Recent Cases Affecting Criminal Law and Procedure
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Robert L. Farb
Institute of Government

North Carolina Supreme Court

Criminal Law and Procedure

(1) Trial Judge Did Not Violate Ruling in Blakely v. Washington, 542 U.S. 296 (2004), When Judge Found Aggravating Factor But Imposed Sentence in Presumptive Range—Ruling of Court of Appeals Is Reversed
(2) Court States That *Blakely* Error Is Not Structural Error, Based on United States Supreme Court Ruling in *Washington v. Recuenco*, and Reversal of a Sentence Is Not Required If Error Is Harmless Beyond a Reasonable Doubt

State v. Norris, 360 N.C. 507, 630 S.E.2d 915 (30 June 2006), *reversing*, 172 N.C. App. 722, 617 S.E.2d 298 (16 August 2005). (1) The trial judge found an aggravating factor and multiple mitigating factors and sentenced the defendant in the presumptive range. The court ruled, reversing the ruling of the Court of Appeals, that the trial judge did not violate the ruling in Blakely v. Washington, 542 U.S. 296 (2004), because the sentence was in the presumptive range. The court also noted that while a judge is required to consider evidence of aggravating and mitigating factors in each case, a judge is required to make findings of such factors only if the judge does not sentence a defendant in the presumptive range. (2) The court stated in footnote two that *Blakely* error is not structural error, based on the United States Supreme Court ruling in *Washington v. Recuenco*, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006), and reversal of a sentence is not required if the error is harmless beyond a reasonable doubt. The court recognized that its prior ruling in State v. Allen, 359 N.C. 425, 615 S.E.2d 256 (2005) (*Blakely* error is structural error automatically requiring reversal of sentence), was in direct conflict with *Washington v. Recuenco*.

Arrest, Search, and Confession Issues

Officer Did Not Have Probable Cause to Stop Vehicle for Perceived Traffic Violation: Failing to Signal When Making a Turn, G.S. 20-154(a)

State v. Ivey, ___ N.C. ___, 633 S.E.2d 459 (18 August 2006). A law enforcement officer stopped a vehicle driven by the defendant after observing that the defendant completely stopped at a stop sign at an intersection, and then made a right turn without using a turn signal. The defendant consented to a search of his vehicle, a firearm was found, and the defendant was convicted of possession of a firearm by felon and carrying a concealed weapon. The court ruled, relying on the standard of probable cause set out in Whren v. United States, 517 U.S. 806 (1996), that the officer did not have probable cause to stop the vehicle for a perceived traffic violation, specifically G.S. 20-154(a). The evidence did not indicate that any vehicle or pedestrian was, or might have been, affected by the turn, including the officer's vehicle which was some distance behind the defendant's vehicle. Because the officer's search of the vehicle arose from the unconstitutional stop, all evidence seized during the search should have been excluded by the trial judge, and it was therefore error to deny the defendant's suppression motion.

North Carolina Court of Appeals

Criminal Law and Procedure

Defendant's Right to a Unanimous Verdict Was Not Violated Involving Eleven Convictions for Raping His Pre-Teen Daughter, When the Victim Testified About One Specific Act of Rape Constituting One Conviction and Offered Generic Testimony (Vaginal Intercourse "More Than Two Times a Week" For More Than a Year) Supporting One Conviction of Rape for Each of Ten Consecutive Months

State v. Bullock, ___ N.C. App. ___, 631 S.E.2d 868 (18 July 2002). The defendant was convicted of eleven counts of rape of his pre-teen daughter. She testified about a specific act of vaginal intercourse that occurred in late 2000. The defendant was indicted and convicted of this rape in an indictment alleging the dates from October through December 2000. She also testified that the defendant continued to have vaginal intercourse with her "more than two times a week" from that first act in late 2000 until at least the Spring of 2002—commonly known as "generic testimony" because she did not describe any particular act of vaginal intercourse during this time period. The defendant was indicted for and convicted of ten rapes based on the generic testimony, one each for the months of January through October 2001. The defendant argued that his constitutional right to a unanimous verdict was violated because the state presented evidence of more acts of rape than charges of rape. The court rejected this argument, based on the ruling in State v. Markeith Lawrence, 360 N.C. 368, 627 S.E.2d 609 (7 April 2006), *reversing in part*, 170 N.C. App. 200, 612 S.E.2d 678 (2005), and the North Carolina Supreme Court's statement in *Markeith Lawrence* that it found persuasive the reasoning of State v. Wiggins, 161 N.C. App. 583, 589 S.E.2d 402 (2003) (upholding convictions of five counts of statutory rape in which the victim testified to four specific acts of rape and offered generic testimony about many other acts of rape). The court also ruled as no longer binding precedent prior rulings of the Court of Appeals that generic testimony can only support one additional conviction beyond those convictions representing specific act testimony. These prior rulings were State v. Gary Lawrence, 165 N.C. App. 548, 599 S.E.2d 87 (2004), *reversed in part*, 360 N.C. 393, 627 S.E.2d 615 (7 April 2006), and State v. Bates, 172 N.C. App. 27, 616 S.E.2d 280 (1 November 2005). The court noted that the Court of Appeals ruling in *Gary Lawrence* was reversed by the North Carolina Supreme Court and *Bates* rested on the Court of Appeals ruling in *Gary Lawrence*. Instead, the court ruled that the binding precedent is State v. Wiggins, cited above. The court stated that there was no language in *Wiggins* that would limit to one the number of convictions based on generic testimony. The court ruled—considering six factors set out by the Supreme Court in *Markeith Lawrence*—that the defendant's ten convictions (one for each month over a ten-month period) based on the victim generic testimony did not violate the defendant's right to a unanimous verdict.

Defendant's Right to Unanimous Jury Verdict Was Not Violated When Defendant Was Convicted of Twenty-Seven Counts of Indecent Liberties and Eighteen Counts of First-Degree Sexual Offense, Although There Was Evidence of Many More Sexual Acts Than Charges

State v. Richard Brigman, ___ N.C. App. ___, 632 S.E.2d 498 (20 June 2006). The defendant was convicted of twenty-seven counts of indecent liberties and eighteen counts of first-degree sexual offense, although there was evidence of many more sexual acts than charges. None of the verdict sheets set out the specific act that the jury had to find to convict. The trial judge instructed

the jury that a verdict must be unanimous, and separate verdict sheets were submitted to the jury. The court ruled, relying on State v. Markeith Lawrence, 360 N.C. 368, 627 S.E.2d 609 (2006), and State v. Gary Lawrence, 360 N.C. 393, 627 S.E.2d 615 (2006), the defendant's right to a unanimous verdict on each charge was not violated.

(1) Defendant's Right to Unanimous Verdict Was Not Violated When Defendant Was Tried for Ten Counts of Indecent Liberties, Evidence Was Presented of Ten Incidents of Indecent Liberties, and Jury Returned Seven Guilty Verdicts
(2) Defendant's Right to Unanimous Verdict Was Not Violated When Defendant Was Tried for Eleven Counts of First-Degree Sexual Offense, Evidence Was Presented of Six to Ten Incidents of First-Degree Sexual Offense, and Jury Returned Six Guilty Verdicts

State v. Bates, ___ N.C. App. ___, ___ S.E.2d ___ (3 October 2006). The defendant was convicted of six counts of first-degree sexual offense and seven counts of indecent liberties, as well as other offenses. In a previous appeal of these convictions, 172 N.C. App. 27, 616 S.E.2d 280 (2005), the court vacated all thirteen convictions because it ruled that the defendant had been denied his right to a unanimous jury verdict. On the state's petition for review, the North Carolina Supreme Court remanded the case for reconsideration in light of its ruling in State v. Markeith Lawrence, 360 N.C. 368, 627 S.E.2d 609 (7 April 2006). (1) The court ruled, relying on State v. Richard Brigman, ___ N.C. App. ___, 632 S.E.2d 498 (20 June 2006) (relying on *Markeith Lawrence* to uphold convictions), that the defendant's right to a unanimous verdict was not violated when the defendant was tried for ten counts of indecent liberties, evidence was presented of ten incidents of indecent liberties, and the jury returned seven guilty verdicts. The court stated that the fact that the jury may have considered evidence of all ten counts to reach a unanimous verdict that the defendant was guilty of seven counts did not, under *Markeith Lawrence*, violate the right to a unanimous verdict. (2) The court ruled, relying on the post-*Markeith Lawrence* unpublished Court of Appeals opinion in State v. Spencer (No. COA05-623, 6 June 2006), that the defendant's right to a unanimous verdict was not violated when the defendant was tried for eleven counts of first-degree sexual offense, evidence was presented of six to ten incidents of first-degree sexual offense, and the jury returned six guilty verdicts. The court considered four factors in determining that the defendant's right to a unanimous verdict was not violated: (i) the evidence; (ii) the indictments; (iii) the jury instructions; and (iv) the verdict sheets. The court stated while the fact that more counts were charged than supported by the evidence created an opportunity for confusion, it did not necessarily make it impossible to match the jury's verdict to the evidence. The court noted that the trial judge had instructed the jury that all twelve jurors must unanimously agree as to each charge, which adequately ensured that the jury would match its unanimous verdicts with the charges. After analyzing the verdict sheets, the court concluded that it was possible to match the jury's guilty verdicts with specific incidents presented by the evidence.

(1) Trial Judge Did Not Err in Instructing Jury That Defendant Could Be Convicted of Indecent Liberties as Principal or Aider and Abettor When Indictment Alleged He was Aider and Abettor
(2) Defendant's Right to Unanimous Jury Verdict Was Not Violated With Two Convictions of Indecent Liberties and Three Convictions of First-Degree Rape

State v. Fuller, ___ N.C. App. ___, 632 S.E.2d 509 (1 August 2006). The defendant was convicted of two counts of indecent liberties and three counts of first-degree rape involving his ten-year-old son. (1) The indecent liberties indictments alleged that the defendant acted as an aider and abettor in committing the offenses. The court ruled that the trial judge did not err in instructing the jury that the defendant could be convicted of indecent liberties as a principal or

aider and abettor. There was no fatal variance because different theories of criminal liability for one offense are not separate offenses. (2) Based on State v. Lawrence, 360 N.C. 368, 627 S.E.2d 609 (2006), the court ruled that the defendant's right to a unanimous jury verdict for the two convictions of indecent liberties was not violated even though there was evidence at trial of more than two acts of indecent liberties. Based on State v. Lawrence, 360 N.C. 368, 627 S.E.2d 609 (2006), the court ruled that the defendant's right to a unanimous jury verdict for the three convictions of first-degree rape was not violated when the victim testified to three specific acts of rape and the verdict sheets included specific dates for the acts, even though evidence suggested that other rapes may have occurred.

Only One Conviction of Indecent Liberties Permitted For Two Acts of Inappropriately Touching Victim That Was Committed During One Transaction

State v. Laney, ___ N.C. App. ___, 631 S.E.2d 522 (5 July 2006). The defendant was convicted of two counts of indecent liberties. The evidence showed that the defendant entered the bedroom where the victim was sleeping and touched the victim's breasts over her shirt and then put his hand inside the waistband of her pants. The court ruled, relying on State v. Hartness, 326 N.C. 561, 391 S.E.2d 177 (1990), and distinguishing State v. Lawrence, 360 N.C. 368, 627 S.E.2d 609 (2006), that only one conviction of indecent liberties was permitted. The defendant's two acts were part of one transaction. The sole act involved was touching, not two distinct sexual acts. There was no time gap between the two touching incidents, and the two acts combined were for the purpose of arousing or gratifying the defendant's sexual desire.

No Fatal Variance Between Indictment Charging Sex Offense with 13 Year Old and Proof That Victim Was Thirteen Years Old When Sexual Act Occurred, Although Indictment Alleged Offense Occurred When Victim Could Have Been Either 12 Years Old or 13 Years Old

State v. Brown, ___ N.C. App. ___, 631 S.E.2d 49 (20 June 2006). The indictment charging the defendant with sexual offense with a 13 year old alleged the offense occurred over a time span that included dates when the victim was either 12 years old or 13 years old. The victim testified at trial that the defendant committed a sexual act with her when she was 13 years old, and the jury instruction required that the jury must find that the victim was 13 years old when the sexual act occurred. The court ruled that there was not a fatal variance between the indictment and proof under these circumstances.

Sufficient Evidence to Support Defendant's Conviction of Felonious Breaking or Entering When Defendant Entered Inner Office of Law Firm to Which Public Access Was Not Allowed and Committed Theft

State v. Brooks, ___ N.C. App. ___, 631 S.E.2d 54 (20 June 2006). The defendant was convicted of felonious breaking or entering. The defendant entered the reception area of a law office that was open to members of the public seeking legal assistance. However, he later entered one of the lawyer's offices and took some of her possessions. The court ruled, relying on State v. Speller, 44 N.C. App. 59, 259 S.E.2d 784 (1979), that this was an illegal entering and upheld the defendant's conviction of felonious breaking or entering. The court stated that when the defendant entered the reception area, he did so with the law firm's implied consent. However, when he went into an area of the firm not open to the public to commit a theft, the consent was void ab initio.

Trial Judge Committed Plain Error in Burglary Trial in Instructing Jury on Breaking and Entering With Intent to Commit Armed Robbery When Indictment Alleged Intent to Commit Larceny

State v. Farrar, ___ N.C. App. ___, ___ S.E.2d ___ (19 September 2006). The defendant was convicted of first-degree burglary and other offenses. The court ruled, relying on State v. Silas, 360 N.C. 377, 627 S.E.2d 604 (2006), that the trial judge committed plain error in instructing jury on the intent to commit armed robbery as the purpose of the breaking and entering when the indictment alleged an intent to commit larceny.

Sufficient Evidence of Aiding and Abetting Obtaining Property by False Pretenses When Defendant Asked County Employee to Fix Defendant's Toilet at His House and Employee Fixed Toilet During Work Day

State v. Sink, ___ N.C. App. ___, 631 S.E.2d 16 (20 June 2006). The court ruled that there was sufficient evidence to support the defendant's conviction of aiding and abetting obtaining property by false pretenses when the defendant asked a county employee to fix the defendant's toilet at his house and the employee fixed the toilet during the work day. The false pretense consisted of the county employee's wrongfully obtaining public funds when he provided private services and later falsified his time sheets. The defendant instigated and encouraged the county employee to provide private services at taxpayer expense.

First-Degree Murder Indictment Did Not Need to Allege Theory of Aiding and Abetting

State v. Glynn, ___ N.C. App. ___, 632 S.E.2d 551 (1 August 2006). The court ruled that the first-degree murder indictment did not need to allege the theory of aiding and abetting by which the defendant was responsible for the murder.

(1) Forgery Indictments Were Not Fatally Defective For Failing to State Manner in Which Defendant Forged Bank Withdrawal Forms
(2) Insufficient Evidence of Forgery When Defendant Signed Her Own Name on Bank Withdrawal Forms But Did Not Sign Victim's Name

State v. King, ___ N.C. App. ___, 630 S.E.2d 719 (20 June 2006). The defendant was convicted of multiple counts of obtaining property by false pretenses, forgery, and uttering involving the withdrawal of money from the victim's bank account with an illegitimate power of attorney from the victim that had been obtained by defendant. (1) The court ruled that the forgery indictments were not fatally defective for failing to state the manner in which the defendant forged bank withdrawal forms. The indictments alleged all the elements of forgery and copies of the withdrawal forms were attached. (2) The court ruled, relying on State v. Lamb, 198 N.C. 423, 152 S.E. 154 (1930), that there was insufficient evidence of forgery when defendant signed her own name on bank withdrawal forms but did not sign the victim's name.

Locked Desk Compartment Was Not Safe Under Safecracking Law, G.S. 14-89.1

State v. Goodson, ___ N.C. App. ___, 631 S.E.2d 842 (18 July 2006). The court ruled that a locked desk compartment was not a safe under the safecracking law, G.S. 14-89.1.

