

Supreme Court Review

Covering Significant Cases Decided Dec. 7, 2011 – Nov. 16, 2012
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Criminal Procedure

Appellate Issues

Notice of Appeal

State v. Oates, __ N.C. __, __ S.E.2d __ (Oct. 5, 2012). The court reversed *State v. Oates*, __ N.C. App. __, 715 S.E.2d 616 (Sept. 6, 2011), and held that the State’s notice of appeal of a trial court ruling on a suppression motion was timely. The State’s notice of appeal was filed seven days after the trial judge in open court orally granted the defendant’s pretrial motion to suppress but three months before the trial judge issued his corresponding written order of suppression. The court held that the window for filing a written notice of appeal in a criminal case opens on the date of rendition of the judgment or order and closes fourteen days after entry of the judgment or order. The court clarified that rendering a judgment or an order means to pronounce, state, declare, or announce the judgment or order and is “the judicial act of the court in pronouncing the sentence of the law upon the facts in controversy.” Entering a judgment or an order is “a ministerial act which consists in spreading it upon the record.” It continued:

For the purposes of entering notice of appeal in a criminal case . . . a judgment or an order is rendered when the judge decides the issue before him or her and advises the necessary individuals of the decision; a judgment or an order is entered under that Rule when the clerk of court records or files the judge’s decision regarding the judgment or order.

Plain Error

State v. Towe, __ N.C. __, __ S.E.2d __ (June 14, 2012). The court modified and affirmed *State v. Towe*, __ N.C. App. __, 707 S.E.2d 770 (Mar. 15, 2011) (plain error to allow the State’s medical expert to testify that the child victim was sexually abused when no physical findings supported this conclusion). The court agreed that the expert’s testimony was improper but held that the court of appeals mischaracterized the plain error test. The court of appeals applied a “highly plausible that the jury could have reached a different result” standard. The correct standard, however, is whether a fundamental error occurred that “had a probable impact on the jury’s finding that the defendant was guilty.” Applying that standard, the court found it satisfied.

State v. Lawrence, __ N.C. __, 723 S.E.2d 326 (April 13, 2012). Reaffirming its decision in *State v. Odom*, 307 N.C. 655, 660 (1983), the court clarified “how the plain error standard of review applies on appeal to unpreserved instructional or evidentiary error.” It stated:

For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial. To show that an error was fundamental, a defendant must establish prejudice—that, after examination of the entire record, the error “had a probable impact on the jury’s finding that the defendant was guilty.” Moreover, because plain error is to be “applied cautiously and only in the exceptional case,” the error will often be one that “seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.”

(citations omitted). Applying that rule to the case at hand, the court held that the court of appeals applied the incorrect formulation of the plain error standard in *State v. Lawrence*, __ N.C. App. __, 706 S.E.2d 822 (Mar. 1, 2011) (holding that the trial judge committed plain error by failing to instruct the jury on all elements of conspiracy to commit armed robbery). Although the trial judge erred (the judge instructed the jury that armed robbery involved a taking from the person or presence of another while using or in the

possession of a firearm but failed to instruct on the element of use of the weapon to threaten or endanger the life of the victim), the error did not rise to the level of plain error.

Counsel Issues

State v. Anderson, __ N.C. __, 722 S.E.2d 509 (Mar. 9, 2012). In a per curiam opinion, the court affirmed *State v. Anderson*, __ N.C. App. __, __ S.E.2d __ (Aug. 16, 2011) (trial court erred by allowing the defendant to waive counsel after accepting a waiver of counsel form but without complying with G.S. 15A-1242; among other things, the trial court failed to clarify the specific charges or inform the defendant of the potential punishments or that he could request court-appointed counsel).

Discovery and Related Issues

Smith v. Cain, 565 U.S. __, 132 S. Ct. 627 (Jan. 10, 2012). The Court reversed petitioner Smith's conviction on grounds of a *Brady* violation. At Smith's trial, a single witness, Larry Boatner, linked Smith to the crime. Boatner testified that Smith and two other gunmen entered a home, demanded money and drugs, and then began shooting, killing five people. At trial, Boatner identified Smith as the first gunman through the door and claimed that he had been face to face with Smith during the initial moments of the robbery. No other witnesses and no physical evidence implicated Smith. Smith was convicted of five counts of murder. After an unsuccessful direct review, Smith sought post-conviction relief in the state courts. In connection with this effort he obtained notes of the lead police investigator. These notes contained statements by Boatner that conflicted with his testimony identifying Smith as a perpetrator. Specifically, they state that Boatner "could not . . . supply a description of the perpetrators other than [sic] they were black males." The investigator also made a handwritten account of a conversation he had with Boatner five days after the crime, in which Boatner said he "could not ID anyone because [he] couldn't see faces" and "would not know them if [he] saw them." The investigator's typewritten report of that conversation states that Boatner told the officer he "could not identify any of the perpetrators of the murder." Smith argued that the prosecution's failure to disclose the notes violated *Brady*. The State did not dispute that Boatner's statements were favorable to Smith and that they were not disclosed. The sole question for the Court thus was whether the statements were material. The Court noted that evidence impeaching an eyewitness may not be material if the State's other evidence is strong enough to sustain confidence in the verdict. However, it concluded the State's evidence was not sufficiently strong in this case. Boatner's testimony was the only evidence linking Smith to the crime. Also, Boatner's undisclosed statements directly contradicted his testimony. Boatner's undisclosed statements, the Court concluded, were plainly material. The Court went on to reject various reasons advanced by the State and the dissent regarding why the jury might have discounted Boatner's undisclosed statements. Justice Thomas dissented.

Double Jeopardy

Blueford v. Arkansas, 566 U.S. __, 132 S. Ct. 2004 (May 24, 2012). Double Jeopardy did not bar retrying the defendant on charges of capital and first-degree murder. Before the jury concluded deliberations, it reported that it was unanimous against guilt on charges of capital and first-degree murder but was deadlocked on manslaughter and had not voted on negligent homicide. The court instructed the jury to continue deliberations. However, when the jury still could not reach a verdict, the court declared a mistrial. The parties agreed that the defendant could be retried on manslaughter and negligent homicide. The question was whether he could also be retried for capital and first-degree murder. Answering this question in the affirmative, the Court rejected the defendant's argument that by reporting its votes on capital and first-degree murder, the jury acquitted him of those charges. The Court reasoned that the fact that deliberations continued after the jury's report deprives the report of the finality necessary to constitute an acquittal on the murder offenses. The Court also rejected the defendant's argument that the

trial court's declaration of a mistrial was improper. Specifically, the defendant argued that the trial court should have taken some action, whether through partial verdict forms or other means, to allow the jury to give effect to its votes on the murder charges and then considered a mistrial only as to the remaining charges. The Court rejected this argument, stating: "We have never required a trial court, before declaring a mistrial because of a hung jury, to consider any particular means of breaking the impasse—let alone to consider giving the jury new options for a verdict."

