

**Criminal Case Compendium**  
**Covering Significant Cases Decided November 2008 – October 20, 2009**  
Jessica Smith, UNC School of Government

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**Criminal Procedure**  
**Bond Forfeiture**

*State v. Largent*, \_\_ N.C. App. \_\_, 677 S.E.2d 514 (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.

**Counsel Issues**

*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. McLeod*, \_\_ N.C. App. \_\_, \_\_ S.E.2d \_\_ (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. Boyd*, \_\_ N.C. App. \_\_, \_\_ S.E.2d \_\_ (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.

### **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.

### **Discovery and Related Issues**

*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*, \_\_\_ N.C. App. \_\_\_, \_\_\_ S.E.2d \_\_\_ (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. Flint*, \_\_ N.C. App. \_\_, \_\_ S.E.2d \_\_ (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. \_\_, \_\_ S.E.2d \_\_ (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.

### **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.

### **DWI Procedure**

*State v. Fowler*, \_\_ N.C. App. \_\_, 676 S.E.2d 523 (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*, \_\_\_ N.C. App. \_\_\_, 676 S.E.2d 559 (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. \_\_\_, \_\_\_ S.E.2d \_\_\_ (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. \_\_\_, \_\_\_ S.E.2d \_\_\_ (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).

### **Extending the Session**

*State v. Hunt*, \_\_\_ N.C. App. \_\_\_, \_\_\_ S.E.2d \_\_\_ (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.

### **Fifth Amendment**

#### **Use of Defendant's Silence at Trial**

*State v. Adu*, \_\_\_ N.C. App. \_\_\_, 672 S.E.2d 84 (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.

### **Habitual Felon**

*State v. Flint*, \_\_\_ N.C. App. \_\_\_, \_\_\_ S.E.2d \_\_\_ (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.

### **Indictment Issues**

#### **General Matters**

##### **Date of Offense**

*State v. Hueto*, \_\_\_ N.C. App. \_\_\_, 671 S.E.2d 62 (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.

#### **Delay in Obtaining Indictment**

*State v. Martin*, \_\_\_ N.C. App. \_\_\_, 671 S.E.2d 53 (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. Thomas*, \_\_\_ N.C. App. \_\_\_, 676 S.E.2d 56 (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.

### **Victim's Name**

*State v. McKoy*, \_\_\_ N.C. App. \_\_\_, 675 S.E.2d 406 (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. \_\_\_, \_\_\_ S.E.2d \_\_\_ (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.

### **Specific Offenses** **Assault**

*In Re D.S.*, \_\_\_ N.C. App. \_\_\_, \_\_\_ S.E.2d \_\_\_ (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.

### **Child Abuse**

*State v. Lark*, \_\_\_ N.C. App. \_\_\_, 678 S.E.2d 693 (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.

### **Injury to Real Property**

*State v. Lilly*, \_\_\_ N.C. App. \_\_\_, 673 S.E.2d 718 (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*, \_\_\_ N.C. App. \_\_\_, \_\_\_ S.E.2d \_\_\_ (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 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. Patterson*, \_\_\_ N.C. App. \_\_\_, 671 S.E.2d 357 (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*, \_\_ N.C. App. \_\_, \_\_ S.E.2d \_\_ (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.

### **Weapons Offenses**

*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.

### **Involuntary Commitment**

*In Re Hayes*, \_\_ N.C. App. \_\_, \_\_ S.E.2d \_\_ (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.

### **Judge**

#### **Expression of Opinion**

*State v. Springs*, \_\_ N.C. App. \_\_, \_\_ S.E.2d \_\_ (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.”

### **Jury Argument**

#### **Comment on Defendant’s Failure to Testify**

*State v. Anderson*, \_\_ N.C. App. \_\_, \_\_ S.E.2d \_\_ (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's failure to testify by stating in closing that there was no evidence regarding accident.

*State v. Graham*, \_\_ N.C. App. \_\_, \_\_ S.E.2d \_\_ (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.

#### **Regarding Aggravating Factors**

*State v. Lopez*, \_\_ N.C. \_\_, \_\_ S.E.2d \_\_ (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*, \_\_ N.C. App. \_\_, 669 S.E.2d 869 (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.

#### **Jury Instructions Flight**

*State v. Rainey*, \_\_ N.C. App. \_\_, \_\_ S.E.2d \_\_ (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.