(1) Indictment for Sale and Delivery of Cocaine Was Fatally Defective for Failing to Name Recipient of Cocaine

(2) Sufficient Evidence to Support Conviction of Keeping Motor Vehicle for Purpose of Selling Controlled Substance
(3) Only One Conviction of Keeping Motor Vehicle for Purpose of Selling Controlled Substance Was Authorized Because Evidence Showed Continuing Offense

State v. Calvino, ___ N.C. App. ___, 632 S.E.2d 839 (15 August 2006). (1) The court ruled, relying on State v. Martindale, 15 N.C. App. 216, 189 S.E.2d 549 (1972), that the indictment for sale and delivery of cocaine was fatally defective because it failed to name the recipient of the cocaine. The state knew the name of the recipient, but had alleged that the defendant sold cocaine to "a confidential source of information." (2) The court ruled that there was sufficient evidence to support the defendant's conviction of keeping a motor vehicle for the purpose of selling a controlled substance. The state's evidence showed the defendant on two separate dates used his van as the place to sell cocaine to the state's witness. (3) The court ruled, relying on State v. Grady, 136 N.C. App. 394, 524 S.E.2d 75 (2000), that only one conviction of keeping a motor vehicle for the purpose of selling a controlled substance was authorized because the state's evidence showed a continuing offense of using the same van to sell cocaine.

(1) Defendant's Positive Urine Test for Marijuana Was By Itself Insufficient Evidence to Support Conviction of Possessing Marijuana
(2) Defendant's Positive Urine Test for Cocaine and Witness's Testimony That She Saw Defendant Snort Cocaine Was Sufficient Evidence to Support Conviction of Possessing Cocaine

State v. Harris, ___ N.C. App. ___, 632 S.E.2d 534 (1 August 2006). **[Author's note: The North Carolina Supreme Court has granted the state's petition to review the ruling in (1) below.]** (1) The court ruled, relying on cases from other jurisdictions, that the defendant's positive urine test for marijuana was by itself insufficient evidence to support his conviction of possessing marijuana. (2) The court ruled that the defendant's positive urine test for cocaine and a witness's testimony that she saw the defendant snort cocaine was sufficient evidence to support his conviction of possessing cocaine.

(1) Sufficient Evidence of Constructive Possession of Cocaine and Marijuana to Support Convictions of Possessing Cocaine With Intent to Sell and Deliver and Possession of Marijuana
(2) Sufficient Evidence of Intent to Sell and Deliver to Support Conviction of Possessing Cocaine With Intent to Sell and Deliver
(3) Sufficient Evidence to Support Conviction of Intentionally Maintaining Building for Purpose of Keeping or Selling Controlled Substances
(4) Trial Judge Did Err in Failing to Submit Lesser Misdemeanor Offense of Knowingly Maintaining Building for Purpose of Keeping or Selling Controlled Substances

State v. Hart, ___ N.C. App. ___, 633 S.E.2d 102 (1 August 2006). **(Author's note: There was a dissenting opinion, but not on the issues discussed below.)** The defendant was convicted of possessing cocaine with the intent to sell and deliver, intentionally maintaining a building for the purpose of keeping or selling controlled substances, and possession of marijuana. Officers executed a search warrant at an apartment. The apartment contained no beds, refrigerator, food other than some leftovers in the trash, and toiletries other than deodorant. Officers found crack cocaine, marijuana, scales, razor blades, aluminum foil, small red baggies, and an object characterized as a crack pipe. The defendant, who was present at the time of the search, had no drugs on his person but possessed $2,900.00 in denominations of fives, tens, and twenties. The defendant was also in close proximity to the drugs. Officers found in a dresser drawer utility and

rent receipts with the defendant's name on them. Another person present (Hooker) had $200.00 in currency. Based on this evidence, the court ruled: (1) there was sufficient evidence of the defendant's constructive possession of the cocaine and marijuana; (2) there was sufficient evidence of intent to sell and deliver the cocaine; (3) there was sufficient evidence to support the defendant's conviction of intentionally maintaining the building for the purpose of keeping or selling controlled substances; and (4) the trial judge did not err in failing to submit the lesser misdemeanor offense of knowingly maintaining a building for the purpose of keeping or selling controlled substances.

(1) No Double Jeopardy Violation When State Obtained Convictions for Possessing Firearm by Felon for Possessing Firearm in 2003 and Habitual Felon Status and 1998 Conviction of Possessing Firearm by Felon Was Used as Underlying Felony to Prove 2003 Offense, and 1998 Offense Also Was One of Three Felony Convictions Used to Prove Habitual Felon Status

(2) No Double Jeopardy Violation When State Obtained Conviction for Possessing Firearm by Felon for Possessing Firearm in 2003, and 1991 Cocaine Conviction Was Used as Underlying Felony for 1998 Offense Which Then Was Used to Prove 2003 Offense

State v. Crump, ___ N.C. App. ___, 632 S.E.2d 233 (1 August 2006). The defendant was convicted of possessing a firearm by felon for possessing a firearm in 2003. The state used a 1998 conviction of possessing firearm by felon as the underlying felony conviction to prove the 2003 offense. The defendant then pled guilty to habitual felon status. The 1998 conviction was one of the three felony convictions used to prove habitual felon status. The court ruled, relying on State v. Glasco, 160 N.C. App. 150, 585 S.E.2d 257 (2003), that there was no double jeopardy violation based on the imposition of multiple punishments. The court rejected the defendant's "double-counting" double jeopardy argument, which was based on the state's use of the 1998 conviction to prove the 2003 offense and to prove habitual felon status. The defendant was punished for possessing a firearm in 2003, not for possessing a firearm in 1998. The court also stated that the mere reliance on the 1998 conviction to establish that the defendant was a recidivist for sentencing purposes does not implicate double jeopardy concerns. (2) The court rejected the defendant's "double-counting" double jeopardy argument that it was impermissible to use the defendant's 1991 cocaine conviction as the underlying felony to prove the 1998 offense of possessing a firearm by a felon and then derivatively use the 1991 cocaine conviction again because that 1998 offense was then used as the underlying felony of the 2003 offense of possessing a firearm by a felon.

Trial Judge Erred in Denying Defendant the Right to Final Jury Argument Based on Defense Counsel's Cross-Examination of State's Expert Witness

State v. Bell, ___ N.C. App. ___, 633 S.E.2d 712 (5 September 2006). During cross-examination of the state's expert witness, a forensic drug chemist, defense counsel asked to view a graph and lab report prepared and brought to court by the witness. The witness gave the documents to defense counsel, who then cross-examined her about them. The defendant did not present any evidence. The court ruled, relying on State v. Shuler, 135 N.C. App. 449, 520 S.E.2d 585 (1999), and State v. Wells, 171 N.C. App. 136, 613 S.E.2d 705 (2005), that the trial judge erred in denying the defendant the right to final jury argument based on defense counsel's cross-examination of the state's expert witness. The court stated that the cross-examination was relevant and directly related to the witness's testimony on direct examination.

Sufficient Evidence to Support Conviction of G.S. 14-256 (Escape from Officer of County Jail) When Alamance County Deputy Sheriff Picked Up Prisoner from Central Prison for

Court Appearance in Alamance County, Placed Him in Alamance County Jail, and Prisoner Escaped When Deputy Was Transporting Him Back to Central Prison

State v. Farrar, ___ N.C. App. ___, 631 S.E.2d 48 (20 June 2006). The court ruled, distinguishing State v. Brame, 71 N.C. App. 270, 321 S.E.2d 449 (1984), that there was sufficient evidence to support a conviction of G.S. 14-256 (escape from officer of county jail) when an Alamance County deputy sheriff picked up a prisoner from Central Prison for a court appearance in Alamance County, placed him in the Alamance County Jail, and the prisoner escaped when the deputy was transporting him back to Central Prison.

(1) Trial Judge Erred in Not Including Possible Verdict of Not Guilty By Reason of Self-Defense in Final Mandate, and Judge Also Erred in Not Correctly Giving Other Self-Defense Instructions to Jury
(2) Trial Judge Did Not Err in Denying Defendant's Motion to Require State to Disclose Identity of Confidential Informant to Prepare Defense at Trial

State v. Withers, ___ N.C. App. ___, 633 S.E.2d 863 (5 September 2006). The defendant was convicted of first-degree murder in which his defense was self-defense. (1) The court ruled that the trial judge erred in not including a possible verdict of not guilty by reason of self-defense in the final mandate to the jury, and the error required a new trial, based on State v. Dooley, 285 N.C. 158, 203 S.E.2d 815 (1974). The court also ruled that the trial judge erred by failing to correctly instruct the jury on: (i) self-defense when the defendant was not the aggressor, and (ii) defense of habitation concerning a person's entry into a home to commit a felony. (See the court's discussion of these issues in its opinion.) (2) The court ruled that the trial judge did not err in denying the defendant's motion to require the state to disclose the identity of a confidential informant to prepare a defense at trial. The court stated that the factors favoring nondisclosure outweighed those favoring disclosure. (See the court's discussion of the factors in its opinion.)

Defendant Was Not Denied Assistance of Counsel for Probation Revocation Hearing When, After Waiving Right to Appointed Counsel, Defendant Failed to Retain Counsel Over Eight-Month Period; Defendant's Own Acts Forfeited His Right to Counsel

State v. Quick, ___ N.C. App. ___, ___ S.E.2d ___ (3 October 2006). The court ruled, relying on State v. Montgomery, 138 N.C. App. 521, 530 S.E.2d 66 (2000), that the defendant was not denied assistance of counsel for his probation revocation hearing when, after waiving his right to appointed counsel, the defendant failed to retain counsel over a eight-month period. The court stated that the defendant through his own acts forfeited his right to proceed with counsel of his choice.

(1) Court's Jurisdiction to Revoke Defendant's Probation for Conviction of Possession of Cocaine Was Lost by Lapse of Time
(2) Court's Revocation of Defendant's Probation for Assault Conviction Was Supported By Sufficient Findings of Trial Judge
(3) Competent Evidence Supported Probation Revocation; Court Notes That Rule 1101(b)(3) Provides That Rules of Evidence Are Inapplicable to Probation Proceedings

State v. Henderson, ___ N.C. App. ___, 632 S.E.2d 818 (15 August 2006). In January 2000, the defendant was placed on 24 months' probation for possession of cocaine (hereafter, cocaine probation). At a probation violation hearing in July 2000, the probation was extended to December 4, 2002. The defendant was arrested and charged on November 3, 2002, for felonious assault. The defendant's probation officer filed a probation violation report on November 25,

2002, alleging violations of the defendant's probation and noted the defendant's pending assault charge. There was no court hearing based on this report before the expiration of the probation on December 4, 2002. On September 17, 2003, the defendant was placed on 30 months' probation for misdemeanor assault (hereafter, assault probation), reduced from the original felonious assault charge. In October 2003, the defendant's probation officer filed a probation violation report for both probations, and the judge in November 2003 modified each probation and extended the cocaine probation to a total of five years to December 2004. It was later extended to June 2005. In April 2005, the defendant's probation officer alleged violations of both probations. In May 2005, a judge revoked both probations. (1) The court ruled that the court's jurisdiction to revoke the defendant's cocaine probation was lost by the lapse of time and arrested judgment on the sentence imposed by the trial judge. The court noted that G.S. 15A-1344(d) tolled the probationary period when he was charged with felonious assault on November 3, 2002. At that time, he had 31 days remaining on his probation. Once the charge was resolved on September 17, 2003, the court had jurisdiction to modify or revoke his probation for only 31 days thereafter. That was not done. Also, a defendant's probation may be revoked after the probationary period expires if the state complies with the provisions of G.S. 15A-1344(f): a written motion and a reasonable effort to notify the probationer and to conduct the hearing earlier. There was no evidence of compliance with the statute in this case. (2) The court ruled that the court's revocation of the defendant's assault probation was supported by sufficient findings, albeit mostly in the preprinted text in AOC-CR-608 and the probation violation report that was incorporate by reference. The court affirmed the revocation of the defendant's assault probation. (3) The defendant argued that there was no competent evidence of any probation violation for the assault probation because the probation officer who had presented the violations at the revocation hearing had been recently assigned to the case and had no actual knowledge of any violations. The defendant contended that incompetent hearsay evidence was thus introduced at the hearing. The court noted that Rule 1101(b)(3) specifically states that the rules of evidence doe not apply in proceedings granting or revoking probation. The court ruled that even if the rules of evidence fully applied to the proceeding, there was sufficient non-hearsay evidence to prove the probation violation.

Evidence

(1) No Crawford v. Washington Violation When Foster Parents Testified About Statements Made to Them by Non-Testifying Foster Children
(2) Foster Children's Statements to Foster Parents Were Properly Admitted Under Residual Hearsay Exception, Rule 804(b)(5)
(3) No Crawford v. Washington Violation When Pediatrician Testified About Statement Made to Pediatrician by Young Child
(4) Trial Judge Erred in Allowing State's Expert to Offer Opinion That Children Suffered Sexual Abuse by Defendant

State v. Richard Brigman, ___ N.C. App. ___, 632 S.E.2d 498 (20 June 2006). The defendant was convicted of eighteen counts of first-degree sexual offense and twenty-seven counts of indecent liberties involving three child victims. (1) During the investigation of the offenses, the children were removed from their home and placed with foster parents. The three children, who did not testify at trial, told the foster parents about the offenses. The foster parents testified at trial about these statements. The court ruled, relying on State v. Kimberly Brigman, 171 N.C. App. 305, 615 S.E.2d 21 (2005), the children's statements were not testimonial and there was no violation of the ruling in Crawford v. Washington, 541 U.S. 36 (2004). (2) The court ruled that the foster children's statements to their foster parents were properly admitted under the residual hearsay exception, Rule 804(b)(5). (See the court's analysis of the rule's requirements in its opinion.) (3) The court ruled, relying on State v. Kimberly Brigman, 171 N.C. App. 305, 615

S.E.2d 21 (2005), that there was no Crawford v. Washington violation when a pediatrician testified about a statement made to the pediatrician by a child who was not quite three years old. The court stated that it cannot conclude that a reasonable child under three years of age would know or should know that his statements might later be used at a trial. The child's statement was not testimonial under Crawford. (4) The court ruled, relying on State v. Figured, 116 N.C. App. 1, 446 S.E.2d 838 (1994), that the trial judge erred in allowing the state's expert, a pediatrician, to offer her opinion that the children suffered sexual abuse by the defendant.

In Prosecution for Failure to Provide Notice of Change of Address as Registered Sex Offender, Documents Used to Prove Date of Defendant's Release from Prison Were Admissible Under Rule 803(b) (Business Records Hearsay Exception)

State v. Wise, ___ N.C. App. ___, 630 S.E.2d 732 (20 June 2006). The court ruled, in a prosecution for failure to provide notice of a change of address as a registered sex offender, the following documents used to prove the date of the defendant's release from prison were admissible under Rule 803(b) (business records hearsay exception): (1) a Department of Correction form sent to the sheriff's department and kept in the defendant's file that notified the department of the defendant's date of release and expected registration as a sex offender in its county; and (2) a sex offender registration worksheet that the defendant completed with the assistance of a deputy sheriff. The court stated the exclusion of some police reports in Rule 803(8) (public records hearsay exception) did not bar the admission of these records under Rule 803(6).

New York State Prison Records Were Properly Admitted Under Rule 803(8) (Public Records Hearsay Exception), and Court Noted That Extrinsic Evidence of Authenticity Was Not Required Under Rule 902 When Records Bore a Seal and Were Certified

State v. Watson, ___ N.C. App. ___, ___ S.E.2d ___ (5 September 2006). The state introduced a New York state prisoner's records. There was a signed certification by the prison's records coordinator that the records were true and exact copies of a particular prisoner's file and were kept in the regular course of business. The court ruled that the records were properly admitted under Rule 803(8) (public records hearsay exception). The court relied on United States v. Weiland, 420 F.3d 1062 (9th Cir. 2005), which involved the identically-worded federal hearsay exception. The records were introduced without testimony of the records coordinator; the court noted under Rule 902 that extrinsic evidence of authenticity was not a condition precedent for the admissibility of documents bearing a seal and were certified copies of public records.

In Prosecution of Sexual Offense With 13 Year Old, Evidence of Defendant's Showing Female Victim Nude Photos of Other Females Before Committing Sexual Act With Victim Made Photos Admissible Under Rule 404(b) to Show Plan and Preparation to Commit Offense and To Corroborate Victim's Testimony

State v. Brown, ___ N.C. App. ___, 631 S.E.2d 49 (20 June 2006). In the prosecution of sexual offense with a 13 year old, the victim testified that before the defendant engaged in a sexual act with her, he showed her four photographs of nude adult women with whom she was acquainted and told her he was going to take similar pictures of her. The photographs were admitted into evidence. The court ruled, relying on State v. Williams, 318 N.C. 624, 350 S.E.2d 353 (1986), and other cases, and distinguishing other cases, such as State v. Bush, 164 N.C. App. 254, 595 S.E.2d 715 (2004) (videotapes inadmissible when not shown to victim), that the photographs were admissible under Rule 404(b) to show plan and preparation to commit the offense as well as to corroborate the victim's testimony.