Law of the Case

State v. Lewis, ___ N.C. ___, 724 S.E.2d 492 (April 13, 2012). Affirming the court of appeals, the court held that on a retrial the trial court erred by applying the law of the case and denying the defendant's motion to suppress. At the defendant's first trial, he unsuccessfully moved to suppress the victim's identification as unduly suggestive. That issue was affirmed on appeal. At the retrial, the defense filed new motions to suppress on the same grounds. However, at the pretrial hearings on these motions, the defense introduced new evidence relevant to the reliability of the identification. The State successfully argued that the law of the case governed and that the defendant's motions must be denied. After the defendant was again convicted, he appealed and the court of appeals reversed on this issue. Affirming that ruling the court noted that "the law of the case doctrine does not apply when the evidence presented at a subsequent proceeding is different from that presented on a former appeal." It then went on to affirm the court of appeals' holding that the retrial court erred in applying the doctrine of the law of the case to defendant's motion to suppress at the retrial.

Motions

State v. Sweat, ___ N.C. ___, 727 S.E.2d 691 (June 14, 2012). The court affirmed the holding of *State v. Sweat*, ___ N.C. App. ___, 718 S.E.2d 655 (Oct. 18, 2011), that there was sufficient evidence of fellatio under the corpus delicti rule to support sex offense charges. The court clarified that the rule imposes different burdens on the State:

If there is independent proof of loss or injury, the State must show that the accused's confession is supported by substantial independent evidence tending to establish its trustworthiness, including facts that tend to show the defendant had the opportunity to commit the crime. However, if there is no independent proof of loss or injury, there must be strong corroboration of essential facts and circumstances embraced in the defendant's confession. Corroboration of insignificant facts or those unrelated to the commission of the crime will not suffice.

(quotations omitted). Here, because the substantive evidence of fellatio was defendant's confession to four such acts, the State was required to strongly corroborate essential facts and circumstances embraced in the confession. Under the totality of the circumstances, the State made the requisite showing based on: the defendant's opportunity to engage in the acts; the fact that the confession evidenced familiarity with corroborated details (such as the specific acts that occurred) likely to be known only by the perpetrator; the fact that the confession fit within the defendant's pattern of sexual misconduct; and the victim's extrajudicial statements to an investigator and a nurse. The court rejected the defendant's argument that the victim's extrajudicial statements introduced to corroborate her testimony could not be used to corroborate his confession.

State v. Joe, ___ N.C. ___, 723 S.E.2d 339 (Apr. 13, 2012). Although a trial court may grant a defendant's motion to dismiss under G.S. 15A-954 or -1227 and the State may enter an oral dismissal in open court under G.S. 15A-931, the trial court has no authority to enter an order dismissing the case on its own motion.

State v. Salinas __ N.C. __, 729 S.E.2d 63 (June 14, 2012). Modifying and affirming *State v. Salinas*, __ N.C. App. __, 715 S.E.2d 262 (Aug. 16, 2011) (trial court incorrectly applied a probable cause standard instead of a reasonable suspicion standard to a vehicle stop), the court held that the trial court may not rely on allegations contained in a defendant's G.S. 15A-977(a) affidavit when making findings of fact in connection with a motion to suppress.

Preservation of Evidence

State v. Lewis, __ N.C. __, 724 S.E.2d 492 (April 13, 2012). Reversing the court of appeals, the court held that the trial court did not violate the defendant's due process rights by allowing the State to present evidence of a knife allegedly used during the crime at the defendant's retrial. The knife had been seized from the defendant's residence and was admitted into evidence during the defendant's first trial. However, the knife was not available at the retrial because it had been destroyed after the defendant's first conviction was affirmed. Before the retrial the defense unsuccessfully moved to limit evidence regarding the knife. The court noted that under *California v. Trombetta*, 467 U.S. 479 (1984), "[t]he duty imposed by the Constitution on the State to preserve evidence is limited to evidence that might be expected to play a significant role in the suspect's defense." It continued: "[t]o meet this standard of constitutional materiality, evidence must both possess an exculpatory value that was apparent before the evidence was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means." (quotation omitted). Applying this test, the court concluded that the evidence did not meet the constitutional materiality threshold required by *Trombetta*. According to the defendant, the knife was the only physical evidence linking him to the crime and if it had been available at the retrial, he would have been able to compare the recovered knife with the victim's description to show that the victim's identification of the knife as the one used by the attacker was not credible. The court concluded however that although the knife was unavailable, defense counsel was able to challenge the victim's identification of the knife by using cross-examination to point out that its handle had been inside the assailant's hand. While cross-examining the lead detective defense counsel also established that the victim's nightgown had been left bloody by the assault but that the recovered knife was tested for blood and DNA and found to be "clean." Thus, the court concluded, despite the knife's unavailability, defense counsel was able to elicit impeaching testimony from the State's witnesses concerning the knife. It held: "In the absence of an allegation that the evidence was destroyed in bad faith, we conclude that the State's failure to preserve the knife for defendant's retrial did not violate defendant's right to due process."

Sentencing

Southern Union Co. v. United States, 567 U.S. __, 132 S. Ct. 2344 (June 21, 2012). The Court held that the *Apprendi* rule applies to fines. Thus, any fact that increases a defendant's statutory maximum fine must be found by a jury beyond a reasonable doubt

State v. Whitehead, __ N.C. __, 722 S.E.2d 492 (Mar. 9, 2012). The superior court judge erred by "retroactively" applying Structured Sentencing Law (SSL) provisions to a Fair Sentencing Act (FSA) case. The defendant was sentenced under the FSA. After SSL came into effect, he filed a motion for appropriate relief asserting that SSL applied retroactively to his case and that he was entitled to a lesser sentence under SSL. The superior court judge granted relief. The supreme court, exercising rarely used general supervisory authority to promote the expeditious administration of justice, allowed the State's petition for writ of certiorari and held that the superior court judge erred by modifying the sentence. The court relied on the effective date of the SSL, as set out by the General Assembly when enacting that law. Finding no other ground for relief, the court remanded for reinstatement of the original FSA sentence.

Miller v. Alabama, 567 U.S. __, 132 S. Ct. 2455 (June 25, 2012). The Court held that the 8th Amendment

prohibits a sentencing scheme that requires life in prison without the possibility of parole for juvenile homicide offenders.

Use of Defendant's Silence at Trial

State v. Moore, __ N.C. __, 726 S.E.2d 168 (June 14, 2012). Affirming an unpublished court of appeals' decision, the court held that no plain error occurred when a State's witness testified that the defendant exercised his right to remain silent. On direct examination an officer testified that after he read the defendant his *Miranda* rights, the defendant "refused to talk about the case." Because this testimony referred to the defendant's exercise of his right to silence, its admission was error. The court rejected the State's argument that no error occurred because the comments were neither made by the prosecutor nor the result of a question by the prosecutor designed to elicit a comment on the defendant's exercise of his right to silence. It stated: "An improper adverse inference of guilt from a defendant's exercise of his right to remain silent cannot be made, regardless of who comments on it." The court went on to conclude that the error did not rise to the level of plain error. Finally, the court rejected the defendant's argument that other testimony by the officer referred to the defendant's pre-arrest silence.

