as to the purpose of doing serious bodily harm to Alvarez given the sexual assault. As to Cortes, the defendant and the accomplice knocked him to the floor, and kicked him in the stomach repeatedly; Cortes was hog-tied so severely that his spine was fractured; he had lacerations to the lips and abrasions on his face, neck, chest, and abdomen; tissue paper was in his mouth; the spine fracture would have paralyzed the lower part of his body; and cause of death was a combination of suffocation and strangulation, with a contributing factor being the fracture of the thoracic spine. (2) The trial court's instruction clearly and appropriately defined "terrorizing" and "serious bodily harm" as required for kidnapping. The trial court instructed that: "Terrorizing means more than just putting another in fear. It means putting that person in some high degree of fear, a state of intense fright or apprehension, or doing serious bodily injury to that person. Serious bodily injury may be defined as such physical injury as causes great pain or suffering."

For Purpose of Doing Serious Bodily Harm

State v. Bonilla, __ N.C. App. __, __ S.E.2d __ (Feb. 15, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0zNTEtMS5wZGY). (1) The evidence was sufficient to establish that the defendant confined and restrained Victims Alvarez and Cortes for the purpose of terrorizing them and doing them serious bodily harm. The evidence was sufficient to establish a purpose of terrorizing Alvarez when the defendant beat and kicked Alvarez repeatedly while wrestling him to the floor; the defendant bound Alvarez's hands and feet and placed a rag in his mouth; the defendant and an accomplice threatened to kill Alvarez; the defendant pulled Alvarez's pants down, and the accomplice forced a bottle into his rectum; and Alvarez testified that he thought he was going to die. There was sufficient evidence as to the purpose of doing serious bodily harm to Alvarez given the sexual assault. As to Cortes, the defendant and the accomplice knocked him to the floor, and kicked him in the stomach repeatedly; Cortes was hog-tied so severely that his spine was fractured; he had lacerations to the lips and abrasions on his face, neck, chest, and abdomen; tissue paper was in his mouth; the spine fracture would have paralyzed the lower part of his body; and cause of death was a combination of suffocation and strangulation, with a contributing factor being the fracture of the thoracic spine. (2) The trial court's

instruction clearly and appropriately defined "terrorizing" and "serious bodily harm" as required for kidnapping. The trial court instructed that: "Terrorizing means more than just putting another in fear. It means putting that person in some high degree of fear, a state of intense fright or apprehension, or doing serious bodily injury to that person. Serious bodily injury may be defined as such physical injury as causes great pain or suffering."

Live Victim

State v. Keller, __ N.C. App. __, 680 S.E.2d 212 (Aug. 4, 2009). Kidnapping requires a live victim.

Multiple Convictions
Restraint, etc., Inherent In/Separate From Other Offense

State v. Cole, __ N.C. App. __, 681 S.E.2d 423 (Aug. 18, 2009). Because the restraint of the victim did not go beyond that inherent in the accompanying robbery, the kidnapping conviction could not stand. The victim was not moved to another location or injured and was held for only 30 minutes.

State v. Payton, __ N.C. App. __, 679 S.E.2d 502 (July 21, 2009). The trial court erred in denying the defendant's motion to dismiss kidnapping charges where the removal and restraint of the victims was inherent in a charged robbery. Distinguishing cases where the victims were bound and physically harmed, the court noted that in this case, the victims only were moved from a bathroom area to the bathroom (a movement deemed merely a technical asportation), and were asked to lie on the bathroom floor until the robbery was complete. The removal and restraint did not expose the victims to greater danger than the robbery itself and thus were inherent in the robbery.

State v. Thomas, ___ N.C. App. ___, 676 S.E.2d 56 (May 5, 2009). In a case in which the defendant was convicted of kidnapping and rape, the kidnapping conviction could stand where the confinement and restraint of the victim went beyond the restraint inherent in the commission of the rape. The defendant threatened the victim with a gun while she was in his car. When she tried to escape, he pulled her back into the car and sprayed her with mace. He drove her away from her car and children. When she jumped out, he forced her back into the car at gunpoint. He then drove her to a secluded wooded area, where he raped her.

State v. Gayton-Barbossa, __ N.C. App. __, 676 S.E.2d 586 (May 19, 2009). The evidence was sufficient to support a charge of kidnapping where the restraint used against the victim was not inherent in the assaults committed. The defendant kept the victim from leaving her house by repeatedly striking her with a bat. When she was able to escape, he chased her, grabbed her, and shot her. Detaining the victim in her home and again outside was not necessary to effectuate the assaults.

Other Multiple Conviction Issues

State v. Williams, __ N.C. App. __, __ S.E.2d __ (Dec. 8, 2009). A defendant may be convicted of assault inflicting serious bodily injury and first-degree kidnapping when serious injury elevates the kidnapping conviction to first-degree.

Release in a Safe Place

State v. Bonilla, __ N.C. App. __, __ S.E.2d __ (Feb. 15, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0zNTEtMS5wZGY). A person who is killed in the course of a kidnapping is not left in a safe place. Alternatively, if the victim still was alive when left by the defendant and his accomplice, he was not left in a safe place given that he was bound so tightly that he suffered a fracture to his spine and ultimately suffocated.

State v. Smith, ___ N.C. App. ___, 669 S.E.2d 8 (Dec. 2, 2008). The fact that the state proceeded on a theory of acting in concert does not require the conclusion that the defendants released the victim in a safe place simply because one of the other perpetrators arguably did so. The record contained substantial evidence that defendants did not undertake conscious, willful action to assure that the victim was released in a safe place.

Larceny & Unauthorized Use

State v. Patterson, ___ N.C. App. ___, 671 S.E.2d 357 (Jan. 6, 2009). The doctrine of recent possession applied to a video camera and a DVD player found in the defendant's exclusive possession 21 days after the break-in.

State v. Szucs, __ N.C. App. __, __ S.E.2d __ (Nov. 2, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/100305-1.pdf). A defendant may not be convicted of both felony larceny and felonious possession of the same goods.

State v. Nickerson, __ N.C. App. __, __ S.E.2d __ (Nov. 16, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091511-1.pdf). Unauthorized use of a motor propelled conveyance is a lesser included offense of possession of stolen goods and on the facts presented, the trial court erred by failing to instruct the jury on the lesser included offense.

Possession of Stolen Goods

State v. Tanner, __ N.C. __, __ S.E.2d __ (June 17, 2010) (online at: http://www.aoc.state.nc.us/www/public/sc/opinions/2010/pdf/474PA08-1.pdf). Reversing the Court of Appeals and overruling *State v. Marsh*, 187 N.C. App. 235 (2007), and *State v. Goblet*, 173 N.C. App. 112 (2005), the Supreme Court held that a defendant who is acquitted of underlying breaking or entering and larceny charges may be convicted of felonious possession of stolen goods on a theory that the defendant knew or had reasonable grounds to believe that the goods were stolen.

State v. Rahaman, __ N.C. App. __, __ S.E.2d __ (Jan. 19, 2010). There was sufficient evidence that a stolen truck was worth more than $1,000. The sole owner purchased the truck new 20 years ago for $9,000.00. The truck was in "good shape"; the tires were in good condition, the radio and air conditioning worked, and the truck was undamaged, had never been in an accident and had been driven approximately 75,000 miles. The owner later had an accident that resulted in a "total loss" for which he received $1,700 from insurance; he would have received $2,100 had he given up title. An officer testified that the vehicle had a value of approximately $3,000. The State is not required to produce direct evidence of value, provided that the jury is not left to speculate as to value.

State v. Wilson, __ N.C. App. __, __ S.E.2d __ (April 20, 2010). The evidence was insufficient to establish that the defendant knew a gun was stolen. Case law establishes that guilty knowledge can be inferred from the act of throwing away a stolen weapon. In this case, shortly after a robbery, the

defendant and an accomplice went to the home of the accomplice's mother, put the gun in her bedroom, and left the house. These actions were not analogous to throwing an item away for purposes of inferring knowledge that an item was stolen.

State v. Szucs, __ N.C. App. __, __ S.E.2d __ (Nov. 2, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/100305-1.pdf). (1) In a case involving felonious breaking or entering, larceny, and possession of stolen goods, there was sufficient evidence of possession. The defendant's truck was parked at the residence with its engine running; items found in the truck included electronic equipment from the residence; a man fitting the defendant's description was seen holding items later identified as stolen; items reported as missing included electronic equipment and a large quantity of loose change; the police dog's handler observed evidence that someone recently had been in a muddy area behind the residence; the side door of the residence showed pry marks; the defendant was found wearing muddy clothing and shoes and in possession of a Leatherman tool and a large quantity of loose change. A reasonable juror could conclude that the defendant possessed goods stolen from the residence, either as the person standing in the yard holding electronic equipment, through constructive possession of the items in his truck, or through actual possession of the loose change. (2) A defendant may not be convicted of both felony larceny and felonious possession of the same goods.

State v. Moses, __ N.C. App. __, __ S.E.2d __ (July 20, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091468-1.pdf). A defendant may not be sentenced for both robbery and possession of stolen property taken during the robbery.

State v. Marshall, __ N.C. App. __, __ S.E.2d __ (Aug. 17, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091416-1.pdf). In a possession of stolen property case, the trial court committed reversible error by instructing the jury on constructive possession. The property, a vehicle stolen from a gas station, was found parked on the street outside of the defendant's residence. The defendant claimed that unknown to him, someone else drove the vehicle there. The State argued that evidence of a surveillance tape showing the defendant at the station when the vehicle was taken, the defendant's opportunity to observe the running, unoccupied vehicle, the fact that the vehicle was not stolen until defendant left the station, and the later discovery of the vehicle near the defendant's residence was sufficient to establish constructive possession. The court concluded that although this evidence showed opportunity, it did not show that the defendant was aware of the vehicle's location outside his residence, was at home when it arrived, that he regularly used that location for his personal use, or that the public street was any more likely to be under his control than the control of other residents. The court concluded that the vehicle's location on a public street not under the defendant's exclusive control and the additional circumstances recounted by the State did not support an inference that defendant had "the intent and capability to maintain control and dominion over" the vehicle. Based on the same analysis, the court also agreed with the defendant's argument that the trial court erred by denying his motions to dismiss as there was insufficient evidence that he actually or constructively possessed the stolen vehicle and by accepting the jury verdict as to possession of stolen goods because it was fatally inconsistent with its verdict of not guilty of larceny of the same vehicle.

State v. Nickerson, __ N.C. App. __, __ S.E.2d __ (Nov. 16, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091511-1.pdf). Unauthorized use of a motor propelled conveyance is a lesser included offense of possession of stolen goods and on the facts presented, the trial court erred by failing to instruct the jury on the lesser included offense.

Robbery

Taking Property of Another

State v. Johnson, __ N.C. App. __, __ S.E.2d __ (Dec. 7, 2010) (http://appellate.nccourts.org/opinions/?c=2&pdf=2010/10-519-1.pdf). The trial court erred by denying the defendant's motion to dismiss a charge of attempted armed robbery when there was no evidence that the defendant attempted to take the victim's personal property. Because the defendant's conviction for felony breaking or entering was based on an intent to commit armed robbery, the trial court also erred by failing to dismiss that charge.

Taking by Violence or Fear of Violence

State v. Elkins, __ N.C. App. __, __ S.E.2d __ (Mar. 1, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC05MTYtMS5wZGY). The evidence was sufficient to establish that the defendant took money from a store clerk by means of violence or fear. The defendant hid his arm underneath his jacket in a manner suggesting that he had a gun; the clerk knew the defendant was "serious" because his eyes were "evil looking"; and the clerk was afraid and therefore gave the defendant the money. The court distinguished *State v. Parker*, 322 N.C. 559 (1988), on grounds that in that case, there was no weapon in sight and the victim was not afraid. Instead, the court found the case analogous to *State v. White*, 142 N.C. App. 201 (2001), which concluded that there was sufficient evidence of violence or fear when the defendant handed a threatening note to the store clerks implying the he had a gun, even though none of them saw a firearm in his possession.

Continuous Transaction

State v. Maness, 363 N.C. 261 (June 18, 2009). If the events constitute a continuous transaction, a defendant may be convicted of armed robbery when the dangerous weapon taken during the robbery also is the weapon used to perpetrate the offense. In this case, the defendant fought with a law enforcement officer and "emerged from the fight" with the officer's gun.

State v. Porter, __ N.C. App. __, 679 S.E.2d 167 (July 7, 2009). The defendant's use of violence was concomitant with and inseparable from the theft of the property from a store where the store manager confronted the defendant in the parking lot and attempted to retrieve the stolen property, at which point the defendant struck the store manager. This constituted a continuous transaction.