(1) Sufficient Authentication Under Rule 901 of Incoming and Outgoing Text Messages Sent or Received by Cellphone Number to Allow Introduction of Printouts and Transcripts of Text Messages
(2) Trial Judge Did Not Err in Allowing State's Witness to Testify Who Had Not Been Listed on State's List of Witnesses Provided to Defendant
(3) Trial Judge Did Not Err in Denying Defendant's Motion to Require Law Enforcement Officer to Submit to Interview by Defense Counsel

State v. Taylor, ___ N.C. App. ___, 632 S.E.2d 218 (18 July 2006). The defendant was convicted of first-degree murder of a victim who had traveled to the defendant's city for a sexual encounter arranged through text messages sent and received by a cellphone number. (1) The court ruled, relying on cases from other jurisdictions, that there was sufficient authentication under Rule 901 of incoming and outgoing text messages sent or received by the victim's Nextel-assigned cellphone number to allow the introduction into evidence of printouts and transcripts of the text messages. Two cellphone employees testified how Nextel sent and received text messages and how these particular messages were stored and retrieved. The text messages contained sufficient circumstantial evidence that tended to show that the victim was the person who had sent and received them. (2) The court ruled that the trial judge did not err in allowing a state's witness, a cellphone store manager, to testify who had not been listed on the state's list of witnesses provided to the defendant. The court noted that the state had disclosed that it would call the custodian of Nextel phone records, and the witness's name was in the detective's file that had been provided to the defendant in discovery. (3) The court ruled that the trial judge did not err in denying the defendant's motion to require a law enforcement officer who investigated the case to submit to an interview by defense counsel. The evidence showed that the district attorney's office had not advised the officer that he was prohibited from meeting with defense counsel. The officer had decided not to submit to an interview on his own. The court rejected the defendant's argument that the 2004 discovery amendments supported the defendant's position on this issue.

Trial Judge Abused Discretion in Allowing State's Expert Witness to Testify When State Had Failed to Comply With Defendant's Pretrial Discovery Request Under G.S. 15A-903(a)(2) (Notice of Expert Witness)

State v. Blankenship, ___ N.C. App. ___, 631 S.E.2d 208 (5 July 2006). The defendant filed a request for pretrial discovery, including a request for notice of expert witnesses that the state reasonably expected to call at trial and the additional information required by G.S. 15A-903(a)(2). The state provided the defendant with various discovery materials, but nothing about the use of expert witnesses. The defendant objected when the state during trial called an SBI agent to testify about the manufacturing process of methamphetamine and the ingredients used. The state informed the trial judge that it did not know that this SBI agent would be testifying on this issue until then, although the evidence showed that the state was planning to call someone from the SBI to testify. The trial judge overruled the defendant's objection on the ground that the witness was a fact witness, not an expert. However, the state then sought to qualify the SBI agent as an expert witness on manufacturing methamphetamine. The judge permitted the SBI agent to testify as a lay witness. The court ruled that the agent was in fact qualified as, and testified as, an expert witness. The court also ruled that the trial judge abused his discretion in allowing the SBI agent to testify when the state had failed to comply with its discovery obligations concerning expert witnesses.

(1) Medical Institution Had Right to Appeal Trial Judge's Order That It Provide Appellate Counsel with Medical Records of State's Witness to Prepare Possible Appeal on Evidence Issue
(2) Defendant's Lack of Access to State's Rule 404(b) Witness's Medical Records Was Not Error Because Contents of Records Were Not Material to Issues at Trial
(3) Testimony by State's Witnesses That Defendant Sexually Abused Them Was Properly Admitted Under Rule 404(b) in Defendant's Trial for Sexually Abusing Thirteen-Year-Old

State v. Bradley, ___ N.C. App. ___, ___ S.E.2d ___ (19 September 2006). The defendant was convicted of sex offenses with a thirteen-year-old. Before trial, the defendant subpoenaed Duke University Health Systems (hereafter, DUHS) for medical records concerning a state's witness, not a victim in this trial, who was to give testimony under Rule 404(b) about the defendant's alleged sexual abuse of her. DUHS intervened and the trial judge granted a protective order denying defendant's access to the records, but required DUHS to maintain a sealed copy until final adjudication of the case. After the trial, the court ordered DUHS to provide appellate counsel with the records to prepare a possible appeal on evidence issues. (1) The court ruled that DUHS had a right under G.S.1-271 and 1-277 to appeal the judge's post-trial order. (2) The state's Rule 404(b) witness testified at the trial and was subject to cross-examination. The defendant argued at trial and on appeal that he intended to use the records to impeach the credibility of the witness by showing that she made statements contained in the records at odds with her testimony at trial, or failed to make statements that would have shown sexual abuse by the defendant. The court ruled that even if the witness had testified at variance to statements in the records, the defendant would not have been able to offer the records for purposes of impeachment because extrinsic evidence of prior inconsistent statements may not be used to impeach a witness concerning matters collateral to the issues. Furthermore, although a witness may be impeached on cross-examination concerning her prior inconsistent statements, the answers are conclusive and may not be attacked with direct evidence. Thus, the defendant's lack of access to the records was not error. (3) The court ruled that testimony by state's witnesses that the defendant sexually abused them was properly admitted under Rule 404(b), given the similarity of the their ages with the victim, their placement with the defendant because of familial or quasi-familial relationships, the defendant's purported modus operandi in each instance, and his warning to the witnesses (as he did with the victim) not to tell anyone what had happened.

In Trial of False Pretenses and Forgery Involving Illegitimate Power of Attorney Obtained by Defendant, Evidence of Another Illegitimate Power of Attorney Obtained by Defendant From a Different Victim Was Admissible Under Rule 404(b) to Show Common Plan or Scheme

State v. King, ___ N.C. App. ___, 630 S.E.2d 719 (20 June 2006). The defendant was convicted of multiple counts of obtaining property by false pretenses, forgery, and uttering involving the withdrawal of money from the victim's bank account with an illegitimate power of attorney from the victim that had been obtained by defendant. The court ruled that evidence of another illegitimate power of attorney that had been obtained by defendant from another victim was admissible under Rule 404(b) to show common plan or scheme. to obtain money from victims' bank accounts.

Defendant's Sexual Offenses with Half Sister of Rape Victim That Occurred Nine Years Earlier Than Offenses Being Tried Were Properly Admitted Under Rule 404(b)

State v. Bullock, ___ N.C. App. ___, 631 S.E.2d 868 (18 July 2006). The defendant was convicted of multiple counts of first-degree rape with his pre-teen daughter for offenses committed from late 2000 through late 2001. The court ruled that the defendant's sexual offenses with the pre-teen half sister of the rape victim that occurred nine years earlier than offenses being tried were properly admitted under Rule 404(b) to show common scheme or plan, based on the similarity of the offenses and unnatural character of a father raping his pre-teen daughters. The court rejected the defendant's argument that the time span between the sex offenses with the two daughters was too great to be relevant in showing a common plan or scheme.

Trial Judge Did Not Abuse Discretion in Drug Trial in Admitting Under Rule 404(b) Evidence of Annual Meeting of Drug Users and Sellers Attended by Defendant to Show His Motive, Opportunity, Intent, and Knowledge

State v. Calvino, ___ N.C. App. ___, 632 S.E.2d 839 (15 August 2006). The defendant was convicted of various drug offenses involving two separate sales of cocaine to the state's witness. The state's witness was a dug dealer who was cooperating with the state. The state's witness was allowed to testify about his attending a annual meeting of drug users and sellers in western North Carolina attended by the defendant. The court ruled that the trial judge did not abuse his discretion in admitting this evidence under Rule 404(b) to show defendant's motive, opportunity, intent, and knowledge.

Defendant's Statement to Mother of Indecent Liberties Victim About His Guilt of Offense Was Admissible as Admission by Party-Opponent under Rule 801(d)(A)

State v. Laney, ___ N.C. App. ___, 631 S.E.2d 522 (5 July 2006). The defendant was convicted of indecent liberties. Several months after the offense, the defendant told the mother of the victim that he was sorry for what he had done and that when he came to court, he would be guilty. The court ruled that the defendant's statement was admissible as an admission by a party-opponent under Rule 801(d)(A).

Arrest, Search, and Confession Issues

(1) *Miranda* Warnings Given in Spanish Were Adequate
(2) Waiver of *Miranda* Rights By Defendant With Low Intellectual Ability Was Valid

State v. Ortez, ___ N.C. App. ___, 631 S.E.2d 188 (5 July 2006). A law enforcement officer fluent in Spanish read the defendant his *Miranda* rights in Spanish from a pre-printed *Miranda* rights and waiver form. The defendant signed the waiver form. (1) The defendant on appeal challenged the adequacy of the *Miranda* warnings, specifically the use of "corte de ley" for "court of law" and "interrogatorio" for "questioning." The defendant also challenged the Spanish translation of the *Miranda* right to counsel for an indigent person. The court discussed these issues and ruled that the *Miranda* warnings given in Spanish reasonably conveyed to the defendant his *Miranda* rights and were therefore adequate. (2) The defendant's testing showed he had an IQ ranging from 55 to 77, classifying him as mildly mentally retarded to borderline intellectual or low average functioning. The court noted that a defendant's IQ alone does not mean the defendant could not make a voluntary, knowing, and intelligent waiver of his *Miranda* rights. The court discussed the facts in this case and ruled that the defendant's waiver was valid based on the totality of circumstances.

Miranda Waiver by Vietnamese-Speaking Defendant Was Understandingly, Voluntarily, and Knowingly Made When Vietnamese-Speaking Law Enforcement Officer Acted as Translator for Interrogating Officer

State v. Nguyen, ___ N.C. App. ___, 632 S.E.2d 197 (18 July 2006). The court ruled that *Miranda* waiver by Vietnamese-speaking defendant was understandingly, voluntarily, and knowingly made when a Vietnamese-speaking law enforcement officer acted as the translator for the interrogating law enforcement officer. There was no evidence that the officer-translator was deceitful or acted in an otherwise improper manner during his dealings with the defendant. The court rejected the defendant's argument that the officer-translator was not a neutral translator because he was a law enforcement officer.

Juvenile Was In Custody in Assistant Principal's Office to Require _Miranda_ and Juvenile Statutory Warnings When Law Enforcement Officer Participated in Questioning and Circumstances of Juvenile's Detention in Office Would Lead Reasonable Person in Juvenile's Position to Believe That He Was Restrained to Degree Associated With Formal Arrest

In re W.R., ___ N.C. App. ___, ___ S.E.2d ___ (3 October 2006). As a result of information that the juvenile, a fourteen-year-old middle school student, may have brought a knife to school, an assistant principal took the juvenile out of his classroom and to her office. The principal and assistant principal questioned him for a while and then a law enforcement officer (school resource officer) joined in the questioning. The officer also conducted a search of the juvenile's pockets for weapons. None were found. The questioning took about thirty minutes and then the juvenile admitted possessing a knife at school on the prior day. The juvenile was never left unsupervised during that time, and the officer was there for most of that time period with the juvenile under his supervision while the principal and assistant principal left the office to conduct the investigation. The court ruled, distinguishing In re Phillips, 128 N.C. App. 732, 497 S.E.2d 292 (1998) (juvenile not in custody when questioned by school officials in school office and no law enforcement officers were present), that the juvenile was in custody to require *Miranda* and juvenile statutory warnings. Given the totality of circumstances, a reasonable person in the juvenile's position would have believed that he was restrained to a degree associated with a formal arrest.

Search Warrant's Information Was Not Stale Because Affidavit Showed Defendant's Commission of On-Going Sex Crimes With Children, and Items to Be Seized Were of Continuing Utility to Defendant

State v. Pickard, ___ N.C. App. ___, 631 S.E.2d 203 (5 July 2006). The defendant was convicted of multiple sex crimes committed in his home with several children. The search warrant for the defendant's home authorized the seizure of computers, computer equipment and accessories, cassette videos and DVDs, video cameras, digital cameras, film cameras and accessories, and photographs and printed materials that could be consistent with the exploitation of a minor. The affidavit described the defendant's sexual and other inappropriate activity with four children under nine years old and with a fourteen year old. The victims described the defendant's taking photographs and his use of video cameras and computers. The activity with the fourteen year old had taken place about 18 months before the issuance of the search warrant. (Author's note: The affidavit apparently did not contain specific dates concerning the defendant's sexual activity with the younger children, but the affidavit stated that the officer's interviews with the younger children occurred the day before the officer applied for the search warrant.) The court ruled, relying on State v. Jones, 299 N.C. 298, 261 S.E.2d 860 (1980), and two cases from other jurisdictions, that the search warrant's information was not stale because the affidavit showed the

defendant's commission of on-going sex crimes with the children, and the items to be seized were of continuing utility to the defendant.

In Civil Lawsuit, Fifth Amendment Privilege Against Self-Incrimination Did Not Protect Production in Discovery of Civil Defendant's Medical Records But Did Protect Defendant From Having to Answer Interrogatories and Requests for Admissions About Alcohol and Medications Taken Before Vehicular Accident

Roadway Express, Inc. v. Hayes, ___ N.C. App. ___, 631 S.E.2d 41 (20 June 2006). Plaintiffs sued the defendant for a vehicular accident in which a death resulted. Plaintiffs alleged that the defendant was impaired when the accident occurred. The court ruled, relying on Schmerber v. California, 384 U.S. 757 (1966), that the Fifth Amendment privilege against self-incrimination did not protect production in discovery of the defendant's medical records that contained blood test results concerning impairing substances. The court ruled, however, that the privilege protected the defendant from having to answer interrogatories and requests for admissions about alcohol and medications that the defendant may have taken before the accident. (There was a pending criminal prosecution of the defendant.) The court noted that the defendant's assertion of the privilege may bar the defendant's assertion of his affirmative defense of sudden emergency.

Sentencing

Defendant Cannot Stipulate in Prior Record Worksheet That Out-of-State Conviction Was Substantially Similar to North Carolina Offense Because Stipulation to Question of Law Is Invalid

State v. Palmateer, ___ N.C. App. ___, ___ S.E.2d ___ (19 September 2006). The court ruled, relying on State v. Hanton, ___ N.C. App. ___, 623 S.E.2d 600 (3 January 2006), that a defendant cannot stipulate in a prior record worksheet that an out-of-state conviction is substantially similar to a North Carolina offense because a stipulation to a question of law is invalid.

Trial Judge Did Not Err in Calculating Defendant's Prior Record Level By Counting Two Convictions on Same Day in Same County When One Conviction Was in District Court and Other Conviction Was in Superior Court

State v. Fuller, ___ N.C. App. ___, 632 S.E.2d 509 (1 August 2006). The court ruled that the trial judge did not err under G.S. 15A-1340.14(d) in calculating the defendant's prior record level by counting two convictions on the same day in the same county when one conviction was in district court and other conviction was in superior court.

