

**Recent Cases Affecting Criminal Law and Procedure**  
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**North Carolina Supreme Court**

**Criminal Law and Procedure**

**Sufficient Evidence That Defendant Constructively Possessed Cocaine To Support Conviction of Possession of Cocaine—Ruling of Court of Appeals Is Reversed**

**State v. Miller**, 363 N.C. 96, 678 S.E.2d 592 (20 March 2009), *reversing*, 191 N.C. App. 124, 661 S.E.2d 770 (17 June 2008). The court ruled that there was sufficient evidence that the defendant constructively possessed cocaine to support his conviction of possession of cocaine. The court reviewed its case law and stated that the two factors frequently considered in analyzing constructive possession were 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.

**Court, Per Curiam and Without Opinion, Summarily Affirms Ruling of Court of Appeals That There Was Sufficient Evidence to Prove Defendant Constructively Possessed Cocaine**

**State v. Alston**, 363 N.C. 367, 677 S.E.2d 455 (18 June 2009), *affirming*, \_\_\_ N.C. App. \_\_\_, 668 S.E.2d 383 (18 November 2008). The court, per curiam and without an opinion, summarily affirmed the ruling of the North Carolina Court of Appeals that there was sufficient evidence to prove that the defendant constructively possessed cocaine to support the defendant's conviction of trafficking by possessing cocaine. Officers with a search warrant and battering ram entered a home. It was occupied by five people, one of whom was the defendant. Knight owned the home and rented it to Hughes. Knight permitted Hughes and the defendant to sell cocaine from the home and accepted proceeds from the sales. When the officers entered the home, the defendant ran down a hallway and crashed into a locked storm door. An officer saw the defendant make a throwing motion toward the living room, but did not see anything leave the defendant's hand. The defendant retreated and was arrested in the living room. Knight and another person (Bio) were detained in the kitchen. Hughes was detained in the entertainment room. The defendant and another person (Reyes) were detained in the living room. Officers found 7.3 grams of cocaine in the living room and 32.8 grams of cocaine in the entertainment room, where the defendant's revolver was found. Cash found in the entertainment room belonged to Hughes. The defendant admitted to owning the cocaine in the living room, but did not admit to the cocaine in the entertainment room. The North Carolina Court of Appeals noted that because the defendant did

not have exclusive possession of the home, the state was required to present sufficient evidence of incriminating circumstances to allow the jury to infer the defendant constructively possessed the cocaine found in the entertainment room. The court concluded there was sufficient evidence. The defendant regularly visited and sold drugs at the home; he was present in the entertainment room before the officers entered the home; he sold cocaine to Reyes in the entertainment room earlier in the evening of the officers' entrance; Hughes did not keep more than one gram of cocaine on his person and kept his cocaine buried in the yard; the defendant was Hughes' drug supplier; and the defendant's revolver was found in the entertainment room.

- (1) Insufficient Evidence to Support Conviction of First-Degree Sexual Offense When State's Evidence Failed to Satisfy Corpus Delicti Rule—Ruling of Court of Appeals Is Affirmed**
- (2) Trial Judge Did Not Commit Plain Error in Jury Instruction on Indecent Liberties, and Sufficient Evidence Supported Conviction When State's Evidence Satisfied Corpus Delicti Rule—Ruling of Court of Appeals Is Reversed**

**State v. Smith**, 362 N.C. 583, 669 S.E.2d 299 (12 December 2008), *affirming in part and reversing in part*, 190 N.C. App. 44, 660 S.E.2d 82 (6 May 2008). The defendant was convicted of first-degree sexual offense and indecent liberties. (1) The court ruled, distinguishing *State v. Parker*, 315 N.C. 222 (1985), that there was insufficient evidence to support the defendant's conviction of first-degree sexual offense when the state's evidence failed to satisfy the corpus delicti rule. There was not substantial evidence independent of the defendant's confession. (See the court's discussion of the evidence in its opinion.) (2) The court ruled that 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; the court cited *State v. Hartness*, 326 N.C. 561 (1990). The court also ruled that there was sufficient evidence to support the indecent liberties conviction because there was substantial evidence independent of the defendant's confession. (See the court's discussion of the evidence in its opinion.)

**Defendant Was Properly Convicted of Armed Robbery Even Though Object Taken in Robbery Was Also Firearm Used to Commit Robbery**

**State v. Maness**, 363 N.C. 261, 677 S.E.2d 796 (18 June 2009). The court ruled, relying on *State v. Black*, 286 N.C. 191 (1974), the defendant was properly convicted of armed robbery even though the object taken in the robbery was also the firearm used to commit the robbery. The defendant fought the officer-victim, took his gun, and then shot and killed him. The court stated that a firearm stolen from a victim can also be a part of the continuing transaction of the armed robbery.

**Court, Per Curiam and Without Opinion, Summarily Affirms Ruling of Court of Appeals That There Was Sufficient Evidence of Dangerous or Deadly Weapon to Support First-Degree Rape Conviction**

**State v. Lawrence**, 363 N.C. 118, 678 S.E.2d 658 (20 March 2009), *affirming*, \_\_\_ N.C. App. \_\_\_, 663 S.E.2d 898 (5 August 2008). The court, per curiam and without an opinion, summarily affirmed the ruling of the North Carolina Court of Appeals that there was sufficient evidence that the defendant possessed a dangerous or deadly weapon to support his conviction of first-degree rape. The defendant grabbed the victim and told her that he was going to kill her. The victim testified that he then reached into his pocket. She did not see if it was a knife or a gun. She just saw something shiny and silver that she thought was a knife.

**Court Remands Case to Trial Court for Consideration Under *Indiana v. Edwards*, 128 S. Ct. 2379 (2008), Whether Trial Judge Should Have Exercised Discretion to Deny Defendant's Request to Represent Himself**

**State v. Lane**, 362 N.C. 667, 669 S.E.2d 321 (12 December 2008). The defendant was convicted of first-degree murder and sentenced to death. The court remanded the case to the trial court for consideration under *Indiana v. Edwards*, 128 S. Ct. 2379 (2008) (United States Constitution does not prohibit states from requiring counsel to represent defendants competent to stand trial but who suffer from severe mental illness to extent that they are not competent to represent themselves at trial) whether the trial judge should have exercised discretion to deny the defendant's request to represent himself. The court outlined two issues that the trial court must decide on remand of this case.

**Court Affirms Trial Judge's Pretrial Dismissal of Charge Under G.S. 15A-954(a)(4) Because Defendant Met His Burden of Proving That State Flagrantly Violated His Constitutional Rights and Irreparably Prejudiced Preparation of His Defense When State Willfully Destroyed Material Evidence Favorable to Defendant—Ruling of Court of Appeals Is Affirmed**

**State v. Williams**, 362 N.C. 628, 669 S.E.2d 290 (12 December 2008), *affirming*, 190 N.C. App. 301, 660 S.E.2d 189 (6 May 2008). The court upheld the trial judge's pretrial dismissal of a charge (felony assault of a government officer) under G.S. 15A-954(a)(4) because the defendant met his burden of proving that the state flagrantly violated the defendant's constitutional rights and irreparably prejudiced the preparation of his defense when the state willfully destroyed material evidence favorable to the defendant. The destroyed evidence consisted of two photographs in the prosecutor's office: one photo showed the uninjured defendant and was captioned "Before suing the District Attorney's office" and the other photo showed the defendant's injuries and was captioned, "After he sued the District Attorney's office." (See the court's analysis why these photos were materially favorable evidence for the defendant and how their willful destruction satisfied the standard under G.S. 15A-954(a)(4) and justified the trial judge's dismissal of the charge.)

**Court, Per Curiam and Without Opinion, Summarily Affirms Ruling of Court of Appeals That: (1) Description of Weapon in Charge of Carrying Concealed Weapon Was Surplusage, and (2) Even Assuming Trial Court Erred in Instructing on Weapon Not Alleged in Charge, Court Did Not Commit Prejudicial Error**

**State v. Bollinger**, 363 N.C. 251, 675 S.E.2d 333 (1 May 2009), *affirming*, \_\_\_ N.C. App. \_\_\_, 665 S.E.2d 136 (19 August 2008). The defendant was charged with carrying a concealed weapon, a metallic set of knuckles. The evidence showed that an officer discovered knives on the defendant's person in addition to the metallic knuckles. The trial court instructed the jury concerning the weapon element as follows: "one or more knives." The court, per curiam and without an opinion, summarily affirmed the ruling of the North Carolina Court of Appeals that (1) the language in the charge for a carrying concealed weapon describing the weapon as "a Metallic set of Knuckles" was unnecessary and thus surplusage; and (2) even assuming the trial court erred in instructing on a weapon not alleged in the charge, the trial court did not commit prejudicial error to require a reversal of the defendant's conviction. The court noted that in this case there was evidence of knives concealed on the defendant's person.

**Sufficient Evidence to Prove That Defendant, a Registered Sex Offender, Changed Her Address and Thus Was Properly Convicted of Failing to Report Change of Address to Sheriff—Ruling of Court of Appeals Is Reversed**

**State v. Abshire**, 363 N.C. 322, 677 S.E.2d 444 (18 June 2009), *reversing*, \_\_\_ N.C. App. \_\_\_, 666 S.E.2d 657 (16 September 2008). The defendant, a registered sex offender, was convicted of failing to notify the sheriff of a change of address under G.S. 14-208.11(a)(2). The court determined that the legislature intended the definition of address to have the ordinary meaning of describing or indicating the location where someone lives. That is, a person's residence is the actual place of abode where he or she lives, whether permanent or temporary. It is not a person's domicile. The legislature clearly intended that even a temporary home address must be registered so that law enforcement and the general public know the whereabouts of sex offenders. Mere physical presence at a location is not the same as establishing a residence. Determining that a place is a person's residence suggests that certain activities of life occur at a particular location. The court examined the facts in this case and ruled that the defendant had changed her address, even if just for a temporary period. Thus, the defendant was properly convicted under G.S. 14-208.11(a)(2).

**Temporary Restraining Order Entered Under Rule 65(b) of Rules of Civil Procedure Was Not Valid Domestic Violence Protective Order to Authorize Enhanced Sentence Under G.S. 50B-4.1(d)—Ruling of Court of Appeals Is Reversed**

**State v. Byrd**, 363 N.C. 214, 675 S.E.2d 323 (1 May 2009), *reversing*, 185 N.C. App. 597 (2007). The defendant's wife filed a civil complaint seeking divorce from bed and board. She filed with the complaint a motion for a preliminary injunction under Rule of Civil Procedure 65(a) and also sought a temporary restraining order (TRO) under Rule 65(b). Her complaint and affidavit alleged that the defendant had assaulted her on many occasions. A district court judge on March 11, 2004, issued an ex parte order granting her request for a TRO (ordering the defendant not to assault his wife) and set a hearing date for March 15, 2004. The TRO was properly served on the defendant on March 12, 2004. The defendant moved for a continuance on March 15, 2004, and the hearing and TRO were both continued until March 24, 2004. On March 23, 2004, the defendant shot his wife in the head with a rifle, resulting in serious injury. The defendant was convicted of a Class C felony assault for this act. During the sentencing phase for this conviction, the jury found that the defendant knowingly violated a valid protective order in the same course of conduct involving the felony assault. Based on the jury's finding, the conviction was elevated under G.S. 50B-4.1(d) from a Class C felony to a Class B2 felony for sentencing purposes. The court ruled: (1) the TRO was not a valid protective order under the definition in G.S. 50B-1(c) and rejected the state's argument that the TRO was the functional legal equivalent of a valid protective order under G.S. 50B-2; and (2) even if the TRO had been entered under Chapter 50B, it failed to meet the definition in G.S. 50B-1(c) because it was not entered "upon hearing by the court or consent of the parties." Merely putting the defendant on notice that a TRO had been entered against him did not satisfy the hearing requirement to permit the sentence enhancement. The court stated that in addition to the statutory hearing requirement, due process required a hearing at which the defendant had an opportunity to be heard about the allegations of domestic violence against him.