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

*State v. Wilson*, \_\_ N.C. \_\_, \_\_ S.E.2d \_\_ (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.

#### **Involuntary Manslaughter**

*State v. Davis*, \_\_ N.C. App. \_\_, \_\_ S.E.2d \_\_ (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.

### **Mutually Exclusive Offenses**

*State v. Melvin*, \_\_\_ N.C. App. \_\_\_, \_\_\_ S.E.2d \_\_\_ (Sept. 1, 2009). Ordering a new trial after finding that the trial judge committed plain error by failing to instruct the jury that it could convict the defendant of one of two mutually exclusive offenses that arose out of the same transaction, but not both. The mutually exclusive offenses at issue were first-degree murder and accessory after the fact to murder.

### **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.

### **Jury Selection**

#### ***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.

### **Peremptories**

*State v. Thomas*, \_\_\_ N.C. App. \_\_\_, 673 S.E.2d 372 (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.

### **Stake-Out Questions**

*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.

### **Jury's Request for Transcripts**

*State v. Long*, \_\_\_ N.C. App. \_\_\_, 674 S.E.2d 696 (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.

## **Motions**

### **Motion to Continue**

*State v. Flint*, \_\_\_ N.C. App. \_\_\_, \_\_\_ S.E.2d \_\_\_ (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.

### **Motion to Dismiss**

*State v. Lowry*, \_\_\_ N.C. App. \_\_\_, \_\_\_ S.E.2d \_\_\_ (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.

### **Suppression Motions**

*State v. Rollins*, \_\_\_ N.C. App. \_\_\_, \_\_\_ S.E.2d \_\_\_ (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*, \_\_\_ N.C. App. \_\_\_, \_\_\_ S.E.2d \_\_\_ (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.

## **Pleas**

### **Factual Basis**

*State v. Flint*, \_\_\_ N.C. App. \_\_\_, \_\_\_ S.E.2d \_\_\_ (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.

### **Motion to Withdraw a Plea**

*State v. Watkins*, \_\_\_ N.C. App. \_\_\_, 672 S.E.2d 43 (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.

### **Plea Agreements**

*State v. Smith*, \_\_\_ N.C. App. \_\_\_, 668 S.E.2d 612 (Nov. 18, 2008), *temp. stay allowed*, 362 N.C. 687 (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.

### **Plea Colloquy**

*State v. Bare*, \_\_ N.C. App. \_\_, 677 S.E.2d 518 (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*, \_\_ N.C. App. \_\_, 679 S.E.2d 165 (July 7, 2009). Following *Bare* (discussed above) and holding that when taking a plea, a judge is not required to inform a defendant of possible imposition of lifetime SBM.

### **Satellite-Based Monitoring (SBM) & Pleas**

*State v. Bare*, \_\_ N.C. App. \_\_, 677 S.E.2d 518 (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. \_\_, \_\_ S.E.2d \_\_ (Sept. 1, 2009). 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.

### **Sentencing**

#### **Aggravating Factors**

*State v. Anderson*, \_\_ N.C. App. \_\_, \_\_ S.E.2d \_\_ (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. 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. Rivens*, \_\_ N.C. App. \_\_, 679 S.E.2d 145 (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.

#### ***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.

### **DWI Sentencing**

*State v. Dalton*, \_\_ N.C. App. \_\_, 677 S.E.2d 208 (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.

### **Impermissibly Based on Exercise of Rights**

*State v. Anderson*, \_\_ N.C. App. \_\_, 669 S.E.2d 793 (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.

### **Post-Release Supervision**

*State v. Harris*, \_\_ N.C. App. \_\_, \_\_ S.E.2d \_\_ (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. Popp*, \_\_ N.C. App. \_\_, 676 S.E.2d 613 (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.

### **Prior Record Level**

#### **All Elements of Current Offense Included in Prior Conviction**

*State v. Ford*, \_\_ N.C. App. \_\_, 672 S.E.2d 689 (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-1340.16(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.

### **Ex Post Facto Issues**

*State v. Watkins*, \_\_ N.C. App. \_\_, 672 S.E.2d 43 (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. \_\_, \_\_ S.E.2d \_\_ (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.