Recent Cases Affecting Criminal Law and Procedure
(November 1, 2005 – June 6, 2006)

Robert L. Farb
Institute of Government

North Carolina Supreme Court

Criminal Law and Procedure

Defendant's Convictions of First-Degree Statutory Rape and Indecent Liberties Did Not Violate Constitutional Right to Unanimous Jury Verdict—Ruling of Court of Appeals Is Reversed

State v. Markeith Lawrence, 360 N.C. 368, 627 S.E.2d 609 (7 April 2006), *reversing in part*, 170 N.C. App. 200, 612 S.E.2d 678 (2005). The defendant was convicted of six counts of first-degree statutory sexual offense, five counts of first-degree statutory rape, and three counts of taking indecent liberties (The first-degree statutory sexual offense convictions were not before the North Carolina Supreme Court for its review.) The court ruled, reversing the ruling of the court of appeals, that the defendant's convictions of first-degree statutory rape and indecent liberties did not violate the defendant's constitutional right to a unanimous jury verdict. (1) The defendant was charged in three identically-worded indecent liberties indictments that lacked specific details distinguishing one offense from another. The offense dates for each indictment were also identical (May 1, 1999, through December 6, 2000). The victim testified about three specific incidents of indecent liberties on three different occasions in the summer of 1999. Relying on State v. Hartness, 326 N.C. 561, 391 S.E.2d 177 (1990), and State v. Lyons, 330 N.C. 298, 412 S.E.2d 308 (1991), the court ruled that the defendant's constitutional right to a unanimous jury verdict was not violated, even though a friend of the victim testified about a fourth act of indecent liberties by the defendant with the victim. The court stated that this fourth incident had no effect on jury unanimity because according to *Lyons*, *Hartness* ruled that while one juror might have found some incidents of misconduct constituting indecent liberties and another juror might have found different incidents of misconduct constituting indecent liberties, the jury as a whole found that improper sexual conduct occurred. (2) The defendant was charged in five identically-worded indictments with first-degree statutory rape that lacked specific details distinguishing one offense from another. The offense dates for each indictment alleged the same time frame. The victim testified that she had sexual intercourse with the defendant thirty-two times during the years 1999 and 2000. During her testimony, she recounted five specific instances in which the defendant penetrated her vagina with his penis. Relying on the reasoning in State v. Wiggins, 161 N.C. App. 583, 589 S.E.2d 402 (2003), the court ruled that the defendant's constitutional right to a unanimous jury verdict was not violated.

Defendant's Convictions of Second-Degree Sexual Offense Did Not Violate Constitutional Right to Unanimous Jury Verdict—Ruling of Court of Appeals Is Reversed

State v. Gary Lawrence, 360 N.C. 393, 627 S.E.2d 615 (7 April 2006), *reversing in part*, 165 N.C. App. 548, 599 S.E.2d 87 (2004). The North Carolina Court of Appeals in this case had reversed seven of the defendant's convictions of second-degree sexual offense because the defendant's constitutional right to a unanimous jury verdict had been violated. The North Carolina Supreme Court, per curiam and without an opinion, stated that for the reasons set out in

State v. Markeith Lawrence, 360 N.C. 368, 627 S.E.2d 609 (7 April 2006), the ruling of the North Carolina Court of Appeals is reversed.

(1) Court Rules That Felonious Breaking or Entering Indictment Need Not Allege Specific Felony Intended to Be Committed; Court Overrules Contrary Court of Appeals Ruling
(2) If Felonious Breaking or Entering Indictment Alleges Specific Felony Intended to Be Committed, State May Not Amend Indictment to Allege Another Felony

State v. Silas, 360 N.C. 377, 627 S.E.2d 604 (7 April 2006), *modifying and affirming*, 168 N.C. App. 627, 609 S.E.2d 400 (2005). The defendant's indictment for felonious breaking and entering alleged that the defendant broke and entered with the intent with the intent commit the felony of murder. During the charge conference, the trial judge allowed the state to amend the indictment to change the intended felony as assault with a deadly weapon with intent to kill inflicting serious injury and assault with a deadly weapon inflicting serious injury. (1) The court ruled, relying on State v. Worsley, 336 N.C. 268, 443 S.E.2d 68 (1994) (burglary indictment need not allege specific felony defendant intended to commit), that a felonious breaking or entering indictment need not allege the specific felony intended to be committed. The court overruled a contrary ruling in State v. Vick, 70 N.C. App. 338, 319 S.E.2d 327 (1984). The court stated that it is sufficient if the indictment alleges that the defendant intended to commit a felony or larceny. (2) The court ruled that if a felonious breaking or entering indictment alleges a specific felony intended to be committed, the state may not amend the indictment to allege another felony. Such an amendment is a substantial alteration of the indictment and prohibited by G.S. 15A-923(e). The court rejected the state's argument that the language concerning the intent to commit murder was harmless surplusage.

(1) Trial Judge Did Not Err in Exercising Discretion to Not Excuse Prospective Juror Because of Her Age
(2) No *Brady v. Maryland* Violation Because Exculpatory Evidence Was Provided in Time for Defendant to Make Effective Use of It at Trial
(3) Trial Judge Did Not Err in Denying Defendant's Motion for Appropriate Relief Alleging Juror Misconduct
(4) Trial Judge Did Not Err in Denying Defendant's Request for Evidentiary Hearing on Motion for Appropriate Relief

State v. Elliott, 360 N.C. 400, 628 S.E.2d 735 (5 May 2006). The defendant was convicted of first-degree murder and sentenced to death. (1) The court ruled that the trial judge did not err in exercising his discretion to not excuse a prospective juror because of her age (she was over 65, the age in G.S. 9-6.1 at the time of this trial; the age is now over 72). She did not have a compelling personal hardship other than her age. The court reminded trial judges that excusing prospective jurors present in the courtroom who are over the statutory age in G.S. 9-6.1 must reflect a genuine exercise of discretion. (2) The state's witness testified that she identified the defendant from a photo lineup. The prosecutor did not ask the witness if she could make an in-court identification. During the argument on the defendant's motion to dismiss charges, the trial judge asked the prosecutor why the witness was not asked to make an in-court identification. The prosecutor explained that the witness had advised the prosecutor just before she was about to testify that she would not be able to make an in-court identification. The defendant then moved to strike her testimony under Brady v. Maryland, 373 U.S. 83 (1963) (state has constitutional duty to disclose materially favorable evidence to defendant). Instead of granting the defendant's motion, the judge allowed the state to re-open its case. The state recalled the witness, who testified on cross-examination that she was unable to make an in-court identification. The court noted that to establish a *Brady* violation, the defendant must show the evidence was materially favorable and

would have affected the outcome of the trial. The court ruled that the while the state should have disclosed the information to the defendant as soon as it became available, the belated disclosure was not reversible error because there is no *Brady* error if the defendant had sufficient time to use the information to his benefit. The defendant during jury argument made good use of this information and the prosecutor's failure to provide it to the defendant. Also, the witness's testimony was most relevant to the charges on which the jury returned verdicts of not guilty. (3) The court ruled that the trial judge did not err in denying the defendant's motion for appropriate relief (MAR), which alleged that the defendant's constitutional and statutory rights had been violated when two jurors met and prayed outside the jury room during a recess from jury deliberations on the death sentence recommendation. The evidence (a newspaper article) revealed that two jurors had prayed together in the lobby during an afternoon recess. The court noted that there was nothing in the record to indicate a discussion or deliberation of any kind occurred in the lobby. The court concluded that because the defendant failed to submit sufficient evidence supporting the allegations in his MAR, he failed to show the existence of the asserted ground for relief. (4) The court also ruled that the trial judge did not err in denying the defendant's request for an evidentiary hearing on his MAR. During argument for an evidentiary hearing, the defendant stated that he intended to call three jurors and then call newspaper reporters on rebuttal if necessary. The court stated that under G.S. 15A-1240(c) and Rule 606(b), the jurors could only have testified whether extraneous information came to their attention or whether someone bribed or intimidated (or attempted to bribe or intimidate) them. Nothing in defendant's MAR indicated that the jurors considered extraneous information, which is information about the defendant or the case being tried that was not introduced into evidence. Therefore, even if the trial judge had granted the defendant's request for an evidentiary hearing, none of the defendant's proposed juror witnesses would have been allowed to testify concerning the issues raised in the MAR that attempted to impeach the death sentence recommendation.

Trial Judge Erred in Allowing State to Amend Habitual DWI Indictment—Ruling of Court of Appeals Is Reversed

State v. Winslow, 360 N.C. 161, 623 S.E.2d 11 (16 December 2005)**.** The court, per curiam and without an opinion, reversed the decision of the North Carolina Court of Appeals, 169 N.C. App. 137, 609 S.E.2d 463 (15 March 2005), for the reasons stated in the dissenting opinion. The defendant was arrested and charged with habitual impaired driving (DWI) on April 9, 2000. He later was indicted, with the oldest prior conviction mistakenly alleged as April 1, 1993, which is not within seven years of the current offense. At the close of the state's evidence, the defendant moved to dismiss the indictment for not alleging habitual DWI. The trial judge allowed the state to amend the indictment to allege the correct conviction date of the oldest conviction as August 11, 1993. The dissenting opinion stated that the amendment was a substantial alteration of the charge and not allowed under G.S. 15A-923(e), because the amendment elevated the offense from a misdemeanor to a felony. The dissenting opinion stated that the case should be remanded for resentencing on misdemeanor DWI.

Trial Judge Erred in Rape Trial in Jury Instruction on Force and Lack of Consent—Ruling of Court of Appeals Is Affirmed

State v. Smith, 360 N.C. 341, 626 S.E.2d 258 (3 March 2006). The court, affirming the ruling of the North Carolina Court of Appeals, 170 N.C. App. 461, 613 S.E.2d 304 (2005), ruled that there was a reasonable likelihood that the trial judge's instruction to the jury in a rape trial impermissibly lessened the state's burden to prove the elements of force and lack of consent beyond a reasonable doubt. The defendant's defense was consent. The judge instructed the jury, based on State v. Moorman, 320 N.C. 387, 358 S.E.2d 502 (1987), that "[f]orce and lack of

consent are implied in law if at the time of the vaginal intercourse the victim is sleeping or similarly incapacitated." The court noted that the instruction was a correct statement of the law, but it also stated that force and lack of consent can only be implied in law if the state proves beyond a reasonable doubt that the victim was sleeping at the time of the vaginal intercourse. In this case the victim's being asleep was the determinative fact in issue and the crux of the state's prosecution. Accordingly, it was imperative that the jury be instructed that they must find the solitary fact (victim was asleep) that satisfied multiple elements of rape (force and lack of consent) beyond a reasonable doubt. The court concluded that there was a reasonable likelihood that the jury misapplied the instruction because it was not informed it had to find the basic fact of sleeping beyond a reasonable doubt.

Insufficient Evidence of Possession of Diazepam With Intent to Sell and Deliver—Ruling of Court of Appeals Is Affirmed

State v. Sanders, 360 N.C. 170, 622 S.E.2d 492 (16 December 2005)**.** The court, per curiam and without an opinion, affirmed the ruling of the North Carolina Court of Appeals, 171 N.C. App. 46, 613 S.E.2d 708 (21 June 2005), that the defendant's possession of thirty diazepam pills with no other evidence connected with the sale of diazepam was insufficient to support his conviction of possession with the intent to sell and deliver diazepam. The court of appeals relied on State v. King, 42 N.C. App. 210, 256 S.E.2d 247 (1979). The court of appeals had ordered the case remanded the for entry of judgment on the lesser included offense of misdemeanor possession of diazepam.

Insufficient Evidence of Kidnapping During Armed Robbery— Ruling of Court of Appeals Is Affirmed

State v. Ripley, 360 N.C. 333, 626 S.E.2d 289 (3 March 2006). The court, affirming the ruling of the North Carolina Court of Appeals, 172 N.C. App. 453, 617 S.E.2d 106 (16 August 2005), ruled that the movement of robbery victims from an Entranceway into a motel lobby during the commission of an armed robbery was not an independent act legally sufficient to support the defendant's separate convictions of second-degree kidnapping.

Court, Per Curiam and Without Opinion, Affirms Court of Appeals Ruling Upholding Jury Instruction in First-Degree Kidnapping Trial Concerning Defendant's Not Releasing Kidnapping Victim in Safe Place

State v. Corbett, 360 N.C. 287, 624 S.E.2d 625 (27 January 2006), *affirming per curiam*, 168 N.C. App. 117, 607 S.E.2d 281 (18 January 2005). The court, per curiam and without an opinion, affirmed the ruling of the court of appeals upholding a jury instruction in a first-degree kidnapping trial concerning the defendant's not releasing the kidnapping victim in a safe place. The defendant took a store employee as a hostage. The defendant released the victim only when a law enforcement officer pointed his weapon at the defendant and the victim. The court of appeals ruled, relying on State v. Heatwole, 333 N.C. 156, 423 S.E.2d 735 (1992), that the jury instruction was proper when it effectively stated that the defendant's release of the victim into the focal point of a law enforcement officer's weapon was not a release in a safe place.

Court, Per Curiam and Without Opinion, Affirms Court of Appeals Ruling That Double Jeopardy Did Not Attach to Defendant's Acknowledgement of Guilt in Deferred Prosecution Agreement

State v. Ross, 360 N.C. 355, 625 S.E.2d 779 (3 March 2006). The court affirmed, per curiam and without an opinion, the ruling of the North Carolina Court of Appeals, ___ N.C. App. ___, 620 S.E.2d 33 (4 October 2005), that double jeopardy did not attach to the defendant's acknowledgement of guilt in a deferred prosecution agreement when the agreement did not comprehend a plea of guilty and a judge did not determine that there was a factual basis for a guilty plea. Thus, when the defendant entered into a deferred prosecution agreement for several misdemeanor tax offenses, failed to comply with the agreement, and the state dismissed the charges and later prosecuted the defendant for embezzlement, there was no double jeopardy violation.

Court, Per Curiam and Without Opinion, Affirms Court of Appeals Ruling That Trial Judge Did Not Err in Giving Instruction on Flight

State v. Etheridge, 360 N.C. 359, 625 S.E.2d 777 (3 March 2006). The court affirmed, per curiam and without an opinion, the ruling of the North Carolina Court of Appeals, 168 N.C. App. 359, 607 S.E.2d 325 (1 February 2005), that there was sufficient evidence to support the trial judge's jury instruction on flight by the defendant. The defendant left the break-in scene shortly after a neighbor arrived. Although law enforcement found the defendant's vehicle, they were unable to locate the defendant for several weeks.

Capital Case Issues

(1) Court Clarifies How It Will Review Trial Judge's Decision Not To Submit Mitigating Circumstance G.S. 15A-2000(f)(1) (No Significant History of Prior Criminal Activity) and Upholds Judge's Decision Not to Submit Circumstance
(2) Court Rules That Trial Judge Did Not Err in Not Submitting Mitigating Circumstances G.S. 15A-2000(f)(7) (Defendant's Age When Murder Committed)

State v. Hurst, 360 N.C. 181, 624 S.E.2d 309 (27 January 2006). The defendant was convicted of first-degree murder and sentenced to death. (1) The trial judge declined to submit mitigating circumstance G.S. 15A-2000(f)(1) (no significant history of prior criminal activity). The defendant had asked the trial judge not to submit the circumstance, but then argued on appeal that the judge erred in not submitting it. The court reaffirmed prior rulings that the judge has a duty to submit mitigating circumstance (f)(1) when evidence supports its submission, regardless of the defendant's position on whether or not to submit it. The court discussed some of its prior case law on (f)(1). The court noted that some of its cases had resulted in a distortion of capital sentencing as trial judges have focused too closely on the existence, nature, and extent of a defendant's record and have correspondingly failed to consider the aspect of the court's rulings that allows the court to determine whether a reasonable jury would find the defendant's criminal activity to be significant. The court stated when a judge decides not to submit the circumstance, that determination is entitled to deference. Whenever a defendant contends the trial judge erred in not submitting (f)(1), the court will review the whole record in evaluating whether the judge acted correctly, considering the court's admonition that any reasonable doubt concerning the submission of a statutory or requested mitigating circumstance should be resolved in the defendant's favor. Although the doctrine of invited error is inapplicable, "a whole record review will necessarily include consideration of the parties' positions as to whether the instruction should be given." The court then examined the evidence in this case and upheld the trial judge's decision not to submit (f)(1): A few months before the murder, the defendant broke and entered a residence in West Virginia and stole a firearm. In 1998, the defendant had been convicted of several breaking and entering offenses in North Carolina. He abused marijuana, crack cocaine, and Oxycontin. He had a pending DUI in West Virginia. The court overruled State v. Rouse, 339 N.C. 59, 451 S.E.2d 543 (1994), to the extent it implied that if evidence concerning a defendant's criminal history is offered in a context other than to determine whether the (f)(1) instruction should be given, the defendant might not be entitled to the instruction. (2) The court ruled that the trial judge did not err in not submitting mitigating circumstances G.S. 15A- 2000(f)(7) (defendant's age when murder committed). The defendant had argued that he was 23 years old at the time of the murder and emotionally immature. The court concluded that the evidence demonstrated that the defendant's maturity was consistent with his chronological age.