**Arrest, Search, and Confession Issues**

**Officers Had Reasonable Suspicion to Make Investigatory Stop of Vehicle—Ruling of Court of Appeals Is Reversed**

**State v. Maready**, 362 N.C. 614, 669 S.E.2d 564 (12 December 2008), *reversing*, 188 N.C. App. 769, 654 S.E.2d 769 (15 January 2008). The defendant was convicted of second-degree murder and other charges involving a vehicle crash in which the defendant was driving impaired. Two officers were on patrol and saw an apparently intoxicated man walking along a road. The man was staggering near the roadway, so the officers began driving toward him. As they did so, the officers saw in the opposite lane a minivan being driven at a slow speed with its hazard lights activated. Behind the minivan was a Honda Civic. The intoxicated man ran across the roadway and got into the Honda. After passing the minivan, which had stopped, the Honda continued down the road. The officers turned around, and as they pulled alongside the minivan, its driver signaled them to get their attention. The minivan driver appeared distraught and told the officers that they needed to check on the Honda's driver because he had been driving erratically, running stop signs and stop lights. The officers conducted an investigatory stop of the Honda, which the defendant was found to be driving. The court ruled that the officers had reasonable suspicion of criminal activity to make the stop: (1) The driver of the minivan was in a position to view the alleged traffic violations; a firsthand eyewitness report is an indicator of reliability. Her cautious driving and apparent distress were consistent with a driver having witnessed another motorist driving erratically. (2) The court gave significant weight to the minivan driver's approaching the officers in person and providing information at a time and place near the scene of the alleged traffic violations. She had little time to fabricate her allegations. She was not a completely anonymous informant because she provided the tip through a face-to-face encounter with the officers. It is inconsequential that the officers did not pause to record her license plate number or other identifying information. Not knowing whether the officers would do so, the minivan driver willingly placed her anonymity at risk. Reviewing all the evidence, including the officers' observations, the court concluded that there was reasonable suspicion to make an investigative stop of the defendant's vehicle.

**Officer's Encounter with Vehicle Passenger Constituted Seizure Under Fourth Amendment—Ruling of Court of Appeals Is Affirmed in Part and Reversed in Part**

**State v. Icard**, 363 N.C. 303, 677 S.E.2d 822 (18 June 2009), *affirming in part and reversing in part*, 190 N.C. App. 76 (2008). At approximately 12:30 a.m., an officer noticed a vehicle parked in the parking lot of a food store in a high crime area known for prostitution and drug-related activity. The officer saw a person behind the steering wheel. The officer parked directly behind the vehicle in which the defendant was a passenger, with his blue lights flashing. The officer, who was in uniform and armed, told the driver in the defendant's presence that the two were being checked out because the area was known for drugs and prostitution. The officer requested from the driver his driver's license and registration and asked for and received the driver's explanation why they were there. After the officer requested law enforcement assistance, another officer arrived in a marked police car and used his take-down lights to illuminate the defendant's side of the vehicle. Both officers then approached the defendant. When the defendant twice failed to respond to one of the officer's attempts to initiate a conversation, the officer opened the defendant's door and made contact with her. The officer requested that the defendant produce her identification, then asked the defendant to come with her purse to the rear of the vehicle where he and the other officer continued to ask questions. When one officer left the defendant to deal with the driver, he did not return her purse but instead handed it to the other officer. The court ruled that the encounter with the defendant constituted a seizure under the Fourth Amendment. The court stated, citing *Florida v. Bostick*, 501 U.S. 429 (1991), that a reasonable person in the defendant's position would have believed she was not free to leave or otherwise terminate the encounter.

## Evidence

### **Court Rejects Bright Line Rule That Admission Under Rule 404(b) of Traffic-Related Convictions That Occurred More Than Sixteen Years Before Date of Second-Degree Vehicular Murder Being Tried Is Plain Error Per Se—Ruling of Court of Appeals Is Reversed**

**State v. Maready**, 362 N.C. 614, 669 S.E.2d 564 (12 December 2008), *reversing*, 188 N.C. App. 169, 654 S.E.2d 769 (15 January 2008). The defendant was convicted of second-degree murder and other charges involving a vehicle crash in which the defendant was driving impaired. The issue before the court was whether the trial judge's admission under Rule 404(b) of prior traffic-related convictions of the defendant that were more than sixteen years old was plain error (the defendant had failed to object at trial to the admission of his prior traffic record). The court rejected the implication that its per curiam ruling in *State v. Goodman*, 357 N.C. 43 (2003), *reversing for reasons stated in dissenting opinion*, 149 N.C. App. 57 (2002), had adopted a bright line rule that the admission under Rule 404(b) of traffic-related convictions that occurred more than sixteen years before the date of a second-degree vehicular murder being tried is plain error per se. The relevance of a temporally remote traffic-related conviction to the malice issue does not depend solely on the length of time that has passed since the conviction occurred. Instead, the extent of its probative value depends largely on intervening circumstances. In this case, in which the defendant was convicted of DWI four times in the sixteen years before the events on trial, his older convictions did not only show that the defendant has the propensity to commit the offense being tried. Instead, those convictions constituted a part of a clear and consistent pattern of criminality that is highly probative of his mental state for the offense being tried. The probative value and thus admissibility of Rule 404(b) evidence must be determined on a case-by-case basis rather than through applying a fixed temporal maximum. The court ruled that the trial judge did not commit plain error in the admission of the defendant's entire driving record.

### **Wife's Conversations With Husband in Public Visiting Areas of State Correctional Facilities Were Not Protected by Marital Communications Privilege Under G.S. 8-57(c)—Ruling of Court of Appeals Is Reversed**

**State v. Rollins**, 363 N.C. 232, 675 S.E.2d 334 (1 May 2009), *reversing*, 189 N.C. App. 248 (2008). The defendant was a suspect in a murder investigation and was incarcerated for an unrelated offense in various state correctional facilities. An officer placed a recording device on the defendant's wife (with her consent) when she visited him. The contents of those conversations were admitted at the defendant's murder trial. The court ruled that the wife's conversations in the public visiting areas of these facilities were not protected by the marital communications privilege under G.S. 8-57(c). The holder of the privilege must possess a reasonable expectation of privacy where the communication takes place and the intent that the communication be kept secret. Relevant factors necessarily include the physical location where the communication was made and whether other people were present.

### **Court, Per Curiam and Without Opinion, Reverses Ruling of North Carolina Court of Appeals for Reasons Stated in Dissenting Opinion That Trial Judge Erred in Allowing Detective to Offer Lay Opinion That White Powder Was Cocaine**

**State v. Llamas-Hernandez**, 363 N.C. 8, 673 S.E.2d 658 (6 February 2009), *reversing for reasons stated in dissenting opinion*, 189 N.C. App. 640, 659 S.E.2d 79 (15 April 2008). The court, per curiam and without an opinion, reversed the ruling of the North Carolina Court of

Appeals for the reasons stated in the dissenting opinion that the trial judge erred in allowing a detective to offer a lay opinion that 55 grams of a white powder seized by officers was cocaine. The substance was not subject to preliminary testing. The identification of the powder was based solely on the detective's visual observations. There was no testimony why he believed that the white powder was cocaine other than his extensive experience in handling drug cases. There also was no testimony about any distinguishing characteristics of the white powder, such as its taste or texture. [Author's note: This ruling raises a question about the continuing validity of *State v. Freeman*, 185 N.C. App. 408 (2007) (officer's lay opinion testimony that pills were crack cocaine was admissible). On the other hand, the rationale for the ruling in *Llamas-Hernandez* does not appear to affect a ruling that an officer may offer expert opinion testimony that a substance is marijuana; see, e.g., *State v. Fletcher*, 92 N.C. App. 50 (1988).]

## Capital Case Issues

### **North Carolina Medical Board's Position Statement on Physician Participation in Executions Is Inconsistent With G.S. 15-190**

**N.C. Department of Correction v. N.C. Medical Board**, 363 N.C. 189, 675 S.E.2d 641 (1 May 2009). The court ruled that the North Carolina Medical Board's (Board's) position statement on physician participation in executions is inconsistent with G.S. 15-190. The court concluded: (1) the plain language of G.S. 15-190 envisions physician participation in executions in some professional capacity; and (2) the Board's position statement exceeds its authority under Chapter 90 of the General Statutes because the statement directly contravenes the specific requirement of physician presence in G.S. 15-190.

### **Trial Court Did Not Commit Error in Its Rulings When Jury Returned Nonunanimous Life Sentence Recommendation**

**State v. Maness**, 363 N.C. 261, 677 S.E.2d 796 (18 June 2009). The defendant was convicted of first-degree murder and sentenced to death. After deliberating in the sentencing hearing for a little more than one and one-half hours, the jury indicated that it had reached a verdict. The foreperson affirmed on the sentencing form that the jury unanimously recommended a life sentence. The oral responses of the jury were consistent with the answers written on the sentencing form. During the polling of the individual jurors, the fourth juror answered "No" when asked whether his recommendation was consistent with the verdict sheet. The trial court called a bench conference and defense counsel moved that the court impose a life sentence, which the court denied. The court stated that the statute imposed a duty to direct the jury to retire and begin deliberations again. However, at the defendant's request and with the state's consent, the court completed the polling of the other jurors. Six of the remaining eight jurors stated they disagreed with the life sentence recommendation. After the polling appeared to be complete, the third juror indicated disagreement with the life sentence recommendation. The court declared that there was not a unanimous sentencing recommendation and its duty under North Carolina law was to direct the jury to resume deliberations. The jury was given a recess and defense counsel moved for a mistrial. Defense counsel noted the varied emotions expressed by both sides when the verdict had initially been announced, and that no verdict could now command confidence. The court denied the motion in its discretion. After deliberating again for just over an hour, the jury reached a unanimous death sentence recommendation. The trial court in its discretion denied the defendant's renewed motion for a mistrial. The supreme court noted that G.S. 15A-1238, dealing with criminal trials in superior court, requires the jury to deliberate further if a poll indicates non-unanimity. However, the death sentencing hearing statute, G.S. 15A-2000(b), is silent. The court stated that the only authorization for the trial court to impose a life sentence is when the jury

cannot, within a reasonable time, agree to its sentence recommendation. The court agreed with the trial court that it lacked authority to impose a life sentence in this case, given the time the jury had deliberated and the lack of evidence suggesting they could not agree or were having trouble reaching a sentencing recommendation. The court also ruled that the trial court did not err in denying in its discretion the defendant's motions for mistrial based on the courtroom reactions when the verdict was initially returned.

- (1) Trial Judge Did Not Err When Giving Jury Instruction on Mitigating Circumstance, G.S. 15A-2000(f)(7) (Defendant's Age When Murder Committed); Ruling in *Roper v. Simmons*, 543 U.S. 551 (2005) Does Not Affect Jury Instruction**
- (2) Ruling in *Roper v. Simmons* Does Not Affect Admissibility of Prior Convictions To Prove Aggravating Circumstance, G.S. 15A-2000(e)(3) (Prior Violent Felony Conviction), Even If Defendant Committed Violent Felonies Before Eighteenth Birthday**

**State v. Garcell**, 363 N.C. 10, \_\_\_ S.E.2d \_\_\_ (20 March 2009). The defendant was convicted of first-degree murder and sentenced to death. The defendant was eighteen years, five months old when he committed the murder. (1) The court ruled that the trial judge did not err when giving a jury instruction on the mitigating circumstance, G.S. 15A-2000(f)(7) (defendant's age when murder committed). The ruling in *Roper v. Simmons*, 543 U.S. 551 (2005) (Eighth Amendment prohibits execution of person who commits murder before eighteenth birthday) did not affect the jury instruction. (2) The court also ruled that *Roper* did not affect the admissibility of prior convictions to prove the aggravating circumstance, G.S. 15A-2000(e)(3) (prior violent felony conviction), even if the defendant committed the violent felonies before his or her eighteenth birthday.

## **Sentencing**

### **Court Modifies Ruling of Court of Appeals on 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)**

**State v. Sellars**, 363 N.C. 112, 678 S.E.2d 618 (20 March 2009), *modifying and affirming*, \_\_\_ N.C. App. \_\_\_, 664 S.E.2d 45 (5 August 2008). The court affirmed the ruling of the North Carolina Court of Appeals that found 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.

