Criminal Case Law Update

Covering significant cases for trial judges, decided Oct. 4, 2017 – June 8, 2018

Jessica Smith, UNC School of Government

For a free searchable database of all significant cases 2008- present, see SMITH'S CRIMINAL CASE COMPENDIUM online here: https://www.sog.unc.edu/sccc

To receive free emails with same day case summaries, sign up here: https://www.sog.unc.edu/webforms/sign-criminal-law-listserv

Criminal Procedure....3
- Collateral Estoppel....3
- Counsel Issues....4
  - Right to Conduct Defense....4
  - Waiver, Forfeiture & Withdrawal....4
  - Ineffective Assistance of Counsel & Related Issues....7
- Discovery Issues....13
- Double Jeopardy....13
- Due Process & Related Issues....15
- Indictment & Pleading Issues....15
  - Name, Race, Date of Birth....15
  - Prior Convictions....16
  - Larceny Offenses....16
  - Obtaining Property by False Pretenses....17
  - Resisting an Officer....18
  - Unlicensed Bail Bonding....18
  - Drug Offenses....19
  - Injury to Property Offenses....19
  - Littering....20
- Judge's Expression of Opinion....20
- Jury Trial, Waiver....21
- Jury Selection....21
- Jury, Questioning of Witnesses....21
- Jury Argument....22
- Jury Deliberation Issues....23
- Jury Instructions....23
  - Definitions of Terms....23
  - Disjunctive Instructions....24
  - Flight....25
  - Self-Defense & Defense of Others....25
  - Theory Not Alleged in Indictment....28
- Mistrial....29
- Motion to Dismiss....29
    - Corpus Delecti Rule....29
    - Defendant as Perpetrator....30
- Motion to Suppress....31
- Pleas....31
- Recusal of District Attorney....33
- Sentencing....33
  - Commitment Order....34
  - Drug Offenses....34

Expunction 34
Extraordinary Mitigation 35
Fees 35
Juveniles 36
Prior Record Level 37
Probation Violations & Revocations 37
Restitution 39
Second-Degree Murder 40
Miscellaneous Cases 40
Sex Offenders 41
Speedy Trial & Related Issues 42
Weapons Permits 43
Witnesses, Remote Testimony 44
Evidence 44
Authentication 44
Relevancy--Rule 401 44
Rule 403 45
Rape Shield 45
Corroboration & Opening the Door 46
Direct & Cross-Examination 46
Prior Acts--404(b) Evidence 46
Fifth Amendment (Self-Incrimination) Issues 47
Hearsay 48
Confrontation Clause 49
Expert Opinions 50
Sexual Assault Cases 50
Drug Cases 51
Impaired Driving, HGN & DRE 52
Fingerprint Experts 53
Use of Force & Related Experts 54
Lay Opinions 54
Privileges 55
Arrest, Search, and Investigation 55
Stops 55
Whether a Seizure Occurred 55
Reasonable Suspicion 55
Duration/Extending Stops 57
Arrests & Charging 61
Exclusionary Rule--Fruit of Poisonous Tree 63
Identification of Defendant 64
Interrogation & Confession 64
Knock & Talk 66
Search Warrants 67
Searches 70
Consent Searches 70
Of People 70
Of Vehicles 71
Of Computerized Devices 72
Pen Registers 73
Criminal Offenses 73
Aiding & Abetting 73

Accessory After the Fact....74
Conspiracy....74
Homicide....75
Assaults....75
Stalking....77
Abuse Offenses....77
Sexual Assaults....79
Kidnapping & Related Offenses....80
Larceny & Possession....80
Robbery....82
Frauds....82
Breaking or Entering....82
Trespass....83
Obstruction....83
Disorderly Conduct....84
Felon in Possession of Firearm....84
Sexual Exploitation of a Minor....84
Unlicensed Bail Bonding....85
Drug Offenses....85
Maintaining a Dwelling, Etc.....85
Possession....86
Constructive Possession....86
Possession with Intent....87
Motor Vehicle Offenses....88
Impaired Driving & Open Container....88
Hit and Run....89
DWLR....89
Defenses....90
Self-Defense....90
Duress & Necessity....90
Capital Law....91
Post-Conviction DNA Testing....93

Criminal Procedure

Collateral Estoppel

State v. Jones, ___ N.C. App. ___, 808 S.E.2d 280 (Nov. 7, 2017)

In this armed robbery case involving a jewelry store heist, the court rejected the defendant's argument that collateral estoppel precluded the admission of a receipt, identified at trial by witness Kristy Riojas of Got Gold pawn shop. The receipt, issued on the date of the offense, contained an itemized list of the items the defendant pawned, a copy of the defendant's driver's license, and the defendant's signature. It was introduced to establish that the defendant was in possession of the stolen property shortly after it was taken, under the doctrine of recent possession. The defendant argued that the ticket was not admissible because the defendant previously had been acquitted on the charge of obtaining property by false pretenses, based on pawning jewelry at Got Gold. The defendant argued that based on his prior acquittal, the State was collaterally estopped from introducing the pawn shop receipt at his later trial for armed robbery to establish recent possession. The defendant did not dispute that he could be prosecuted for the robbery, notwithstanding his prior acquittal. Instead, he focused on the admissibility of evidence that was

admitted in the prior trial. The court rejected the defendant's argument, concluding that he could not establish that his acquittal of obtaining property by false pretenses represented a determination by the jury that he was not in possession of stolen property shortly after it was taken. The court noted, in part, that the doctrine of recent possession, which allows the jury to infer guilt based upon possession of stolen goods shortly after a theft, includes no requirement that the defendant made a false representation about the goods, attempt to obtain something of value, or deceive another party about ownership of the items.

Counsel Issues

Right to Conduct Defense

State v. Payne, ___ N.C. App. ___, 808 S.E.2d 476 (Nov. 21, 2017)

In a case where the trial court made a pretrial determination of not guilty by reason of insanity (NGRI), the defendant's constitutional right to counsel was violated when the trial court allowed defense counsel to pursue a pretrial insanity defense against her wishes. Against the defendant's express wishes, counsel moved for a pretrial determination of NGRI pursuant to G.S. 15A-959. The State consented and the trial court agreed, purportedly dismissing the charges based on its determination that the defendant was NGRI. The court noted that the issue whether a competent defendant has a right to refuse to pursue a defense of NGRI is a question of first impression in North Carolina. It determined:

> By ignoring Defendant's clearly stated desire to proceed to trial rather than moving for a pretrial verdict of NGRI pursuant to N.C.G.S. § 15A-959(c), the trial court allowed — absent Defendant's consent and over her express objection — the "waiver" of her fundamental rights, including the right to decide "what plea to enter, whether to waive a jury trial and whether to testify in [her] own defense[,]" as well as "the right to a fair trial as provided by the Sixth Amendment[,] . . . the right to hold the government to proof beyond a reasonable doubt[,] . . . [and] the right of confrontation[.]" These rights may not be denied a competent defendant, even when the defendant's choice to exercise them may not be in the defendant's best interests. In the present case, Defendant had the same right to direct her counsel in fundamental matters, such as what plea to enter, as she had to forego counsel altogether and represent herself, even when Defendant's choices were made against her counsel's best judgment. (citations omitted)

It went on to hold:

> [B]ecause the decision of whether to plead not guilty by reason of insanity is part of the decision of "what plea to enter," the right to make that decision "is a substantial right belonging to the defendant." Therefore, by allowing Defendant's counsel to seek and accept a pretrial disposition of NGRI, the trial court "deprived [Defendant] of [her] constitutional right to conduct [her] own defense." We are not called upon to determine how that right should be protected when asserted by a defendant's counsel at trial but, at a minimum, a defendant's affirmative declaration that the defendant does not wish to move for a pretrial determination of NGRI must be respected. (quotation and footnote omitted).

The court went on to reject the State's argument that the defendant could not show prejudice because she was subject to periodic hearings pertaining to her commitment.

Waiver, Forfeiture & Withdrawal

State v. Boderick, ___ N.C. App. ___, ___ S.E.2d ___ (Mar. 20, 2018)

The trial court's determination that the defendant had forfeited his right to counsel does not "carry over" to the new trial, ordered by the court for unrelated reasons. In the 3½ years leading up to trial the defendant, among other things, fired or threatened to fire three separate lawyers, called them liars, accused them of ethical violations, reported one to the Bar, cursed at one in open court, and refused to meet with his lawyers. After the defendant refused to cooperate with and attempted to fire his third

attorney, the trial court found that the defendant had forfeited his right to court-appointed counsel and appointed standby counsel. On the first day of trial, the defendant informed the trial court that he finally understood the seriousness of the situation and asked the trial court to appoint standby counsel as his lawyer. Standby counsel said that he would not be ready to go forward with trial that day if appointed. The trial court denied the motion for counsel based on the prior forfeiture orders, and the trial court declined to reconsider this matter when it arose later. The defendant represented himself at his bench trial, with counsel on standby, and was convicted. After finding that the trial court erred by proceeding with a bench trial, the court considered the defendant's forfeiture claims. Specifically, the defendant argued on appeal that his conduct did not warrant forfeiture and that the trial court's forfeiture order should have been reconsidered in light of the defendant's changed conduct. In light of the court's determination that a new trial was warranted on unrelated grounds, it declined to address these issues. However, it concluded that a break in the period of forfeiture occurs when counsel is appointed to represent the defendant on appeal following an initial conviction. Here, because the defendant accepted appointment of counsel on appeal following his trial and allowed appointed counsel to represent him through the appellate process, "the trial court's prior forfeiture determinations will not carry over to defendant's new trial." The court concluded: "Thus, defendant's forfeiture ended with his first trial. If, going forward, defendant follows the same pattern of egregious behavior toward his new counsel, the trial court should conduct a fresh inquiry in order to determine whether that conduct supports a finding of forfeiture."

State v. Schumann, ___ N.C. App. ___, 810 S.E.2d 379 (Feb. 6, 2018)
In this drug trafficking case, the trial court did not err by requiring the defendant to represent himself at trial. In September 2013, the defendant appeared before a Superior Court Judge and signed a waiver of counsel form. In December 2013 the defendant appeared before another judge and signed a second waiver of counsel form. On that same day, attorney Palmer filed a notice of limited appearance, limiting his representation of the defendant to pretrial case management. In September 2015 the defendant again appeared in Superior Court. Palmer informed the court that the State "got their labs back" and would be ready to set a trial date. The trial court informed the defendant that if he wanted a court appointed lawyer, he should ask now. Among other things, the trial court informed the defendant of the hazards of proceeding pro se. In response to the judge's questioning, the defendant indicated that he would hire an attorney for trial. The ADA stated that the case would come on for trial in the middle of the following year. The judge told the defendant he had two months to hire a lawyer and scheduled him to return to court on November 5 with his lawyer to talk about trial date. He expressly warned the defendant not to return in November saying that he did not have a lawyer. On November 5, 2015 the defendant appeared in court without a lawyer. The judge again warned the defendant that it was his responsibility to hire a lawyer and of the hazards of proceeding pro se. On December 10, 2015 the defendant again appeared in court, indicating that he continued to have trouble hiring a lawyer. The court informed the defendant to report back on January 27, and warned the defendant that the trial was soon approaching. In January 2016, the defendant again appeared in court, this time with attorney Byrd. Byrd told the court he was not in a position to make an appearance for the defendant and asked for more time. The judge scheduled the matter to return in February. On February 15, 2016, the trial court reported to the defendant that Mr. Byrd was not ready to make an appearance in his case. He warned the defendant to make arrangements to hire Byrd or someone else because a trial date would be set on March 10. On March 28, 2016, the defendant appeared before a different judge. The State indicated it was ready to proceed to trial. After hearing from the defendant regarding his dealings with various lawyers over the past months, the trial court informed the defendant of his counsel rights and asked the defendant how he intended to proceed. During this colloquy the defendant indicated that he would represent himself. The trial court reset the matter for the next administrative session so that the senior resident judge could address the counsel issue. On April 7, 2016 the case came back in Superior Court. The State requested a July trial date and asked the court to address the counsel issue. The court summarized the prior discussions with the defendant and appointed standby counsel. Proceedings continued in this vein until the defendant's case came on for trial August 30, 2016. The defendant appeared pro se with standby counsel. The defendant was found guilty and

appealed, asserting a violation of his sixth amendment counsel rights. The court disagreed with the defendant's assertion that the trial court did not adhere to the requirements of G.S. 15A-1242 in procuring his waiver. The court noted, in part:

> The trial court gave Defendant years to find an attorney. At each stage the trial court advised and counseled Defendant about his right to an attorney including his right to appointed counsel. The trial court also repeatedly counseled Defendant on the complexity of handling his own jury trial and the fact the judge would not be able to help him. Finally, the trial court repeatedly addressed the seriousness of the charges and advised Defendant a conviction likely meant a life sentence. Despite this, Defendant proceeded to represent himself at trial.
>
> Defendant's assertion the trial court failed to take any measures to ascertain whether Defendant understood the various difficulties associated with representing himself is without merit. Our review of the record indicates the trial court advised Defendant he would have to adhere to rules of court and evidence. The trial court also informed Defendant the court would not assist Defendant, and Defendant was facing serious charges which could result in a life sentence upon conviction. The record also indicates Defendant repeatedly expressed his understanding of the trial court's instruction on this issue. We conclude Defendant waived his right to court appointed counsel.

The court went on to hold that even if the defendant's waiver of counsel was not knowing and voluntary, the defendant forfeited his right to counsel through extended delaying tactics. It explained:

> First, Defendant waived his right to assigned counsel in 2013. The trial court repeatedly advised Defendant on the seriousness of the charges and informed Defendant a conviction could lead to a life sentence due to Defendant's age. Time after time, Defendant stated he intended to hire his own attorney. Defendant made close to monthly appearances in court over a 10-month period, and consistently told the court he wished to hire his own attorney. During these appearances, the trial court asked Defendant at least twice if he needed appointed counsel. Defendant answered by claiming to have sufficient funds to hire an attorney. Additionally, the trial court continued Defendant's case several times to give Defendant's attorney time to prepare since Defendant claimed the attorneys he met with did not have adequate time to prepare for trial.

State v. Pena, ___ N.C. App. ___, 809 S.E.2d 1 (Dec. 19, 2017)

(1) In this sexual assault case the court reversed and remanded for a new trial, finding that even if the defendant had clearly and unequivocally asked to proceed pro se, the record did not establish that the defendant's waiver of counsel complied with G.S. 15A-1242. The defendant was indicted on multiple sexual assault charges. He later was found to be indigent and Timothy Emry was appointed as counsel. Emry later moved to withdraw claiming that he and the defendant were at an impasse regarding representation. He asserted that the defendant was unwilling to discuss the case with him and the defendant was upset with Emry to asking him to sign a form acknowledging that he understood a plea offer and the consequences of taking or rejecting the plea. At a January hearing on the motion, the State asserted that if Emry was allowed to withdraw, the defendant would be on his fourth lawyer. Emry however clarified that this was inaccurate. The trial court told the defendant that he could have Emry continue as counsel, have the trial court find that the defendant had forfeited his right to counsel, or hire his own lawyer. The defendant opted to proceed pro se and the trial court appointed Emry as standby counsel. A waiver of counsel form was signed and completed. However, on the form the defendant only indicated that he waived his right to assigned counsel, not his right to all assistance of counsel. The case came to trial before a different judge. Although the trial court engaged in a colloquy with the defendant about counsel, the transcript of this event was indecipherable in parts. The defendant was convicted and appealed. On appeal, the defendant argued that the trial court erred by requiring him to proceed to trial pro se when he did not clearly and unequivocally elect to do so. Although the defendant did say that he wished to represent himself, he only did so after being faced with no other option than to continue with

Emry's representation. The court noted: "This case is a good example of the confusion that can occur when the record lacks a clear indication that a defendant wishes to proceed without representation." Here, even assuming that the defendant did clearly and unequivocally assert his wish to proceed pro se, he still would be entitled to a new trial because the waiver was not knowing and voluntary as required by G.S. 15A-1242. At the January hearing, after explaining the defendant's options to him the court asked that the defendant "be sworn to [his] waiver." At this point the clerk simply asked the defendant if he solemnly swore that he had a right to a lawyer and that he waived that right. This colloquy did not meet the requirements of the statute. The court stated: "The fact that defendant signed a written waiver acknowledging that he was waiving his right to assigned counsel does not relieve the trial court of its duty to go through the requisite inquiry with defendant to determine whether he understood the consequences of his waiver." Additionally, the written waiver form indicates that the defendant elected only to waive the right to assigned counsel, not the right to all assistance of counsel. With respect to the colloquy that occurred at trial, defects in the transcript made it unclear what the defendant understood about the role of standby counsel. In any event, "simply informing defendant about standby counsel's role is not an adequate substitute for complying with [the statute]." Additionally, there is no indication that the trial court inquired into whether the defendant understood the nature of the charges and permissible punishments as required by the statute. The court rejected the State's suggestion that the fact that Emry had informed the defendant about the charges could substitute for the trial court's obligation to ensure that the defendant understood the nature of the charges and the potential punishments before accepting a waiver of counsel.

(2) The defendant did not engage in conduct warranting forfeiture of the right to counsel. Although the state and the trial court hinted that the defendant was intentionally delaying the trial and that he would be on his fourth attorney after counsel was dismissed, the record indicates that this was an inaccurate characterization of the facts. As explained by Emry, although other attorneys had been listed as the defendant's counsel at various points early in the proceedings, the defendant received substantial assistance only from Emry. Additionally, nothing in the transcript indicates any type of "flagrant" tactics that would constitute extreme misconduct warranting forfeiture. Specifically, there is no indication that the defendant sought other delays of his trial or that he engaged in any inappropriate behavior either in court or with counsel.

State v. Curry, ___ N.C. App. ___, 805 S.E.2d 552 (Oct. 17, 2017)

The trial court did not abuse its discretion by denying counsel's motion to withdraw. The defendant was indicted for first-degree murder and armed robbery. Just prior to trial, the defendant provided defense counsel with a list of facts that he wished to concede to the jury: that he was at the scene of the crime; that he fired a gun; and that he was part of an attempted robbery. At a closed hearing, counsel advised the trial court that the defendant's new admissions would impact his ability to handle the case. When he contacted the State Bar for guidance, it was suggested that he ask to withdraw because of a "personal conflict." Counsel did so and the trial court denied the motion. Finding no abuse of discretion, the court noted that the personal conflict at issue related to counsel's inability to believe what the defendant told him, in light of the eve of trial admissions. It noted:

> As the State Bar confirmed, defense counsel did not have an actual conflict, and there is no evidence he breached the rules of professional conduct. Counsel had represented Defendant for nearly three years, and had presumably expended significant time and resources preparing for trial. In addition, there was no disagreement about trial strategy, nor was there an identifiable conflict of interest.

Moreover, the court concluded, the defendant could not show prejudice resulting from the denial of the motion to withdraw.

Ineffective Assistance of Counsel & Related Issues

McCoy v. Louisiana, 584 U.S. ___ (May 14, 2018)

Under the Sixth Amendment, a defendant has the right to insist that defense counsel refrain from admitting guilt, even when counsel's experienced-based view is that confessing guilt offers the defendant the best chance to avoid the death penalty. The defendant was charged with three counts of first-degree murder in this capital case. Throughout the proceedings, the defendant insistently maintained that he was out of State at the time of the killings and that corrupt police killed the victims when a drug deal went wrong. The defendant's lawyer concluded that the evidence against the defendant was overwhelming and that absent a concession at the guilt stage that the defendant was the killer, a death sentence would be impossible to avoid at the penalty phase. The defendant was furious when told about this strategy. The defendant told counsel not to make the concession, pressuring counsel to pursue acquittal. However, at the beginning of opening statements in the guilt phase, defense counsel told the jury there was "no way reasonably possible" that they could hear the prosecution's evidence and reach "any other conclusion" than that the defendant was the cause of the victims' death. Although the defendant protested in a hearing outside of the presence of the jury the trial court allowed defense counsel to continue with his strategy. Defense counsel then told the jury that the evidence was "unambiguous" that "my client committed three murders." The defendant testified in his own defense, maintaining his innocence and pressing an alibi defense. In his closing argument, defense counsel reiterated that the defendant was the killer. The defendant was found guilty of all counts. At the penalty phase, defense counsel again conceded that the defendant committed the crimes but urged mercy. The jury returned three death verdicts.

The Supreme Court granted certiorari in light of a division of opinion among state courts of last resort on the question whether it is unconstitutional to allow defense counsel to concede guilt over the defendant's intransigent and unambiguous objection. The Court held that the Sixth Amendment was violated. It stated: "When a client expressly asserts that the objective of *'his* defence' is to maintain innocence of the charged criminal acts, his lawyer must abide by that objective and may not override it by conceding guilt." The Court distinguished Florida v. Nixon, 543 U. S. 175 (2004), in which it had considered whether the Constitution bars defense counsel from conceding a capital defendant's guilt at trial when the defendant, informed by counsel, neither consents nor objects. In that case, defense counsel had several times explained to the defendant a proposed guilt phase concession strategy, but the defendant was unresponsive.

The Nixon Court held that when counsel confers with the defendant and the defendant remains silent, neither approving nor protesting counsel's proposed concession strategy, no blanket rule demands the defendant's explicit consent to implementation of that strategy. The Court distinguished Nixon on grounds that there the defendant never asserted his defense objective. Here however the defendant opposed counsel's assertion of guilt at every opportunity, before and during trial and in conferences with his lawyer and in open court. The Court clarified: "If a client declines to participate in his defense, then an attorney may permissibly guide the defense pursuant to the strategy she believes to be in the defendant's best interest. Presented with express statements of the client's will to maintain innocence, however, counsel may not steer the ship the other way." It held: "counsel may not admit her client's guilt of a charged crime over the client's intransigent objection to that admission." The Court went on to hold that this type of claim required no showing of prejudice. Rather, the issue was one of structural error. Thus, the defendant must be afforded a new trial without any need to first show prejudice.

State v. McNeill, ___ N.C. ___, ___ S.E.2d ___ (June 8, 2018)

(1) Addressing the merits of the defendant's *Strickland* ineffective assistance of counsel claim in this direct appeal in a capital case, the court rejected the defendant's argument that he received ineffective assistance of counsel when his lawyers disclosed to law enforcement where to look for the five-year-old child victim. Because the trial court heard evidence and made findings on this issue in a pretrial motion, the court determined that no further investigation was required and it could address the merits of the claim on direct appeal. After the defendant was charged with kidnapping, he engaged the services of attorney Rogers, who immediately associated with attorney Brewer to assist in the matter. When Rogers and Brewer undertook representation of the defendant on 13 November, the victim had been missing since the morning of 10 November and a massive search was underway, in hope that the child would be found

alive. The defendant admitted to police that he had taken the victim to a hotel. Hotel cameras and witnesses confirmed this admission. By 12 November, law enforcement agencies and volunteers were searching the area around Highway 87, where the defendant's cell phone data had placed him. Rogers had conversations with law enforcement and was aware of the evidence against the defendant and of the defendant's admission to taking the victim to the hotel. Rogers was also aware of the defendant's three felony convictions, which constituted aggravating circumstances that could be used at a capital sentencing proceeding. Rogers and Brewer met with the defendant and discussed the fact that the child had not been found and the possibility that capital charges could be forthcoming. The defendant denied hurting or killing the victim. Rogers asked the defendant if he had any information about the victim's location, and the defendant told Rogers and Brewer that he did. Rogers and Brewer discussed the death penalty with the defendant, and the defendant agreed that it would be in his best interest to offer information that might be helpful as to the victim's location. Rogers explained that providing this information could be helpful with respect to a possible plea agreement or with respect to mitigating circumstances and could avoid a sentence of death. The defendant agreed with Rogers and Brewer that they would tell law enforcement where to search for the victim, without specifically stating the defendant's name or that he was the source of the information. According to Rogers, he was trying to give the defendant the best advice to save the defendant's life, and the defendant understood the situation and agreed with the strategy. On 14 and 15 November Brewer told law enforcement where to look for the victim. On 16 November, the victim's body was found in the specified area.

On appeal, the defendant argued that his lawyers' conduct was deficient because they gave the State incriminating evidence against him without seeking any benefit or protection for the defendant in return. He asserted that his attorneys' conduct was objectively unreasonable because they had a duty to seek or secure a benefit for him in exchange for the disclosure. The court disagreed. The court determined that to the extent counsel has a duty to seek a benefit in exchange for disclosing information, here the lawyers did so. The purpose of the disclosure was to show that the defendant could demonstrate cooperation and remorse, which would benefit the defendant in the form of achieving a plea agreement for a life sentence or as to mitigating circumstances and ultimately to avoid the death penalty. In fact, the State made a plea offer of life in prison, which the defendant rejected, and he later refused to present mitigating evidence at trial. Despite his agreement at the time of the disclosure, the defendant argued on appeal that a plea agreement for life in prison to avoid the death penalty was not a reasonable objective that could justify the disclosure of incriminating evidence at that stage because his attorneys were aware that he denied causing the victim harm and because, according to the defendant, "everything turned" on his innocence defense. The court found this contention difficult to square with the record, in light of the fact that defense counsel also were aware that the defendant had in essence confessed to kidnapping the child in the middle of the night and taking her to a remote hotel where he was the last and only person seen with her. Moreover, they knew he had information on her remote location, though he was unwilling to disclose how he acquired that information. They knew that this information directed law enforcement to search a more specific area in the vicinity in which an extensive search tracking the defendant's cell phone data was already underway, suggesting an incriminating discovery would be imminent. Thus, while the disclosure certainly would be incriminating to the defendant and could lead to additional incriminating evidence against him, the disclosure must be viewed in light of the already heavily incriminating evidence against the defendant, and the likelihood that further incriminating evidence would be forthcoming.

The defendant further argued that his lawyers should have pushed harder for better concessions for him. Recognizing that in many situations it may make strategic sense for counsel to negotiate the best possible agreement before disclosing potentially incriminating information, the court noted that that is not necessarily true in situations such as this one, where time was a substantial factor. Had law enforcement located the victim's body before the defendant's disclosure, the opportunity to obtain any benefit in return for the information would have been irrevocably lost. Additionally, given that the defendant denied causing the victim harm, there was a possibility that the victim was still alive. In the end, the court disagreed with the defendant that his attorneys acted unreasonably by targeting a plea agreement for life imprisonment and avoiding the death penalty in exchange for making the disclosure. "[U]nder the unique

and difficult circumstances here--with the already heavily incriminating evidence against defendant, as well as the apparent likelihood that the discovery of further incriminating evidence could be imminent" and the presumption of reasonableness of counsels' conduct, the court held that the lawyers' decision to disclose potentially incriminating information with the sought-after goal of avoiding imposition of the death penalty did not fall below an objective standard of reasonableness.

The court determined that it need not resolve the more difficult question of whether defense counsel erred by not first securing or attempting to secure a plea agreement for life in prison before making the disclosure. It explained: "we need not answer this question because, given that we have held that a plea agreement for life in prison and avoidance of the death penalty was a reasonable disposition in these circumstances, defendant cannot establish any prejudice when the State did offer defendant a plea agreement for life in prison."

(2) The court rejected the defendant's argument that his attorneys were deficient by failing to conduct an adequate investigation before disclosing to the police where to search for the victim, finding that the defendant's assertions were not supported by the record. For example, the defendant argued that lawyer Rogers failed to look at any formal discovery materials before making the disclosure, yet Rogers testified that at that early stage of the case there was no discovery file to examine. Considering the defendant's other assertions, the court found that the defendant was unable to identify anything Roger's allegedly inadequate investigation failed to uncover and which would have had any effect on the reasonableness of his lawyers' strategic decision to make the disclosure. Nor, the court noted, does the defendant suggest what other avenues the lawyers should have pursued.

(3) The court rejected the defendant's assertion that his lawyers erroneously advised him that they would shield his identity as the source of the information but that their method of disclosure revealed him as the source. The defendant's argument was premised on the fact that his agreement with his lawyers was conditioned on their implicit promise that they would prevent the disclosure from being attributed to the defendant, even by inference. The court found that this assertion was not supported by the record, noting that the entire purpose of the disclosure, to which the defendant agreed, was that it be attributable to the defendant to show cooperation. The court found that the fact that the defendant and his lawyers agreed not to explicitly name the defendant as the source of the disclosure cannot be read as an implicit understanding that his lawyers would shield him as the source but rather must be read in the context of their conversation, in which the defendant told his lawyers that he had information about the victim's location but did not explain how he had acquired that information. The method of disclosure allowed an immediate inference of cooperation but avoided any inadvertent admission of guilt. The court explained:

> Certainly, that the information came from defendant's attorneys allowed an inference that defendant was the source, which, while demonstrating immediate cooperation on the part of defendant, was also potentially incriminating as it suggested an inference of guilt. But this trade-off goes to the heart of the agreed upon strategy—the mounting evidence against defendant was already highly incriminating, and providing this information to the police that could potentially be further incriminating was a strategic decision made to avoid imposition of the death penalty.

(4) The court rejected the defendant's argument that by disclosing the location of the victim to the police without first securing any benefit in return, his lawyers were essentially working for the police and that the situation resulted in a complete breakdown of the adversarial process resulting in a denial of counsel. The court declined to consider this issue as a denial of counsel claim, finding that the defendant's challenge is more properly brought as a *Strickland* attorney error claim, which the court had already rejected.

State v. Veney, ___ N.C. App. ___, ___ S.E.2d ___ (June 5, 2018)

In this assault case, the court held that although the trial court erred by instructing prospective jurors outside of the presence of defense counsel, the error was harmless beyond a reasonable doubt. During jury selection the trial court called a recess. While waiting for jury selection to resume and while defense counsel was outside of the courtroom, the trial court gave an instruction to the prospective juror pool. The

instruction informed the jurors that they would decide the case based on evidence presented in the courtroom and the law as provided by the trial court. The trial court further informed the jurors that they were not to search for legal definitions on the Internet or do any research on their own. The trial court admonished the jurors that they were not investigators and reiterated that they should not resort to any investigation on their own, legal or otherwise. The defendant was found guilty and appealed, arguing that the trial court committed structural error in violation of the sixth amendment by giving instructions to potential jurors while defense counsel was absent from the courtroom. The State conceded error but argued the error was not structural. The court agreed. It noted that voir dire did not continue during defense counsel's absence. Instead, the trial court instructed the potential jurors to abstain from site visits or independent research. Neither the court nor the State questioned prospective jurors.

The court went on to conclude that the State had proved that the error was harmless beyond a reasonable doubt, noting in part that the trial court gave the jury similar instructions at different times during trial while counsel was present without objection.

Two judges filed concurring opinions. One concurring judge noted that the trial court violated the defendant's sixth amendment rights by speaking to the jury pool outside the presence of defense counsel and stated: "The court should not have done so, and no trial court should do this again."

State v. Mathis, ___ N.C. App. ___, ___ S.E.2d ___ (Apr. 3, 2018)
Considering the merits of the defendant's ineffective assistance of counsel claim on direct appeal from his conviction of felony assault, the court held that the defendant did not receive ineffective assistance of counsel when trial counsel consented to a mistrial at the first trial. Analyzing the claim under the *Strickland* attorney error standard, the court held that the defendant failed to show prejudice because the trial court did not abuse its discretion in declaring a mistrial due to manifest necessity. Thus, counsel's failure to object "was not of any consequence."

State v. Benitez, ___ N.C. App. ___, ___ S.E. 2d ___ (Mar. 20, 2018)
On an appeal from an adverse ruling on the defendant's motion for appropriate relief (MAR) in this murder case, the court held that because the defendant's attorney made an objectively reasonable determination that the defendant's uncle would qualify as his "guardian" under G.S. 7B-2101(b) and therefore did not seek suppression of the defendant's statements on grounds of a violation of that statute, counsel did not provide ineffective assistance. When he was 13 year old, the defendant a signed statement, during an interrogation, that he "shot the lady as she was sleeping on the couch in the head." The defendant's uncle, with whom the defendant had been living, was present during the interrogation. Two weeks later, the trial court sua sponte entered an order appointing the director of the County Department of Social Services as guardian of the person for the defendant pursuant to G.S. 7B-2001. The district court found that "the juvenile appeared in court with no parent, guardian or custodian but he lived with an uncle who did not have legal custody of him" and "[t]hat the mother of the juvenile resides in El Salvador and the father of the juvenile is nowhere to be found and based on information and belief lives in El Salvador." The defendant was prosecuted as an adult for murder. The defendant unsuccessfully moved to suppress his statement and was convicted. He filed a MAR arguing that his lawyer rendered ineffective assistance by failing to challenge the admission of his confession on grounds that his uncle was not his "parent, guardian, custodian, or attorney[,]" and therefore that his rights under G.S. 7B-2101(b) were violated as no appropriate adult was present during his custodial interrogation. The trial court denied the MAR and it came before the court of appeals. Noting that the statute does not define the term "guardian," the court viewed state Supreme Court law as establishing that guardianship requires a relationship "established by legal process." The requirement of "legal process" means that the individual's authority is "established in a court proceeding." But, the court concluded, it need not precisely determine what the high court meant by "legal process," because at a minimum the statute "requires authority gained through some legal proceeding." Here, the defendant's uncle did not obtain legal authority over the defendant pursuant to any legal proceeding. Thus, there was a violation of the statute when the defendant was interrogated with only his uncle present. However, to establish ineffective

assistance, the defendant must establish that his counsel's conduct fell below an objective standard of reasonableness. Here, the trial court found--based on the lawyer's actions and in the absence of any expert or opinion testimony that his performance fell below an objective standard of reasonableness--that defense counsel appropriately researched the issue and acted accordingly. Although the defendant's counsel made a legal error, it was not an objectively unreasonable one. In the course of its holding, the court noted that expert evidence "is not necessarily required for every claim of [ineffective assistance of counsel]," though "some evidence from practicing attorneys as to the standards of practice is often helpful, particularly in cases such as this where the issue is the interpretation of case law rather than a more blatant error such as a failure to prepare for a hearing at all." Because the court held the counsel's conduct did not fall below an objective standard of reasonableness, it did not address the prejudice prong of the ineffective assistance of counsel claim.

State v. Harris, ___ N.C. App. ___, 808 S.E.2d 327 (Nov. 21, 2017)
In this attempted murder and assault case, the court rejected the defendant's claim that his lawyer rendered ineffective assistance by failing to object to the introduction of testimony about street gangs. The court rejected the assertion that there was no strategic reason for trial counsel to fail to object to the evidence. The record clearly established that trial counsel's strategy was to show that the shooting may have been gang related. Counsel's strategy focused on the victim's own criminal record and gang connections, the fact that he was shot again when the defendant was incarcerated, and the connection between where the gun was found and the gang with which the victim was associated. Counsel further asserted in jury argument that the prosecution reflected law enforcement tunnel vision and a failure to explore other possible culprits. The court rejected the defendant's argument that this trial strategy constituted ineffective assistance of counsel.

State v. Spinks, ___ N.C. App. ___, 808 S.E.2d 350 (Nov. 21, 2017)
Following precedent, the court rejected the defendant's assertion that counsel rendered ineffective assistance by failing to assert a fourth amendment claim at the hearing where he was ordered to submit to satellite-based monitoring for life. SBM proceedings are civil and ineffective assistance of counsel claims only can be asserted in criminal matters.

State v. Curry, ___ N.C. App. ___, 805 S.E.2d 552 (Oct. 17, 2017)
(1) The court rejected the defendant's assertion that counsel was ineffective by failing to state for the record details of an absolute impasse between himself and counsel. Although the defendant initially wanted counsel to make certain admissions in opening statements to the jury, after discussing the issue with counsel he informed the court that he would follow counsel's advice. The court noted there was neither disagreement regarding tactical decisions nor anything in the record suggesting any conflict between the defendant and defense counsel. Although counsel made statements to the trial court indicating that he was having difficulty believing things that the defendant told him, the court noted: "Defendant points to no authority which would require a finding of an impasse where defense counsel did not believe what a criminal-defendant client told him."
(2) Trial counsel did not provide ineffective assistance when he failed to cross-examine witness Tarold Ratlif for a third time about who shot the victim. The defendant asserted that additional questioning would have supported his theory that someone else killed the victim. The court concluded that even assuming arguendo that the defendant satisfied the first prong of the *Strickland* ineffective assistance of counsel test, he could not--in light of the evidence presented--satisfy the second prong, which requires a showing of prejudice.

State v. Meadows, , ___ N.C. App. ___, 806 S.E.2d 682 (Oct. 17, 2017) review granted, ___ N.C. ___, ___ S.E.2d ___ (May 9 2018)
(1) In this drug case, the court rejected the defendant's argument that she received ineffective assistance of counsel when defense counsel elicited damaging testimony from a law enforcement officer that a

witness was "honest." Declining to address whether counsel's conduct constituted deficient performance, the court concluded that the ineffective assistance of counsel claim failed on the prejudice prong: there was no reasonable probability that in the absence of trial counsel's alleged errors the results of the proceeding would have been different.
(2) The defendant did not receive ineffective assistance of counsel when counsel failed to object to a law enforcement officer's testimony that he felt that the defendant should be charged because she was as guilty as her husband. The court noted that because law enforcement officers may not express an opinion that they believe a defendant to be guilty, admission of the statement was error. However, the defendant failed to show prejudice and thus her ineffective assistance of counsel claim failed.

Discovery Issues

State v. Jackson, ___ N.C. App. ___, 810 S.E.2d 397 (Feb. 20, 2018)
In this first-degree murder case, the trial court did not abuse its discretion by allowing the State to elicit testimony from a supplemental rebuttal expert, Dr. Wolfe, first disclosed by the State during trial. The defendant asserted a violation of G.S. 15A-903(a)(2)'s pretrial expert witness disclosure requirements. The State did not disclose Wolfe, her opinion or expert report before trial. The State offered Wolfe in response to its receipt, right before jury selection, of a primary defense expert's final report, which differed from the expert's previously supplied report. Wolfe was a supplemental rebuttal witness, not the State's sole rebuttal witness, nor a primary expert introducing new evidence. The defendant was able to fully examine Wolfe and the basis for her opinion during a voir dire held eight days before her trial testimony. The trial court set parameters limiting Wolfe's testimony, and the defendant received the required discovery eight days before she testified. No court was held on four of these days, providing the defense an opportunity to prepare for her testimony. Although the defense moved to continue its expert's voir dire examination based on the timing of the State's discovery disclosures (Wolfe initially was offered as a rebuttal witness on the Dabuert voir dire of the defendant's expert; when the trial court found that the defendant's expert satisfied Rule 702, Wolfe was offered as a rebuttal expert at trial), it never moved for a trial continuance or requested more time to prepare for Wolfe's rebuttal. Thus, the defendant failed to show that the trial court abused its discretion in allowing Wolfe's limited rebuttal testimony.

State v. Santifort, ___ N.C. App. ___, 809 S.E.2d 213 (Dec. 19, 2017)
The trial court's ex parte orders compelling the production of the defendant's personnel files and educational records were void ab initio. While employed as a police officer the defendant was involved in a vehicle pursuit that resulted in the death of the pursued driver. Prior to charging the defendant with a crime, the State obtained two separate ex parte orders compelling the production of the defendant's personnel records from four North Carolina police departments where he had been employed as well as his educational records related to a community college BLET class. After the defendant was indicted for involuntary manslaughter, he unsuccessfully moved to set aside the ex parte orders. On appeal, the court concluded that the orders were void ab initio. Citing In re Superior Court Order, 315 N.C. 378 (1986), and In re Brooks, 143 N.C. App. 601 (2001), both dealing with ex parte orders for records, the court concluded:

> The State did not present affidavits or other comparable evidence in support of their motions for the release of [the defendant's] personnel files and educational records sufficiently demonstrating their need for the documents being sought. Nor was a special proceeding, a civil action, or a criminal action ever initiated in connection with the ex parte motions and orders. For these reasons, the State never took the steps necessary to invoke the superior court's jurisdiction.