State v. Blue, __ N.C. App. __, __ S.E.2d __ (Oct. 5, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091717-1.pdf). There was sufficient evidence that the theft and the use of force were part of one continuous transaction when the defendant formed an intent to rob the victim, attacked her, and then took her money. The court rejected the defendant's argument that his rape of the victim constituted a break in the continuous transaction.

Evidence of Defendant As Perpetrator

State v. Williams, __ N.C. App. __, __ S.E.2d __ (Dec. 8, 2009). Distinguishing *State v. Holland*, 234 N.C. 354 (1951), and *State v. Murphy*, 225 N.C. 115 (1945), in which the victims were rendered unconscious by the defendants and regained consciousness bereft of their property, the court held that there was sufficient evidence that the defendant was the perpetrator of the robbery. Shoe prints placed the defendant at the scene, he admitted that he was with the victim on the morning in question, a receipt found at the scene bearing the defendant's name indicated that he was in the area at the time, a crack pipe

with the victim's DNA was found in the defendant's vehicle, the defendant matched the description given by the victim to investigators, a third party encountered the defendant at the scene not long after the events occurred, and the defendant told conflicting stories to investigators.

Multiple Convictions

State v. Moses, __ N.C. App. __, __ S.E.2d __ (July 20, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091468-1.pdf). A defendant may not be sentenced for both robbery and possession of stolen property taken during the robbery.

Presumption of Dangerous Weapon

State v. Ford, 194 N.C. App. 468 (Dec. 16, 2008). There was sufficient evidence to establish that the defendant used a firearm in an armed robbery case. The evidence showed that the defendant and an accomplice entered a store and that one of them pointed what appeared to be a silver handgun at the clerk. When later arresting the accomplice at a residence, an officer saw what appeared to be a silver gun on the ground. However, the item turned out to be some type of lighter that appeared to be a gun. Neither the state nor the defendant presented evidence at trial that the item found was the one used during the robbery. When a person perpetrates a robbery by brandishing an instrument that appears to be a firearm or other dangerous weapon, in the absence of any evidence to the contrary, the law will presume the instrument to be what the person's conduct represents it to be.

State v. Bettis, __ N.C. App. __, __ S.E. 2d __ (Sept. 7, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091345-1.pdf). Where witness testimony indicated that the defendant used a gun in an armed robbery and there was no evidence that the gun was inoperable, the State was not required to affirmatively demonstrate operability and the trial court was not required to instruct on common law robbery.

State v. Williamson, __ N.C. App. __, __ S.E. 2d __ (Sept. 7, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091475-1.pdf). The trial court did not err by failing to instruct the jury on the lesser included offense of common law robbery and by denying defendant's motion to dismiss the armed robbery charges. Because the defendant presented no evidence at trial to rebut the presumption that the firearm used in the robbery was functioning properly, he was not entitled to either an instruction on common law robbery or dismissal of the armed robbery charges.

Frauds

Identity Theft

State v. Barron, __ N.C. App. __, __ S.E.2d __ (Mar. 2, 2010). The defendant's active (and false) acknowledgement to an officer that the last four digits of his social security number were "2301" constituted the use of identifying information of another within the meaning of G.S. 14-113.20(a).

Exploitation of Elder Adult

State v. Forte, __ N.C. App. __, __ S.E. 2d __ (Sept. 7, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091591-1.pdf). The defendant was charged with offenses under the current (G.S. 14-112.2) and prior (G.S. 14-32.3) statutes proscribing the

crime of exploitation of an elder adult. (1) There was sufficient evidence that the victim was an elder adult. The victim was either 99 or 109 years old and had not driven a vehicle for years. Individuals helped him by paying his bills, driving him, bringing him meals and groceries, maintaining his vehicles, cashing his checks, helping him with personal hygiene, and making medical appointments for him. (2) There was sufficient evidence that the defendant was the victim's caretaker. The defendant assisted the victim by, among other things, performing odd jobs, running errands, serving as a driver, taking him shopping, purchasing items, doing projects on the victim's property, writing checks, visiting with him, taking him to file his will, making doctor appointments, and cutting his toenails. Additionally, the two had a close relationship, the defendant was frequently at the victim's residence, and was intricately involved in the victim's financial affairs. The court rejected the defendant's argument that these activities were not sufficient to transform the "friendly relationship" into that of caretaker and charge.

Forgery

State v. Guarascio, __ N.C. App. __, __ S.E.2d __ (July 20, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/090883-1.pdf). There was sufficient evidence of forgery under G.S. 14-119 when the evidence showed that the defendant signed a law enforcement officer's name on five North Carolina Uniform Citations.

Impersonating An Officer

State v. Guarascio, __ N.C. App. __, __ S.E.2d __ (July 20, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/090883-1.pdf). The trial court erred in its jury instructions for the crime of impersonating an officer under G.S. 14-277(b). The court noted that while G.S. 14-277(a) makes it a crime for an individual to make a false representation to another person that he is a sworn law enforcement officer, G.S. 14-277(b) makes it a crime for an individual, while falsely representing to another that he is a sworn law enforcement officer, to carry out any act in accordance with the authority granted to a law enforcement officer. Accordingly, the court concluded, a charge under G.S. 14-277(b) includes all of the elements of a charge under G.S. 14-277(a). The court further concluded that while NCPJI – Crim. 230.70 correctly charges an offense under G.S. 14-277(a), NCPJI – Criminal 230.75 "inadequately guides the trial court regarding the elements of [an offense under G.S. 14-277(b)] . . . by omitting from the instruction the ways enumerated in [G.S. 14-277(a)] and N.C.P.I. – Crim. 230-70 by which an individual may falsely represent to another that he is a sworn law enforcement officer." The trial court's instructions based on this pattern instruction were error, however the error was harmless.

Obtaining Property by False Pretenses

State v. Moore, __ N.C. App. __, __ S.E.2d __ (Feb. 15, 2011) http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC03NjQtMS5wZGY). There was sufficient evidence of obtaining property by false pretenses when the defendant received money for rental of a house that the defendant did not own or have the right to rent.

Burglary, Breaking or Entering, and Related Offenses

State v. Reavis, __ N.C. App. __, __ S.E.2d __ (Sept. 21, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091425-1.pdf). Although the victim's testimony tended to show that the crime did not occur at nighttime, there was sufficient evidence of this element where the victim called 911 at 5:42 am; she told police the attack occurred between 5:00 and 5:30

am; a crime scene technician testified that "it was still pretty dark" when she arrived, and she used a flashlight to take photographs; and the defendant stipulated to a record from the U.S. Naval Observatory showing that on the relevant date the sun did not rise until 6:44 am.

State v. Rawlinson, __ N.C. App. __, 679 S.E.2d 878 (Aug. 4, 2009). The defendant did not have implied consent to enter an office within a video store. Even if the defendant had implied consent to enter the office, his act of theft therein rendered that implied consent void ab initio.

State v. Chillo, __ N.C. App. __, __ S.E.2d __ (Dec. 21, 2010) (http://appellate.nccourts.org/opinions/?c=2&pdf=2010/10-622-1.pdf). The evidence was insufficient to establish that the defendant intended to commit a larceny in the vehicle. The evidence suggested that the defendant's only intent was to show another how to break glass using a spark plug and that the two left without taking anything once the vehicle's glass was broken.

State v. Clagon, __ N.C. App. __, __ S.E.2d __ (Oct. 5, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/100299-1.pdf). The evidence was sufficient to establish that the defendant intended to commit a felony assault inside the dwelling. Upon entering the residence, carrying an axe, the defendant asked where the victim was and upon locating her, assaulted her with the axe.

State v. Owens, __ N.C. App. __, __ S.E.2d __ (July 6, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091441-1.pdf). First-degree trespass is a lesser included offense of felony breaking or entering.

State v. Clark, __ N.C. App. __, __ S.E.2d __ (Dec. 7, 2010) (http://appellate.nccourts.org/opinions/?c=2&pdf=2010/10-235-1.pdf). An indictment properly alleges the fifth element of breaking and entering a motor vehicle—with intent to commit a felony or larceny therein—by alleging that the defendant intended to steal the same motor vehicle.

Trespass

In re S.M.S., ___ N.C. App. ___, 675 S.E.2d 44 (April 7, 2009). A male juvenile's entry into a school's female locker room with a door marked "Girl's Locker Room" was sufficient evidence to support the juvenile's adjudication of second-degree trespass. The sign was reasonably likely to give the juvenile notice that he was not authorized to go into the locker room.

State v. Owens, __ N.C. App. __, __ S.E.2d __ (July 6, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091441-1.pdf). First-degree trespass is a lesser included offense of felony breaking or entering.

Disorderly Conduct

Snyder v. Phelps, 562 U.S. __ (Mar. 2, 2010). The First Amendment shields members of a church from tort liability for picketing near a soldier's funeral. A jury held members of the Westboro Baptist Church liable for millions of dollars in damages for picketing near a soldier's funeral service. The picket signs reflected the church's view that the United States is overly tolerant of sin and that God kills American soldiers as punishment. The picketing occurred in Maryland. Although that state now has a criminal statute in effect restricting picketing at funerals, the statute was not in effect at the time the conduct at

issue arose. Noting that statute and that other jurisdictions have enacted similar provisions, the Court stated: "To the extent these laws are content neutral, they raise very different questions from the tort verdict at issue in this case. Maryland's law, however, was not in effect at the time of the events at issue here, so we have no occasion to consider how it might apply to facts such as those before us, or whether it or other similar regulations are constitutional." Slip Op. at 11. [**Author's note**: In North Carolina, G.S. 14-288.4(a)(8), criminalizes disorderly conduct at funerals, including military funerals. In a prosecution for conduct prohibited by that statute, the issue that the U.S. Supreme Court did not have occasion to address may be presented for decision].

Bombing, Terrorism, and Related Offenses

Manufacture, Possession, Etc. of a Machine Gun, Sawed-Off Shotgun, or Weapon of Mass Destruction

State v. Watterson, __ N.C. App. __, 679 S.E.2d 897 (Aug. 4, 2009). In a prosecution under G.S. 14-288.8, the State is not required to prove that the defendant knew of the physical characteristics of the weapon that made it unlawful.

Weapons Offenses

Constitutional Issues

McDonald v. City of Chicago, 561 U.S. __ (June 28, 2010) (http://www.supremecourt.gov/opinions/09pdf/08-1521.pdf). The Second Amendment right to keep and bear arms applies to the states. For a more detailed discussion of this case see the blog post, *McDonald's* Impact in North Carolina (online at: http://sogweb.sog.unc.edu/blogs/ncclaw/?p=1386).

Britt v. North Carolina, 363 N.C. 546 (Aug. 28, 2009). The court held that G.S. 14-415.1 (felon in possession), as applied to the plaintiff, was unconstitutional. In 1979, the plaintiff was convicted of possession of a controlled substance with intent to sell and deliver, a nonviolent crime that did not involve the use of a firearm. He completed his sentence in 1982 and in 1987, his civil rights were fully restored, including his right to possess a firearm. The then-existing felon in possession statute did not bar the plaintiff from possessing a firearm. In 2004, G.S. 14-415.1 was amended to extend the prohibition to all firearms by anyone convicted of a felony and to remove the exceptions for possession within the felon's own home and place of business. Thereafter, the plaintiff spoke with his local sheriff about whether he could lawfully possess a firearm and divested himself of all firearms, including sporting rifles and shotguns that he used for game hunting on his land. Plaintiff, who had never been charged with another crime, filed a civil action against the State, alleging that G.S. 14-415.1 violated his constitutional rights. The North Carolina Supreme Court held that as applied to him, G.S. 14-415.1, which contains no exceptions, violated the plaintiff's right to keep and bear arms protected by Article I, Section 30 of the North Carolina Constitution. Specifically, the court held that as applied, G.S. 14-451.1 was not a reasonable regulation. The court held: "Plaintiff, through his uncontested lifelong nonviolence towards other citizens, his thirty years of law-abiding conduct since his crime, his seventeen years of responsible, lawful firearm possession between 1987 and 2004, and his assiduous and proactive compliance with the 2004 amendment, has affirmatively demonstrated that he is not among the class of citizens who pose a threat to public peace and safety." It concluded: "[I]t is unreasonable to assert that a nonviolent citizen who has responsibly, safely, and legally owned and used firearms for seventeen years is in reality so dangerous that any possession at all of a firearm would pose a significant threat to public safety."

State v. Whitaker, __ N.C. __, __ S.E.2d __ (Oct. 8, 2010)

(http://www.aoc.state.nc.us/www/public/sc/opinions/2010/pdf/21A10-1.pdf). Affirming, *State v. Whitaker*, __ N.C. App. __, 689 S.E.2d 395 (Dec. 8, 2009), the court held that G.S. 14-415.1, the felon in possession statute, was not an impermissible ex post facto law or bill of attainder.