## **North Carolina Court of Appeals**

### **Criminal Law and Procedure**

- (1) State Did Not Have Right to Appeal to North Carolina Court of Appeals a Superior Court's Order Involving a District Court's Preliminary Finding Granting Defendant's Pretrial Motion to Dismiss DWI Under G.S. 20-38.6**

- (2) Court Rejects Defendant’s Constitutional and Other Challenges to District Court DWI Procedures Set Out in G.S. 20-38.6(a), 20-38.6(f), and 20-38.7(a)**
- (3) Court Offers Interpretations of Statutory Issues**
- (4) Court Sets Parameters of Remand to Superior Court**

**State v. Fowler**, \_\_\_ N.C. App. \_\_\_, 676 S.E.2d 523 (19 May 2009). The defendant was charged with DWI. He made a pretrial motion in district court under G.S. 20-38.6(a) alleging that the arresting officer lacked probable cause to arrest him. The district court entered a preliminary finding granting the pretrial motion under G.S. 20-38.6(f) and ordered dismissal of the DWI charge. The state gave notice of appeal to superior court under G.S. 20-38.7(a). The superior court entered an order finding that the district court’s conclusions of law granting the motion to dismiss were based on findings of fact cited in its order. The superior court further 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 the matter 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. The defendant filed a motion to dismiss the state’s appeal. (1) The court ruled that the state did not have a right to appeal the superior court’s order to the North Carolina Court of Appeals. The order was interlocutory and did not grant the defendant’s motion to dismiss. The legislature did not provide the state with the right to appeal to North Carolina Court of Appeals under these circumstances. However, the court granted the state’s petition for certiorari to review the issues in this case. (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 from district court’s preliminary finding indicating it would grant defendant’s pretrial motion). See the court’s extensive analysis of these issues. (3) In the course of the court’s rejection of the defendant’s challenges, discussed in (2) above, the court offered its interpretation of other statutory issues. For example, the court recognized that the statutes cited above do not expressly preclude the state from appealing motions to suppress or dismiss made by the defendant during trial based on newly discovered facts. However, 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 to the proceedings (author’s note: before the first witness is sworn for trial), and (ii) is entirely unrelated to the sufficiency of evidence concerning any element of the offense or to 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. On another issue, 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 each case. (4) The court noted that the district court entered a preliminary finding granting the defendant’s pretrial motion to dismiss the DWI charge, based on its conclusion that the arresting officer did not possess probable cause to arrest and charge the defendant with DWI. The court stated that a court document showed, however, that a pretrial motion to suppress had been granted. The court inferred that the district court not only considered whether the officer had probable cause to arrest defendant but, further, preliminarily determined whether there was sufficient 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 the case to superior court with instructions to remand the case to district court to enter a preliminary order indicating its ruling on the defendant's motion to suppress evidence of the defendant's arrest for lack of probable cause. If the district court preliminarily allows the defendant's motion to suppress, the state may appeal to the superior court under G.S. 20-38.7(a). However, 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.

### **State's Notice of Appeal to Superior Court of District Court's Preliminary Notice of Intention to Grant Defendant's Motion to Suppress in DWI Case Was Properly Perfected**

**State v. Palmer**, \_\_\_ N.C. App. \_\_\_, 676 S.E.2d 559 (19 May 2009). The court examined the facts and ruled that 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 *State v. Fowler*, \_\_\_ N.C. App. \_\_\_, 676 S.E.2d 523 (19 May 2009), in noting that the procedures in G.S. 15A-1432(b) are a guide but are not binding; instead, an appeal must be taken and perfected within a reasonable time, which depends on the circumstances of each case. See the court's discussion of the facts concerning the state's notice of appeal in this case.

### **Rape and Sexual Offense Indictments Were Not Fatally Defective When They Identified Victim Solely By Her Initials, "RTB"**

**State v. McKoy**, \_\_\_ N.C. App. \_\_\_, 675 S.E.2d 406 (5 May 2009). The court ruled that rape and sexual offense indictments were not fatally defective when they identified the victim solely by her initials, "RTB." The indictments tracked the statutory language of rape and sexual offense statutes and G.S. 15-144.1 and 15-144.2. The court noted that the record on appeal demonstrates that the defendant had notice of the identity of the victim. The arrest warrants served on the defendant listed the victim by her initials, "R.T.B.," with periods after each letter. The defendant admitted to law enforcement that he knew R.T.B. The defendant did not argue on appeal that he had difficulty preparing his case because of the use of "RTB" instead of the victim's full name. Thus, it appears that the defendant was not confused concerning the identity of the victim, and therefore the use of "RTB" in the indictments provided the defendant with sufficient notice to prepare his defense. The defendant did not argue on appeal that the use of "RTB" placed him at risk of being subjected to double jeopardy. In any event, the victim testified at trial and identified herself in court. Thus, the defendant was protected from double jeopardy.

### **Sufficient Evidence of Sexual Act to Support Convictions of First-Degree Sexual Offense**

**State v. Crocker**, \_\_\_ N.C. App. \_\_\_, \_\_\_ S.E.2d \_\_\_ (2 June 2009). The defendant was convicted of three counts of first-degree sexual offense and other offenses. The victim was nine years old when the offenses occurred and eleven years old when she testified. She said that on three separate occasions the defendant reached beneath her shorts and touched between the "the skin type area" in "[t]he area that you pee out of." Also, the defendant rubbed against a pressure point causing her pain and made her feel as if she was about to pass out. The examining pediatrician testified that "with extreme pressure and friction on the outside [of the labia majora]

or also on the inside coupled with the complaint of pain, it would be more suggestive of touching these structures on the inside.” The court ruled that this evidence was sufficient to prove that the defendant committed a sexual act involving penetration.

**Evidence Was Insufficient to Support Convictions of Trafficking in Methamphetamine By Manufacture and Possession When There Was No Determination of Exact Amount of Methamphetamine in 530 Grams of Liquid; G.S. 90-95(h)(3b) Does Not Include Weight of Mixture Containing Methamphetamine**

**State v. Conway**, \_\_\_ N.C. App. \_\_\_, 669 S.E.2d 40 (2 December 2008). The defendant was convicted of trafficking by possession of 400 grams or more of methamphetamine and trafficking by 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 (as well as amphetamine) does not contain that clause. The court analyzed the statutes and case law and ruled that the state’s evidence was insufficient to support the defendant’s trafficking convictions because G.S. 90-95(h)(3b) requires the state to prove the actual weight of the methamphetamine in a mixture. The weight of the mixture itself is not relevant. (Author’s note: The court did not discuss whether the use of the term “mixture” (“if the quantity of such substance or mixture involved”) 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.)

- (1) Sufficient Evidence to Prove Defendant’s Knowing Possession of Marijuana Found in Vehicle**
- (2) Sufficient Evidence to Support Defendant’s Conviction of Conspiracy to Traffic in Marijuana**
- (3) Trial Judge Did Not Err in Not Instructing on Lesser Included Trafficking Offenses Based on Lesser Amounts of Marijuana**

**State v. Robledo**, \_\_\_ N.C. App. \_\_\_, 668 S.E.2d 91 (4 November 2008). The defendant was convicted of (i) trafficking in 50 pounds or more but less than 2,000 pounds of marijuana, and (ii) conspiracy to traffic by possessing 50 pounds or more but less than 2,000 pounds of marijuana. Officers intercepted a box (box A) at a UPS store that contained 43.8 pounds. They repackaged it and waited for someone to pick it up. The defendant arrived at the store in a Pontiac Grand Am to pick up another box (box B). Box B was not addressed to the defendant, but he had an authorization note from his niece to receive the box. About a half hour later, the defendant returned to the store in the same vehicle with an alleged co-conspirator (not his niece). The co-conspirator entered the store and requested box A, produced an authorization note from the defendant’s niece, and with the defendant’s and a store employee’s assistance loaded box A into the Pontiac. Officers stopped the Pontiac as it left the store. Box B as well as box A were in the Pontiac. Box B contained 44.1 pounds of marijuana, for a total of 87.9 pounds of marijuana in both boxes. Both boxes had identical packaging inside containing Styrofoam for padding and laundry detergent to prevent detection of the marijuana. The defendant told an officer that he and his niece had previously lived at the same residence and she had received many packages from UPS. He also acknowledged he knew that he would be collecting two boxes that day. Changing the amounts during the interview, he stated that he was expecting to be paid \$50, \$100, or \$200 just for delivering the boxes. (1) The court ruled that there was sufficient evidence to prove the defendant’s knowing possession of marijuana found in the two boxes in the vehicle. The evidence

supported an inference that the defendant was aware of what the boxes contained, which in turn proved the defendant's knowing possession of the marijuana. (2) The court ruled that there was sufficient evidence to support the defendant's conviction of conspiracy to traffic in marijuana. The court stated that the state's voluntary dismissal of the conspiracy charge against the co-conspirator was irrelevant in determining the sufficiency of evidence to support the defendant's conspiracy conviction. (3) The court ruled that the trial judge did not err in not instructing on lesser included trafficking offenses based on lesser amounts of marijuana. The court noted that the defendant did not present conflicting evidence to suggest that the defendant possessed only one of the two boxes of marijuana to require a lesser-included offense instruction based on an amount less than 50 pounds.

- (1) Sufficient Evidence to Support Defendant's Conviction of Armed Robbery When Instrument Used in Robbery Appeared to Be Firearm and There Was No Evidence Introduced at Trial That Instrument Was Not a Firearm**
- (2) Trial Judge Did Not Err in Not Instructing on Common Law Robbery**

**State v. Ford**, \_\_\_ N.C. App. \_\_\_, 669 S.E.2d 832 (16 December 2008). The defendant was convicted of armed robbery. The defendant and an accomplice committed a robbery at a convenience store. One of them pointed what appeared to be a silver handgun at the store clerk. When later arresting the accomplice at a residence, an officer saw what appeared to be a silver gun laying on the ground. However, the "gun" was not a firearm but rather some type of lighter that appeared to be a gun. Neither the state nor the defendant presented evidence at trial that the "gun" was the same one used during the robbery. The judge instructed the jury on armed robbery, but not on the lesser offense of common law robbery. (1) The court ruled, relying on *State v. Thompson*, 297 N.C. 285 (1979) (when person commits robbery with instrument that appears to be firearm or other dangerous weapon, in absence of contrary evidence, law presumes instrument to be what person's conduct represent it to be—a firearm or other dangerous weapon), that there was sufficient evidence to support the defendant's conviction of armed robbery. The court noted that no evidence was introduced that the "gun" found by the officer was used in the robbery. (2) The court ruled that the trial judge did not err in not instructing on common law robbery, based on the evidence set out above. (Author's note: One judge of the three-judge panel dissented in part on this issue because the judge stated that the defendant failed to preserve this issue for appellate review so the court should not have considered it.)

- (1) Sufficient Evidence to Support Conviction of Possessing Cocaine**
- (2) Sufficient Evidence to Support Conviction of Possession of Firearm by Felon**
- (3) Insufficient Evidence to Support Conviction of Maintaining Dwelling for Purpose of Keeping or Selling Cocaine**

**State v. Fuller**, \_\_\_ N.C. App. \_\_\_, 674 S.E.2d 824 (21 April 2009). The court ruled: (1) there was sufficient evidence to support the defendant's conviction of possessing cocaine by showing the defendant's constructive possession of the cocaine; (2) there was sufficient evidence to support the defendant's conviction of possession of a firearm by felon by linking the defendant to the trailer in which the weapon was found; and (3) there was insufficient evidence to support the defendant's conviction of maintaining a dwelling for the purpose of keeping or selling cocaine; the state failed to show that the defendant "maintained" the dwelling where the cocaine was found.

- (1) Trial Court Did Not Err in Not Submitting Assault on Female in Trial of First-Degree Rape Based on Short-Form Indictment Under G.S. 15-144.1; Court Sets Standards for Submitting Assault on Female**

**(2) Sufficient Evidence to Support Second-Degree Kidnapping Conviction Occurring During Commission of Rape**

**State v. Thomas**, \_\_\_ N.C. App. \_\_\_, 676 S.E.2d 56 (5 May 2009). The defendant was convicted of first-degree rape under a short-form indictment under G.S. 15-144.1. He was also convicted of second-degree kidnapping. (1) The court ruled that the trial court did not err in not submitting assault on a female as a lesser offense under the statutory language in G.S. 15-144.1. The court reviewed the case law concerning the submission of this alternative offense and set standards for its submission. (See the court's opinion for its extensive analysis.) (2) The court ruled that there was sufficient evidence to support the defendant's conviction of second-degree kidnapping. 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.

**In First-Degree Kidnapping Trial, Fact that Accomplice on His Own Initiative Arguably Released Victim in Safe Place Did Not Inure to Benefit of Defendant Who Had Not Undertaken to Release Victim in Safe Place**

**State v. Smith**, \_\_\_ N.C. App. \_\_\_, 669 S.E.2d 8 (2 December 2008). The defendant was convicted of first-degree kidnapping based on not releasing the victim in a safe place. The court ruled that when an accomplice of the defendant on his own initiative arguably released the victim in a safe place, that event did not inure to the benefit of the defendant who had not undertaken to release the victim in a safe place.