Evidence

404(b) Evidence

State v. Beckelheimer, __ N.C. __, 726 S.E.2d 156 (June 14, 2012). Reversing *State v. Beckelheimer*, __ N.C. App. __, 712 S.E.2d 216 (April 19, 2011), the court held that the trial judge did not err by admitting 404(b) evidence. The defendant was charged with sexual offense and indecent liberties. At the time of the alleged offense the defendant was 27. The victim was the defendant's 11-year-old male cousin. The victim testified that after inviting him to the defendant's bedroom to play video games, the defendant climbed on top of the victim and pretended to be asleep. He placed his hands in the victim's pants, unzipped the victim's pants, and performed oral sex on the victim while holding him down. The victim testified that on at least two prior occasions the defendant placed his hands on the victim's genital area outside of his clothes while pretending to be asleep. At trial, witness Branson testified about sexual activity between himself and the defendant. Branson, then 24 years old, testified that when he was younger than 13 years old, the defendant, who was 4½ years older, performed various sexual acts on him. Branson and the defendant would play video games together and spend time in the defendant's bedroom. Branson described a series of incidents during which the defendant first touched Branson's genital area outside of his clothes while pretending to be asleep and then reached inside his pants to touch his genitals and performed oral sex on him. Branson also related an incident in which he performed oral sex on the defendant in an effort to stop the defendant from digital anal penetration. The court found that Branson's testimony was properly admitted to show modus operandi. The conduct was sufficiently similar to the acts at issue given the victim's ages, where they occurred, and how they were brought about. The court of appeals improperly focused on the differences between the acts rather than their similarities (among other things, the court of appeals viewed the acts with Branson as consensual and those with the victim as non-consensual and relied on the fact that the defendant was only 4½ years older than Branson but 16 years older than the victim). The court went on to conclude that given the similarities between the incidents, the remoteness in time was not so significant as to render the prior acts irrelevant and that the temporal proximity of the acts was a question of evidentiary weight. Finally, the court held that the trial court did not abuse its discretion by admitting the evidence under Rule 403.

State v. Brown, __ N.C. __, 722 S.E.2d 508 (Mar. 9, 2012). In a per curiam opinion, the court affirmed the decision below in *State v. Brown*, __ N.C. App. __, 710 S.E.2d 265 (May 3, 2011) (in a case in which the defendant was charged with sexually assaulting his minor child, the court rejected the defendant's

argument that the trial court erred by admitting evidence that he possessed pornographic materials (“Family Letters,” a publication purporting to contain letters regarding individuals’ sexual exploits with family members); the defendant argued that the evidence was inadmissible under Rule 404(b) absent a showing that he used the materials during the crimes or showed them to the victim at or near the time of the crimes; the court concluded that the evidence was properly admitted to show motive and intent; as to motive, it stated: “evidence of a defendant’s incestuous pornography collection sheds light on that defendant’s desire to engage in an incestuous relationship, and that desire serves as evidence of that defendant’s motive to commit the underlying act – engaging in sexual intercourse with the victim/defendant’s child – constituting the offense charged”; as to intent, it concluded that the defendant’s desire to engage in incestuous sexual relations may reasonably be inferred from his possession of the incestuous pornography, a fact relevant to the attempted rape charge; the court also found the evidence relevant to show a purpose of arousing or gratifying sexual desire in connection with an indecent liberties charge; finally, the court concluded that the evidence passed the Rule 403 balancing test, noting that it was admitted with a limiting instruction).

Rule 608

State v. Lewis, ___ N.C. ___, 724 S.E.2d 492 (April 13, 2012). The court of appeals properly found that the trial court abused its discretion by excluding, at a retrial, evidence of remarks that the lead investigator, Detective Roberts, made to a juror at the defendant’s first trial. After the defendant’s conviction, he filed a motion for appropriate relief (MAR) alleging that his trial had been tainted because of improper communication between Roberts and a juror, Deputy Hughes. At a hearing on the MAR, the defendant presented evidence that when his case was called for trial Hughes was in the pool of prospective jurors. While in custody awaiting trial, Hughes had twice transported the defendant to Central Prison in Raleigh. On one of those trips, the defendant told Hughes that he had failed a polygraph examination. Also, Hughes had assisted Roberts in preparing a photographic lineup for the investigation. While undergoing voir dire, Hughes acknowledged that he knew the defendant and had discussed the case with him. While he had misgivings about being a juror, Hughes said that he believed he could be impartial. Because the defendant insisted that Hughes remain on the jury, his lawyer did not exercise a peremptory challenge to remove Hughes from the panel. The evidence at the MAR hearing further showed that during a break in the trial proceedings, Roberts made the following statement to Hughes: “if we have . . . a deputy sheriff for a juror, he would do the right thing. You know he flunked a polygraph test, right?” Hughes did not report this communication to the trial court. Although the trial court denied the MAR, the court of appeals reversed, ordering a new trial. Prior to the retrial, the State filed a motion in limine seeking to suppress all evidence raised in the MAR hearing. Defense counsel opposed the motion, arguing that Roberts’ earlier misconduct was directly relevant to his credibility. The trial court allowed the State’s motion. The defendant was again convicted and appealed. The court of appeals held that the trial court abused its discretion by granting the State’s motion. The supreme court affirmed, holding that the trial court should have allowed defense counsel to cross-examine Roberts regarding his statements to Hughes to show Roberts’ bias against the defendant and pursuant to Rule 608(b) to probe Roberts’ character for untruthfulness. The court went on to reject the State’s argument that the evidence was properly excluded under Rule 403, noting that defense counsel understood that the line of questioning would inform the jurors that the defendant had been convicted in a prior trial but believed the risk was worth taking. Finally, the court held that the trial court’s error prejudiced the defense given Roberts’ significant role in the case.