(1) Trial Judge Did Not Err in Not Giving Peremptory Instructions on Statutory Mitigating Circumstances G.S. 15A-2000(f)(2) and -2000(f)(6)
(2) No Double Jeopardy Violation in Submitting Aggravating Circumstance in Capital Resentencing Hearing That Had Not Been Submitted in First Capital Sentencing Hearing in Which Defendant Had Received Death Sentence
(3) Court Comments on Jury Instructions and Form on Issue Three in Capital Sentencing Hearing

State v. Duke, 360 N.C. 110, 623 S.E.2d 11 (16 December 2005). The defendant was convicted of two counts of first-degree murder and sentenced to death. (1) The court ruled that the defendant was not entitled to a peremptory instruction on mitigating circumstances G.S. 15A-2000(f)(2) (defendant under influence of mental or emotional disturbance) and -2000(f)(6) (defendant's impaired capacity to appreciate criminality of conduct or to conform conduct to requirements of law). Concerning (f)(2), the defense mental health expert admitted on cross-examination that two clinicians could reach different conclusions about the defendant's mental condition. In addition, the expert testified that other mental health professionals had previously given inconsistent diagnoses of the defendant's condition. Concerning (f)(6), the state offered evidence that the jury could reasonably have found that the defendant knew and appreciated the criminality of his actions. (2) The court ruled, relying on State v. Sanderson, 346 N.C. 669, 488 S.E.2d 133 (1997), and distinguishing Ring v. Arizona, 536 U.S. 584 (2002), that there is no double jeopardy violation in submitting an aggravating circumstance in a capital resentencing hearing that had not been submitted in the first capital sentencing hearing in which the defendant had received a death sentence. (3) The court commented that North Carolina's death penalty structure differs from the statute the Kansas Supreme Court recently struck down and is pending for a decision in the United States Supreme Court. State v. Marsh, 278 Kan. 520 (2004), *cert. granted*, 125 S. Ct. 2517 (2005). The court stated that in North Carolina, should the jury answer Issue Three in the affirmative, the jury is required to make one last decision of guided discretion: whether the aggravating circumstances are sufficiently substantial to call for the imposition of the death penalty. Unlike the Kansas statute, a North Carolina jury's decision does not rest completely on the weighing of the mitigating circumstances against the aggravating circumstances. Assuming arguendo a constitutional violation occurs under the Kansas statute, North Carolina's statutory scheme offers an additional layer of protection against the arbitrary imposition of the death penalty.

Prosecutor Did Not Abuse Discretion in Seeking Death Penalty

State v. Allen, 360 N.C. 297, 626 S.E.2d 271 (3 March 2006). The defendant was convicted of first-degree murder and sentenced to death. The court ruled that the state did not abuse its discretion in seeking the death penalty in this case. The court noted that to prevail on the assertion of abuse of discretion, the defendant must show a discriminatory purpose and a discriminatory effect, and there was no evidence of either.

Evidence

(1) Admission of SBI Lab Reports Prepared by Non-Testifying SBI Serologist Did Not Violate *Crawford v. Washington*
(2) SBI Lab Report Was Admissible Under Rule 803(6) (Business Records) and Was Not Inadmissible Because of Rule 803(8) (Public Records)

State v. Forte, 360 N.C. 427, 629 S.E.2d 137 (5 May 2006). The defendant was convicted of three counts of first-degree murder and sentenced to death. (1) A forensic pathologist performed an autopsy on one of the murder victims and provided vaginal swabs and smears to a law enforcement officer, who submitted the evidence to the SBI laboratory. As a serologist in the lab, Agent Spittle would receive samples of blood and bodily fluids, examine the samples and identify the fluids, and then refer them to others in the lab for further analysis. His records reflected both the results of his investigation and his disposition of the evidence. After receiving the serological evidence for this murder, Agent Spittle sent the evidence relating to the sperm from vaginal swabs and smears to SBI Agent Budzynski, who testified at trial that the DNA in the samples matched DNA recovered in one of the other murders. The same procedure was followed for one of the other murders: rectal and vaginal swabs were collected by a forensic pathologist, were received and examined by Agent Spittle, and then were sent to Agent Budzynski. Agent Spittle did not testify at trial, but his reports involving both murders were introduced into evidence. These reports contained Agent Spittle's results of his analyses and chain of custody information. The court ruled that the admission of Agent Spittle's reports did not violate Crawford v. Washington, 124 S. Ct. 1354 (2004), because the reports were not testimonial. The court stated that the reports did not bear witness against the defendant. Instead, they were neutral, having the power to exonerate as well as to convict. The court acknowledged that while the reports were prepared with the understanding that eventual use in court was possible or even probable, they were not prepared exclusively for trial and Agent Spittle had no interest in the outcome of any trial in which the records might be used. The court noted dicta in *Crawford* that business records are not testimonial. The court stated that among other attributes, business records are neutral, are created to serve a number of purposes important to the creating organization, and are not inherently subject to manipulation or abuse. (2) The court ruled that Agent Spittle's reports were admissible as business records under Rule 803(6). The court noted that Agent Nelson was Agent Spittle's supervisor and was responsible for creating and implementing laboratory record-keeping policies. Agent Nelson testified that Agent Spittle created the reports contemporaneously with his work as part of the regular practice of the agency and within the ordinary course of agency business. The court noted the comment to Rule 803(8) (public records hearsay exception) states that reports that are not admissible under the rule are not admissible as business records under Rule 803(6). The defendant argued that the provision in Rule 803(6) that findings from an investigation made under authority are admissible against the state means that laboratory reports are inadmissible when offered by the state against the defendant. The court, relying on State v. Smith, 675 P.2d 510 (Ore. App. 1984), and noting that it had cited this case in State v. Smith, 312 N.C. 361, 323 S.E.2d 316 (1984) (upholding Breathalyzer affidavit in district court under business and public records hearsay exceptions), stated that if Agent Spittle's reports were purely ministerial observations, they were not inadmissible under either Rule 803(8) or Rule 803(6). The court concluded that the reports concerned routine, nonadversarial matters, and were prepared for a number of purposes, including statistical analysis and construction of databases, even though one purpose was potential use in court. Agent Spittle's analysis of the evidence also facilitated further examination of the evidence within the SBI lab. The court ruled that the reports were records of purely ministerial observations that do not offend the public records exception and were properly admitted as business records.

Proposed Defense Cross-Examination of Rape Victim Was Not Permitted Under Rule 412, Rape Evidence Shield Rule—Ruling of Court of Appeals Is Reversed

State v. Harris, 360 N.C. 145, 623 S.E.2d 615 (16 December 2005), *reversing*, 166 N.C. App. 386, 602 S.E.2d 697 (5 October 2004). The defendant was convicted of second-degree rape and common law robbery. The state's evidence showed that the defendant physically attacked the victim, raped her, and stole property from her. A nurse who examined the victim testified that her

examination of the victim showed multiple lacerations, bruising, and tears in her anus and vagina, and her cervix was very bruised and swollen red. The defendant's defense was consent. The trial judge did not allow the defendant to cross-examine the victim about her sexual activity with her boyfriend earlier on the day of rape and robbery. At a hearing under Rule 412 (rape evidence shield rule), the victim testified that her boyfriend had attempted to have consensual sex with her, but no penetration had occurred. The court ruled, distinguishing State v. Ollis, 318 N.C. 370, 348 S.E.2d 777 (1986), that the proposed cross-examination of the victim was not permitted under Rule 412, specifically subdivision (b)(2) (evidence of specific instances of sexual behavior to show act was not committed by the defendant). The encounter with her boyfriend was consensual and was unlikely to have produced the type and number of injuries, based on the nurse's testimony. The court upheld the trial judge's ruling and reversed the ruling of the North Carolina Court of Appeals, 166 N.C. App. 386, 602 S.E.2d 697 (2004). The court also concluded that even assuming that the excluded evidence was probative, it was substantially outweighed by the danger of unfair prejudice to the state and prosecuting witness under Rule 403.

Arrest, Search, and Confession Issues

Defendant Did Not Unambiguously Assert Right to Silence and Thus Officer's Asking for Amplification of Defendant's "No" Response Did Not Violate His Constitutional Rights

State v. Forte, 360 N.C. 427, 629 S.E.2d 137 (5 May 2006). Officers were investigating the defendant's alleged involvement in three murders. They asked the defendant at work whether he would accompany them to the police station for an interview. He was told that he was not under arrest and he could return to work later. He was not given *Miranda* warnings. He went with the officers to the police station, where he admitted involvement with the three murders and then went with the officers to the locations where the murders were committed. The officers returned to the police station where he was given *Miranda* warnings and asked if he wanted to answer any more questions at that time. When the defendant answered, "no," the officer asked what he meant. The defendant responded that he was tired and would answer more questions after he had a chance to sleep. When the defendant awoke after several hours sleep, he said that he felt like talking some more. The officers re-advised the defendant of his *Miranda* rights, and the defendant affirmed his willingness to continue answering questions. The court ruled, citing State v. Golphin, 352 N.C. 364, 533 S.E.2d 168 (2000), that under these circumstances, the defendant's "no" response was ambiguous (that is, not a clear assertion of the right to remain silent), and the officer did not violate the defendant's constitutional rights by asking for amplification. The defendant had been cooperative from the beginning of his encounter with the police and had been forthcoming with his answers to the officers' questions. When the defendant unexpectedly answered "no" on being asked if he wished to answer any more questions, the officer did no more than ask him what he meant.

North Carolina Court of Appeals

Criminal Law and Procedure

(1) Notes in File of Department of Social Services (DSS) But Not in Prosecutor's File Were Not Discoverable Under G.S. 15A-903(a)(1) Because DSS Is Not a Prosecutorial Agency; Nor Did It Act As a Prosecutorial Agency In This Case
(2) Evidence Supported Jury Instruction on Defendant's Flight

State v. Pendleton, ___ N.C. App. ___, 622 S.E.2d 708 (20 December 2005). The defendant was convicted of multiple sex offenses involving a twelve-year-old. (1) The trial judge denied the defendant's motion to continue made after the state on the morning of trial produced notes originating from the Department of Social Services (DSS) that may have contained names of possible witnesses. The court ruled that notes in a DSS file but not in the prosecutor's file were not discoverable under G.S. 15A-903(a)(1), because DSS is not a prosecutorial agency. Nor did DSS act as a prosecutorial agency in this case. DSS referred the matter to law enforcement who developed their own evidence by interviewing the victim. Although a DSS employee sat in on a law enforcement interview of the victim, the court stated that this activity did not transform DSS into a prosecutorial agency. The court also ruled that the defendant had waived appellate review of any constitutional issues involving the defendant's motion to continue based on the state's failure to produce the notes until the morning of trial. (2) The court ruled that the evidence supported the jury instruction on flight. The defendant failed to keep two appointments with a detective, left the area, and then presented false identification when he was stopped for a traffic violation in South Carolina.

(1) Trial Judge Did Not Err in Allowing State's Witness to Testify Whose Name Did Not Appear on Witness List Disclosed by State Before Trial, Based on State's Good Faith Showing Under Case Law and G.S. 15A-903(a)(3)
(2) Sufficient Evidence of Serious Bodily Injury to Support Conviction of Assault Inflicting Serious Bodily Injury

State v. Brown, ___ N.C. App. ___, 628 S.E.2d 787 (18 April 2006). The two defendants were convicted of common law robbery and assault inflicting serious bodily injury. (1) The court ruled that the trial judge did not err in allowing a state's witness to testify whose name did not appear on a witness list disclosed by the state before trial. The state informed the trial judge that before being approached by the witness the morning of trial, the state was unaware of the witness or that he had observed the victim's injuries. The judge conducted a voir dire of the witness, who testified that he had not previously spoken with the state about the case. The court ruled that a good faith showing had been made under State v. Smith, 291 N.C. 505, 231 S.E.2d 663 (1977), and G.S. 15A-903(a)(3) to allow the witness to testify. (2) The victim testified that his facial injuries were "very" painful, he suffered pain in his mouth for about a month, and his right eye felt like it fell out of his head. The victim's father testified that the victim complained about pain for about ten months. A doctor testified that the victim suffered multiple facial fractures and lacerations, and characterized his injuries as causing "severe" and "extreme" pain. The court ruled that this evidence was sufficient to prove "serious bodily injury" under that part of the statutory definition that includes a protracted condition that causes extreme pain.

(1) Defendant's Right to Unanimous Jury Verdict Was Not Violated When Defendant Was Convicted of Five Counts of First-Degree Sexual Offense
(2) Defendant's Right to Unanimous Jury Verdict Was Violated for Eight of Ten Convictions of Sexual Activity by Substitute Parent, G.S. 14-27.7(a)
(3) Defendant's Right to Unanimous Jury Verdict Was Violated for Four Convictions of Indecent Liberties

State v. Massey, 174 N.C. App. 216, 621 S.E.2d 633 (1 November 2005). **(Author's note: There was a dissenting opinion on the rulings reversing the defendant's convictions in (2) and (3) below, so the North Carolina Supreme Court may review the rulings.)** The defendant was convicted of multiple sex acts with a minor victim. (1) The court ruled that the defendant's right to a unanimous jury verdict was not violated when the defendant was convicted of five counts of first-degree sexual offense. The court noted that an examination of the record revealed

that the jury instructions and verdicts contained specific references to the date, act, and location of the alleged acts. From these references, it was possible to determine which of the defendant's five convictions corresponded to the possible acts testified to at trial. (2) The court ruled that the defendant's right to a unanimous jury verdict was violated for eight of ten convictions of sexual activity by a substitute parent, G.S. 14-27.7(a). There was generic testimony about alleged incidents in the bedroom and living room consisting of anal intercourse and cunnilingus. This testimony was sufficient to support one conviction each in the bedroom and living room under State v. Lawrence, 165 N.C. App. 548, 599 S.E.2d 87 (2004), *disc. rev. allowed*, 359 N.C. 413, 612 S.E.2d 634 (2005), and other cases. But as to the remaining eight convictions in which the jury found the defendant guilty based on identical instances of anal intercourse, it was impossible to relate the charges in the verdict sheets to the specific instances, because the verdict sheets did not associate an offense with a given incident. Because it cannot be determined whether the jury unanimously convicted the defendant based on specific acts, the court ordered a new trial for these eight convictions. (3) The court ruled that the defendant's right to a unanimous jury verdict was violated for four convictions of indecent liberties. The court was unable to determine which particular evidence was the basis for the jury's guilty verdicts because, although the defendant was only charged with four counts of indecent liberties, the state presented evidence of more than four incidents of indecent liberties. Although the trial judge instructed the jury to consider each count of indecent liberties a separate and distinct act, the instructions did not distinguish among the counts. It was therefore impossible to determine whether each juror had in mind the same incidents when voting to convict the defendant. **[Author's note: This ruling may be affected by the later rulings in State v. Markeith Lawrence, 360 N.C. 368, 627 S.E.2d 609 (7 April 2006), and State v. Gary Lawrence, 360 N.C. 393, 627 S.E.2d 615 (7 April 2006), discussed above.]**

(1) Juvenile's Giving False Name to Officer During Investigative Stop Constituted Sufficient Evidence of G.S. 14-223 (Resist, Delay, or Obstruct Public Officer)
(2) Sufficient Evidence of Burning Public Building, G.S. 14-59
(3) Trial Judge Erred Under G.S. 7B-2605 in Failing to Find Compelling Reasons When Denying Release of Juvenile Pending Appeal to Court of Appeals

In re J.L.B.M., ___ N.C. App. ___, 627 S.E.2d 239 (21 March 2006). (1) The court ruled that the juvenile's giving a false name to the officer during an investigative stop constituted sufficient evidence of G.S. 14-223. In giving a false name to the officer, the juvenile delayed the officer's investigation, including any attempt to contact the juvenile's parent or guardian. The court rejected the juvenile's argument that because the officer's stop was unlawful, the juvenile could not be convicted of a violation of G.S. 14-223. The court stated that the unlawful stop did not give the juvenile a license to lie about his identity. The court distinguished cases in which the underlying arrest was unlawful, because in those cases a lawful arrest was a necessary element of a violation of G.S. 14-223. (2) The juvenile set off fireworks in a room at the police station, resulting in a two to three-foot flame that deposited back soot on the floor and wall. The juvenile laughed when an officer attempted to put out the fireworks. The court ruled that this evidence was sufficient to prove that the juvenile acted wantonly and willfully and "set fire" to the building. The court, relying on State v. Hall, 93 N.C. 571 (1885), noted that the state was not required to prove a "burning" under G.S. 14-59; setting fire to a building does not requiring proof of charring. (3) The court ruled that the trial judge erred under G.S. 7B-2605 in failing to find compelling reasons when denying the release of the juvenile pending the juvenile's appeal to the North Carolina Court of Appeals. Compare with In re K.T.L., ___ N.C. App. ___, 629 S.E.2d 152 (2 May 2006) (trial judge found compelling reasons in writing to deny release pending appeal).