**(1) Sufficient Evidence to Support Kidnapping Conviction Arising During Assaults of Victim**

**(2) Fatal Variance Existed Between Felonious Larceny Indictment and Evidence Showing Ownership of Stolen Property Did Not Belong to Victim as Alleged in Indictment**

**State v. Gayton-Barbosa**, \_\_\_ N.C. App. \_\_\_, 676 S.E.2d 586 (19 May 2009). The defendant was convicted of two counts of felonious assault, first-degree kidnapping, felonious larceny, and other offenses. (1) The court ruled that there was sufficient evidence to support the defendant's conviction of kidnapping that occurred during the commission of the assaults of the victim. The defendant kept the victim from leaving her house by repeatedly striking her with a bat. When she was able to escape, he chased, grabbed, and shot her. Detaining the victim in her home and then again outside was not necessary to effectuate the assaults. (2) The court ruled that there was a fatal variance between the felonious larceny indictment and evidence showing ownership of stolen property did not belong to the victim as alleged in the indictment. The victim alleged in the indictment neither owned nor had a special property interest in the stolen property.

**(1) Sufficient Evidence of Intent to Kill to Support Felonious Assault Conviction**

**(2) Trial Judge Did Not Err in Not Instructing on Assault Inflicting Serious Injury as Lesser Offense of Felony Assault**

**State v. Liggins**, \_\_\_ N.C. App. \_\_\_, 670 S.E.2d 333 (6 January 2009). The defendant was convicted of assault with a deadly weapon with intent to kill inflicting serious injury (the victim was driver of a vehicle) and other offenses. The defendant or his accomplice threw a large rock at a moving vehicle, and the rock crashed through the windshield. After the vehicle stopped, they assaulted the passenger and robbed him. The driver suffered a severe skull fracture and underwent surgery to remove pieces of bone and rock lodged in her brain. (1) The court ruled that

there was sufficient evidence of intent to kill to support the conviction involving the vehicle driver. The evidence showed that the defendant and his accomplice had previously discussed intentionally forcing motorists off the highway to rob them. The defendant or his accomplice had thrown the rock when the vehicle was traveling about 55 m.p.h. or 60 m.p.h. The court stated that it was foreseeable that this act could result in death either from the impact of the rock on the driver or from the driver's losing control of the vehicle and being involved in a deadly vehicular accident. (2) The court ruled that the trial judge did not err in not instructing on assault inflicting serious injury as a lesser offense of the felony assault of the driver. The rock, considering its size and the manner of its use, was a deadly weapon as a matter of law. Thus an instruction on an offense without the deadly weapon element was not required.

### **Sufficient Evidence to Prove Fists and Tree Limbs Used to Assault Victim Were Deadly Weapons**

**State v. Wallace**, \_\_\_ N.C. App. \_\_\_, 676 S.E.2d 922 (2 June 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.

### **Assault Is Not Lesser-Included Offense of Sexual Battery**

**State v. Corbett**, \_\_\_ N.C. App. \_\_\_, 675 S.E.2d 150 (21 April 2009). The court ruled that assault is not a lesser-included offense of sexual battery. The crime of assault has elements that are not elements of sexual battery.

### **Defendant Was Lawfully Convicted of Accessory After Fact of Assault With Deadly Weapon With Intent to Kill Inflicting Serious Injury Even Though Perpetrator of Assault Pled Guilty to Assault With Deadly Weapon Inflicting Serious Injury**

**State v. McGee**, \_\_\_ N.C. App. \_\_\_, 676 S.E.2d 662 (2 June 2009). The court ruled that the defendant was lawfully convicted of accessory after the fact of assault with a deadly weapon with the intent to kill inflicting serious injury even though the perpetrator of the assault pled guilty to assault with a deadly weapon inflicting serious injury. The court noted that if the perpetrator had been acquitted of all types of assaults, then the accessory after the fact could not be convicted.

- (1) Indictment Charging Larceny of Church Was Fatally Defective Because It Did Not Indicate That Church Was Legal Entity Capable of Owning Property**
- (2) Doctrine of Possession of Recently-Stolen Property Was Properly Applied to Charge of Breaking or Entering of Church**

**State v. Patterson**, \_\_\_ N.C. App. \_\_\_, 671 S.E.2d 357 (6 January 2009). The defendant was convicted of felonious breaking or entering of a church, larceny of property pursuant to the breaking or entering, and felonious possession of stolen goods pursuant to the breaking or entering. The trial judge arrested judgment for the conviction of possession of stolen goods. (1) The court ruled, relying on *State v. Thornton*, 251 N.C. 658 (196), and *State v. Cathey*, 162 N.C. App. 350 (2004), that the indictment charging larceny of the church (alleged 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. The court noted that this ruling did not apply to the offense of possession of stolen goods. (2) The evidence showed that property stolen from the church—as well as other stolen property and tools often used for breaking and entering—were

found in the defendant's exclusive control twenty-one days after the church break-in. The defendant argued on appeal that twenty-one days was not "recent" for application of the doctrine of possession of recently-stolen property, which permits an inference of guilt. The court ruled, distinguishing *State v. Hamlet*, 316 N.C. 41 (1986), that the doctrine was properly applied to the breaking and entering charge and there was sufficient evidence to support the conviction.

**Male Juvenile's Entry into School's Female Locker Room With Door Marked "Girl's Locker Room" Was Sufficient Evidence to Support Adjudication of Second-Degree Trespass**

**In re S.M.S.**, \_\_\_ N.C. App. \_\_\_, 675 S.E.2d 44 (7 April 2009). The court ruled that a male juvenile's entry into a school's female locker room with the door marked "Girl's Locker Room" was sufficient evidence to support the juvenile's adjudication of second-degree trespass. The court noted that the door's sign was reasonably likely to give the juvenile notice that he was not authorized to go into the girls' locker room [see G.S. 14-159.13(a)(2)].

- (1) Court Counselor Did Not Under G.S. 7B-1703 Timely File Petition Alleging Delinquent Act, and Thus Juvenile Court Lacked Jurisdiction to Adjudicate Delinquent Act**
- (2) Variance Between Allegation in Juvenile Petition and Evidence at Adjudicatory Hearing Was Not Fatal**

**In re D.S.**, \_\_\_ N.C. App. \_\_\_, \_\_\_ S.E.2d \_\_\_ (16 June 2009). [Author's note: The North Carolina Supreme Court has granted the state's petition to review the ruling summarized in (1) below.] The juvenile was adjudicated delinquent of simple assault and sexual battery. Both acts occurred during a single incident at a school on September 21, 2007. The court counselor received a complaint on September 25, 2007, and filed a petition on October 10, 2007, alleging simple assault. The court ruled that this petition was timely filed under G.S. 7B-1703. The court counselor received a complaint on November 15, 2007, and filed a petition on November 16, 2007, alleging sexual battery based on the incident that occurred on September 21, 2007. Although the second petition was filed within 15 days of receiving the second complaint, the court ruled that the second petition was filed beyond the 30 days allowed under G.S. 7B-1703 (15 days plus an extension of 15 days if allowed by the chief court counselor) because the court counselor received all the information about both delinquent acts in the complaint filed on September 25, 2007. Thus, the juvenile court lacked jurisdiction to adjudicate sexual battery; see *In re J.B.*, 186 N.C. App. 301 (2007). (2) The petition alleged that the juvenile committed simple assault with his hands but the evidence at the adjudicatory hearing showed that he touched the victim with an object (Pixy Stix) that was in his hands. The court ruled that his variance was not fatal. It did not affect the juvenile's ability to present his defense.

- (1) Joinder of Offenses Was Not Error**
- (2) Judge Did Not Improperly Base Sentence on Defendant's Insistence on Jury Trial**
- (3) Double Jeopardy Did Not Bar Convictions and Punishments for Both Second-Degree and Third-Degree Sexual Exploitation of Minor**

**State v. Anderson**, \_\_\_ N.C. App. \_\_\_, 669 S.E.2d 793 (16 December 2008). The defendant surreptitiously placed a camera in his stepdaughter's bedroom. The camera was connected by a cord to the defendant's computer located in another room. After the camera was discovered, the computer was taken to the sheriff's office. Investigation of the computer's hard drive discovered child pornography. The defendant was convicted of misdemeanor peeping and appealed for trial de novo. He was also indicted, based on the child pornography in the computer, for ten counts of third-degree sexual exploitation of a minor and ten counts of second-degree sexual exploitation of

a minor. At a conference with the prosecutor and defense counsel before trial, the judge commented that if the two 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 at a single trial was convicted of all 21 charges and sentenced to imprisonment. The court ruled: (1) the trial judge did not abuse his discretion in granting the state's motion to join all offenses for a single trial; (2) 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; and (3) relying on *State v. Davis*, 302 N.C. 370 (1981), double jeopardy did not bar convictions and punishments for both second-degree and third-degree sexual exploitation offenses. 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.

**(1) Double Jeopardy Did Not Bar Convictions and Punishments for Both Indecent Liberties and Using Minor in Obscenity**

**(2) No Due Process Violation Involving Lengthy Delay From Commission of Offenses to Issuance of Indictments**

*State v. Martin*, \_\_\_ N.C. App. \_\_\_, 671 S.E.2d 53 (20 January 2009). The defendant was convicted of two counts of indecent liberties with a child and using a minor in obscenity. (1) The court ruled that there was no double jeopardy violation when the defendant was convicted and punished for one count of indecent liberties and one count of using a minor in obscenity based on the same photograph of the child and defendant; each offense has at least one element that is not included in the other offense. (2) The court ruled that there was no due process violation involving the lengthy delay from the commission of the offenses to the issuance of the indictments. The offenses occurred in 2000. In 2001, the department of social services possessed the incriminating photos and instituted an action to terminate parental rights. 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 year in which the defendant was indicted. The court ruled that the department's purported delay was not attributable to the state in determining whether a due process violation had occurred.

**Variance Between Period of Time Alleged in Statutory Rape Indictments Within Which Rapes Occurred and Evidence Introduced at Trial Was Not Material and Did Not Deprive Defendant of Opportunity to Adequately Present Defense**

*State v. Hueto*, \_\_\_ N.C. App. \_\_\_, 671 S.E.2d 62 (20 January 2009). The defendant was indicted on six counts of statutory rape for having sex with the victim: two counts each for the months of June, August, and September 2004. The court ruled, assuming that the victim's testimony was insufficient to prove that the defendant had sex with her twice in August, 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. The variance between the period of time alleged in the indictment within which the offenses occurred and the state's evidence at trial was not material and did not deprive the defendant of the opportunity to adequately present his defense.

**Double Jeopardy Prohibits Convictions of Both Accessory After Fact of First-Degree Murder and Accessory After Fact of First-Degree Kidnapping When Jury Could Have**

### **Found That Accessory After Fact of First-Degree Murder Was Based Solely on Kidnapping Under Felony Murder Rule**

**State v. Best**, \_\_\_ N.C. App. \_\_\_, 674 S.E.2d 467 (3 February 2009). The defendant was convicted of three counts of accessory after the fact to first-degree murder and three counts of accessory after the fact to first-degree kidnapping, based on assistance to others who had killed three people. The court ruled, relying on *State v. Gardner*, 315 N.C. 444 (1986), that double jeopardy prohibited convictions of both accessory after fact of first-degree murder and accessory after fact of first-degree kidnapping when the jury could have found that accessory after fact of first-degree murder was based solely on kidnapping under felony murder rule. The jury's verdict did not indicate whether it found the first-degree murder element 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.

### **Indictment Charging Injury to Real Property, Which Incorrectly Described Lessee of Real Property As Its Owner, Did Not Create Fatal Variance With Evidence Presented at Trial**

**State v. Lilly**, \_\_\_ N.C. App. \_\_\_, 673 S.E.2d 718 (17 March 2009). The court ruled that an indictment charging injury to real property, which incorrectly described the lessee of the real property as its owner, did not create a fatal variance with the evidence presented at trial. The court relied on the case law concerning larceny indictments, such as the ruling in *State v. Liddell*, 39 N.C. App. 373 (1979) (no fatal variance when indictment named owner of stolen property and evidence disclosed that person, although not the owner, lawfully possessed the property when the larceny was committed).