Double Jeopardy

State v. Courtney, ___ N.C. App. ___, ___ S.E.2d __ (May 15, 2018)

The State's voluntary dismissal of a murder charge after a first trial resulted in a hung jury barred a retrial. In 2009, the defendant was charged with first-degree murder. The trial court declared a mistrial when the jury deadlocked. Four months later, the prosecutor filed a voluntary dismissal under G.S. 15A-931, explaining that the State had elected not to retry the case. In 2015, after acquiring new evidence, the State recharged the defendant with first-degree murder. The defendant moved to dismiss the new indictment, claiming a double jeopardy bar, which the trial court denied. The defendant was found guilty of second-degree murder and appealed. On appeal, the defendant argued that the prosecutor's post-mistrial voluntary dismissal terminated the initial continuing jeopardy and therefore the State was barred from later re-prosecuting him for the same offense. The court agreed, holding that a "non-defense requested section 15A-931 voluntary dismissal . . . was a jeopardy-terminating event tantamount to an acquittal." It held:

> [W]hen a prosecutor takes a section 15A-931 voluntary dismissal of a criminal charge after jeopardy had attached to it, such a post-jeopardy dismissal is accorded the same constitutional finality and conclusiveness as an acquittal for double jeopardy purposes. Further, while the State has the undisputed right to retry a hung charge, we hold that a prosecutor's election instead to dismiss that charge is binding on the State and tantamount to an acquittal.

Applying this rule to the case at hand, the court held:

> [H]ere, by virtue of the prosecutor's post-jeopardy dismissal of the murder charge, regardless of whether it was entered after a valid hung-jury mistrial but before a permissible second trial, the State was barred under double jeopardy principles from retrying defendant four years later for the same charge.

The court rejected the State's argument that when a proper hung-jury mistrial is declared, it is as if there has been no trial at all to which jeopardy ever attached. The court noted that jeopardy attaches when the jury is empaneled and sworn and does not "unattach" when the trial ends in a hung jury.

The court found that the "State's election" rule supported its holding. Under the "State's election" rule, the court explained, a prosecutor's pre-jeopardy silence of an intent to prosecute a potential charge in an indictment constitutes a "binding election . . . tantamount to an acquittal" of that potential charge, barring the State from later attempting to prosecute that potential charge for the first time after jeopardy has attached to the indictment. The court found that the principle underlying this rule—that the event of jeopardy attachment renders such a decision binding and tantamount to an acquittal—applicable to the State's action here. It explained:

> In this case, jeopardy attached to the murder charge when the first jury was empaneled and sworn. The State had the right to retry defendant for that charge following the hung-jury mistrial. But after what the record indicates was at least one homicide status hearing with the trial court to determine whether the State was going to exercise its right to retry the hung charge, the prosecutor instead elected to file a section 15A-931 voluntary dismissal of that charge, explicitly acknowledging in its dismissal entry that a jury had been empaneled and evidence had been introduced, and reasoning in part that "State has elected not to re-try case." The record in this case leaves little doubt that both the trial court and the prosecutor contemplated his election to dismiss the hung charge, rather than announce the State's intent to retry it, amounted to a decision conclusively ending the prosecution, as would any reasonable defendant.

The court continued, stating that a "logical extension" of the State's election rule supported its holding in this case: Because the prosecutor, after acknowledging that jeopardy had attached to the murder charge, elected to dismiss the hung charge in part because the "State has elected not to re-try case," rather than announce the State's intent to exercise its right to retry it, that decision was "binding on the State and tantamount to acquittal" of the murder charge.

The court also rejected the State's argument that since its dismissal was entered after the mistrial but before the second trial, the case was back in "pretrial" status and the dismissal was effectively a pre-jeopardy dismissal.

State v. Allbrooks, ___ N.C. App. ___, 808 S.E.2d 168 (Nov. 21, 2017)
In this murder case, the court rejected the defendant's argument that he could not be retried for murder after his first trial ended in a hung jury. It noted that courts have long held that the prohibition against double jeopardy does not apply when the prior trial ended in a hung jury.

State v. Payne, ___ N.C. App. ___, 808 S.E.2d 476 (Nov. 21, 2017)
On the particular facts of the case, the trial court's erroneous entry of judgment of not guilty by reason of insanity did not create a jeopardy bar to further proceedings. The trial court's order did not constitute an acquittal to which jeopardy attached. Its order, which dismissed the charges with leave, was more akin to a procedural dismissal than a substantive ruling.

Due Process & Related Issues

State v. Stroud, ___ N.C. App. ___, ___ S.E.2d __ (May 1, 2018)
In this robbery case, the defendant's due process rights were not violated. The defendant asserted that a due process violation occurred when an accomplice was compelled to appear at trial as a witness for the State. Specifically, the defendant asserted that the prosecutor improperly coerced the accomplice into testifying by threatening to charge her with obstruction of justice if she refused to testify and by telling the accomplice that she would make inquiries about the accomplice possibly having visitation with her son if she testified for the State. Because the issue was not raised at trial, it was waived. However even if it was properly presented, it would fail. The court noted that the defendant did not argue that he intended to call the accomplice as a defense witness but was prevented from doing so by the State. Furthermore, the circumstances surrounding the accomplice's agreement to testify did not result in the accomplice testifying more favorably for the State than she otherwise would have. To the contrary, the record makes clear that her testimony was largely unhelpful to the State.

State v. Diaz, ___ N.C. App. ___, 808 S.E.2d 450 (Nov. 21, 2017) review granted, ___ N.C. ___, ___ S.E.2d ___ (May 9 2018)
In a case where the defendant was found guilty of abduction of a child, statutory rape and second-degree sexual exploitation, the trial court rejected the defendant's argument that his constitutional right to a fair trial was violated when the State admitted into evidence his affidavit of indigency, which indicated that he was under a secured bond of $500,000 which had not been posted. Specifically, the defendant argued he was prejudiced by the jurors knowing that he was in custody and that the information on the affidavit violated the presumption of innocence. The court held that even if the jurors had inferred that the defendant was in custody and unable to pay the bond, his right to a fair trial was not violated. It noted that although there was some evidence that the defendant was in custody, he was not shackled or handcuffed in the courtroom.

Indictment & Pleading Issues

Name, Race, Date of Birth

State v. Stroud, ___ N.C. App. ___, ___ S.E.2d __ (May 1, 2018)
(1) In this robbery case, the indictment was not fatally defective for misspelling the defendant's middle name. The indictment incorrectly alleged the defendant's middle name as "Rashawn." His actual middle name is "Rashaun." A minor misspelling of a defendant's name does not constitute a fatal defect absent some showing of prejudice.
(2) Neither an error in the indictment with respect to the defendant's race nor one with respect to his date of birth rendered the indictment fatally defective. The indictment listed the defendant's race as white despite the fact that he is black. Additionally, his date of birth was alleged to be 31 August 1991 when, in

fact, his birth date is 2 October 1991. There is no requirement that an indictment include the defendant's date of birth or race. Thus, these inaccuracies can be deemed surplusage.

Prior Convictions

State v. Brice, 370 N.C. 244 (Nov. 3, 2017)
On discretionary review from unanimous decision of the Court of Appeals, ___ N.C. App. ___, 786 S.E.2d 812 (2016), concluding that the habitual misdemeanor larceny indictment was defective, the court reversed. The Court of Appeals concluded that the indictment was defective because it failed to comply with G.S. 15A-928, a defect that was jurisdictional. The indictment alleged that the defendant stole the property after having been previously convicted of misdemeanor larceny on four separate occasions. The court began by holding that the indictment alleged all of the essential elements of habitual misdemeanor larceny. However, it failed to comply with G.S. 15A-928, which provides that when the fact that the defendant has been previously convicted of an offense raises the present offense to a higher grade and thereby becomes an element, the indictment must be accompanied by a special indictment charging the prior convictions or these allegations must be included as a separate count. Thus, the issue before the court was whether the fact that the indictment failed to comply with the separate indictment or separate account requirements set out in G.S. 15A-928 constituted a fatal defect depriving the trial court of jurisdiction. The court concluded that noncompliance with the statute was not a jurisdictional issue and thus could not be raised on appeal where, as here, the defendant raised no objection or otherwise sought relief on the issue before the trial court. The court overruled State v. Williams, 153 N.C. App. 192 (2002), which the Court of Appeals had relied on to conclude that a violation of G.S. 15A-928 was jurisdictional.

State v. Carter, 370 N.C. 266 (Nov. 3, 2017)
On discretionary review from a unanimous unpublished decision of the Court of Appeals vacating a conviction for carrying a concealed gun on grounds that the indictment was fatally defective, the court reversed per curiam for the reasons stated in *State v. Brice*, ___ N.C. ___, ___ S.E.2d ___ (Nov. 3, 2017). The defendant was charged with felony carrying a concealed weapon, an offense that became a felony because of a prior conviction. The indictment did not comply with G.S. 15A-928, which requires a special indictment or separate count alleging the prior conviction. The Court of Appeals found that failure to comply with the statute was a jurisdictional defect; the Supreme Court reversed.

State v. Simmons, ___ N.C. App. ___, 811 S.E.2d 711 (Feb. 20, 2018)
On remand from the state Supreme Court for reconsideration in light of State v. Brice, ___ N.C. ___, 806 S.E.2d 32 (2017) (habitual misdemeanor larceny indictment was not defective; a violation of G.S. 15A-928 is not jurisdictional and cannot be raised on appeal where the defendant raised no objection or otherwise sought relief on the issue in the trial court), the court held that because the defendant failed to raise the non-jurisdictional issue below, the defendant waived his right to appeal the issue of whether the aggravated felony death by vehicle indictment violated G.S. 15A-928.

Larceny Offenses

State v. Brawley, ___ N.C. ___, 811 S.E.2d 144 (Apr. 6, 2018)
On appeal from the decision of a divided panel of the Court of Appeals, ___ N.C. App. ___, 807 S.E.2d 159 (2017), the court per curiam reversed for the reasons stated in the dissenting opinion below, thus holding that a larceny from a merchant indictment was not fatally defective. A majority of the panel of the Court of Appeals held that the indictment, which named the victim as "Belk's Department Stores, an entity capable of owning property," failed to adequately identify the victim. The court of appeals stated:

> In specifying the identity of a victim who is not a natural person, our Supreme Court provides that a larceny indictment is valid only if either: (1) the victim, as named, itself imports an association or a corporation [or other legal entity] capable of owning

> property[;] or, (2) there is an allegation that the victim, as named, if not a natural person, is a corporation or otherwise a legal entity capable of owning property[.]" (quotations omitted).

The court of appeals further clarified: "A victim's name imports that the victim is an entity capable of owning property when the name includes a word like "corporation," "incorporated," "limited," "church," or an abbreviated form thereof." Here, the name "Belk's Department Stores" does not itself import that the victim is a corporation or other type of entity capable of owning property. The indictment did however include an allegation that the store was "an entity capable of owning property." Thus the issue presented was whether alleging that the store is some unnamed type of entity capable of owning property is sufficient or whether the specific type of entity must be pleaded. The Court of Appeals found that precedent "compel[led]" it to conclude that the charging language was insufficient. The Court of Appeals rejected the State's argument that an indictment which fails to specify the victim's entity type is sufficient so long as it otherwise alleges that the victim is a legal entity. The dissenting judge believed that the indictment adequately alleged the identity of the owner. The dissenting judge stated: "Given the complexity of corporate structures in today's society, I think an allegation that the merchant named in the indictment is a legal entity capable of owning property is sufficient to meet the requirements that an indictment apprise the defendant of the conduct which is the subject of the accusation." As noted, the Supreme Court reversed for reasons stated in the dissent.

State v. Campbell, ___ N.C. App. ___, 810 S.E.2d 803 (Feb. 6, 2018) temp. stay granted, ___ N.C. ___, 809 S.E.2d 390 (Feb 16 2018)

Invoking its discretion under Rule 2 to reach the merit of the defendant's argument, the court held, over a dissent, that the trial court erred by failing to dismiss a larceny charge due to a fatal variance between the indictment and the evidence regarding ownership of the property. The indictment alleged that the property belonged to "Andy [Stevens] and Manna Baptist Church." Andy Stevens was the church's Pastor. In a prior opinion in the case, the court had held that a fatal variance existed because the evidence showed that the stolen property belonged *only* to the church. The Supreme Court however granted discretionary review as to whether the Court of Appeals erred in invoking Rule 2 to address that issue. That court remanded to the Court of Appeals for an express determination as to whether the court would exercise its discretion to invoke Rule 2 and consider the merits of the fatal variance claim. Following these instructions, the court determined that in this "unusual and extraordinary case" it would exercise its discretion to employ Rule 2 and consider the merits of the defendant's fatal variance claim. Turning to the merits, the court adopted its analysis in its earlier decision in the case and held—again—that a fatal variance occurred. Specifically, although the indictment alleged that the property was owned by both Andy Stevens and the church, the evidence established that the property was owned only by the church. The court reiterated the principle that if the State fails to present evidence of a property interest of some sort in both owners alleged in the indictment, a fatal variance occurs. Here, the evidence did not show that Pastor Stevens held title or had any type of ownership interest in the stolen property.

Obtaining Property by False Pretenses

State v. Mostafavi, ___ N.C. ___, 811 S.E.2d 138 (Apr. 6, 2018)

On appeal from the decision of a divided panel of the Court of Appeals, ___ N.C. App. ___, 802 S.E.2d 508 (2017), the court reversed, holding that the obtaining property by false pretenses indictment was not defective and that the evidence was sufficient to sustain the conviction on that charge. The obtaining property by false pretenses indictment, that described the property obtained as "United States Currency" was not fatally defective. The indictment charged the defendant with two counts of obtaining property by false pretenses, alleging that the defendant, through false pretenses, knowingly and designedly obtained "United States Currency from Cash Now Pawn" by conveying specifically referenced personal property, which he represented as his own. The indictment described the personal property used to obtain the money as an Acer laptop, a Vizio television, a computer monitor, and jewelry. An indictment for

obtaining property by false pretenses must describe the property obtained in sufficient detail to identify the transaction by which the defendant obtained money. Here, the indictment sufficiently identifies the crime charged because it describes the property obtained as "United States Currency" and names the items conveyed to obtain the money. As such, the indictment is facially valid; it gave the defendant reasonable notice of the charges against him and enabled him to prepare his defense. The transcript makes clear that the defendant was not confused at trial regarding the property conveyed. Had the defendant needed more detail to prepare his defense, he could have requested a bill of particulars. In so holding the court rejected the defendant's argument that the indictment was fatally defective for failing to allege the amount of money obtained by conveying the items.

State v. Everrette, ___ N.C. App. ___, 807 S.E.2d 168 (Nov. 7, 2017)
An indictment charging obtaining property by false pretenses was defective where it charged the defendant with obtaining an unspecified amount of "credit" secured through the issuance of an unidentified "loan" or "credit card." This vague language failed to describe what was obtained with sufficient particularity to enable the defendant to adequately prepare a defense. A grand jury indicted the defendant on three counts of obtaining property by false pretenses. The indictment for the first count charged that the defendant "obtain[ed] credit, from Weyco." The indictments for the second and third counts charged that the defendant "obtain[ed] credit, from Weyco" and that "this property was obtained by means of giving false information on an application for a loan so as to qualify for said loan which loan was made to defendant." The court concluded:

> [I]ndictments charging a defendant with obtaining "credit" of an unspecified amount, secured through two unidentified "loan[s]" and a "credit card" are too vague and uncertain to describe with reasonable certainty what was allegedly obtained, and thus are insufficient to charge the crime of obtaining property by false pretenses. "Credit" is a term less specific than money, and the principle that monetary value must at a minimum be described in an obtaining-property-by-false-pretenses indictment extends logically to our conclusion that credit value must also be described to provide more reasonable certainty of the thing allegedly obtained in order to enable a defendant adequately to mount a defense. Moreover, although the indictments alleged defendant obtained that credit through "loan[s]" and a "credit card," they lacked basic identifying information, such as the particular loans, their value, or what was loaned; the particular credit card, its value, or what was obtained using that credit card.

It continued:

> Because the State sought to prove that defendant obtained by false pretenses a $14,399 secured vehicle loan for the purchase of a Suzuki motorcycle and a $56,736 secured vehicle loan for the purchase of a Dodge truck, the indictments should have, at a minimum, identified these particular loans, described what was loaned, and specified what actual value defendant obtained from those loans. Because the State sought also to prove that defendant obtained the Credit Card by false pretenses, that indictment should have, at a minimum, identified the particular credit card and its account number, its value, and described what defendant obtained using that credit.

Resisting an Officer

State v. Cromartie, ___ N.C. App. ___, 810 S.E.2d 766 (Feb. 6, 2018)
Over a dissent, the court held that the trial court did not err by denying the defendant's motion to dismiss a charge of resisting a public officer on grounds of fatal variance. The indictment specified that the defendant resisted by running away from the officer on foot. The evidence showed that although the defendant initially was on a moped, he continued to elude the officer on foot after the moped overturned.

Unlicensed Bail Bonding

State v. Golder, ___ N.C. App. ___, 809 S.E.2d 502 (Feb. 6, 2018)
There was no fatal defect in an indictment charging the defendant with misdemeanor unlicensed bail bonding in violation of G.S. 58-71-40. The indictment alleged that the defendant "did act in the capacity of, and performed the duties, functions, and powers of a surety bondsman and runner, without being qualified and licensed to do so. This act was done in violation of N.C.G.S. 58-71-40." Where, as here, the language of the indictment is couched in the language of the statute it is sufficient to charge the offense. The court rejected the defendant's argument that the indictment was defective because it failed to specify the exact manner in which he allegedly violated the statute.

Drug Offenses

State v. Simmons, ___ N.C. App. ___, 808 S.E.2d 306 (Nov. 7, 2017)
The trial court erred by allowing the State, at the beginning of trial, to amend the indictment charging the defendant with trafficking in heroin to allege trafficking in opiates. In connection with a drug investigation, an officer and informant waited in a hotel room for the defendant. The defendant arrived in a vehicle and, carrying a child in his arms, approached the room. Events ensued and the defendant admitted having placed a packet of heroin in the child's pants. The defendant was arrested and the car was searched. A search of the car produced: two digital scales; a partially smoked marijuana "blunt;" $800 in cash; a key box under the hood containing balloons of heroin, a pill bottle containing marijuana, crack cocaine and 17 hydrocodone pills; and a revolver wrapped in a sock. The hydrocodone weighed 4.62 grams; the heroin recovered from the child's pants weighed .84 grams; and the heroin found in the car weighed 3.77 grams. The minimum amount for trafficking in heroin is 4 grams; thus, the only way for the State to prove that minimum was to prove that the defendant possessed both the heroin found in the car and the smaller quality of heroin found in the child's pants. At a pretrial hearing, the State dismissed several charges leaving the following charges in place: possession of a firearm by a felon, possession of marijuana, possession with intent to sell or deliver cocaine, trafficking in heroin by transportation, and trafficking in heroin by possession. At this point, defense counsel informed the court that the defendant would admit to the heroin found in the child's pants. The prosecutor then asked to amend the trafficking indictments from trafficking in heroin to trafficking in opiates. The trial court granted the State's motion to amend, over the defendant's objection. The defendant was convicted on the trafficking charges. The court noted that here, the amendment broadened the scope of the original indictment to allege trafficking in "opiates," a category of controlled substances, rather than "heroin," a specific controlled substance. It did so, the court reasoned, for the purpose of bringing an additional controlled substance—hydrocodone—within the ambit of the indictment. Although heroin is an opiate, not all opiates are heroin. Therefore, when the original indictment was amended to include hydrocodone, a new substance was effectively alleged in the indictment. The court found its holding consistent with the proposition that a critical purpose of the indictment is to enable the accused to prepare for trial. Here, the State moved to amend on the morning of trial. Until then, the defendant had justifiably relied on the original indictment in preparing his defense. In fact this concern was expressed by defense counsel in his objection to the motion to amend, specifically arguing that the defendant had no knowledge that the hydrocodone would be included in the trafficking amount. Additionally, the State sought to amend the indictment only after the defendant informed the trial court of his intention to admit possessing some, but not all, of the heroin. The logical inference of the sequence is that upon learning of the defendant's trial strategy on the morning of trial, the State sought to thwart that strategy by broadening the scope of the indictment. The court stated: "In essence, the State was permitted to change the rules of the game just as the players were taking the field."

Injury to Property Offenses

In re J.B., ___ N.C. App. ___, 809 S.E.2d 353 (Jan. 2, 2018)

In a case where a juvenile was found to be delinquent based on the offense of injury to personal property with respect to a school printer, the trial court did not err by denying the juvenile's motion to dismiss. The petition alleged that the juvenile damaged a printer owned by the "Charlotte Mecklenburg Board of Education[.]" The juvenile argued that the trial court erred by denying the motion to dismiss because the petition failed to allege that the school was an entity capable of owning property and that the evidence at trial did not prove who owned the printer. The court held that because the juvenile conceded the fact that the school was an entity capable of owning property and the State presented evidence that the school owned the printer, the trial court did not err by denying the motion. The court noted that the juvenile's counsel expressly acknowledged to the trial court that the Charlotte-Mecklenburg Board of Education is an entity capable of owning property. The court also noted that because the juvenile did not contest this issue at trial, it could not be raised for the first time on appeal. As to the evidence, the State presented a witness who testified to ownership of the printer. A concurring judge recognized that with respect to the petition's failure to plead that the owner was an entity capable of owning property, had the pleading been an indictment, the issue could be raised for the first time on appeal. However, the concurring judge concluded that the owner's capability of owning property does not need have been pleaded in a petition with the same specificity as in an indictment.

Littering

State v. Rankin, ___ N.C. App. ___, 809 S.E.2d 358 (Jan. 2, 2018) temp. stay granted, ___ N.C. ___, 808 S.E.2d 757 (Jan 22 2018)
Over a dissent the court held that where an indictment for felony littering of hazardous waste failed to plead an essential element of the crime it was fatally defective. The indictment failed to allege that the defendant had not discarded litter on property "designated by the State or political subdivision thereof for the disposal of garbage and refuse[ ] and . . . [was] authorized to use the property for this purpose" as set out in G.S. 14-399(a)(1). The issue on appeal was whether subsection (a)(1) is an essential element of the crime or alternatively an exception that need not be alleged. Holding that subsection (a)(1) is an element, the court reasoned: "The offense of littering under N.C. Gen. Stat. § 14-399(a) is not a "complete and definite" crime absent consideration of subsections (a)(1) and (a)(2)." It explained:

> Under § 14-399(a), the crime of littering is premised upon a defendant's act of disposing of or discarding trash in any place other than a waste receptacle (as provided for in subsection (a)(2)) or on property designated by the city or state for the disposal of garbage and refuse (as provided for in subsection (a)(1)). The text of the statutory language in § 14-399(a) prior to the word "except" does not state a crime when that language is read in isolation. Rather, subsections (a)(1) and (a)(2) are inseparably intertwined with the language preceding them.

The court further noted that it had previously held that subsection (a)(2) is an essential element of the crime and that "[b]ecause subsections (a)(1) and (a)(2) serve identical purposes in this statute, it would be illogical to suggest that one is an essential element but the other is not."

Judge's Expression of Opinion

State v. Shore, ___ N.C. App. ___, ___ S.E.2d ___ (Apr. 3, 2018)
The trial court did not impermissibly express an opinion on the evidence in violation of G.S. 15A-1222 by denying the defendant's motion to dismiss in the presence of the jury. At the close of the State's evidence and outside the presence of the jury, the defendant made a motion to dismiss the charges, which the trial court denied. Following the presentation of the defendant's evidence, the defendant renewed his motion to dismiss, in the jury's presence. The trial court denied the motion. The defendant did not seek to have the ruling made outside of the presence of the jury, did not object, and did not move for a mistrial on these grounds. The court found *State v. Welch*, 65 N.C. App. 390 (1983), controlling and rejected the defendant's argument.

Jury Trial, Waiver

State v. Boderick, ___ N.C. App. ___, ___ S.E. 2d ___ (Mar. 20, 2018)
Because the constitutional amendment permitting waiver of a jury trial only applies to defendants arraigned on or after 1 December 2014, a bench trial was improperly allowed in this case where the defendant was arraigned in February 2014. The session law authorizing the ballot measure regarding waiver of a jury trial provided that if the constitutional amendment is approved by the voters it becomes effective 1 December 2014 and applies to criminal cases arraigned in Superior Court on or after that date. After the ballot measure was approved, the constitutional amendment was codified at G.S. 15A-1201(b). That statute was subsequently amended to provide procedures for a defendant's waiver of the right to a jury trial, by a statute that became effective on 1 October 2015. The court rejected the State's argument that because of the subsequent statutory amendment, the constitutional amendment allowing for waiver of a jury trial applies to any defendant seeking to waive his right to a jury trial after 1 October 2015. The amendment to the statute does not change the effective date of the constitutional amendment itself. The court concluded: "Accordingly, a trial court may consent to a criminal defendant's waiver of his right to a jury trial only if the defendant was arraigned on or after 1 December 2014." The parties may not stipulate around this requirement. Here, because the defendant was arraigned in February 2014, he could not waive his right to a trial by jury. The court found that automatic reversal was required.

Jury Selection

State v. Crump, ___ N.C. App. ___, ___ S.E.2d ___ (Apr. 17, 2018)
In a case involving a shoot-out with police, the defendant was not prejudiced by the trial court's limitation on his questioning of potential jurors. The trial court did not allow the defendant to inquire into the opinions of potential jurors regarding an unrelated, high-profile case involving a shooting by a police officer that resulted in a man's death and police shootings of black men in general. The trial court disallowed these questions as stakeout questions. On appeal the defendant argued that this was a proper subject of inquiry. The court began by rejecting the State's contention that it need not consider the issue at all because the defendant failed to exhaust his preemptory challenges, therefore forestalling his ability to demonstrate prejudice, stating:

> [T]he requirement that a defendant exhaust his peremptory challenges is a meaningless exercise where, as here, a defendant has been precluded from inquiring into jurors' potential biases on a relevant subject, leaving the defendant to assume or guess about those biases without being permitted to probe deeper; this requirement elevates form over function in that the exhaustion of peremptory challenges in a case like this does nothing to ameliorate defendant's dissatisfaction with the venire. As a result, any peremptory challenge made by a defendant (or any party) is an empty gesture once a trial court has ruled that an entire line of (relevant) questioning will be categorically prohibited.

The court then turned to the defendant's challenge to the trial court's ruling prohibiting any inquiry into the opinions of potential jurors regarding the unrelated, high-profile case and regarding police officer shootings of black men in general. Based "[o]n the specific facts of the instant case," the court concluded that the trial court's rulings were not prejudicial to the defendant. Specifically, the court noted that in this case, the defendant did not realize until after the fact that he had been shooting at police officers. The court was careful to note that in some other case involving a black male defendant and a shooting with police officers, the line of questioning at issue could very well be proper, and even necessary. Again, however, on the precise facts of this case, the court found no prejudicial error.

Jury, Questioning of Witnesses

State v. Goodman, ___ N.C. App. ___, 808 S.E.2d 791 (Dec. 5, 2017)

Although declining to reach the merits of the defendant's claim that the trial court erred in handling a juror's inquiry about whether jurors may question witnesses, the court noted that whether to allow jurors to question witnesses is within the sound discretion of the trial court. Although the trial court may allow jurors to ask witnesses questions, the better practice is for the jury to submit written questions to the trial judge, who then has a bench conference with the attorneys, hearing any objections that they might have. The judge would then question the witnesses.

Jury Argument

State v. McNeill, ___ N.C. ___, ___ S.E.2d ___ (June 8, 2018)
In this capital case, the court rejected the defendant's argument that the trial court abused its discretion by denying his requests for a mistrial because of two statements made by the State during closing arguments at the guilt phase of the trial. During the investigation of the case, the defendant authorized defense counsel to reveal the location of the victim's body, in hopes of receiving a plea offer or perhaps the possibility of arguing for mitigating circumstances at a possible later capital trial. The defendant and the lawyers agreed that the information would be conveyed to the police but that its source would not be disclosed. The lawyers carried out this agreement in making their disclosure to law enforcement. During closing argument at trial, the prosecutor noted in part that the victim's body was found "where the defendant's lawyer said he put the body." Later, the prosecutor asserted, "And his defense attorney telling law enforcement where to look for the body puts him there." The court found that the second statement was not improper. Evidence that the information of the victim's location was conveyed to law enforcement by defense counsel was properly admitted by the trial court and this evidence permitted reasonable inferences to be drawn that were incriminating to the defendant, specifically that the defendant was the source of the information and had been to the location. The prosecutor's first statement however was improper. This statement was couched as an assertion of fact which was not an accurate reflection of the evidence. However, the statement did not require a mistrial. The court stated: "this sole misstatement of that evidence did not run far afield of what was permissible."

State v. Reed, __ N.C. ___, ___ S.E.2d __ (May 11, 2018)
In case where the defendant was convicted of misdemeanor child abuse and contributing to the delinquency of a minor, the court reversed the opinion below, ___ N.C. App. ___, 789 S.E.2d 703 (2016), for the reasons stated in the dissent. The case involved the drowning of a child under the defendant's supervision. Over a dissent, a majority of the Court of Appeals held that the State's jury argument regarding 404(b) evidence involving the drowning of another child in the defendant's care "amounted to plain error." The dissenting judge rejected the contention that the trial court erred by failing to intervene ex mero motu to this argument, arguing that plain error was not the appropriate standard of review with respect to jury argument that fails to provoke a timely objection. Applying the gross impropriety standard, the dissenting judge found no error.

State v. Mumma, ___ N.C. App. ___, 811 S.E.2d 215 (Feb. 6, 2018)
In this murder case, the trial court did not err by failing to intervene ex mero motu during the State's closing argument. The defendant argued that the prosecutor's closing arguments injected the prosecutor's personal beliefs, appealed to the jury's passion, and led the jury away from the evidence. The court determined that the challenged portions of the argument, when taken in context, draw reasonable inferences based on the defendant's inconsistent statements and point out inconsistencies in his testimony. The court determined that statements like "give me a break" and "come on" do not reflect the prosecutor's personal opinion but rather point out inconsistencies in the defendant's testimony. With respect to the prosecutor's statement that he would "respectfully disagree" with the jury if they decided to find that the defendant killed the victim in self-defense, even if this argument was improper, it was not grossly so as to warrant the trial court's intervention ex mero motu.

State v. Peace, ___ N.C. App. ___, 808 S.E.2d 318 (Nov. 21, 2017)
In this DWI case the court rejected the defendant's argument that the trial court erred by failing to intervene ex mero motu to statements made by the prosecutor in closing argument. The court found the defendant's argument to be "meritless at best," noting that the statements at issue were consistent with the evidence presented and did not delve into conjecture or personal opinion. Even if the remarks were improper, the defendant failed to show prejudice.

State v. Madonna, ___ N.C. App. ___, 806 S.E.2d 356 (Oct. 17, 2017)
In this murder case, the prosecutor's statement that the defendant "can't keep her knees together or her mouth shut" was "improperly abusive." The defendant was charged with murdering her husband, and the State's evidence indicated that she was having an affair with her therapist. However, the trial court did not abuse its discretion by denying the defendant's motion for a mistrial--a "drastic remedy"--on grounds of the prosecutor's improper statements. The prosecutor's statements that the defendant had lied to the jury while testifying at trial were clearly improper, as was the prosecutor's statement referring to the defendant as a narcissist. However, considering the overwhelming evidence of guilt, the prosecutor's remarks did not render the trial and conviction fundamentally unfair and thus the trial court did not err by failing to intervene ex mero motu.

Jury Deliberation Issues

State v. Mumma, ___ N.C. App. ___, 811 S.E.2d 215 (Feb. 6, 2018)
In this murder case, the court held, over a dissent, that the trial court did not commit prejudicial error by sending photographs of the victim's body to the jury deliberation room over the defendant's objection and in violation of G.S. 15A-1233. Assuming the trial court erred by submitting the photographs to the jury room without the defendant's consent, the error was harmless. In so holding the court rejected the defendant's argument that considering the number and content of the photographs and the amount of time the jury viewed them, he was prejudiced by this error. The court noted, in part, that all the photographs had been admitted into evidence and that the defendant had not established prejudice.

State v. Cox, ___ N.C. App. ___, 808 S.E.2d 339 (Nov. 21, 2017)
The court rejected the defendant's argument that the trial court erred by giving a coercive instruction after the jury indicated that it was deadlocked, concluding that the trial court's instructions to continue deliberations were in accord with G.S. 15A-1235(b). The jury informed the trial court three times that it was unable to reach a unanimous verdict. Each time the trial court gave an instruction consistent with the statute. After the jury had deliberated less than five hours in a single day, and after its third note to the trial court stating that it was deadlocked, the trial court informed the jury that it was sending them back to further deliberate with the same instructions previously given. However, in this instance, the trial court added: "after five days of testimony and less than 5 hours of deliberations, these folks deserve better." The defendant argued that this comment was impermissibly coercive and left the jurors with the impression that the judge was irritated with them for not reaching a verdict. The court found otherwise, noting that the judge was polite, patient, and accommodating. The trial court properly gave an *Allen* charge each time the jury stated that it was deadlocked. Prior to its final comment, the jury received a lunch break, recess and a meal. After the third impasse, the trial court gave the jury a choice to continue to deliberate that day or to go home and continue deliberations the next day. Considering the totality of the circumstances, the trial court's comment was not coercive.

Jury Instructions

Definitions of Terms

State v. Fletcher, 370 N.C. 313 (Dec. 8, 2017)

In a footnote, the court "urge[d]" the trial courts to define all relevant terms in its jury instructions and avoid the situation that occurred here, where the trial court declined to define the relevant term and allowed counsel to argue definitions of the term to the jury.

Disjunctive Instructions

State v. Dick, 370 N.C. 305 (Dec. 8, 2017)
The court reversed a unanimous, unpublished decision of the Court of Appeals in this first-degree sexual offense case, holding that the trial court did not err by giving a disjunctive jury instruction. One of the factors that can elevate a second-degree sexual offense to a first-degree sexual offense is that the defendant was aided and abetted by one or more other persons; another is that the defendant used or displayed a dangerous or deadly weapon. Here, the trial court gave a disjunctive instruction, informing the jury that it could convict the defendant of the first-degree offense if it found that he was aided and abetted by another or that he used or displayed a dangerous or deadly weapon. Where, as here, the trial court instructs the jury disjunctively as to alternative acts which establish an element of the offense, the requirement of unanimity is satisfied. However, when a disjunctive instruction is used, the evidence must be sufficient under both theories. In this case it was undisputed that the evidence was sufficient under the dangerous or deadly weapon prong. The defendant contested the sufficiency of the evidence under the aiding and abetting prong. The court found the evidence sufficient, holding that the Court of Appeals erred in concluding that actual or constructive presence is required for aiding and abetting. As the Court stated in *State v. Bond,* 345 N.C. 1 (1996), actual or constructive presence is no longer required to prove aiding and abetting. Applying that law, the court held that although the defendant's accomplices left the room before the defendant committed the sexual act, there was sufficient evidence for the jury to conclude that the others aided and abetted him. Among other things, two of the accomplices taped the hands of the residents who were present; three of them worked together to separate the sexual assault victim from the rest of the group; one of the men grabbed her and ordered her into a bedroom when she tried to sit in the bathroom; and in the bedroom the defendant and an accomplice groped and fondled the victim and removed her clothes. Most of these acts were done by the defendant and others. The act of taping her mouth shut, taping her hands behind her back, moving her into the bedroom, removing her clothing and inappropriately touching her equate to encouragement, instigation and aid all of which "readily meet the standards of . . . aiding and abetting." The court rejected the defendant's argument that the evidence was insufficient because he was the only person in the room when the sex act occurred.

State v. Collington, ___ N.C. App. ___, ___ S.E.2d ___ (Apr. 17, 2018) temp. stay granted, ___ N.C. ___, ___ S.E.2d ___ (Apr 27 2018)
The trial court properly granted the defendant's Motion for Appropriate Relief (MAR) alleging ineffective assistance of appellate counsel. The defendant was found guilty of felon in possession of a firearm. The trial court's jury instructions allowed for a guilty verdict if the defendant committed the crime by himself or acting in concert with his brother, also a felon. The verdict sheet did not indicate on which theory the jury convicted. The defendant appealed his conviction challenging the jury instruction. On direct appeal, the court held that even assuming the trial court erred in its jury instructions, the defendant did not establish plain error. That decision noted that the defendant had not presented any arguments under *State v. Pakulski*, 319 N.C. 562 (1987), which held that a trial court commits plain error when it instructs a jury on disjunctive theories of a crime, where one of the theories is improper, and it cannot be discerned from the record the theory upon which the jury relied. The defendant then filed a MAR asserting ineffective assistance of appellate counsel. He asserted that appellate counsel rendered ineffective assistance by failing to argue the *Pakulski* issue on appeal. The trial court concluded that the defendant received ineffective assistance of appellate counsel and granted the defendant's MAR, vacated the conviction and ordered a new trial. The State sought review. The court affirmed. It began by reviewing the relevant rules with respect to plain error and disjunctive jury instructions. It then concluded that appellate counsel's performance was deficient. It stated: "Appellate counsel's lack of professional

diligence in uncovering the readily-available—and outcome determinative—legal principles enunciated in the *Pakulski* line of cases was so unreasonable as to constitute ineffective assistance of counsel." The court went on to conclude that the prejudice prong of the ineffective assistance analysis also was satisfied.

Flight

State v. Locklear, ___ N.C. App. ___, ___ S.E.2d __ (May 1, 2018)
In this burning case, the trial court erred by instructing the jury on flight. Here, the evidence raises no more than suspicion and conjecture that the defendant fled the scene. Moreover, there is no evidence that the defendant took steps to avoid apprehension. The error however was not prejudicial.

Self-Defense & Defense of Others

State v. Lee, ___ N.C. ___, 811 S.E.2d 563 (Apr. 6, 2018)
On discretionary review of a unanimous decision of the Court of Appeals, ___ N.C. App. ___, 789 S.E.2d 679 (2016), the court reversed because of errors in the jury instructions on self-defense. At trial, the parties agreed to the delivery of N.C.P.I.–Crim. 206.10, the pattern instruction on first-degree murder and self-defense. That instruction provides, in relevant part: "Furthermore, the defendant has no duty to retreat in a place where the defendant has a lawful right to be." Additionally, N.C.P.I.–Crim. 308.10, which is incorporated by reference in footnote 7 of N.C.P.I.–Crim. 206.10 and entitled "Self-Defense, Retreat," states that "[i]f the defendant was not the aggressor and the defendant was . . . [at a place the defendant had a lawful right to be], the defendant could stand the defendant's ground and repel force with force." Although the trial court agreed to instruct the jury on self-defense according to N.C.P.I.–Crim. 206.10, it ultimately omitted the "no duty to retreat" language of N.C.P.I.–Crim. 206.10 from its actual instructions without prior notice to the parties and did not give any part of the "stand-your-ground" instruction. Defense counsel did not object to the instruction as given. The jury convicted defendant of second-degree murder and the defendant appealed. The Court of Appeals affirmed the conviction, reasoning that the law limits a defendant's right to stand his ground to any place he or she has the lawful right to be, which did not include the public street where the incident occurred. The Supreme Court allowed defendant's petition for discretionary review and reversed.
(1) The court held that when a trial court agrees to give a requested pattern instruction, an erroneous deviation from that instruction is preserved for appellate review without further request or objection. Here, because the trial court agreed to instruct the jury in accordance with N.C.P.I.–Crim. 206.10, its omission of the required stand-your-ground provision substantively deviated from the agreed-upon pattern jury instruction, thus preserving this issue for appellate review.
(2) By omitting the relevant stand-your-ground provision, the trial court's jury instructions were an inaccurate and misleading statement of the law. The court concluded, in part, that "[c]ontrary to the opinion below, the phrase "any place he or she has the lawful right to be" is not limited to one's home, motor vehicle, or workplace, but includes any place the citizenry has a general right to be under the circumstances." Here, the defendant offered ample evidence that he acted in self-defense while standing in a public street, where he had a right to be when he shot the victim. Because the defendant showed a reasonable possibility that, had the trial court given the required stand-your-ground instruction, a different result would have been reached at trial, the court reversed the Court of Appeals, finding that the defendant was entitled to a new trial.