### **Proof Issues & Stipulations**

*State v. Lee*, \_\_ N.C. App. \_\_, 668 S.E.2d 393 (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*, \_\_ N.C. App. \_\_, \_\_ S.E.2d \_\_ (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. Hussey*, \_\_ N.C. App. \_\_, 669 S.E.2d 864 (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.

### **Probation**

*State v. Hubbard*, \_\_ N.C. App. \_\_, 678 S.E.2d 390 (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*, \_\_ N.C. App. \_\_, 677 S.E.2d 199 (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. \_\_, \_\_ S.E.2d \_\_ (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.

## **Restitution**

*State v. Best*, \_\_\_ N.C. App. \_\_\_, 674 S.E.2d 467 (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. Swann*, \_\_\_ N.C. App. \_\_\_, 676 S.E.2d 654 (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.

## **Satellite-Based Monitoring (SBM)**

*State v. Wooten*, \_\_\_ N.C. App. \_\_\_, 669 S.E.2d 749 (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. The defendant also 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.

*State v. Bare*, \_\_\_ N.C. App. \_\_\_, 677 S.E.2d 518 (June 16, 2009). SBM does not violate the ex post facto clause by increasing the punishment for a crime. The legislature intended SBM to be a civil and regulatory scheme, rather than a punitive scheme. Further, the regulatory scheme is not so punitive either in purpose or effect as to negate the General Assembly's intent to deem it civil in nature. Based on the record before it, the court concluded that (1) the SBM device is not a "modern-day shame sanction" (the defendant had argued that the bulky device is a physical, visible sign notifying the public that the wearer committed a sex offense); (2) wearing an electronic tracking device at all times and being required to cooperate with the Department of Correction in order to ensure that the device is working properly does not impose a punitive restraint on daily activities; (3) although the SBM provisions could have a deterrent effect, this single factor is insufficient to override a non-punitive purpose; (4) the SBM provisions have a rational connection to the non-punitive purpose of protecting the public; and (5) the SBM provisions are not excessive in light of the legislative purpose.

*State v. Wagoner*, \_\_\_ N.C. App. \_\_\_, \_\_\_ S.E.2d \_\_\_ (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. Anderson*, \_\_ N.C. App. \_\_, 679 S.E.2d 165 (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. Kilby*, \_\_ N.C. App. \_\_, \_\_ S.E.2d \_\_ (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. \_\_, \_\_ S.E.2d \_\_ (Sept. 15, 2009). Following *Kilby* (discussed immediately above), on similar facts.

*State v. Morrow*, \_\_ N.C. App. \_\_, \_\_ S.E.2d \_\_ (Oct. 6, 2009). Following *Bare*, discussed above, and concluding, over a dissent, that the SBM statute does not violate the Ex Post Facto clause. 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. Concluding that 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. Stines*, \_\_ N.C. App. \_\_, \_\_ S.E.2d \_\_ (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.

### **Spectators in the Courtroom**

*State v. Dean*, \_\_ N.C. App. \_\_, 674 S.E.2d 453 (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. \_\_, \_\_ S.E.2d \_\_ (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.

## **Verdict**

### **Generally**

*State v. Douglas*, \_\_ N.C. App. \_\_, 676 S.E.2d 620 (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.

### **Inconsistent Verdicts**

*State v. Cole*, \_\_ N.C. App. \_\_, \_\_ S.E.2d \_\_ (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.

### **Polling the Jury**

*State v. Hunt*, \_\_ N.C. App. \_\_, \_\_ S.E.2d \_\_ (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.

## **Evidence**

### **403 Balancing**

*State v. Miller*, \_\_ N.C. App. \_\_, 676 S.E.2d 546 (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*, \_\_ N.C. App. \_\_, 672 S.E.2d 25 (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.

**404(b) Evidence  
Evidence Admissible**

*State v. Locklear*, \_\_\_. N.C. \_\_\_, \_\_\_ S.E.2d \_\_\_ (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. Dean*, \_\_\_ N.C. App. \_\_\_, 674 S.E.2d 453 (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. 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*, \_\_\_ N.C. App. \_\_\_, \_\_\_ S.E.2d \_\_\_ (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. \_\_\_, \_\_\_ S.E.2d \_\_\_ (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.