### **Court Vacates Defendant's Guilty Plea Because Plea Agreement Stated That Defendant's Pretrial Motions Were Preserved for Appeal, But Appellate Review Was Unavailable for One of Defendant's Pretrial Motions**

**State v. Smith**, \_\_\_ N.C. App. \_\_\_, 668 S.E.2d 612 (18 November 2008). The defendant was charged with a drug offense and habitual felon. Two of his pretrial motions were denied: (1) a motion to suppress evidence based on an alleged Fourth Amendment violation; and (2) a motion to dismiss the habitual felon indictment on the ground that the habitual felon law was unconstitutional. The defendant then entered a guilty plea pursuant to a plea agreement in which one of its terms was: "the defendant's pretrial motions shall be preserved for appeal." The court ruled, relying on *State v. Wall*, 348 N.C. 671 (1998), that the defendant's guilty plea must be vacated because the defendant was entitled to receive the benefit of the plea agreement, and the pretrial motion to dismiss the indictment was not subject to appellate review by appeal of right or by writ of certiorari.

### **Trial Judge Erred in Denying Defendant Final Jury Argument Because Defendant Did Not Introduce Evidence When Cross-Examining State's Witness**

**State v. English**, \_\_\_ N.C. App. \_\_\_, 669 S.E.2d 869 (16 December 2008). The court ruled, distinguishing *State v. Macon*, 346 N.C. 109 (1997), that the trial judge erred in denying the defendant the final jury argument because the defendant did not introduce evidence under Rule 10 of the General Rules of Practice for the Superior and District Courts when cross-examining a state's witness. Defense counsel referred to the contents of an 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. Thus, the defendant did not introduce evidence under Rule 10. (Author's note: This opinion contains a

useful summary of case law on this issue that judges and lawyers may want to read if this issue arises at a future trial.)

### **Trial Judge Erred by Failing to Grant Defendant's Request to Remove Juror With Remaining Peremptory Challenge After Judge Had Reopened Jury Voir Dire**

**State v. Thomas**, \_\_\_ N.C. App. \_\_\_, 673 S.E.2d 372 (3 March 2009). After the jury was impaneled and the trial had begun, the trial judge learned that one of the seated jurors had attempted to contact an employee in the district attorney's office before impanelment. Voir dire was reopened, the trial judge questioned the juror, and allowed the parties to do so as well. The judge did not allow the defendant to remove the juror with a remaining peremptory challenge. The court ruled that the judge erred under *State v. Holden*, 364 N.C. 404 (1997) (once trial judge reopens examination of a juror, each party has absolute right to exercise any remaining peremptory challenges to excuse juror).

### **Armed Robbery Victim's Identification of Defendant in Courtroom During Trial Did Not Violate Due Process**

**State v. Hussey**, \_\_\_ N.C. App. \_\_\_, 669 S.E.2d 864 (16 December 2008). The court ruled, relying on *State v. Bass*, 280 N.C. 435 (1972), that an armed robbery victim's identification of the defendant in the courtroom during the trial did not violate due process. Before trial the victim chose not to attempt to identify the defendant through a photo lineup. It was not until the victim was seated in the courtroom before the beginning of the trial that he viewed the defendant for the first time since the robbery. Law enforcement did not suggest this method of identification to the victim.

### **Trial Judge Did Not Err in Not Instructing on Entrapment Defense in Trial of Soliciting Child By Computer Under G.S. 14-202.3**

**State v. Morse**, \_\_\_ N.C. App. \_\_\_, 671 S.E.2d 538 (6 January 2009). The defendant was convicted under G.S. 14-202.3 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 ruled that the trial judge did not err in not instructing on the entrapment defense. The defendant failed to meet his burden of production to justify a jury instruction. The court reviewed the evidence and concluded that officers merely provided the defendant with the opportunity to commit the offense and, when presented with that opportunity, the defendant pursued it with little hesitation.

### **Trial Judge Did Not Err in Ordering Removal of Spectators from Courtroom**

**State v. Dean**, \_\_\_ N.C. App. \_\_\_, 674 S.E.2d 453 (7 April 2009). The court ruled that the trial court did not abuse its discretion in ordering the removal of four spectators in a gang-related murder trial when jurors had expressed concern for their own safety, and the trial court specifically found that the spectators were talking in the courtroom in violation of a pretrial order and had not followed orders of the court.

### **Trial Judge Erred in Not Exercising Discretion When Denying Jury's Request for Transcripts of Testimony of Victim and Defendant**

**State v. Long**, \_\_\_ N.C. App. \_\_\_, 674 S.E.2d 696 (7 April 2009). The court ruled that the trial judge erred in not exercising discretion when denying the jury's request for transcripts of

testimony of the victim and the defendant. The court also ruled that the error was prejudicial and ordered a new trial.

### **Trial Court Properly Denied Defendant's Motion to Suppress DNA Evidence Involving Alleged Expunction of Conviction**

**State v. Swann**, \_\_\_ N.C. App. \_\_\_, 676 S.E.2d 654 (19 May 2009). In 2006, the defendant was arrested and charged with offenses, and incident to his arrest officers obtained a buccal swab containing a sample of his DNA. The defendant's DNA profile was logged into the SBI's DNA database. A prosecutor later voluntarily dismissed the charges. The defendant's DNA profile matched DNA evidence in other cases, which led to his indictment in January 2007 for various offenses. In November 2007, the defendant filed a petition to expunge the 2006 charges and all DNA evidence incident to those charges. The defendant made a motion to suppress the DNA evidence used to bring the 2007 charges and offered the petition for expunction into evidence. The court ruled that the trial court properly denied the defendant's suppression motion based on three separate and independent reasons: (1) the appellate record was devoid of any ruling on the defendant's petition for expunction; (2) expunction of DNA records under G.S. 15A-146(b1) and (b2) requires a trial court dismissal and the 2006 charges were dismissed by a prosecutor, and the reasons for expunction also did not exist under G.S. 15A-148(a) (requires appellate court reversal and dismissal of conviction or pardon of innocence); and (3) even assuming an order of expunction was entered in November 2007, it operates only prospectively. It does not retroactively expunge DNA records that had been used by law enforcement to identify the defendant that resulted in the January 2007 indictments.

### **PJC With Certain Conditions Constituted Conviction**

**State v. Popp**, \_\_\_ N.C. App. \_\_\_, 676 S.E.2d 613 (19 May 2009). The court ruled that a PJC for possession of a handgun on educational property was a conviction because the following conditions were beyond a requirement to obey the law: the defendant was ordered to abide by a curfew, complete high school, enroll in an institution of high 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.

- (1) Application of Satellite-Based Monitoring Program (SBM) to Defendant Did Not Violate Ex Post Facto Clause Although Legislature Enacted SBM After Defendant Had Been Convicted of Offenses That Subjected Him to SBM**
- (2) Defendant's Guilty Plea Was Not Involuntary**

**State v. Bare**, \_\_\_ N.C. App. \_\_\_, 677 S.E.2d 518 (16 June 2009). The defendant in 1998 was convicted based on a plea of guilty to indecent liberties and sentenced to prison. In 2002, he was convicted based on a no contest plea to failure to register as a sex offender and sexual activity by a custodian of a minor; he was sentenced to prison. In 2006, the legislature enacted the satellite-based monitoring program (SBM). The defendant was released in 2007 and enrolled in SBM. In 2008, the trial court held a determination hearing under G.S. 14-208.40B and found that the defendant was convicted of a reportable conviction as defined under G.S. 14-208.6(4) and was a recidivist. The defendant was ordered to enroll in SBM for the remainder of his natural life. The court ruled that application of SBM to the defendant did not violate the Ex Post Facto Clause although the legislature enacted SBM after the defendant had been convicted of offenses that subjected him to SBM. The court concluded that the legislature intended SBM to be a civil and regulatory scheme, not a criminal punishment. Nor was SBM so punitive in purpose or effect to negate the legislature's intention to deem it civil. (2) The court rejected the defendant's two

arguments concerning the trial court's acceptance of his 2002 no contest plea. First, the defendant argued that the trial court violated G.S. 15A-1002(a)(6) (informing defendant of possible sentence and related matters) when it failed to inform him that imposition of SBM would be a direct consequence of his plea. The court stated that the defendant's argument was predicated on the assumption that SBM is punishment, which the court had rejected under its Ex Post Facto Clause analysis. Second, the defendant argued that his plea was involuntary because imposition of SBM was a direct consequence of his no contest plea, and thus he had to be informed of SBM when entering his plea. The court noted that imposition of SBM was not an automatic result of his no contest plea.

### **Court Affirms Trial Court's Order at Hearing Conducted Under G.S. 14-208.40B That Defendant When Released From Prison Will Be Subject to Satellite-Based Monitoring for His Natural Life**

**State v. Wooten**, \_\_\_ N.C. App. \_\_\_, 669 S.E.2d 749 (16 December 2008). The court affirmed the trial court's order at a hearing conducted under G.S. 14-208.40B that the defendant when released from prison will be subject to satellite-based monitoring for his natural life. The defendant on October 23, 2006, had pled no contest to taking indecent liberties, which occurred on October 31, 2001. He was sentenced to prison, and the trial court conducted the hearing on the satellite-based monitoring issue just before his release from prison. The defendant had been previously convicted on April 25, 1989, of taking indecent liberties. The court ruled: (1) the trial court had subject matter jurisdiction to conduct the hearing (see the court's discussion of this issue); (2) the trial court correctly determined that the defendant was a "recidivist" as a result of the 1989 conviction, based on the statutory language in G.S. 14-208.6(2b) [prior conviction for an offense that is "described in" G.S. 14-208.6(4)], even though the 1989 conviction was not a "reportable conviction" because it predated the sex offender registration law; and (3) the issue whether satellite-based monitoring violates ex post facto was not properly preserved for appellate review.

## **Arrest, Search, and Confession Issues**

- (1) Officer Had Reasonable Suspicion of Criminal Activity to Detain Defendant After Vehicle Traffic Stop Had Concluded**
- (2) Length of Detention of Defendant Was Reasonable Under Fourth Amendment**
- (3) Defendant-Driver Lacked Standing to Contest Passenger's Consent Search and, Alternatively, Evidence of Passenger's Statement Giving Consent Was Not Inadmissible Hearsay**

**State v. Hodges**, \_\_\_ N.C. App. \_\_\_, 672 S.E.2d 724 (17 February 2009). Vice detectives were conducting drug surveillance at a residence and also had information from confidential informants about specific drug sellers and drug sales there. They believed that a vehicle leaving the residence contained a buyer of drugs and followed it to Interstate 40. They saw the vehicle apparently speeding and asked an officer on routine patrol on the interstate to make his own observations about the vehicle's speed or another traffic violation and make a vehicle stop if a violation occurred. The officer followed the vehicle, saw it speeding, and turned on his lights to stop the vehicle. One of the detectives in their vehicle noticed the passenger look back at the officer's vehicle and appeared to conceal something underneath the passenger's seat. He radioed the officer that he believed the passenger was hiding either drugs or a weapon under the seat and warned him to be careful. After stopping the vehicle, the officer spoke with the driver (the defendant) and the passenger. The defendant stated that the passenger was his neighbor and identified his first name, which was inconsistent with the passenger's driver's license. The officer

issued a verbal warning to the defendant for speeding. The officer further detained both the defendant and passenger and eventually the passenger consented to a search of the vehicle. The court ruled that based on these and other facts set out in its opinion that the officer had reasonable suspicion of criminal activity (specifically, drugs or other contraband in the vehicle) to detain them after the traffic stop had concluded. (2) The court ruled that the five-minute detention after the traffic stop had concluded was reasonable under the Fourth Amendment. (3) When the officer asked the defendant-driver for consent to search the vehicle, the defendant gave the officer a rental contract in the passenger's name and told the officer that he would have to ask the passenger for consent to search, who then gave a statement that he consented to a search. The defendant argued on appeal that the passenger's statement was inadmissible hearsay. The court first ruled that the defendant waived any standing he may have had to challenge the passenger's consent to search the vehicle. The court noted that the defendant-driver did not assert any ownership interest in the vehicle nor in the items inside. Alternatively, the court ruled that the passenger's statement was not hearsay because it was not offered to prove the truth of the matter asserted. Instead, the statement explained why the officer believed he could conduct the search and his subsequent conduct. [Author's note: Hearsay is admissible in a suppression hearing. See Robert L Farb, *Arrest, Search, and Investigation in North Carolina* (3d ed. 2003) at pages 21, 26, and 83. And most courts who have considered the issue have ruled that *Crawford v. Washington*, 541 U.S. 36 (2004), does not apply to suppression or preliminary hearings. See, e.g., *People v. Felder*, 129 P.3d 1072 (Colo. App. 2005); *Gresham v. Edwards*, 644 S.E.2d 122 (Ga. 2007); *Sheriff v. Witzenburg*, 145 P.3d 1002 (Nev. 2006); *State v. Watkins*, 190 P.3d 266 (Kan. App. 2007); *Vanmeter v. State*, 165 S.W. 3d 68 (Tex. App. 2005).]