State v. Cook, ___ N.C. ___, 809 S.E.2d 566 (Mar. 2, 2018)
The court per curiam affirmed a divided panel of the Court of Appeals, ___ N.C. App. ___, 802 S.E.2d 575 (2017). In this assault on a law enforcement officer case, the court of appeals held, over a dissent, that the trial court did not err by denying the defendant's request for a self-defense instruction. While executing a warrant for the defendant's arrest at his home, an officer announced his presence at a

bedroom door and stated that he was going to kick in the door. The officer's foot went through the door on the first kick. The defendant fired two gunshots from inside the bedroom through the still-unopened door and the drywall adjacent to the door, narrowly missing the officer. The charges at issue resulted. The defendant testified that he was asleep when the officer arrived at his bedroom door; that when his girlfriend woke him, he heard loud banging and saw a foot come through the door "a split second" after waking up; that he did not hear the police announce their presence but did hear family members "wailing" downstairs; that he was "scared for [his] life . . . thought someone was breaking in the house . . . hurting his family downstairs and coming to hurt [him] next;" and that he when fired his weapon he had "no specific intention" and was "just scared." Rejecting the defendant's appeal, the court of appeals explained: "our Supreme Court has repeatedly held that a defendant who fires a gun in the face of a perceived attack is not entitled to a self-defense instruction if he testifies that he did not intend to shoot the attacker when he fired the gun." Under this law, a person under an attack of deadly force is not entitled to defend himself by firing a warning shot, even if he believes that firing a warning shot would be sufficient to stop the attack; he must shoot to kill or injure the attacker to be entitled to the instruction. This is true, the court of appeals stated, even if there is, in fact, other evidence from which a jury could have determined that the defendant did intend to kill the attacker.

State v. Crump, ___ N.C. App. ___, ___ S.E.2d ___ (Apr. 17, 2018)
No prejudicial error occurred with respect to the trial court's self-defense instructions. With respect to an assault with a deadly weapon with intent to kill charge, the defendant raised the statutory justifications of protection of his motor vehicle and self-defense. The trial court found that the defendant's evidence did not show that his belief that entry into his motor vehicle was imminent and gave the pattern jury instruction N.C.P.I.-Crim 308.45 ("All assaults involving deadly force") and not N.C.P.I.-Crim. 308.80 ("defense of motor vehicle"), as requested by defendant. The trial court instructed the jury pursuant to N.C.P.I.-Crim 308.45, incorporating statutory language indicating that self-defense is not available to one who was attempting to commit, was committing, was escaping from the commission of a felony. The State requested that the trial court also define for the jury the felonies that would disqualify the defendant's claim of self-defense. The trial court agreed and instructed the jury, using the language of G.S. 14-51.4(1), that self-defense was not available to one who engaged in specified felonious conduct. On appeal, the defendant first argued that G.S. 14-51.4(1) requires both a temporal and causal nexus between the disqualifying felony and the circumstances which gave rise to the perceived need to use defensive force. The court agreed that the statute contains a temporal requirement but disagreed that it contains a causal nexus requirement. Second, the defendant argued that the inclusion of assault with a deadly weapon with intent to kill as a qualifying felony was circular and therefore erroneous. The court agreed, but found the error was not prejudicial.

State v. Thomas, ___ N.C. App. ___, ___ S.E.2d ___ (Apr. 17, 2018)
Where there was evidence that the defendant was the aggressor, the trial court did not err by instructing the jury on the aggressor doctrine as it relates to self-defense. The court noted that based on the defendant's own testimony regarding the incident, it was possible for the jury to infer that the defendant was the initial aggressor. Additionally, the victim was shot twice in the back, indicating either that the defendant continued to be the aggressor or shot the victim in the back during what he contended was self-defense. As a result, the trial court properly allowed the jury to determine whether or not the defendant was the aggressor.

State v. Lee, ___ N.C. App. ___, 811 S.E.2d 233 (Feb. 20, 2018)
In a case where the defendant was charged with attempted murder and assault, the trial court did not err by instructing the jury that the defendant could not receive the benefit of self-defense if he was the aggressor. The incident in question involved a shooting; the defendant argued that he shot the victim in self-defense. The two sides presented differing evidence as to what occurred. During the charge conference, defense counsel objected to the inclusion of the aggressor doctrine in the pattern jury

instruction for self-defense. The defendant argued that because the victim had approached his car before the defendant said anything, the victim initiated the fight. The State contended that because its evidence showed only that the victim told the defendant to step out of his vehicle, the question should go to the jury as to who was the aggressor. The trial court overruled the defendant's objection and gave the aggressor instruction. The jury found the defendant guilty on the assault charge. The court noted that the law does not require that a defendant instigate a fight to be considered an aggressor. Rather, even if his opponent starts a fight, a defendant who provokes, engages in, or continues an argument which leads to serious injury or death may be found to be the aggressor. Where there is conflicting evidence as to which party was the aggressor, the jury should make the determination. Here, the State's evidence tended to show that the defendant was the aggressor. The victim testified that he told the defendant to step out of his car so they could talk, he did not threaten the defendant, touch the defendant's car or approach the defendant. And the victim was unarmed. After speaking with the defendant, the victim testified that he stepped into the yard to allow the defendant to exit his car, only to be shot by the defendant. Although the defendant's testimony materially differed from the State's evidence, the issue was one for the jury.

State v. Mumma, ___ N.C. App. ___, 811 S.E.2d 215 (Feb. 6, 2018)
Where evidence showed--in this murder case--that the defendant was the aggressor, the trial court did not err by instructing the jury on the aggressor doctrine. The trial court instructed the jury that a defendant is not entitled to the benefit of self-defense if the defendant was the aggressor with the intent to kill or inflict serious bodily harm on the victim. The defendant argued that this was error because all of the evidence showed that the victim was the aggressor. The court disagreed. Among other things, the defendant gave an account to law enforcement indicating that he became the aggressor after he gained control of the victim's knife and then proceeded to get on top of her and stab her; while the defendant had no visible injuries from the incident, the victim sustained stab wounds and lacerations to her back, shoulder, lip, cheek, temple, hands, and fingers; and the pathologist who performed the autopsy testified that the case was a "textbook" one of the victim being struck in a defensive position.

State v. Gomola, ___ N.C. App. ___, 810 S.E.2d 797 (Feb. 6, 2018)
In a case where the defendant was found guilty of involuntary manslaughter on the theory that he committed an unlawful act which proximately caused the victim's death, the trial court committed reversible error by refusing to give a jury instruction on defense of others as an affirmative defense to the unlawful act at issue. The defendant was involved in an altercation at a waterfront bar that resulted in the death of the victim. The defendant's version of the events was that the victim fell into the water and drown after physical contact by the defendant; the defendant claimed to be defending his friend Jimmy, who had been shoved by the victim. The unlawful act at issue was the offense of affray. On appeal the defendant argued that the trial court committed reversible error by refusing to instruct the jury on defense of others as an affirmative defense to the crime of affray. The defendant asserted that his only act—a single shove—was legally justified because he was defending his friend and thus was not unlawful. The court agreed. It noted that the state Supreme Court has previously sanctioned the use of self-defense by a defendant as an appropriate defense when the defendant is accused of unlawfully participating in affray. Where, as here, the State prosecuted the defendant for involuntary manslaughter based on the theory that the defendant committed an unlawful act (as opposed to the theory that the defendant committed a culpably negligent act) "the defendant is entitled to all instructions supported by the evidence which relate to the unlawful act, including any recognized affirmative defenses to the unlawful act." Here, the evidence supports the defendant's argument that the instruction on defense of others was warranted. Among other things, there was evidence that Jimmy felt threatened when shoved by the victim; that the defendant immediately advanced towards the victim in response to his contact with Jimmy; that the victim punched and kicked the defendant; and that the defendant only struck the victim once. The defendant was thus entitled to a defense of others instruction to affray. The court was careful to note that it took no position as to whether the defendant did in fact act unlawfully. It held only that the defendant was entitled to the instruction. The court also noted that the issue in this case is not whether self-defense

is a defense to involuntary manslaughter; the issue in this case is whether self-defense is an affirmative defense to affray, the unlawful act used as the basis for the involuntary manslaughter charge.

Theory Not Alleged in Indictment

State v. Lofton, ___ N.C. App. ___, ___ S.E.2d __ (May 1, 2018)
An indictment charging the defendant with manufacturing a controlled substance was fatally defective. The indictment alleged that the defendant "unlawfully, willfully and feloniously did manufacture a controlled substance . . . by producing, preparing, propagating and processing [marijuana]." Under controlling law, manufacturing a controlled substance does not require an intent to distribute unless the relevant activity is preparing or compounding. Because the manufacturing indictment included preparing as a basis, it failed to allege a required element – intent to distribute. Here, the jury was instructed on all four bases alleged in the indictment, including preparing. As such, the jury was allowed to convict the defendant on a theory of manufacturing that was not supported by a valid indictment. The court reached this issue even though it was not raised by the defendant on appeal.

State v. Locklear, ___ N.C. App. ___, ___ S.E.2d __ (May 1, 2018)
(1) The trial court committed plain error with respect to its jury instructions on obtaining property by false pretenses; the instructions allowed the jury to convict the defendant of a theory not alleged in the indictment. The indictment alleged that the false pretense at issue was the filing a fire loss claim under the defendant's homeowner insurance policy, when in fact the defendant had intentionally burned her own residence. In its instructions to the jury, the trial court did not specify the false pretense at issue. Although the State's evidence supported the allegation in the indictment, it also supported other misrepresentations made by the defendant in connection with her insurance claim. The court concluded: "Where there is evidence of various misrepresentations which the jury could have considered in reaching a verdict for obtaining property by false pretense, we hold the trial court erred by not mentioning the misrepresentation specified in the indictment in the jury instructions."
(2) The trial court committed plain error with respect to its jury instructions for insurance fraud. The indictment for insurance fraud alleged that the defendant falsely denied setting fire to her residence. The trial court's instructions to the jury did not specify the falsity at issue. Following the same analysis applied with respect to the false pretenses charge, the court held that because the trial court's instructions allowed the jury to convict the defendant of insurance fraud on a theory not alleged in the indictment, the instructions constituted plain error.

State v. Harding, ___ N.C. App. ___, ___ S.E.2d ___ (Mar. 6, 2018) temp. stay granted, ___ N.C. ___, 811 S.E.2d 601 (Apr 11 2018)
In this kidnapping case, although the trial court erred by instructing the jury on theories that were not alleged in the indictment, no plain error occurred. After rejecting the State's argument that the defendant was precluded from plain error review, the court noted that the instruction error pertained to the elements that elevate a kidnapping to first-degree: failure to release in a safe place; serious injury to the victim; or sexual assault of the victim. Here, although the indictment charged only the element of sexual assault, the trial court instructed the jury that it could find the defendant guilty based on failure to release in a safe place, sexual assault or serious injury to the victim. Thus, the jury was instructed on elements not charged in the indictment, and this was error. However, the jury was given a special verdict sheet that separately listed all of the elevating elements, and the jury found the defendant guilty based on each individual elevating element. Because the State presented compelling evidence to support the elevating element of failure to release in a safe place (among other things, the defendant left the victim alone at the bottom of a rocky creek embankment under a bridge near a deserted stretch of road) and because the jury separately found the defendant guilty of first-degree kidnapping based on all of the elevating elements, no plain error occurred.

Mistrial

State v. Shore, ___ N.C. App. ___, ___ S.E.2d ___ (Apr. 3, 2018)
In this child sexual assault case, the trial court did not abuse its discretion by failing to sua sponte declare a mistrial. The court rejected the defendant's argument that a mistrial was required by certain behavior of the victim's father. The defendant had pointed to several instances of conduct by the victim's father which he argued disrupted the "atmosphere of judicial calm" to which he was entitled. The court noted that with respect to each of the instances in question, the trial judge took immediate measures to address the behavior and the defendant did not request additional action by the trial court, move for a mistrial, or object to the trial court's method of handling the matter. The court found that "in light of the immediate and reasonable steps" by the trial court in response to the conduct, the trial court did not abuse its discretion in failing to declare a mistrial sua sponte.

State v. Mathis, ___ N.C. App. ___, ___ S.E.2d ___ (Apr. 3, 2018)
The trial court properly declared a mistrial for manifest necessity in this felony assault case. After the State rested, the trial court expressed concern that one of the jurors would be unavailable due to his wife's upcoming heart procedure. The trial court expressed "no confidence" and "absolutely no faith" in the alternate juror because the alternate had not heard much of the trial testimony up to that point. In light of the impending absence of the juror in question and the judge's belief that the alternate would be unable to perform his duties, the trial court did not abuse its discretion by declaring a mistrial.

Motion to Dismiss
Corpus Delecti Rule

State v. Hines, ___ N.C. App. ___, ___ S.E.2d __ (May 1, 2018)
In this case, involving habitual impaired driving, driving while license revoked, and reckless driving, the corpus delicti rule was satisfied. The defendant argued that no independent evidence corroborated his admission to a trooper that he was the driver of the vehicle. The court disagreed, noting, in part, that the wrecked vehicle was found nose down in a ditch; one shoe was found in the driver's side of the vehicle, and the defendant was wearing the matching shoe; no one else was in the area at the time of the accident other than the defendant, who appeared to be appreciably impaired; the defendant had an injury consistent with having been in a wreck; and the wreck of the vehicle could not otherwise be explained. Also the State's toxicology expert testified that the defendant's blood sample had a blood ethanol concentration of 0.33.

State v. Blankenship, ___ N.C. App. ___, ___ S.E.2d ___ (Apr. 17, 2018) temp. stay granted, ___ N.C. ___, ___ S.E.2d ___ (May 3 2018)
In this child sexual assault case, the trial court erred by denying the defendant's motion to dismiss charges of statutory sexual offense and indecent liberties with a child where the State failed to satisfy the corpus delecti rule. Here, the only substantive evidence was the defendant's confession. Thus, the dispositive question is whether the confession was supported by substantial independent evidence tending to establish its trustworthiness, including facts tending to show that the defendant had the opportunity to commit the crime. In this case, the defendant had ample opportunity to commit the crimes; as the victim's father, he often spent time alone with the victim at their home. Thus, the defendant's opportunity corroborates the essential facts embedded in the confession. However, the confession did not corroborate any details related to the crimes likely to be known by the perpetrator. In out-of-court statements, the victim told others "Daddy put weiner in coochie." However, the defendant denied that allegation throughout his confession. He confessed to other inappropriate sexual acts but did not confess to this specific activity. Also, the defendant's confession did not fit within a pattern of sexual misconduct. Additionally, the confession was not corroborated by the victim's extrajudicial statements. Although the defendant confessed to touching the victim inappropriately and watching pornography with her, he did not confess

to raping her. Thus, the State failed to prove strong corroboration of essential facts and circumstances. The court noted that although the defendant spoke of watching pornography with the victim, investigators did not find pornography on his computer. The court thus determined that the State failed to satisfy the corpus delecti rule. It went on to reject the State's argument that even without the defendant's confession, there was sufficient evidence that the defendant was the perpetrator of the crimes.

State v. Bridges, ___ N.C. App. ___, 810 S.E.2d 365 (Feb. 6, 2018)
In this possession of methamphetamine case, the court rejected the defendant's argument that her admission to an officer that she possessed "meth" in her bra was insufficient to establish the nature of the controlled substance under the corpus delicti rule. The defendant's out-of-court statement to the officer was corroborated by the physical object of the crime. Specifically, law enforcement found a crystal-like substance in the defendant's bra. Additionally, an investigation revealed that the individual from whom the defendant admitted purchasing the substance had been under surveillance for drug-related activity.

State v. Sawyers, ___ N.C. App. ___, 808 S.E.2d 148 (Nov. 7, 2017)
In this case involving impaired and reckless driving, the court rejected the defendant's argument that the State presented insufficient evidence to establish that he was driving the vehicle, in violation of the corpus delicti rule. The court found that the State presented substantial evidence to establish that the cause the car accident was criminal activity, specifically reckless or impaired driving. Among other things: three witnesses testified that immediately before the crash, the driver was speeding and driving in an unsafe manner on a curvy roadway; an officer testified that when he arrived at the scene, he detected alcohol from both occupants; and two motorists who stopped to assist saw the defendant exit the driver side of the vehicle seconds after the crash.

Defendant as Perpetrator

State v. Rodriguez, ___ N.C. ___, ___ S.E.2d ___ (June 8, 2018)
In this capital murder case, the trial court did not err by denying the defendant's motion to dismiss a first-degree murder charge. The defendant argued that the State failed to present sufficient evidence to establish that he was the perpetrator. The court noted that the State's evidence tended to show that the defendant had a history of abusing the victim, that the defendant had threatened to kill the victim and to dispose of her body, that the defendant violently attacked the victim, that the defendant was the last person to see the victim alive, that the defendant had been seen in the general area in which the victim's body had been discovered, that the defendant had attempted to clean up the location at which he assaulted the victim, that the defendant sent text messages from the victim's phone to another person in an attempt to establish that the victim had voluntarily left the area, that the victim's clothing and blood were found in the defendant's vehicle, that the defendant made conflicting statements concerning the circumstances surrounding the victim's disappearance to various people, and that the autopsy performed upon the victim's body indicated, consistently with other evidence tending to show that blood was emanating from the victim's nose as the defendant carried her away, that the victim had aspirated blood prior to her death. On these facts, the trial court did not err by denying the defendant's motion to dismiss the first-degree murder charge for insufficiency of the evidence.

State v. Webb, ___ N.C. App. ___, 812 S.E.2d 182 (Mar. 6, 2018)
In a case involving convictions for felony breaking or entering, felony larceny, and misdemeanor injury to real property, the trial court did not err by denying the defendant's motion to dismiss. The property owner was the defendant's former girlfriend, who was away at the time. The items taken included a television. At trial, and at the State's request, the trial court did not instruct the jury on acting in concert or aiding and abetting. Thus, to find the defendant guilty, the State was required to prove that the defendant committed the offenses himself. The court rejected the defendant's argument that there was insufficient evidence that he was the perpetrator. Among other things, a neighbor saw a vehicle backed up to the

victim's patio; neighbors saw two males going in and out of the apartment; a neighbor recognized the defendant as one of the men; when one of the neighbors spoke to the defendant he seemed startled and anxious; a neighbor saw a television in the vehicle; another neighbor saw "stuff" in the car and when the men saw her, they quickly closed the trunk and departed; the victim told only three people that she was going out of town, one of whom was the defendant; and when the victim asked the defendant about the evening in question, he lied, telling her he was out of town. These and other facts were sufficient evidence that the defendant was the perpetrator.

Motion to Suppress

State v. Jones, ___ N.C. App. ___, ___ S.E.2d ___ (Apr. 3, 2018)
At a suppression hearing, the trial court may consider testimony from an officer about a vehicle stop that includes material information not contained in the officer's contemporaneous reports. On the date of the traffic stop, Trooper Myers—the stopping officer--made handwritten notes in an Affidavit and Revocation Report and in a Driving While Impaired Report form (DWIR form). He testified that for most of his impaired driving cases, he was unable to put a lot of information on the DWIR form due to space constraints and his own sloppy handwriting. His practice was to later type his full observations into a Word document so that it would be easier to read. He followed this practice with respect to the incident in question, typing his notes into a Word document the following day; these notes contained greater detail about the incident than the prior Revocation Report or DWIR form. The court rejected the defendant's argument that the trial court could not consider additional details included in the typed notes. This additional information supplemented rather than contradicted that in the earlier-created documents.

State v. Thompson, ___ N.C. App. ___, 809 S.E.2d 340 (Jan. 2, 2018) temp. stay granted, ___ N.C. ___, 808 S.E.2d 757 (Jan 19 2018)
Where the trial court's order denying the defendant's suppression motion failed to resolve disputed issues of fact central to the court's ability to conduct a meaningful appellate review, the court, over a dissent, remanded for appropriate findings of fact. In its order denying the defendant's suppression motion, the trial court concluded that, at the time defendant was asked for consent to search his car, he had not been seized. On appeal, the defendant challenged that conclusion, asserting that because the officers retained his driver's license, a seizure occurred. It was undisputed that the law enforcement officers' interactions with the defendant were not based upon suspicion of criminal activity. Thus, if a seizure occurred it was in violation of the Fourth Amendment. The State argued that the trial court's findings of fact fail to establish whether the officers retained the defendant's license or returned it to him after examination. The court agreed, noting that the evidence was conflicting on this critical issue and remanding for appropriate findings of fact.

State v. Faulk, ___ N.C. App. ___, 807 S.E.2d 623 (Nov. 7, 2017)
Because the trial court failed to provide its rationale for denying the defendant's motions to suppress, the court found itself unable to engage in meaningful review with respect to the trial court's denial of the motions and thus remanded. Although the trial court is only required to make findings of fact when there is a material conflict in the evidence, the trial court must make conclusions of law. Here, the trial court did not provide its rationale during the hearing and its order lacked adequate conclusions of law applying necessary principles to the facts presented.

Pleas

Kernan v. Cuero, 583 U.S. ___, 138 S. Ct. 4 (Nov. 6, 2017)
In a per curiam decision in a case decided under the Antiterrorism and Effective Death Penalty Act of 1996, the Court held that no decision from the Court clearly establishes that a state court must impose a lower, originally expected sentence when—after the defendant has pled guilty—the State is allowed to

amend the criminal complaint, subjecting the defendant to a higher sentence, and the defendant is allowed to withdraw his plea but chooses to enter into a new plea agreement based on the amended complaint. A California court permitted the State to amend a criminal complaint to which the defendant had pleaded guilty. That guilty plea would have led to a maximum sentence of 14 years, 4 months. The court acknowledged that permitting the amendment would lead to a higher sentence, and it consequently permitted the defendant to withdraw his guilty plea. The defendant then pleaded guilty to the amended complaint and was sentenced to a term with a minimum of 25 years. The Ninth Circuit held that the defendant was entitled to specific performance of the lower 14-year, 4-month sentence that he would have received had the complaint not been amended. The Court reversed. It began by assuming that the State violated the Constitution when it moved to amend the complaint. But it went on to conclude: "we still are unable to find in Supreme Court precedent that clearly established federal law demanding specific performance as a remedy. To the contrary, no holdin[g] of this Court requires the remedy of specific performance under the circumstances present here." (quotation omitted).

State v. Bullock, ___ N.C. App. ___, 811 S.E.2d 713 (Feb. 20, 2018)
With one judge concurring in the result only, the court held that the trial court did not commit prejudicial error when, in connection with a plea, it misinformed the defendant of the maximum sentence. Pursuant to an agreement, the defendant pleaded guilty to trafficking in heroin and possession of a controlled substance with intent to sell. The trial court correctly informed the defendant of the maximum punishment for the trafficking charge but erroneously informed the defendant that the possession with intent charge carried a maximum punishment of 24 months (the correct maximum was 39 months). The trial court also told the defendant that he faced a total potential maximum punishment of 582 months, when the correct total was 597 months. Both errors were repeated on the transcript of plea form. The trial court accepted the defendant's plea, consolidated the convictions and sentenced the defendant to 225 to 279 months. The defendant argued that the trial court violated G.S. 15A-1022(a)(6), providing that a trial court may not accept a guilty plea without informing the defendant of the maximum possible sentence for the charge. The court noted that decisions have rejected a ritualistic or strict approach to the statutory requirement and have required prejudice before a plea will be set aside. Here, the defendant cannot show prejudice. The court noted that the defendant faced no additional time of imprisonment because of the error; put another way, the trial court's error did not affect the maximum punishment that the defendant received as a result of the plea. Furthermore, the defendant failed to argue how the result would have been different had he been correctly informed of the maximum punishment. The court stated: "It would be a miscarriage of justice for us to accept that Defendant would have backed out of his agreement if Defendant knew that the total potential maximum punishment was 15 months longer on a charge that was being consolidated into his trafficking conviction."
[Author's Note: The defendant does not appear to have made the constitutional argument that the plea was not knowing, voluntary and intelligent; constitutional errors are presumed to be prejudicial unless the State proves them to be harmless beyond a reasonable doubt.]

State v. Thompson, ___ N.C. App. ___, 809 S.E.2d 340 (Jan. 2, 2018) temp. stay granted, ___ N.C. ___, 808 S.E.2d 757 (Jan 19 2018)
Where the record was inconsistent and unclear as to whether the defendant pled guilty to felony possession of marijuana, the court vacated a judgment for that offense and remanded, directing the trial court to "take the necessary steps to resolve the discrepancy between the transcript of plea and the written judgment." The court rejected the defendant's argument that the issue was simply a clerical error, finding: "on the basis of the record as presently constituted, it is not possible to determine whether judgment was properly entered on the charge of felony possession of marijuana." A dissenting judge asserted that judgment should "simply be arrested as to [the possession] charge, or the matter should be remanded for correction of the clerical error."

State v. Rogers, ___ N.C. App. ___, 808 S.E.2d 156 (Nov. 7, 2017)

The court rejected the defendant's argument that his plea was not knowing and voluntary because the trial court erroneously advised him that he had the right to appeal a denial of the defendant's pro se motion to dismiss. The motion to dismiss was based on lack of subject matter and personal jurisdiction and asserted as its basis the fact that the defendant was a Sovereign Citizen. The defendant agreed to plead guilty pursuant to a plea agreement. The trial court advised him of the maximum possible punishment and the defendant stated that he entered the plea of his own free will. The trial court told the defendant that he would have the right to appeal the ruling denying the pro se motion to dismiss. The court agreed with the defendant that the trial court erroneously advised him that he had the right to appeal the denial of his pro se motion to dismiss after entering his plea. However, the court found that any error was harmless, noting that the defendant's motion to dismiss failed to present a coherent, legally recognized challenge the trial court's jurisdiction.

Recusal of District Attorney

State v. Smith, ___ N.C. App. ___, ___ S.E.2d ___ (Apr. 3, 2018)
The court vacated the trial court's order recusing the District Attorney and all staff of that office from further prosecuting the defendant and five unnamed co-defendants. In 2013, the defendant was indicted for electronic sweepstakes offenses. Those charges resulted in a mistrial. In 2015, the defendant was indicted on multiple charges involving video gaming machines, gambling, and electronic sweepstakes. The State moved to revoke the defendant's initial bond of $68,750 and set a new secured bond of $500,000. The defendant filed a response to this motion, along with a motion to dismiss all charges for prosecutorial vindictiveness. On the same day, businesses affiliated with the defendant filed a civil complaint against the District Attorney and others. Although a hearing on the State's motion to increase the bond was set, it was continued by agreement of the parties. Before that hearing occurred, the trial court, sua sponte and without a hearing, entered an order removing the District Attorney and his entire staff from serving as prosecutors in the pending criminal cases. The State sought review. The court noted that under *State v. Camacho*, 329 N.C. 589 (1991),a prosecutor may not be disqualified unless the trial court determines that an actual conflict of interest exists. Such a conflict arises when a District Attorney or a member of staff has previously represented the defendant on the charges to be prosecuted and, as a result of that attorney-client relationship, the prosecution has obtained confidential information which may be used to the defendant's detriment at trial. If such a conflict exits, the disqualification order ordinarily should be directed only to individual prosecutors who have been exposed to such information. This holding recognizes the constitutional nature of the office of the District Attorney. The court found the recusal order at issue deficient in several respects. First, *Camacho* "plainly directs" that a prosecutor may be disqualified only when the trial court finds a conflict of interest because of prior representation of the defendant. Here the trial court made no finding that such a conflict existed, nor was there evidence that would support such a finding. Rather, the trial court based its recusal order on the fact that the civil action created a conflict of interest. The court went on to hold that even assuming some other type of conflict could support a recusal order, the unilateral filing of a civil suit by a criminal defendant cannot, on its own, suffice. It continued: "A conflict of interests sufficient to disqualify a prosecutor cannot arise merely from the unilateral actions of a criminal defendant." And it added that the trial court's order included no findings as to how the civil suit created a conflict of interest. Moreover, the court continued, *Camacho* directs that any order tending to infringe on the constitutional powers and duties of the District Attorney must be narrowly drawn. Here, the trial court's order disqualifies the District Attorney and the entire office, and applies not only to the defendant but also to five other unnamed co-defendants. The court concluded: "Because the trial court's order lacks the proper findings sufficient to support the disqualification of the prosecutor or any of his staff, and because the trial court's order is not narrowly tailored to address any possible conflict of interests, we hold that the trial court exceeded its lawful authority in ordering the recusal of the District Attorney . . . and his entire staff."

Sentencing

Commitment Order

State v. Watson, ___ N.C. App. ___, 812 S.E.2d 392 (Mar. 6, 2018) temp. stay granted, ___ N.C. ___, 811 S.E.2d 600 (Apr 10 2018)
A trial court is required to enter a commitment order at the time of judgment and sentencing. While awaiting sentencing on federal charges, on 18 May 2009 the defendant pleaded guilty to state charges. The trial court held a sentencing hearing that day and, pursuant to the plea, sentenced the defendant to prison. On 19 May 2009, the trial court entered its Judgment, ordering the defendant to be imprisoned in the custody of "N.C. DOC." The trial court left unchecked a box on the Judgment form indicating that the sentence was to be consecutive to any other imposed sentences. It also left unchecked a box ordering the sheriff or other officer to cause the defendant to be delivered to the custody of the agency named in the judgment to serve the sentence imposed. On 12 November 2009, judgment was entered against the defendant in his federal case, sentencing him to concurrent sentences in the custody of the United States Bureau of Prisons, and the defendant began service of his federal sentence. On 30 March 2016 the North Carolina Department of Public Safety lodged a detainer in the federal system. After learning of the detainer, on 20 July 2016 the defendant filed an MAR requesting that he be adjudged to have served all of his North Carolina time. The trial court denied the MAR and the defendant appealed. The court held that the trial court erred by denying the defendant's request for entry of a commitment order nunc pro tunc consistent with the judgment. Under G.S. 15A-1353, when a sentence includes a term of imprisonment, the court must include an order of commitment. Unless otherwise specified in the order of commitment, the date of the order is the date service of the sentence is to begin. Here, the trial court entered its Judgment imposing a term of imprisonment but failed to enter an order of commitment for N.C. DOC to take custody of the defendant for service of that term. Thus, the defendant is entitled to entry of a commitment order nunc pro tunc 19 May 2009. The court went on to reject the defendant's argument that his sentence began on that date. Here, the very terms of the Judgment require the defendant to spend at least 80 months in the custody of N.C. DOC, and such a term necessarily cannot begin to run until he actually is remitted into the agency's custody. Because the defendant was never remitted into the custody of N.C. DOC, and his sentence cannot begin to run consistent with the Judgment until he is so remitted, the defendant's sentence for the state charges had not begun to run at the time of the MAR hearing. The court remanded for entry of an order of commitment specifying that the defendant's sentence is to begin when he is released from federal custody.

Drug Offenses

State v. Howell, ___ N.C. ___, 811 S.E.2d 570 (Apr. 6, 2018)
On discretionary review of a unanimous decision of the Court of Appeals, ___ N.C. App. ___, 792 S.E.2d 898 (2016), the court held that G.S. 90-95(e)(3), which provides that a Class 1 misdemeanor "shall be punished as a Class I felon[y]" when the misdemeanant has committed a previous offense punishable under the controlled substances act, establishes a separate felony offense rather than merely serving as a sentence enhancement of the underlying misdemeanor. The trial court treated the conviction as a Class I felony because of the prior conviction, and then elevated punishment to a Class E felony because of the defendant's habitual felon status. The defendant appealed to the Court of Appeals, which reversed, reasoning that while the Class 1 misdemeanor was punishable as a felony under the circumstances presented, the substantive offense remained a misdemeanor to which habitual felon status could not apply. The State sought discretionary review. The Supreme Court reversed, holding that 90-95(e)(3) creates a substantive felony offense which may be subject to habitual felon status.

Expunction

State v. J.C., ___ N.C. App. ___, 808 S.E.2d 154 (Nov. 7, 2017) temp. stay granted, ___ N.C. ___, 806 S.E.2d 313 (Nov 27 2017)

In a decision replacing the court's original opinion, issued on September 19, 2017, the court held that the State has no statutory right to appeal an order of expunction made pursuant to G.S. 15A-145.5 and it granted the petitioner's motion to dismiss the appeal. The State appealed from a trial court order granting petitions for expunction pursuant to G.S. 15A-145.5 and -146. On appeal, the State challenged only the portion of the trial court's order granting the petition for expunction pursuant to G.S. 15A-145.5. The court rejected the State's argument that it had jurisdiction over the appeal under G.S. 7A-27, concluding that G.S. 15A-1445 determines its jurisdiction because the trial court's expunction order pursuant to G.S. 15A-145.5 is part of a criminal proceeding. The court then reasoned that because G.S. 15A-1445 "clearly does not include any reference to a right of the State to appeal from an order of expunction under N.C. Gen. Stat. § 15A-145.5, we are compelled to conclude that the General Assembly did not intend to bestow such a right at the time the statute was adopted." The court went on to note that it has, on occasion, reviewed expunctions pursuant to the granting of a petition for writ of certiorari. Here, the State filed such a petition only after the original opinion was issued; the court reviewed the petition and in its discretion denied it.

Extraordinary Mitigation

State v. Leonard, ___ N.C. App. ___, 811 S.E.2d 658 (Feb. 20, 2018)
In this voluntary manslaughter case, the trial court did not abuse its discretion by failing to find extraordinary mitigation. Although the court found numerous mitigating factors, it found no extraordinary mitigation in the defendant's case; the trial court sentenced the defendant to the lowest possible sentence in the mitigated range. The court rejected the defendant's argument that the trial court misunderstood the applicable law, finding that the transcript of the sentencing hearing reveals that the trial court understood the extraordinary mitigation statute and exercised proper discretion.

Fees

State v. Morgan, ___ N.C. App. ___, ___ S.E.2d ___ (Apr. 17, 2018)
Because the defendant was not given notice and an opportunity to be heard as to the final amount of attorneys' fees that would be entered against him, the court vacated the civil judgment entered pursuant to G.S. 7A-455 and remanded to the trial court. At sentencing, the trial court may enter a civil judgment against an indigent defendant for fees incurred by the defendant's court-appointed attorney. However, before entering judgment the trial court must give the defendant notice and opportunity to be heard regarding the total amount of hours and fees claimed by court-appointed counsel. Although the trial court discussed attorneys fees with the defendant's appointed attorney in the defendant's presence, the trial court did not ask the defendant whether he wished to be heard on the issue. Additionally, while the exchange reveals that the appointed lawyer claimed seven hours of work, the record contains no evidence that the defendant was notified of and given an opportunity to be heard regarding the total amount of fees that would be entered.

State v. Friend, ___ N.C. App. ___, 809 S.E.2d 902 (Jan. 16, 2018)
The trial court erred by entering a civil judgment against the defendant for the attorneys' fees incurred by his court-appointed counsel under G.S. 7A-455 without providing the defendant with notice and an opportunity to be heard. The court explained, in part:

> With respect to counsel fees incurred under § 7A-455, the interests of defendants and their counsel may not always align. Because indigent defendants may feel that the fees charged by counsel were unreasonable in light of the time, effort, or responsibility involved in the case, and because those defendants might reasonably believe—as is the case at various stages of the criminal trial and sentencing—that they may speak only through their counsel, we hold that trial courts must provide criminal defendants, personally and not through their appointed counsel, with an opportunity to be heard

> before entering a money judgment under § 7A-455. Because [the defendant] was not informed of his right to be heard before the court entered the money judgment in this case, we vacate that judgment and remand for further proceedings.

The court instructed: "[B]efore entering money judgments against indigent defendants for fees imposed by their court-appointed counsel . . . trial courts should ask defendants—personally, not through counsel—whether they wish to be heard on the issue." It added:

> Absent a colloquy directly with the defendant on this issue, the requirements of notice and opportunity to be heard will be satisfied only if there is other evidence in the record demonstrating that the defendant received notice, was aware of the opportunity to be heard on the issue, and chose not to be heard.

Juveniles

State v. James, ___ N.C. ___, ___ S.E.2d __ (May 11, 2018)

On discretionary review of a unanimous decision of the Court of Appeals, ___ N.C. App. ___, 786 S.E.2d 73 (2016), in this murder case where the defendant, who was a juvenile at the time of the offense, was resentenced to life in prison without parole under the state's *Miller*-compliant sentencing scheme (G.S. 15A-1340.19A to -1340.19D), the court modified and affirmed the opinion below and remanded for further proceedings. In the Court of Appeals, the defendant argued that the trial court had, by resentencing him pursuant the new statutes, violated the constitutional prohibition against the enactment of ex post facto laws, that the statutory provisions subjected him to cruel and unusual punishment and deprived him of his rights to a trial by jury and to not be deprived of liberty without due process of law, and that the trial court failed to make adequate findings of fact to support its decision to impose a sentence of life without parole. In a unanimous opinion, the Court of Appeals upheld the constitutionality of the statutes while reversing the trial court's resentencing order and remanding for further proceedings. The Court of Appeals remanded for the trial court to correct what it characterized as inadequate findings as to the presence or absence of mitigating factors to support its determination. Before the Supreme Court, the defendant argued that the Court of Appeals erred by holding that the statute creates a presumption in favor of life without parole and by rejecting his constitutional challenges to the statutory scheme.

The Supreme Court began its analysis by addressing whether or not G.S. 15A-1340.19C gives rise to a mandatory presumption that a juvenile convicted of first-degree murder on the basis of a theory other than felony murder should be sentenced to life imprisonment without the possibility of parole. The court concluded, in part: "the relevant statutory language, when read in context, treats the sentencing decision required by N.C.G.S. § 15A-1340.19C(a) as a choice between two equally appropriate sentencing alternatives and, at an absolute minimum, does not clearly and unambiguously create a presumption in favor of sentencing juvenile defendants convicted of first-degree murder on the basis of a theory other than the felony murder rule to life imprisonment without the possibility of parole." Thus, the Court of Appeals erred by construing the statutory language as incorporating such a presumption. The court offered this instruction for trial judges:

> On the contrary, trial judges sentencing juveniles convicted of first-degree murder on the basis of a theory other than the felony murder rule should refrain from presuming the appropriateness of a sentence of life imprisonment without the possibility of parole and select between the available sentencing alternatives based solely upon a consideration of "the circumstances of the offense," "the particular circumstances of the defendant," and "any mitigating factors," N.C.G.S. § 15A-1340.19C(a), as they currently do in selecting a specific sentence from the presumptive range in a structured sentencing proceeding, in light of the United States Supreme Court's statements in *Miller* and its progeny to the effect that sentences of life imprisonment without the possibility of parole should be reserved for those juvenile defendants whose crimes reflect irreparable corruption rather than transient immaturity.

The court then rejected the defendant's argument that the statutory scheme was unconstitutionally vague, concluding that the statutes "provide sufficient guidance to allow a sentencing judge to make a proper, non-arbitrary determination of the sentence that should be imposed upon a juvenile convicted of first-degree murder on a basis other than the felony murder rule to satisfy due process requirements." The court also rejected the defendant's arbitrariness argument. Finally, the court rejected the defendant's ex post facto argument, holding that the Court of Appeals correctly determined that the statutory scheme does not allow for imposition of a different or greater punishment than was permitted when the crime was committed. In this respect, it held: because the statutes "make a reduced sentence available to defendant and specify procedures that a sentencing judge is required to use in making the sentencing decision, we believe that defendant's challenge to the validity of the relevant statutory provisions as an impermissible ex post facto law is without merit." Justices Beasley and Hudson dissented.