### **Evidence Inadmissible**

*State v. Ward*, \_\_ N.C. App. \_\_, \_\_ S.E. 2d \_\_ (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. Ray*, \_\_ N.C. App. \_\_, 678 S.E.2d 378 (July 7, 2009), *temp. stay allowed* (N.C. July 7, 2009). Ordering a new trial in a child sex case because 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. Although the State asserted that the instances were similar because in both the defendant had been drinking, there was no evidence of alcohol being involved in the prior events. Additionally, the prior events were different from the current event, which involved an alleged sexual assault on a seven-year-old girl who the defendant barely knew; the assault allegedly occurred during a picnic at the defendant's home. By contrast, the prior events were based on personal conflicts between the defendant and an adult woman with whom the defendant was involved romantically. The only similarity was that both victims were females.

*State v. Webb*, \_\_ N.C. App. \_\_, \_\_ S.E.2d \_\_ (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 of 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.

### **Character of Victim**

*State v. Buie*, \_\_ N.C. App. \_\_, 671 S.E.2d 351 (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.

### **Corroboration**

*State v. Cook*, \_\_ N.C. App. \_\_, 672 S.E.2d 25 (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 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. \_\_, \_\_ S.E.2d \_\_ (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**

*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*, \_\_\_ N.C. \_\_\_, \_\_\_ S.E.2d \_\_\_ (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. Galindo*, \_\_\_ N.C. App. \_\_\_, \_\_\_ S.E.2d \_\_\_ (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>

### **Demonstrations and Experiments**

*State v. Witherspoon*, \_\_\_ N.C. App. \_\_\_, \_\_\_ S.E.2d \_\_\_ (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. \_\_\_, \_\_\_ S.E.2d \_\_\_ (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*, \_\_\_ N.C. App. \_\_\_, \_\_\_ S.E.2d \_\_\_ (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 Exceptions**

*State v. Wilson*, \_\_ N.C. App. \_\_, 676 S.E.2d 512 (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."

### **Impeachment**

*State v. Wilson*, \_\_ N.C. App. \_\_, 676 S.E.2d 512 (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.

### **Opinions**

#### **Expert Opinions**

#### **Child Victim Cases**

*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*, \_\_ N.C. App. \_\_, \_\_ S.E.2d \_\_ (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. \_\_, \_\_ S.E.2d \_\_ (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), *temporary stay allowed* (N.C. July 27, 2009). 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.

### **Drug Cases**

*State v. Ward*, \_\_ N.C. App. \_\_, \_\_ S.E.2d \_\_ (Aug. 18, 2009). The trial court erred by allowing the State’s expert to identify prescription pills as controlled substances solely by visual examination and without chemical analysis. The expert identified the pills by comparing their appearance and markings to information contained in Micromedics Literature, a publication used by doctors in hospitals and pharmacies to identify prescription medicines.

### **Generally**

*State v. Smart*, \_\_ N.C. App. \_\_, 674 S.E.2d 684 (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*, \_\_ N.C. App. \_\_, \_\_ S.E.2d \_\_ (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**

*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. Hargrave*, \_\_ N.C. App. \_\_, \_\_ S.E.2d \_\_ (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.

*State v. Buie*, \_\_ N.C. App. \_\_, 671 S.E.2d 351 (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.

## **Privileges**

*State v. Watkins*, \_\_\_ N.C. App. \_\_\_, 672 S.E.2d 43 (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*, \_\_ N.C. \_\_\_, 675 S.E.2d 334 (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.

## **Rape Shield**

*State v. Cook*, \_\_\_ N.C. App. \_\_\_, 672 S.E.2d 25 (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*, \_\_\_ N.C. App. \_\_\_, 672 S.E.2d 84 (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.

## **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.

## **Vouching for the Credibility of a Victim**

*State v. Giddens*, \_\_ N.C. App. \_\_\_, \_\_ S.E.2d \_\_ (Aug. 18, 2009). 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.

### **Arrest, Search, and Investigation**

#### **Admissibility of Statements Made in Violation of 6<sup>th</sup> 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.

### **Arrests and Investigatory Stops**

#### **Generally**

*State v. Carrouters*, \_\_ 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.

*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. 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.

#### **Anonymous and Other 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. 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.

*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. 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.

### **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. Morton*, \_\_\_ N.C. App. \_\_\_, \_\_\_ S.E.2d \_\_ (July 21, 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.