**Officer Did Not Have Reasonable Suspicion to Stop Vehicle for Reckless or Impaired Driving Based on Content of Uncorroborated Anonymous Telephone Call to Dispatcher and Officer's Observation of Weaving Within Lane**

**State v. Peele**, \_\_\_ N.C. App. \_\_\_, 675 S.E.2d 682 (5 May 2009). At approximately 7:50 p.m. on April 7, 2007, 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 a tenth of a mile and seeing the truck weave within its lane once, the officer stopped the truck. The court ruled that the officer did not have reasonable suspicion to stop the truck. The court noted that there was no information identifying the caller, what the caller had seen, or where the caller was located. The officer's observation of the truck's weaving with a lane once did not corroborate the caller's assertion of careless or reckless driving.

**Officer Did Not Have Reasonable Suspicion to Stop Vehicle When Sole Indicator of Impaired Driving Was Vehicle's Weaving Within Lane**

**State v. Fields**, \_\_\_ N.C. App. \_\_\_, 673 S.E.2d 765 (17 March 2009). Around 4:00 p.m., an officer followed the defendant's vehicle for about one and a half miles. On three separate occasions, the officer saw the defendant's vehicle swerve to the white line on the right side of the traffic lane. The officer stopped the vehicle for impaired driving. The court ruled that the officer did not have reasonable suspicion to stop the vehicle. The vehicle's weaving within its lane, standing alone, was insufficient to support reasonable suspicion. The court noted that the facts in this case were clearly distinguishable from the circumstances in *State v. Jacobs*, 162 N.C. App. 251 (2004) (reasonable suspicion of impaired driving existed when defendant's vehicle was weaving within lane at 1:43 a.m. in area near bars), and *State v. Watson*, 122 N.C. App. 596 (1996) (reasonable suspicion of impaired driving existed when defendant's vehicle was weaving

within lane and driving on dividing line of highway at 2:30 a.m. near nightclub). In this case, the officer did not see the defendant violating any laws such as driving above or significantly below the speed limit. Furthermore, the defendant's vehicle was stopped about 4:00 p.m., which is not an unusual hour, and there was no evidence that the defendant was near any places to purchase alcohol.

### **Officers Had Reasonable Suspicion of Defendant's Selling Marijuana to Make Investigative Stop**

**State v. Garcia**, \_\_\_ N.C. App. \_\_\_, 677 S.E.2d 555 (16 June 2009). A detective received information in May 2007 and on July 7, 2007, from an anonymous confidential informant that marijuana was being stored in a storage shed at a house at 338 Barnes Road and identified the defendant as the seller of the marijuana. After searching the defendant's name on a law enforcement database, the detective found his picture and information that he lived at that address and had a lengthy history of police contact, including suspicion of drug and firearms offenses. Surveillance on July 26, 2007, at the house revealed two men who left and returned several times to the residence in a black BMW. The detective thought one of the men was the defendant. She also saw both men coming from the area near the shed and enter the BMW. One of them had a black bag with large handles. Other officers who received this information from the detective followed the BMW to a place which was a known drug area. Two people (not the two who were in the BMW) fled when an officer told them he was an officer. Both men who arrived in the BMW, one of whom was the defendant, were placed in handcuffs. The court ruled, distinguishing *State v. Hughes*, 353 N.C. 200 (2000), that the officers had reasonable suspicion of the defendant's selling marijuana to make an investigative stop, based on the information from the anonymous confidential informant and the officers' corroboration of that information.

### **Officer Had Reasonable Suspicion of Criminal Activity to Stop Vehicle**

**State v. Hudgins**, \_\_\_ N.C. App. \_\_\_, 672 S.E.2d 717 (17 February 2009). An officer received a call from dispatch at approximately 2:55 a.m. informing him that a man (hereafter, caller) was driving his car and being followed by another vehicle. The caller did not identify himself but stated he was being followed by a man armed with a gun in the vicinity of a specified intersection in Greensboro. The caller described the vehicle by make, model, and color, and provided updates on the location. The officer advised the dispatcher to direct the caller to Market Street so he could intercept them. The officer arrived there and saw the two vehicles at a red light. The officer activated his lights and siren, which caused both vehicles to stop, and approached the vehicle that was following the caller. The caller did not identify himself but exited his vehicle and identified the driver of the other vehicle as the man who had been following him. The officer removed the defendant from his car. The court ruled, relying on *State v. Maready*, 362 N.C. 614 (2008), that the officer had reasonable suspicion of criminal activity to stop the defendant's vehicle: (1) the caller telephoned police and remained on the telephone for about eight minutes; (2) the caller provided specific information about the vehicle following him and the location; (3) the caller carefully followed the instructions of the dispatcher, which allowed the officer to intercept the vehicles; (4) the defendant followed the caller over a peculiar and circuitous route that doubled back on itself, going in and out of residential areas between 2:00 a.m. and 3:00 a.m.; (5) the caller remained on the scene long enough to identify the defendant to the officer; and (6) by calling on a cell phone and remaining at the scene, the caller placed his anonymity at risk.

### **Officer Had Reasonable Suspicion to Conduct Investigatory Stop Based on Information That Occupant Had Recently Committed Assault**

**State v. Allen**, \_\_\_ N.C. App. \_\_\_, 676 S.E.2d 519 (19 May 2009). An officer responded to an assault call from a motel at about 3:30 a.m. The victim told the officer that the suspect was a tall white male who left in a small dark car driven by a white female with blonde hair. The officer looked in the vicinity for about ten minutes and then saw a small, light-colored vehicle operated by a white female with blonde hair and driving away from the motel. The officer saw the vehicle enter the center turn lane and make an abrupt left turn into a parking lot and drive hastily over rough pavement. The driver was outside the vehicle when the officer approached. The officer saw a person in the passenger seat but could not determine whether the passenger was male or female. The officer directed the driver to come to his vehicle so he could ask her questions about the assault. She was eventually arrested for DWI. The court ruled, relying on *State v. Allison*, 148 N.C. App. 702 (2002), and distinguishing *State v. Hughes*, 353 N.C. 200 (2000), that the officer had reasonable suspicion to conduct an investigatory stop based on the information supplied by the assault victim and the officer's observations. The court stated that although the record did not reveal the victim's name or give details about the victim's encounter with the officer, a face-to-face encounter with a crime victim affords a higher degree of reliability than an anonymous telephone call. In addition to the victim's information, the officer saw the driver's hurried actions that indicated the driver was trying to avoid him. In addition, the car was near where the assault had occurred. The fact that the car was light-colored and not dark-colored as described by the victim did not detract from a finding of reasonable suspicion under all the circumstances.

- (1) Officer Had Reasonable Suspicion to Make Investigative Stop of Defendant for Armed Robbery and To Frisk Him for Weapons**
- (2) Court Remands to Trial Court to Apply Correct Legal Standard in Determining Whether Officer's Seizure of Cocaine During Frisk Satisfied Plain Feel Doctrine Under Fourth Amendment**

**State v. Williams**, \_\_\_ N.C. App. \_\_\_, 673 S.E.2d 394 (3 March 2009). An officer heard a radio report of an armed robbery that had just occurred at an Hispanic store. Due to language barriers between the victims and law enforcement, there were two conflicting descriptions of the robber. The first described him as a white male wearing a hood and gloves and carrying a silver firearm. The second as an African-American male about six feet tall with a medium build, wearing a green hooded jacket with gloves and carrying a silver gun. Just minutes later, the officer saw the defendant—an African-American male approximately six feet tall with a medium build—a block or two from the robbery location, walking in the same direction that the robber was reportedly traveling, although he was walking down the middle of the street blocking traffic. The defendant was wearing a "blue-green" jacket made of a material that changed colors. He had his hands in his pockets, hood up, and was wearing wrap-around glasses. The officer approached the defendant and asked him to take his hands out of his pockets. The defendant stopped walking, kept his hands in his pockets, and did not say anything. After again ordering the defendant to show his hands, the defendant took them out but also started to empty his pockets. As he was doing so, the officer saw the top of a plastic baggie in one of the pockets. When the officer frisked the defendant, he patted the defendant's front pocket and felt something hard to the touch, round, and possibly a quarter of an inch thick. Based on its feel, the officer believed the object to be a "crack cookie" and removed it. (1) The court ruled, distinguishing *State v. Cooper*, 186 N.C. App. 100 (2007), that the officer had reasonable suspicion to make an investigatory stop of the defendant for armed robbery and to frisk him for weapons. (2) The court remanded to the trial court to apply the correct legal standard in determining whether the officer's seizure of cocaine during the frisk satisfied the plain feel doctrine under Fourth Amendment. The correct standard is whether the officer had probable cause to believe that the object felt during the frisk was an illegal substance, not reasonable suspicion—the standard applied by the trial court in this case. The court cited *Minnesota v. Dickerson*, 508 U.S. 366 (1993); *State v. Shearin*, 170 N.C. App.

222 (2005); and *State v. Briggs*, 140 N.C. App. 484 (2000). [Author's note: If the object had felt like a weapon, then the officer could have removed it without needing to satisfy a probable cause standard.]

### **Defendant's Flight from Officer Who Had Ordered Defendant to Stop and for Whom Officer Had Reasonable Suspicion to Make Investigative Stop Provided Probable Cause to Arrest Defendant for Resisting, Delaying, or Obstructing Officer Under G.S. 14-223**

**State v. Washington**, \_\_\_ N.C. App. \_\_\_, 668 S.E.2d 622 (18 November 2008). Officers were conducting surveillance of a house. The defendant drove his vehicle to the house and another person got into the vehicle as a passenger. The defendant then drove away. Officer A ran a license check of the vehicle and determined that its registration had expired and the vehicle was not covered by liability insurance. The vehicle stopped in parking lot. Officer A arrested the passenger, for whom there were outstanding felony arrest warrants. Officer B approached the defendant, who had left the vehicle and was walking toward a gasoline station. The officer identified herself and told the defendant that she needed to speak with him. The defendant asked why, and she replied that they had warrants for the passenger's arrest. The officer told the defendant to stop at least three times, but the defendant ran away. The officer did not have the opportunity to explain to the defendant that she needed to speak to him about the expired registration and insurance. The defendant was eventually stopped and then arrested for resisting, delaying or obstructing an officer under G.S. 14-223 (he was not arrested for the registration and insurance offenses because it was determined before the arrest that the vehicle did not belong to the defendant), and a search incident to arrest discovered illegal drugs. The defendant contended on appeal that the search was unlawful because the arrest was not valid. The court ruled that the officer had reasonable suspicion to make an investigative stop of the defendant for the registration and insurance violations and when the defendant failed to stop when ordered by the officer, there was probable cause to arrest the defendant for a violation of G.S. 14-223; the court relied on the ruling in *State v. Lynch*, 94 N.C. App. 330 (1989). The court rejected the defendant's argument that the officer's failure to identify to the defendant the reason for her lawful investigative stop rendered the stop unlawful. The court noted that reasonable suspicion is determined by the officer's knowledge before the stop, not the defendant's. The court stated, however, that the officer did not have reasonable suspicion to stop the defendant merely because he was in a vehicle with another person for whom the officers had outstanding arrest warrants.

### **Exigent Circumstances Supported Officers' Warrantless Entry Into Mobile Home To Arrest Defendant Pursuant To Outstanding Arrest Warrant**

**State v. Fuller**, \_\_\_ N.C. App. \_\_\_, 674 S.E.2d 824 (21 April 2009). The court ruled that exigent circumstances supported officers' warrantless entry into a mobile home to arrest the defendant pursuant to an outstanding arrest warrant when officers reasonably believed that the defendant was attempting to escape and also presented a danger to the officers and others in the home.