State v. Santillan, ___ N.C. App. ___, ___ S.E.2d __ (May 1, 2018)
In this case involving a defendant who was 15 years old at the time of his crimes, and as conceded by the State, the trial court failed to make sufficient findings to support two sentences of life without parole. On appeal the defendant argued that although the trial court listed each of the statutory mitigating factors under G.S. 15A-1340.19B(c), it failed to expressly state the evidence supporting or opposing those mitigating factors as required by relevant case law. The State conceded that this was error and the court remanded.

Prior Record Level

State v. Weldon, ___ N.C. App. ___, 811 S.E.2d 683 (Feb. 20, 2018)
No prejudicial error occurred with respect to the trial court's finding that the defendant's prior federal conviction of unlawful possession of a firearm was substantially similar to the North Carolina conviction of possession of a firearm by a felon, for purposes of assigning an extra point when all of the elements of the present offense are included in any prior offense for which the defendant has been convicted. Here, the extra point elevated the defendant from Level I to Level II. The defendant argued that the State failed to present evidence of substantial similarity. The court held that because the trial court's finding was in fact correct, any error that occurred was harmless. In its holding the court concluded that a finding that an out-of-state offense is substantially similar to a North Carolina offense is sufficient for a finding that the elements of the present offense are included in any prior conviction under G.S. 1340.14(b)(6).

Probation Violations & Revocations

State v. Moore, 370 N.C. 338 (Dec. 8, 2017)
On appeal from a divided panel of the Court of Appeals, ___ N.C. App. ___, 795 S.E.2d 598 (2016), the court modified and affirmed the decision below, holding that the defendant received adequate notice of his probation revocation hearing pursuant to G.S. 15A-1345(e). The trial court revoked the defendant's probation for violating the condition that he commit no criminal offenses, specifically fleeing to allude arrest and no operator's license. On appeal, the defendant argued that because the probation violation reports did not specifically list the "commit no criminal offense" condition as the condition violated, the statutory notice requirement was not satisfied. The court determined that the issue was one of first impression. The statute requires that the State give the probationer notice of the hearing and its purpose, including a statement of the violations alleged. The words "violation" and "violations" as used in the statute refer to violations of conditions of probation. It follows that the phrase "statement of the violations alleged" refers to a statement of what the probationer did to violate his conditions of probation. It does not require a statement of the underlying conditions that were violated. The court also overruled post-Justice Reinvestment Act cases decided by the Court of Appeals that had created a different notice requirement. Here, the State sought to prove that the defendant had violated the condition that he commit no criminal offense. Thus, the notice needed to contain a statement of the actions the defendant allegedly took that

constituted a violation of the probation— that is, a statement of what the defendant actually did that violated a probation condition. The defendant received proper notice when the violation report named the specific offenses that the defendant was alleged to have committed, listing his pending criminal charges.

State v. Morgan, ___ N.C. App. ___, ___ S.E.2d ___ (Apr. 17, 2018)
The court held, over a dissent, that the trial court properly revoked the defendant's probation on grounds that he committed a new crime and willfully absconded. The court began by rejecting the defendant's argument that the trial court erred by revoking his probation after his 36-month probationary period expired because it failed to make any findings of "good cause" under G.S. 15A-1344(f)(3). Citing prior case law, the court noted that the statute does not require specific findings as to good cause. The court also rejected the defendant's argument that the trial court failed to comply with the statute because the judgments do not include findings that each violation is, in and of itself, a sufficient basis for revoking probation. Here, the trial court's judgment includes the appropriate finding that revocation was warranted for willful violation of the condition that he not commit any criminal offense or absconding from supervision. With regard to the basis for the revocation, the court noted that at the violation hearing the defendant admitted all of the State's allegations. As such, the trial court did not abuse its discretion by revoking probation.

State v. Sharpe, ___ N.C. App. ___, ___ S.E.2d __ (May 15, 2018)
Finding that the trial court properly revoked the defendant's probation, the court affirmed but remanded for correction of a clerical error. While on probation for another offense, the defendant was convicted of possession of drug paraphernalia. A probation officer filed a violation report noting three violations: arrears for $800 in court indebtedness, $720 in probation supervision fees, and the new conviction. The trial court revoked the defendant's probation and he appealed. On appeal the defendant argued that the trial court abused its discretion and acted under a misapprehension of the law when it revoked probation based on the three alleged violations when only one provided a statutory basis for revocation. Because the defendant committed a criminal offense while on probation, the trial court properly revoked probation on that ground. The court acknowledged the trial court could not have revoked based on the other two violations and, as noted by the defendant, the trial court improperly checked the box on the form indicating that each violation is in and of itself a sufficient basis for revocation. However, other evidence in the record indicated that the trial court recognized that only one of the violations was sufficient to revoke probation. The court thus remanded for correction of the clerical error.

State v. Melton, ___ N.C. App. ___, 811 S.E.2d 678 (Feb. 20, 2018)
The trial court abused its discretion by revoking the defendant's probation, where the evidence was insufficient to establish absconding. The probation officer testified that the defendant absconded a week after a 26 October 2016 meeting by failing attend meetings scheduled for 28 October and 2 November and by failing to contact the officer thereafter even though the officer attempted to call and visit the defendant multiple times and left messages for the defendant with the defendant's parents. However, the officer could not support her testimony with records and did not recall the number of times and dates on which these contacts were made. The defendant testified that her cell phone was missing, that she was not at home when the officer visited, and that she received no messages that the officer was trying to reach her. She testified that since she had seen the officer at the end of October, it did not occur to her to contact the officer. Although the officer testified to attempts to call and visit the defendant and to having left messages with the defendant's parents for the defendant, there was no evidence that any message was given to the defendant or that the defendant knew the officer was trying to reach her. Although there was competent evidence that the officer attempted to contact the defendant, there was insufficient evidence that the defendant willfully refused to make herself available for supervision.

State v. Krider, ___ N.C. App. ___, 810 S.E.2d 828 (Feb. 20, 2018) temp. stay granted, ___ N.C. ___, 809 S.E.2d 888 (Feb 20 2018)

Over a dissent, the court held that because the State presented insufficient evidence to support a finding of willful absconding, the trial court lacked jurisdiction to revoke the defendant's probation after the term of probation ended. When the defendant's probation officer visited his reported address, an unidentified woman advised the officer that the defendant did not live there. The State presented no evidence regarding the identity of this person or her relationship to the defendant. The officer never attempted to contact the defendant again. However when the defendant contacted the officer following his absconding arrest, the officer met the defendant at the residence in question. This evidence is insufficient to establish absconding. The trial court's decision was not only an abuse of discretion but also was an error that deprived the court of jurisdiction to revoke the defendant's probation after his probationary term expired.

State v. Peed, ___ N.C. App. ___, 810 S.E.2d 777 (Feb. 6, 2018)
The trial court did not have jurisdiction to revoke the defendant's probation. Four days before his 30 months of probation was to expire, the trial court entered an order extending the defendant's probation for 12 months with the defendant's consent. The purpose of the extension was to allow the defendant time "to complete Substance Abuse Treatment." During the 12-month extension the defendant violated probation and after a hearing the trial court revoked probation. The defendant appealed. The court began by rejecting the State's argument that the defendant's appeal was moot because he had already served the entire sentence assigned for the revocation. Turning to the merits, the court held that the trial court lacked jurisdiction to revoke the defendant's probation because his probationary period was unlawfully extended. In order to extend an individual's probationary period, the trial court must have statutory authority to do so. No statue authorizes a trial court to extend the defendant's probation to allow him time to complete a substance abuse program. The court rejected the State's argument that because the statutes allow an extension of probation for completion of medical or psychiatric treatment ordered as a condition of probation, the trial court's extension was proper. It reasoned, it part, that the General Assembly did not intend for a probation condition to complete "substance-abuse treatment" to be synonymous with, or a subset of, a probation condition to complete "medical or psychiatric treatment."

State v. McCaster, ___ N.C. App. ___, 811 S.E.2d 211 (Feb. 6, 2018)
The trial court lacked jurisdiction to conduct a probation revocation hearing because the defendant was not provided with adequate notice, including a written statement of the violations alleged. The trial court revoked the defendant's probation after the defendant made multiple repeated objections to probation. The court rejected the State's argument that the defendant waived her right to statutory notice by voluntarily appearing before the court and participating in the revocation hearing. Because the defendant was not provided with prior statutory notice of the alleged violations, the trial court lacked jurisdiction to revoke probation. The court went on to note that the trial court is not without recourse to compel a recalcitrant defendant in these circumstances. The violation report could have been filed and an arrest warrant could have been issued to provide the defendant with proper notice. Alternatively, the trial court could have found the defendant in contempt of court. And, regardless of the defendant's statements and protests, the trial court could have simply ordered the defendant to be accompanied by a law enforcement or probation officer to register and implement probation supervision.

Restitution

State v. Thomas, ___ N.C. App. ___, ___ S.E.2d ___ (Apr. 17, 2018)
In this homicide case there was insufficient evidence to support restitution in the amount of $3,360.00 in funeral expenses to the victim's family. No documentary or testimonial evidence supported the amount of restitution ordered. The record contains only the restitution worksheet, which is insufficient to support the restitution order.

State v. Hillard, ___ N.C. App. ___, 811 S.E.2d 702 (Feb. 20, 2018)

In this animal cruelty case, the trial court did not err by imposing a restitution award in the amount of $10,693.43. There was sufficient competent evidence to support the amount of restitution ordered. The State provided written victim impact statements to the trial court during the sentencing hearing and the trial court heard oral victim impact statements and received an itemized worksheet of expenses as well as supporting documentation, including veterinary bills and receipts. These materials constitute sufficient competent evidence to support the restitution award. The trial court properly considered the defendant's financial circumstances and found the award to be within his ability to pay. Specifically, the defendant testified regarding his employment history and other matters.

Second-Degree Murder

State v. Mosley, ___ N.C. App. ___, 806 S.E.2d 365 (Oct. 17, 2017)
In this second-degree murder case, the trial court erred by sentencing the defendant as a Class BI felon. The jury unanimously convicted the defendant of second-degree murder. The verdict however was silent as to whether the second-degree murder was a Class BI or B2 offense. The court held that the jury's general verdict of guilty of second-degree murder was ambiguous for sentencing purposes because, in this case, there was evidence of depraved-heart malice to support a verdict of guilty of a Class B2 second-degree murder. Specifically, there was evidence of the defendant's reckless use of a rifle. The court distinguished the case from *State v. Lail*, ___ N.C. App. ___, 795 S.E.2d 401 (2016). And it went on to state:

> In order to avoid such ambiguity in the future, we recommend two actions. First, the second degree murder instructions contained as a lesser included offense in N.C.P.I.--Crim. 206.13 should be expanded to explain all the theories of malice that can support a verdict of second degree murder, as set forth in N.C.P.I.--Crim. 206.30A. Secondly, when there is evidence to support more than one theory of malice for second degree murder, the trial court should present a special verdict form that requires the jury to specify the theory of malice found to support a second degree murder conviction.

Miscellaneous Cases

State v. Singletary, ___ N.C. App. ___, 810 S.E.2d 775 (Feb. 6, 2018)
The trial court had jurisdiction to sentence the defendant after a mandate issued from the Court of Appeals. The defendant appealed his sentence following multiple convictions for sex offense charges. He argued that after the Court of Appeals filed an opinion vacating his original sentence and remanding for resentencing, the trial court improperly resentenced him before the Court of Appeals had issued the mandate. The court rejected the defendant's argument that the mandate had not issued at the time of resentencing. It held that the mandate from the appellate division issues on the day that the appellate court transmits the mandate to the lower court, not the day that the lower court actually receives the mandate.

State v. Meadows, , ___ N.C. App. ___, 806 S.E.2d 682 (Oct. 17, 2017) review granted, ___ N.C. ___, ___ S.E.2d ___ (May 9 2018)
Reconciling conflicting cases, the court held that the requirements of North Carolina Rule of Appellate Procedure 10(a)(1) apply to sentencing hearings. The court went on to hold that the defendant waived any argument that the sentencing hearing should not have been conducted at that particular time or in front of that particular judge, by failing to either object to the commencement of the hearing or request a continuance of that hearing. The court also held that by failing to object to trial as required by Rule 10(a)(1), the defendant waived her argument that imposition of consecutive sentences of 70 to 93 months on a 72-year-old first offender for single drug transaction violated her eighth amendment rights. Assuming arguendo that the defendant preserved her argument that the trial court abused its discretion in sentencing her to two consecutive sentences and only consolidating the third conviction for sentencing,

the court rejected the defendant's claim on appeal, finding that she failed to show the sentence imposed constituted an abuse of discretion.

Sex Offenders

State v. Grady, ___ N.C. App. ___, ___ S.E.2d __ (May 15, 2018)
Over a dissent, the court held that the State failed to prove the reasonableness of imposing lifetime satellite-based monitoring (SBM) on the defendant. At a SBM bring-back hearing, the trial court ordered the defendant enroll in lifetime SBM. Defendant appealed, arguing that imposition of SBM violated his fourth amendment rights. In an unpublished decision, the court of appeals affirmed the trial court's order and the North Carolina Supreme Court dismissed the defendant's appeal and denied discretionary review. The United States Supreme Court granted the defendant's petition for certiorari and held that despite its civil nature, North Carolina's SBM program constituted a fourth amendment search. The high Court remanded for the North Carolina courts to examine whether the search was reasonable. The trial court then held a remand hearing on the reasonableness of the lifetime SBM. In addition to offering the testimony of a probation supervisor, the State presented photographs of the SBM equipment currently used to monitor offenders; certified copies of the sex offense judgments; and the defendant's criminal record. The trial court entered an order finding that imposition of SBM on the defendant was a reasonable search and that the SBM statute is facially constitutional. The defendant appealed, arguing that the State failed to prove that the search was reasonable. The court agreed. The court began by holding that because the State failed to raise at the trial court its argument that SBM is a reasonable special needs search, that argument was waived.

The court then turned to an analysis under a general fourth amendment approach, based on diminished expectations of privacy. The court found that the defendant, who is an unsupervised offender, has an expectation of privacy that is "appreciably diminished as compared to law-abiding citizens." However, the court found it to be unclear whether the trial court considered the legitimacy of the defendant's privacy expectation. The trial court's findings address the nature and purpose of SBM but not the extent to which the search intrudes upon reasonable expectations of privacy. This is a "significant omission." Considering the intrusion on the defendant's privacy, the court first considered the compelled attachment of the ankle monitor. It noted that the device is physically unobtrusive and waterproof and does not physically limit an offender's movements, employment opportunities, or ability to travel. Noting the defendant's concern about certain audible messages produced by the device, the court found those aspects of SBM to be "more inconvenient than intrusive, in light of defendant's diminished expectation of privacy as a convicted sex offender." However, SBM also involves an invasion of privacy with respect to continuous GPS monitoring, an aspect of SBM that the court found to be uniquely intrusive. The court noted, among other things, that "the State presented no evidence of defendant's current threat of reoffending, and the record evidence regarding the circumstances of his convictions does not support the conclusion that lifetime SBM is objectively reasonable." The court noted that at an SBM hearing there must be "sufficient record evidence" to support a conclusion that SBM is reasonable as applied to "this particular defendant." (emphasis in original). The court further noted that although the SBM program had been in effect for approximately 10 years, the State failed to present any evidence of its efficacy in furtherance of the State's "undeniably legitimate interests." The defendant however presented multiple government reports rebutting the widely held assumption that sex offenders recidivate at higher rates than other groups. The court emphasized that its holding was limited to the facts of this case. It reiterated the continued need for individualized determinations of reasonableness at Grady hearings.

State v. Bursell, ___ N.C. App. ___, ___ S.E. 2d ___ (Mar. 20, 2018)
(1) Over a dissent, the court rejected the State's argument that because the defendant failed to raise a Fourth Amendment *Grady* objection when challenging imposition of SBM at sentencing, he waived his right to appellate review of the issue. Considering the objections made below, the court concluded that "although defendant did not clearly and directly reference the Fourth Amendment when objecting to the

State's application for SBM, nor specifically argue that imposing SBM without a proper *Grady* determination would violate his constitutional rights, it is readily apparent from the context that his objection was based upon the insufficiency of the State's evidence to support an order imposing SBM, which directly implicates defendant's rights under *Grady* to a Fourth Amendment reasonableness determination before the imposition of SBM." Even if the defendant's objection was inadequate to preserve the constitutional challenge for appellate review, the court stated that in its discretion it would invoke Rule 2 in order to review the issue on its merits.
(2) On an appeal from an order requiring the defendant to enroll in lifetime SBM, the court held--as conceded by the State--that the trial court erred by imposing lifetime SBM without conducting the required *Grady* hearing to determine whether monitoring would amount to a reasonable search under the Fourth Amendment. The court vacated the SBM order without prejudice to the State's ability to file a subsequent SBM application.

State v. Harding, ___ N.C. App. ___, ___ S.E.2d ___ (Mar. 6, 2018) temp. stay granted, ___ N.C. ___, 811 S.E.2d 601 (Apr 11 2018)
The court reversed the trial court's lifetime registration and SBM orders. When a trial court finds a person was convicted of a "reportable conviction," it must order that person to maintain sex offender registration for a period of at least 30 years. If a trial court also finds that the person has been classified as a sexually violent predator, is a recidivist, or was convicted of an aggravated offense, it must order lifetime registration. Before a trial court may impose SBM, it must make factual findings determining that (i) the offender has been classified as a sexually violent predator pursuant to G.S. 14-208.20, (ii) the offender is a recidivist, (iii) the conviction offense was an aggravated offense, (iv) the conviction offense was a violation of G.S. 14-27.2A or G.S. 14-27.4A, or (v) the offense involved the physical, mental, or sexual abuse of a minor. Because the victim was not a minor, only the first three categories are relevant here. However in its orders, the trial court found that the defendant had not been convicted of an aggravated offense, was not a recidivist, nor had he been classified as a sexually violent predator. It nevertheless ordered the defendant to enroll in lifetime registration and lifetime SBM. The court reversed the registration and SBM orders and remanded those issues for resentencing. The court noted that if the State pursues SBM on remand, it must satisfy its burden of presenting evidence from which the trial court can fulfill its judicial duty to make findings concerning the reasonableness of SBM under the fourth amendment pursuant to the *Grady* decision.

Speedy Trial & Related Issues

State v. Wilkerson, ___ N.C. App. ___, 810 S.E.2d 389 (Feb. 6, 2018)
On an appeal from the denial of a motion to dismiss for violation of speedy trial rights in a case involving a trial delay of 3 years and 9 months, the court held that because the trial court failed to adequately weigh and apply the *Barker v. Wingo* factors and to fully consider the prima facie evidence of prosecutorial neglect, the trial court's order must be vacated and the case remanded "for a full evidentiary hearing and to make proper findings and analysis of the relevant factors." After reviewing the facts of the case vis-a-vis the *Barker* factors, the court noted:

> [W]ith the limited record before us, Defendant tends to show his Sixth Amendment right to a speedy trial may have been violated. The length of the delay and the lack of appropriate reason for the delay tends to weigh in his favor. Defendant's evidence regarding the prejudice he suffered in his pretrial incarceration and the prejudice to his ability to defend against his charges, if true, would tend to weigh in his favor, but requires a more nuanced consideration.

State v. Armistead, ___ N.C. App. ___, 807 S.E.2d 664 (Nov. 7, 2017)
(1) In this impaired driving case, the court rejected the defendant's argument that his speedy trial rights were violated due to a four year delay between indictment and trial. Considering the speedy trial factors,

the court found that the length of delay weighed in the defendant's favor. The second factor—the reason for the delay—also weighed in the defendant's favor. Here, the delay could have been avoided by reasonable effort by the State. It was undisputed that on the date the defendant failed to appear in court and on the date four months later when the prosecutor removed the case from the docket, the fact that the defendant was incarcerated was readily discernible by a search of the Department of Public Safety's Offender Public Information website and through other online databases used by prosecutors. Thus, the State's failure to discover the defendant's whereabouts--in its own custody--resulted from the prosecutor's negligence by not checking readily available information. With respect to the third factor—the defendant's assertion of his right—trial counsel acknowledged that there was no record of receipt by the clerk's office of any communication from the defendant until more than three years after the defendant's case was removed from the court docket. Based on the evidence presented, the court rejected the defendant's assertion that he had made prior attempts to assert his right. For example, while he testified that he had asserted his right in a letter to the Clerk, he was unable to produce a copy of the letter and no letter was found in the Clerk's file. In light of the lack of evidence that the defendant's claimed assertions of his speedy trial right reached the proper court officials or the prosecutor until three years after he first failed to appear in court, this factor was neutral. Turning to prejudice, the court concluded that, despite his arguments to the contrary, the defendant was unable to show actual, substantial prejudice. (2) The trial court did not err by denying the defendant's motion to dismiss pursuant to G.S. 15A-711. The State Supreme Court has held that failure to serve a G.S. 15A-711 motion on the prosecutor as required by the statute bars relief for a defendant. The court rejected the defendant's assertion that certain letters he sent were properly filed written requests sufficient to satisfy the statute.

Weapons Permits

Debruhl v. Mecklenburg County Sheriff's Office, ___ N.C. App. ___, ___ S.E.2d ___ (Apr. 17, 2018) The due process clause of the 14th Amendment requires that an applicant be afforded an opportunity for an evidentiary hearing to contest the denial of his application for renewal of a Concealed Handgun Permit pursuant to G.S. 14-415.12(a)(3). Daniel DeBruhl, who had maintained a Concealed Handgun Permit for 10 years, submitted an application for the renewal of his permit to the county Sheriff's Office. The Sheriff's Office issued a perfunctory denial of the application, without notice of the nature of or basis for the denial or any opportunity for DeBruhl to be heard. DeBruhl appealed the Sheriff's decision to the District Court, arguing that there was no way for him to know what facts to challenge on appeal because no detail was provided in the denial. The District Court denied the appeal, finding in part that the permit was denied because DeBruhl sought or received mental health and/or substance abuse treatment and that he suffers from a mental health disorder that affects his ability to safely handle a firearm. Without affording DeBruhl an opportunity to be heard, District Court affirmed the Sheriff's decision. DeBruhl appealed. The Court of Appeals began by finding that the defendant had a protected property interest in the renewal of his Concealed Handgun Permit upon expiration of his prior permit. The court went on to find that he was deprived of his right to procedural due process by the manner in which the renewal application was denied. Here, although DeBruhl had an opportunity for review, he did not have an opportunity to be heard. The court determined that "appellate review without an opportunity to be heard does not satisfy the demands of due process" and that the procedures employed here were "wholly inadequate." It held:

> Where a local sheriff determines that an application for renewal of a Concealed Handgun Permit ought to be denied on the grounds that the applicant "suffer[s] from a . . . mental infirmity that prevents the safe handling of a handgun[,]" that applicant must be afforded an opportunity to dispute the allegations underlying the denial before it becomes final. The opportunity to appeal the denial to the district court as set forth in N.C. Gen. Stat. § 14-415.15(c) is procedurally sufficient only to the extent that it provides an opportunity for the applicant to be heard at that stage. At a minimum, an applicant denied the renewal of a permit pursuant to the provisions of this subsection must be provided notice of the

precise grounds for the sheriff's denial, together with the information alleged in support thereof. This process must be followed by an opportunity to contest the matter in a hearing in district court.

Witnesses, Remote Testimony

State v. Phachoumphone, ___ N.C. App. ___, 810 S.E.2d 748 (Feb. 6, 2018)
In this child sexual assault case, although the trial court violated the procedural requirements of G.S. 15A-1225.1 by authorizing the victim's testimony to be offered remotely without holding a recorded evidentiary hearing on the matter or entering an appropriate order supporting its decision to allow the State's motion, the defendant was not entitled to relief. The defendant did not challenge the trial court's ultimate decision allowing the victim to testify remotely; he challenged only the procedure employed in authorizing her remote testimony. The court agreed that the trial court erred by failing to follow statutory procedure. However, for reasons detailed in the court's opinion, it rejected the defendant's challenge on the basis that he failed to demonstrate that he was prejudiced by these procedural errors.

Evidence

Authentication

State v. Allen, ___ N.C. App. ___, 812 S.E.2d 192 (Mar. 6, 2018)
In this felony breaking or entering and felony larceny case, a store Notice of Prohibited Entry was properly authenticated. After detaining the defendant for larceny, a Belk loss prevention associate entered the defendant's name in a store database. The associate found an entry for the defendant at Belk Store #329, along with a photograph that resembled the defendant and an address and date of birth that matched those listed on his driver's license. The database indicated that, as of 14 November 2015, the defendant had been banned from Belk stores for a period of 50 years pursuant to a Notice of Prohibited Entry following an encounter at store #329. The Notice included the defendant's signature. The defendant was charged with felony breaking or entering and felony larceny. At trial the trial court admitted the Notice as a business record. On appeal, the defendant argued that the Notice was not properly authenticated. The court disagreed, concluding that business records need not be authenticated by the person who made them. Here, the State presented evidence that the Notice was completed and maintained by Belk in the regular course of business. The loss prevention associate testified that she was familiar with the store's procedures for issuing Notices and with the computer system that maintains this information. She also established her familiarity with the Notice and that such forms were executed in the regular course of business. The court found it of "no legal moment" that the loss prevention officer did not herself make or execute the Notice in question, given her familiarity with the system under which it was made.

Relevancy--Rule 401

State v. Santillan, ___ N.C. App. ___, ___ S.E.2d __ (May 1, 2018)
In this case involving a gang-related home invasion and murder, the trial court did not commit plain error by admitting rap lyrics found in a notebook in the defendant's room. The lyrics, which were written before the killing, described someone "kick[ing] in the door" and "spraying" bullets with an AK47 in a manner that resembled how the victims were killed. The court concluded that the defendant failed to show that, absent the alleged error, the jury probably would have returned a different verdict.

State v. Solomon, ___ N.C. App. ___, ___ S.E.2d __ (May 1, 2018)
In this second-degree murder vehicle accident and felony speeding to elude case, the trial court did not err by excluding, under Rule 401, the defendant's testimony regarding his medical diagnoses. At trial, the defendant attempted to testify to his cognitive impairments and behavioral problems. The State objected, arguing that the defendant had failed to provide notice of an insanity or diminished capacity defense, and

failed to provide an expert witness or medical documentation for any of the conditions. On voir dire, the defendant testified that he suffered from several mental disorders including Attention Deficit Disorder, Attention Deficit Hyperactivity Disorder, Pediatric Bipolar Disorder, and Oppositional Defiant Disorder. Defense counsel stated the testimony was not offered as a defense but rather so that "the jury would be aware of [the defendant's] condition and state of mind." The trial court determined that lay testimony from the defendant regarding his various mental disorders was not relevant under Rule 401. The court found no error, reasoning:

> Defendant attempted to offer specific medical diagnoses through his own testimony to lessen his culpability or explain his conduct without any accompanying documentation, foundation, or expert testimony. Defendant's testimony regarding the relationship between his medical diagnoses and his criminal conduct was not relevant without additional foundation or support. Such evidence would have required a tendered expert witness to put forth testimony that complies with the rules of evidence. Without a proper foundation from an expert witness and accompanying medical documentation, Defendant's testimony would not make a fact of consequence more or less probable from its admittance.

The court went on to hold that even if error occurred, it was not prejudicial.

Rule 403

State v. Faulk, ___ N.C. App. ___, 807 S.E.2d 623 (Nov. 7, 2017)
In this murder case, the trial court did not abuse its discretion by admitting photographs of the victim and crime scene. The trial court allowed the State to introduce approximately 20 photographs depicting various angles and details of the crime scene and the victim's location and injuries. The photographs corroborated the defendant's statement to officers that the victim was attacked at her kitchen, suffered a head injury, and was stabbed multiple times. The autopsy photographs illustrated the testimony of the medical examiner, who described the injuries as consistent with multiple particular weapons, the defensive characteristics of some injuries, and the deliberate and persistent nature of the attack.

Rape Shield

State v. Jacobs, ___ N.C. ___, 811 S.E.2d 579 (Apr. 6, 2018)
On discretionary review of a unanimous decision of the Court of Appeals, ___ N.C. App. ___, 798 S.E.2d 532 (2017), the court reversed, holding that at the trial court erred by excluding defense evidence of the victim's history of STDs. The case involved allegations that the defendant had sexual relations with the victim over a period of several years. Evidence showed that the victim had contracted Trichomonas vaginalis and the Herpes simplex virus, Type II, but that testing of the defendant showed no evidence of those STDs. At trial the defense proffered as an expert witness a doctor who was a certified specialist in infectious diseases who opined, in part, that given this, it was unlikely that the victim and the defendant had engaged in unprotected sexual activity over a long period of time. The trial court determined that the defendant could not introduce any STD evidence unless the State open the door. The defendant was convicted and appealed. The Court of Appeals rejected the defendant's argument that the trial court erred by excluding this evidence. The Supreme Court reversed and ordered a new trial. The Rule 412(b)(2) exception allows for admission of "evidence of specific instances of sexual behavior offered for the purpose of showing that the act or acts charged were not committed by the defendant." The court concluded:

> The proposed expert's conclusions regarding the presence of STDs in the victim and the absence of those same STDs in defendant affirmatively permit an inference that defendant did not commit the charged crime. Furthermore, such evidence diminishes the likelihood of a three-year period of sexual relations between defendant and [the victim]. Therefore, the trial court erred in excluding this evidence pursuant to Rule 412 and there

is "a reasonable possibility that, had the error not been committed, a different result would have been reached at trial."

Corroboration & Opening the Door

State v. Crump, ___ N.C. App. ___, ___ S.E.2d ___ (Apr. 17, 2018)
In a case involving charges of assault on a law enforcement officer, the trial court did not err by allowing the State to present evidence that an internal police department investigation of the involved officers resulted in no disciplinary actions or demotions. The defendant asserted that this evidence constituted inadmissible hearsay. During a pretrial hearing on the defendant's motion in limine to exclude this evidence, the defendant noted his intent to open the door during cross-examination and question the officers about their knowledge of the inner workings of such investigations and whether they had conferred with an attorney prior to making their official statements. The trial court noted that this proposed line of questioning would open the door to the State's introduction of the results of the investigation. However, the defendant maintained his intent to proceed with his line of questioning, and the trial court denied the motion in limine. When the defendant cross-examined the officers about these matters at trial, he opened the door to the evidence at issue.

State v. Allbrooks, ___ N.C. App. ___, 808 S.E.2d 168 (Nov. 21, 2017)
In this murder case, the trial court did not err by admitting a witness's prior statement to the police to corroborate his in-court testimony. According to the defendant, the prior statement added "critical facts" that were not otherwise shown by the evidence. The court found that many of the critical facts noted by the defendant were actually present in the witness's testimony. It found that other facts were not critical, noting that slight variations do not render prior statements inadmissible.

Direct & Cross-Examination

State v. Rodriguez, ___ N.C. ___, ___ S.E.2d ___ (June 8, 2018)
In this capital case, the trial court did not err by allowing the State to elicit testimony that defense counsel had previously hired the State's expert to testify on behalf of another client. The defendant argued that this allowed the State to improperly vouch for its expert's credibility. The State's expert testified that he disagreed with a defense expert's opinion that the defendant suffers from mild intellectual disability. In light of the differences between the experts' opinions it was proper to elicit testimony regarding potential witness bias or lack thereof. The court noted:

> Although the trial court might have been better advised to have exercised its discretionary authority pursuant to . . . Rule 403, to limit the scope of the prosecutor's inquiry to whether [the State's expert] had previously worked for counsel representing criminal defendants in general rather than specifically identifying one of defendant's trial counsel as an attorney to whom [the expert] had provided expert assistance, we are unable to say, given the record before us in this case, that the challenged testimony constituted impermissible prosecutorial vouching for [the expert]'s credibility or that the trial court erred by refusing to preclude the admission of the challenged testimony.

Prior Acts--404(b) Evidence

State v. Weldon, ___ N.C. App. ___, 811 S.E.2d 683 (Feb. 20, 2018)
In this possession of a firearm by a felon case, the trial court did not err when it allowed an officer to testify that during an unrelated incident, the officer saw the defendant exiting a house that the officer was surveilling and to testify that the defendant had a reputation for causing problems in the area. This testimony was offered for a proper purpose: to establish the officer's familiarity with the defendant's

appearance so that he could identify him as the person depicted in surveillance footage. Additionally, the trial court did not abuse its discretion in finding that the probative value of this testimony outweighed its prejudicial impact under the Rule 403 balancing test. However, the court went on to hold that the officer's testimony that the surveillance operation in question was in response to "a drug complaint" did not add to the reliability of the officer's ability to identify the defendant. But because no objection was made to this testimony at trial plain error review applied, and any error that occurred with respect to this testimony did not meet that high threshold.

State v. Spinks, ___ N.C. App. ___, 808 S.E.2d 350 (Nov. 21, 2017)
In this child sexual assault case, the trial court did not err by admitting Rule 404(b) evidence regarding a sexual assault perpetrated by the defendant on another child, Katy. The case being tried involved vaginal intercourse and other acts with a child victim. The 404(b) evidence involved in anal intercourse with Katy. The State offered Katy's testimony to establish that the defendant had a common scheme or plan to commit assaults on young females. The trial court allowed the evidence for that purpose. On appeal, the court rejected the defendant's argument that the acts were too dissimilar, noting: both the victim and Katy are the same sex; the defendant allegedly had forcible intercourse with both victims; the assaults took place in the early morning; and in both incidents, the defendant was a guest in the homes where the children were staying, he entered their bedrooms after midnight, and later bribed them for their silence. The court went on to hold that the evidence was admissible under Rule 403, rejecting the defendant's argument that testimony of anal intercourse of a child by an adult improperly inflamed the jury.

Fifth Amendment (Self-Incrimination) Issues

State v. Triplett, , ___ N.C. App. ___, 810 S.E.2d 404 (Feb. 20, 2018)
The trial court did not err by allowing the State to use the defendant's post-arrest exercise of his right to remain silent against him. Here, there is no evidence in the record that the defendant was given Miranda warnings or that he ever invoked his right to remain silent. In fact, the evidence indicates that the defendant voluntarily spoke with officers after his arrest. Thus, he cannot demonstrate that his Fifth Amendment right to remain silent was improperly used against him at trial.

State v. Wyrick, ___ N.C. App. ___, 809 S.E.2d 608 (Jan. 16, 2018)
In this sexual assault case, the court rejected the defendant's argument that the State's impeachment of the defendant with his post-Miranda silence violated the defendant's constitutional rights. After the defendant was arrested and read his Miranda rights, he signed a waiver of his rights and gave a statement indicating that he did not recall the details of the night in question. He was later connected to the crimes and brought to trial. At trial the defendant testified to specific details of the incident. He recounted driving an unknown man home from a nightclub to an apartment complex, meeting two young women in the complex's parking lot, and having a consensual sexual encounter with the women. The defendant testified that the women offered him "white liquor," marijuana, and invited him to their apartment. However, the defendant had failed to mention these details when questioned by law enforcement after his arrest, stating instead that he did not remember the details of the night. On cross-examination, the prosecutor asked the defendant why he had not disclosed this detailed account to law enforcement during that interview. The defendant stated that he was unable to recall the account because he was medicated due to a recent series of operations, and that the medication affected his memory during the interview. The court determined that the prosecutor's cross-examination "was directly related to the subject matter and details raised in Defendant's own direct testimony, including the nature of the sexual encounter itself, the police interrogation, and his prior convictions." "Further," the court explained, "the inquiry by the prosecutor was not in an effort to proffer substantive evidence to the jury, but rather to impeach Defendant with his inconsistent statements." It concluded:

> Defendant failed to mention his story of a consensual sexual encounter to the detective which he later recalled with a high level of particularity during direct examination. Such

> a "memorable" encounter would have been natural for Defendant to recall at the time [the officer] was conducting his investigation; thus, his prior statement was an "indirect inconsistency." Further, the prosecutor did not exploit Defendant's right to remain silent, but instead merely inquired as to why he did not remain consistent between testifying on direct examination and in his interview with the detective two years prior.

State v. Diaz, ___ N.C. App. ___, 808 S.E.2d 450 (Nov. 21, 2017) review granted, ___ N.C. ___, ___ S.E.2d ___ (May 9 2018)
In a case where the defendant was found guilty of abduction of a child, statutory rape and second-degree sexual exploitation, the defendant's right against self-incrimination was violated where the State admitted into evidence the defendant's affidavit of indigency which contained his date of birth. A defendant cannot be required to surrender one constitutional right in order to assert another. Here, the defendant cannot be required to complete an affidavit of indigency to receive his right to counsel and then have the State use the affidavit against him, violating his constitutional right against self-incrimination. The abduction of a child offense required the child to be at least four years younger than the defendant; the statutory rape charges required proof that the defendant was more than four but less than six years older than the victim. The trial court erred by admitting the affidavit of indigency which showed the defendant's age—an element of the charges. The court went on to conclude that the State failed to establish that the error was harmless beyond a reasonable doubt and granted the defendant a new trial on these charges.

Hearsay

State v. Blankenship, ___ N.C. App. ___, ___ S.E.2d ___ (Apr. 17, 2018) temp. stay granted, ___ N.C. ___, 812 S.E.2d 666 (May 3 2018)
In this child sexual assault case, the trial court did not err by admitting hearsay statements of the victim. At issue were several statements by the child victim. In all of them, the victim said some version of "daddy put his weiner in my coochie."

First, the trial court admitted the victim's statements to the defendant's parents, Gabrielle and Keith, as a present sense impression and an excited utterance and under the residual exception to Rule 804. The court reviewed this matter for plain error. The court began by finding that the victim's statements were inadmissible as excited utterances. Although it found that the delay between the defendant's acts and the victim's statements does not bar their admission as excited utterances, it concluded that the State presented insufficient evidence to establish that the victim was under the stress of the startling event at the time she made the statements. In fact, the State presented no evidence of the victim's stress. Next, the court considered the present sense impression exception to the hearsay rule. Present sense impressions, it explained, are statements describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter. Here, the trial court erred by admitting the statements as present sense impressions because the record lacked evidence of exactly when the sexual misconduct occurred. However, the statements were properly admitted under the residual exception to Rule 804. There is a six-part test for admitting statements under the residual exception. Here, the trial court failed to make any conclusions regarding the second part of that test, whether the hearsay is covered by any of the exceptions listed in Rule 804(b)(1)-(4). Additionally, with respect to the third part of the test—whether the hearsay statement was trustworthy—the trial court failed to include in the record findings of fact and conclusions of law that the statements possess circumstantial guarantees of trustworthiness. Although the trial court determined that the statements possess a guarantee of trustworthiness, it found no facts to support that conclusion. This was error. However, the court went on to conclude that the record established the required guarantees of trustworthiness. Specifically: the victim had personal knowledge of the events; the victim had no motivation to fabricate the statements; the victim never recanted; and the victim was unavailable because of her lack of memory of the events. The court noted that in this case the parties had stipulated that the victim was unavailable due to lack of memory, not due to an inability to distinguish truth from fantasy. Additionally, the court concluded that

the defendant suffered no prejudice from the trial court's failure to explicitly state that none of the other Rule 804 exceptions applied. Having concluded that the statements had a sufficient guarantee of trustworthiness, the court found that the trial court did not err by admitting the statements under the Rule 804 residual exception.

Second, the trial court admitted statements by the victim to Adrienne Opdike, a former victim advocate at the Children's Advocacy and Protection Center, under the residual exception of Rule 804. Referring to its analysis of the victim's statements to Gabrielle and Keith, the court concluded that the statement to Opdike has sufficient guarantees of trustworthiness and that the trial court did not abuse its discretion by admitting it under the Rule 804 residual exception.