Confrontation Clause

Williams v. Illinois, 567 U.S. ___, 132 S. Ct. 2221 (June 18, 2012). In a plurality opinion the Court affirmed the holding below that the defendant’s confrontation clause rights were not violated when the State’s DNA expert testified to an opinion based on a report done by a non-testifying analyst. The

defendant Sandy Williams was charged with, among things, sexual assault of L.J. After the incident in question L.J. was taken to the emergency room, where a doctor performed a vaginal exam and took vaginal swabs. The swabs and other evidence were sent to the Illinois State Police (ISP) Crime Lab for testing and analysis. An analyst confirmed the presence of semen in the swabs. About six months later, the defendant was arrested on unrelated charges and a blood sample was drawn from him pursuant to a court order. An analyst extracted a DNA profile from the sample and entered it into ISP Crime Lab database. Meanwhile, L.J.'s swabs from the earlier incident were sent to Cellmark Diagnostic Laboratory for DNA analysis. Cellmark returned the swabs to the ISP Crime Lab, having derived a DNA profile for the person whose semen was recovered from L.J. At trial, ISP forensic biologist Sandra Lambatos testified as an expert for the State. Lambatos indicated that it is a commonly accepted practice in the scientific community for one DNA expert to rely on the records of another DNA analyst to complete her work and that Cellmark's testing and analysis methods were generally accepted in the scientific community. Over a defense objection, Lambatos then testified to the opinion that the DNA profile received from Cellmark matched the defendant's DNA profile from the blood sample in the ISP database. Cellmark's report was not introduced into evidence. Also, while Lambatos referenced documents she reviewed in forming her opinion, she did not read the contents of the Cellmark report into evidence. At the conclusion of Lambatos' testimony, the defendant moved to strike the evidence of Cellmark's testing based upon a violation of his confrontation clause rights. The motion was denied and the defendant was convicted. On appeal to the Illinois Supreme Court the defendant again argued that Lambatos' testimony violated his rights under *Crawford* and *Melendez-Diaz*. The Illinois court disagreed, reasoning that because the Cellmark report supplied a basis for Lambatos' opinion, it was not admitted for the truth of the matter asserted. The U.S. Supreme Court affirmed. Justice Alito wrote the plurality opinion, which was joined by the Chief Justice and Justices Kennedy and Breyer. The plurality determined that no confrontation clause violation occurred for two reasons. First, the Cellmark report fell outside of the scope of the confrontation clause because it was not introduced for the truth of the matter asserted. In this respect, the plurality was careful to distinguish the Court's prior decisions in *Bullcoming* and *Melendez-Diaz*, which it characterized as involving forensic reports that were introduced for that purpose. Second, the plurality concluded that no confrontation clause violation occurred because the report was non-testimonial. Justice Thomas concurred in judgment only. He agreed that the report was non-testimonial, though he reached this conclusion through different reasoning. Thomas disagreed with that portion of the plurality opinion concluding that the report was not introduced for the truth for the matter asserted. Justices Kagan, Scalia, Ginsburg and Sotomayor dissented, noting among other things, the "significant confusion" created by the fractured opinion.

Opinions

State v. Towe, __ N.C. __, __ S.E.2d __ (June 14, 2012). The court modified and affirmed *State v. Towe*, __ N.C. App. __, 707 S.E.2d 770 (Mar. 15, 2011). The court of appeals held that the trial court committed plain error by allowing the State's medical expert to testify that the child victim was sexually abused when no physical findings supported this conclusion. On direct examination, the expert stated that 70-75% of sexually abused children show no clear physical signs of abuse. When asked whether she would put the victim in that group, the expert responded, "Yes, correct." The court of appeals concluded that this amounted to impermissible testimony that the victim was sexually abused. The supreme court agreed that it was improper for the expert to testify that the victim fell into the category of children who had been sexually abused when she showed no physical symptoms of such abuse. The supreme court modified the opinion below with respect to its application of the plain error standard, but like the lower court agreed that plain error occurred in this case.

State v. King, __ N.C. __, __ S.E.2d __ (June 14, 2012). (1) Affirming *State v. King*, __ N.C. App. __, 713 S.E.2d 772 (Aug. 2, 2011) (trial court did not abuse its discretion by excluding the State's expert testimony regarding repressed memory under Rule 403), the court disavowed that part of the opinion

below that relied on *Barrett v. Hyldburg*, 127 N.C. App. 95 (1997), to conclude that all testimony based on recovered memory must be excluded unless it is accompanied by expert testimony. The court agreed with the holding in *Barrett* that a witness may not express the opinion that he or she personally has experienced repressed memory. It reasoned that psychiatric theories of repressed and recovered memories may not be presented without accompanying expert testimony to prevent juror confusion and to assist juror comprehension. However, *Barrett* “went too far” when it added that even if the adult witness in that case were to avoid use of the term “repressed memory” and simply testified that she suddenly in remembered traumatic incidents from her childhood, such testimony must be accompanied by expert testimony. The court continued: “unless qualified as an expert or supported by admissible expert testimony, the witness may testify only to the effect that, for some time period, he or she did not recall, had no memory of, or had forgotten the incident, and may not testify that the memories were repressed or recovered.” (2) The court held that the trial court did not abuse its discretion by excluding the repressed memory evidence under Rule 403. The trial court had concluded that although the expert’s testimony was “technically” admissible under *Howerton* and was relevant, it was inadmissible under Rule 403 because recovered memories are of “uncertain authenticity” and susceptible to alternative possible explanations. The trial court found that “the prejudicial effect [of the evidence] increases tremendously because of its likely potential to confuse or mislead the jury.” The court noted that its holding was case specific:

We promulgate here no general rule regarding the admissibility or reliability of repressed memory evidence under either Rule 403 or Rule 702. As the trial judge himself noted, scientific progress is “rapid and fluid.” Advances in the area of repressed memory are possible, if not likely, and even . . . [the] defendant’s expert, acknowledged that the theory of repressed memory could become established and that he would consider changing his position if confronted with a study conducted using reliable methodology that yielded evidence supporting the theory. Trial courts are fully capable of handling cases involving claims of repressed memory should new or different scientific evidence be presented.

Arrest, Search, and Investigation

Vehicle Stops

State v. Burke, ___ N.C. ___, 720 S.E.2d 388 (Jan. 27, 2012). In a per curiam opinion, the court affirmed the decision below in *State v. Burke*, ___ N.C. App. ___, 712 S.E.2d 704 (June 21, 2011) (over a dissent, the court held that the trial judge erred by denying the defendant’s motion to suppress when no reasonable suspicion supported a stop of the defendant’s vehicle; the officer stopped the vehicle because the numbers on the 30-day tag looked low and that the “low” number led him to “wonder[] about the possibility of the tag being fictitious”; the court noted that it has previously held that 30-day tags that were unreadable, concealed, obstructed, or illegible, justified stops of the vehicles involved; here, although the officer testified that the 30-day tag was dirty and worn, he was able to read the tag without difficulty; the tag was not faded; the information was clearly visible; and the information was accurate and proper).