State v. Sullivan, __ N.C. App. __, 691 S.E.2d 417 (Feb. 16, 2010). The court rejected the defendant's argument that as applied to him, G.S. 14-269.4 (carrying weapon in a courthouse) violated his right to bear arms under Article I, Section 30 of the North Carolina Constitution. The defendant had argued that the General Assembly had no authority to enact any legislation regulating or infringing on his right to bear arms. The court rejected this argument, noting that the state may regulate the right to bear arms, within proscribed limits. The court also held that the trial judge did not err by refusing to instruct the jury that it must consider whether the defendant knowingly or willfully violated the statute. The court concluded that an offender's intent is not an element of the offense.

State v. Buddington, __ N.C. App. __, __ S.E.2d __ (Mar. 1, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0yODYtMS5wZGY). The trial court erred by granting the defendant's motion to dismiss an indictment charging felon in possession of a firearm on grounds that the statute was unconstitutional as applied to him. The defendant's motion was unverified, trial court heard no evidence, and there were no clear stipulations to the facts. To prevail in a motion to dismiss on an as applied challenge to the statute, the defense must present evidence that would allow the trial court to make findings of fact regarding the type of felony convictions and whether they involved violence or threat of violence; the remoteness of the convictions; the felon's history of law abiding conduct since the crime; the felon's history of responsible, lawful firearm possession during a period when possession was not prohibited; and the felon's assiduous and proactive compliance with amendments to the statute.

Felon in Possession
Constitutionality

Britt v. North Carolina, ___ N.C. ___, ___ S.E.2d ___ (Aug. 28, 2009). The court held that G.S. 14-415.1 (felon in possession), as applied to the plaintiff, was unconstitutional. In 1979, the plaintiff was convicted of possession of a controlled substance with intent to sell and deliver, a nonviolent crime that did not involve the use of a firearm. He completed his sentence in 1982 and in 1987, his civil rights were fully restored, including his right to possess a firearm. The then-existing felon in possession statute did not bar the plaintiff from possessing a firearm. In 2004, G.S. 14-415.1 was amended to extend the prohibition to all firearms by anyone convicted of a felony and to remove the exceptions for possession within the felon's own home and place of business. Thereafter, the plaintiff spoke with his local sheriff about whether he could lawfully possess a firearm and divested himself of all firearms, including sporting rifles and shotguns that he used for game hunting on his land. Plaintiff, who had never been charged with another crime, filed a civil action against the State, alleging that G.S. 14-415.1 violated his constitutional rights. The North Carolina Supreme Court held that as applied to him, G.S. 14-415.1, which contains no exceptions, violated the plaintiff's right to keep and bear arms protected by Article I, Section 30 of the North Carolina Constitution. Specifically, the court held that as applied, G.S. 14-451.1 was not a reasonable regulation. The court held: "Plaintiff, through his uncontested lifelong nonviolence towards other citizens, his thirty years of law-abiding conduct since his crime, his seventeen years of responsible, lawful firearm possession between 1987 and 2004, and his assiduous and proactive compliance with the 2004 amendment, has affirmatively demonstrated that he is not among the class of citizens who pose a threat to public peace and safety." It concluded: "[I]t is unreasonable to assert that a nonviolent citizen who has responsibly, safely, and legally owned and used firearms for seventeen years is in reality so

dangerous that any possession at all of a firearm would pose a significant threat to public safety."

State v. Whitaker, __ N.C. __, __ S.E.2d __ (Oct. 8, 2010) (http://www.aoc.state.nc.us/www/public/sc/opinions/2010/pdf/21A10-1.pdf). Affirming, *State v. Whitaker*, __ N.C. App. __, 689 S.E.2d 395 (Dec. 8, 2009), the court held that G.S. 14-415.1, the felon in possession statute, was not an impermissible ex post facto law or bill of attainder.

Sufficiency of Evidence

State v. McNeill, __ N.C. App. __, __ S.E.2d __ (Mar. 1, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC00NTYtMS5wZGY). There was sufficient evidence that the defendant constructively possessed the firearm. The defendant was identified as having broken into a house from which a gun was stolen. The gun was found in a clothes hamper at the home of the defendant's ex-girlfriend's mother. The defendant had arrived at the home shortly after the breaking and entering, entering through the back door and walking past the hamper. When the defendant was told that police were "around the house," he fled to the front porch, where officers found him. A vehicle matching the description of the getaway car was parked outside.

State v. Fuller, ___ N.C. App. ___, 674 S.E.2d 824 (April 21, 2009). There was sufficient evidence of constructive possession to sustain conviction for possession of a firearm by a felon.

State v. Taylor, __ N.C. App. __, __ S.E.2d __ (April 20, 2010). There was sufficient evidence of constructive possession. When a probation officer went to the defendant's cabin, the defendant ran away; a frisk of the defendant revealed spent .45 caliber shells that smelled like they had been recently fired; the defendant told the officer that he had been shooting and showed the officer boxes of ammunition close to the cabin, of the same type found during the frisk; a search revealed a .45 caliber handgun in the undergrowth close to the cabin, near where the defendant had run.

State v. Mewborn, __ N.C. App. __, 684 S.E.2d. 535 (Nov. 3, 2009). The evidence was sufficient to establish possession supporting convictions of felon in possession and carrying concealed where the defendant ran through a field in a high traffic area, appeared to have something heavy in his back pocket and to make throwing motions from that pocket, and a clean dry gun was found on the wet grass.

Effect of Defendant's Stipulation to Prior Conviction

State v. Fortney, __ N.C. App. __, __ S.E.2d __ (Jan. 5, 2010). Following *State v. Little*, 191 N.C. App. 655 (2008), and *State v. Jackson*, 139 N.C. App. 721 (2000), and holding that the trial court did not abuse its discretion by allowing the State to introduce evidence of the defendant's prior conviction in a felon in possession case where the defendant had offered to stipulate to the prior felony. The prior conviction, first-degree rape, was not substantially similar to the charged offenses so as to create a danger that the jury might generalize the defendant's earlier bad act into a bad character and raise the odds that he perpetrated the charged offenses of drug possession, possession of a firearm by a felon, and carrying a concealed weapon.

Multiple Convictions

State v. Wiggins, __ N.C. App. __, __ S.E.2d __ (Mar. 1, 2011)

(http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC00NTAtMS5wZGY). The felon in possession statute does not authorize multiple convictions and sentences for possession of a firearm by a convicted felon predicated on evidence that the defendant simultaneously obtained and possessed one or more firearms, which he or she used during the commission of multiple substantive criminal offenses during the course of the same transaction or series of transactions. The court clarified that the extent to which a defendant is guilty of single or multiple offenses hinges upon the extent to which the weapons in question were acquired and possessed at different times. In the case at hand, the weapons came into the defendant's possession simultaneously and were used over a two-hour period within a relatively limited part of town in connection with the commission of a series of similar offenses. Based on these facts, only one felon in possession conviction could stand.

Carrying Concealed

State v. Mewborn, __ N.C. App. __, 684 S.E.2d. 535 (Nov. 3, 2009). The evidence was sufficient to establish possession supporting convictions of felon in possession and carrying concealed where the defendant ran through a field in a high traffic area, appeared to have something heavy in his back pocket and to make throwing motions from that pocket, and a clean dry gun was found on the wet grass.

Possession of Deadly Weapon in Courthouse

State v. Sullivan, __ N.C. App. __, __ S.E.2d __ (Feb. 16, 2010). The court rejected the defendant's argument that as applied to him, G.S. 14-269.4 (carrying weapon in a courthouse) violated his right to bear arms under Article I, Section 30 of the North Carolina Constitution. The defendant had argued that the General Assembly had no authority to enact any legislation regulating or infringing on his right to bear arms. The court rejected this argument, noting that the state may regulate the right to bear arms, within proscribed limits. The court also held that the trial judge did not err by refusing to instruct the jury that it must consider whether the defendant knowingly or willfully violated the statute. The court concluded that an offender's intent is not an element of the offense.

Possession of Weapons on School Grounds

In Re J.C., __ N.C. App. __, __ S.E. 2d __ (July 6, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/100031-1.pdf). The evidence was sufficient to support the court's adjudication of a juvenile as delinquent for possession of a weapon on school grounds in violation of G.S. 14-269.2(d). The evidence showed that while on school grounds the juvenile possessed a 3/8-inch thick steel bar forming a C-shaped "link" about 3 inches long and 1½ inches wide. The link closed by tightening a ½-inch thick bolt and the object weighed at least 1 pound. The juvenile could slide several fingers through the link so that 3-4 inches of the 3/8-inch thick bar could be held securely across his knuckles and used as a weapon.

Obscenity and Related Offenses

State v. Anderson, 362 N.C. 90 (Dec. 16, 2008). Double jeopardy did not bar conviction and punishment for both second-degree and third-degree sexual exploitation offenses where the third-degree charges were based on the defendant's possession of the images of minors, and the second-degree charges were based on the defendant's receipt of those images.

State v. Ligon, __ N.C. App. __, __ S.E.2d __ (Aug. 17, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/090747-1.pdf). The evidence was insufficient to sustain a conviction for first-degree sexual exploitation of a minor. The State's evidence consisted of photographs of the five-year-old victim but did not depict any sexual activity. The court rejected the State's arguments that a picture depicting the child pulling up the leg of her shorts while her fingers were in her pubic area depicted masturbation; the court concluded that the photograph merely showed her hand in proximity to her crotch. It also rejected the State's argument that this picture, along with other evidence supported an inference that the defendant coerced or encouraged the child to touch herself for the purpose of producing a photograph depicting masturbation, concluding that no statutorily prohibited sexual activity took place. Finally, it rejected the State's argument that a photograph of the defendant pulling aside the child's shorts depicted prohibited touching constituting sexual activity on grounds that the picture depicted the defendant touching the child's shorts not her body.

State v. Martin, 195 N.C. App. 43 (Jan. 20, 2009). No double jeopardy violation when the defendant was convicted and punished for indecent liberties and using a minor in obscenity based on the same photograph depicting the child and defendant. Each offense has at least one element that is not included in the other offense.

Obstruction of Justice and Related Offenses

State v. Richardson, __ N.C. App. __, __ S.E.2d __ (Feb. 16, 2010). There was insufficient evidence of resisting an officer. The State argued that the defendant resisted by exiting a home through the back door after officers announced their presence with a search warrant. "We find no authority for the State's presumption that a person whose property is not the subject of a search warrant may not peacefully leave the premises after the police knock and announce if the police have not asked him to stay."

State v. Goble, __ N.C. App. __, __ S.E.2d __ (July 6, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091192-1.pdf). The trial court did not err by denying the defendant's motion to dismiss a charge of felony failure to appear. To survive a motion to dismiss a charge of felonious failure to appear, the State must present substantial evidence that (1) the defendant was released on bail pursuant to G.S. Article 26 in connection with a felony charge or, pursuant to section G.S. 15A-536, after conviction in the superior court; (2) the defendant was required to appear before a court or judicial official; (3) the defendant did not appear as required; and (4) the defendant's failure to appear was willful. In this case, the defendant signed an Appearance Bond for Pretrial Release which included the condition that the defendant appear in the action whenever required. The defendant subsequently failed to appear on the second day of trial. The court further held that the defendant, who failed to appear on felony charges, was not entitled to an instruction on misdemeanor failure to appear even though the felony charges resulted in misdemeanor convictions.

State v. Wright, __ N.C. App. __, __ S.E.2d __ (Aug. 3, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/090674-1.pdf). The trial court did not err by denying the defendant's motion to dismiss a charge of felony obstruction of justice. The State argued that the defendant knowingly filed with the State Board of Elections (Board) campaign finance reports with the intent of misleading the Board and the voting public about the sources and uses of his campaign contributions. The defendant was a member of the House of Representatives and a candidate for re-election. He was required to file regular campaign finance disclosure reports with the Board to provide the Board and the public with accurate information about his compliance with campaign finance laws, the sources of his contributions, and the nature of his expenditures. His reports were made under oath or

penalty of perjury. The defendant's sworn false reports deliberately hindered the ability of the Board and the public to investigate and uncover information to which they were entitled by law: whether defendant was complying with campaign finance laws, the sources of his contributions, and the nature of his expenditures. Further, his false reports concealed illegal campaign activity from public exposure and possible investigation. The lack of any pending judicial proceeding or a specific investigation into whether the defendant had violated campaign finance laws was immaterial. The court also rejected the defendant's argument that the trial court's jury instructions deviated from the indictment. The defendant argued that the indictment alleged that he obstructed public access to the information but that the jury instructions focused on obstructing the Board's access to information. The court found this to be a distinction without a difference.