### **Defendant's Consent to Search His Residence Was Voluntarily Given Despite Officer's Untruthful Statement to Defendant**

**State v. Kuegel**, \_\_\_ N.C. App. \_\_\_, 672 S.E.2d 97 (3 February 2009). After receiving information that the defendant was selling marijuana and cocaine from his apartment, an officer decided to go to the apartment to conduct a knock and talk. Two other officers stationed themselves about three houses away. The officer identified himself, told the defendant that he knew that the defendant had both marijuana and cocaine in the apartment, and wanted his consent to search it without a search warrant. He untruthfully told the defendant that he had conducted

surveillance of the apartment, saw a lot of people coming and going there, stopped their cars after they left the neighborhood, and each time recovered either marijuana or cocaine. The defendant said, "What if I give you what I got?" The officer explained that he needed to find all the drugs inside the apartment and if the defendant did not feel comfortable giving consent to search, the officer would leave two officers at the apartment and apply for a search warrant. The defendant asked, "If I cooperate, what will you do for me?" The officer replied that he could not make any promises, but if he did not have a kilo or dead body in the apartment, he might be able to keep him out of jail for the holiday (it was December 21). The defendant invited the officers in and agreed to show them where everything was. The defendant argued on appeal that his consent to search was not voluntary because it was the product of the officer's deceptive practices. The court ruled, relying on *State v. Sokolowski*, 344 N.C. 428 (1996) (no coercion when eight officers disarmed defendant before asking consent to search), *State v. Fincher*, 309 N.C. 1 (1983) (no coercion when officers told defendant that if he did not consent officers would get search warrant and search anyway), and *State v. Barnes*, 154 N.C. App. 111 (2002) (officer's deception in telling pedophile that victim was pregnant, in effort to elicit confession, was not sufficient to overcome defendant's will and render confession inadmissible), the defendant's consent to search was voluntary based on the totality of circumstances.

### **Defendant Did Not Make Clear Request for Counsel to Require Officer to Stop Interrogation**

*State v. Dix*, \_\_\_ N.C. App. \_\_\_, 669 S.E.2d 25 (2 December 2008). Officers arrested the defendant at his residence for various felony sex offenses. Before being transported to the police station, the defendant indicated his willingness to talk to one of the arresting officers (hereafter, detective). The detective told the defendant to wait until they arrived at the jail. The detective told the defendant that at the police station she would first advise the defendant of his rights and then listen to his side of the story. While being transported, the defendant made a brief unsolicited oral confession to another officer, who related this information to the detective. At the police station, the detective gave Miranda warnings to the defendant. The detective asked the defendant if he understood his rights, and the defendant responded, "yeah." The detective then said, "Okay. And will you answer some questions for me?" The defendant said, "I'm probably gonna have to have a lawyer." The officer explained that it was up to him if he wanted to answer questions or not, and the defendant eventually agreed to talk and signed a Miranda waiver of rights form. The court ruled, relying on *Davis v. United States*, 512 U.S. 452 (1994) (suspect must unambiguously request counsel), and distinguishing *State v. Torres*, 330 N.C. 517 (1992), that the defendant's statement was not a clear request for counsel. The court noted that the defendant's statement must be considered in the context of what had occurred beforehand. The court stated that the defendant's statement was ambiguous because no reasonable officer under the circumstances would have understood the defendant's words as an unambiguous request for a lawyer at that moment, as opposed to a mere comment about the likelihood that the defendant would eventually require an attorney in this matter, which he surely anticipated would involve criminal proceedings.

- (1) Officer Did Not Conduct Interrogation After Defendant Asserted Right to Counsel**
- (2) Violation of Vienna Convention (Requiring Notification to Arrested Foreign National of Right to Have Consul of National's Country Notified of Arrest) Does Not Provide Remedy of Suppression of Confession**

*State v. Herrera*, \_\_\_ N.C. App. \_\_\_, 672 S.E.2d 71 (3 February 2009). Officers obtained an arrest warrant charging the defendant with first-degree murder. They notified Virginia authorities of the warrant because it was believed he might be there. A Spanish interpreter called the

defendant's grandmother in Honduras to determine if the defendant had returned there. The grandmother expressed concern about the defendant and asked the interpreter to notify her if law enforcement found him. The defendant was eventually arrested in Virginia and taken to Durham. During interrogation, in which the same interpreter was used, the defendant asserted the right to counsel and questioning stopped. The officer then prepared to take the defendant to a magistrate. The interpreter advised the officer of his call to the grandmother in Honduras and her desire to be notified when the defendant was in custody. The officer then allowed the interpreter to place a call on speaker phone to the defendant's grandmother and offered to let the defendant speak with her, to which he assented. He and his grandmother conversed in Spanish over the speaker phone in the presence of the officer and interpreter, with the interpreter translating for the officer. During the call, the grandmother asked the defendant, "Son, did you do this?," and he replied affirmatively. The grandmother told him to tell the truth to the police, and he indicated he would. Thereafter, the defendant re-initiated interrogation with the officer by informing the interpreter that he wanted to tell the truth. (1) The court ruled, relying on *Arizona v. Mauro*, 481 U.S. 520 (1987), that the officer did not conduct interrogation after the defendant had asserted the right to counsel. There was no evidence to show that the phone call to the defendant's grandmother was made to elicit incriminating statements from the defendant or she was acting as an agent of the officer. In addition, a suspect in the defendant's position would not have felt coerced to incriminate himself by being permitted to speak with his grandmother via speaker phone in the presence of the officer and interpreter. (2) The court ruled, relying on *Sanchez-Llamas v. Oregon*, 548 U.S. 331 (2006), that 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 provide the remedy of suppression of a confession.

#### **State Violated Defendant's Fifth Amendment Rights By Using Defendant's Silence as Substantive Evidence of Guilt**

**State v. Adu**, \_\_\_ N.C. App. \_\_\_, 672 S.E.2d 84 (3 February 2009). The court ruled, relying on *State v. Hoyle*, 325 N.C. 232 (1989), *State v. Ward*, 354 N.C. 231 (2001), and *State v. Shores*, 155 N.C. App. 342 (2002), that the state on cross-examination of the defendant and during jury argument violated the defendant's Fifth Amendment rights by using the defendant's silence as substantive evidence of guilt. (See the court's discussion of the facts in this case.)

#### **Wildlife Enforcement Officer Had Subject Matter Jurisdiction to Stop Vehicle Driver for Impaired Driving and To Arrest Her For That Offense**

**Parker v. Hyatt**, \_\_\_ N.C. App. \_\_\_, 675 S.E.2d 109 (21 April 2009). The court ruled that a wildlife enforcement officer had subject matter jurisdiction 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."

#### **Local School Board's Policy of Random, Suspicionless Drug and Alcohol Testing of All Employees Violates Art. I, Sec. 20 of North Carolina Constitution**

**Jones v. Graham County Board of Education**, \_\_\_ N.C. App. \_\_\_, 677 S.E.2d 171 (2 June 2009). The court ruled, distinguishing *Boesche v. Raleigh-Durham Airport Authority*, 111 N.C. App. 149 (1993), that a local school board's policy of random, suspicionless drug and alcohol testing of all employees violated Art. I, Sec. 20, of the North Carolina Constitution that prohibits unreasonable searches.

## Evidence

### **Rule 702(a1) Obviates State's Need to Prove HGN Testing Method Is Sufficiently Reliable**

**State v. Smart**, \_\_\_ N.C. App. \_\_\_, 674 S.E.2d 684 (17 March 2009). An officer stopped a vehicle for impaired driving. She noticed a “very strong” odor of alcohol on the driver and other signs of impairment. She administered the horizontal gaze (HGN) nystagmus test and observed several indicators that the defendant was under the influence of an impairing substance. The court rejected the defendant’s argument that the state failed to show that HGN is sufficiently reliable as a basis for expert testimony. The court ruled that Rule 702(a1) obviates the state’s need to prove that the HGN testing method is sufficiently reliable.

- (1) Trial Judge Erred Under Rule 404(a)(2) in Allowing State to Offer Good Character Evidence Concerning Sexual Assault Victim When Defendant Had Not Offered Bad Character Evidence, Although Defense Counsel Had Forecast Evidence of Female’s Bad Character in Opening Statement**
- (2) Trial Judge Erred in Allowing Detective To Offer Lay Opinion Testimony That Surveillance Videotapes of Events Involving Criminal Offenses Were Consistent With Victim’s Trial Testimony**

**State v. Buie**, \_\_\_ N.C. App. \_\_\_, 671 S.E.2d 351 (6 January 2009). The defendant was convicted of first-degree sexual offense and rape, armed robbery, and second-degree kidnapping. The victim was kidnapped in a hospital parking lot, forced to withdraw money from her ATM, and later was sexually assaulted. (1) The court ruled, relying on *State v. Faison*, 330 N.C. 347 (1991) [opening statement is not evidence under Rule 404(a)(2)], the trial judge erred under Rule 404(a)(2) in allowing the state to offer good character evidence concerning the victim when defendant had not offered bad character evidence, although defense counsel had forecast evidence of the female’s bad character in an opening statement. (2) The state introduced surveillance tapes from the hospital and bank that had recorded some of the events involving the crimes being tried. The court ruled that the trial judge erred in allowing a detective to offer lay opinion testimony of what the videotapes depicted. For example, the detective was impermissibly allowed to testify that the videotapes were consistent with the victim’s trial testimony. The court distinguished other appellate cases that have upheld the admission of testimony by officers concerning surveillance videotapes, because their interpretations of those videotapes were based in part on their firsthand observations.

### **Evidence of Assault Committed by Defendant That Occurred Two Days Before Murder Being Tried Was Admissible Under Rule 404(b) to Show Identity When Same Weapon Was Used in Both Murder and Assault**

**State v. Dean**, \_\_\_ N.C. App. \_\_\_, 674 S.E.2d 453 (7 April 2009). The defendant was convicted of first-degree murder. The court ruled that evidence of an assault committed by the defendant that occurred two days before the murder being tried was admissible under Rule 404(b) to show identity when the state’s ballistics evidence showed that the same weapon was used in both the murder and the assault.

### **Defense-Proffered Audio Recording of Statement of Defense Witness to Law Enforcement Officer Was Not Admissible Under Rule 803(5) (Recorded Recollection) or Rule 608(b) (Cross-Examination of Witness About Prior Conduct If Probative of Untruthfulness)**

**State v. Wilson**, \_\_\_ N.C. App. \_\_\_, 676 S.E.2d 512 (19 May 2009). The defendant was convicted of first-degree murder. A person (Daughtridge) spoke to a witness (Morgan) to the murder and later gave a tape recorded statement about that conversation to a law enforcement officer. The defendant called the Daughtridge as a witness. She testified that she had no recollection of seeing Morgan, the conversation with Morgan, or giving a statement to the officer. As the result of an illness, she could hardly remember anything. She also said that she was capable of saying anything and was a mental health patient. (1) The court ruled that an audio recording of a statement is covered within Rule 803(5) (recorded recollection), but the statement in this audio recording was inadmissible under the rule. Daughtridge did not recall giving the statement to the officer and her mental status raised questions about the statement's reliability. (2) The court ruled, relying on *State v. Hunt*, 324 N.C. 343 (1989), and *State v. Najewicz*, 112 N.C. App. 280 (1993), that Daughtridge's statement was not admissible to impeach Morgan's testimony under Rule 608(b) (cross-examination of witness about prior conduct if probative of untruthfulness). The defendant had cross-examined Morgan during the state's case concerning statements Morgan purportedly made to Daughtridge, and Morgan denied telling Daughtridge matters that were inconsistent with his trial testimony. Under these circumstances, the defendant was limited to Morgan's answers on cross-examination. Daughtridge's statement was extrinsic evidence, barred by Rule 608(b) and the *Hunt* and *Najewicz* rulings. 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; the prior statement only concerns a collateral matter, i.e., whether the statement was ever made.

**Defendant's Cross-Examination of State's Medical Expert Opened Door to Permit Expert's Answer Even Though It Would Otherwise Have Been Inadmissible on Direct Examination**

**State v. Crocker**, \_\_\_ N.C. App. \_\_\_, 676 S.E.2d 658 (2 June 2009). The defendant was convicted of three counts of first-degree sexual offense and other offenses. On cross-examination of a state's medical expert, a pediatrician, the defendant asked whether the pediatrician had ever asked the victim if she was telling the truth. The pediatrician responded, "I did not specifically ask her. I felt like what she was telling me was the truth." The court ruled the defendant's cross-examination opened the door to permit the expert's answer even though it would otherwise have been inadmissible on direct examination.