Third, the trial court admitted statements by the victim to a relative, Bobbi, as a present sense impression and under the Rule 804 residual exception. The court reviewed this issue for plain error. Relying on its analysis with respect to the victim's statements to Gabrielle and Keith, the court held that the trial court erred by admitting the statement to Bobbi as a present sense impression. However, the trial court did not err, or abuse its discretion, in admitting the statement under the Rule 804 residual exception. The trial court adequately performed the six-part analysis that applies to the residual exception and the statement has sufficient guarantees of trustworthiness

Fourth, the trial court admitted statements by the victim to Amy Walker Mahaffey, a registered nurse in the emergency room, under the medical diagnosis and treatment exception. Although it found the issue a close one, the court determined that it need not decide whether the trial court erred by admitting the statement under this exception because even if error occurred, the defendant failed to show prejudice. Specifically, the trial court properly admitted substantially identical statements made by the victim to others.

State v. Brown, ___ N.C. App. ___, 811 S.E.2d 224 (Feb. 20, 2018)
(1) The trial court did not err by admitting the defendant's brother's videotaped statement to the police as illustrative evidence. The defendant asserted that the videotaped statement constituted inadmissible hearsay. However the trial court specifically instructed the jury that the videotape was being admitted for the limited, non-hearsay purpose of illustrating the brother's testimony. Because the videotaped statement was not admitted for substantive purposes the defendant's argument fails.
(2) The trial court properly allowed into evidence the defendant's brother's testimony that "[the defendant] told [him] that he did it" and "[the defendant] told [him] he was the one that did it." These statements were properly allowed as admissions of a party opponent under Rule 801(d).

State v. Brown, ___ N.C. App. ___, 811 S.E.2d 224 (Feb. 20, 2018)
In this murder case, the trial court did not err by admitting into evidence prior written statements made to the police by the defendant's brothers, Reginald and Antonio, pursuant to the Rule 803(5) recorded recollection exception to the hearsay rule. The statements at issue constitute hearsay. Even though Reginald and Antonio testified at trial, their written statements were not made while testifying; rather they were made to the police nearly 3 years prior to trial. Thus they were hearsay and inadmissible unless they fit within a hearsay exception. Here, and as discussed in detail in the court's opinion, the statements meet all the requirements of the Rule 803(5) recorded recollection hearsay exception.

Confrontation Clause

State v. Miller, ___ N.C. ___, ___ S.E.2d ___ (June 8, 2018)
On discretionary of a unanimous decision of the Court of Appeals, ___ N.C. App. ___, 801 S.E.2d 696 (2017), in this murder case the court reversed, holding that the Court of Appeals erred by concluding that certain evidence was admitted in violation of the defendant's confrontation rights. The defendant was charged with murdering his estranged wife. Approximately 9 months before the murder, an officer responded to a call at the victim's apartment regarding a domestic dispute. The officer made initial contact with the victim at a location outside of her apartment. The victim told the officer that the

defendant entered her apartment through an unlocked door and kept her there against her will for two hours. The victim said that during this period she and the defendant argued and that a physical struggle occurred. Although the officer did not recall seeing any signs that the victim had sustained physical injury, he noticed a tear and stress marks on her shirt. The officer accompanied the victim to her apartment to check the premises to make sure the defendant was not still there. The defendant was later charged and convicted of domestic criminal trespass. At the defendant's murder trial the trial court admitted, over the defendant's confrontation clause objection, the officer's testimony about the statements the victim made to him in the incident 9 months before the murder. The Court of Appeals found, among other things, that the victim's statements were testimonial. The Supreme Court disagreed, finding that the victim's statements were nontestimonial. The victim made the statements during an ongoing emergency caused by the defendant's entry into her apartment and decision to both detain and physically assault her. The information she provided to the officer caused him to enter the apartment to ensure that the defendant, whose location was unknown, had departed and no longer posed a threat to the victim's safety. The victim's statements to the officer "served more than an information-gathering purpose." Additionally, the conversation was informal and took place in an environment that cannot be described as tranquil.

State v. Clonts, ___ N.C. ___, ___ S.E.2d ___ (June 8, 2018)
On appeal from the decision of a divided panel of the Court of Appeals, ___ N.C. App. ___, 802 S.E.2d 531 (2017), the court per curiam affirmed. The Court of Appeals had held that the trial court erred by admitting a non-testifying witness's pretrial deposition testimony. First, the Court of Appeals held that the trial court's findings were insufficient to establish that the witness was unavailable for purposes of the Rule 804(b)(1) hearsay exception and the Confrontation Clause. The entirety of the trial court's findings on this issue were: "The [trial court] finds [the witness] is in the military and is stationed outside of the State of North Carolina currently. May be in Australia or whereabouts may be unknown as far as where she's stationed." The trial court made no findings that would support more than mere inference that the State was unable to procure her attendance; made no findings concerning the State's efforts to procure the witness's presence at trial; and made no findings demonstrating the necessity of proceeding to trial without the witness's live testimony. The trial court did not address the option of continuing trial until the witness returned from deployment. It did not make any finding that the State made a good-faith effort to obtain her presence at trial, much less any findings demonstrating what actions taken by the State could constitute good-faith efforts. It thus was error for the trial court to grant the State's motion to admit the witness' deposition testimony in lieu of her live testimony at trial. Second, the Court of Appeals found that even if the trial court's findings of fact and conclusions had been sufficient to support its ruling, the evidence presented to the trial court was insufficient to support an ultimate finding of "unavailability" for purposes of Rule 804. It noted in part that the State's efforts to "effectuate [the witness's] appearance" were not "reasonable or made in good faith." Third, the Court of Appeals held that a witness's pretrial deposition testimony, taken in preparation of the criminal case, was clearly testimonial for purposes of the Confrontation Clause. And finally, the Court of Appeals found that the facts of the case did not support a finding that the witness was unavailable under the Confrontation Clause. In this respect, the court noted that no compelling interest justified denying the defendant's request to continue the trial to allow for the witness's live testimony. It added: "The mere convenience of the State offers no such compelling interest." It continued: "We hold that . . . in order for the State to show that a witness is unavailable for trial due to deployment, the deployment must, at a minimum, be in probability long enough so that, with proper regard to the importance of the testimony, the trial cannot be postponed." (quotation omitted).

Expert Opinions

Sexual Assault Cases

State v. Shore, ___ N.C. App. ___, ___ S.E.2d ___ (Apr. 3, 2018)
In this child sexual assault case, the trial court did not abuse its discretion by allowing Kelli Wood, an expert in clinical social work specializing in child sexual abuse cases, to testify that it is not uncommon

for children to delay disclosure of sexual abuse and to testify to possible reasons for delayed disclosures. At issue was whether the testimony satisfied Rule 702. The defendant did not dispute either Wood's qualifications or the relevance of her testimony. Rather, he asserted that her testimony did not meet two prongs of the Rule 702 *Daubert* reliability test. First, he asserted, Wood's testimony was not based on sufficient facts or data, noting that she had not conducted her own research and instead relied upon studies done by others. The court rejected this argument, finding that it directly conflicted with Rule 702, the *Daubert* line of cases and the court's precedent. Among other things, the court noted that as used in the rule, the term "data" is intended to encompass reliable opinions of other experts. Here, Wood's delayed disclosure testimony was grounded in her 200 hours of training, 11 years of forensic interviewing experience, conducting over 1200 forensic interviews (90% of which focused sex abuse allegations), and reviewing over 20 articles on delayed disclosures. Wood testified about delayed disclosures in general and did not express an opinion as to the alleged victim's credibility. As such, her testimony "was clearly" based on facts or data sufficient to satisfy the first prong of the reliability test.

Second, the defendant argued that Wood's testimony was not the product of reliable principles and methods. Specifically, he asserted that the delayed disclosure research she relied upon was flawed: it assumed the participants were honest; it did not employ methods or protocols to screen out participants who made false allegations; and because there was no indication of how many participants might have lied, it was impossible to know an error rate. The defendant also argued that when Wood provided a list of possible reasons why an alleged victim might delay disclosure, she did not account for the alternative explanation that the abuse did not occur. The court rejected this contention, pointing to specific portions of direct and cross-examination where these issues were addressed and explained. The court found that the defendant failed to demonstrate that his arguments attacking the principles and methods of Wood's testimony were pertinent in assessing its reliability. It thus held that her testimony was the product of reliable principles and methods sufficient to satisfy the second prong of the reliability analysis.

State v. Spinks, ___ N.C. App. ___, 808 S.E.2d 350 (Nov. 21, 2017)
(1) In this child sexual assault case, the trial court did not err by admitting an assessment in a report by the State's medical expert, Dr. Thomas, of "Child sexual abuse." Thomas testified to general characteristics of abused children. She did not offer an opinion that the victim had been sexually abused or that the victim fell into the category of children who have been sexually abused but showed no physical symptoms of abuse. The report in question includes a statement: "Chief Concern: Possible child sexual abuse." The statement at issue in the report was in a paragraph entitled Assessment and Recommendations, which began with the following sentence: "Child sexual abuse by [victim's] disclosure." The court rejected the argument that Thomas opined that the victim had been sexually abused. It concluded that the phrase at issue merely introduced the paragraph of the report dealing with the victim's disclosure.
(2) In this child sexual assault case, no plain error occurred with respect to admission of certain statements made by the State's medical expert, Dr. Thomas, alleged by the defendant to impermissibly bolster and vouch for the victim's credibility. In her written report, Thomas wrote that the victim's disclosures have been "consistent and compelling" and that she "agree[s] with law enforcement in this compelling and concerning case." It is not improper for an expert to testify to a victim's examination being "consistent" with the victim's statements of abuse. Here, the defendant argued that "compelling" was the problematic word. Assuming arguendo that admission of the statements was error, it did not rise to the level of plain error.

Drug Cases

State v. Gray, ___ N.C. App. ___, ___ S.E.2d __ (May 1, 2018)
In this drug case, the trial court did not commit plain error by admitting the expert opinion of a forensic chemist. On appeal, the defendant argued that the expert's testimony failed to demonstrate that the methods she used were reliable under the Rule 702. Specifically, he argued that the particular testing

process used by the Charlotte-Mecklenburg Police Department Crime Lab to identify cocaine creates an unacceptable risk of a false positive and that this risk, standing alone, renders expert testimony based on the results of this testing process inherently unreliable under Rule 702(a). The court declined to consider this argument, concluding that it "goes beyond the record." The defendant did not object to the expert's opinion at trial. The court concluded that because the defendant failed to object at trial, the issue was unpreserved. However, because an unpreserved challenge to the performance of a trial court's gatekeeping function under Rule 702 in a criminal trial is subject to plain error review, the court reviewed the case under that standard. The court noted that its "jurisprudence wisely warns against imposing a Daubert ruling on a cold record" and that as a result the court limits its plain error review "of the trial court's gatekeeping function to the evidence and material included in the record on appeal and the verbatim transcript of proceedings." (quotation omitted). Here, the defendant's false positive argument "is based on documents, data, and theories that were neither presented to the trial court nor included in the record on appeal." The court determined that its plain error review of the defendant's Rule 702 argument "is limited solely to the record on appeal and the question of whether or not an adequate foundation was laid before [the] expert opinion was admitted." Here, an adequate foundation was laid. The witness, tendered as an expert in forensic chemistry, testified that she had a degree in Chemistry and over 20 years of experience in drug identification. She also testified about the type of testing conducted on the substance in question and the methods used by the Crime Lab to identify controlled substances. The witness testified that she tested the seized substance, that she used a properly functioning GCMS, and that the results from that test provided the basis for her opinion. Furthermore, her testimony indicates that she complied with Lab procedures and the methods she used were "standard practice in forensic chemistry." This testimony was sufficient to establish a foundation for admitting her expert opinion under Rule 702.

The court also rejected the defendant's argument that the trial court erred "by failing to conduct any further inquiry" when the witness's testimony showed that she used scientifically unreliable methods, stating: "While in some instances a trial court's gatekeeping obligation may require the judge to question an expert witness to ensure his or her testimony is reliable, sua sponte judicial inquiry is not a prerequisite to the admission of expert opinion testimony."

State v. Bridges, ___ N.C. App. ___, 810 S.E.2d 365 (Feb. 6, 2018)
The evidence was sufficient to sustain the defendant's conviction for possession of methamphetamine. After the police discovered a white crystalline substance in a vehicle, they arrested the defendant who had been sitting in the driver's seat of the car. While being transported to a detention center the defendant admitted to a detective that she had "a baggie of meth hidden in her bra." Upon arrival at the detention center, an officer found a bag of "crystal-like" substance in the defendant's bra. At trial an officer testified without objection to the defendant's statement regarding the methamphetamine in her bra. Additionally, the actual substance retrieved from her bra was admitted as exhibit. However, the State did not present any other evidence regarding the chemical composition of substance. On appeal, the defendant argued that the State failed to present evidence of the chemical nature of the substance in question.
Under *Ward,* some form of scientifically valid chemical analysis is required unless the State establishes that another method of identification is sufficient to establish the identity of a controlled substance beyond a reasonable doubt. Citing the state Supreme Court's opinions in *Nabors* and *Ortiz-Zape,* the court held that the defendant's admission constitutes sufficient evidence that the substance was a controlled substance.

Impaired Driving, HGN & DRE

State v. Fincher, ___ N.C. App. ___, ___ S.E.2d ___ (Apr. 17, 2018)
In this DWI case the trial court did not abuse its discretion by admitting an officer's expert testimony that the defendant was under the influence of a central nervous system depressant. On appeal the defendant argued that the State failed to lay a sufficient foundation under Rule 702 to establish the reliability of the Drug Recognition Examination to determine that alprazolam was the substance that impaired the

defendant's mental or physical faculties. The defendant also argued that the officer's testimony did not show that the 12-step DRE protocol was a reliable method of determining impairment. The court rejected these arguments, noting that pursuant to Rule 702(a1)(2), the General Assembly has indicated its desire that Drug Recognition Evidence, like that given in the present case, be admitted and that this type of evidence already has been determined to be reliable and based on sufficient facts and data. Accordingly, the trial court properly admitted the testimony.

State v. Barker, ___ N.C. App. ___, 809 S.E.2d 171 (Dec. 19, 2017)
The trial court did not err by admitting an officer's testimony about the results of a horizontal gaze nystagmus (HGN) test. At trial, the North Carolina Highway Patrol Trooper who responded to a call regarding a vehicle accident was tendered as an expert in HGN testing. The defendant objected to the Trooper being qualified as an expert. After a voir dire the trial court overruled the defendant's objection and the Trooper was permitted to testify. On appeal, the defendant argued that the witness failed to provide the trial court with the necessary foundation to establish the reliability of the HGN test. Citing *Godwin* and *Younts* (holding that Evidence Rule 702(a1) obviates the State's need to prove that the HGN testing method is sufficiently reliable), the court determined that such a finding "is simply unnecessary."

State v. Hayes, ___ N.C. App. ___, 808 S.E.2d 446 (Nov. 21, 2017)
Following its decision in State v. Babich, ___ N.C. App. ___, 797 S.E.2d 359 (2017), in this DWI case the court held that the State's expert testimony regarding retrograde extrapolation was inadmissible under *Daubert* and Rule 702. The expert used the defendant's .06 BAC 1 hour and 35 minutes after the traffic stop to determine that the defendant had a BAC of .08 at the time of the stop. To reach this conclusion the expert assumed that the defendant was in a post-absorptive state at the time of the stop, meaning that alcohol was in the process of being eliminated from his bloodstream and that his BAC was in decline. The expert admitted that while there were no facts to support this assumption, it was required so that he could complete his retrograde extrapolation analysis. The State conceded error under *Babich* and argued only that the error was not prejudicial. The court found otherwise and reversed and remanded for a new trial.

State v. Squirewell, ___ N.C. App. ___, 808 S.E.2d 312 (Nov. 7, 2017)
The trial court did not err by allowing a state trooper to testify about the results of a chemical analysis of the defendant's breath. On appeal, the defendant argued that the State failed to provide an adequate foundation for this testimony. Specifically, the court found that the requirements of G.S. 20-139.1 were satisfied. Here, the trooper testified: that he was certified by the Department of Human Resources to perform chemical breath analysis using the ECIR2 machine; that the defendant's breath analysis was conducted on the ECIR2 machine; that he set up the ECIR2 machine in preparation for the defendant's test according to the procedures established by the Department; about those specific procedures and that he followed the procedures in this instance; and that the machine worked properly and produced a result for defendant's breath test. The court noted:

> Although the trooper did not explicitly state that he had a Department issued permit to conduct chemical analysis on the day he conducted defendant's breath test, which is certainly best practice, we hold the trooper's testimony that he was certified to conduct chemical analysis by the Department and that he performed the chemical analysis according to the Department's procedures was adequate in this case to lay the necessary foundation for the admission of chemical analysis results.

Fingerprint Experts

State v. McPhaul, ___ N.C. App. ___, 808 S.E.2d 294 (Nov. 7, 2017) review granted, ___ N.C. ___, ___ S.E.2d ___ (May 9 2018)

In this attempted murder and robbery case, the court applied the *Daubert* test for expert testimony and held that trial court abused its discretion by allowing the State's expert witness to testify that latent fingerprints found on the victim's truck and on evidence seized during a home search matched the defendant's known fingerprint impressions. The court held that the witness's testimony failed to satisfy Rule 702(a)(3). To meet the requirements of the rule, an expert witness must be able to explain not only the abstract methodology underlying the opinion, but also that the witness reliably applied that methodology to the facts of the case. Here, the witness testified that during an examination, she compares the pattern type and minutia points of the latent print and known impressions until she is satisfied that there are "sufficient characteristics in sequence of the similarities" to conclude that the prints match. However, she provided no such detail in testifying about how she arrived at her actual conclusions in this case. The court concluded: without further explanation for her conclusions, the expert implicitly asked the jury to accept her expert opinion that the prints matched. Since she failed to demonstrate that she applied the principles and methods reliably to the facts of the case as required by Rule 702(a)(3) the trial court abused its discretion by admitting this testimony. The court went on to find that the error was not prejudicial.

Use of Force & Related Experts

State v. Thomas, ___ N.C. App. ___, ___ S.E.2d ___ (Apr. 17, 2018)
In this homicide case, the trial court did not err by excluding the expert opinion testimony of a forensic psychologist about the phenomenon of "fight or flight." Citing the North Carolina Supreme Court's *McGrady* decision the court noted that the expert did not possess any medical or scientific degrees. This led the trial court to determine that the expert would not provide insight beyond the conclusions that the jurors could readily draw from their own ordinary experiences. The trial court acted well within its discretion in making this determination. The expert's testimony was not proffered to explain a highly technical and scientific issue in simpler terms for the jury. Rather her testimony appeared to be proffered "in order to cast a sheen of technical and scientific methodology onto a concept of which a lay person (and jury member) would probably already be aware." As such, it did not provide insight beyond the conclusions that the jurors could readily draw from their ordinary experience.

Lay Opinions

State v. Weldon, ___ N.C. App. ___, 811 S.E.2d 683 (Feb. 20, 2018)
In this felon in possession of a firearm case, the trial court did not abuse its discretion by allowing an officer to identify a person depicted in a surveillance video as being the defendant. The officer testified that while he had never had any direct contact with the defendant he knew who the defendant was. On appeal the defendant argued that the officer was in no better position than the jury to identify the defendant in the surveillance footage. Rejecting this argument, the court noted that the officer had seen the defendant in the area frequently and knew who he was. In one instance, the officer saw the defendant coming out of a house that the officer was surveilling; the officer could identify the defendant because he recognized the defendant's face and the defendant was wearing a leg brace and limping. These encounters would have sufficiently allowed the officer to acquire the requisite familiarity with the defendant's appearance so as to qualify him to testify to the defendant's identity. Additionally, the defendant had altered his appearance significantly between the date in question and the date of trial. The length and style of the defendant's hair was distinctive during the period that the officer became familiar with the defendant and matched that of the individual shown on the surveillance footage. However, the defendant had a shaved head at trial. Thus, by the time of trial the jury was unable to perceive the distinguishing nature of the defendant's hair at the time of the shooting. Thus the officer was better qualified than the jury to identify the defendant in the videotape. Because the officer was familiar with the defendant's appearance and because the defendant had altered his appearance by the time of trial, the trial court did

not abuse its discretion by allowing the officer to testify to his opinion that the defendant was the individual depicted shooting a weapon in the surveillance video.

Privileges

State v. McNeill, ___ N.C. ___, ___ S.E.2d ___ (June 8, 2018)
In this capital case the court rejected the defendant's argument that the trial court erred in the guilt phase by instructing the jury that it could find the defendant guilty of sexual offense if it found either vaginally or anal penetration where the State failed to present any evidence of anal penetration and it cannot be discerned from the record upon which theory or theories the jury relied in arriving at its verdict. The court also rejected the defendant's related argument that the trial court erred in the sentencing phase by instructing the jury that it could find the (e)(5) aggravating circumstances that the capital felony was committed while the defendant was engaged in the commission of, or flight after committing, the act of sexual offense with a child. Noting that the trial judge should never give instructions to a jury which are not based upon facts presented by some reasonable view of the evidence, the court found that here there was sufficient evidence of anal penetration.

Arrest, Search, and Investigation

Stops

Whether a Seizure Occurred

State v. Turnage, ___ N.C. App. ___, ___ S.E.2d __ (May 15, 2018)
In this fleeing to elude, resisting an officer and child abuse case, the trial court erred by concluding that a seizure occurred when a detective activated his blue lights. After receiving complaints about drug activity at 155 John David Grady Road, officers conducted surveillance of the area. All officers were in plain clothes and in unmarked vehicles. As a detective was arriving in the area, he received a report that a burgundy van was leaving the premises. The detective followed the van and saw it, suddenly and without warning, stop in the middle of the road. The detective waited approximately 15 seconds and activated his blue lights. As the detective approached the driver's side of the vehicle, he saw a male exit the passenger side, who he recognized from prior law enforcement encounters. The individual started walking towards the officer's vehicle with his hands in his pockets. The detective told his colleague, who was in the vehicle, to get out. The male then ran back to the van yelling "Go, go, go" and the van sped away. During a mile and a half pursuit the van ran off the shoulder of the road, crossed the centerline and traveled in excess of 80 mph in a 55 mph zone. When officers eventually stopped the vehicle, two children were in the back of the van. The defendant was arrested for the charges noted above. The trial court found that a seizure occurred when the detective pulled behind the stopped the van and activated his blue lights and that no reasonable suspicion justified this activity. On appeal, the State argued that the trial court erred by concluding a seizure occurred when the detective activated his blue lights. The court agreed. Citing Hodari D., the court noted that a show of authority by law enforcement does not rise to the level of a seizure unless the suspect submits to that authority or is physically restrained. Here, for unknown reasons the driver and the defendant stopped the vehicle in the middle of the road before any show of authority from law enforcement. The detective's later activation of his blue lights did not constitute a seizure because the defendant did not yield to the show of authority. The defendant was not seized until the vehicle was stopped during the chase. The criminal activity observed by the officer during the chase and his observation of the two minor children in the van justified the arrest for the offenses at issue.

Reasonable Suspicion

State v. Nicholson, ___ N.C. ___, ___ S.E.2d ___ (June 8, 2018)
On appeal from the decision of a divided panel of the Court of Appeals, ___ N.C. App. ___, 805 S.E.2d 348 (2017), the court reversed, holding that an officer's decision to briefly detain the defendant for

questioning was supported by reasonable suspicion of criminal activity. While on patrol at 4 AM, Lieutenant Marotz noticed a car parked in a turn lane of the street, with its headlights on but no turn signal blinking. Marotz saw two men inside the vehicle, one in the driver's seat and the other—later identified as the defendant—in the seat directly behind the driver. The windows were down despite rain and low temperatures. As Marotz pulled alongside of the vehicle, he saw the defendant pull down a hood or toboggan style mask with holes in the eyes, but then push the item back up when he saw the officer. Martoz asked the two whether everything was okay and they responded that it was. The driver said that the man in the back was his brother and they had been arguing. The driver said the argument was over and everything was okay. Sensing that something was not right, the officer again asked if they were okay, and they nodded that they were. Then the driver moved his hand near his neck, "scratching or doing something with his hand," but Marotz was not sure how to interpret the gesture. Still feeling that something was amiss, Marotz drove to a nearby gas station to observe the situation. After the car remained immobile in the turn lane for another half minute, Marotz got out of his vehicle and started on foot towards the car. The defendant stepped out of the vehicle and the driver began to edge the car forward. Marotz asked the driver what he was doing and the driver said he was late and had to get to work. The officer again asked whether everything was okay and the men said that everything was fine. However, although the driver responded "yes" to the officer's question, he shook his head "no." This prompted the officer to further question the defendant. The driver insisted he just had to get to work and the officer told him to go. After the driver left, the defendant asked the officer if he could walk to a nearby store. The officer responded, "[H]ang tight for me just a second . . . you don't have any weapons on you do you?" The defendant said he had a knife but a frisk by a backup officer did not reveal a weapon. After additional questioning the officers learned the defendant's identity and told him he was free to go. Later that day the driver reported to the police that the defendant was not his brother and had been robbing him when Marotz pulled up. The defendant held a knife to the driver's throat and demanded money. Officers later found a steak knife in the back seat of the vehicle. The defendant was charged with armed robbery and he moved to suppress the evidence obtained as a result of his seizure by Marotz. The parties agreed that the defendant was seized when Marotz told him to "hang tight." The court found that the circumstances established a reasonable, articulable suspicion that criminal activity was afoot. Although the facts might not establish reasonable suspicion when viewed in isolation, when considered in their totality they could lead a reasonable officer to suspect that he had just happened upon a robbery in progress. The court also found that the Court of Appeals placed undue weight on Marotz's subjective interpretation of the facts (the officer's testimony suggested that he did not believe he had reasonable suspicion of criminal activity), rather than focusing on how an objective, reasonable officer would have viewed them. The court noted that an action is reasonable under the fourth amendment regardless of the officer's state of mind, if the circumstances viewed objectively justify the action. Here the circumstances objectively justified the action.

State v. Sutton, ___ N.C. App. ___, ___ S.E.2d ___ (June 5, 2018)
In this drug trafficking case, the court held that the fact that the defendant's truck crossed over a double yellow line justified the stop. The officer saw the defendant's vehicle cross the center line of the road by about 1 inch. The court stated:

> [T]here is a "bright line" rule in some traffic stop cases. Here, the bright line is a double yellow line down the center of the road. Where a vehicle actually crosses over the double yellow lines in the center of a road, even once, and even without endangering any other drivers, the driver has committed a traffic violation of N.C. Gen. Stat. § 20-146 (2017). This is a "readily observable" traffic violation and the officer may stop the driver without violating his constitutional rights.

State v. Jones, ___ N.C. App. ___, ___ S.E.2d ___ (Apr. 3, 2018)
In this impaired driving case, an officer's observation of a single instance of a vehicle crossing the double yellow centerline in violation of state motor vehicle law provided reasonable suspicion to support the

traffic stop. While traveling southbound on Highway 32, NC Highway Patrol Trooper Myers was notified by dispatch that a caller had reported a black Chevrolet truck traveling northbound on Highway 32 at a careless, reckless, and high speed. Myers then saw a black Chevrolet truck travelling northbound cross the center double yellow line. Myers initiated a traffic stop, which resulted in impaired driving charges. The defendant argued that the stop was not supported by reasonable suspicion because Myers did not corroborate the caller's information. The court rejected this argument, noting that Myer's own observation of the vehicle driving left of center providing reasonable suspicion for the stop. Under G.S. 20-150(d), crossing a double yellow centerline constitutes a traffic violation. Citing prior case law, the court stated that an officer's observation of such a violation is sufficient to constitute reasonable suspicion for a traffic stop.

Duration/Extending Stops

State v. Downey, ___ N.C. ___, 809 S.E.2d 566 (Mar. 2, 2018)
The court per curiam affirmed a divided decision of the Court of Appeals, ___ N.C. App. ___, 796 S.E.2d 517 (2017), affirming an order denying the defendant's motion to suppress. Over a dissent, the court of appeals had held that reasonable suspicion supported extension of the traffic stop. After an officer stopped the defendant for a traffic violation, he approached the vehicle and asked to see the driver's license and registration. As the defendant complied, the officer noticed that his hands were shaking, his breathing was rapid, and that he failed to make eye contact. He also noticed a prepaid cell phone inside the vehicle and a Black Ice air freshener. The officer had learned during drug interdiction training that Black Ice freshener is frequently used by drug traffickers because of its strong scent and that prepaid cell phones are commonly used in drug trafficking. The officer determined that the car was not registered to the defendant, and he knew from his training that third-party vehicles are often used by drug traffickers. In response to questioning about why the defendant was in the area, the defendant provided vague answers. When the officer asked the defendant about his criminal history, the defendant responded that he had served time for breaking and entering and that he had a cocaine-related drug conviction. After issuing the defendant a warning ticket for the traffic violation and returning his documentation, the officer continued to question the defendant and asked for consent to search the vehicle. The defendant declined. He also declined consent to a canine sniff. The officer then called for a canine unit, which arrived 14 minutes after the initial stop ended. An alert led to a search of the vehicle and the discovery of contraband. The court of appeals rejected the defendant's argument that the officer lacked reasonable suspicion to extend the traffic stop, noting that before and during the time in which the officer prepared the warning citation, he observed the defendant's nervous behavior; use of a particular brand of powerful air freshener favored by drug traffickers; the defendant's prepaid cell phone; the fact that the defendant's car was registered to someone else; the defendant's vague and suspicious answers to the officer's questions about why he was in the area; and the defendant's prior conviction for a drug offense. These circumstances, the court of appeals held, constituted reasonable suspicion to extend the duration of stop.

State v. Bullock, 370 N.C. 256 (Nov. 3, 2017)
On an appeal from a divided panel of the Court of Appeals, ___ N.C. App. ___, 785 S.E.2d 746 (2016), the court reversed, concluding that the stop at issue was not unduly prolonged. An officer puller over the defendant for several traffic violations. During the traffic stop that ensued, officers discovered heroin inside a bag in the car. The defendant moved to suppress the evidence, arguing that the search was unduly prolonged under *Rodriguez*. The trial court denied the motion and the Court of Appeals reversed, concluding that the stop had been unduly prolonged. The Supreme Court reversed. After initiating the stop, the officer asked the defendant, the vehicle's sole occupant, for his license and registration. The defendant's hand trembled as he provided his license. Although the car was a rental vehicle, the defendant was not listed as a driver on the rental agreement. The officer noticed that the defendant had two cell phones, a fact he associated, based on experience, with those transporting drugs. The defendant was stopped on I-85, a major drug trafficking thoroughfare. When the officer asked the defendant where he

was going, the defendant said he was going to his girlfriend's house on Century Oaks Drive and that he had missed his exit. The officer knew however that the defendant was well past the exit for that location, having passed three exits that would have taken him there. The defendant said that he recently moved to North Carolina. The officer asked the defendant to step out of the vehicle and sit in the patrol car, telling him that he would receive a warning, not a ticket. At this point the officer frisked the defendant, finding $372 in cash. The defendant sat in the patrol car while the officer ran the defendant's information through law enforcement databases, and the two continued to talk. The defendant gave contradictory statements about his girlfriend. Although the defendant made eye contact with the officer when answering certain questions, he looked away when asked about his girlfriend and where he was traveling. The database checks revealed that the defendant was issued a driver's license in 2000 and that he had a criminal history in North Carolina starting in 2001, facts contradicting his earlier claim to have just moved to the state. The officer asked the defendant for permission to search the vehicle. The defendant agreed to let the officer search the vehicle but declined to allow a search of a bag and two hoodies. When the officer found the bag and hoodies in the trunk, the defendant quickly objected that the bag was not his, contradicting his earlier statement, and said he did not want it searched. The officer put the bag on the ground and a police dog alerted to it. Officers opened the bag and found a large amount of heroin. The defendant did not challenge the validity of the initial stop. The court began by noting during a lawful stop, an officer can ask the driver to exit the vehicle. Next, it held that the frisk was lawful for two reasons. First, frisking the defendant before putting them in the patrol car enhanced the officer safety. And second, where, as here, the frisk lasted only 8-9 seconds it did not measurably prolong stop so as to require reasonable suspicion. The court went on to find that asking the defendant to sit in the patrol car did not unlawfully extend the stop. The officer was required to check three databases before the stop could be finished and it was not prolonged by having the defendant in the patrol car while this was done. This action took a few minutes to complete and while it was being done, the officer was free to talk with the defendant "at least up until the moment that all three database checks had been completed." The court went on to conclude that the conversation the two had while the database checks were running provided reasonable suspicion to prolong the stop. It noted that I-85 is a major drug trafficking corridor, the defendant was nervous and had two cell phones, the rental car was in someone else's name, the defendant gave an illogical account of where he was going, and cash was discovered during the frisk. All of this provided reasonable suspicion of drug activity that justified prolonging the stop shortly after the defendant entered the patrol car. There, as he continued his conversation with the officer, he gave inconsistent statements about his girlfriend and the database check revealed that the defendant had not been truthful about a recent move to North Carolina. This, combined with the defendant's broken eye contact, allowed the officer to extend the stop for purposes of the dog sniff.

State v. Reed, 370 N.C. 267 (Nov. 3, 2017)
On appeal from a divided panel of the Court of Appeals, ___ N.C. App. ___, 791 S.E.2d 486 (2016), the court vacated and remanded for reconsideration in light of its decision in *State v. Bullock*, ___ N.C. ___, ___ S.E.2d ___ (2017), holding that a stop was not unduly prolonged.

State v. Sutton, ___ N.C. App. ___, ___ S.E.2d ___ (June 5, 2018)
After a proper traffic stop, the officer had reasonable suspicion to extend the stop for six or seven minutes for a dog sniff. The officer was patrolling the road based on complaints about drug activity and had been advised by the SBI to be on the lookout for the defendant based upon reports that he was bringing large quantities of methamphetamine to a supplier who lived off of the road. After the officer stopped the defendant's vehicle, he identified the defendant as the person noted in the lookout warning. The defendant was confused, spoke so quickly that he was hard to understand, and began to stutter and mumble. The defendant did not make eye contact with the officer and his nervousness was "much more extreme" than a typical stopped driver. His eyes were bloodshot and glassy and the skin under his eyes was ashy. Based on his training and experience, the officer believed the defendant's behavior and appearance were consistent with methamphetamine use. The defendant told the officer he was going to "Rabbit's" house.

The officer knew that "Rabbit" was involved with methamphetamine and that he lived nearby. When the defendant exited his car, he put his hand on the car for stability. These facts alone would have given the officer reasonable suspicion. But additionally, a woman the officer knew had given drug information to law enforcement in the past approached and told the officer she had talked to Rabbit and the defendant had "dope in the vehicle." These facts were more than sufficient to give the officer a reasonable suspicion that the defendant had drugs in his vehicle and justify extension of the stop for a dog sniff.

State v. Cox, ___ N.C. App. ___, ___ S.E.2d __ (May 15, 2018)
The traffic stop at issue was not unduly extended. The defendant, a passenger in the stopped vehicle, argued that officers extended, without reasonable suspicion, the traffic stop after issuing the driver a warning citation. The stopping officer had extensive training in drug interdiction, including the detection of behaviors by individuals tending to indicate activity related to the use, transportation, and other activity associated with controlled substances, and had investigated more than 100 drug cases. The officer observed a sufficient number of "red flags" before issuing the warning citation to support a reasonable suspicion of criminal activity and therefore justifying extending the stop. When the officer first encountered the vehicle, he observed body language by both the driver and the defendant that he considered evasive; the driver exhibited extreme and continued nervousness throughout the stop and was unable to produce any form of personal identification; the driver and the defendant gave conflicting accounts of their travel plans and their relationship to each other; the officer observed an open sore on the defendant's face that appeared, based on the officer's training and experience, related to the use of methamphetamine; and background checks revealed that the driver had an expired license.

State v. Campola, ___ N.C. App. ___, 812 S.E.2d 681 (Mar. 6, 2018)
An officer had reasonable suspicion to prolong the traffic stop. A six-year officer who had received training in identification of drugs and had participated in 100 drug arrests pulled into the parking lot of a Motel 6, a high crime area. When he entered the lot, he saw two men sitting in a car. After the officer passed, the vehicle exited the lot at high speed. The officer stopped the car after observing a traffic violation. The vehicle displayed a temporary license tag. When the officer approached for the driver's information, the driver was "more nervous than usual." The officer asked why the two were at the motel, and the driver stated that they did not enter a room there. The passenger—the defendant—did not have any identifying documents but gave the officer his name. The officer went to his patrol car to enter the information in his computer and called for backup, as required by department regulations when more than one person is in a stopped vehicle. While waiting for backup to arrive, he entered the vehicle's VIN number in a 50-state database, not having a state registration to enter. He determined that the vehicle was not stolen. Although neither the driver nor the passenger had outstanding warrants, both had multiple prior drug arrests. Shortly after, and 12 minutes after the stop began, the backup officer arrived. The two discussed the stop; the stopping officer told the backup officer that he was going to issue the driver a warning for unsafe movement but asked the backup officer to approach the defendant. The two approached the vehicle some 14 minutes after the stop was initiated. The stopping officer asked the driver to step to the rear the vehicle so that they could see the intersection where the traffic violation occurred while the officer explained his warning. The officer gave the driver a warning, returned his documents and asked to search the vehicle. The driver declined. While the stopping officer was speaking with the driver, the backup officer approached the defendant and saw a syringe in the driver's seat. He asked the defendant to step out of the car and the defendant complied, at which point the officer saw a second syringe in the passenger seat. Four minutes into these conversations, the backup officer informed the stopping officer of the syringe caps. The stopping officer asked the driver if he was a diabetic and the driver said that he was not. The stopping officer then searched the vehicle, finding the contraband at issue. On appeal, the court held that the stop was not improperly extended. It noted that the stopping officer was engaged in "conduct within the scope of his mission" until the backup officer arrived after 12 minutes. Database searches of driver's licenses, warrants, vehicle registrations, and proof of insurance all fall within the mission of a traffic stop. Additionally the officer's research into the men's criminal histories

was permitted as a precaution related to the traffic stop, as was the stopping officer's request for backup. Because officer safety stems from the mission of the traffic stop itself, time devoted to officer safety is time that is reasonably required to complete the mission of the stop. Even if a call for backup was not an appropriate safety precaution, here the backup call did not actually extend the stop because the stopping officer was still doing the required searches when the backup officer arrived. By the time the backup officer arrived, the stopping officer had developed a reasonable suspicion of criminal activity sufficient to extend the stop. The stopping officer was a trained officer who participated 100 drug arrests; he saw the driver and passenger in a high crime area; after he drove by them they took off at a high speed and made an illegal turn; the driver informed the officer that the two were at the motel but did not go into a motel room; the driver was unusually nervous; and both men had multiple prior drug arrests. These facts provided reasonable suspicion to extend the stop. Even if these facts were insufficient, other facts support a conclusion that reasonable suspicion existed, including the men's surprise at seeing the officer in the motel lot; the titling of the vehicle to someone other than the driver or passenger; the driver's statement that he met a friend at the motel but did not know the friend's name; and the fact that the officer recognized the defendant as someone who had been involved in illegal drug activity. Finally, drawing on some of the same facts, the court rejected the defendant's argument that any reasonable suspicion supporting extension of the stop was not particularized to him. The court also noted that an officer may stop and detain a vehicle and its occupants if an officer has reasonable suspicion that criminal activity is afoot.