(1) Trial Judge Did Not Err in Ordering Juvenile Adjudicatory Hearing to Be Open to Public
(2) Trial Judge After Entry of Dispositional Order Did Not Err in Placing Juvenile in Custody of DSS With Review Within 90 Days Under G.S. 7B-2506(1)(c) and G.S. 7B-906(a)
(3) Trial Judge Did Not Err Under 7B-2605 in Finding in Writing Compelling Reasons To Deny Release of Juvenile Pending Appeal to Court of Appeals

In re K.T.L., ___ N.C. App. ___, 629 S.E.2d 152 (2 May 2006). The juvenile was adjudicated delinquent of involuntary manslaughter. The court ruled: (1) in a case in which both the state and the juvenile moved that the adjudicatory hearing be closed to the public, the trial judge did not abuse his discretion in denying the motions of the state and juvenile and ordering that the hearing be open to the public after holding a hearing on the issue and considering the factors set out in G.S. 7B-2402; (2) the trial judge after the entry of the dispositional order did not err in ordering the juvenile to be placed in the custody of the department of social services (with a review hearing within 90 days) under the provisions of G.S. 7B-2506(1)(c) and G.S. 7B-906(a); and (3) the trial judge did not err when he provided in writing compelling reasons under G.S. 7B-2605 to support his order that, pending the juvenile's appeal of the disposition order, the department of social services is granted custody of the juvenile and placement in a residential treatment facility.

Sufficient Evidence Supported Juvenile Adjudication of Ethnic Intimidation (G.S. 14-401.14) Based on Content of E-Mail Sent by Student to Assistant Principal

In re B.C.D., ___ N.C. App. ___, 629 S.E.2d 617 (16 May 2006). The court ruled that sufficient evidence supported the juvenile's adjudication of ethnic intimidation, G.S. 14-401.4. An African-American assistant principal at a high school received an e-mail that was determined to have been sent by the juvenile, a student, who had previously been disciplined by the assistant principal for using racial epithets on a school bus. In the e-mail, the juvenile used a racial epithet [starting with the letter "n" and consisting of six letters] in describing her and stated that if she ever suspended somebody for using that racial epithet, the KKK will show up on her door step. It further stated that this was a promise, not a threat. The court concluded that the e-mail communicated a threat to assault the assistant principal for a racially-motivated reason.

Insufficient Evidence to Support Defendant's Conviction of Embezzlement Because She Neither Took Lawful Possession of Her Employer's Property Nor Was She Entrusted With Property In a Fiduciary Capacity

State v. Palmer, ___ N.C. App. ___, 622 S.E.2d 676676 (20 December 2005). The court ruled, relying on State v. Weaver, 359 N.C. 246, 607 S.E.2d 599 (2005), and State v. Keyes, 64 N.C. App. 529, 307 S.E.2d 890 (1983), that there was insufficient evidence to support the defendant's conviction of embezzlement because she neither took lawful possession of her employer's property nor was she entrusted with property in a fiduciary capacity. Even though the defendant generally had access to incoming checks, she did not lawfully possess them nor was she entrusted with them as a fiduciary because she obtained them through misrepresentation. The court noted that the appropriate charge against the defendant was larceny.

Sufficient Evidence to Support Defendant's First-Degree Felony Murder Conviction Based on Felony Murder Theory of Acting in Concert With Another Person Who Committed Drug Trafficking Offense With Deadly Weapon and Shot and Killed Victim-Seller

State v. Herring, ___ N.C. App. ___, 626 S.E.2d 742 (7 March 2006). The defendant knew A, who was a drug dealer, and the defendant had often found buyers for A. The defendant agreed to get B, his cousin, to purchase drugs from A. The defendant later arrived at A's apartment with B, the defendant having previously discussed with B purchasing cocaine from A and robbing A of his drugs and money. B left the apartment and obtained a gun, and then B fought with A over the cocaine. B shot and killed A. The amount of cocaine was a trafficking amount. The defendant was convicted of first-degree felony murder, with trafficking by possessing or attempting to possess cocaine as the underlying felony and committing it with a deadly weapon. The jury rejected the state's alternate theory that A's death was the result of an armed robbery or attempted armed robbery. The court ruled that there was sufficient evidence of the defendant's conviction based on acting in concert with B, who had constructive possession of the cocaine during his struggle with A. Relying on State v. Barnes, 345 N.C. 184, 481 S.E.2d 44 (1997), the court stated that as long as the defendant joined with B in committing *a* (emphasis in opinion) crime (in this case, drug trafficking by possessing or attempting to possess cocaine), he was responsible for all other crimes committed in a single transaction in furtherance of the common purpose or plan: to facilitate B's possession of A's cocaine. It was irrelevant that the defendant may not have intended to join B in shooting and killing A. Also, the state was not required to prove the defendant knew that B possessed a gun.

Sufficient Evidence of Intent to Kill to Support Conviction of Attempted First-Degree Murder of Infant Abandoned in Thirty Degree Weather in Remote Dilapidated Shed Where She Would Not Likely Be Found

State v. Pittman, ___ N.C. App. ___, 622 S.E.2d 135 (6 December 2005). The court ruled, relying on State v. Edwards, 174 N.C. App. 490, 621 S.E.2d 333 (15 November 2005), that there was sufficient evidence of intent to kill to support the defendant's conviction of attempted first-degree murder of an six-week-old infant who the defendant abandoned in thirty degree weather in a remote dilapidated shed where she would not likely be found. There was also evidence that the defendant acted to avoid paying child support for the infant, a goal that could only be ensured by the infant's death.

(1) Indictment Charging Felony Eluding Arrest (G.S. 20-141.5) Was Not Fatally Defective When It Alleged Aggravating Factors But It Did Not Set Forth Facts Supporting Them
(2) Trial Judge Did Not Commit Plain Error in Jury Instructions on Felony Eluding Arrest (G.S. 20-141.5) in Failing to Define "Gross Impairment" Aggravating Factor
(3) Sufficient Evidence Supported "Gross Impairment" Aggravating Factor
(4) When Indictment Charging Felony Eluding Arrest (G.S. 20-141.5) Alleged Three Aggravating Factors, State Was Only Required to Prove Two Aggravating Factors

State v. Stokes, 174 N.C. App. 447, 621 S.E.2d 311 (15 November 2005). The defendant was convicted of felony eluding arrest under G.S. 20-141.5. (1) The court ruled that the indictment charging felony eluding arrest was not fatally defective when it alleged the aggravating factors but did not set forth facts supporting them. For example, it alleged the gross impairment of a person's faculties while driving due to the consumption of an impairing substance [G.S. 20-141.5(b)(2)a.], but it did not allege the facts supporting this aggravating factor. (2) The court ruled the trial judge did not commit plain error in failing to define the "gross impairment" aggravating factor in the jury instructions. (3) The court ruled that sufficient evidence support the "gross impairment" aggravating factor. The defendant had a strong odor of alcohol about him; his eyes were very red, glazed, and glassy; his speech was mush mouthed and very hard to understand; he drove his vehicle one-half mile with a law enforcement officer hanging out of the window; he had to be forcibly removed from the vehicle; and he admitted to consuming six to seven beers. (4) The court ruled, relying on State v. Funchess, 141 N.C. App. 302, 540 S.E.2d 435 (2000), that when the indictment charging felony eluding arrest alleged three aggravating factors, the state was only required to prove two aggravating factors.

Sufficient Evidence to Support Conviction of Sale of Methamphetamine When Defendant Provided Drug as Payment for Work Previously Done for Defendant By Recipient of Drug

State v. Yelton, ___ N.C. App. ___, 623 S.E.2d 594 (3 January 2006). The court ruled, relying on State v. Carr, 145 N.C. App. 335, 549 S.E.2d 897 (2001) ("sale" of controlled substance includes exchange for money or any other form of consideration), that there was sufficient evidence to support the defendant's conviction of sale of methamphetamine when the defendant provided the drug as payment for work previously done for the defendant by the recipient of drug.

Trial Judge Erred in Failing to Instruct Jury That to Convict Defendant It Must Find Defendant Knew What He Possessed Was Heroin, When Defendant Had Testified That He Was Unaware Heroin Was in Refrigerator

State v. Lopez, ___ N.C. App. ___, 626 S.E.2d 736 (7 March 2006). The defendant was convicted of trafficking by possessing heroin and conspiracy to traffic by possessing heroin. The

court ruled, relying on State v. Boone, 310 N.C. 284, 311 S.E.2d 552 (1984), the trial judge erred in failing to instruct the jury that to convict the defendant it must find the defendant knew what he possessed was heroin, when the defendant had testified that he was unaware that heroin was in a refrigerator. [Author's note: The relevant jury instruction is in footnote 2 of N.C.P.I.—Crim. 260.17.]

Drug Indictments Were Fatally Defective When They Did Not Allege Correct Name of Controlled Substance

State v. Ahmadi-Turshizi, ___ N.C. App. ___, 625 S.E.2d 604 (7 February 2006). The court ruled, relying on State v. Ledwell, 171 N.C. App. 328, 614 S.E.2d 412 (2005), that drug indictments were fatally defective when they did not allege the correct name of a controlled substance. They alleged "methylenedioxymethamphetamine," when the correct name is "3, 4 – methylenedioxymethamphetamine."

G.S. 90-95(e)(9) (Possessing Controlled Substance on Premises of Local Confinement Facility) Includes Secured Area in Local Confinement Facility Where Officers Detain and Search Arrestees Who Are to Be Taken Before Magistrate

State v. Dent, 174 N.C. App. 459, 621 S.E.2d 274 (15 November 2005). The court ruled that G.S. 90-95(e)(9) (possessing a controlled substance on the premises of a local confinement facility) includes the secured area in a local confinement facility (in this case, Forsyth County Law Enforcement and Detention Center) where officers detain and search arrestees who are to be taken before a magistrate. The court stated that the offense extends beyond the bounds of the lockup area to include those secured areas in which arrestees are temporarily detained for search, booking, and other purposes.

Insufficient Evidence to Support Defendant's Conviction of Trafficking in Cocaine by Transportation

State v. Williams, ___ N.C. App. ___, 630 S.E.2d 216 (6 June 2006). The defendant was convicted of trafficking in cocaine by possession and by transportation. The court ruled that there was insufficient evidence to support the conviction by transportation. The state failed to present evidence that the defendant moved the cocaine from one place to another. When law enforcement officers arrived at a YMCA where their informant had set up a drug deal with the defendant, the defendant's vehicle containing the cocaine was already parked there and remained stationary during the course of the transaction. There was no evidence to show whether the defendant moved the cocaine before the informant arrived. Also, there was insufficient evidence to show when or how the cocaine was placed in the defendant's vehicle.

Sufficient Evidence of Corpus Delecti to Support Defendant's Conviction of Conspiracy to Traffic by Possessing Cocaine

State v. Sims, ___ N.C. App. ___, 622 S.E.2d 132 (6 December 2005). The defendant was convicted of conspiracy to traffic by possessing more than 400 grams of cocaine. The court ruled, relying on State v. Parker, 315 N.C. 222, 337 S.E.2d 487 (1985), that there was sufficient evidence independent of the defendant's confession to support the amount of cocaine necessary to prove this offense. The defendant admitted that he had purchased a half kilogram of cocaine from another person on three occasions. Two items of evidence established the trustworthiness of this statement. First, a search of the defendant's residence resulted in the officers' finding a substantial amount of cocaine, 181 grams, in the defendant's possession. Second, a controlled buy

had been made before the search of the defendant's residence in which an informant had purchased 26 grams of cocaine from the defendant.

(1) Sufficient Evidence of Defendant's Constructive Possession of Illegal Drugs
(2) Sufficient Circumstantial Evidence That Defendant Knew or Had Reasonable Grounds to Know Goods Were Stolen to Support Conviction of Possession of Stolen Goods

State v. Weakley, ___ N.C. App. ___, 627 S.E.2d 315 (21 March 2006). (1) The defendant was convicted of drug offenses based on various illegal drugs being found in his home pursuant to a search warrant. Relying on State v. Thorpe, 326 N.C. 451, 390 S.E.2d 311 (1990), and other cases, the court ruled that there was sufficient evidence of the defendant's constructive possession of the illegal drugs. There was undisputed evidence that the defendant leased and resided in the house (although when the search warrant was executed, another man also lived in the residence and his girlfriend had stayed there a couple of nights a week). (2) The court ruled that there was sufficient circumstantial evidence that the defendant knew or had reasonable grounds to know that the goods were stolen to support his conviction of possession of stolen goods. His girlfriend stole the goods and transported them to the defendant's house. A person assisting the girlfriend in transporting the goods testified that the goods looked suspicious; for example, the girlfriend cleaned people's houses and told the defendant that these people had given her the various items of property, yet it included a ladder that could be used in cleaning. The defendant referred to the stolen goods as "nice stuff" and told his girlfriend that "there better not be no stolen stuff in my house."

Evidence Was Sufficient to Support Defendant's Armed Robbery Conviction Involving Store Employee When Defendant Threatened To Harm Another Person in Store With a Knife If Employee Did Not Open Drawer of Cash Register

State v. Corum, ___ N.C. App. ___, 625 S.E.2d 889 (21 February 2006). The court ruled, relying on State v. Thomas, 85 N.C. App. 319, 354 S.E.2d 891 (1987), there was sufficient evidence to support the defendant's armed robbery conviction involving a store employee when the defendant threatened to harm another person in the store with a knife if the employee did not open the drawer of the cash register. The court noted that the jury could infer that the employee's life was endangered and threatened by the defendant's use of the knife.

Insufficient Evidence To Support Kidnapping Conviction When Restraint of Victim Did Not Expose Her to Greater Danger Than Inherent in Armed Robbery

State v. Stephens, ___ N.C. App. ___, 623 S.E.2d 610 (3 January 2006). The defendant was convicted of second-degree kidnapping and armed robbery. The defendant, one of the robbers, pointed a shotgun at the victim (a convenience store employee), demanded money, struck her in the back with the shotgun, and pushed her toward the cash register. He broke open the register and took money. The court ruled, relying on State v. Irwin, 304 N.C. 93, 282 S.E.2d 439 (1981), that this evidence was insufficient to support the defendant's kidnapping conviction. The victim's restraint was an inherent and integral part of the armed robbery and did not expose her to a greater danger than that inherent in such a robbery.

(1) Trial Judge in First-Degree Kidnapping Trial Did Not Err in Not Submitting Second-Degree Kidnapping When Evidence Showed That Defendants Did Not Release Victims in Safe Place
(2) Trial Judge in Multi-Defendant Trial Erred in Jury Selection Procedure By Alternating Between State and Each Defendant on Passing on Jury Panel Instead of Each Defendant Passing on Juror Panel Before Sending Jury Panel Back to State

State v. Love, ___ N.C. App. ___, 630 S.E.2d 234 (6 June 2006). (1) The court ruled that the trial judge in a first-degree kidnapping trial did not err in not submitting second-degree kidnapping when the evidence showed that the defendants did not release the victims in a safe place. After robbing the victims in their home, the defendants left them bound to chairs and gagged. (2) The court ruled that the trial judge in a multi-defendant trial erred in the jury selection procedure set out in G.S. 15A-1214 by alternating between the state and each defendant on passing on the jury panel instead of each defendant passing on the juror panel before sending the jury panel back to the state.