Gambling

McCracken v. Perdue, __ N.C. App. __, __ S.E.2d __ (December 22, 2009). Reversing the trial court's ruling that federal Indian gaming law prohibits the State from granting the Eastern Band of Cherokee Indians of North Carolina ("the Tribe") exclusive rights to conduct certain gaming on tribal land while prohibiting such gaming, in G.S. 14-306.1A, throughout the rest of the State. The court held that state law providing the Tribe with exclusive gaming rights does not violate federal Indian gaming law.

Drug Offenses

Maintaining a Dwelling

State v. Fuller, ___ N.C. App. ___, 674 S.E.2d 824 (April 21, 2009). There was insufficient evidence to establish that the defendant "maintained" the dwelling. Evidence showed only that the defendant had discussed, with the home's actual tenant, taking over rent payments but never reached an agreement to do so; a car, similar to defendant's was normally parked at the residence; and the defendant's shoes and some of his personal papers were found there.

State v. Craven, __ N.C. App. __, __ S.E.2d __ (July 20, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091138-1.pdf). The trial court did not err by denying the defendant's motion to dismiss a charge of maintaining a vehicle where the evidence was sufficient to establish that the defendant had possession of cocaine in his mother's vehicle over a duration of time and/or on more than one occasion.

State v. Hudson, __ N.C. App. __, __ S.E.2d __ (Aug. 17, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091421-1.pdf). The evidence was sufficient to support a conviction for maintaining a vehicle. Drugs were found in a vehicle being transported by a car carrier driven by the defendant. The evidence showed that the defendant kept or maintained the vehicle where the bill of lading showed that the defendant picked it up and maintained possession as the authorized bailee continuously and without variation for two days. Having stopped to rest overnight at least one time during the time period, the defendant retained control and disposition over the vehicle and resumed his planned route with the car carrier.

Possession

Knowing Possession

State v. Nunez, __ N.C. App. __, __ S.E.2d __ (May 18, 2010). The evidence was sufficient to establish that the defendant knowingly possessed and transported the controlled substance. The evidence showed

that (1) the packages involved in the controlled delivery leading to the charges at issue were addressed to "Holly Wright;" although a person named Holly Wainwright had lived in the apartment with the defendant, she had moved out; (2) the defendant immediately accepted possession of the packages, dragged them into the apartment, and never mentioned to the delivery person that Wainwright no longer lived there; (3) Wainwright testified that she had not ordered the packages; (4) the defendant told a neighbor that another person (Smallwood) had ordered the packages for her; (5) the defendant did not open the packages, but immediately called Smallwood to tell him that they had arrived; (6) after getting off the phone with Smallwood, the defendant acted like she was in a hurry to leave; and (7) Smallwood came to the apartment within thirty-five minutes of the packages being delivered.

State v. Robledo, ___ N.C. App. ___, 668 S.E.2d 91 (Nov. 4, 2008). There was sufficient evidence to show that the defendant knowingly possessed marijuana in a case where the defendant was convicted of trafficking in marijuana and conspiracy to traffic by possession. Defendant signed for and collected a UPS package containing 44.1 pounds of marijuana. About a half hour later, the defendant helped load a second UPS package containing 43.8 pounds of marijuana into the back seat of a car. Both boxes were found when police searched the car, driven by the defendant. The defendant had once lived in the same residence as his niece, the person to whom the packages were addressed, and knew that his niece frequently got packages like these. Also, the defendant expected to earn between $50 and $200 for simply taking the package from UPS to his niece. Finally the address on one of the boxes did not exist.

Constructive Possession

State v. Miller, 363 N.C. 96 (Mar. 20, 2009). There was sufficient evidence that the defendant constructively possessed cocaine. Two factors frequently considered in analyzing constructive possession are the defendant's proximity to the drugs and indicia of the defendant's control over the place where the drugs are found. The court found the following evidence sufficient to support constructive possession: Officers found the defendant in a bedroom of a home where two of his children lived with their mother. When first seen, the defendant was sitting on the same end of the bed where the cocaine was recovered. Once the defendant slid to the floor, he was within reach of the package of cocaine recovered from the floor behind the bedroom door. The defendant's birth certificate and state-issued identification card were found on top of a television stand in that bedroom. The only other person in the room was not near any of the cocaine. Even though the defendant did not exclusively possess the premises, these incriminating circumstances permitted a reasonable inference that the defendant had the intent and capability to exercise control and dominion over cocaine in that room.

State v. Biber, __ N.C. App. __, __ S.E. 2d __ (Sept. 7, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/090331-1.pdf). Over a dissent, the court held that there was insufficient evidence that the defendant had constructive possession of the substance at issue, found in a motel room's bathroom light fixture while the defendant and two others were present. Ms. Hensley, who had rented the room with an unidentified friend, twice complained that people were using drugs in her room and that she did not want them there. The court found no competent evidence that the defendant intended and had the capability to maintain control and dominion over the room or the substance itself. In this regard it noted that because Ms. Hensley did not want the defendant in the room, his control over it was minimal. It also noted that there was no way to determine how long the defendant had been in the room before the officers arrived. Also, there was insufficient evidence of the defendant's proximity to the substance given that no evidence showed that he ever entered the bathroom. Rather, the evidence showed that when the officers entered the room, one of the other people present ran into the bathroom, refused to come out, and engaged in activity consistent with the destruction or concealing of

contraband. [Note: Although the case was before the court on an appeal from an adverse ruling on a suppression motion, the court reached the issue of sufficiency of the evidence].

State v. Ferguson, __ N.C. App. __, __ S.E.2d __ (June 15, 2010) (online at: http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091048-1.pdf). There was insufficient evidence that the defendant had constructive possession of bags of marijuana found in a vehicle. An officer found a vehicle that had failed to stop on his command in the middle of a nearby street with the engine running. The driver and passengers had fled. Officers searched the vehicle and found, underneath the front passenger seat, a large bag containing two smaller bags of marijuana; in the glove box, a small bag of marijuana; and in the defendant's handbag, a burned marijuana cigarette. The defendant, who had been sitting in the back seat, did not own the vehicle. There was no evidence that the defendant behaved suspiciously or failed to cooperate with officers after being taken into custody. There was no evidence that the defendant made any incriminating admissions, had a relationship with the vehicle's owner, had a history of selling drugs, or possessed an unusually large amount of cash.

State v. Terry, __ N.C. App. __, __ S.E.2d __ (Oct. 5, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/100009-1.pdf). There was sufficient evidence of constructive possession of drugs found in a house. The defendant lived at and owned a possessory interest in the house; he shared the master bedroom where the majority of the marijuana and drug paraphernalia were found; he was in the living space adjoining the master bedroom when the search warrant was executed; there were drugs in plain view in the back bedroom; he demonstrated actual control over the premises in demanding the search warrant; and in a conversation with his wife after their arrest, the two questioned each other about how the police found out about the drugs and the identity of the confidential informant who said that the contraband belonged to the defendant).

State v. Robledo, 193 N.C. App. 521 (Nov. 4, 2008). There was sufficient evidence to show that the defendant knowingly possessed marijuana in a case where the defendant was convicted of trafficking in marijuana and conspiracy to traffic by possession. Defendant signed for and collected a UPS package containing 44.1 pounds of marijuana. About a half hour later, the defendant helped load a second UPS package containing 43.8 pounds of marijuana into the back seat of a car. Both boxes were found when police searched the car, driven by the defendant. The defendant had once lived in the same residence as his niece, the person to whom the packages were addressed, and knew that his niece frequently got packages like these. Also, the defendant expected to earn between $50 and $200 for simply taking the package from UPS to his niece. Finally the address on one of the boxes did not exist.

State v. Hough, __ N.C. App. __, __ S.E.2d __ (Mar. 2, 2010). There was sufficient evidence of constructive possession even though the defendant did not have exclusive control of the residence where the controlled substances were found. The defendant admitted that he resided there, officers found luggage, mail, and a cellular telephone connected to the defendant at the residence, the defendant's car was in the driveway, and when the officers arrived, no one else was present. Additionally, the defendant was found pushing a trash can that contained the bulk of the marijuana seized, acted suspiciously when approached by the officers, and ran when an officer attempted to lift the lid.

State v. Fuller, 196 N.C. App. 412 (April 21, 2009). There was sufficient evidence of constructive possession of cocaine for purposes of charges of trafficking by possession, possession with intent, and possession of paraphernalia.

State v. Fortney, __ N.C. App. __, __ S.E.2d __ (Jan. 5, 2010). There was sufficient evidence that the

defendant constructively possessed controlled substances found in a motorcycle carry bag even though the defendant did not own the motorcycle.

State v. Barron, __ N.C. App. __, __ S.E.2d __ (Mar. 2, 2010). There was insufficient evidence that the defendant constructively possessed the controlled substances at issue. The defendant did not have exclusive possession of the premises where the drugs were found; evidence showed only that the defendant was present, with others, in the room where the drugs were found.

State v. Richardson, __ N.C. App. __, __ S.E.2d __ (Feb. 16, 2010). There was insufficient evidence that the defendant constructively possessed cocaine and drug paraphernalia. When officers announced their presence at a residence to be searched pursuant to a warrant, the defendant exited through a back door and was detained on the ground; crack cocaine was found on the ground near the defendant and drug paraphernalia was found in the house. As to the cocaine, the defendant did not have exclusive control of the house, which was rented by a third party, and there was insufficient evidence of other incriminating circumstances. The defendant did not rent the premises, no documents bearing his name were found there, none of his family lived there, and there was no evidence that he slept or lived at the home. The defendant's connection to the paraphernalia was even weaker where no evidence connected the defendant to the paraphernalia or to the room where it was found.

State v. Hudson, __ N.C. App. __, __ S.E.2d __ (Aug. 17, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091421-1.pdf). There was sufficient evidence of constructive possession to sustain a conviction for possession with the intent to sell and deliver marijuana. The drugs were found in a vehicle being transported by a car carrier driven by the defendant. The court determined that based on the defendant's power and control of the vehicle in which the drugs were found, an inference arose that he had knowledge their presence. The vehicle had been under the defendant's exclusive control since it was loaded onto his car carrier two days earlier and the defendant had keys to every car on the carrier. Although the defendant's possession of the vehicle was not exclusive because he did not own it, other evidence created an inference of his knowledge. Specifically, he acted suspiciously when stopped (held his hands up, nervous, sweating), he turned over a suspect bill of lading, and he had fully functional keys for all cars on the carrier except the one at issue for which he gave the officers a "fob" key which prevented its user from opening the trunk housing the marijuana.

Possession with Intent

State v. Wilkins, __ N.C. App. __, __ S.E.2d __ (Dec. 21, 2010) (http://appellate.nccourts.org/opinions/?c=2&pdf=2010/10-634-1.pdf). The trial court erred by denying the defendant's motion to dismiss a charge of possession with intent to sell or deliver. Evidence that an officer found 1.89 grams of marijuana on the defendant separated into three smaller packages, worth about $30, and that the defendant was carrying $1,264.00 in cash was insufficient to establish the requisite intent.

State v. Jones, __ N.C. App. __, __ S.E.2d __ (Dec. 21, 2010) (http://appellate.nccourts.org/opinions/?c=2&pdf=2010/10-475-1.pdf). An officer's testimony that a substance's packaging was indicative of it being held for sale was sufficient evidence of an intent to sell to survive a motion to dismiss.

Multiple Convictions

State v. Parlee, __ N.C. App. __, __ S.E.2d __ (Jan. 4, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=2011/10-497-1.pdf). For purposes of double jeopardy, a second-degree murder conviction based on unlawful distribution of and ingestion of a controlled substance was not the same offense as sale or delivery of a controlled substance to a juvenile or possession with intent to sell or deliver a controlled substance.

State v. Springs, __ N.C. App. __, __ S.E.2d __ (Oct. 6, 2009). A defendant may be convicted and punished for both felony possession of marijuana and felony possession of marijuana with intent to sell or deliver.

State v. Hall, __ N.C. App. __, __ S.E.2d __ (May 4, 2010). A defendant may be convicted and sentenced for both possession of ecstasy and possession of ketamine when both of the controlled substances are contained in a single pill.

Manufacturing

State v. Hinson, __ N.C. App. __, __ S.E.2d __ (April 6, 2010), *reversed on other grounds* __ N.C. __, __ S.E.2d __ (Oct. 8, 2010). The offense of manufacturing a controlled substance does not require an intent to distribute unless the activity constituting manufacture is preparing or compounding. An indictment charging the defendant with manufacturing methamphetamine "by chemically combining and synthesizing precursor chemicals" does not charge compounding but rather charges chemically synthesizing and thus the State was not required to prove an intent to distribute.