State v. Otto, ___ N.C. ___, 726 S.E.2d 824 (June 14, 2012). Reversing *State v. Otto*, ___ N.C. App. ___, 718 S.E.2d 181 (Nov. 15, 2011), the court held that there was reasonable suspicion for the stop. Around 11 pm, an officer observed a vehicle drive past. The officer was about a half mile from Rock Springs Equestrian Center, and the vehicle was coming from the direction of Rock Springs. However, because the road was a busy one, the officer did not know exactly where the vehicle was coming from. He did know that Rock Springs was hosting a banquet that night, and he had heard that Rock Springs sometimes served alcohol. The officer turned behind the vehicle and immediately noticed that it was weaving within its own lane. The vehicle never left its lane, but was “constantly weaving from the center line to the fog line.” The vehicle appeared to be traveling at the posted speed limit. After watching the vehicle weave in its own

lane for about $\frac{3}{4}$ of a mile, the officer stopped the vehicle. The defendant was issued a citation for impaired driving and was convicted. The court of appeals determined that the traffic stop was unreasonable because it was supported solely by the defendant's weaving within her own lane. The supreme court disagreed, concluding that under the totality of the circumstances, there was reasonable suspicion for the traffic stop. The court noted that unlike other cases in which weaving within a lane was held insufficient to support reasonable suspicion, the weaving here was "constant and continual" over $\frac{3}{4}$ of a mile. Additionally, the defendant was stopped around 11:00 pm on a Friday night.

State v. Salinas __ N.C. __, 729 S.E.2d 63 (June 14, 2012). The court modified and affirmed *State v. Salinas*, __ N.C. App. __, 715 S.E.2d 262 (Aug. 16, 2011) (trial court incorrectly applied a probable cause standard instead of a reasonable suspicion standard when determining whether a vehicle stop was unconstitutional). The supreme court agreed that the trial judge applied the wrong standard when evaluating the legality of the stop. The court further held that because the trial court did not resolve the issues of fact that arose during the suppression hearing, but rather simply restated the officers' testimony, its order did not contain sufficient findings of fact to which the court could apply the reasonable suspicion standard. It thus remanded for the trial court to reconsider the evidence pursuant to the reasonable suspicion standard.

State v. Williams, __ N.C. __, 726 S.E.2d 161 (June 14, 2012). The court affirmed *State v. Williams*, __ N.C. App. __, 714 S.E.2d 835 (Aug. 16, 2011) (reasonable articulable suspicion justified extending the traffic stop). The officer stopped the vehicle in which the defendant was a passenger for having illegally tinted windows and issued a citation. The officer then asked for and was denied consent to search the vehicle. Thereafter he called for a canine trained in drug detection; when the dog arrived it alerted on the car and drugs were found. Several factors supported the trial court's determination that reasonable suspicion supported extending the stop. First, the driver told the officer that she and the defendant were coming from Houston, Texas, which was illogical given their direction of travel. Second, the defendant's inconsistent statement that they were coming from Kentucky and were traveling to Myrtle Beach "raises a suspicion as to the truthfulness of the statements." Third, the driver's inability to tell the officer where they were going, along with her illogical answer about driving from Houston, permitted an inference that she "was being deliberately evasive, that she had been hired as a driver and intentionally kept uninformed, or that she had been coached as to her response if stopped." Fourth, the fact that the defendant initially suggested the two were cousins but then admitted that they just called each other cousins based on their long-term relationship "could raise a suspicion that the alleged familial relationship was a prearranged fabrication." Finally, the vehicle, which had illegally tinted windows, was owned by a third person. The court concluded:

Viewed individually and in isolation, any of these facts might not support a reasonable suspicion of criminal activity. But viewed as a whole by a trained law enforcement officer who is familiar with drug trafficking and illegal activity on interstate highways, the responses were sufficient to provoke a reasonable articulable suspicion that criminal activity was afoot and to justify extending the detention until a canine unit arrived.

Identification

Perry v. New Hampshire, 565 U.S. __, 132 S. Ct. 716 (Jan. 11, 2012). The Due Process Clause does not require a preliminary judicial inquiry into the reliability of an eyewitness identification when the identification was not procured under unnecessarily suggestive circumstances arranged by law enforcement. New Hampshire police received a call reporting that an African-American male was trying to break into cars parked in the lot of the caller's apartment building. When an officer responding to the call asked eyewitness Nubia Bandon to describe the man, Bandon, who was standing in her apartment building just outside the open door to her apartment, pointed to her kitchen window and said the man she saw breaking into the car was standing in the parking lot, next to a police officer. Petitioner Perry, who

was that person, was arrested. About a month later, when the police showed Bandon a photographic array that included a picture of Perry and asked her to point out the man who had broken into the car, she was unable to identify Perry. At trial Perry unsuccessfully moved to suppress Bandon's identification on the ground that admitting it would violate due process. The Court began by noting that an identification infected by improper police influence is not automatically excluded. Instead, the Court explained, the trial judge must screen the evidence for reliability pretrial. If there is a very substantial likelihood of irreparable misidentification, the judge must disallow presentation of the evidence at trial. But, it continued, if the indicia of reliability are strong enough to outweigh the corrupting effect of the police-arranged suggestive circumstances, the identification evidence ordinarily will be admitted, and the jury will ultimately determine its worth. In this case, Perry asked the Court to extend pretrial screening for reliability to cases in which the suggestive circumstances were not arranged by law enforcement officers because of the grave risk that mistaken identification will yield a miscarriage of justice. The Court declined to do so, holding: "When no improper law enforcement activity is involved . . . it suffices to test reliability through the rights and opportunities generally designed for that purpose, notably, the presence of counsel at postindictment lineups, vigorous cross-examination, protective rules of evidence, and jury instructions on both the fallibility of eyewitness identification and the requirement that guilt be proved beyond a reasonable doubt." Justice Thomas filed a concurring opinion. Justice Sotomayor dissented.

Miranda

Howes v. Fields, 565 U.S. ___, 132 S. Ct. 1181 (Feb. 21, 2012). The Sixth Circuit erroneously concluded that a prisoner is in custody within the meaning of *Miranda* if the prisoner is taken aside and questioned about events that occurred outside the prison. While incarcerated, Randall Fields was escorted by a corrections officer to a conference room where two sheriff's deputies questioned him about allegations that, before he came to prison, he had engaged in sexual conduct with a 12-year-old boy. In order to get to the conference room, Fields had to go down one floor and pass through a locked door that separated two sections of the facility. Fields arrived at the conference room between 7 and 9 pm and was questioned for between five and seven hours. At the beginning of the interview, Fields was told that he was free to leave and return to his cell. Later, he was again told that he could leave whenever he wanted. The interviewing deputies were armed, but Fields remained free of handcuffs and other restraints. The door to the conference room was sometimes open and sometimes shut. About halfway through the interview, after Fields had been confronted with the allegations of abuse, he became agitated and began to yell. One of the deputies, using an expletive, told Fields to sit down and said that "if [he] didn't want to cooperate, [he] could leave." Fields eventually confessed to engaging in sex acts with the boy. Fields claimed that he said several times during the interview that he no longer wanted to talk to the deputies, but he did not ask to go back to his cell before the interview ended. When he was eventually ready to leave, he had to wait an additional 20 minutes or so because an officer had to be called to escort him back to his cell, and he did not return to his cell until well after when he generally went to bed. At no time was Fields given *Miranda* warnings or advised that he did not have to speak with the deputies. Fields was charged with criminal sexual conduct. Fields unsuccessfully moved to suppress his confession and the jury convicted him of criminal sexual conduct. After an unsuccessful direct appeal, Fields filed for federal habeas relief. The federal district court granted relief and the Sixth Circuit affirmed, holding that the interview was a custodial interrogation because isolation from the general prison population combined with questioning about conduct occurring outside the prison makes any such interrogation custodial per se. Reversing, the Court stated: "it is abundantly clear that our precedents do not clearly establish the categorical rule on which the Court of Appeals relied, i.e., that the questioning of a prisoner is always custodial when the prisoner is removed from the general prison population and questioned about events that occurred outside the prison." "On the contrary," the Court stated, "we have repeatedly declined to adopt any categorical rule with respect to whether the questioning of a prison inmate is custodial." The Court went on to hold that based on the facts presented, Fields was not in custody for purpose of *Miranda*.