(1) Indictment Charging Malicious Conduct by Prisoner Was Not Defective Although It Did Not Specifically Allege Defendant Was in Custody
(2) Trial Judge's Failure at Close of State's Evidence to Arraign Defendant for Prior Convictions Under Habitual Misdemeanor Assault Was Not Prejudicial Error Requiring New Trial
(3) Double Jeopardy Did Not Bar Convictions for Both Malicious Conduct by Prisoner and Habitual Misdemeanor Assault Based on Same Conduct
(4) Trial Judge Erred in Sentencing Defendant as Habitual Felon Because Judge Did Not Question Defendant Under G.S. 15A-1022(a) Concerning Defendant's Guilty Plea to Habitual Felon Status

State v. Artis, ___ N.C. App. ___, 622 S.E.2d 204 (6 December 2005). The defendant, while an inmate in a county detention center, threw his urine at a detention officer. The defendant was convicted of malicious conduct by prisoner and habitual misdemeanor assault; both offenses were based on the defendant's throwing of the urine. (1) The court ruled, relying on State v. Jordan, 75 N.C. App. 637, 331 S.E.2d 232 (1985), that the indictment charging malicious conduct by prisoner was not defective although it did not specifically allege that the defendant was in custody. The indictment alleged that the defendant assaulted a detention officer of a specified county detention center by throwing a bodily fluid, which sufficiently informed the defendant that he was in custody. A criminal pleading under G.S. 15A-924(a)(5) does not have to state every element of a charge offense; it is only required to assert facts supporting every element. (2) The court ruled, relying on State v. McDonald, 165 N.C. App. 239, 599 S.E.2d 50 (2004), that the trial judge's failure under G.S. 15A-928(c) to arraign the defendant at the close of the state's evidence for the prior convictions under habitual misdemeanor assault was not prejudicial error requiring a new trial. Defense counsel, after consulting with the defendant, affirmed the defendant's intent to stipulate to the prior convictions. (3) The court ruled that double jeopardy did not bar convictions for both malicious conduct by prisoner and habitual misdemeanor assault based on same conduct. (4) The court ruled, relying on State v. Gilmore, 142 N.C. App. 465, 542 S.E.2d 694 (2001), that the trial judge erred in sentencing the defendant as a habitual felon because the judge did not question defendant under G.S. 15A-1022(a) (judge's duties in taking guilty plea from defendant) concerning defendant's guilty plea to habitual felon status.

After Defendant Pled Guilty to Criminal Offenses, Admitted to Habitual Felon Status and Sentencing Was Continued Until Later Date, Felony Charge Brought Thereafter Must Be Accompanied By New Habitual Felon Indictment or Information

State v. Bradley, ___ N.C. App. ___, 623 S.E.2d 85 (20 December 2005). The defendant was indicted in 2001 for a cocaine offense and in 2003 for another cocaine offense. Under a plea agreement, the defendant on February 11, 2004, pled guilty to both cocaine offenses and admitted to habitual felon status on two bills of information charging habitual felon. Sentencing was continued until April 6, 2004. The defendant failed to appear for sentencing, and he was arrested on July 16, 2004, and also charged with a new cocaine offense committed on that date. On

August 5, 2004, the defendant was sentenced as an habitual felon on the two old cocaine charges and the new cocaine charge. An habitual felon indictment or information was not brought for the cocaine offense committed on July 16, 2004. The court ruled that the state did not satisfy the requirements of G.S. 14-7.3 that there must be an indictment (or information) ancillary to the predicate substantive felony. Although the state had previously charged the defendant with being an habitual felon by the bills of information accompanying the two cocaine offenses committed in 2001 and 2003, the defendant already had been convicted of the substantive felonies associated with these bills of information by his guilty pleas on February 11, 2004. Thus, the trial judge lacked the authority to sentence him as an habitual felon for the July 16, 2004, cocaine offense without a new habitual felon indictment or information.

Date of Prior Conviction Under Habitual Felon Law Is Jury's Return of Guilty Verdict, Not When Sentence Is Imposed

State v. McGee, ___ N.C. App. ___, 623 S.E.2d 782 (17 January 2006). The defendant was convicted of possession of cocaine and then pled guilty to being an habitual felon. The court ruled that in determining whether the commission of a felony occurred after the conviction of a prior felony, the date of conviction is the jury's return of a guilty verdict for the felony, not when the defendant was sentenced for that felony. In this case, the jury's guilty verdict for the first felony was returned before the commission of the second felony, although sentencing for the first felony occurred after the commission of the second felony.

Defendant Failed to Prove Intentional Discrimination in Prosecution of Habitual Felons

State v. Blyther, ___ N.C. App. ___, 623 S.E.2d 43 (20 December 2005). The defendant was prosecuted as an habitual felon in a county in which the state prosecutes as habitual felons all who are eligible. The defendant asserted that this was impermissible discrimination because in other counties not all eligible defendants are prosecuted. The court ruled that the defendant failed to prove intentional discrimination based on race, religion, or other arbitrary classification. See also State v. Gibson, ___ N.C. App. ___, 622 S.E.2d 729 (20 December 2005) (similar ruling).

(1) Road Was Public Vehicular Area in DWI Prosecution
(2) No Statutory Right to Discovery for Superior Court Trial de Novo Cases

State v. Cornett, ___ N.C. App. ___, 629 S.E.2d 857 (2 May 2006). The defendant was convicted of DWI in a superior court trial de novo. (1) The court ruled that the road on which the defendant drove was a public vehicular area. It was a dead-end dirt road with six homes, with driveways from the road to each of the homes, which had different owners. Both a law enforcement officer and the defendant testified that they drove on the road and there were no gates or signs indicating that it was a private road. The court noted that under G.S. 20-4.01(32)(c) ("road opened to vehicular traffic within or leading to a subdivision for use by subdivision residents, their guests, and members of the public, whether or not the subdivision roads have been offered for dedication to the public') a public vehicular area must only be opened to vehicular traffic, but not necessarily "offered for dedication to the public." (2) Before trial de novo in superior court, the defendant moved for discovery of written protocols concerning Intoxilyzer operation, calibration, and measures. The court ruled, relying on G.S. 15A-901 and the official commentary to the section, that there is no statutory discovery for criminal cases originating in district court. The court noted that the defendant did not argue that he had been denied exculpatory evidence under Brady v. Maryland, 373 U.S. 83 (1963).

(1) Sufficient Evidence of Malice to Support Conviction of Second-Degree Vehicular Murder
(2) Defendant's Nine-Year-Old Prior DWI Conviction Was Properly Admitted on Issue of Malice and Was Not Too Remote To Be Relevant

State v. Westbrook, ___ N.C. App. ___, 623 S.E.2d 73 (20 December 2005). The defendant was convicted of second-degree murder based on a vehicular crash caused by the defendant in which a person died. (1) The court ruled that there was sufficient evidence of malice to support the defendant's conviction. The defendant was driving while impaired with an alcohol concentration of 0.156. He was on notice about the serious consequences of driving while impaired as a result of his prior DWI conviction that had occurred nine years earlier. He drove seventy-five to eighty miles per hour in a forty-five miles per hour zone, crossed the center lane, traveled in a lane in the opposite direction, and ran a red light without attempting to brake or stop. (2) The court ruled, relying on State v. Goodman, 149 N.C. App. 57, 560 S.E.2d 196 (2002) (dissenting opinion), reversed per curiam for reasons stated in dissenting opinion, 357 N.C. 43, 577 S.E.2d 619 (2003), and other cases, that the defendant's nine-year-old prior DWI conviction was properly admitted under Rule 404(b) to show malice. The conviction was admissible for this purpose without showing the facts and circumstances supporting the conviction. The court also ruled, relying on State v. Rich, 351 N.C. 386, 527 S.E.2d 299 (2000), that the nine-year-old conviction was not too remote to be relevant.

(1) Motorized Scooter Was "Vehicle" to Support DWI Conviction
(2) Defendant Had Fair Notice of Acts Prohibited by DWI Laws, and His Due Process Rights Were Not Violated

State v. Crow, ___ N.C. App. ___, 623 S.E.2d 68 (20 December 2005). The defendant was convicted of DWI while riding a motor scooter. The scooter was powered by an electric motor, had two wheels, approximately six to eight inches in diameter and arranged in tandem like the wheels of a bicycle. (1) The court ruled that the motorized scooter fell within the definition of "vehicle" in G.S. 20-4.01(49) and did not meet the requirements of any exceptions to the definition. (2) The court ruled that the defendant had fair notice of the acts prohibited by DWI laws, and his due process rights were not violated.

Court Reaffirms That Habitual DWI Is Substantive Felony Offense and Thus Superior Court Had Original Jurisdiction to Try Transactionally-Related Misdemeanors

State v. Bowden, ___ N.C. App. ___, 630 S.E.2d 208 (6 June 2006). The defendant was tried for habitual DWI, driving while license revoked, and DWI. He was convicted of habitual DWI and driving while license revoked. The court, relying on the ruling in State v. Priddy, 115 N.C. App. 547, 445 S.E.2d 610 (1994), reaffirmed that habitual DWI is a substantive felony offense, not a status offense, and thus the superior court had original jurisdiction to try the transactionally-related misdemeanors under G.S. 7A-271(a)(3). The court noted that in the post-*Priddy* case of State v. Vardiman, 146 N.C. App. 381, 552 S.E.2d 697 (2001), habitual DWI was described as a recidivist offense. The court, relying on In re Appeal from Civil Penalty, 324 N.C. 373, 379 S.E.2d 30 (1989), stated that one panel of the Court of Appeals cannot overrule another panel, and that in any event *Vardiman* in fact reaffirmed *Priddy*'s ruling that habitual DWI is a substantive felony. The court also noted that the mere fact that a statute is directed at recidivism does not prevent the statute from establishing a substantive offense.

(1) Trial Judge Did Not Abuse Discretion in Denying Defendant's Motion to Prevent State in DWI Trial De Novo in Superior Court from Calling Extrapolation Expert As Witness When State Had Given Notice to Defendant on Day of Trial That It Would Do So
(2) State's Extrapolation Expert's Opinion of Defendant's Alcohol Concentration At Officers' First Contact With Defendant Was Admissible As Within "Relevant Time After Driving"
(3) Sufficient Evidence to Support Defendant's DWI Conviction on 0.08 Prong, Based on Extrapolation Evidence

State v. Fuller, ___ N.C. App. ___, 626 S.E.2d 655 (21 February 2006). The defendant was convicted of DWI in superior court after she had appealed her conviction in district court for trial de novo. Her Intoxilyzer test result was 0.07. The state's extrapolation expert testified that the defendant's blood alcohol concentration when officers first came into contact with her was 0.08. (1) The state gave notice to the defendant on the day of trial that it would call the extrapolation expert as a witness. The trial judge denied the defendant's motion to prevent the state from calling the expert because she was not notified in sufficient time to procure a rebuttal witness. The defendant conceded on appeal that there were no statutory discovery provisions applicable to the defendant for her trial de novo in superior court. The court noted that Article 48 (discovery) of Chapter 15A applies only to cases within the superior court's original jurisdiction. The court ruled that, in light of the defendant's clear understanding of the importance of extrapolation evidence to the state's case and the longstanding acceptance of such evidence in state courts, the trial judge did not abuse his discretion in denying the defendant's motion. (2) The court ruled that the state's extrapolation expert's opinion of the defendant's alcohol concentration at the officers' first contact with the defendant was admissible as within a "relevant time after driving" as defined in G.S. 20-4.01(33a). (3) The court ruled there was sufficient evidence to support the defendant's DWI conviction based on the 0.08 prong, considering the state's extrapolation expert's testimony.

Jury's Note About Its Agreement on Issue in First Trial Ending in Hung Jury Did Not Under Collateral Estoppel or Double Jeopardy Bar Relitigation of Issue in Second Trial

State v. Herndon, ___ N.C. App. ___, 629 S.E.2d 170 (2 May 2006). The defendant was charged with first-degree murder. The first trial ended in a mistrial because the jury could not agree on a verdict. The jury during its deliberations at the first trial sent a note to the judge stating that the jurors agreed the defendant was not the aggressor but it was split on a verdict. At the second trial, the defendant was convicted of voluntary manslaughter. The defendant argued on appeal that the state at the second trial was collaterally estopped under the Double Jeopardy Clause from relitigating the issue that the defendant was the aggressor. The court ruled, relying on State v. Booker, 306 N.C. 302, 293 S.E.2d 78 (1982) (jury's note at first first-degree murder trial ending in hung jury that it was deadlocked 7-5 on second-degree murder did not bar state from re-prosecuting defendant for first-degree murder), and State v. Mays, 158 N.C. App. 563, 582 S.E.2d 360 (2003) (jury's note at first first-degree murder trial ending in hung jury that it unanimously agreed that minimally defendant was guilty of second-degree murder did not bar state from re-prosecuting defendant for first-degree murder), that the doctrine of collateral estoppel does not apply because the jury note was not a final verdict in the case.

Trial Judge Did Not Err in Allowing State's Witness to Testify About Defendant's Bribery Offer Not to Testify That State Had Not Provided in Discovery to Defendant, Because State's Witness Did Not Reveal Bribery Offer Until He Testified on Re-Direct Examination at Trial

State v. Farmer, ___ N.C. App. ___, 630 S.E.2d 244 (6 June 2006). The court ruled, relying on State v. Godwin, 336 N.C. 499, 444 S.E.2d 206 (1994), that the trial judge did not err in allowing a state's witness to testify about the defendant's bribery offer not to testify that the state had not provided in discovery to the defendant, because the state's witness did not reveal the bribery offer until he testified on re-direct examination at trial.

Trial Judge Did Not Abuse Discretion When He Denied Defendant's Motion for Mistrial Based on State's Statutory Discovery Violations

State v. Jaaber, ___ N.C. App. ___, 627 S.E.2d 312 (21 March 2006). The court ruled that the trial judge did not abuse his discretion when he denied the defendant's motion for a mistrial based on the state's statutory discovery violations (not providing defendant with two witnesses' statements). Because a trial judge is not required to impose any sanctions for statutory discovery violations, what sanctions to impose, if any, are within the trial judge's discretion.

Sufficient Evidence of "Breaking" to Support Burglary Conviction When Victim Opened Front Door in Response to Knock on Door and Defendant and Others Grabbed Victim and Forced Their Way Into Home

State v. Reid, ___ N.C. App. ___, 625 S.E.2d 575 (7 February 2006). The court ruled, relying on State v. Jolly, 297 N.C. 121, 254 S.E.2d 1 (1979), and other cases, that there was sufficient evidence of "breaking" to support the defendant's burglary conviction when the victim opened the front door in response to a knock on the door and the defendant and others grabbed the victim and forced their way into the victim's home.

(1) Sufficient Evidence of Burglary and Felonious Breaking or Entering Because Defendant Could Not Have Reasonably Believed Thirteen-Year-Old Victim of Statutory Rape and Sex Offenses Had Authority to Consent to Defendant's Entry Into Parents' Home for Purpose of Engaging in Sex With Victim
(2) Sufficient Evidence of Constructive "Breaking" for Burglary When Thirteen-Year-Old Victim of Statutory Rape and Sex Offenses Opened Bedroom Window Pursuant to Defendant's Instructions

State v. Brown, ___ N.C. App. ___, 626 S.E.2d 307 (21 February 2006). The defendant was convicted of first-degree burglary, felonious breaking or entering, statutory rape, statutory sexual offense, and indecent liberties with a thirteen year old. The defendant, who was 45 years old, contacted the victim through the Internet and eventually was invited by the victim into her parents' house where they engaged in various sex acts. (1) The court ruled, relying on State v. Upchurch, 332 N.C. 439, 421 S.E.2d 577 (1992), and other cases, that there was sufficient evidence of burglary and felonious breaking or entering because the defendant could not have reasonably believed that the thirteen-year-old victim had authority to consent to the defendant's entry into the victim's parents' home for purpose of engaging in sex with her. (2) The court ruled, relying on State v. Smith, 311 N.C. 145, 316 S.E.2d 75 (1984), that there was sufficient evidence of a constructive "breaking" for burglary when the thirteen-year-old victim opened the bedroom window pursuant to the defendant's instructions.