Sale or Delivery to Juvenile
Multiple Convictions

State v. Parlee, __ N.C. App. __, __ S.E.2d __ (Jan. 4, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=2011/10-497-1.pdf). For purposes of double jeopardy, a second-degree murder conviction based on unlawful distribution of and ingestion of a controlled substance was not the same offense as sale or delivery of a controlled substance to a juvenile or possession with intent to sell or deliver a controlled substance.

Counterfeit Controlled Substance Offenses

State v. Bivens, __ N.C. App. __, __ S.E.2d __ (June 1, 2010) (available at: http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/090483-1.pdf). For purposes of the counterfeit controlled substance offenses, a counterfeit controlled substance is defined, in part, by G.S. 90-87(6) to include any substance intentionally represented as a controlled substance. The statute further provides that "[i]t is evidence that the substance has been intentionally misrepresented as a controlled substance" if certain factors are established. The court rejected the defendant's argument that for a controlled substance to be considered intentionally misrepresented, all of the factors listed in the statute must be proved, concluding that the factors are evidence that the substance has been intentionally misrepresented as a controlled substance, not elements of the crime. The court also concluded that the evidence was sufficient to establish that the defendant misrepresented the substance at issue—calcium carbonate—as crack cocaine where the defendant approached a vehicle, asked its occupants what they were looking for, departed to fill their request for "a twenty," and handed the occupants a little baggie containing a white rock-like substance. Finally, the court held that the statute does not require the State to prove that the defendant had specific knowledge that the substance was counterfeit.

State v. Mobley, __ N.C. App. __, __ S.E.2d __ (Aug. 3, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/090975-1.pdf). There was sufficient evidence to support the defendant's conviction of conspiracy to sell a counterfeit controlled substance. The court concluded that G.S. 90-87(6) (definition of counterfeit controlled substance) requires only that the substance be intentionally represented as a controlled substance, not that a defendant have specific knowledge that it is counterfeit. There was sufficient evidence that the defendant intentionally represented the substance as a controlled substance in this case: when an undercover officer asked for a "40" ($40 worth of crack cocaine), an accomplice produced a hard, white substance packaged in two small corner baggies, which the officers believed to be crack cocaine. There also was substantial evidence that the defendant conspired with the accomplice: the defendant initiated contact with the officers, directed them where to park, spoke briefly with the accomplice who emerged from a building with the substance, and the defendant brokered the deal.

Trafficking

State v. Conway, ___ N.C. App. ___, 669 S.E.2d 40 (Dec. 2, 2008). The evidence was insufficient to support the defendant's methamphetamine trafficking convictions because G.S. 90-95(h)(3b) requires the state to prove the actual weight of the methamphetamine in a mixture. The defendant was convicted of trafficking by possession and manufacture of 400 grams or more methamphetamine. The state's evidence consisted of 530 grams of a liquid that contained a detectable amount of methamphetamine. The exact amount of methamphetamine was not determined. The court noted that the trafficking statutes for methaqualone, cocaine, heroin, LSD, and MDA/MDMA specifically contain the clause "or mixture containing such substance," whereas G.S. 90-95(h)(3b) for methamphetamine and as amphetamine does not contain that clause. Note: The court did not discuss whether the use of the term "mixture" at the end of the introductory paragraph in G.S. 90-95(h)(3b) is relevant in determining the legislature's intent and outweighs what may have been the inadvertent omission of the clause "or mixture containing such substance" earlier in the paragraph.

State v. Beam, __ N.C. App. __, __ S.E.2d __ (Jan. 5, 2010). The term "deliver," used in the trafficking statutes, is defined by G.S. 90-87(7) to "mean[] the actual constructive, or attempted transfer from one person to another of a controlled substance, whether or not there is an agency relationship." Thus, an actual delivery is not required. In a prosecution under G.S. 90-95, the defendant bears the burden of establishing that an exemption applies, such as possession pursuant to a valid prescription. In this case, the trial court properly denied the defendant's motion to dismiss and properly submitted to the jury the issue of whether the defendant was authorized to possess the controlled substances.

Motor Vehicle Offenses

Impaired Driving

State v. Davis, __ N.C. App. __, __ S.E.2d __ (Nov. 16, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091537-1.pdf). In a case in which there was no admissible evidence as to the defendant's blood alcohol level, the court found that the evidence was insufficient to show that the defendant drove while impaired, even though it showed that she had been drinking before driving. The accident at issue occurred when the defendant collided with someone or something extending over the double yellow line and into her lane of traffic. Under these circumstances, the fact of the collision itself did not establish faulty or irregular driving indicating impairment.

State v. Armstrong, __ N.C. App. __, __ S.E.2d __ (April 20, 2010). A defendant may be convicted for both second-degree murder (for which the evidence of malice was the fact that the defendant drove while impaired and had prior convictions for impaired driving) and impaired driving.

State v. Davis, __ N.C. App. __, __ S.E.2d __ (Aug. 4, 2009). A defendant may not be sentenced for both felony death by vehicle and impaired driving arising out of the same incident. However, a defendant may be sentenced for both involuntary manslaughter and impaired driving.

Felony Death & Serious Injury by Vehicle

State v. Davis, __ N.C. __, __ S.E.2d __ (Aug. 27, 2010) (http://www.aoc.state.nc.us/www/public/sc/opinions/2010/pdf/320PA09-1.pdf). The trial court erred by imposing punishment for felony death by vehicle and felony serious injury by vehicle when the defendant also was sentenced for second-degree murder and assault with a deadly weapon inflicting serious injury based on the same conduct. G.S. 20-141.4(a) prescribes the crimes of felony and misdemeanor death by vehicle, felony serious injury by vehicle, aggravated felony serious injury by vehicle, aggravated felony death by vehicle, and repeat felony death by vehicle. G.S. 20-141.4(b), which sets out the punishments for these offenses, begins with the language: "Unless the conduct is covered under some other provision of law providing greater punishment, the following classifications apply to the offenses set forth in this section[.]" Second-degree murder and assault with a deadly weapon inflicting serious injury provide greater punishment than felony death by vehicle and felony serious injury by vehicle. The statute thus prohibited the trial court from imposing punishment for felony death by vehicle and felony serious injury by vehicle in this case.

State v. Davis, __ N.C. App. __, __ S.E.2d __ (Aug. 4, 2009). A defendant may not be sentenced for both felony death by vehicle and impaired driving arising out of the same incident. However, a defendant may be sentenced for both involuntary manslaughter and impaired driving.

Speeding to Elude

State v. Dewalt, __ N.C. App. __, __ S.E.2d __ (Jan. 4, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=2011/10-559-1.pdf). The trial court did not err by instructing the jury that in order to constitute an aggravating factor elevating speeding to elude arrest to a felony, driving while license revoked must occur on a highway. Although the offense of driving while license revoked under G.S. 20-28 requires that the defendant drive on a highway, driving while license revoked can aggravate speeding to elude even if it occurs on a public vehicular area. While the felony speeding to elude arrest statute lists several other aggravating factors with express reference to the motor vehicle statutes proscribing those crimes (e.g., passing a stopped school bus as proscribed by G.S. 20-217), the aggravating factor of driving while license revoked does not reference G.S. 20-28.

Animal Cruelty

State v. Mauer, __ N.C. App. __, __ S.E.2d __ (Feb. 16, 2010). The evidence was sufficient to establish misdemeanor cruelty to animals under G.S. 14-360(a) on grounds of torment. The odor of cat feces and ammonia could be smelled outside of the property and prevented officers from entering without ventilating and using a breathing apparatus; while the house was ventilated, residents from two blocks away were drawn outside because of the smell; fecal matter and debris blocked the front door; all doors and windows were closed; old and new feces and urine covered everything, including the cats; the cats

left marks on the walls, doors and windows, trying to get out of the house.

Defenses

Accident

State v. Yarborough, __ N.C. __, __ S.E.2d __ (July 7, 2009) (http://www.aoc.state.nc.us/www/public/coa/opinions/2009/pdf/081185-1.pdf). The trial court did not err by failing to instruct on accident. The defense is unavailable when the defendant was engaged in misconduct at the time of the killing. Here, the defendant was engaged in misconduct—he broke into a home with the intent to commit robbery and the killing occurred during a struggle over the defendant's gun. The court also rejected the defendant's argument that because he abandoned his plan to commit the robbery, his right to the defense of accident was "restored." Even assuming that the defendant abandoned his plan, that fact would not break the sequence of events giving rise to the shooting.

Duress

State v. Sanders, __ N.C. App. __, __ S.E.2d __ (Jan. 5, 2010). The trial court did not err in denying the defendant's request for a jury instruction on duress. The defendant voluntarily joined with his accomplices to commit an armed robbery, he did not object or attempt to exit the vehicle as an accomplice forced the victims into the car, and the defendant took jewelry from one victim while an accomplice pointed a gun at her. There was no evidence that any coercive measures were directed toward the defendant prior to the crimes being committed. Any threats made to the defendant occurred after the crimes were committed.

Entrapment

State v. Morse, ___ N.C. App. ___, 671 S.E.2d 538 (Jan. 6, 2009). The trial judge did not err by refusing to instruct on entrapment. The defendant was convicted of soliciting a child by computer with intent to commit an unlawful sex act. The "child" was a law enforcement officer pretending to be a 14 year old in an adults-only Yahoo chat room. The court concluded that there was no credible evidence that the criminal design originated in the minds of the government officials, rather than defendant, such that the crime was the product of the creative activity of the government. Instead, it stated, the evidence indicates that undercover deputies merely provided the opportunity for the defendant and, when presented with that opportunity, the defendant pursued it with little hesitance.

State v. Beam, __ N.C. App. __, __ S.E.2d __ (Jan. 5, 2010). In a drug case, the evidence failed to establish that the defendant was entitled to the entrapment defense as a matter of law. Thus, the trial court did not err by denying the defendant's motion to dismiss on grounds of entrapment and submitting the issue to the jury.

Self-Defense

State v. Moore, 363 N.C. 793 (Jan. 29, 2010). The trial court erred by refusing to instruct the jury on self-defense and defense of a family member. Viewed in the light most favorable to the defendant, the evidence showed that the defendant was at his produce stand; the victim was a 16-year-old male, approximately 6 feet tall and 180 pounds; the victim had a physical altercation with the defendant's wife as he attempted to rob the cash box; the victim struck at the defendant's wife and violently pulled at the cash box; the defendant's wife, was "scared to death" and cried out for her husband; when the defendant

ordered the victim to "back off", the victim did so, but placed his hand in his pocket, and as he again approached the defendant and the defendant's wife, began to pull his hand from his pocket; and defendant shot the victim once because he feared for the safety of his wife, his grandson, and himself. The defendant's evidence was sufficient to show that he believed that it was necessary to use force to prevent death or great bodily injury to himself or a family member.

State v. Cruz, __ N.C. __, __ S.E.2d __ (Oct. 8, 2010) (http://www.aoc.state.nc.us/www/public/sc/opinions/2010/pdf/193A10-1.pdf). The court affirmed per curiam *State v. Cruz*, __ N.C. App. __, 691 S.E.2d 47 (April 6, 2010) (holding, in a murder case, and over a dissenting opinion, that an instruction on self-defense was not required where there was no evidence that the defendant believed it was necessary to kill the victim in order to save himself from death or great bodily harm).

State v. Effler, __ N.C. App. __, __ S.E. 2d __ (Sept. 7, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/100053-1.pdf). The trial court did not commit plain error by instructing the jury that a defendant acting in self-defense is guilty of voluntary manslaughter if he was the aggressor, where there was sufficient evidence suggesting that the defendant was indeed the aggressor. Although the trial court erred by failing to include an instruction on no duty to retreat, the error did not rise to the level of plain error given the evidence suggesting that the defendant used excessive force and was the aggressor.

State v. Haire, __ N.C. App. __, __ S.E.2d __ (July 20, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/100037-1.pdf). No error, much less plain error, occurred when the trial judge gave a self defense instruction based on NCPJI – Crim. 308.45. Although the court found the wording of the pattern instruction confusing as to burden of proof on self defense, it concluded that the trial court properly edited the pattern instruction by repeatedly telling the jury that the State had the burden of proving beyond a reasonable doubt that defendant's actions were not in self-defense.

State v. Jenkins, __ N.C. App. __, __ S.E.2d __ (Feb. 2, 2010). Reversing and remanding for a new trial where, despite the fact that there was no evidence that the defendant was the aggressor, the trial judge instructed the jury that in order to receive the benefit of self-defense, the defendant could not have been the aggressor.

State v. Kirby, __ N.C. App. __, __ S.E.2d __ (Aug. 17, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091631-1.pdf). The trial court did not err by denying the defendant's motion to dismiss a charge of second-degree murder based on the defendant's contention that he acted in self-defense where the evidence was sufficient to establish that rather than acting in self-defense, the defendant went armed after the victim to settle an argument.