State v. Bullock, ___ N.C. App. ___, 811 S.E.2d 713 (Feb. 20, 2018)
On remand from State v. Bullock, 370 N.C. 256 (Nov. 3, 2017), the court rejected the defendant's argument that his consent to search his rental vehicle was involuntary because it was given at a time when the stop had been unduly prolonged. Specifically, the defendant argued that the stop was prolonged because of questioning by the officer and the time he was detained while waiting for a second officer to arrive to assist with the search. An officer stopped the defendant for traffic violations. After routine questioning, the officer asked the defendant to step out of the vehicle and for permission to search the defendant. The defendant consented. After frisking the defendant, the officer placed the defendant in the patrol car and ran database checks on the defendant's license. The officer continued to ask the defendant questions while waiting for the checks to finish. The officer asked the defendant if there were guns or drugs in the car and for consent to search the vehicle. The defendant said he did not want the officer to search "my shit," meaning his property. The officer asked the defendant what property he had in the vehicle. The defendant said that his property included a bag and two hoodies. The defendant said that the officer could search the car but not his personal property. The officer then called for backup, explaining that he could not search the car without another officer present. A second officer arrived 3 to 5 minutes after the backup call and the defendant's property was removed from the vehicle. One of the officers began to search the defendant's vehicle. The officer brought his K-9 to the vehicle and it failed to alert to narcotics. The dog then sniffed the bag and indicated that there were narcotics inside. The case was before the court on remand from the state Supreme Court. That court had held that the initial traffic stop was valid; that the officer lawfully frisked the defendant without prolonging the stop; that the officer's database checks on the defendant's license did not unduly prolong the stop; and that the conversation that occurred was sufficient to form reasonable suspicion authorizing the dog sniff of the vehicle and bag. Because all parts of the stop were lawfully extended, the trial court did not err in determining that the defendant's consent to search his vehicle was voluntary.

State v. Reed, ___ N.C. App. ___, 810 S.E.2d 245 (Jan. 16, 2018) temp. stay granted, ___ N.C. ___, 809 S.E.2d 130 (Feb 2 2018)
On remand from the N.C. Supreme Court for consideration in light of State v. Bullock, 370 N.C. 256 (2017), the court held—over a dissent—that the trial court erred by denying the defendant's motion to suppress evidence obtained during a traffic stop. Finding itself bound by *Bullock,* the court concluded that the officer's actions requiring the defendant to exit his car, frisking him, and making him sit in the patrol

car while the officer—Trooper Lamm—ran records checks and questioned the defendant, did not unlawfully extend the stop under *Rodriguez*. However, the court went on to find that the case was distinguishable from *Bullock* because here, after the officer returned the defendant's paperwork and issued the warning ticket, the defendant remained unlawfully seized in the patrol car. The court explained:

> [A] reasonable person in Defendant's position would not believe he was permitted to leave. When Trooper Lamm returned Defendant's paperwork, Defendant was sitting in the patrol car. Trooper Lamm continued to question Defendant as he sat in the patrol car. When the trooper left the patrol car to seek [the passenger's] consent to search the rental car, he told Defendant to "sit tight." At this point, a second trooper was present on the scene, and stood directly beside the passenger door of Trooper Lamm's vehicle where Defendant sat. Moreover, at trial Trooper Lamm admitted at this point Defendant was not allowed to leave the patrol car.

Because a reasonable person in the defendant's position "would not feel free to leave when one trooper told him to stay in the patrol car, and another trooper was positioned outside the vehicle door," the defendant remained seized after his paperwork was returned. Thus, reasonable suspicion was required for the extension of the stop. Here, no such suspicion existed. Although the defendant appeared nervous, the passenger held a dog in her lap, dog food was scattered across the floorboard of the vehicle, and the car contained air fresheners, trash, and energy drinks, this is "legal activity consistent with lawful travel." And, while the officer initially had suspicions concerning the rental car agreement, he communicated with the rental company confirmed everything was fine.

State v. Parker, ___ N.C. App. ___, 807 S.E.2d 617 (Nov. 7, 2017)
Because the trial court's findings of fact do not support its conclusion that the defendant was legally seized at the time consented to a search of his person, the court reversed the trial court's order denying the defendant's motion to suppress contraband found on his person. Officers were conducting surveillance on a known drug house. They noticed the defendant leave the residence in a truck and return 20 minutes later. He parked his truck in the driveway and walked toward a woman in the driveway of a nearby residence. The two began yelling at each other. Thinking the confrontation was going to escalate, the officers got out of their vehicle and separated the two. One officer asked the defendant for his identification. The officer checked the defendant's record, verifying that the defendant had no pending charges. Without returning the defendant's identification, the officer then asked the defendant if he had any narcotics on him and the defendant replied that he did not. At the officer's request, the defendant consented to a search of his person and vehicle. Drugs were found in his pants pocket. On appeal, the defendant argued that when the officer failed to return his identification after finding no outstanding warrants and after the initial reason for the detention was satisfied, the seizure became unlawful and the defendant's consent was not voluntary. The court agreed. It noted that the officer failed to return the defendant's identification before pursuing an inquiry into possession of drugs. It found that the trial court's order failed to provide findings of fact which would give rise to a reasonable suspicion that the defendant was otherwise subject to detention. Absent a reasonable suspicion to justify further delay, retaining the defendant's driver's license beyond the point of satisfying the initial purpose of the detention—the escalating the conflict, checking the defendant's identification, and verifying that he had no outstanding warrants—was unreasonable. Thus, the defendant's consent to search his person, given during the period of unreasonable detention, was not voluntary.

Arrests & Charging

District of Columbia v. Wesby, 583 U.S. ___, 138 S. Ct. 577 (Jan. 22, 2018)
Ruling in a civil suit against the District of Columbia and five of its police officers brought by individuals arrested for holding a raucous, late-night party in a house they did not have permission to enter, the Court held that the officers had probable cause to arrest the partygoers and were entitled to qualified immunity. As to probable cause, the Court concluded that "[c]onsidering the totality of the circumstances, the

officers made an entirely reasonable inference that the partygoers were knowingly taking advantage of a vacant house as a venue for their late-night party." (quotation omitted). In this respect, the Court noted the condition of the house, including among other things that multiple neighbors told the officers that the house had been vacant for several months and that the house had virtually no furniture and few signs of inhabitance. The Court also noted the partygoers' conduct, including among other things that the party was still going strong when the officers arrived after 1 am, with music so loud that it could be heard from outside; upon entering, multiple officers smelled marijuana; partygoers left beer bottles and cups of liquor on the floor; the living room had been converted into a makeshift strip club; and the officers found upstairs a group of men with a single, naked woman on a bare mattress—the only bed in the house—along with multiple open condom wrappers and a used condom. The Court further noted the partygoers' reaction to the officers, including scattering and hiding at the sight of the uniformed officers. Finally, the Court noted the partygoers' vague and implausible answers to the officers' questions about who had given them permission to be at the house. The Court went on to hold that the officers were entitled to qualified immunity.

State v. Clapp, ___ N.C. App. ___, ___ S.E.2d ___ (June 5, 2018)
Probable cause supported the defendant's second arrest for impaired driving. After the defendant's first arrest for DWI, he signed a written promise to appear and was released. Thirty minutes later Officer Hall saw the defendant in the driver's seat of his vehicle at a gas station, with the engine running. The defendant had an odor of alcohol, slurred speech, red, glassy eyes, and was unsteady on his feet. The defendant told the officer that he was driving his vehicle to his son's residence. The officer did not perform field sobriety tests because the defendant was unable to safely stand on his feet. Based on the defendant's prior blood-alcohol reading--done less than two hours before the second incident--and the officer's training about the rate of alcohol elimination from the body, the officer formed the opinion that the defendant still had alcohol in his system. The defendant was arrested a second time for DWI and, because of his first arrest, driving while license revoked. The trial court granted the defendant's motion to suppress evidence in connection with his second arrest. The State appealed and the court reversed. The court began by determining that certain findings made by the trial court were not supported by competent evidence. The court then held that probable cause supported the defendant's second arrest. The defendant admitted that he drove his vehicle between his two encounters with the police. During the second encounter, Hall observed that the defendant had red, glassy eyes, an odor of alcohol, slurred speech and was unsteady on his feet to the extent that it was unsafe to conduct field sobriety tests. While Hall did not observe the defendant's driving behavior, he had personal knowledge that the defendant had a blood alcohol concentration of .16 one hour and 40 minutes prior to the second encounter. And Hall testified that based on standard elimination rates of alcohol for an average individual, the defendant probably still would be impaired.

State v. Parisi, ___ N.C. App. ___, ___ S.E.2d ___ (June 5, 2018)
In this impaired driving case, the court held, over a dissent, that an officer had probable cause to charge the defendant with driving while impaired. The officer was operating a checkpoint. As a vehicle being driven by the defendant stopped at the checkpoint, the officer approached the driver's door and saw an open box of alcoholic beverage on the passenger floorboard but did not see any open containers. The defendant had glassy, watery eyes and an odor of alcohol. Upon inquiry, the defendant told the officer he had consumed three beers earlier that evening. The officer administered an HGN test and found that the defendant demonstrated six "clues" indicating impairment. The officer also administered a walk and turn test and the defendant missed multiple steps. Finally, when the officer administered a one leg stand test, the defendant used his arms and swayed, indicators of impairment. These facts supported probable cause.

State v. Daniel, ___ N.C. App. ___, ___ S.E.2d __ (May 1, 2018)
Over a dissent, the court held that because an officer had probable cause to arrest the defendant for impaired driving, the trial court erred by granting the defendant's motion to suppress. Here, the trooper

"clocked" the defendant traveling at 80 miles per hour in a 65 mile per hour zone on a highway. As the trooper approached the defendant's vehicle, the defendant abruptly moved from the left lane of the highway into the right lane, nearly striking another vehicle before stopping on the shoulder. During the stop, the trooper noticed a moderate odor of alcohol emanating from the defendant and observed an open 24-ounce container of beer in the cup-holder next to the driver's seat. The defendant told the trooper that he had just purchased the beer, and was drinking it while driving down the highway. The defendant admitted that he had been drinking heavily several hours before the encounter with the trooper. The trooper did not have the defendant perform any field sobriety tests but did ask the defendant to submit to two Alco-sensor tests, both of which yielded positive results for alcohol. The court noted that while swerving alone does not give rise to probable cause, additional factors creating dangerous circumstances may, as was the case here.

State v. Burwell, ___ N.C. App. ___, 808 S.E.2d 583 (Dec. 5, 2017)
When, under G.S. 122C-303, an officer takes a publicly intoxicated person to jail to assist that person and the action is taken against the person's will, an arrest occurs.

State v. Wilkes, ___ N.C. App. ___, 807 S.E.2d 672 (Nov. 7, 2017)
In this murder case, officers had probable cause to arrest the defendant. Thus, the trial court did not err by denying the defendant's motion to suppress incriminating statements made by the defendant after arrest. After law enforcement discovered a woman's body inside an abandoned, burned car, officers arrested the defendant. During question after arrest, the defendant implicated himself in the woman's murder. He unsuccessfully moved to suppress those incriminating statements and challenged the trial court's denial of his suppression motion on appeal. At the time the officers arrested the defendant, they had already visited the victim's home and found a knife on the chair near a window with the cut screen. When they questioned the victim's boyfriend, he admitted that he was with the defendant at the victim's home on the night of the murder and that, after the victim locked the two men out of her house, the boyfriend cut the screen, entered the house through the window, unlocked the door from the inside, and let the defendant in. These facts and circumstances constituted sufficient, reasonably trustworthy information from which a reasonable officer could believe that the defendant had committed a breaking and entering. Thus, regardless of whether the officers had probable cause to arrest the defendant for murder, they had probable cause to arrest the defendant for that lesser crime.

Exclusionary Rule--Fruit of Poisonous Tree

State v. Burwell, ___ N.C. App. ___, 808 S.E.2d 583 (Dec. 5, 2017)
In an assault on a law enforcement officer inflicting serious bodily injury case, the trial court did not err by denying the defendant's motion to suppress evidence of his attack on the officer, alleged by the defendant to be proper resistance to an unlawful arrest. The court concluded: "Even if a police officer's conduct violates a defendant's Fourth Amendment rights, evidence of an attack on an officer is not fruit of a poisonous tree subject to suppression." It elaborated:

> "The doctrine of the fruit of the poisonous tree is a specific application of the exclusionary rule[,]" providing for the suppression of "all evidence obtained as a result of illegal police conduct." However, this doctrine does not permit evidence of attacks on police officers to be excluded, even "where those attacks occur while the officers are engaging in conduct that violates a defendant's Fourth Amendment rights." Thus, where a defendant argues an initial stop or subsequent arrest violated "his Fourth Amendment rights, the evidence of his crimes against the officers would not be considered excludable 'fruits' pursuant to the doctrine." (citations omitted).

Here, the defendant sought suppression of evidence of an attack on a police officer. The court concluded: "Defendant seeks the suppression of evidence of an attack on a police officer. Since evidence of an attack

on a police officer cannot be suppressed as a fruit of the poisonous tree, the evidence Defendant sought to suppress cannot be suppressed as a matter of law."

Identification of Defendant

State v. Malone, ___ N.C. App. ___, 807 S.E.2d 639 (Nov. 7, 2017) review granted, ___ N.C. ___, 809 S.E.2d 586 (Mar 1 2018)
(1) Over a dissent, the court held that identification procedures used with respect to two witnesses, Alvarez and Lopez, violated Due Process. At issue was a meeting between the two eyewitnesses and a legal assistant from the district attorney's office. The legal assistant met with the eyewitnesses and showed them: photographs of the defendant and another individual who already had been convicted for his role in the shooting; a surveillance video, taken from a security camera where the incident occurred; and part of the defendant's recorded interview with police officers. While they were watching the interview, Alvarez was standing near a window and happened to see the defendant exiting a police car. Alvarez directed Lopez to look outside and she too saw the defendant exiting the police car, wearing an orange jumpsuit, in handcuffs, and escorted by an officer. The evidence at trial showed that after the shooting neither Lopez nor Alvarez were able to give detailed descriptions of the defendant or positively identify him. Then, 3 ½ years later, and approximately two weeks prior to trial, the witnesses met with the legal assistant, viewed a video of the defendant's interview, surveillance footage of the incident, and more recent photographs of the defendant. The court stated "It is likely the witnesses would assume [the legal assistant] showed them the photographs and videos because the individuals portrayed therein were suspected of being guilty." The court concluded that the facts do not support the trial court's conclusion that the witnesses' in-court identifications were of independent origin. It noted: the short amount of time they had to view the defendant, their inability to positively identify him two days after the incident, and their inconsistent descriptions demonstrate that it is improbable that 3 ½ years later they could positively identify the defendant with accuracy absent the intervention by the legal assistant. It concluded that the identification procedures were impermissibly suggestive and the identifications were not of independent origin and thus violated the defendant's Due Process rights. The court went on to hold that admission of the identification testimony was not harmless beyond a reasonable doubt and reversed.
(2) The court went on to reject the defendant's argument that the legal assistant subjected Lopez and Alvarez to an impermissible show up procedure. Specifically, it found that there was no evidence to support the defendant's argument that the witness's looking out of the window at the exact moment the defendant exited a police car was coordinated by the legal assistant to have the witnesses view the defendant in person. Although it found the circumstances suspicious, the court concluded that it could not determine that the DA's office conducted an impermissible show up.

Interrogation & Confession

State v. Santillan, ___ N.C. App. ___, ___ S.E.2d __ (May 1, 2018)
(1) In this case involving a gang-related home invasion and murder, the court remanded to the trial court on the issue of whether the defendant's waiver of his right to counsel was voluntary. Officers interrogated the 15-year-old defendant four times over an eight hour period. Although he initially denied being involved in either a shooting or a killing, he later admitted to being present for the shooting. He denied involvement in the killing, but gave a detailed description of the murders and provided a sketch of the home based on information he claimed to have received from another person. All four interviews were videotaped. At trial, the State sought to admit the videotaped interrogation and the defendant's sketch of the home into evidence. The defendant moved to suppress on grounds that the evidence was obtained in violation of his Sixth Amendment rights. The trial court denied the motion and the defendant was convicted. He appealed arguing that the trial court's suppression order lacks key findings concerning law enforcement's communications with him after he invoked his right to counsel. The video recording of the interrogation shows that the defendant initially waived his right to counsel and spoke to officers. But,

after lengthy questioning, he re-invoked his right to counsel and the officers ceased their interrogation and left the room. During that initial questioning, law enforcement told the defendant that they were arresting him on drug charges. The officers also told the defendant they suspected he was involved in the killings, but they did not tell him they were charging him with those crimes, apparently leaving him under the impression that he was charged only with drug possession. Before being re-advised of his rights and signing a second waiver form, the defendant engaged in an exchange with the police chief, who was standing outside of the interrogation room. During the exchange, the defendant asked about being able to make a phone call; the police chief responded that would occur later because he was being arrested and needed to be booked for the shooting. The defendant insisted that he had nothing to do with that and had told the police everything he knew. The chief responded: "Son, you f***** up." Later, when officers re-entered the interrogation room, the defendant told them that he wanted to waive his right to counsel and make a statement. The trial court's order however did not address the exchange with the chief. Because of this, the court concluded that it could not examine the relevant legal factors applicable to this exchange, such as the intent of the police; whether the practice is designed to elicit an incriminating response from the accused; and any knowledge the police may have had concerning the unusual susceptibility of a defendant to a particular form of persuasion. The court thus remanded for the trial court to address this issue.
(2) The court went on however to reject the defendant's argument that separate and apart from the chief's communication with him, his waiver of his right to counsel was involuntary given his age, the officers' interrogation tactics, and his lack of sleep, food, and medication. The court concluded that the trial court's order addressed these factors and, based on facts supported by competent evidence in the record, concluded that the defendant's actions and statements showed awareness and cognitive reasoning during the entire interview and that he was not coerced into making any statements, but rather made his statements voluntarily. Because the trial court's fact findings on these issues are supported by competent evidence, and those findings in turn support the court's conclusions, the court rejected this voluntariness challenge.

State v. Benitez, ___ N.C. App. ___, ___ S.E. 2d ___ (Mar. 20, 2018)
(1) On an appeal from an adverse ruling on the defendant's motion for appropriate relief (MAR) in this murder case, the court held that because the defendant's attorney made an objectively reasonable determination that the defendant's uncle would qualify as his "guardian" under G.S. 7B-2101(b) and therefore did not seek suppression of the defendant's statements on grounds of a violation of that statute, counsel did not provide ineffective assistance. When he was 13 year old, the defendant a signed statement, during an interrogation, that he "shot the lady as she was sleeping on the couch in the head." The defendant's uncle, with whom the defendant had been living, was present during the interrogation. Two weeks later, the trial court sua sponte entered an order appointing the director of the County Department of Social Services as guardian of the person for the defendant pursuant to G.S. 7B-2001. The district court found that "the juvenile appeared in court with no parent, guardian or custodian but he lived with an uncle who did not have legal custody of him" and "[t]hat the mother of the juvenile resides in El Salvador and the father of the juvenile is nowhere to be found and based on information and belief lives in El Salvador." The defendant was prosecuted as an adult for murder. The defendant unsuccessfully moved to suppress his statement and was convicted. He filed a MAR arguing that his lawyer rendered ineffective assistance by failing to challenge the admission of his confession on grounds that his uncle was not his "parent, guardian, custodian, or attorney[,]" and therefore that his rights under G.S. 7B-2101(b) were violated as no appropriate adult was present during his custodial interrogation. The trial court denied the MAR and it came before the court of appeals. Noting that the statute does not define the term "guardian," the court viewed state Supreme Court law as establishing that guardianship requires a relationship "established by legal process." The requirement of "legal process" means that the individual's authority is "established through a court proceeding." But, the court concluded, it need not precisely determine what the high court meant by "legal process," because at a minimum the statute "requires authority gained through some legal proceeding." Here, the defendant's uncle did not obtain

legal authority over the defendant pursuant to any legal proceeding. Thus, there was a violation of the statute when the defendant was interrogated with only his uncle present. However, to establish ineffective assistance, the defendant must establish that his counsel's conduct fell below an objective standard of reasonableness. Here, the trial court found--based on the lawyer's actions and in the absence of any expert or opinion testimony that his performance fell below an objective standard of reasonableness--that defense counsel appropriately researched the issue and acted accordingly. Although the defendant's counsel made a legal error, it was not an objectively unreasonable one. In the course of its holding, the court noted that expert evidence "is not necessarily required for every claim of [ineffective assistance of counsel]," though "some evidence from practicing attorneys as to the standards of practice is often helpful, particularly in cases such as this where the issue is the interpretation of case law rather than a more blatant error such as a failure to prepare for a hearing at all." Because the court held the counsel's conduct did not fall below an objective standard of reasonableness, it did not address the prejudice prong of the ineffective assistance of counsel claim.

(2) The court remanded to the trial court for further findings of fact on the defendant's claim that he did not make a knowing and intelligent waiver of rights during the police interrogation. G.S. 7B-2101(d) provides that "Before admitting into evidence any statement resulting from custodial interrogation, the court shall find that the juvenile knowingly, willingly, and understandingly waived the juvenile's rights." To determine if a defendant has knowingly and voluntarily waived his or her rights, the trial court must consider the totality of the circumstances of the interrogation, and for juveniles, this includes the juvenile's age, experience, education, background, and intelligence, and an evaluation into whether the juvenile has the capacity to understand the warnings given, the nature of his or her Fifth Amendment rights, and the consequences of waving them. Here, competency to stand trial was an issue, although the trial court did ultimately determine that the defendant was competent to stand trial. However, the competency determination was made when the defendant was an 18-year-old adult; because the defendant was 13 years old at the time of the interrogation, a determination of the defendant's competency at age 18 "has little weight in the analysis of defendant's knowing and intelligent waiver at age 13." Nevertheless, the competency order found that the defendant suffered from a mental illness or defect that existed since before age 18. This fact is relevant to the totality of the circumstances analysis regarding the waiver issue. The competency order did not identify the mental illness or defect or describe its impact on the defendant's abilities or understanding. Although the trial court's findings of fact in the motion to suppress do address the defendant's age and the circumstances surrounding the interrogation, they do not address the defendant's experience, education, background, and intelligence or whether he had the capacity to understand the warnings, the nature of the rights, and the consequences of waving them. The absence of findings on these issues is "especially concerning" since the trial court had found that the defendant suffered from an unnamed mental illness or defect. The court thus remanded to the trial court to make additional findings of fact addressing whether the defendant's waiver of rights at age 13 was knowing and intelligent. The court added a cautionary note about later evaluations:

> Certainly the trial court may consider later evaluations and events in its analysis of defendant's knowing and intelligent waiver at age 13 but should take care not to rely too much on hindsight. Hindsight is reputed to be 20/20, but hindsight may also focus on what it is looking for to the exclusion of things it may not wish to see. The trial court's focus must be on the relevant time period and defendant's circumstances at that time as a 13 year old boy who required a translator and who suffered from a "mental illness or defect" and not on the 10 years of litigation of this case since that time.

Knock & Talk

State v. Stanley, ___ N.C. App. ___, ___ S.E.2d __ (May 15, 2018)

The knock and talk conducted by officers in this drug case violated the fourth amendment. After a confidential informant notified officers that he had purchased heroin from a person at an apartment located at 1013 Simmons Street, officers conducted three controlled drug buys at the apartment. On all

three occasions the purchases were made at the back door of the apartment from an individual named Meager, who did not live there. Officers then obtained a warrant for Meager's arrest and approached the apartment to serve him. Upon arrival, they immediately walked down the driveway that led to the back of the apartment and knocked on the door. Events then transpired which lead to, among other things, a pat down of the defendant and the discovery of controlled substances on the defendant's person. The defendant was arrested and charged with drug offenses. He filed a motion to suppress which was denied. He pled guilty, reserving his right to appeal. On appeal, the court addressed the defendant's argument that the knock and talk was unlawful. It began by noting that officers may approach the front door and conduct a knock and talk without implicating the fourth amendment. However, it also noted that knock and talks occurring at a home's back door have been held to be unconstitutional. It held: to pass constitutional muster the officers were required to conduct the knock and talk by going to the front door, which they did not do. Rather than using the paved walkway that led directly to the unobstructed front door, they walked along the gravel driveway into the backyard to knock on the back door, which was not visible from the street. This was unreasonable. The court rejected the trial court's determination that the officers had an implied license to approach the back door because the confidential informant had purchased drugs there. The court stated: "the fact that the resident of a home may choose to allow certain individuals to use a back or side door does not mean that similar permission is deemed to have been given generally to members of the public." The court recognized that "unusual circumstances in some cases may allow officers to lawfully approach a door of the residence other than the front door in order to conduct a knock and talk." However no such unusual circumstances were presented in this case and the knock and talk was unconstitutional.

Search Warrants

State v. Jackson, 370 N.C. 337 (Dec. 8, 2017)
On appeal from a decision of a divided panel of the Court of Appeals, ___ N.C. App. ___, 791 S.E.2d 505 (2016), the court affirmed in a per curiam opinion. Over a dissent, the Court of Appeals had held that the search warrant was supported by sufficient probable cause. At issue was the reliability of information provided by a confidential informant. Applying the totality of the circumstances test, and although the informant did not have a "track record" of providing reliable information, the court found that the informant was sufficiently reliable. The court noted that the information provided by the informant was against her penal interest (she admitted purchasing and possessing marijuana); the informant had a face-to-face communication with the officer, during which he could assess her demeanor; the face-to-face conversation significantly increase the likelihood that the informant would be held accountable for a tip that later proved to be false; the informant had first-hand knowledge of the information she conveyed; the police independently corroborated certain information she provided; and the information was not stale (the informant reported information obtained two days prior).

State v. Howard, ___ N.C. App. ___, ___ S.E.2d ___ (June 5, 2018)
In this felony counterfeit trademark goods case, the court held that a search warrant was supported by probable cause. A Special Agent obtained a search warrant to search the residence and vehicles at 13606 Coram Place in Charlotte, North Carolina. The affidavit indicated that the Agent had 26 years of law enforcement experience and investigated thousands of counterfeit merchandise cases. It stated that in May 2013 a County police officer informed the Agent that the defendant was found in possession of possible counterfeit items and was charged with violating the peddlers license ordinance. The items seized were later confirmed to be counterfeit. In October 2013, as part of a compliance check/counterfeit merchandise interdiction operation at a shipping hub in Charlotte, the Agent intercepted two packages from a known counterfeit merchandise distributor in China, addressed to the defendant at the residence in question. The boxes contained counterfeit items. The Agent attempted a controlled delivery of the packages at the residence but no one was home. Two other packages previously delivered by the shipper were on the porch. The Agent contacted the defendant, who agreed to meet with him and agreed to bring the two

packages. The defendant consented to a search of the packages and they were found to contain counterfeit merchandise. The defendant said that she did not realize the merchandise was counterfeit and voluntarily surrendered all of the merchandise. She was issued a warning. In November 2013, while the Agent was working as part of a compliance check at a football game, the defendant was found selling counterfeit items. The defendant was charged with felony criminal use of counterfeit trademark and pled guilty to the lesser misdemeanor charge. During another compliance check outside of the Charlotte Convention Center in May 2015 the Agent found a booth with a large display of counterfeit items. The booth was unmanned but business cards listed the owner as "Tammy." The Agent verified that the address listed in the search warrant was the premises of the defendant, Tammy Renee Howard. During a search of the premises pursuant to the warrant at issue hundreds of counterfeit items with an approximate retail value of $2 million were seized. The defendant was indicted and unsuccessfully moved to suppress the evidence seized pursuant to the search. The defendant was convicted and appealed. On appeal the defendant asserted that the affidavit failed to contain sufficient evidence to support a reasonable belief that evidence of counterfeit items would be found at the premises. The affidavit included evidence of counterfeit merchandise being delivered to the premises, evidence that the defendant continued to conduct her illegal business after warnings and arrests, and evidence that the officer confirmed that the defendant resided at the premises. The defendant also argued that the evidence in the affidavit was stale, noting that the only evidence linking the premises with criminal activity allegedly took place in October 2013, some 20 months prior to the issuance of the warrant. However the evidence showed that the defendant was conducting a business involving counterfeit goods over a number of years at numerous locations and involving the need to acquire counterfeit merchandise from China. The court however found that a remand was required because the trial court failed to provide any rationale during its ruling from the bench to explain or support the denial of the motion. It thus remanded for the trial court to make appropriate conclusions of law to substantiate its ruling.

State v. Lenoir, ___ N.C. App. ___, ___ S.E.2d ___ (June 5, 2018)
In this possession of a firearm by a felon case, the court held that the affidavit contained insufficient details to support issuance of the search warrant. When officers went to the defendant's home to conduct a knock and talk, the defendant's brother answered the door and invited them in. An officer asked if anyone else was present and the brother said he was alone. The brother however gave consent for an officer to check a back bedroom. In the bedroom the officer saw a woman lying on a bed and a "glass smoke pipe" on a dresser. The officer applied for and was issued a search warrant for the residence. A search of the home revealed a shotgun in the bedroom. After the defendant admitted that he owned the gun, he was charged with possession of a firearm by a felon. The defendant unsuccessfully moved to suppress evidence from the search. The defendant was convicted and appealed. Applying the plain error standard, the court began by addressing whether the trial court did in fact err by denying the motion to suppress. Here, the affidavit stated that the officer saw a "smoke pipe used for methamphetamine" in the bedroom. It did not mention the officer's training and experience, nor did the officer offer information explaining the basis for his belief that the pipe was being used to smoke methamphetamine as opposed to tobacco. The affidavit did not explain how the officer was qualified to distinguish between a pipe used for lawful versus unlawful purposes. And it did not purport to describe in any detail the appearance of the pipe or contain any indication as to whether it appeared to have been recently used. It further lacked any indication that information had been received connecting the defendant or his home to drugs. The court stated: "a pipe—standing alone--is neither contraband nor evidence of a crime." Because the affidavit was insufficient to establish probable cause for issuance of the warrant, the trial court erred in denying the defendant's motion to suppress. The court went on to find that this error constituted plain error.

State v. Teague, ___ N.C. App. ___, ___ S.E.2d ___ (June 5, 2018)
In this drug case, the court held that the affidavit provided sufficient probable cause for a search of the residence in question. The affidavit indicated that after the officer received an anonymous tip that drugs were being sold at the residence, he conducted a "refuse investigation" at the premises. The defendant

asserted that this information was stale and could not properly support issuance of the warrant. The court noted that although the affidavit does not state when or over what period of time the tipster observed criminal activity at the residence, when the tipster relayed the information to the police or the exact date when the officer conducted the refuse search, the affidavit was based on more than just this information. Specifically, it included details regarding database searches indicating that the defendant had a waste and water utility account at the residence, that the defendant lived at the residence, that the officer was familiar with the residence and the defendant from his previous assignment as a patrol officer, and recounted the defendant's prior drug charges. To the extent the information in the anonymous tip was stale, it was later corroborated by the refuse search in which the officer found a cup containing marijuana residue, plastic bags containing marijuana residue and a butane gas container that the officer said is consistent with potential manufacturing of butane hash oil. Also the affidavit stated that the officer conducted the refuse investigation on Thursday, "regular refuse day." A common sense reading of the affidavit would indicate that this referred to the most recent Thursday, the date the affidavit was completed. The court continued noting that even if the anonymous tip was so stale as to be unreliable, the marijuana-related items obtained from the refuse search, the defendant's criminal history, and the database searches linking the defendant to the residence provided a substantial basis upon which the magistrate could determine that probable cause existed.

State v. Lewis, ___ N.C. App. ___, ___ S.E.2d __ (May 1, 2018) temp. stay granted, ___ N.C. ___, ___ S.E.2d ___ (May 17 2018)

In this robbery and kidnapping case, the court held that although the warrant application and accompanying affidavit contained sufficient information to establish probable cause to search two vehicles, it did not contain sufficient information to establish probable cause to search a residence where the defendant was arrested. The case involved a string of robberies of dollar stores. After the defendant was arrested, officers obtained a search warrant to search the premises where the defendant was arrested as well as two vehicles—a Nissan Titan and Kia Optima—at the premises. The defendant unsuccessfully moved to suppress evidence seized as a result of the warrant.

The court began by finding that the warrant application contained sufficient facts to establish probable cause to search the vehicles. The affidavit establishes that the same suspect committed four robberies, the first while driving a dark blue Nissan Titan and the fourth while driving a Kia Optima. The defendant was arrested on the day of the fourth robbery; the Nissan Titan and Kia Optima were parked at the premises where he was arrested. The court held that these facts were "more than sufficient for the magistrate to conclude that . . . there was probable cause to believe those vehicles contained evidence connected to the robberies."

The court went on to agree with the defendant that the affidavit did not establish probable cause to search the home. Although the defendant resided at the home, the affidavit did not state that. The only information in the affidavit tying the defendant to the home is a statement that officers observed a dark blue Nissan Titan at the residence while arresting the defendant. The court concluded: "this statement is sufficient to establish that [the defendant] was found at that location; but it does not follow from that statement that [the defendant] also must reside at that location." "Indeed," it continued, "from the information in the affidavit, [the home] could have been someone else's home with no connection to [the defendant] at all." It concluded: "That [the defendant] visited that location, without some indication that he may have stowed incriminating evidence there, is not enough to justify a search of the home."

State v. Frederick, ___ N.C. App. ___, ___ S.E.2d ___ (Apr. 17, 2018)

In this case involving drug trafficking and related charges, the court held, over a dissent, that the search warrant of the defendant's residence was supported by probable cause. The warrant was supported by the following information: A detective received information from a reliable confidential source regarding a mid-level drug dealer who sold MDMA, heroin, and crystal methamphetamine. The source had previously provided truthful information that the detective could corroborate, and the source was familiar with the packaging and sale of the drugs in question. The source had assisted the detective with the

purchase of MDMA one week prior to the issuance of the search warrant. For that purchase, the detective gave the source money to purchase the drugs. The source met a middleman with whom he then traveled to the defendant's residence. The detective saw the middleman enter the residence and return to the source after approximately two minutes. The detective found this conduct indicative of drug trafficking activity based on his training and experience. The source then met with the detective, and provided him with MDMA. A subsequent purchase of drugs occurred 72 hours prior to the issuance of the search warrant. The details of that transaction were very similar, except that the officer also saw two males enter the residence and exit approximately two minutes later, conduct he believed to be indicative of drug trafficking activity. This was sufficient to establish probable cause.

State v. McPhaul, ___ N.C. App. ___, 808 S.E.2d 294 (Nov. 7, 2017) review granted, ___ N.C. ___, ___ S.E.2d ___ (May 9 2018)
In this attempted murder and robbery case, a search warrant was supported by probable cause. On appeal, the defendant argued that the warrant lacked probable cause because a statement by a confidential informant provided the only basis to believe the evidence might be found at the premises in question and the supporting affidavit failed to establish the informant's reliability. The court disagreed. The detective's affidavit detailed a meeting between an officer and the confidential informant in which the informant stated that he witnessed described individuals running from the crime scene and said that one of them entered the premises in question. The informant's statement corroborated significant matters previously known to the police department, including the general time and location of the offenses, the victim's physical description of his assailants, and the suspect's possession of items similar in appearance to those stolen from the victim. The affidavit therefore demonstrated the informant's reliability.

Searches

Consent Searches

State v. Bullock, ___ N.C. App. ___, 811 S.E.2d 713 (Feb. 20, 2018)
(1) An officer's search of the defendant's rental car did not exceed the scope of the defendant's consent. During a traffic stop, the defendant consented to a search of the vehicle but not to a search of his personal belongings in it, a bag and two hoodies. After searching the defendant's vehicle, the officer's K-9--which had failed to alert to the vehicle--alerted to the presence of narcotics in the defendant's bag, which had been removed from the vehicle before the search began. The scope of the officer's search of the vehicle did not exceed the scope of the defendant's consent.
(2) The defendant did not revoke consent to search his vehicle. Although the defendant asked the officer what would happen if he revoked his consent, the defendant never revoked consent to search the vehicle, even after the officer explained that he needed to wait for a second officer to arrive to conduct the search.

Of People

State v. Fuller, ___ N.C. App. ___, 809 S.E.2d 157 (Dec. 19, 2017)
(1) In this drug case, a search of the defendant's person was a proper search incident to arrest. An officer stopped the defendant's vehicle for driving with a revoked license. The officer had recognized the defendant and knew that his license was suspended. The officer arrested the defendant for driving with a revoked license, handcuffed him and placed him in the police cruiser. The officer then asked the defendant for consent to search the car. According to the officer the defendant consented. The defendant denied doing so. Although an initial search of the vehicle failed to locate any contraband, a K-9 dog arrived and "hit" on the right front fender and driver's seat cushion. When a second search uncovered no contraband or narcotics, the officer concluded that the narcotics must be on the defendant's person. The defendant was brought to the police department and was searched. The search involved lowering the defendant's pants and long johns to his knees. During the search the officer pulled out, but did not pull down, the defendant's underwear and observed the defendant's genitals and buttocks. Cocaine eventually

was retrieved from a hidden area on the fly of the defendant's pants. The defendant unsuccessfully moved to suppress the drugs and was convicted. On appeal, the court rejected the defendant's argument that the strip search could only have been conducted with probable cause and exigent circumstances. The court noted however that standard applies only to roadside strip searches. Here, the search was conducted incident to the defendant's lawful arrest inside a private interview room at a police facility.
(2) The search of the defendant's person, which included observing his buttocks and genitals, was reasonable. The defendant had argued that even if the search of his person could be justified as a search incident to an arrest, it was unreasonable under the totality of the circumstances. Rejecting this argument, the court noted that the search was limited to the area of the defendant's body and clothing that would have come in contact with the cushion of the driver's seat where the dog alerted; specifically, the area between his knees and waist. Moreover, the defendant was searched inside a private interview room at the police station with only the defendant and two officers present. The officers did not remove the defendant's clothing above the waist. They did not fully remove his undergarments, nor did they touch his genitals or any body cavity. The court also noted the suspicion created by, among other things, the canine's alert and the failure to discover narcotics in the car. The court thus concluded that the place, manner, justification and scope of the search of the defendant's person was reasonable.

Of Vehicles

Collins v. Virginia, 584 U.S. ___, (May 29, 2018)
The automobile exception to the Fourth Amendment does not permit an officer, uninvited and without a warrant, to enter the curtilage of a home to search a vehicle parked there. Officer McCall saw the driver of an orange and black motorcycle with an extended frame commit a traffic infraction. The driver eluded McCall's attempt to stop the motorcycle. A few weeks later, Officer Rhodes saw an orange and black motorcycle traveling well over the speed limit, but the driver got away from him, too. The officers compared notes, determined that the two incidents involved the same motorcyclist, and that the motorcycle likely was stolen and in the possession of Ryan Collins. After discovering photographs on Collins' Facebook page showing an orange and black motorcycle parked at the top of the driveway of a house, Rhodes tracked down the address of the house, drove there, and parked on the street. It was later established that Collins' girlfriend lived in the house and that Collins stayed there a few nights per week. From the street, Rhodes saw what appeared to be a motorcycle with an extended frame covered with a white tarp, parked at the same angle and in the same location on the driveway as in the Facebook photo. Rhodes, who did not have a warrant, walked toward the house. He stopped to take a photograph of the covered motorcycle from the sidewalk, and then walked onto the residential property and up to the top of the driveway to where the motorcycle was parked. Rhodes removed the tarp, revealing a motorcycle that looked like the one from the speeding incident. He ran a search of the license plate and vehicle identification numbers, which confirmed that the motorcycle was stolen. Rhodes photographed the uncovered motorcycle, put the tarp back on, left the property, and returned to his car to wait for Collins. When Collins returned, Rhodes approached the door and knocked. Collins answered, agreed to speak with Rhodes, and admitted that the motorcycle was his and that he had bought it without title. Collins was charged with receiving stolen property. He unsuccessfully sought to suppress the evidence that Rhodes obtained as a result of the warrantless search of the motorcycle. He was convicted and his conviction was affirmed on appeal. The U.S. Supreme Court granted certiorari and reversed. The Court characterized the case as arising "at the intersection of two components of the Court's Fourth Amendment jurisprudence: the automobile exception to the warrant requirement and the protection extended to the curtilage of a home." After reviewing the law on these doctrines, the Court turned to whether the location in question is curtilage. It noted that according to photographs in the record, the driveway runs alongside the front lawn and up a few yards past the front perimeter of the house. The top portion of the driveway that sits behind the front perimeter of the house is enclosed on two sides by a brick wall about the height of a car and on a third side by the house. A side door provides direct access between this partially enclosed section of the driveway and the house. A visitor endeavoring to reach the front door would have to walk partway up the

driveway, but would turn off before entering the enclosure and instead proceed up a set of steps leading to the front porch. When Rhodes searched the motorcycle, it was parked inside this partially enclosed top portion of the driveway that abuts the house. The Court concluded that the driveway enclosure here is properly considered curtilage. The Court continued, noting that by physically intruding on the curtilage, the officer not only invaded the defendant's fourth amendment interest in the item searched—the motorcycle—but also his fourth amendment interest in the curtilage of his home. Finding the case an "easy" one, the Court concluded that the automobile exception did not justify an invasion of the curtilage. It clarified: "the scope of the automobile exception extends no further than the automobile itself." The Court rejected Virginia's request that it expand the scope of the automobile exception to permit police to invade any space outside an automobile even if the Fourth Amendment protects that space. It continued:

> Just as an officer must have a lawful right of access to any contraband he discovers in plain view in order to seize it without a warrant, and just as an officer must have a lawful right of access in order to arrest a person in his home, so, too, an officer must have a lawful right of access to a vehicle in order to search it pursuant to the automobile exception. The automobile exception does not afford the necessary lawful right of access to search a vehicle parked within a home or its curtilage because it does not justify an intrusion on a person's separate and substantial Fourth Amendment interest in his home and curtilage.