### **Vehicle Stops**

*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. 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 weaving 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. Hodges*, \_\_\_ N.C. App. \_\_\_, 672 S.E.2d 724 (Feb. 17, 2009). (1) 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. (2) A five-minute detention after the traffic stop had concluded was reasonable. (3) 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. 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.

*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**

*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. 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.

### **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 . . . ."

### **Exigent Circumstances**

*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.

### **Frisk**

*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. Morton*, \_\_\_ N.C. \_\_\_, \_\_\_ S.E.2d \_\_\_ (July 21, 2009). Over a dissent, the court held 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 court ruled, in part, that the record did not support the trial judge's factual finding that information received from confidential informants and concerned citizens was reliable.

### **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.

### **Interrogation**

*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 5<sup>th</sup> Amendment right to counsel under *Miranda* for custodial interrogations remains intact.

*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. 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.

### **Jurisdiction of Officers**

*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."

### **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.

## **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 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. 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. 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.

## **Standing**

*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.

## **Students, Searches of**

*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.

### **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.

### **Criminal Offenses** **States of Mind**

*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.

### **General Crimes** **Accessory After the Fact**

*State v. Best*, \_\_\_ N.C. App. \_\_\_, 674 S.E.2d 467 (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. \_\_\_, \_\_\_ S.E.2d \_\_\_ (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. \_\_\_, \_\_\_ S.E.2d \_\_\_ (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. 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.

### **Homicide**

*State v. Davis*, \_\_\_ N.C. App. \_\_\_, \_\_\_ S.E.2d \_\_\_ (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.

## **Assaults**

### **Assault**

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

### **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. Liggins*, \_\_\_ 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.

### **Intent to Kill**

*State v. Liggins*, \_\_\_ 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 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.

### **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.

### **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).

### **Sexual Assaults and Sex Offender Registration 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.”

### **Indecent Liberties**

*State v. McClary*, \_\_\_ N.C. App. \_\_\_, \_\_\_ S.E.2d \_\_\_ (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.

### **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. \_\_, \_\_ S.E.2d \_\_ (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 10<sup>th</sup>, but did not submit a change of address form until September 16<sup>th</sup>. 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.

### **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. 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. 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."

### **Kidnapping Confinement**

*State v. Yarborough*, \_\_ N.C. App. \_\_, \_\_ S.E.2d \_\_ (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.

### **Live Victim**

*State v. Keller*, \_\_ N.C. App. \_\_, \_\_ S.E.2d \_\_ (Aug. 4, 2009). Kidnapping requires a live victim.

### **Multiple Convictions**

*State v. Cole*, \_\_ N.C. App. \_\_, \_\_ S.E.2d \_\_ (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. \_\_\_, \_\_\_ S.E.2d \_\_ (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.

#### **Release in a Safe Place**

*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**

*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.

#### **Robbery**

*State v. Ford*, \_\_\_ N.C. App. \_\_\_, 669 S.E.2d 832 (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. 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.

*Stat 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.

### **Burglary and Breaking and Entering**

*State v. Rawlinson*, \_\_ N.C. App. \_\_, \_\_ S.E.2d \_\_ (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.

### **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.

### **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. \_\_, \_\_ S.E.2d \_\_ (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**

*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. 14-415.1 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. 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.

### **Obscenity and Related Offenses**

*State v. Anderson*, \_\_\_ N.C. App. \_\_\_, 669 S.E.2d 793 (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. Martin*, \_\_\_ N.C. App. \_\_\_, 671 S.E.2d 53 (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.

### **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.

#### **Possession**

##### **Knowing and 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. 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.

*State v. Fuller*, \_\_\_ N.C. App. \_\_\_, 674 S.E.2d 824 (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.

### **Multiple Convictions**

*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.

### **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.

### **Motor Vehicle Offenses**

*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.

## **Defenses**

### **Accident**

*State v. Yarborough*, \_\_\_ N.C. \_\_\_, \_\_\_ S.E.2d \_\_\_ (July 7, 2009). 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.

### **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.

## **Capital**

### **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.

### **Peremptory Instruction on Non-Statutory Mitigating Circumstance**

*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.

### **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."

### **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.

### **Post-Conviction**

#### **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.

### **Ineffective Assistance of Counsel**

*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 not show prejudice; it was highly improbable that a 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.

*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.

### **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.

## 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.