State v. Pittman, __ N.C. App. __, __ S.E.2d __ (Sept. 21, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091190-1.pdf). In a murder case, the trial court did not err by declining to instruct on self-defense where there was no evidence that would support a finding that the defendant reasonably believed that he needed to use deadly force against the victim to prevent death or serious bodily injury. Although the victim had threatened the defendant repeatedly, there was no evidence that he threatened to kill the defendant or attempted to harm him. There was no evidence that anyone had ever seen the victim with a weapon or attack another person. There was no indication that the victim had a reputation for violence; in fact, although the victim was angry with the defendant for a

while, their conflict had never escalated beyond threats. There was no evidence that the victim threatened to hurt or attack the defendant on the day in question or that the encounter between them was more heated than earlier disputes. Instead, the evidence established that the defendant approached the victim with a gun, fired multiple shots at the victim, and continued firing as the victim attempted to retreat. The victim's prior threats against the defendant, without more, did not establish a reasonable need for deadly force. The defendant's description of the victim's conduct immediately prior to the shooting did not, whether considered in isolation or in the context of the victim's prior threats, suffice to support a self-defense instruction. The fact that the victim may have been "edging up" on the defendant while reaching behind his back did not support a finding that the defendant reasonably believed that he needed to use lethal force given that the defendant did not claim to have seen the victim with a weapon on that or any occasion, the victim had not threatened him immediately prior to the shooting, and the defendant had no other objective basis, aside from prior threats, for believing that the victim was about to attack him and create a risk of death or great bodily injury.

Capital

Rule 24 Hearing

State v. Defoe, __ N.C. __, __ S.E.2d __ (April 15, 2010). The 2001 amendments to the capital sentencing statutes revoked the statutory mandate that provided the rationale for *State v. Rorie,* 348 N.C. 266 (1998) (holding that the trial court exceeded its authority to enforce Rule 24 by precluding the State from prosecuting a first-degree murder case capitally). Thus, the trial court has inherent authority to enforce Rule 24 by declaring a case noncapital in appropriate circumstances. Declaring a case noncapital is appropriate only when the defendant makes a sufficient showing of prejudice resulting from the State's delay in holding the Rule 24 conference. In this case, the defendant did not show sufficient prejudice to warrant declaring the cases noncapital.

Right to Be Present

State v. Williams, __ N.C. __, __ S.E.2d __ (Dec. 11, 2009). The random segregation of the entire jury pool so that it could be split among the defendant's proceeding and other matters being handled at the courthouse that day was a preliminary administrative matter at which defendant did not have a right to be present.

Jury Selection

State v. Waring, __ N.C. __, __ S.E.2d __ (Nov. 5, 2010) (http://www.aoc.state.nc.us/www/public/sc/opinions/2010/pdf/525A07-1.pdf). (1) The trial court did not err by allowing the State's challenge for cause of a prospective juror when the juror's beliefs about the death penalty could not be pinned down. (2) The trial court did not err in denying the defendant's motion to dismiss asserting that disproportionate numbers of prospective jurors who were African-American, opposed the death penalty, or both, were excluded from the jury in violation of *Wainwright v. Witt,* 469 U.S. 412 (1985). The court declined to reconsider its previous holding that death qualifying a jury in a capital case does not violate the United States or North Carolina Constitutions. (3) The trial court did not err by prohibiting defense counsel from suggesting during voir dire that there is a presumption that life without parole is the appropriate sentence when North Carolina law does not establish such a presumption. (4) The court rejected the defendant's argument that the State injected error when it stated to prospective jurors that the jury had to be unanimous as to a sentence of death or life without parole. According to the defendant, these comments erroneously indicated that the jury had to recommend a life

sentence unanimously, placing a burden on the defendant, when in fact life sentence is imposed if the jury cannot agree during a capital sentencing proceeding. While the defendant was correct that an inability to reach unanimity in a capital sentencing proceeding will result in a life sentence, the jury is not to be instructed as to the result of being unable to reach a unanimous sentencing recommendation. (5) The State did not reduce its burden when it asked prospective jurors to presuppose that the defendant had been found guilty. Such a supposition was a necessary prelude to voir dire questions relating to the sentencing proceeding, should one be needed.

Jury Instructions

Smith v. Spisak, 558 U.S. __ (Jan. 12, 2010). Distinguishing *Mills v. Maryland*, 486 U.S. 367 (1988), and holding that the penalty phase jury instructions and verdict forms were not unconstitutional. The defendant had asserted that the instructions improperly required the jury to consider in mitigation only those factors the jury unanimously found to be mitigating.

Aggravating Circumstances

(e)(3) ─ Prior Violent Felony Conviction

State v. Garcell, 363 N.C. 10 (Mar. 20, 2009). The defendant was convicted of first-degree murder and sentenced to death. Notwithstanding *Roper v. Simmons*, 543 U.S. 551 (2005) (Eighth Amendment prohibits execution of one who commits murder before eighteenth birthday), prior violent felonies committed when the defendant was only 16 years old could be considered with respect to the G.S. 15A-2000(e)(3) (prior violent felony conviction) aggravating circumstance.

(e)(4) ─ Murder Committed To Prevent Arrest Or Effect Escape

State v. Maness, 363 N.C. 261 (June 18, 2009). The trial court did not commit plain error by submitting both the (e)(4) (murder committed to prevent arrest or effect escape) and (e)(8) (crime committed against law enforcement officer) aggravating circumstances. The (e)(4) aggravating circumstance focuses on the defendant's subjective motivation for his or her actions while the (e)(8) aggravating circumstance pertains to the underlying factual basis of the crime. The court rejected the defendant's argument that the aggravating circumstances impermissibly overlapped because the defendant's motive for killing the officer was to avoid the very arrest that the officer was attempting to carry out at the time of the killing.

(e)(8) ─ Crime Committed Against Law Enforcement Officer

State v. Maness, 363 N.C. 261 (June 18, 2009). The trial court did not commit plain error by submitting both the (e)(4) (murder committed to prevent arrest or effect escape) and (e)(8) (crime committed against law enforcement officer) aggravating circumstances. The (e)(4) aggravating circumstance focuses on the defendant's subjective motivation for his or her actions while the (e)(8) aggravating circumstance pertains to the underlying factual basis of the crime. The court rejected the defendant's argument that the aggravating circumstances impermissibly overlapped because the defendant's motive for killing the officer was to avoid the very arrest that the officer was attempting to carry out at the time of the killing.

Mitigating Circumstances

(f)(1) ─ Defendant's Age When Murder Committed

State v. Garcell, 363 N.C. 10 (Mar. 20, 2009). The defendant was convicted of first-degree murder and

sentenced to death. The defendant was eighteen years and five months old when he committed the murder. The court rejected the defendant's argument that *Roper v. Simmons*, 543 U.S. 551 (2005) (Eighth Amendment prohibits execution of one who commits murder before eighteenth birthday), required it to conclude that the defendant's age had mitigating value as a matter of under the G.S. 15A-2000(f)(7) (defendant's age when murder committed) mitigating circumstance.

State v. Waring, __ N.C. __, __ S.E.2d __ (Nov. 5, 2010) (http://www.aoc.state.nc.us/www/public/sc/opinions/2010/pdf/525A07-1.pdf). The trial court did not err by instructing the jury to consider, over the defendant's objection, the (f)(1) mitigating circumstance (no significant history of prior criminal activity). The defendant's priors consisted of breaking and entering a motor vehicle (Class I felony) and several misdemeanors (larceny, public disturbance, defrauding an innkeeper, trespassing, carrying a concealed weapon, and possession of marijuana). There was also evidence of unspecified thefts, mostly at school. Because the evidence pertained to minor offenses, a rational jury could conclude that the defendant had no significant history of criminal activity.

Peremptory Instructions

State v. Maness, 363 N.C. 261 (June 18, 2009). The trial judge did not err by declining to give a peremptory instruction on a non-statutory mitigating circumstance that the defendant accepted responsibility for his criminal conduct. While the defendant admitted killing the victim and acknowledged that the killing was a terrible mistake, he only authorized his lawyers to concede guilt to second-degree murder. A willingness to plead guilty to second-degree murder is evidence only of the defendant's willingness to lessen exposure to the death penalty or a life sentence upon a conviction for first-degree murder.

State v. Waring, __ N.C. __, __ S.E.2d __ (Nov. 5, 2010) (http://www.aoc.state.nc.us/www/public/sc/opinions/2010/pdf/525A07-1.pdf). (1) The trial court did not err by failing to give a peremptory instruction on statutory mitigating circumstances when the evidence as to each was contested. (2) Although the trial court erred by failing to give a peremptory instruction on the non-statutory mitigating circumstance that the defendant's mother did not accept his deficits, the error was harmless beyond a reasonable doubt. (3) The trial court did not err by failing to give peremptory instructions on non-statutory mitigating circumstances when it was not clear how one was mitigating or that the evidence was credible; as to others, the evidence was not uncontroverted.

Mental Retardation Issues

State v. Locklear, ___ N.C. ___, ___ S.E.2d ___ (Aug. 28, 2009). The trial court erred by denying the defendant's request to instruct the jury that a verdict finding the defendant mentally retarded would result in a sentence of life imprisonment without parole. The trial judge had given N.C.P.J.I.—Crim. 150.05, which states, in part, that "no defendant who is mentally retarded shall be sentenced to death," and the attorneys argued that if the defendant was found mentally retarded he would receive life in prison. Stating that on remand, the trial court should instruct the jury that "[i]f the jury determines the defendant to be mentally retarded, the court shall declare the case noncapital and the defendant shall be sentenced to life imprisonment."

State v. Ward, __ N.C. __, __ S.E.2d __ (July 17, 2010) (online at: http://www.aoc.state.nc.us/www/public/sc/opinions/2010/pdf/68A99-3.pdf). The trial judge has discretion regarding whether to submit the special issue of mental retardation to the jury in a bifurcated or unitary

capital sentencing proceeding. The court held that in the case before it, the trial court did not abuse its discretion by denying a defense motion to bifurcate the issues of mental retardation and sentence.

Non-Unanimous Jury Poll

State v. Maness, 363 N.C. 261 (June 18, 2009). The trial judge properly denied a defense motion for imposition of a sentence of life imprisonment when polling revealed that the jury had returned a non-unanimous verdict after deliberations of just over 1 hour and 30 minutes. Under 15A-2000(b) "the only contingency in which a trial court unilaterally shall impose a life sentence in a capital case is when the jury is non[-]unanimous after having deliberated for a 'reasonable time.'"

Physician Participation in Execution

N.C. Dep't of Correction v. N.C. Medical Board, 363 N.C. 189 (May 1, 2009). The N.C. Medical Board's position statement on physician participation in executions exceeds its authority under G.S. Chapter 90 because it contravenes the specific requirement of physician presence in G.S. 15-190.

Jurisdictional Issues

State v. Williams, __ N.C. __, __ S.E.2d __ (Dec. 11, 2009). A judge who did not preside over the guilt phase of a capital trial had jurisdiction to preside over the penalty phase. The first judge had declared a mistrial as to the penalty phase after the defendant attacked one of his lawyers and both counsel were allowed to withdraw. The fact that the original guilt phase jury did not hear the penalty phase when it was re-tried after the mistrial did not create a jurisdictional issue. A death sentence imposed after the re-trial of the penalty phase was not out-of-session or out-of-term.

Post-Conviction

Clerical Errors

State v. Eaton, __ N.C. App. __, __ S.E.2d __ (Mar. 1, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8wOS0xNTg2LTEucGRm). In a case in which the defendant was sentenced as a Class C habitual felon, the court remanded for correction of a clerical error regarding the felony class of the underlying felony.

State v. Moore, __ N.C. App. __, __ S.E.2d __ (Feb. 15, 2011) http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC03NjQtMS5wZGY). Trial judge's failure to mark the appropriate box in the judgment indicating that the sentence was in the presumptive range was a clerical error.

State v. Blount, __ N.C. App. __, __ S.E.2d __ (Jan. 18, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=2011/10-352-1.pdf). Listing the victim on the restitution worksheet as an "aggrieved party" was a clerical error.

State v. Kerrin, __ N.C. App. __, __ S.E.2d __ (Jan. 4, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=2011/09-1153-1.pdf). The trial court committed a clerical error when, in a written order revoking probation, it found that the conditions violated and the facts of each violation were set forth in a violation report dated October 20, 2008, which was the date of a probation violation hearing, not a violation report.

State v. Dobbs, __ N.C. App. __, __ S.E.2d __ (Dec. 7, 2010) (http://appellate.nccourts.org/opinions/?c=2&pdf=2010/10-388-1.pdf). The court treated as a clerical error the trial court's mistake on the judgment designating an offense as Class G felony when it in fact was a Class H felony. The court remanded for correction of the clerical error.