It also rejected Virginia's argument that the Court's precedent indicates that the automobile exception is a categorical one that permits the warrantless search of a vehicle anytime, anywhere, including in a home or curtilage. For these and other reasons discussed in the Court's opinion, the Court held that "the automobile exception does not permit an officer without a warrant to enter a home or its curtilage in order to search a vehicle therein." It left for resolution on remand whether Rhodes' warrantless intrusion on the curtilage may have been reasonable on a different basis, such as the exigent circumstances exception to the warrant requirement.

Byrd v. United States, 584 U.S. ___ (May 14, 2018)
Pennsylvania State Troopers pulled over a car driven by Terrence Byrd. Byrd was the only person in the car. During the traffic stop the troopers learned that the car was rented and that Byrd was not listed on the rental agreement as an authorized driver. For this reason, the troopers told Byrd they did not need his consent to search the car, including its trunk where he had stored personal effects. A search of the trunk uncovered body armor and 49 bricks of heroin. The defendant was charged with federal drug crimes. He moved to suppress the evidence. The Federal District Court denied the motion and the Third Circuit affirmed. Both courts concluded that, because Byrd was not listed on the rental agreement, he lacked a reasonable expectation of privacy in the car. The Supreme Court granted certiorari to address the question whether a driver has a reasonable expectation of privacy in a rental car when he or she is not listed as an authorized driver on the rental agreement. The Government argued, in part, that drivers who are not listed on rental agreements always lack an expectation of privacy in the automobile based on the rental company's lack of authorization alone. The Court found that "[t]his per se rule rests on too restrictive a view of the Fourth Amendment's protections." It held, in part: "the mere fact that a driver in lawful possession or control of a rental car is not listed on the rental agreement will not defeat his or her otherwise reasonable expectation of privacy." The Court remanded on two arguments advanced by the Government: that one who intentionally uses a third party to procure a rental car by a fraudulent scheme for the purpose of committing a crime is no better situated than a car thief (who, the Court noted, would lack a legitimate expectation of privacy); and that probable cause justified the search in any event.

Of Computerized Devices

State v. Terrell, ___ N.C. App. ___, 810 S.E.2d 719 (Feb. 6, 2018) temp. stay granted, ___ N.C. ___, 809 S.E.2d 499 (Feb 23 2018)

In this peeping and sexual exploitation of a minor case, and with one judge dissenting in part, the court held that the trial court erred by concluding that an officer's warrantless search of the defendant's thumb drive was lawful. While examining a thumb drive belonging to the defendant, the defendant's girlfriend saw an image of her nine-year-old granddaughter sleeping without a shirt. Believing the image was inappropriate, she contacted law enforcement and gave them the thumb drive. The thumb drive was placed in an evidence locker. Later, an officer conducted a warrantless search of the thumb drive to locate the image in question. During this search he discovered images of other partially or fully nude minors that the girlfriend never saw. Using this information in a warrant application, the officer obtained a search warrant to forensically examine the contents of the thumb drive for "contraband images of child pornography and evidence of additional victims and crimes." The executed warrant yielded 12 incriminating images located in a different subfolder than the original image. After the defendant was charged, he unsuccessfully moved to suppress the contents of the thumb drive. The trial court determined that the girlfriend's private viewing of the thumb drive defeated the defendant's expectation of privacy in its contents and thus that the officer's warrantless search was lawful under the private search exception to the warrant requirement. After conviction, the defendant appealed. The court held that the trial court erred by concluding that the girlfriend's thumb drive search effectively frustrated the defendant's expectation of privacy in its entire contents. Distinguishing a prior ruling in a case involving a videotape and citing the U.S. Supreme Court's *Riley* case (declining to extend the search-incident-to-arrest exception to police searches of digital data on cell phones), the court found that with respect to this search of digital data on an electronic storage device, the defendant retained an expectation of privacy in the information not revealed by his girlfriend's search. In so ruling the court held that an electronic storage device should not be viewed as a single container for Fourth Amendment purposes. It then turned to whether the trial court's findings supported its conclusion that the officer's search remained within the permissible scope of the girlfriend's prior search and whether it was reasonable under the circumstances, and was, therefore, a valid warrantless search under the private-search doctrine. In this respect it held: The officer's warrantless search was not authorized under the private-search doctrine, since the trial court's findings establish that he did not conduct his warrantless search with the requisite "virtual certainty" that the thumb drive contained only contraband, or that his inspection of its data would not reveal anything more than what the girlfriend already told him. However, finding the record insufficient to determine whether the trial court would have determined that the search warrant was supported by probable cause without the tainted evidence from the unlawful search, the court remanded to the trial court to determine the validity of the search warrant.

Pen Registers

State v. Forte, ___ N.C. App. ___, 810 S.E.2d 339 (Jan. 16, 2018)
The trial court properly issued an order authorizing a pen register for the defendant's phone. The order was issued pursuant to the Stored Communications Act (SCA). The SCA requires only reasonable suspicion for issuance of an order for disclosure. The order in question was based on information provided by a known drug dealer informant, Oliver. The court found that there were "multiple indications of reliability" of Oliver's statements, including that he made substantial admissions against his penal interest. Also, Oliver provided a nickname, general description of the defendant, background information from dealing with him previously, and current travel information of the suspect. Oliver spoke with the officer, and the two spoke more than once, adding to the reliability of his tip. These facts met the standard under the SCA.

Criminal Offenses

Aiding & Abetting

State v. Cannon, ___ N.C. ___, 809 S.E.2d 567 (Mar. 2, 2018)

The court per curiam affirmed a divided panel of the Court of Appeals, ___ N.C. App. ___, 804 S.E.2d 199 (2017). Over a dissent, the court of appeals had held that the trial court did not err by denying the defendant's motion to dismiss a charge of aiding and abetting larceny. The charges arose out of the defendant's involvement with store thefts. A Walmart loss prevention officer observed Amanda Eversole try to leave the store without paying for several clothing items. After apprehending Eversole, the loss prevention officer reviewed surveillance tapes and discovered that she had been in the store with William Black, who had taken a number of items from store shelves without paying. After law enforcement was contacted, the loss prevention officer went to the parking lot and saw Black with the officers. Black was in the rear passenger seat of an SUV, which was filled with goods from the Walmart. A law enforcement officer testified that when he approached Black's vehicle the defendant asked what the officers were doing. An officer asked the defendant how he knew Black and the defendant replied that he had only just met "them" and had been paid $50 to drive "him" to the Walmart. The defendant also confirmed that he owned the vehicle. Citing this and other evidence, the court of appeals held that the trial court did not err by denying the motion to dismiss.

In its per curiam opinion, the supreme court "specifically disavowed" the taking of judicial notice by the court of appeals of the prevalence of Wal-Mart stores in Gastonia and in the area between Gastonia and Denver, as well as of the "ubiquitous nature of Wal-Mart stores."

Accessory After the Fact

State v. Ditenhafer, ___ N.C. App. ___, ___ S.E. 2d ___ (Mar. 20, 2018)
Over a dissent, the court held that the trial court erred by denying the defendant's motion to dismiss a charge of accessory after the fact to sexual activity by a substitute parent. This charge was based on the allegation that the defendant was an accessory after the fact by not reporting her husband Williams's sexual abuse of her daughter. To support a conviction of accessory after the fact the State must prove that a felony was committed; the defendant knew that the person assisted was the person who committed the felony; and the accused rendered assistance to the felon personally. Here, the defendant argued that the evidence was insufficient as to the third element. Specifically, she argued that merely failing to report a crime is insufficient evidence of this element. The court agreed. However, it was careful to note that it did not address whether the defendant's affirmative acts, such as destroying physical evidence of the perpetrator's sexual activity with the daughter and of telling investigators that a report of abuse was just "lies" by her daughter, as those activities were not alleged in the indictment.

Conspiracy

State v. Stroud, ___ N.C. App. ___, ___ S.E.2d __ (May 1, 2018)
The evidence was sufficient to support a charge of conspiracy to commit armed robbery. On appeal, the defendant argued that there was insufficient evidence of an agreement to commit the robbery. Here, the victim identified the defendant and others as the individuals who robbed him. Additionally, the defendant confirmed to a detective that his accomplice's statement that the robbery was in retaliation for the victim's robbery of another person was accurate. This was sufficient evidence of a conspiracy.

State v. Stimpson, ___ N.C. App. ___, 807 S.E.2d 603 (Nov. 7, 2017)
In a case in which the defendant was charged with five indictments alleging five separate offenses of conspiracy to commit robbery arising from five separate incidents, the court held, over a dissent, that the trial court did not err by denying the defendant's motion to dismiss four of the charges. On appeal, the defendant argued that there was only one agreement and thus only one conspiracy charge was proper. The majority disagreed, concluding, in part, that the random nature and happenstance of the robberies did not indicate a one-time, pre-planned conspiracy. It noted that the victims and crimes committed arose at random and by pure opportunity.

Homicide

State v. Cox, ___ N.C. App. ___, 808 S.E.2d 339 (Nov. 21, 2017)
The trial court did not err by denying the defendant's motion to dismiss a first-degree murder charge based on the theory of lying in wait. The defendant asserted that no ambush occurred because the defendant announced his presence. The evidence showed that the victim was in his residence with friends when the defendant arrived after dark. The victim went outside to speak with the defendant. There was no evidence that the defendant threatened or directed harm at the victim. The victim returned to his trailer, unharmed, after speaking with the defendant. The defendant waited for the victim to go back inside and then fired his weapon into the trailer, killing the victim. The victim had no warning that the defendant intended any harm. When the defendant spoke with the victim, the defendant told the victim to send another person outside, indicating that he only had an issue with the other person. Therefore, the court concluded, the victim was taken by complete surprise and had no opportunity to defend himself.

State v. Madonna, ___ N.C. App. ___, 806 S.E.2d 356 (Oct. 17, 2017)
In this murder case, there was sufficient evidence of premeditation and deliberation. The evidence showed that the victim suffered from a heart condition and other ailments. In the months before his death, the defendant and the victim--who were married--were arguing about financial issues. The defendant began a romantic relationship with her therapist and planned to ask the victim for divorce. A search of the home computer discovered Internet searches including "upon death of the veteran," "can tasers kill people," "can tasers kill people with a heart condition," "what is the best handgun for under $200," "death in absentia USA," and "declare someone dead if missing 3 years." On the date of death, the defendant visited her nephew, expressed concern about her safety due to break-ins in her neighborhood, and received from her nephew a gun and a knife. Shortly after that, she returned home and asked the victim to go on a drive with her. The defendant took the gun and knife in the car and used the weapons to kill the victim, shooting him and stabbing him approximately 12 times. Later in the day, the defendant messaged her therapist "it's almost done" and "it got ugly." After the incident, the defendant got rid of her bloodstained clothing, threw away the victim's medications and identification, and said that he had either gone to Florida or was at a rehabilitation center.

Assaults

State v. Harding, ___ N.C. App. ___, ___ S.E.2d ___ (Mar. 6, 2018) temp. stay granted, ___ N.C. ___, 811 S.E.2d 601 (Apr 11 2018)
The trial court did not err by sentencing the defendant for both of assault on a female and assault by strangulation. Prefatory language in G.S. 14-33(c) provides that "Unless the conduct is covered under some other provision of law providing greater punishment," assault on a female is punished as a Class A1 misdemeanor. Here, the defendant was also punished for the higher class offense of assault by strangulation. The prefatory clause of G.S. 14-33(c) only applies when both assaults are based on the same conduct. Here, the assaults were based on different conduct. The defendant's act of pinning down the victim and choking her to stop her from screaming supported the assault by strangulation conviction. His acts of grabbing her hair, tossing her down a rocky embankment, and punching her face and head multiple times supported the assault on a female conviction. The two assaults were sufficiently separate and distinct. First, they required different thought processes. The defendant's decision to grab the victim's hair, throw her down the embankment and repeatedly punch her required a separate thought process from his decision to pin her down and strangle her to quiet her screaming. Second the assaults were distinct in time. After the defendant's initial physical assault and then the strangulation, he briefly ceased his assault when she stopped screaming and resisting. But when she resumed screaming and he again hit her in the head multiple times. Third, the victim sustained injuries to different parts of her body.

State v. Cromartie, ___ N.C. App. ___, 810 S.E.2d 766 (Feb. 6, 2018)

Because misdemeanor larceny and simple assault are lesser included offenses of common law robbery, the trial court erred by sentencing the defendant for all three offenses. The court rejected the State's argument that the defendant was not prejudiced by this error because all three convictions were consolidated for judgment and the defendant received the lowest possible sentence in the mitigated range. The court noted that the State's argument ignores the collateral consequences of the judgment. The court thus arrested judgment on the convictions for misdemeanor larceny and simple assault.

State v. Burwell, ___ N.C. App. ___, 808 S.E.2d 583 (Dec. 5, 2017)
(1) The trial court did not err by denying the defendant's motion to dismiss a charge of assault on a law enforcement officer inflicting serious bodily injury. The defendant asserted that he only used the amount of force reasonably necessary to resist an unlawful arrest. In the case, the officer responded to a 911 call reporting a suspicious person who refused to leave a public housing complex. The person was described as a male in his 30s wearing all black and near or around an older model, a black truck. The police department had an agency agreement with the complex giving officers the authority to remove trespassers from the property. Upon arrival the officer saw the male defendant wearing all black clothing and standing in front of an older model, black truck with a beer can in his hand. When the two spoke, the officer could smell a strong odor of alcohol emitting from the defendant. After further interaction, the officer explained to the defendant that he was trespassing. In part because of his impairment, the officer asked the defendant how he was going to get home. The defendant gave no clear answer. The officer informed the defendant that he was being "trespassed" and although not under arrest he would be taken for a "detox." The officer attempted to handcuff the defendant in accordance with department policy to handcuff people transported by the police. When the officer reached for his handcuff pouch, the defendant became aggressive and used foul language, tensed up and tried to pull away from the officer. Trying to get control of the defendant, the officer pushed the defendant towards his vehicle. The officer informed the defendant that he was under arrest for resisting delaying and obstructing an officer. The defendant tried to turn around, raising his fist as if to "throw a punch." The officer pointed his Taser at the defendant giving commands and advising him that he was under arrest. The defendant fled and the officer pursued. When the defendant fell to the ground on his back, the officer commanded him to roll over and put his hands behind his back. The defendant refused to comply and raised his feet and hands towards the officer "taking a combat stance." The officer fired his Taser. However, the defendant was able to remove one of the Taser leads and took flight again. After the officer tackled the defendant, a struggle ensued. Backup arrived and assisted in securing the defendant. The officer sustained injuries from the struggle. There was sufficient evidence of the first element of the offense, an assault on the officer. Specifically, the officer testified that the defendant hit and bit him. There also was sufficient evidence with respect to serious bodily injury. Specifically, the officer testified that the bites caused extreme pain, skin removal, permanent scarring, and hospitalization. Photographs of the injuries were shown to the jury, as were the officer's scars. The evidence also was sufficient to establish the third element, that the victim was a law enforcement officer performing his official duties at the time of the assault. The evidence showed that the officer was attempting to discharge his official duties as a routine patrol officer by responding to a report about a trespasser, conducting investigative work and acting on the results of his investigation. Finally, the evidence was sufficient to establish that the defendant knew or had reasonable grounds to know that the victim was a law enforcement officer. Here, the officer arrived in a marked patrol vehicle, was in uniform and told the defendant that he was a law enforcement officer.
(2) The trial court did not err by failing to instruct the jury on the right to resist an unlawful arrest. Here, an arrest occurred when under G.S. 122C-303, the officer attempted, against the defendant's will, to take the publicly intoxicated defendant to jail to assist him. However, probable cause to arrest the defendant for second-degree trespass existed at this time. It does not matter that the officer did not arrest the defendant for that offense. The arrest was lawful because there was probable cause that the defendant had committed the trespass offense in the officer's presence. Throughout the officer's investigation, the defendant remained at the complex without authorization, even after he had been notified not to enter or remain there by the officer, a person authorized to so notify him. The court rejected the defendant's

argument that second-degree trespass does not create probable cause to arrest because that offense is a misdemeanor.
(3) The trial court did not err by failing to instruct the jury on the right to defend oneself from excessive force by a law enforcement officer where the evidence did not show that the officer's use of force was excessive.

State v. Cox, ___ N.C. App. ___, 808 S.E.2d 339 (Nov. 21, 2017)
(1) The trial court did not err by denying the defendant's motion to dismiss a charge of assault with a deadly weapon with intent to kill inflicting serious injury on victim Stokes. The court rejected the defendant's argument that the State was required to prove that the defendant specifically intended to kill Stokes when he fired into a trailer when Stokes and others were present. The court reasoned that "It is not determinative to this issue of whether or not Defendant knew Stokes was in the trailer." It concluded: "there was sufficient evidence for the jury to infer Defendant intended to kill whoever was inside the trailer." The court noted that, among other things, the defendant fired numerous shots into the trailer knowing it was occupied.
(2) The court rejected the defendant's argument that the assault conviction should be reversed because the trial court did not instruct the jury on the doctrine of transferred intent, noting that the State did not argue transferred intent and neither party requested a transferred intent instruction. Rather, the State's evidence showed that the defendant knew a trailer was occupied by at least two people when he fired into it numerous times. Based on the nature of the assault, the evidence was sufficient for the jury to find that the defendant intended to kill whoever was in the trailer.

State v. McPhaul, ___ N.C. App. ___, 808 S.E.2d 294 (Nov. 7, 2017) review granted, ___ N.C. ___, ___ S.E.2d ___ (May 9 2018)
The trial court erred by imposing sentences for assault with a deadly weapon with intent to kill inflicting serious injury and assault inflicting serious bodily injury based on the same incident. The statute proscribing the lesser of the two offenses, a Class F felony, includes the following prefatory language: "Unless the conduct is covered under some provision of law providing greater punishment." Here, the defendant was also convicted of the more serious assault, a Class C felony. Thus multiple punishment is precluded.

Stalking

State v. Mitchell, ___ N.C. App. ___, ___ S.E.2d ___ (June 5, 2018)
The trial court did not err by denying the defendant's motion to dismiss a felony stalking charge. Felonious stalking occurs when the defendant commits the offense while a court order is in effect prohibiting the conduct at issue. The State presented evidence that at the time of the conduct at issue, the defendant was subject to conditions of pretrial release orders specifying that he have no contact with the victim. The defendant asserted that he was not subject to these orders because he never posted bond and remained in jail during the relevant time period. He argued that because he was not "released," the conditions of release orders could not apply to him. The court rejected this argument finding that the relevant orders were in effect until the charges were disposed of, regardless of whether the defendant remained committed or was released. Here, two separate pretrial conditions orders were at issue. The court found that at all relevant times either the first order, the second order or both were in effect. Furthermore, the orders included the prohibition that the defendant have no contact with the victim.

Abuse Offenses

State v. Reed, __ N.C. ___, ___ S.E.2d __ (May 11, 2018)
In case where the defendant was convicted of misdemeanor child abuse and contributing to the delinquency of a minor, the court reversed the opinion below, State v. Reed, ___ N.C. App. ___, 789

S.E.2d 703 (2016), for the reasons stated in the dissent. Considering the defendant's evidence, along with the State's evidence, in this appeal from a denial of a motion to dismiss, the Court of Appeals held, over a dissent, that the evidence was insufficient to support a conviction of misdemeanor child abuse. The evidence showed that the defendant went to use the bathroom in her home for a few minutes, and her toddler, Mercadiez, managed to fall into their outdoor pool and drown. The defendant's evidence, which supplemented and did not contradict the State's evidence, showed that the defendant left the child in the care of another responsible adult while she used the bathroom. Although the concurring judge did not agree, the court went on to hold that the motion should also have been granted even without consideration of the defendant's evidence. Specifically, the State's evidence failed to establish that the defendant's conduct was "by other than accidental means." Reviewing prior cases, the court found: "the State's evidence never crossed the threshold from 'accidental' to 'nonaccidental.'" It continued:

The known danger here was an outdoor pool. The only purposeful action defendant took, even in the light most favorable to the State, was that defendant went to the bathroom for five to ten minutes. In choosing to go to the restroom, defendant did not leave her child in a circumstance that was likely to create physical injury. . . . If defendant's conduct herein is considered enough to sustain a conviction for misdemeanor child abuse, it seems that any parent who leaves a small child alone in her own home, for even a moment, could be prosecuted if the child is injured during that time, not because the behavior she engaged in was negligent or different from what all other parents typically do, but simply because theirs is the exceedingly rare situation that resulted in a tragic accident.

With the same lineup of opinions, the court held that the evidence was insufficient to support a conviction of contributing to the delinquency of a minor.

The dissenting judge believed the evidence was sufficient to support both convictions. The dissenting judge broke from the majority, finding that the defendant's evidence regarding the events immediately before the child drowned was contradictory to, not consistent with, the State's evidence. According to the dissenting judge, the critical issue was not whether adults were in the home at the time but rather who was supervising the child. "On that critical issue," the dissenting judge concluded, "the State's evidence showed that defendant left her 19-month-old baby in the care of [a] nine-year-old [child]. I simply do not agree with the majority's assertion that the acknowledged presence of [another adult] somewhere inside a multi-room house, without any evidence that he could hear or see Mercadiez as she played outside on the side porch with other children, was in any way relevant to the question of who was supervising Mercadiez when she wandered away to her death." Citing the evidence presented, the dissenting judge disagreed that the State offered no evidence of a lack of supervision by the defendant and asserted that because the defendant's husband's version of the events was inconsistent with the State's evidence, it should not have been considered with respect to the motion to dismiss. The dissenting judge found that the evidence was sufficient to support the convictions for misdemeanor child abuse and contributing to the delinquency of a juvenile by neglect. The dissenting judge summarized the evidence as follows:

> Taken together the State's evidence at trial shows that defendant knew (1) how quickly unsupervised toddlers in general could wander away into dangerous situations, (2) that two of her young children, including a toddler who appears to have been Mercadiez, had wandered unsupervised to the edge of the street only the month before, (3) that some of defendant's older children were in the habit of leaving gates open which allowed younger children to wander, (4) how attractive and dangerous open water sources like her backyard pool could be for toddlers, and (5) that defendant had previously been held criminally responsible in the death of a toddler she was babysitting after that child was left unsupervised inside defendant's home for five to fifteen minutes, managed to get outside, and wandered into a creek where she drowned. Despite this knowledge, defendant still chose to (6) leave toddler Mercadiez outside on a side porch (7) supervised only by other children (8) while defendant spent five to ten minutes in a bathroom where she could not see or hear her youngest child.

State v. Dixon, ___ N.C. App. ___, 811 S.E.2d 705 (Feb. 20, 2018) temp. stay granted, ___ N.C. ___, 809 S.E.2d 887 (Mar 7 2018)
In a case where the defendant was convicted of child abuse inflicting serious bodily injury under G.S. 14-318.4(a3), there was insufficient evidence that the victim experienced serious bodily injury. The victim, the defendant's daughter, experienced a femur fracture that required surgery temporarily placing rods in her leg, and resulting in permanent scarring. The court rejected the State's argument that the presence of a scar is sufficient by itself to show serious bodily injury. Here, the victim's scars resulted from surgery. By the time of trial, the scars had healed and she was engaged in unrestricted physical activities. The State's expert testified that the child should have no permanent disfiguration or any loss or impairment of function due to the scars. On these facts the scars by themselves are insufficient evidence of permanent disfigurement. The court went on to reject the State's argument that the victim suffered extreme pain and loss of use of her leg for a period of time, noting that the statute requires more. It is not enough for the victim to suffer extreme pain; the statute requires a permanent or protracted condition that causes extreme pain. Here, the victim testified that her leg stopped hurting long before trial and the evidence showed she was cleared to engage in normal activities within nine months of her surgery. No testimony or other evidence showed that the victim was ever at risk of death due to her injury. Thus, the state presented insufficient evidence of serious bodily injury. The evidence was sufficient however to support a conviction of child abuse resulting in serious physical injury.

Sexual Assaults

State v. Harding, ___ N.C. App. ___, ___ S.E.2d ___ (Mar. 6, 2018) temp. stay granted, ___ N.C. ___, 811 S.E.2d 601 (Apr 11 2018)
There was sufficient evidence to support a conviction for first-degree sex offense. The defendant challenged the sufficiency of the evidence with respect to infliction of serious personal injury on the victim. The defendant, a 43-year-old male approximately 5'10" tall with a medium build, physically and sexually assaulted a 22-year-old female, approximately 5'1" tall and weighing only 96 pounds. The defendant unexpectedly grabbed the victim and threw her down a steep, rocky embankment. He punched her face and head numerous times, and straddled her, pinned her down and strangled her. Although he initially ceased his assault when she stopped resisting, he resumed it when she resumed screaming, punching her face and head before forcing her to perform oral sex on him. The victim was diagnosed with a head injury and experienced pain throughout her body for days. She experienced two black eyes, body bruises, and hoarseness in her voice; and she had difficulty concentrating. At trial the victim testified that she continued to have trouble trusting people, opening up to others, and maintaining friendships. Evidence showed that the victim had difficulty concentrating and remembering and suffered from short-term memory loss from the attack, all of which caused her problems at work. This constitutes sufficient evidence of serious personal injury.

State v. Phachoumphone, ___ N.C. App. ___, 810 S.E.2d 748 (Feb. 6, 2018)
(1) The evidence was sufficient to sustain a conviction for indecent liberties. The defendant challenged only the sufficiency of the evidence with respect to whether he took or attempted to take an indecent liberty with the victim. Having concluded that the State presented substantial evidence that the defendant digitally penetrated the child victim, the court concluded that the same act supports the challenged element of this offense.
(2) In this child sexual assault case, the evidence was sufficient to support a conviction for statutory sex offense with a child by an adult. Specifically, the court rejected the defendant's argument that there was insufficient evidence that he digitally penetrated the victim. Among other things: during the victim's testimony, she demonstrated what the defendant did to her vagina by inserting her finger into a hole that the interpreter created with her hand; the victim stated that the defendant "put his finger in" her private part; a doctor testified that the six-year-old victim's hymen was substantially missing, an irregular finding

which could only have been caused by a penetrating injury; and the doctor observed redness in the vaginal area behind where the hymen was, which indicated a penetrating injury within the last 48 hours.

Kidnapping & Related Offenses

State v. China, ___ N.C. ___, 811 S.E.2d 145 (Apr. 6, 2018)
On appeal from the decision of a divided panel of the Court of Appeals, ___ N.C. App. ___, 797 S.E.2d 324 (2017), the court reversed, holding that because there was evidence of restraint beyond that inherent in the commission of the sex offense the defendant could be convicted of both the sex offense and kidnapping. The defendant was convicted of a number of several offenses, including first-degree sexual offense and second-degree kidnapping. The Court of Appeals concluded that there was insufficient evidence of restraint separate and apart from that inherent in the sex offense to support the kidnapping conviction. The Supreme Court disagreed. Here, the defendant exercised restraint over the victim during the sexual offense. However, after that offense was completed, the defendant pulled the victim off the bed, causing his head to hit the floor, and called to an accomplice who then, with the defendant, physically attacked the victim, kicking and stomping him. These additional actions increased the victim's helplessness and vulnerability beyond the initial attack that enabled the defendant to commit the sex offense. The court concluded: these actions constituted an additional restraint, which exposed the victim to greater danger than that inherent in the sex offense. For example, the victim testified that as a result of the kicking and stomping on his knees and legs, which had not been targeted or harmed during the sex offense, he was unable to walk for 2 to 3 weeks after the attack.

State v. Diaz, ___ N.C. App. ___, 808 S.E.2d 450 (Nov. 21, 2017) review granted, ___ N.C. ___, ___ S.E.2d ___ (May 9 2018)
The trial court did not err by denying the defendant's motion to dismiss a charge of abduction of a child under G.S. 14-41. The defendant, who had a sexual relationship with the child victim, argued that the evidence showed that the child voluntarily left her home. The court rejected this argument, noting in part that the defendant induced the child to leave with him by telling her that if she didn't come with him she would never see him again.

Larceny & Possession

State v. McDaniel, ___ N.C. App. ___, ___ S.E.2d __ (May 15, 2018)
Over a dissent, the court held that the evidence was insufficient to support the defendant's convictions for felonious breaking and entering and larceny after a breaking and entering, which the State pursued under the doctrine of recent possession. On 1 April 2014 the property owner discovered that items were missing from his home. The next day an officer received information that the missing property was located at a house at 24 Ridge Street. The officer saw items matching the description of the stolen items outside of the residence. A person at the premises told the officer that someone driving a white pickup truck brought the items to the premises earlier that day. The owner later identified the items as property missing from his home. On 4 April 2014 law enforcement received a report that someone again had entered the home, left in a white pickup truck and turned down Ridge Street. An officer went to Ridge Street and found the defendant in a white pickup truck parked across from 24 Ridge Street. With consent, the officer searched the truck and found items, which the property owner said "might have been" in his home on 1 April 2014. The defendant was arrested and charged with felony breaking and entering and larceny after breaking and entering on or about 20 March 2014 and felony breaking and entering and larceny after breaking and entering on 4 April 2014. The trial court dismissed the 4 April 2014 breaking and entering charge. When the defendant was found guilty of the remaining charges the trial court arrested judgment on the 4 April 2014 larceny charge. The defendant appealed, arguing that the State presented insufficient evidence that the defendant was the perpetrator of the 20 March 2014 offenses. The State's case relied on the doctrine of recent possession. The court noted that the defendant was not convicted of any offenses in connection

with the stolen property that was found in her possession on 4 April 2014. Rather, she was convicted on charges stemming from activity on or about 20 March 2014. The items associated with those charges were found by the officer at 24 Ridge Street on 2 April 2014 when the defendant was not present. Thus, the State's evidence suggested up to two weeks may have passed between the alleged crimes and the discovery of the stolen property, which was not actually found in the defendant's possession. Although the defendant acknowledged that she was briefly in possession of the stolen property when she transported it to Ridge Street, possession of stolen property is, by itself, insufficient to raise a presumption of guilt. The court noted, in part, that the defendant testified that she did not know the property was stolen, and believed it to belong to a friend of her acquaintance when she put it in her truck, and there was no evidence tending to show that she possessed, controlled, or exercised dominion over the property during the two weeks between the crimes and her transportation of it. For these and other reasons, the court found the State's evidence insufficient to support an inference that the defendant broke into the residence and stole the property she transported to Ridge Street two weeks later. Specifically, it found that the State failed to prove beyond a reasonable doubt the second element of the doctrine of recent possession, that the defendant had possession of the property, subject to his or her control and disposition to the exclusion of others.

State v. Quinones, ___ N.C. App. ___, 811 S.E.2d 734 (Mar. 20, 2018)
In this possession of a stolen motor vehicle case, the trial court's jury instruction did not contain an incorrect statement of law regarding the element of possession. The evidence tended to show that an officer saw an individual driving a vehicle that was reported stolen. After an accident, the officer saw an individual wearing a white T-shirt flee from the vehicle's driver side. An officer at the scene observed that only the driver's door had been left open. Officers maintained almost constant visual contact with the defendant as he fled. The defendant was apprehended shortly afterwards wearing a white T-shirt. Instructing the jury on possession, the trial court stated that a person has actual possession of a vehicle if the person is aware of its presence, is in the car, such as driving, and has both the power intent to control its disposition or use. The court held that the instruction provided an accurate statement of law arising from the evidence presented and that the defendant's argument that the instruction shifted the burden of proof to the defendant was without merit. The evidence was sufficient for the jury to infer that the defendant operated the stolen vehicle and was not merely a passenger.

State v. Campbell, ___ N.C. App. ___, 810 S.E.2d 803 (Feb. 6, 2018) temp. stay granted, ___ N.C. ___, 809 S.E.2d 390 (Feb 16 2018)
In a case involving a theft of property from a church, the court held, over a dissent, that the evidence was insufficient to support a larceny conviction. The defendant argued that the State failed to present sufficient evidence that the defendant took the property in question. The evidence showed that the church had evening services on August 15 which ended at about 9 PM. The next morning the church secretary locked the church, after discovering that it had been left unlocked. On August 19 the Pastor discovered that audio equipment, including microphones, sound system wires, a music receiver, and a pair of headphones, was missing from the church. Additionally, some computer equipment had been moved around. There were no signs of forced entry. No fingerprints or DNA evidence were taken from the premises. However, an officer found a wallet in the baptistery changing area containing the defendant's license. None of the stolen equipment was ever located. Two days later a Detective met with the defendant, who was incarcerated in jail on an unrelated matter. The defendant admitted that he had been at the church and he had "done some things" but didn't recall all of what he had done. He remembered that the door to the church was open and that he went in to get a drink of water and to pray. He said he left the church and called 911 after having chest pains. When emergency medical services arrived, the defendant was not carrying a bag and had nothing in his pockets. On these facts, the State's evidence relies solely on the fact that the defendant was in the church during a four-day time period when the stolen items were taken. This is insufficient to establish that the defendant committed the larceny.

Robbery

State v. Hendricksen, ___ N.C. App. ___, 809 S.E.2d 391 (Jan. 2, 2018)
Addressing the issue as one of legislative intent, the court held that the trial court did not err by imposing punishment for armed robbery in Johnston County when the defendant previously pled guilty in Harnett County to two counts of misdemeanor possession of stolen goods with respect to some of the property obtained in the robbery. The misdemeanor charges pertained to the defendant's possession of two stolen lottery tickets. The robbery charge involved theft of money and hundreds of additional tickets. Noting this, the court concluded the same property was not at issue. The court went on to conclude that the offenses for which the defendant pled guilty was not for the same conduct at issue in the robbery charge, stating: "the possession to which defendant pled guilty was solely related to his attempt at cashing in two lottery tickets a few days after the robbery in Johnston County and was adjudicated in a separate trial in another county, with different facts and evidence." Finally, the court concluded that even if the two tickets were the exact same and only property stolen during the robbery, the defendant's appeal must fail because he repeatedly opposed other remedies at trial, including an offer by the State not to mention the tickets that were at issue in the earlier proceeding

Frauds

State v. Mostafavi, ___ N.C. ___, 811 S.E.2d 138 (Apr. 6, 2018)
On appeal from the decision of a divided panel of the Court of Appeals, ___ N.C. App. ___, 802 S.E.2d 508 (2017), the court reversed, holding that the evidence was sufficient to sustain the conviction on that charge. The indictment charged the defendant with two counts of obtaining property by false pretenses, alleging that the defendant, through false pretenses, knowingly and designedly obtained "United States Currency from Cash Now Pawn" by conveying specifically referenced personal property, which he represented as his own. The State presented sufficient evidence of the defendant's false representation that he owned the stolen property to support his conviction for obtaining property by false pretenses. The pawnshop employee who completed the transaction verified the pawn tickets, which described the conveyed items and contained the defendant's name, address, driver's license number, and date of birth. The tickets included language explicitly stating that the defendant was "giving a security interest in the . . . described goods." On these facts, the State presented sufficient evidence of the defendant's false representation that he owned the stolen property that he conveyed.

Breaking or Entering

State v. Allen, ___ N.C. App. ___, 812 S.E.2d 192 (Mar. 6, 2018)
The evidence was sufficient to convict the defendant of felony breaking or entering. After detaining the defendant for larceny, a Belk loss prevention associate entered the defendant's name in a store database. The associate found an entry for the defendant's name at Belk Store #329 in Charlotte, along with a photograph that resembled the defendant and an address and date of birth that matched those listed on his driver's license. The database indicated that, as of 14 November 2015, the defendant had been banned from Belk stores for a period of 50 years pursuant to a Notice of Prohibited Entry following an encounter at the Charlotte store. The notice contained the defendant's signature. On appeal, the defendant argued that the evidence was insufficient because it showed he entered a public area of the store during regular business hours. Deciding an issue of first impression, the court disagreed. In order for an entry to be unlawful, it must be without the owner's consent. Here, Belk did not consent to the defendant's entry. It had issued a Notice expressly prohibiting him "from re-entering the premise[s] of any property or facility under the control and ownership of Belk wherever located" for a period of 50 years. The loss prevention associate testified that the Notice had not been rescinded, that no one expressly allowed the defendant to return to store property, and that no one gave the defendant permission to enter the store on the date in question.

Trespass

State v. Vetter, ___ N.C. App. ___, 810 S.E.2d 759 (Feb. 6, 2018)
The evidence was sufficient to support a conviction for domestic criminal trespass. The court rejected the defendant's argument that the owner, his former girlfriend, never forbade him from entering her residence. The girlfriend ended her relationship with the defendant and ordered him to leave her residence. She affirmed that directive by locking the door and activating her alarm system upon discovering the defendant in her driveway. The court also rejected the defendant's argument that because he had permission to enter a portion of the premises, he had permission to enter the residence itself. The girlfriend granted the defendant limited permission to enter the garage to collect his belongings, but this consent did not extend to the inside of the residence. Thus, the fact that the defendant initially entered a portion of the premises with the owner's consent did not render him incapable of later trespassing upon a separate part of the premises where his presence was forbidden. Finally, the court rejected the defendant's argument that because the girlfriend was not physically present when he entered the interior of her home, the statute's requirement that the premises be "occupied" at the time of the trespass was not satisfied. The court held that this offense does not require the victim to be physically present at the time of the trespass.

Obstruction

State v. Mitchell, ___ N.C. App. ___, ___ S.E.2d ___ (June 5, 2018)
The trial court did not err by denying the defendant's motion to dismiss felony obstruction of justice charges. The obstruction of justice charges involved sending threatening letters. The defendant argued that this conduct could not be elevated to a felony because the offense does not include the elements of secrecy and malice. The court rejected this argument, noting that obstruction of justice may be elevated to a felony under G.S. 14-3(b) when it is done in secrecy and malice, or with deceit and intent to defraud. Thus, the trial court properly denied the defendant's motion to dismiss charges of felony obstruction of justice and felony attempted obstruction of justice.