Searches

Incident to Arrest

State v. Mbacke, __ N.C. __, 721 S.E.2d 218 (Jan. 27, 2012). The court reversed the court of appeals and determined that a search of the defendant's vehicle incident to his arrest for carrying a concealed gun did not violate the Fourth Amendment. The defendant was indicted for, among other things, trafficking in cocaine and carrying a concealed gun. Officers were dispatched to a specific street address in response to a 911 reporting that a black male armed with a black handgun, wearing a yellow shirt, and driving a red Ford Escape was parked in his driveway and that the male had "shot up" his house the previous night. Officers Walley and Horsley arrived at the scene less than six minutes after the 911 call. They observed a black male (later identified as the defendant) wearing a yellow shirt and backing a red or maroon Ford Escape out of the driveway. The officers exited their vehicles, drew their weapons, and moved toward the defendant while ordering him to stop and put his hands in the air. Officer Woods then arrived and blocked the driveway to prevent escape. The defendant initially rested his hands on his steering wheel, but then lowered them towards his waist. Officers then began shouting at the defendant to keep his hands in sight and to exit his vehicle. The defendant raised his hands and stepped out of his car, kicking or bumping the driver's door shut as he did so. Officers ordered the defendant to lie on the ground and handcuffed him, advising him that he was being detained because they had received a report that a person matching his description was carrying a weapon. After the defendant said that he had a gun in his waistband and officers found the gun, the defendant was arrested for carrying a concealed gun. The officers secured the defendant in the back of a patrol car, returned to his vehicle, and opened the driver's side door. Officer Horsley immediately saw a white brick wrapped in green plastic protruding from beneath the driver's seat. As Officer Horsley was showing this to Officer Walley, the defendant attempted to escape from the patrol car. After re-securing the defendant, the officers searched his vehicle incident to the arrest but found no other contraband. The white brick turned out to be 993.8 grams of cocaine. The court noted that the case required it to apply *Arizona v. Gant*, 556 U.S. 332 (2009) (officers may search a vehicle incident to arrest only if (1) the arrestee is unsecured and within reaching distance of the passenger compartment when the search is conducted; or (2) it is reasonable to believe that evidence relevant to the crime of arrest might be found in the vehicle). It began its analysis by concluding that as used in the second prong of the *Gant* test, the term "reasonable to believe" establishes a threshold lower than probable cause that "parallels the objective 'reasonable suspicion' standard sufficient to justify a *Terry* stop." Thus, it held that "when investigators have a reasonable and articulable basis to believe that evidence of the offense of arrest might be found in a suspect's vehicle after the occupants have been removed and secured, the investigators are permitted to conduct a search of that vehicle." Applying that standard, the court concluded:

[D]efendant was arrested for . . . carrying a concealed gun. The arrest was based upon defendant's disclosure that the weapon was under his shirt. Other circumstances . . . such as the report of defendant's actions the night before and defendant's furtive behavior when confronted by officers, support a finding that it was reasonable to believe additional evidence of the offense of arrest could be found in defendant's vehicle. Accordingly, the search was permissible under *Gant*"

The court ended by noting that it "[was] not holding that an arrest for carrying a concealed weapon is *ipso facto* an occasion that justifies the search of a vehicle." It expressed the belief that "the 'reasonable to believe' standard required by *Gant* will not routinely be based on the nature or type of the offense of arrest and that the circumstances of each case ordinarily will determine the propriety of any vehicular searches conducted incident to an arrest."

Jail Searches

Florence v. Board of Chosen Freeholders, 566 U.S. __, 132 S. Ct. 1510 (April 2, 2012). Reasonable suspicion is not required for a close visual inspection of arrestees who will be held in the general

population of a detention facility. The petitioner was arrested and taken to the Burlington County Detention Center. Burlington County jail procedures required every arrestee to shower with a delousing agent. Officers would check arrestees for scars, marks, gang tattoos, and contraband as they disrobed. Petitioner claims he was also instructed to open his mouth, lift his tongue, hold out his arms, turn around, and lift his genitals. The petitioner was later transferred to the Essex County Correctional Facility. At that facility all arriving detainees passed through a metal detector and waited in a group holding cell for a more thorough search. When they left the holding cell, they were instructed to remove their clothing while an officer looked for body markings, wounds, and contraband. Without touching the detainees, an officer looked at their ears, nose, mouth, hair, scalp, fingers, hands, arms, armpits, and other body openings. Petitioner alleges he was required to lift his genitals, turn around, and cough in a squatting position. After a mandatory shower, during which his clothes were inspected, petitioner was admitted to the facility. He was released the next day. Petitioner filed suit under 42 U.S.C. §1983 arguing that persons arrested for a minor offense could not be required to remove their clothing and expose their private areas to close visual inspection as a routine part of the intake process. Rather, he contended, officials could conduct this kind of search only if they had reason to suspect a particular inmate of concealing a weapon, drugs, or other contraband. The district court granted the petitioner's motion for summary judgment. The Third Circuit reversed. The Court affirmed, stating in part:

The question here is whether undoubted security imperatives involved in jail supervision override the assertion that some detainees must be exempt from the more invasive search procedures at issue absent reasonable suspicion of a concealed weapon or other contraband. The Court has held that deference must be given to the officials in charge of the jail unless there is "substantial evidence" demonstrating their response to the situation is exaggerated. Petitioner has not met this standard, and the record provides full justifications for the procedures used.

Slip op. at 9-10 (citation omitted). The Court noted that correctional officials have a significant interest in conducting a thorough search as a standard part of the intake process to identify disease, gang affiliation, and locate contraband. The Court rejected the petitioner's assertion that certain detainees, such as those arrested for minor offenses, should be exempt from this process unless they give officers a particular reason to suspect them of hiding contraband. It concluded: "It is reasonable, however, for correctional officials to conclude this standard would be unworkable. The record provides evidence that the seriousness of an offense is a poor predictor of who has contraband and that it would be difficult in practice to determine whether individual detainees fall within the proposed exemption." Slip op. at 14.