State v. Mohamed, __ N.C. App. __, __ S.E.2d __ (July 20, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/090943-1.pdf). The inclusion of an incorrect file number on the caption of a transcript of plea was a clerical error where the plea was taken in compliance with G.S. 15A-1022 and the body of the form referenced the correct file number.

State v. Curry, __ N.C. App. __, __ S.E.2d __ (April 20, 2010). The trial judge committed a clerical error when he entered judgment for a violation of G.S. 14-34.1(a), the Class E version of discharging a firearm into occupied property. The record showed that, based on the defendant's prior record level, the judge's sentence reflected a decision to sentence the defendant to the Class D version of this offense (shooting into occupied dwelling) and at sentencing the judge stated that the defendant was being sentenced for discharging a firearm into an occupied dwelling, the Class D version of the offense.

State v. McCormick, __ N.C. App. __, __ S.E.2d __ (May 18, 2010). Inadvertent listing of the wrong criminal action number on the judgment was a clerical error.

State v. Treadway, __ N.C. App. __, __ S.E.2d __ (Dec. 7, 2010) (http://appellate.nccourts.org/opinions/?c=2&pdf=2010/10-287-1.pdf). On the judicial findings and order for sex offender form, the trial court erroneously indicated that the defendant had been convicted of an offense against a minor under G.S. 14-208.6(1i) when in fact he was convicted of a sexually violent offense under G.S. 14-208.6(5). The court remanded for correction of the clerical error.

State v. Yow, __ N.C. App. __, __ S.E.2d __ (May 18, 2010). The trial court's mistake of ordering SMB for a period of ten years (instead of lifetime registration) after finding that the defendant was a recidivist was not a clerical error.

State v. May, __ N.C. App. __, __ S.E.2d __ (Sept. 21, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/100140-1.pdf). When the trial court intended to check one box on AOC-CR-615 (judicial findings and order for sex offenders) but another box was marked on the form signed by the judge, this was a clerical error that could be corrected on remand.

DNA Testing

District of Attorney's Office v. Osborne, 129 S. Ct. 2308 (June 18, 2009). A defendant whose criminal conviction has become final does not have a substantive due process right to gain access to evidence so that it can be subjected to DNA testing to attempt to prove innocence. Additionally, the Court rejected the holding below that Alaska's procedures for post-conviction relief violated the defendant's procedural due process rights.

Skinner v. Switzer, 562 U.S. __ (Mar. 7, 2011). In a 6-to-3 decision, the Court held that a convicted state prisoner seeking DNA testing of crime-scene evidence may assert a claim under 42 U.S.C. § 1983. However, the Court noted that *District Attorney's Office for Third Judicial Dist. v. Osborne,* 557 U.S. __

(2009), severely limits the federal action a state prisoner may bring for DNA testing. It stated: "*Osborne* rejected the extension of substantive due process to this area, and left slim room for the prisoner to show that the governing state law denies him procedural due process." Slip Op. at 2 (citation omitted).

State v. Norman, __ N.C. App. __, __ S.E.2d __ (Feb. 2, 2010). A defendant does not have a right to appeal a trial judge's order denying relief following a hearing to evaluate test results.

Ineffective Assistance of Counsel

Inapplicable in SBM Proceedings

State v. Miller, __ N.C. App. __, __ S.E.2d __ (Feb. 1, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC05MTEtMS5wZGY=). The court noted in dicta that ineffective assistance of counsel claims are not available in civil appeals, such as that from an SBM eligibility hearing.

Review on Direct Appeal

State v. Boyd, __ N.C. App. __, __ S.E.2d __ (Feb. 1, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8wOS0xNjY2LTEucGRm). The defendant's claim that trial counsel was ineffective by failing to object to a videotape of the defendant's interrogation was properly considered on appeal. Although the defendant asked the court to dismiss his claim without prejudice to raise it in a motion for appropriate relief, he failed to identify how the record on appeal was insufficient to resolve the claim.

Strickland Attorney Error Claims

Padilla v. Kentucky, 559 U.S. __ (Mar. 31, 2010). After pleading guilty to a charge of transportation of a large amount of marijuana, the defendant, a lawful permanent resident of the United States for more than 40 years, faced deportation. He challenged his plea, arguing that his counsel rendered ineffective assistance by failing to inform him that the plea would result in mandatory deportation and by incorrectly informing him that he did not have to worry about his immigration status because he had been in the country so long. The Court concluded that when, as in the present case, "the deportation consequence [of a plea] is truly clear," counsel must correctly inform the defendant of this consequence. However, the Court continued, where deportation consequences of a plea are "unclear or uncertain[] [t]he duty of the private practitioner . . . is more limited." It continued: "When the law is not succinct and straightforward . . . , a criminal defense attorney need do no more than advise a noncitizen client that pending criminal charges may carry a risk of adverse immigration consequences." The Court declined to rule whether the defendant was prejudiced by his lawyer's deficient conduct.

Porter v. McCollum, __ S. Ct. __ (Nov. 30, 2009) (per curiam). A capital defendant's trial counsel's conduct fell below an objective standard of reasonableness when counsel failed to investigate and present mitigating evidence, including evidence of the defendant's mental health, family background, and military service. The state court's holding that the defendant was not prejudiced by counsel's deficient representation was unreasonable. To establish prejudice, the defendant need not show that counsel's deficient conduct more likely than not altered the outcome; the defendant need only establish a probability sufficient to undermine the confidence in the outcome, as he did in this case.

Bobby v. Van Hook, __ S. Ct. __ (Nov. 9, 2009). Although restatements of professional conduct, such as ABA Guidelines, can be useful guides to whether an attorney's conduct was reasonable, they are relevant only when they describe the professional norms prevailing at the time that the representation occurred. In this case, the lower court erred by applying 2003 ABA standards to a trial that occurred eighteen years earlier. Moreover, the lower court erred by treating the ABA Guidelines "as inexorable commands with which all capital defense counsel must comply." Such standards are merely guides to what is reasonable; they do not define reasonableness. The Court went on to reject the defendant's arguments that counsel was ineffective under prevailing norms; the defendant had argued that his lawyers began their mitigation investigation too late and that the scope of their mitigation investigation was unreasonable. The Court held that even if the defendant's counsel had performed deficiently, the defendant suffered no prejudice.

Wong v. Belmontes, __ S. Ct. __ (Nov. 16, 2009). Even if counsel's performance was deficient with regard to mitigating evidence in a capital trial, the defendant could not establish prejudice. Trial counsel testified that he presented a limited mitigating case in order to avoid opening the door for the prosecution to admit damaging evidence regarding a prior murder to which the defendant admitted but for which the defendant could not be tried. The defendant did not establish a reasonable probability that the jury would have rejected a capital sentence after it weighed the entire body of mitigating evidence (including the additional testimony counsel could have presented, some of which was cumulative) against the entire body of aggravating evidence (including evidence of the prior murder, which would have be admitted had counsel made a broader case for mitigation).

Knowles v. Mirzayance, 129 S. Ct. 1411 (Mar. 24, 2009). Counsel was not ineffective by recommending that the defendant withdraw his insanity defense. The defendant entered pleas of not guilty and not guilty by reason of insanity (NGI) at his first-degree murder trial in state court. State procedure required a bifurcated trial consisting of a guilt phase followed by a NGI phase. During the guilt phase, the defendant sought, through medical testimony, to show that he was insane and thus incapable of premeditation and deliberation. The jury nevertheless convicted him of first-degree murder. For the NGI phase, the defendant had the burden of showing insanity. Counsel had planned to meet that burden presenting medical testimony similar to that offered in the guilt phase. Although counsel had planned to offer additional testimony of the defendant's parents, counsel learned that the parents were refusing to testify. At this point, counsel advised the defendant to withdraw his NGI plea and the defendant complied. Defense counsel was not ineffective by recommending withdrawal of a defense that counsel reasonably believed was doomed to fail. The defendant's medical testimony already had been rejected in the guilt phase and the defendant's parents' expected testimony, which counsel believed to be the strongest evidence, was no longer available. Counsel is not required to raise claims that are almost certain to lose. Additionally, the defendant did now show prejudice; it was highly improbable that jury that had just rejected testimony about the defendant's mental state when the state bore the burden of proof would have reached a different result when the defendant presented similar evidence at the NFI phase.

Smith v. Spisak, 558 U.S. __ (Jan. 12, 2010). Even if counsel's closing argument at the sentencing phase of a capital trial fell below an objective standard of reasonableness, the defendant could not show that he was prejudiced by this conduct.

Wood v. Allen, 558 U.S. __ (Jan. 20, 2010). The state court's conclusion that the defendant's counsel made a strategic decision not to pursue or present evidence of his mental deficiencies was not an unreasonable determination of the facts. The Court did not reach the question of whether the strategic decision itself was a reasonable exercise of professional judgment under *Strickland.*

Sears v. Upton, 561 U.S. __ (June 29, 2010) (per curiam) (http://www.supremecourt.gov/opinions/09pdf/09-8854.pdf). After the defendant was sentenced to death in state court, a state post-conviction court found that the defendant's lawyer conducted a constitutionally inadequate penalty phase investigation that failed to uncover evidence of the defendant's significant mental and psychological impairments. However, the state court found itself unable to assess whether counsel's conduct prejudiced the defendant; because counsel presented some mitigating evidence, the state court concluded that it could not speculate as to the effect of the new evidence. It thus denied the defendant's claim of ineffective assistance. The United State Supreme Court held that although the state court articulated the correct prejudice standard (whether there was a reasonable likelihood that the outcome of the trial would have been different if counsel had done more investigation), it failed to properly apply that standard. First, the state court put undue reliance on the assumed reasonableness of counsel's mitigation theory, given that counsel conducted a constitutionally unreasonable mitigation investigation and that the defendant still might have been prejudiced by counsel's failures even if his theory was reasonable. More fundamentally, the Court continued, in assessing prejudice, the state court failed to consider the totality of mitigation evidence (both that adduced at trial and the newly uncovered evidence). The prejudice inquiry, the Court explained, requires the state court to speculate as to the effect of the new evidence. A proper prejudice inquiry, it explained, requires the court to consider the newly discovered evidence along with that introduced at trial and assess whether there is a significant probability that the defendant would have received a different sentence after a constitutionally sufficient mitigation investigation.

Harrington v. Richter, 562. U.S. __ (Jan. 19, 2011) (http://www.supremecourt.gov/opinions/10pdf/09-587.pdf). The Court reversed the Ninth Circuit, which had held that the state court unreasonably applied existing law when rejecting the defendant's claim that his counsel was deficient by failing to present expert testimony on serology, pathology, and blood spatter patterns; the defendant had asserted that this testimony would have confirmed his version of how the events in question occurred. The Court concluded that it was at least arguable that a reasonable attorney could decide to forgo inquiry into the blood evidence under the circumstances, which included, among other things, the fact that counsel had reason to question the truth of the defendant's version of the events. The Court also rejected the Ninth Circuit's conclusion that counsel was deficient because he had not expected the prosecution to offer expert testimony and therefore was unable to offer expert testimony of his own in response. The Court concluded that although counsel was mistaken in thinking the prosecution would not present forensic testimony, the prosecution itself did not expect to make that presentation and had made no preparations for doing so on the eve of trial. For this reason alone, the Court concluded, it is at least debatable whether counsel's error was so fundamental as to call the fairness of the trial into doubt. Finally, the Court concluded that it would not have been unreasonable for the state court to conclude that the defendant failed to establish prejudice. Justice Kagan did not participate in the consideration or decision of the case.

Premo v. Moore, 562 U.S. __ (Jan. 19, 2011) (http://www.supremecourt.gov/opinions/10pdf/09-658.pdf). The Court reversed the Ninth Circuit, which had held that the state court unreasonably applied existing law when rejecting the defendant's claim that counsel was ineffective by failing to file a motion to suppress the defendant's confession to police before advising him to accept a plea offer. Counsel had explained that he discussed the plea bargain with the defendant without first challenging the confession to the police because suppression would serve little purpose given that the defendant had made full and admissible confessions to two other private individuals, both of whom could testify. The state court would not have been unreasonable to accept this explanation. Furthermore, the Court held, the state court reasonably could have determined that the defendant would have accepted the plea agreement even if his confession had been ruled inadmissible. Justice Kagan did not participate in the consideration or decision

of the case.

State v. Carter, __ N.C. App. __, __ S.E.2d __ (Mar. 1, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC02NDgtMS5wZGY). In a child sexual assault case, defense counsel's failure to move to strike testimony of a forensic interviewer that the fact that a young child had extensive sexual knowledge suggested that "something happened," did not constitute deficient performance.