State v. Ditenhafer, ___ N.C. App. ___, ___ S.E. 2d ___ (Mar. 20, 2018)
Although the trial court properly denied a motion to dismiss one count of obstruction of justice, it erred by failing to dismiss a second count. The defendant was convicted of two counts of felony obstruction of justice and felony accessory after the fact to sexual activity by a substitute parent, William. It was alleged that William sexually assaulted the defendant's biological daughter. The trial court properly denied the defendant's motion to dismiss the first count of felony obstruction of justice, which alleged that the defendant pressured her daughter to recant statements regarding the sexual abuse. The defendant argued that there was insufficient evidence of willful intent to obstruct justice by encouraging the daughter to recant. Specifically, the defendant argued that she acted only with the purpose of getting the daughter to tell what the defendant believed was the truth and that the evidence did not support a conclusion that she was encouraging the daughter to recant with the willful intent to hinder the investigation of the daughter's allegations. The court disagreed. It found that the evidence showed that the defendant did more than simply encourage the daughter to tell the truth, an act which would not constitute obstruction of justice on its own. Among other things, the defendant directed the daughter to specifically state that William had not abused her. When the daughter did not do so, the defendant punished her, verbally abused her, and turned immediate family members against her. The defendant did so even after admitting to others that she believed the daughter had been abused. The defendant coached the daughter on what to say in person, on the telephone and in emails in order to recant. This evidence was sufficient to allow a reasonable juror to infer that the defendant's conduct was designed to achieve a particular outcome: the end of the criminal trial and administrative investigation that the defendant believed was destroying her family and would cause them to lose money. Even after the defendant witnessed William's abuse of the daughter, she declined to report it because it would cost them money and time, describing the investigation as a

"nightmare." The court also rejected the defendant's argument that the evidence was insufficient to establish that her actions were committed with deceit and intent to defraud, facts necessary to elevate the charges to a felony.

The trial court erred by denying the defendant's motion to dismiss a second count of obstruction of justice, alleging that the defendant denied the Sheriff's Department and County Child Protective Services access to her daughter during the investigation. The defendant argued that she never denied any request from these entities for an interview with her daughter. The State presented no evidence of a specific incident in which the defendant expressly denied a request by these entities to interview the daughter. In fact, it showed that the defendant allowed individuals from these entities to speak with her daughter on multiple occasions. The court rejected the State's argument that the entities were denied "full access" because the defendant was present in many of the interviews, concluding: "the delineation between "access" as alleged in the indictment and "full access" as advanced by the State on appeal would create an unworkable distinction in our jurisprudence."

Disorderly Conduct

In Re I.W.P., ___ N.C. App. ___, ___ S.E.2d __ (May 1, 2018)
In the context of deciding whether a manifest injustice existed that would warrant the court's invocation of Rule 2 to consider on appeal an issue that was otherwise waived in this juvenile delinquency case, the court determined that sufficient evidence supported a delinquency adjudication on grounds that the juvenile engaged in disorderly conduct. The juvenile encouraged another middle school student to pull the fire alarm on the last day of school. Because the other student complied and the alarm was sounded, the juvenile's actions disrupted, disturbed and interfered with the teaching of students and disturbed the peace, order or discipline at the middle school within the meaning of G.S. 14-288.4(6).

Felon in Possession of Firearm

State v. Fernandez, ___ N.C. App. ___, 808 S.E.2d 362 (Nov. 21, 2017)
In a case where the defendant was convicted of felon in possession of a firearm, the court rejected his argument that the felony possession statute was unconstitutional as applied to him. The court began by rejecting the defendant's federal constitutional claim, noting that because he is a convicted felon he cannot show that he is a law-abiding, responsible citizen under the test articulated in Hamilton v. Pallozzi, 848 F.3d 614, 623 (4th Cir. 2017). Turning to the defendant's state constitutional claim, the court applied the *Britt* analysis. It noted that the defendant's prior felony conviction was for possessing a sawed-off shotgun in 2005, a weapon of mass destruction. It noted that although his felony conviction occurred 11 years ago, the court has held the statute is constitutional as applied to a defendant where there was a span of 18 years between the prior conviction and the possession charge. With respect to the defendant's history of law-abiding conduct, the court noted that the defendant has been convicted of driving while impaired, simple assault, assault on a female, driving without an operator's license, being intoxicated and disruptive, felony possession of a weapon of mass destruction, and fishing without a license. With respect to the defendant's history of lawful possession, the record established that the defendant had been unlawfully possessing at least one firearm since 2005. He thus could not establish compliance with the statute. Considering the *Britt* factors, the court concluded that the statute was not unconstitutional as applied to the defendant.

Sexual Exploitation of a Minor

State v. Fletcher, 370 N.C. 313 (Dec. 8, 2017)
(1) On discretionary review of a unanimous, unpublished decision of the Court of Appeals in this sexual exploitation of a minor case, the court held that although statements in the prosecutor's final jury argument were improper, they were not prejudicial. The defendant claimed that the images at issue

depicting his penis near the child's mouth did not show actual conduct and instead had been digitally manipulated to depict the conduct. In closing argument to the jury, the prosecutor argued that the crime of sexual exploitation of a minor could occur if the image was altered or manipulated to show a person engaged in a sexual act with a child. The prosecutor argued that the child does not have to actually be involved in the sexual act itself. The defendant was convicted and he appealed. The court held that the prosecutor's argument was improper. According to the plain language of the statute, the minor is required to have engaged in sexual activity. When the minor depicted in an image appears to have been shown as engaged in sexual activity as a result of digital manipulation, the defendant has not committed the offense of first-degree sexual exploitation of a minor. Thus, the prosecutor's argument misstated the applicable law. However, the court went on to hold that although the trial court erred by sustaining the defendant's objection to the challenge argument, the error did not justify a new trial. It reasoned that when, as here, a misstatement of the law during jury argument is cured by correct jury instructions, no prejudice occurs. Here, the trial court's instructions to the jury explicitly stated that to find the defendant guilty the jury had to find that the defendant used, induced, coerced, encouraged or facilitated the child victim's involvement in sexual activity.
(2) In this first-degree sexual exploitation of a minor case, the trial court did not err by denying the defendant's request that the jury be instructed that the "oral intercourse" element of the offense requires penetration. The court determined that whether the term "oral intercourse" as used in the statute proscribing this crime requires penetration presents an issue of first impression. The court concluded that the General Assembly intended the relevant statutory language to be construed broadly to provide minors with the maximum reasonably available protection from sexual exploitation. The court went on to hold that the term "oral intercourse" was intended as a gender-neutral reference to cunnilingus and fellatio, neither of which require penetration. Thus, the trial court did not err by refusing to instruct the jury in accordance with the defendant's request.

Unlicensed Bail Bonding

State v. Golder, ___ N.C. App. ___, 809 S.E.2d 502 (Feb. 6, 2018)
The evidence was sufficient to support a conviction for unlicensed bail bonding in violation of G.S. 58-71-40. The defendant admitted at trial that he was not licensed as a bondsman in North Carolina. However he asserted that there was insufficient evidence that he acted in the capacity of or performed the functions duties or powers of a bondsman. The evidence introduced at trial established that the relevant agency had interpreted the governing statutes as prohibiting an unlicensed person from, other things, discussing motions and petitions with court staff that relate to a bond forfeiture. Here, the defendant was engaged with a member of court staff in falsifying motions to set-aside bond forfeitures. The court rejected the defendant's argument that the evidence was insufficient because he was discussing false motions with court staff.

Drug Offenses

Maintaining a Dwelling, Etc.

State v. Dunston, __ N.C. ___, ___ S.E.2d __ (May 11, 2018)
The Court per curiam affirmed the opinion below, ___ N.C. App. ___, 806 S.E.2d 697 (2017). Over a dissent, the Court of Appeals held that the trial court did not err by denying the defendant's motion to dismiss a charge of maintaining a vehicle for keeping or selling controlled substances. The court disagreed with the defendant's argument that case law establishes a bright-line rule that one incident of keeping or selling controlled substances always is insufficient to sustain a conviction for maintaining a vehicle. The determination, the court said, is based on the totality of the circumstances. Here, the defendant was in the vehicle at a location known for a high level of illegal drug activity. He was observed by officers unwrapping cigars and rerolling them after manipulating them. Based on the officer's training and experience, the defendant's actions were consistent with those used in distributing marijuana. The

driver was observed in hand-to-hand exchange of cash with another person. When searched by officers, the driver was discovered to have marijuana and the defendant was no longer in possession of the "cigars." Additionally, the defendant possessed a trafficking quantity of heroin along with plastic bags, two sets of digital scales, three cell phones, and $155 in cash. Additionally, the defendant's ex-girlfriend testified that she was concerned about his negative influence on his nephew because she "knew the lifestyle."

State v. Rousseau, 370 N.C. 268 (Nov. 3, 2017)
On appeal from an unpublished decision of a divided panel of the Court of Appeals which had found no error with respect to the defendant's maintaining a vehicle conviction, the court affirmed per curiam. The defendant was convicted for maintaining a vehicle for the purpose of keeping a controlled substance. Before the Court of Appeals, he unsuccessfully argued that the trial court erred by denying his motion to dismiss for insufficiency of the evidence. Specifically, the defendant argued that to prove the "keeping" element of the offense, the State must show that the vehicle was used over time for the illegal activity. The Court of Appeals found the cases cited by the defendant distinguishable, noting that here 29.927 grams of marijuana was found in a plastic bag, tucked in a sock, and placed in a vent inside the vehicle's engine compartment outside of the passenger area and remnants of marijuana were found throughout the vehicle's interior. The Court of Appeals noted, in part, that a jury may infer "keeping" from the remnants of the controlled substance found throughout the interior space of the vehicle and a storage space in it for the keeping of controlled substances in the engine compartment.

Possession
Constructive Possession

State v. Chekanow, ___ N.C. ___, 809 S.E.2d 546 (Mar. 2, 2018)
The court reversed a unanimous, unpublished decision of the Court of Appeals and held, in this drug case, that the State presented sufficient evidence of constructive possession of marijuana. While engaged in marijuana eradication operations by helicopter, officers saw marijuana plants growing on a three-acre parcel of land owned by the defendants. When the officers arrived at the home they found the defendant Chekanow leaving the house by vehicle. They directed her back to the home, and she complied. She was the only person at the residence and she consented to a search of the area where the plants were located, the outbuildings, and her home. The officers found 22 marijuana plants growing on a fenced-in, ½ acre portion of the property. The area was bordered by a woven wire fence and contained a chicken coop, chickens and fruit trees. The fence was approximately 4 feet high. The single gate to the area was adjacent to the defendants' yard. At trial, an officer testified that a trail leading from the house to the plants was visible from the air. The plants themselves were located 60-70 yards beyond the gate; 50-75 yards from the defendant's home; and 10-20 yards from a mowed and maintained area with a trampoline. The plants and the ground around them were well maintained. An officer testified that the plants appeared to have been started individually in pots and then transferred into the ground. No marijuana or related paraphernalia was found in the home or outbuildings; however officers found pots, shovels, and other gardening equipment. Additionally, they found a "small starter kit," which an officer testified could be used for starting marijuana plants. The officer further testified that the gardening equipment could have been used for growing marijuana or legitimate purposes, because the defendants grew regular plants on the property. One of the shovels, however, was covered in dirt that was similar to that at the base of the marijuana plants, whereas dirt in the garden was brown. The State's case relied on the theory of constructive possession. The defendants were found guilty and appealed. The court of appeals found for the defendant, concluding that the evidence was insufficient as to constructive possession. The Supreme Court reversed. It viewed the case as involving a unique application of the constructive possession doctrine. It explained: "The doctrine is typically applied in cases when a defendant does not have actual possession of the contraband, but the contraband is found in a home or in a vehicle associated with the defendant; however, in this case we examine the doctrine as applied to marijuana plants found growing on

a remote part of the property defendants owned and occupied." Reviewing the law, the court noted that unless a person has exclusive possession of the place where drugs are found, the State must show other incriminating circumstances before constructive possession can be inferred. Here, both defendants lived in the home with their son and they allowed another individual regular access to their property to help with maintenance when they were away. The court noted that the case also involves consideration of a more sprawling area of property, including a remote section where the marijuana was growing and to which others could potentially gain access. Against this backdrop, the court stated: "Reiterating that this is an inquiry that considers all the circumstances of the individual case, when there is evidence that others have had access to the premises where the contraband is discovered, whether they are other occupants or invitees, or the nature of the premises is such that imputing exclusive possession would otherwise be unjust, it is appropriate to look to circumstances beyond a defendant's ownership and occupation of the premises." It continued: "Considering the circumstances of this case, neither defendant was in sole occupation of the premises on which the contraband was found, defendants allowed another individual regular access to the property, and the nature of the sprawling property on which contraband was found was such that imputing exclusive control of the premises would be unjust." The court thus turned to an analysis the additional incriminating circumstances present in the case. The court first noted as relevant to the analysis the close proximity of the plants to an area maintained by the defendants, the reasonably close proximity of the defendants' residence to the plants, and one defendant's recent access to the area where the plants were growing. Second, the court found multiple indicia of control, including, among other things, the fact that the plants were surrounded by a fence that was not easily surmountable. Third, the court considered evidence of suspicious behavior in conjunction with discovery of the marijuana, including the fact that defendant Chekanow appeared to flee the premises when officers arrived. Finally, the court considered evidence found in the defendants' possession linking them to the contraband, here the shovel with dirt matching that found at the base of the plants and the "starter kit." The court held that notwithstanding the defendants' nonexclusive possession of the location where the contraband was found, there was sufficient evidence of constructive possession.

State v. Sawyers, ___ N.C. App. ___, 808 S.E.2d 148 (Nov. 7, 2017)
In this possession of marijuana paraphernalia case, the State presented sufficient evidence to establish that the defendant constructively possessed a marijuana pipe found in a crashed vehicle. Although the defendant did not have exclusive possession of the vehicle, sufficient incriminating circumstances existed to establish constructive possession, including that the defendant was driving the vehicle; the pipe was found on the driver's side floorboard; and the defendant admitted ownership of a small amount of marijuana found on his person.

Possession with Intent

State v. Yisrael, __ N.C. ___, ___ S.E.2d __ (May 11, 2018)
The Court per curiam affirmed the opinion below, ___ N.C. App. ___, 804 S.E.2d 742 (2017). Over a dissent, the Court of Appeals held that the trial court did not err by denying the defendant's motion to dismiss a charge of possession with intent to sell or deliver marijuana. The defendant argued that the State failed to present sufficient evidence of his intent to sell or deliver the drugs and that the evidence shows the marijuana in his possession was for personal use. The defendant possessed 10.88 grams of marijuana. Although the amount of drugs may not be sufficient, standing alone, to support an inference of intent to sell or deliver, other facts supported this element, including the packaging of the drugs. Additionally, the 20-year-old defendant was carrying a large amount of cash ($1,540) and was on the grounds of a high school. Moreover, a stolen, loaded handgun was found inside the glove compartment of the vehicle.

State v. Coley, ___ N.C. App. ___, 810 S.E.2d 359 (Feb. 6, 2018)
The evidence was sufficient to sustain a conviction for possession with intent to sell or deliver marijuana. The defendant's vehicle contained 11.5 grams of marijuana packaged in two sandwich bags, a digital

scale, and 23 additional loose sandwich bags. On appeal, the defendant's primary argument was that the amount of marijuana found in his vehicle was too small to establish the requisite intent to sell or deliver. Citing prior case law, the court noted that with respect to showing intent, prior decisions have placed particular emphasis on the amount of drugs discovered, their method of packaging, and the presence of paraphernalia typically used to package drugs for sale. Moreover, the inquiry is fact specific in which the totality of the circumstances must be considered unless the quantity of drugs is so substantial that quantity alone supports an inference of intent to sell or deliver. Here, the relatively small quantity of marijuana was not be enough on its own to support an inference regarding the defendant's intent. However, given the additional presence of the scale and the sandwich bags the evidence was sufficient to go to the jury.

Motor Vehicle Offenses
Impaired Driving & Open Container

State v. Eldred, ___ N.C. App. ___, ___ S.E.2d __ (May 1, 2018)
The trial court erred by denying the defendant's motion to dismiss in this impaired driving case. Responding to a report of a motor vehicle accident, officers found a Jeep Cherokee on the side of the road. The vehicle's right side panel was damaged and the officer saw approximately 100 feet of tire impressions on the grass leading from the highway to the stopped vehicle. The first ten feet of impressions led from the highway to a large rock embankment that appeared scuffed. Beyond the embankment, the impressions continued to where the vehicle was stopped. No one was in the vehicle or at the scene. An officer checked the vehicle's records and found it was registered to the defendant. The officer then set out in search of the defendant, who he found walking alongside the road about 2 or 3 miles away. The officer saw a mark on the defendant's forehead and noticed that he was twitching and unsteady on his feet. When asked why he was walking along the highway, the defendant responded: "I don't know, I'm too smoked up on meth." The officer handcuffed the defendant for safety purposes and asked if he was in pain. When the defendant said that he was, the officer called for medical help. During later questioning at the hospital, the defendant confirmed that he had been driving the vehicle and said that it had run out of gas. He added that he was hurt in a vehicle accident that occurred a couple of hours ago. Upon inquiry, the defendant said that he had not used alcohol but that he was "on meth." The officer didn't ask the defendant or anyone else at the hospital whether the defendant had been given any medication. The defendant appeared dazed, paused before answering questions, and did not know the date or time. The officer informed the defendant that he would charge him with impaired driving and read the defendant his Miranda rights. Upon further questioning the officer did not ask the defendant when he had last consumed meth, when he became impaired, whether he had consumed meth prior to or while driving, or what the defendant did between the time of the accident and when he was found on the side of the road. At trial the State presented no lab report regarding the presence of an impairing substance in the defendant's body. The court agreed with the defendant that the State failed to present substantial evidence of an essential element of DWI: that the defendant was impaired while he was driving. Contrasting the case from one where the evidence was held to be sufficient, the court noted, in part, that the State presented no evidence regarding when the first officer encountered the defendant on the side of the road. The officer who spoke with him at the hospital did not do so until more than 90 minutes after the accident was reported, and at this time the defendant told the officer he had been in an accident a couple of hours ago. Moreover, the State presented no evidence of how much time elapsed between the vehicle stopping on the shoulder and the report of an accident being made. And, there was no testimony by any witness who observed the defendant driving the vehicle at the time of the accident or immediately before the accident. The court concluded that although there was evidence that the defendant owned the vehicle and the defendant admitted driving and wrecking the vehicle, he did not admit to being on meth or otherwise impaired when he was driving the vehicle. And the State presented no evidence, direct or circumstantial, to establish that essential element of the crime.

State v. Fincher, ___ N.C. App. ___, ___ S.E.2d ___ (Apr. 17, 2018)

The trial court did not err by denying the defendant's motion to dismiss a DWI charge, which alleged that the defendant was under the influence of alprazolam. The evidence was sufficient where it showed: the defendant drove her vehicle in the public drive-through area of a restaurant where she collided with another vehicle; responding officers noted that her eyes were red and glassy and her speech was slurred; the defendant admitted to officers at the scene that she had consumed alprazolam, a Schedule IV controlled substance, that morning; an officer testified that the defendant presented six of six clues indicating impairment after administering the HGN test; and another officer testified that after performing his 12-step DRE evaluation on the defendant, he determined that she was impaired by a central nervous system depressant.

State v. Mayo, ___ N.C. App. ___, 807 S.E.2d 654 (Nov. 7, 2017)
For habitual impaired driving, the three prior impaired driving convictions need not be from different court dates. On appeal, the defendant alleged that the indictment for habitual impaired driving was facially invalid because two of the underlying impaired driving convictions were from the same court date. The indictment alleged the following prior charges: impaired driving on November 26, 2012, with a conviction date of September 30, 2015 in Johnson County; impaired driving on June 22, 2012, with a conviction date of December 20, 2012 in Wake County; and impaired driving on June 18, 2012, with a conviction date of December 20, 2012 in Wake County. The statute contains no requirement regarding the timing of the three prior impaired driving convictions, except that they occur within 10 years of the current charge.

State v. Squirewell, ___ N.C. App. ___, 808 S.E.2d 312 (Nov. 7, 2017)
There was sufficient evidence to support an open container charge. Specifically, the evidence was sufficient to establish constructive possession, including, among other things, that the trooper saw the can near the console area of the vehicle that the defendant was driving; the defendant initially provided the trooper a false name; and the defendant's eyes were red and glassy and his speech was slurred.

Hit and Run

State v. Malloy, ___ N.C. App. ___, 809 S.E.2d 14 (Dec. 19, 2017)
Hit and run resulting in injury is a lesser included offense of hit and run resulting in death. The defendant was indicted for a felonious hit and run resulting in death. At trial the State requested that the jury be instructed on the offense of felonious hit and run resulting in injury. Over the defendant's objection, the trial court agreed to so instruct the jury. The jury found the defendant guilty of that offense. On appeal, the court held that because felonious hit and run resulting in injury is a lesser included offense of hit and run resulting in death no error occurred.

DWLR

State v. Green, ___ N.C. App. ___, 811 S.E.2d 666 (Feb. 20, 2018)
In this driving while license revoked case, because the defendant introduced evidence that he did not receive actual notice from the DMV that his license was revoked, the trial court erred by refusing to instruct the jury that it could find the defendant guilty only if he had knowledge of his revocation. The State's evidence included copies of four dated letters from the DMV addressed to the defendant stating that his license had been suspended. However, the defendant testified that he never received any of those letters and was unaware that his license had been suspended. He suggested that his father might have received and opened the letters because he lived at the same address as the defendant. At trial, the defendant requested the instruction that to be guilty he must have had knowledge of the revocation. The trial court denied this request. To prove driving while license revoked, the State must prove that the defendant had actual or constructive knowledge of the revocation. If the State presents evidence that the DMV mailed notice of the defendant's license revocation to the address on file for the defendant at least

four days prior to the incident, there is a prima facie presumption that the defendant received the notice. However the defendant can rebut the presumption. If the defendant presents some evidence that he or she did not receive the notice or some other evidence sufficient to raise the issue, the trial court must instruct the jury that guilty knowledge is necessary for conviction. Here, the defendant testified that he did not receive the notice and offered an explanation as to why it may not have reached him. He was thus entitled to an instruction that he must have knowledge of the revocation. The court went on to hold that the error was prejudicial.

Defenses

Self-Defense

State v. Madonna, ___ N.C. App. ___, 806 S.E.2d 356 (Oct. 17, 2017)
In this murder case, the court rejected the defendant's argument that the trial court should have granted the defendant's motion to dismiss because the State failed to present substantial evidence that the defendant did not act in self-defense. Ample evidence contradicted the defendant's claim of self-defense, including that the victim had medical issues and was so frail that the VA had approved a plan to equip the victim and the defendant's home with a wheelchair lift, ramps, and a bathroom modification; the defendant was physically active; after the victim was twice wounded by gunshots, the defendant stabbed him 12 times; and the victim suffered minimal injuries compared to the nature and severity of the victim's injuries.

Duress & Necessity

State v. Miller, ___ N.C. App. ___, ___ S.E.2d ___ (Mar. 6, 2018)
In this DWI case, the trial court erred by refusing to instruct the jury on the defense of necessity. The defendant was arrested for DWI while driving a golf cart. The evidence showed that the defendant and his wife used the golf cart on paths connecting their home to a local bar, that he drove the golf cart to the bar on those paths on the evening in question, and that he planned to return the same way. However when a fight broke out at the bar, the defendant and his wife fled on the golf cart, driving on the roadway. The defendant was convicted and he appealed. The court began its analysis by noting that the affirmative defense of necessity is available to DWI defendants and involves these elements: reasonable action, taken to protect life, limb, or health of a person, and no other acceptable choices available. The trial court erred by applying an additional element, requiring that the defendant's action was motivated by fear. The court went on to determine that an objective standard of reasonableness applies to necessity, as compared to duress which appears to involve a subjective standard. The evidence was sufficient to satisfy the first two elements of the defense: reasonable action taken to protect life, limb, or the health of a person. Here, the bar attracted a rough clientele, including "the biker crowd." It was not unusual for fights to break out there, but the bar had no obvious security. On the night in question, the bar atmosphere became "intense" and "mean" such that the two decided to leave. The defendant then argued with several men in the parking lot, which escalated to shouting and cursing. The main person with whom the defendant was arguing was described as the "baddest mother_cker in the bar." The defendant punched the man, knocking him to the ground. The man was angry and drew a handgun, threatening the defendant. Neither the defendant nor his wife were armed. The scene turned "chaotic," with a woman telling the defendant's wife that the man was "crazy" and that they needed to "get out of [t]here." The defendant's wife was concerned that the man might shoot the defendant, her or someone else. When the defendant saw the gun, he screamed at his wife to leave. The defendant's wife said she had no doubt that if they had not fled in the golf cart they would have been hurt or killed by the man with the gun. On these facts the court held:

> [S]ubstantial evidence was presented that could have supported a jury determination that a man drawing a previously concealed handgun, immediately after having been knocked to the ground by Defendant, presented an immediate threat of death or serious bodily injury to Defendant, [his wife], or a bystander, and that attempting to escape from that

danger by driving the golf cart for a brief period on the highway was a reasonable action taken to protect life, limb, or health.

The court also found that there was sufficient evidence as to the third element of the defense: no other acceptable choices available. With respect to whether the perceived danger had abated by the time the defendant encountered the officer, the court noted that the defendant had pulled off the highway approximately 2/10 of a mile from the bar and the defendant's wife said that she saw the officer within minutes of the altercation. The court concluded: "On the facts of this case, including . . . that there was a man with a firearm who had threatened to shoot Defendant, and who would likely have access to a vehicle, we hold two-tenths of a mile was not, as a matter of law, an unreasonable distance to drive before pulling off the highway." The court further clarified that the defenses of necessity and duress are separate and distinct. And it held that the evidence also supported a jury instruction on duress.

State v. Faulk, ___ N.C. App. ___, 807 S.E.2d 623 (Nov. 7, 2017)

The trial court did not err by failing to instruct the jury on duress as a defense to a charge of first-degree murder on the basis of premeditation and deliberation. Duress is not a defense to such a charge.

Capital Law

Dunn v. Madison, 583 U.S. ___, 138 S. Ct. 9 (Nov. 6, 2017)

In a per curiam decision in this capital murder case decided under the Antiterrorism and Effective Death Penalty Act of 1996, the Court held that the state court did not unreasonably apply the law when it determined that the defendant was competent to be executed. The defendant was sentenced to death in an Alabama court. As his execution neared, the defendant petitioned the trial court for a suspension of his death sentence, arguing that due to several recent strokes, he had become incompetent to be executed. At a hearing on the matter, a court appointed psychologist noted the defendant's significant post-stroke decline but testified that he understood the posture of his case and that the State was seeking retribution against him for his criminal act. A defense psychologist testified that the defendant's strokes rendered him unable to remember numerous events that had occurred in the past. However, he found that the defendant was able to understand the nature of the pending proceeding, what he was tried for, that he was in prison because of murder, that Alabama was seeking retribution for that crime, and the sentence, specifically the meaning of a death sentence. The defense witness also opined that the defendant does not understand the act he is being punished for because he cannot recall the sequence of events from the offense through the trial and believes that he "never went around killing folks." After the trial court denied the defendant's petition, the defendant pursued federal habeas proceedings. The federal district court denied the defendant's petition and the Eleventh Circuit reversed. That court found that because the defendant has no memory of his capital offense it inescapably follows that he does not rationally understand the connection between his crime and his execution. On that basis, the federal appellate court held that the trial court's conclusion that the defendant is competent to be executed was plainly unreasonable. The Court disagreed. Reviewing its prior case law, the Court concluded that those decisions did not clearly establish that a prisoner is incompetent to be executed because of a failure to remember his commission of the crime, as distinct from the failure to rationally comprehend the concepts of crime and punishment as applied in his case. Thus, the state court did not unreasonably apply Supreme Court law when it determined that the defendant was competent to be executed because, notwithstanding his memory loss, he recognizes that he will be put to death as punishment for the murder he was found to have committed.

State v. McNeill, ___ N.C. ___, ___ S.E.2d ___ (June 8, 2018)

(1) The court rejected the defendant's argument that the trial court erred by denying his motion under the Racial Justice Act to prohibit the State from seeking the death penalty without holding an evidentiary hearing. Assuming arguendo that any version of the RJA applies to the defendant, the defendant failed to follow the provisions of that statute which mandate that the claim shall be raised by the defendant at the Rule 24 conference. Here, the defendant did not raise a RJA claim at the Rule 24 conference, despite

being twice asked by the trial court whether he wanted to be heard. The court concluded: "Defendant cannot complain of the trial court's failure to strictly adhere to the RJA's pretrial statutory procedures where he himself failed to follow those procedures." The court noted that its ruling was without prejudice to the defendant's ability to raise an RJA claim in post-conviction proceedings.
(2) The court rejected the defendant's argument that the trial court erred by failing to intervene ex mero motu during the State's closing argument during the sentencing phase of the trial. On appeal the defendant pointed to two statements made by prosecutors during the State's closing arguments which refer to the defendant's decision not to present mitigating evidence or closing statements. The court found no gross impropriety in the prosecutor's remarks, noting in part that it is not impermissible for prosecutors to comment on the defendant's lack of mitigating evidence.
(3) The court found that the defendant's sentencing survived proportionality review, noting in part that the defendant kidnapped a five-year-old child from her home and sexually assaulted her before strangling her and discarding her body under a log in a remote area used for field dressing deer carcasses.

State v. Rodriguez, ___ N.C. ___, ___ S.E.2d ___ (June 8, 2018)
(1) In this capital case, the court rejected the defendant's argument that the trial court deprived him of his state and federal constitutional right to a trial by a fair and impartial jury by prohibiting defense counsel from questioning prospective jurors concerning their ability to follow the applicable law prohibiting the imposition of the death penalty upon an intellectually disabled person. Defense counsel informed the trial court that they wanted to ask the jurors whether they can follow the law with regard to mental retardation and that in order to make an adequate inquiry, defense counsel would need to tell the jurors about the relevant law. The trial judge determined that the defense would be limited to inquiring into the jurors' ability to follow the applicable law. When the jurors returned to the courtroom, defense counsel told the jurors that mental retardation is a defense to the death penalty and that it is defined, among other things, as having a low IQ. Both defense counsel and the prosecutor asked prospective jurors numerous questions related to intellectual disability issues. Although the trial court told defense counsel to limit their questioning with respect to intellectual disability issues to inquiry as to whether members of the jury could follow the law as given to them by the court, the defendant was allowed, without objection, to explain to two different jury panels, at a time when all prospective jurors were present, that mental retardation is a defense to the death penalty. Additionally, defense counsel asked prospective jurors about their experiences with intellectually disabled persons, the extent of their familiarity with intelligence testing and adaptive skills functioning issues, their willingness to consider expert mental health testimony, and their willingness to follow the applicable law as given in the trial court's instructions. When considered in conjunction with the fact that defense counsel was allowed to tell jurors that mental retardation was a defense, the questions defense counsel were allowed to pose sufficiently permitted counsel to determine whether jurors could fairly consider and follow the trial court's instruction concerning whether the defendant should be exempted from the imposition of the death penalty on the basis of any intellectual disabilities. The limitations that the trial court put on defense counsel's questioning of prospective jurors concerning intellectual disability issues was not an abuse of discretion and did not render the trial fundamentally unfair.
(2) The court rejected the defendant's argument that he demonstrated that he suffers from an intellectual disability by a preponderance of the evidence and that the trial court erred by denying his motion to set aside the jury's verdict in the State's favor with respect to this issue. Although the defendant did present sufficient evidence to support a determination that he should be deemed exempt from the imposition of the death penalty on intellectual disability grounds, the State presented expert testimony tending to support a contrary determination. The relative credibility of the testimony offered by the various experts concerning the nature and extent of the defendant's intellectual limitations was a matter for the jury. Because the record reveals a conflict in the evidence concerning the extent to which the defendant was intellectually disabled, the trial court did not abuse its discretion by failing to set aside the jury's verdict.
(3) The trial court committed reversible error at the defendant's capital sentencing proceeding by failing to instruct the jury with respect to the statutory mitigating factor in G.S. 15A-2000(f)(6), which addresses

the extent to which a defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the law was impaired. The trial judge is required to instruct the jury to consider any mitigating circumstances which have adequate evidentiary support and the trial court has no discretion in determining whether to submit a mitigating circumstance when substantial evidence in support of it has been presented. Citing evidence in the record, the court held that it contains ample support for the submission of the mitigating circumstance at issue. The court went on to find that the trial court's error was not harmless beyond a reasonable doubt. The court ordered a new capital sentencing hearing

Post-Conviction DNA Testing

State v. Randall, ___ N.C. App. ___, ___ S.E.2d ___ (June 5, 2018)
(1) The trial court properly denied the defendant's motion for post-conviction DNA testing. The defendant, who pleaded guilty to multiple sexual assaults, filed a pro se motion seeking DNA testing of evidence he alleged was collected by law enforcement, including vials of blood and saliva, a bag of clothes, and a rape kit. The court found that the post-conviction DNA testing statute was not intended to "completely forestall" the filing of such a motion when the defendant enters a guilty plea. It continued, noting that when such a motion is filed "[t]he trial court is obligated to consider the facts surrounding a defendant's decision to plead guilty in addition to other evidence, in the context of the entire record of the case, in order to determine whether the evidence is 'material'" within the meaning of the post-conviction DNA testing statute. A defendant's burden to show materiality requires more than a conclusory statement that the ability to conduct the requested testing is material to the defense. Here, the defendant's assertion in his motion that his DNA would not be found in the rape kit essentially amounts to a statement that testing would show he was not the perpetrator. The court noted that it has previously held that such a statement is insufficient to establish materiality. The court thus found that the defendant failed to show the DNA testing would have been material to his defense. Specifically, the record indicates that the defendant was convicted of multiple counts of statutory rape for encounters with a single victim which took place over many months; the defendant confessed to the crimes; and the victim reported that the defendant had sexually abused her. The defendant's motion requested that DNA testing be performed on certain items recovered from the victim over a month after the defendant's last alleged contact with the victim. The lack of DNA on those items, recovered well after the alleged crimes, would not conclusively prove that the defendant was not involved in the conduct at issue. Additionally, the Sheriff's office indicated that the only relevant evidence it had—or ever had—was a computer that an officer searched for child pornography with the defendant's consent.
(2) The court found that the defendant's challenge to the trial court's denial of his request for an inventory of biological evidence pursuant to G.S. 15A-268 was not properly before it. The defendant asserted that he requested an inventory from a hospital and DSS, whom he alleged had clothing, hair and blood samples, and other items. However, there was no evidence of these requests in the record. Without any evidence that the defendant made a proper request pursuant to the statute and without any indication that the trial court considered this issue, the court found that there was no ruling for it to review.

State v. Shaw, ___ N.C. App. ___, ___ S.E.2d __ (May 15, 2018)
The trial court erred by denying the defendant's motion for post-conviction DNA testing and discovery pursuant to G.S. 15A-269. The defendant was tried for burglary, kidnapping, assault by strangulation, rape, sex offense, and attaining habitual felon status. Evidence at trial included, among other things, testimony from the State's expert in forensic DNA analysis concerning DNA evidence recovered from the victim. The DNA analyst concluded that defendant's DNA "cannot be excluded as a contributor to the DNA mixture" that was recovered, and that "the chance of selecting an individual at random that would be expected to be included for the observed DNA mixture profile" was approximately, "for the North Carolina black population, 1 in 14.5 million[.]" The defendant was convicted and his conviction was affirmed on direct appeal. He then filed a pro se motion with the trial court under G.S. 15A-269 and included a sworn affidavit maintaining his innocence. The trial court treated the motion as a Motion for

Appropriate Relief (MAR) and denied the motion. It determined that the defendant had not complied with the service and filing requirements for MARs, did not allege newly discovered evidence or other genuine issues that would require a hearing, and that the claims were procedurally barred under the MAR statute. The Court of Appeals granted the defendant's petition for writ of certiorari and reversed. The court noted that the procedures for post-conviction DNA testing pursuant to G.S. 15A-269 are distinct from those that apply to MARs. Thus, when a defendant brings a motion for post-conviction DNA testing pursuant to G.S. 15A-269, the trial court must rule on the motion in accordance with the statutes that apply to that type of motion. The trial court may not supplant those procedures with procedures applicable to MARs. The court vacated and remanded for the trial court's review consistent with the relevant statutes.

State v. Velasquez-Cardenas, ___ N.C. App. ___, ___ S.E.2d ___ (Apr. 17, 2018)
(1) The court held that it had both jurisdiction and authority to decide whether *Anders*-type review should be prohibited, allowed, or required in appeals from G.S. 15A-270.1. Exercising this discretionary authority, the court held that *Anders* procedures apply to appeals pursuant to G.S. 15A–270.1. However, it was careful to limit its holding "to the issue before us – appeal pursuant to N.C.G.S. § 15A– 270.1."
(2) Conducting an *Anders* review in this appeal from the trial court's denial of the defendant's motion to locate and preserve evidence and for post-conviction DNA testing pursuant to G.S. 15A-268 and 269, the court found the appeal wholly frivolous. In this homicide case the defendant argued that he did not act with premeditation and deliberation in killing the victim and did not come to her apartment with intent to commit a felony therein. The court found that these averments bear no relation to the integrity of the DNA evidence presented at trial or to the potential value of additional testing. The court also found that the defendant's argument was "wholly at odds" with the theory presented in his motion to the trial court, that is, that the testing would prove he was not the perpetrator.

State v. Lane, ___ N.C. ___, 809 S.E.2d 568 (Mar. 2, 2018)
In this capital case, the court held that the defendant failed to prove materiality in connection with his request for post-conviction DNA testing of hair samples. The hair samples were found in a trash bag in which the victim's body had been placed. Before the trial court the defendant argued that the requested testing was material for two reasons. First, the evidence at trial showed two separate crimes, a rape and murder; acknowledging that DNA evidence implicated him in the rape, the defendant asserted that the hairs could relate to another perpetrator, and potentially the only perpetrator of the murder. Second, the defendant argued that the State's closing argument relied in part on the forensic analysis of hairs recovered from the defendant's residence that were found to be microscopically consistent with the victim's hair; the defendant asserted that if those hairs were material to the State, the hairs found in the bag were material to the defense. The trial court denied the testing motion, finding that the defendant failed to establish materiality. The trial court considered, among other things, the evidence presented at trial and prior post-conviction DNA testing that was done on vaginal and rectal swabs from the victim's body that ultimately implicated the defendant. The court began by adopting the following standard of review of the denial of the motion for post-conviction DNA testing: findings of fact are binding if supported by competent evidence and may not be disturbed absent an abuse of discretion; conclusions of law are reviewed de novo. The court further determined that the post-conviction DNA statute adopted the *Brady* materiality standard. It went on to conclude that taken together, the overwhelming evidence of guilt at trial, the dearth of trial evidence pointing to a second perpetrator, and "the inability of forensic testing to determine whether the hair samples at issue are relevant to establish a third party was involved", created an "insurmountable hurdle" to the defendant's materiality argument with respect to either the conviction or sentence. Finally, the court denied the defendant's request that the court exercise its constitutional supervisory or inherent authority to order testing.

State v. Briggs, ___ N.C. App. ___, 812 S.E.2d 174 (Jan. 16, 2018)
The trial court lacked subject matter jurisdiction to enter an order denying the defendant's motion for post-conviction DNA testing pursuant to G.S. 15A-269 while the defendant's appeal from the original

judgment of conviction was pending. The defendant was convicted of an attempted sexual offense and sentenced on 10 November 2014. The defendant gave notice of appeal that day. On 6 April 2016, while his appeal was pending in the court of appeals, the defendant filed a pro se motion for post-conviction DNA testing pursuant to G.S. 15A-269. The trial court denied the defendant's motion. The defendant timely filed notice of appeal from this denial. Then, on 16 August 2016, the court of appeals issued an opinion in defendant's original appeal, vacating his sentence and remanding the case to the trial court for re-sentencing. The mandate issued on 6 September 2016. The court noted that once a notice of appeal has been filed, the trial court retains jurisdiction only over matters that are ancillary to the appeal. The trial court's order on the defendant's post-conviction motion was not such a matter. The court concluded:

> In the instant case, the trial court was divested of jurisdiction when defendant filed notice of appeal from the judgment entered on his conviction . . . on 10 November 2014. Because defendant's motion for post-conviction DNA testing opened an inquiry into a case that this Court was already reviewing, the trial court lacked jurisdiction to rule on it until after the case was returned to the trial court by way of mandate, which issued on 6 September 2016. We therefore must vacate the trial court's order denying defendant's motion for post-conviction DNA testing.