Of Students

In re T.A.S., ___ N.C. ___, ___ S.E.2d ___ (Oct. 5, 2012). The court vacated and remanded *In re T.A.S.*, ___ N.C. App. ___, 713 S.E.2d 211 (July 19, 2011) (holding that a search of a juvenile student's bra was constitutionally unreasonable), ordering further findings of fact. The court ordered the trial court to make additional findings of fact, including but not necessarily limited to: the names, occupations, genders, and involvement of all the individuals physically present at the "bra lift" search of T.A.S.; whether T.A.S. was advised before the search of the Academy's "no penalty" policy; and whether the "bra lift" search of T.A.S. qualified as a "more intrusive" search under the Academy's Safe School Plan.

It provided that "[i]f, after entry of an amended judgment or order by the trial court, either party enters notice of appeal, counsel are instructed to ensure that a copy of the Safe School Plan, discussed at the suppression hearing and apparently introduced into evidence, is included in the record on appeal."

With GPS Devices

United States v. Jones, 565 U.S. ___, 132 S. Ct. 945 (Jan. 23, 2012). The government's installation of a GPS tracking device on a vehicle and its use of that device to monitor the vehicle's movements on public

streets constitutes a “search” within the meaning of the Fourth Amendment. Suspecting that the defendant was involved in drug trafficking, the government obtained a search warrant for use of a GPS device on the defendant’s vehicle; the warrant authorized officers to install the device in the District of Columbia within 10 days. Officers ended up installing the device on the undercarriage of the vehicle while it was parked in a public parking lot in Maryland, 11 days after the warrant was signed. Over the next 28 days, the government used the device to track the vehicle’s movements, and once had to replace the device’s battery when the vehicle was parked in a different public lot in Maryland. By means of signals from multiple satellites, the device established the vehicle’s location within 50 to 100 feet, and communicated that location by cellular phone to a government computer. It relayed more than 2,000 pages of data over the 4-week period. The defendant was charged with several drug offenses. He unsuccessfully sought to suppress the evidence obtained through the GPS device. Before the U.S. Supreme Court the government conceded noncompliance with the warrant and argued only that a warrant was not required for the GPS device. Concluding that the evidence should have been suppressed, the Court characterized the government’s conduct as having “physically occupied private property for the purpose of obtaining information.” So characterized, the Court had “no doubt that such a physical intrusion would have been considered a ‘search’ within the meaning of the Fourth Amendment when it was adopted.” The Court declined to address whether the defendant had a reasonable expectation of privacy in the undercarriage of his car and in the car’s locations on the public roads, concluding that such an analysis was not required when the intrusion—as here—“encroached on a protected area.”

Criminal Offenses

Sexual Assaults

State v. Hunt, __ N.C. __, 722 S.E.2d 484 (Mar. 9, 2012). (1) Reversing a decision of the court of appeals in *State v. Hunt*, __ N.C. App. __, 710 S.E.2d 339 (May 3, 2011), the court held that expert testimony was not required for the State to establish that the victim had a mental disability for purposes of second-degree sexual offense. In the opinion below, the court of appeals reversed the defendant’s conviction on grounds that there was insufficient evidence as to the victim’s mental disability, reasoning: “where the victim’s IQ falls within the range considered to be ‘mental retardation[.]’ but who is highly functional in her daily activities and communication, the State must present expert testimony as to the extent of the victim’s mental disability as defined by [G.S.] 14-27.5.” The supreme court, however, found the evidence sufficient. First, it noted, there was evidence that the victim was mentally disabled. The victim had an IQ of 61, was enrolled in special education classes, a teacher assessed her to be in the middle level of intellectually disabled students, and she required assistance to function in society. Second, the victim’s condition rendered her substantially incapable of resisting defendant’s advances. The victim didn’t know the real reason why the defendant asked her to come into another room, his initial acts of touching scared her because she didn’t know what he was going to do, she was shocked when he exposed himself, she was frightened when he forced her to perform fellatio and when she raised her head to stop, he forced it back down to his penis. Finally, there was evidence that the defendant knew or reasonably should have known about the victim’s disability. Specifically, his wife testified that she had discussed the victim’s condition with the defendant. The court emphasized that “expert testimony is not necessarily required to establish the extent of a victim’s mental capacity to consent to sexual acts when a defendant is charged with second-degree sexual offense pursuant to section 14-27.5.” (2) Reversing the court of appeals, the court held that the State presented sufficient evidence of crime against nature. The defendant conceded knowing that the victim was 17 years old. For the reasons discussed above, the court concluded that there was sufficient evidence that the victim’s conditions rendered her substantially incapable of resisting the defendant’s advances. All of this evidence indicates that the sexual acts were not consensual. In addition, the court noted, the record suggests that the acts were coercive, specifically pointing to the defendant’s conduct of forcing the victim’s head to his penis. The court emphasized that “expert testimony is not

necessarily required to establish the extent of a victim's mental capacity to consent to sexual acts when a defendant is charged with . . . crime against nature.”

Weapons & Drug Offenses

State v. Bradshaw, __ N.C. __, 728 S.E.2d 345 (June 14, 2012). Affirming an unpublished opinion below, the court held that the trial court properly denied the defendant's motion to dismiss charges of trafficking by possession and possession of a firearm by a felon. The State presented sufficient evidence to support the jury's determination that the defendant constructively possessed drugs and a rifle found in a bedroom that was not under the defendant's exclusive control. Among other things, photographs, a Father's Day card, a cable bill, a cable installation receipt, and a pay stub were found in the bedroom and all linked the defendant to the contraband. Some of the evidence placed the defendant in the bedroom within two days of when the contraband was found.

Post-Conviction Proceedings

Ineffective Assistance

Missouri v. Frye, 566 U.S. __, 132 S. Ct. 1399 (Mar. 21, 2012). The Court held that a defense lawyer rendered ineffective assistance by allowing a plea offer by the prosecution to expire without advising the defendant of the offer or allowing him to consider it. The defendant was charged with felony driving with a revoked license, an offense carrying a maximum term of imprisonment of four years. On November 15, the prosecutor sent a letter to defense counsel offering a choice of two plea bargains. First, the prosecutor offered to recommend a 3-year sentence for a guilty plea to the felony charge, without a recommendation regarding probation but with a recommendation for 10 days in jail as so called “shock” time. Second, to reduce the charge to a misdemeanor and, if the defendant pleaded guilty, to recommend a 90-day sentence. The misdemeanor charge would have carried a maximum term of imprisonment of one year. The letter stated both that offers would expire on December 28. The defendant's attorney did not tell the defendant of the offers and they expired. Before this charge was resolved, the defendant was again arrested for driving with a revoked license. The defendant subsequently plead guilty to the initial charge. There was no plea agreement. The trial court accepted the guilty plea and sentenced the defendant to three years in prison. The defendant challenged his conviction, arguing that counsel's failure to inform him of the plea offer constituted ineffective assistance of counsel.