State v. Boyd, __ N.C. App. __, __ S.E.2d __ (Feb. 1, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8wOS0xNjY2LTEucGRm). (1) The defendant's claim that trial counsel was ineffective by failing to object to a videotape of the defendant's interrogation fails because even if counsel had objected, the objection would have been overruled when the defendant opened the door to the evidence through his own trial testimony. (2) The defendant failed to demonstrate that counsel's performance was deficient. As noted, the defendant's own testimony opened the door to admission of the videotape. Trial counsel made a strategic decision to have the defendant testify to offer an alibi. On appeal, the defendant did not challenge this strategy, which the jury rejected, and thus did not overcome the presumption that counsel's trial strategy was reasonable.

Harbison **Claims**

State v. Maready, __ N.C. App. __, __ S.E.2d __ (July 6, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/070171-2.pdf). Because defense counsel admitted the defendant's guilt to assault with a deadly weapon and involuntary manslaughter to the jury without obtaining the defendant's express consent, counsel was per se ineffective under *State v. Harbison*, 315 N.C. 175 (1985). A majority of the panel distinguished the United States Supreme Court's holding in *Florida v. Nixon*, 543 U.S. 175 (2004) (under federal law, when the defendant alleges ineffective assistance due to an admission of guilt, the claim should be analyzed under the *Strickland* attorney error standard), on grounds that *Nixon* was a capital case and the case before the court was non-capital. The majority further concluded that post-*Nixon* decisions by the North Carolina Supreme Court and the court of appeals required it to apply the *Harbison* rule.

State v. Goode, __ N.C. App. __, 677 S.E.2d 507 (June 16, 2009). No *Harbison* error occurred in this murder case where the defendant consented, on the record, to counsel's strategy of admitting guilt.

Denial of Counsel Claims

State v. Banks, __ N.C. App. __, __ S.E.2d __ (Mar. 1, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8wOS0xMTUwLTEucGRm). The trial court's denial of a motion to continue in a murder case did not violate the defendant's right to effective assistance of counsel. The defendant asserted that he did not realize that certain items of physical evidence were shell casings found in defendant's room until the eve of trial and thus was unable to procure independent testing of the casings and the murder weapon. Even though the relevant forensic report was delivered to the defendant in 2008, the defendant did not file additional discovery requests until February 3, 2009, followed by *Brady* and *Kyles* motions on February 11, 2009. The trial court afforded the defendant an opportunity to have a forensic examination done during trial but the defendant declined to do so. The defendant was not entitled to a presumption of prejudice on grounds that denial of the motion created made it so that no

lawyer could provide effective assistance. The defendant's argument that had he been given additional time, an independent examination *might* have shown that the casings were not fired by the murder weapon was insufficient to establish the requisite prejudice.

Motions for Appropriate Relief
Claims That Can Be Raised
Significant Change in the Law

State v. Chandler, __ N.C. __, __ S.E.2d __ (Aug. 27, 2010) (http://www.aoc.state.nc.us/www/public/sc/opinions/2010/pdf/298PA09-1.pdf). On the State's petition for writ of certiorari, the court reversed the trial court and held that no significant change in the law pertaining to the admissibility of expert opinions in child sexual abuse cases had occurred and thus that the defendant was not entitled to relief under G.S. 15A-1415(b)(7) (in a motion for appropriate relief, a defendant may assert a claim that there has been a significant change in law applied in the proceedings leading to the defendant's conviction or sentence, and retroactive application of the changed legal standard is required). Contrary to the trial court's findings and conclusions, *State v. Stancil*, 355 N.C. 266 (2002), was not a significant change in the law, but merely an application of the court's existing case law on expert opinion evidence requiring that in order for an expert to testify that abuse occurred, there must be physical findings consistent with abuse.

Newly Discovered Evidence

State v. Williamson, __ N.C. App. __, __ S.E. 2d __ (Sept. 7, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091475-1.pdf). Over a dissent, the court held that the trial court properly denied the defendant's MAR claim of newly discovered evidence. The evidence was an accomplice's statement that the gun used in the armed robbery was inoperable. The trial court properly determined that the defendant failed to show that the evidence was probably true; based on the accomplice's prior statements, his refusal to say whether he discussed the operability of the gun with his attorney, and his plea of guilty to armed robbery, the court concluded that the accomplice's testimony that the gun was inoperable was not uncontroverted. The trial court properly concluded that the defendant failed to show that due diligence was used to procure the evidence at trial noting that the State left a report about the accomplice's statement in defense counsel's court mailbox the day before trial and defense counsel interviewed the accomplice at the end of the first day of trial. The court concluded that because the accomplice already had made the statement about the inoperable nature of the gun to the State, a reasonable interview by defense counsel should have revealed this same information.

Procedural Default

Beard v. Kindler, __ S. Ct. __ (Dec. 8, 2009). A federal habeas court will not review a claim rejected by a state court if the state court decision rests on an adequate and independent state law ground. The Court held that a state rule is not inadequate for purposes of this analysis just because it is a discretionary rule.

Court's Order

State v. Williamson, __ N.C. App. __, __ S.E. 2d __ (Sept. 7, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091475-1.pdf). Over a dissent, the court

rejected the defendant's argument that the trial court erred by failing to enter a written order containing its findings of fact and conclusions of law when denying the defendant's MAR. The trial court's oral order, containing findings of fact and conclusions of law and appearing in the transcript, was sufficient. It concluded: "While it is the best practice for the trial court to enter a written order with its findings of fact and conclusions of law when ruling on a defendant's MAR, this practice is not required by the MAR statute."

Miscellaneous

State v. Long, __ N.C. __, __ S.E.2d __ (Feb. 4. 2011) (http://appellate.nccourts.org/opinions/?c=1&pdf=MjAxMS8yNjVQQTA5LTEucGRm). With one justice taking no part in consideration of the case and with the other members of the court equally divided, the court affirmed, without opinion, a ruling by the trial court on the defendant's motion for appropriate relief. The case was before the court on writ of certiorari to review the trial court's order. The question presented, as stated in the defendant's appellate brief, was: "Whether the trial court erred in finding in a capitally-charged case that failing to disclose exculpatory SBI reports, testifying falsely as to what evidence was brought to the SBI and failing to preserve irreplaceable biological evidence did not violate due process?"

Jails and Corrections

Wilkins v. Gaddy, 559 U.S. __ (Feb. 22, 2010). Trial court erred by dismissing the prisoner's excessive force claim on grounds that his injuries were de minimis. In an excessive force claim, the core inquiry is not whether a certain quantum of injury was sustained but rather whether the force was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm.

Judicial Administration

Due Process and Recusal

Caperton v. Massey Coal Co., Inc., 129 S. Ct. 2252 (June 8, 2009). A violation of due process occurred when West Virginia Supreme Court justice Brent Benjamin denied a recusal motion. The Supreme Court of West Virginia reversed a trial court judgment which had entered a jury verdict of $50 million against A.T. Massey Coal Co., Inc. Five justices heard the case, and the vote was 3 to 2. The basis for the recusal motion was that Justice Benjamin had received campaign contributions in an extraordinary amount from, and through the efforts of, Don Blankenship, Massey's board chairman and principal officer. After the initial verdict in the case, but before the appeal, West Virginia held its 2004 judicial elections. Benjamin was running against an incumbent justice. In addition to contributing the $1,000 statutory maximum to Benjamin's campaign committee, Blankenship donated almost $2.5 million to a political organization opposed to the incumbent and supporting Benjamin. Additionally, Blankenship spent just over $500,000 on independent expenditures—direct mailings and letters soliciting donations as well as television and newspaper advertisements supporting Benjamin. Blankenship's $3 million in contributions were more than the total amount spent by all other Benjamin supporters and three times the amount spent by Benjamin's own committee. Benjamin won, in a close election. In October 2005, before Massey filed its petition for appeal to the West Virginia Supreme Court, the plaintiffs in the underlying action moved to disqualify now-Justice Benjamin based on the conflict caused by Blankenship's campaign involvement. Justice Benjamin denied the motion. In November 2007, the West Virginia Supreme Court reversed the $50 million verdict against Massey. It did so again on rehearing, after another recusal motion was denied. The U.S. Supreme Court held that "Blankenship's significant and disproportionate influence—coupled

with the temporal relationship between the election and the pending case—offer a possible temptation to the average . . . judge to . . . lead him not to hold the balance nice, clear, and true" and that "[o]n these extreme facts, the probability of actual bias rises to an unconstitutional level."

One Trial Judge Overruling Another

State v. Harris, __ N.C. App. __, __ S.E.2d __ (July 21, 2009). When a mistrial was declared, the judge retrying the case was not bound by rulings made by the judge who presided over the prior trial. Here, the rulings pertained to the admissibility of 404(b) evidence and complete recordation of the trial.

Recusal

State v. Oakes, __ N.C. App. __, __ S.E.2d __ (Jan. 4, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=2011/09-1280-1.pdf). The defendant failed to demonstrate grounds for recusal. The defendant argued that recusal was warranted based on the trial judge's comments at various hearings and on the fact that "the trial court was often dismissive of defense counsel's efforts and made a number of rulings unfavorable to the Defendant." The court cautioned the trial court with respect to the following statement made at trial: "The other thing I want to do is put on the record that I leave to the appellate courts whether or not any recommendation as to discipline should be made to any of the responses or conduct of the attorneys based upon the record in this case as to whether any of the Rules of Practice or Rules of Conduct have been violated." The court concluded that although it was unclear what issue the trial court meant to address with this statement, "it is the trial court's responsibility initially to pass on these concerns if the court has them, especially in view of the fact that the trial court is in a better position than a Court of the Appellate Division both to observe and control the trial proceedings. . . . It is not for the trial court to abdicate its role in managing the conduct of trial to an appellate court whose task is to review the cold record" (citation omitted).

Sanctioning Lawyers

In Re Appeal from Order Sanctioning Benjamin Small, __ N.C. App. __, __ S.E.2d __ (Dec. 8, 2009). The trial court had inherent authority to order an attorney to pay $500 as a sanction for filing motions in violation of court rules, that were vexatious and without merit, and that were for the improper purpose of harassing the prosecutor. The attorney received proper notice that the sanctions might be imposed and of the alleged grounds for their imposition, as well as an opportunity to be heard.

Sealing Search Warrants

In Re Cooper, __ N.C. App. __, __ S.E.2d __ (Oct. 6, 2009). Affirming the trial court's order denying the plaintiffs' motion to unseal three returned search warrants and related papers. Holding that although returned search warrants are public records, the trial court did not abuse its discretion by sealing the documents where the release of information would undermine the ongoing investigation, and that sealing for a limited time period was necessary to ensure the interests of maintaining the State's right to prosecute a defendant, protecting a defendant's right to a fair trial, and preserving the integrity of an investigation. The court also rejected the plaintiffs' argument that the orders violated North Carolina common law on the public's right of access to court records and proceedings, concluding that the public records law had supplanted any common law right and that even if the common law right existed no abuse of discretion occurred. The court rejected the plaintiffs' First Amendment argument, concluding that because the documents were not historically open to the press and public, the plaintiffs did not have a qualified First

Amendment right to access. The court rejected the plaintiff's argument that the sealing orders violated the open courts provision of Article I, § 18 of the State Constitution. Although the court recognized a qualified right of access to the documents under the open courts provision, it found that right was outweighed by compelling governmental interests. Finally, the court concluded that the trial court's findings were sufficiently specific, that any alternatives were not feasible, and that by limiting the sealing orders to 30 days the trial court used the least restrictive means of keeping the information confidential.

Closing the Courtroom

Presley v. Georgia, 558 U.S. __ (Jan. 19, 2010). The Sixth Amendment right to a public trial extends to the voir dire of prospective jurors. Trial courts are required to consider alternatives to closure even when they are not offered by the parties.

State v. Register, __ N.C. App. __, __ S.E. 2d __ (Sept. 7, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/090629-1.pdf). In a child sexual abuse case, the trial court did not err by excluding spectators from the courtroom during the victim's testimony. The court excluded all spectators except the victim's mother and stepfather, investigators for each side, and a high school class. Because the defendant did not argue that he was denied a public trial, the requirements of *Waller v. Georgia*, 467 U.S. 39 (1984), do not apply. The defendant waived any constitutional issues by failing to raise them at trial. The trial court's action was permissible under G.S. 15-166 (in sexual assault cases the trial judge may, during the victim's testimony, exclude from the courtroom everyone except the officers of the court, the defendant, and those engaged in the trial of the case). Furthermore, the court noted, G.S. 15A-1034(a) gives the trial court authority to restrict access to the courtroom to ensure orderliness in the proceedings. The State was concerned about the child victim being confronted with "a hostile environment with [defendant's] family sitting behind him;" the trial court was concerned about the potential for outbursts or inappropriate reactions by supporters of both the defendant and the victim. Although it was unusual to allow the high school class to stay, this decision was not unreasonable given that the issue was reactions by family members.

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