**Statements of Others Used in Questioning By Detectives of Defendant Were Not Hearsay Because They Were Not Offered to Prove Truth of Matter Asserted**

**State v. Miller**, \_\_\_ N.C. App. \_\_\_, 676 S.E.2d 546 (19 May 2009). The state introduced into evidence the defendant's statement to detectives. Some of the detectives' questions contained statements incriminating the defendant that were made by others who did not testify at trial. The court ruled, relying on *State v. Chapman*, 339 N.C. 328 (2005), that the statements were not hearsay because they were not offered to prove the truth of the matter asserted, but rather to show their effect on the defendant and his response. And because they were not offered for the truth, their admission into evidence did not violate the defendant's Confrontation Clause rights under *Crawford v. Washington*, 541 U.S. 36 (2004).

- (1) Testimony of Defendant's Former Attorney During Hearing on Defendant's Motion to Withdraw Guilty Plea Did Not Violate Attorney-Client Privilege**
- (2) Trial Judge Did Not Err in Denying Defendant's Motion to Withdraw Guilty Plea**

**State v. Watkins**, \_\_\_ N.C. App. \_\_\_, 672 S.E.2d 43 (3 February 2009). The defendant filed a motion to withdraw his guilty plea. The defendant's former attorney, who had represented the

defendant during the plea negotiations leading to the guilty plea, testified over the defendant's objection about a meeting with the defendant in which the defendant provided the attorney with his proposed testimony to be relayed to the prosecutor (this occurred during the plea negotiation process to show what testimony the defendant could offer at a possible trial of co-defendants). The court ruled, based on the reasoning in *In re Investigation of Death of Eric Miller*, 357 N.C. 316 (2003), that the conversation between the attorney and defendant was not a confidential communication to which the attorney-client privilege attached because the defendant had provided the information to the attorney for the purpose of conveying it to the prosecutor, a third party. [The court noted that the defendant had not raised the issue whether the defendant's proposed testimony was prohibited by Rule 410 (inadmissibility of plea discussions), and therefore the court would not address it.] (2) The court ruled that the trial judge did not err in denying the defendant's motion to withdraw his guilty plea. Based on the factors set out in *State v. Handy*, 326 N.C. 532 (1990), the defendant failed to show a fair and just reason for withdrawing his plea. (See the court's discussion of these factors and the facts in this case.)

- (1) Trial Judge Did Not Err Under Rule 412 in Excluding Evidence of Child Sexual Assault Victim's Prior Sexual Activity With Others**
- (2) Trial Judge Did Not Err Under Rule 403 in Excluding Evidence of Victim's Alleged False Accusation That Another Person Had Raped Her**
- (3) Trial Judge Did Not Err in Permitting Officer to Offer Corroborative Testimony Even Though It Included Incident of Digital Penetration Not Mentioned in Victim's Testimony**

**State v. Cook**, \_\_\_ N.C. App. \_\_\_, 672 S.E.2d 25 (3 February 2009). The defendant was convicted of first-degree statutory rape and other sex offenses involving a child victim. There was medical evidence of two scars on the victim's hymen that appeared to be healed lacerations. (1) The court ruled, relying on *State v. Black*, 111 N.C. App. 284 (1993), that the trial judge did not err under Rule 412 in excluding evidence of the victim's prior sexual activity with others. The defendant sought to introduce testimony of a boy indicating that he had sex with the victim during the week the victim accused the defendant of committing the offenses. However, the defendant failed to offer the boy's testimony during the Rule 412 in camera hearing and also failed to call him as a witness at trial to show its relevance. Thus, the only evidence was the victim's denial of having sex with the boy. Based on *Black*, the judge did not err in excluding this testimony (the court also ruled that the defendant failed to show the relevance of the testimony). Concerning another person, who allegedly inserted his finger into the victim's vagina, the court ruled that the defendant failed to present evidence during the in camera hearing that the digital penetration could have caused the victim's internal scarring. (2) The court ruled, relying on *State v. Harris*, \_\_\_ N.C. App. \_\_\_, 657 S.E.2d 701 (2008), and distinguishing *State v. Ginyard*, 122 N.C. App. 25 (1996), that 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, because there were different circumstances between the false accusation and the events being tried. The trial judge could have reasonably determined that the proposed testimony was not highly probative when compared to the potential for unfair prejudice if the jury perceived the victim as promiscuous. (3) The court ruled, relying on *State v. Ramey*, 318 N.C. 457 (1986), that the trial judge did not err in permitting an officer to offer corroborative testimony even though it included an incident of digital penetration not mentioned in the victim's testimony. Because the officer's testimony about digital penetration was within the defendant's course of conduct and did not directly contradict the victim's testimony, the officer's testimony strengthened the victim's testimony to warrant its admission as corroborative evidence.

### **Trial Judge in Child Sexual Assault Trial Properly Excluded Under Rule 412(b)(2) Defense-Proffered Evidence of Third Person's Sexual Abuse of Victim**

**State v. Adu**, \_\_\_ N.C. App. \_\_\_, 672 S.E.2d 84 (3 February 2009). The defendant was convicted of first-degree statutory rape and indecent liberties with a child. A doctor testified that a genital examination of the child victim revealed a notch or healed tear to her hymen, which was consistent with genital penetration. The defendant proffered evidence of a third person's sexual abuse of the victim as an alternative explanation for the physical trauma. The court ruled that the trial judge properly excluded this evidence under Rule 412(b)(2). The court reviewed the defendant's evidence and concluded that 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.

## **Sentencing**

### **Parole Statute For First-Degree Murder in Existence on December 20, 1975, Required Life Sentence Be Considered 80 Years for All Purposes, Not Just Parole Eligibility**

**State v. Bowden**, \_\_\_ N.C. App. \_\_\_, 668 S.E.2d 107 (4 November 2008). The defendant was convicted of two counts of first-degree murder on December 20, 1975, and was given two concurrent life sentences. The court ruled that the statute then in existence required that a life sentence be considered 80 years for all purposes, not just parole eligibility.

### **Defendant's Stipulation That Out-of-State Conviction Was Substantially Similar to North Carolina Offense Was Ineffective Because Judge Must Make Finding**

**State v. Lee**, \_\_\_ N.C. App. \_\_\_, 668 S.E.2d 393 (18 November 2008). The defendant stipulated during the sentencing hearing that a New Jersey conviction was substantially similar to a North Carolina offense for the prior record level points allocation. The court ruled, relying on *State v. Palmateer*, 179 N.C. App. 579 (2006), that the stipulation was ineffective because the "substantially similar" issue is a question of law that the judge must make.

### **Stipulation Signed by Prosecutor and Defense Counsel in Section III of AOC-CR-600 Supported Judge's Finding of Defendant's Prior Record Level**

**State v. Hussey**, \_\_\_ N.C. App. \_\_\_, 669 S.E.2d 864 (16 December 2008). The court ruled that a stipulation signed by the prosecutor and defense counsel in Section III of AOC-CR-600 (worksheet on prior record level) supported the judge's finding of the defendant's prior record level. The court distinguished *State v. Jeffrey*, 167 N.C. App. 575 (2004) (presentation of worksheet to judge is insufficient to support judge's finding of prior record level), because AOC-CR-600 in that case did not contain a stipulation. [Author's note: The worksheet in *Hussey* apparently did not contain out-of-state convictions that would require an appropriate judicial finding; see *State v. Palmateer*, 179 N.C. App. 579 (2006).]

### **Trial Judge Properly Found One Point Under G.S. 15A-1340.16(b)(6) in Determining Defendant's Prior Record Level in Sentencing for Habitual Felon**

**State v. Ford**, \_\_\_ N.C. App. \_\_\_, 672 S.E.2d 689 (3 February 2009). The defendant was convicted of attempted felony larceny and then pled guilty to being an habitual felon. The defendant had previously been convicted of felony larceny. The court ruled, relying on *State v. Bethea*, 122 N.C. App. 623 (1996), 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 the defendant's prior record level; G.S. 15A-1340.16(b)(6) is not contrary to the provisions of G.S. 14-7.6. 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.

**No Ex Post Facto Violation When Defendant's Points for Prior Record Level Were Increased Under G.S. 15A-1340.14(c) Because of Change in Classification of Prior Conviction**

**State v. Watkins**, \_\_\_ N.C. App. \_\_\_, 672 S.E.2d 43 (3 February 2009). When the defendant committed the offenses for which he was being sentenced, the punishment for the sale of cocaine was a Class G felony. When the defendant was convicted in 1997 of sale of cocaine, the punishment was a Class H felony. As required by G.S. 15A-1340.14(c), the prior conviction was treated as a Class G felony in determining the defendant's prior record level. The court ruled, relying on *State v. Mason*, 126 N.C. App. 318 (1997), and *State v. Wolfe*, 157 N.C. App. 22 (2003), that there was no ex post facto violation in determining the defendant's prior record level.

**Trial Court Erred in Ordering Restitution to Murder Victims' Families When Defendant Was Convicted of Accessory After Fact of First-Degree Murder and There Was No Direct and Proximate Causal Link Between Defendant's Actions and Harm Cause to Victims' Families**

**State v. Best**, \_\_\_ N.C. App. \_\_\_, 674 S.E.2d 467 (3 February 2009). The defendant was convicted of three counts of accessory after the fact to first-degree murder. The court examined the evidence in this case and ruled that 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 cause to victims' families.

**Prosecutor's Unsworn Statement Was Insufficient by Itself to Support Award of Restitution**

**State v. Swann**, \_\_\_ N.C. App. \_\_\_, 676 S.E.2d 654 (19 May 2009). The court ruled that the trial court erred in ordering the defendant to pay restitution because the award was not supported by competent evidence. The prosecutor presented a restitution worksheet without any supporting documentation. The victim did not testify. The defendant did not stipulate to the award. The prosecutor's unsworn statement about the reason for restitution was insufficient by itself to support the award of restitution.

- (1) Trial Court Was Without Jurisdiction to Conduct Probation Revocation Hearing After Probation Term Had Expired Because State Failed to Comply With G.S. 15A-1344(f)**
- (2) Court States That Recently-Enacted Aggravating Factor G.S. 15A-1340.16(d)(12a) (Defendant Willfully Violated Probation or Parole Condition During Ten-Year Period Before Commission of Offense for Which Defendant Being Sentenced) Applies to Probation or Parole Violations That Occurred Before Enactment of Legislation Creating Aggravating Factor**

**State v. Black**, \_\_\_ N.C. App. \_\_\_, 677 S.E.2d 199 (2 June 2009). (1) The court ruled that the trial court was without jurisdiction to conduct a probation revocation hearing after the probation term had expired because the state failed to comply with the version of G.S. 15A-1344(f) applicable to this case—specifically, the state failed to make reasonable efforts to notify the probationer and to conduct the hearing earlier. [Author's note: S.L. 2009-129, effective for

probation revocation hearings conducted on or after December 1, 2008, deleted the state's duty to make reasonable efforts to notify the probationer and to conduct the hearing earlier.] (2) The court stated that the recently-enacted aggravating factor G.S. 15A-1340.16(d)(12a) (defendant willfully violated probation or parole condition during ten-year period before commission of offense for which defendant being sentenced), applicable to offenses committed on or after December 1, 2008, includes probation or parole violations that occurred before the enactment of the legislation (S.L. 2008-129) creating the aggravating factor.

- (1) Juvenile Court Judge Erred in Entering Separate Dispositions for Juvenile Adjudicated Delinquent of Two Offenses in Same Court Session**
- (2) Juvenile Stipulated to Delinquency History Points and History Level**

**In re D.R.H.**, \_\_\_ N.C. App. \_\_\_, 668 S.E.2d 919 (2 December 2008). The juvenile was adjudicated delinquent of armed robbery and conspiracy to commit armed robbery. (1) The court ruled that juvenile court judge erred under G.S. 7B-2508(h) (requires single disposition for consolidated offenses during juvenile court session) in entering separate dispositions for the juvenile who had been adjudicated delinquent of these two offenses in the same court session. (2) The court ruled that the juvenile stipulated to six delinquency history points and a high delinquency level. Relying on case law involving adult sentencing, *State v. Boyce*, 175 N.C. App. 663 (2006), and *State v. Eubanks*, 151 N.C. App. 499 (2002), the court ruled that the juvenile stipulated to the court counselor's prior history report when the juvenile's attorney received and reviewed the report and failed to object to it. The attorney had responded, "yes" to the judge's question whether the attorney had had an opportunity to review the report. In addition, the juvenile did not assert in his appellate brief that any of the prior adjudications in the report did not exist.