The Court began its analysis by concluding that the constitutional right to counsel extends to the negotiation and consideration of plea offers that lapse or are rejected. It stated: “In today's criminal justice system . . . the negotiation of a plea bargain . . . is almost always the critical point for a defendant.” Having determined that there is a right to effective assistance with respect to plea offers, the Court turned to the question of whether defense counsel has the duty to communicate the terms of a formal offer to accept a plea on terms and conditions that may result in a lesser sentence, a conviction on lesser charges, or both. On this issue it held:

[A]s a general rule, defense counsel has the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused. Any exceptions to that rule need not be explored here, for the offer was a formal one with a fixed expiration date. When defense counsel allowed the offer to expire without advising the defendant or allowing him to consider it, defense counsel did not render the effective assistance the Constitution requires.

The Court then turned to the issue of prejudice and laid out the following standards:

To show prejudice from ineffective assistance of counsel where a plea offer has lapsed or been rejected because of counsel's deficient performance, defendants must demonstrate a reasonable probability they would have accepted the earlier plea offer had they been

afforded effective assistance of counsel. Defendants must also demonstrate a reasonable probability the plea would have been entered without the prosecution canceling it or the trial court refusing to accept it, if they had the authority to exercise that discretion under state law. To establish prejudice in this instance, it is necessary to show a reasonable probability that the end result of the criminal process would have been more favorable by reason of a plea to a lesser charge or a sentence of less prison time.

Applying these standards to the case before it, the Court concluded that because defense counsel made no meaningful attempt to inform the defendant of the written plea offer, counsel's representation fell below an objective standard of reasonableness. As to prejudice, the Court found that the state court applied the wrong standard. Specifically, it did not require the defendant to show that the first plea offer, if accepted, would have been adhered to by the prosecution and accepted by the trial court, particularly given the defendant's subsequent arrest for the same offense. The Court remanded on this issue.

Laffler v. Cooper, 566 U.S. ___, 132 S. Ct. 1376 (Mar. 21, 2012). The Court held that defense counsel rendered ineffective assistance by advising a defendant to reject a plea offer and it specified the appropriate remedy for the constitutional violation. The defendant was charged with assault with intent to murder, possession of a firearm by a felon, possession of a firearm in the commission of a felony, misdemeanor possession of marijuana, and being a habitual offender. The prosecution twice offered to dismiss two of the charges and to recommend a sentence of 51-85 months for the other two, in exchange for a guilty plea. The defendant rejected both offers, allegedly after his attorney convinced him that the prosecution would be unable to establish intent to murder. On the first day of trial the prosecution offered a significantly less favorable plea deal, which the defendant rejected. The defendant was convicted on all counts and received a mandatory minimum sentence of 185-360 months' imprisonment. He then challenged the conviction, arguing that his attorney's advice to reject the plea constituted ineffective assistance.

On appeal the parties agreed that counsel rendered deficient performance when he advised the defendant to reject the plea offer. Thus, the only issue before the Court was how to apply *Strickland's* prejudice prong. The court held that when ineffective assistance results in a rejection of the plea offer and the defendant is convicted at the later trial

a defendant must show that but for the ineffective advice of counsel there is a reasonable probability that the plea offer would have been presented to the court (i.e., that the defendant would have accepted the plea and the prosecution would not have withdrawn it in light of intervening circumstances), that the court would have accepted its terms, and that the conviction or sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence that in fact were imposed.

The Court then addressed the issue of the appropriate remedy, noting that the injury suffered by defendants who decline a plea offer as a result of ineffectiveness and then receive a greater sentence at a trial can come in at least one of two forms. Sometimes, the Court explained, the sole advantage a defendant would have received under the plea is a lesser sentence. In this situation, the trial court may conduct an evidentiary hearing to determine whether the defendant has shown a reasonable probability that but for counsel's errors he or she would have accepted the plea. "If the showing is made," the Court elaborated, "the court may exercise discretion in determining whether the defendant should receive the term of imprisonment the government offered in the plea, the sentence he received at trial, or something in between." In some situations, however, the Court noted "resentencing alone will not be full redress for the constitutional injury," such as when an offer was for a guilty plea to a less serious crime than the one the defendant ends up getting convicted for at trial, or if a mandatory sentence limits a judge's sentencing discretion. In these situations, the Court explained, "the proper exercise of discretion to remedy the constitutional injury may be to require the prosecution to reoffer the plea proposal. Once this has occurred, the judge can then exercise discretion in deciding whether to vacate the conviction from trial and accept the plea or leave the conviction undisturbed." The Court noted that when implementing a

remedy in both situations, the trial court must weigh various factors. Although it determined that the “boundaries of proper discretion need not be defined here” the Court noted two relevant considerations:

First, a court may take account of a defendant’s earlier expressed willingness, or unwillingness, to accept responsibility for his or her actions. Second, it is not necessary here to decide as a constitutional rule that a judge is required to prescind (that is to say disregard) any information concerning the crime that was discovered after the plea offer was made. The time continuum makes it difficult to restore the defendant and the prosecution to the precise positions they occupied prior to the rejection of the plea offer, but that baseline can be consulted in finding a remedy that does not require the prosecution to incur the expense of conducting a new trial.

Applying the relevant test to the case at hand, the Court found that the defendant met *Strickland*’s two-part test for ineffective assistance. The fact of deficient performance had been conceded and the defendant showed that but for counsel’s deficient performance there is a reasonable probability that both he and the trial court would have accepted the guilty plea. Additionally, as a result of not accepting the plea and being convicted at trial, respondent received a minimum sentence 3½ times greater than he would have received under the plea. The Court found that the correct remedy is to order the State to reoffer the plea agreement. It continued: “Presuming [the defendant] accepts the offer, the state trial court can then exercise its discretion in determining whether to vacate the convictions and resentence respondent pursuant to the plea agreement, to vacate only some of the convictions and resentence respondent accordingly, or to leave the convictions and sentence from trial undisturbed.”

Judicial Administration

Preemption

Arizona v. United States, 567 U.S. ___, 132 S. Ct. 2492 (June 25, 2012). The Court held that federal law preempted three of four provisions of Arizona’s immigration statute. Four provisions of the Arizona law were at issue. One section made failure to comply with federal alien registration requirements a state misdemeanor. A second section made it a misdemeanor for an unauthorized alien to seek or engage in work in Arizona. A third section authorized officers to arrest without a warrant a person “the officer has probable cause to believe . . . has committed any public offense that makes the person removable from the United States.” A fourth section provided that officers who conduct a stop, detention, or arrest must in some circumstances make efforts to verify the person’s immigration status with the Federal Government. The Court held that the first three provisions were preempted by federal law but that it was improper to enjoin the fourth provision “before the state courts had an opportunity to construe it and without some showing that enforcement of the provision in fact conflicts with federal immigration law and its objectives.”