(1) When Trial Judge Failed to Instruct on Theories of Aiding and Abetting or Acting in Concert, State Must Prove That Defendant Personally Committed Every Element of Offense
(2) Sufficient Evidence to Support Two Conspiracy Convictions

State v. Roberts, ___ N.C. App. ___, 625 S.E.2d 846 (21 February 2006). The defendant and others agreed on December 15, 2002, to rob an apartment. For his participation in the robbery, the defendant was convicted of first-degree burglary, armed robbery, and conspiracy to commit first-degree burglary and armed robbery. On December 16, 2002, the defendant took part in another burglary and robbery of a different apartment. For his participation in these crimes, the defendant was convicted of various offenses, including first-degree burglary, kidnapping, first-degree sexual offense, armed robbery, and conspiracy to commit first-degree burglary and armed robbery. (1) When instructing the jury on first-degree sexual offense, the trial judge failed to instruct on the theories of aiding and abetting or acting in concert. Relying on State v. Wilson, 345 N.C. 119, 478 S.E.2d 507 (1996), and State v. Cunningham, 140 N.C. App. 315, 536 S.E.2d 341 (2000), the court ruled that the state was required to prove that the defendant personally committed every element of the crime. Because the defendant did not personally employ or display a dangerous weapon (his accomplice did), the evidence was insufficient to support the defendant's conviction of first-degree sexual offense. (2) The court ruled there was sufficient evidence to support the defendant's two conspiracy convictions (one on December 15, 2002, and another on December 16, 2002). The court noted that there was no evidence that the agreement formed on December 15, 2002, consisted of more than robbing someone that night. The mere fact that the defendant was involved in a similar crime the next night did not indicate the two crimes were committed as part of the agreement made on December 15, 2002.

Indictment for Statutory Rape of Thirteen Year Old Under G.S. 14-27.7A (Statutory Rape or Sexual Offense of 13, 14, or 15 Year Old) Was Insufficient To Support Judgment on Guilty Plea to Attempted Second-Degree Rape Under G.S. 14-27.3

State v. Frink, ___ N.C. App. ___, 627 S.E.2d 472 (4 April 2006). The defendant was indicted for statutory rape of a thirteen year old under G.S. 14-27.7A (statutory rape or sexual offense with 13, 14, or 15 year old). He pled guilty to attempted second-degree rape under G.S. 14-27.3. The court ruled that the indictment was insufficient to support the judgment on the guilty plea because it failed to alleged the essential elements of attempted second-degree rape (that is, by force or with a mentally disabled person, etc.). Because the indictment was fatally defective, the trial court had no jurisdiction to accept the plea. And jurisdiction may be raised at any time, including for the first time on appeal. [Author's note: Attempted second-degree rape under G.S. 14-27.3 is not a lesser-included offense of statutory rape of a thirteen year old under G.S. 14-27.7A. To accept the defendant's guilty plea in this case, an information or a new indictment was necessary.]

Lack of Mistake-of-Fact Defense to Statutory Rape of 13, 14, or 15 Year Old Is Not Unconstitutional Under Ruling in *Lawrence v. Texas*

State v. Browning, ___ N.C. App. ___, 629 S.E.2d 299 (16 May 2006). The court ruled that the lack of a mistake-of-fact defense to statutory rape of a 13, 14, or 15 year old under G.S. 14-27.7A is not unconstitutional under the ruling in Lawrence v. Texas, 539 U.S. 558 (2003) (state statute prohibiting two people of same sex to engage in consensual sex act violated privacy interest in Due Process Clause of Fourteenth Amendment when consensual sex act occurred between two adults in private residence).

Sufficient Evidence to Support Conviction of First-Degree Arson When Defendant Burned Outbuilding (Detached Garage) Within Curtilage of House While People Were Inside House

State v. Nipper, ___ N.C. App. ___, 629 S.E.2d 883 (6 June 2006). **[Author's note: The North Carolina Supreme Court has granted the defendant's petition to review this ruling.]** The court ruled, relying on State v. Teeter, 165 N.C. App. 680, 599 S.E.2d 435 (2004), and rejecting a possible conflict with *Teeter* in State v. Woods, 109 N.C. App. 360, 427 S.E.2d 145 (1993), that there was sufficient evidence to support the defendant's conviction of first-degree arson when the defendant burned an outbuilding (a detached garage) within curtilage of a house while people were inside the house.

(1) Defendant May Not Be Tried Without His or Her Consent During Same Week of Arraignment on Charges for Trial De Novo in Superior Court in Counties Subject to Mandatory Arraignment Under G.S. 15A-943(a)
(2) Requirement Under G.S. 15A-941(d) That Defendant Make Written Request for Arraignment in Superior Court Is Applicable Only to Cases Involving Indictments

State v. Vereen, ___ N.C. App. ___, 628 S.E.2d 408 (18 April 2006). The defendant was convicted of various offenses in Durham County District Court and appealed for trial de novo in superior court. (Author's note: Durham County Superior Court is subject to the arraignment requirements of G.S. 15A-943.) When the defendant was formally arraigned on the charges in superior court on the day of the trial, he moved for a continuance so he could obtain evidence that he had subpoenaed. The trial judge immediately proceeded to trial. The court ruled that the defendant's trial violated G.S. 15A-943(b), which prohibits a trial without the defendant's consent in the week in which the defendant is arraigned. The court also ruled that the defendant's

motion for a continuance to obtain evidence constituted a lack of consent to a trial during the same week. (2) The court ruled that the requirement under G.S. 15A-941(d) that a defendant make a written request for an arraignment in superior court is applicable only to cases involving indictments. The requirement does not apply to trial de novo cases because an indictment is not involved. The court noted that while there was no indictment, an arraignment was still required under G.S. 15A-943 to enable the defendant to submit a plea in superior court.

(1) Prosecutor in Jury Argument Impermissibly Commented on Defendant's Silence in His Interaction with Law Enforcement
(2) G.S. 15A-959(c) Prohibits Use of Testimony from Pretrial Insanity Hearing , Including Use of Testimony to Impeach Trial Witness

State v. Durham, ___ N.C. App. ___, 623 S.E.2d 63 (20 December 2005). The defendant was convicted of first-degree murder. The only trial issue was whether the defendant was insane. A pretrial hearing was conducted under G.S. 15A-959 on the defendant's motion to dismissal the charge, which was denied. (1) The court ruled, relying on State v. Ward, 354 N.C. 231, 555 S.E.2d 251 (2001), that the prosecutor in jury argument impermissibly commented on the defendant's silence in his interaction with law enforcement. The jury argument implied that the defendant must have been sane and known right from wrong based on his refusal to talk to law enforcement once he was in custody. (2) The court ruled that G.S. 15A-959(c) ("testimony or evidence taken at the hearing is not admissible as evidence at the trial") prohibits the use of testimony from a pretrial insanity hearing, including the use of testimony to impeach a trial witness.

Trial Judge Did Not Err in Granting State's Motion to Join for Trial Charges of Possession of Firearm by Felon and Felonious Assault Arising from Same Transaction

State v. Cromartie, ___ N.C. App. ___, 627 S.E.2d 677 (4 April 2006). The court ruled, relying on State v. Floyd, 148 N.C. App. 290, 558 S.E.2d 237 (2002), that the trial judge did not err in granting the state's motion to join for trial charges of possession of firearm by felon and assault with a deadly weapon with intent to kill inflicting serious injury, when both charges arose from the same transaction (the defendant's using a firearm to shoot the victim). Joinder of the two charges did not prejudice the defendant's ability to defend himself on the felonious assault charge.

Indictment Charging Possession of Firearm by Felon (G.S. 14- 415.1) Was Not Fatally Defective When It Failed to Comply With Statutory Requirement to Allege Date of Prior Felony Conviction

State v. Inman, 174 N.C. App. 567, 621 S.E.2d 306 (15 November 2005). The court ruled that an indictment charging possession of firearm by felon (G.S. 14-415.1) was not fatally defective when it failed to comply with the statutory requirement in G.S. 14-415.1(c) to allege the date of a prior felony conviction. All required information about the prior felony conviction was alleged except the date of the conviction. The court stated that the failure was not material and did not affect a substantial right. The requirement to allege the date of the prior felony conviction was merely directory, not mandatory.

Evidence Was Insufficient to Support Conviction of Larceny Because Defendant Did Not Commit Trespassory Taking When She Dug Up Money Buried on Real Property On Which She Had Leasehold Interest Granting Her Lawful Possession of the Real Property

State v. Jones, ___ N.C. App. ___, 628 S.E.2d 436 (18 April 2006). The defendant was convicted of felony larceny. In June 2002, the alleged larceny victim buried $13,400 in cash in her mother's backyard (in two separate containers, one of which had a note stating to whom the money belonged). Her mother died in November 2002. In January 2004, the alleged victim returned to the property to retrieve her money. Her mother's mobile home was now being rented to the defendant. The defendant later admitted to finding some of the money and spending it. The court noted that the defendant was in lawful possession of the real property where the alleged larceny victim had buried her money. The defendant had a valid lease to rent not only the mobile home, but also the property on which the mobile home was located. The defendant's leasehold entitled her to lawful possession of the real property and consequently the buried money. Relying on State v. Bailey, 25 N.C. App. 412, 213 S.E.2d 400 (1975) (defendant who rented mobile home and inside furnishings did not commit larceny when taking furnishings, although title remained in landlord, because defendant had complete access and control over furnishings as tenant), the court ruled the defendant did not commit a trespassory taking. Therefore, the evidence was insufficient to support the defendant's conviction of felony larceny. The court indicated that the defendant may have been guilty of violating G.S. 14-168.1 (conversion by lessee). [Author's note: Although the defendant had possession of the real property under the leasehold interest, the containers and their contents having been buried by the victim, with an clue to ownership in the note left with one of them, may still have been constructively in the victim's possession, and the defendant at most had custody of the containers when she took them and spent the money. *See generally* State v. Courtsol, 89 Conn. 564, 94 A. 973 (1915).]

Larceny Indictment Alleging Property Owner as "N.C. FYE, Inc." Was Not Defective

State v. Cave, 174 N.C. App. 580, 621 S.E.2d 299 (15 November 2005). The court ruled that a larceny indictment alleging the property owner as "N.C. FYE, Inc." was not defective. The abbreviation "Inc." imports a corporation, which is a legal entity capable of owning property. [Author's note: To make an allegation clearer, an indictment could allege, after the description of the owner, the words: "a legal entity capable of owning property."]

When Defendant Was Convicted of Felonious Larceny But Jury Did Not Reach Verdict on Felonious Breaking and Entering, Remand Was Required for Entry of Judgment for Misdemeanor Larceny When Jury Did Not Make Finding That Value of Goods Taken Was More Than $1,000.00

State v. Matthews, ___ N.C. App. ___, 623 S.E.2d 815 (17 January 2006). Relying on State v. Keeter, 35 N.C. App. 574, 241 S.E.2d 708 (1978), the court ruled that when the defendant was convicted of felonious larceny but the jury did not reach a verdict on felonious breaking and entering, remand was required for the entry of a judgment for misdemeanor larceny when the jury did not make a finding that the value of goods taken was more than $1,000.00.

Sufficient Evidence to Support Adjudication of Delinquency for Intimidating Witness Under G.S. 14-226

In re R.D.R., ___ N.C. App. ___, 623 S.E.2d 341 (3 January 2006). The court ruled that there was sufficient evidence to support the juvenile's adjudication of delinquency for intimidating a witness under G.S. 14-226. Another juvenile, B.T., admitted to participating in a criminal offense with the juvenile. In court and in the juvenile's presence, B.T. agreed to be a witness for the state against the juvenile. The juvenile stood up, turned toward B.T., and mouthed the words, "I'm going to kick your ass." A court counselor saw what the juvenile had done and asked B.T. if the juvenile had threatened him, and B.T. responded, "Yes."

(1) Trial Judge Did Not Err in Not Allowing Defendant to Withdraw Guilty Plea Before Sentencing Because Defendant Did Not Show Fair or Just Reason for Doing So
(2) Trial Judge Did Not Abuse Discretion in Concluding Defendant Did Not Provide Substantial Assistance in Drug Trafficking Case

State v. Robinson, ___ N.C. App. ___, 628 S.E.2d 252 (18 April 2006). (1) The defendant pled guilty to a drug trafficking charge pursuant to a plea agreement in sentencing was continued, with the requirement that the defendant must testify truthfully and consistently with prior statements to law enforcement if called upon to testify in a pending federal prosecution. About three and one-half months later (during which time the federal prosecutor did not call the defendant as a witness apparently because of the defendant's inconsistent statements), the defendant moved to withdraw his guilty plea, which the trial judge denied. After discussing the factors for withdrawing a guilty plea set out in State v. Handy, 326 N.C. 532, 391 S.E.2d 159 (1990), the court ruled that the defendant did not show a fair or just reason for withdrawing his guilty plea. The court rejected the defendant's argument that there was confusion over the conditions of the plea agreement. (See the court's discussion of the factors and the evidence in this case.) (2) The court ruled that the trial judge did not abuse his discretion in concluding that the defendant did not provide substantial assistance in the drug trafficking case and in not departing from the mandatory sentence.

Defendant's Confession to Deputy Sheriff in Interview Conducted After Defendant Entered Plea Agreement With Federal Government Was Admissible Notwithstanding Deputy Sheriff's Statement to Defendant Before Interview

State v. Lacey, ___ N.C. App. ___, 623 S.E.2d 351 (3 January 2006). The defendant pled guilty in federal court to a drug offense under a plea agreement with a federal prosecutor, accepted by a federal judge, in which the federal government agreed it would not prosecute the defendant for any crime he confessed to, except crimes of violence, and it would not share information with other prosecuting entities except as provided in the agreement. Afterward, the defendant with counsel present agreed to be interviewed by a Beaufort County deputy sheriff, who told the defendant that anything he said would not be used against him, unless it was murder. The defendant confessed to a violent home invasion committed in Wilson County, and the federal government provided the confession to Wilson County authorities. The confession was used to support the defendant's convictions by guilty plea in Wilson County of felonious assault, kidnapping, and burglary. The court ruled that the Beaufort County deputy sheriff had neither actual nor apparent authority to modify the terms of the defendant's plea agreement with the federal government, and the federal government did not breach the plea agreement by informing Wilson County authorities of the defendant's confession to the home invasion.

Unavailability of Trial Transcript for Appeal of Conviction That Occurred in 1988, When Transcript Was Unavailable Through No Fault of State, Did Not Violate Defendant's Constitutional or Statutory Rights

State v. Upshur, ___ N.C. App. ___, 625 S.E.2d 911 (21 February 2006). The defendant was convicted of two offenses at a trial conducted in 1988. The defendant did not appeal his conviction then. In 2000, the court of appeals allowed the defendant's writ of certiorari to review the defendant's conviction. The court ruled, relying on Novell v. Illinois, 373 U.S. 420 (1963), that the unavailability of the trial transcript for the appeal of the defendant's conviction, when the transcript was unavailable through no fault of the state, did not violate defendant's constitutional or statutory rights.

Duke University Campus Police Officer Was a "Public Officer" Under G.S. 14-223 (Resist, Delay, or Obstruct Public Officer)

State v. Ferebee, ___ N.C. App. ___, 630 S.E.2d 460 (6 June 2006). The court ruled that a Duke University campus police officer, who has arrest authority under G.S. 74G-6(b), was a "pubic officer" under G.S. 14-223 (resist, delay, or obstruct public officer).

State Did Not Have Right to Appeal Order Granting Judge's Own Motion for Appropriate Relief Setting Aside Defendant's Sentence as Habitual Felon

State v. Starkey, ___ N.C. App. ___, 628 S.E.2d 424 (18 April 2006). The defendant was convicted of possession of cocaine and having attained the status of an habitual felon. The trial judge sentenced the defendant accordingly. Immediately after entering a judgment on that sentence, the judge, sua sponte, entered an order granting his own motion for appropriate relief. The judge found that the defendant's sentence violated the Eighth Amendment, vacated the defendant's sentence as an habitual felon, and sentenced him for possession of cocaine. The court ruled, after reviewing G.S. 15A-1422 and G.S. 15A-1445, that that state did not have a right to appeal the judge's order. The court also ruled that the state's petition for a writ of certiorari did not satisfy any of the conditions of Rule 21 of the Rules of Appellate Procedure. The court also declined the state's request to suspend the Rules of Appellate Procedure under Rule 2 to review the judge's ruling.

Evidence

Based on North Carolina Supreme Court Rulings in State v. Lewis, 360 N.C. 1, (2005), and State v. Smith, 312 N.C. 361 (1984), Court Rules That Lab Reports or Lab Technician's Notes Prepared for Use in Criminal Prosecution Are Nontestimonial Business Records Under Crawford v. Washington, 541 U.S. 36 (2004), Only When Testing Is Mechanical, As With Intoxilyzer Tests, and Information Contained in Documents Are Objective Facts Not Involving Opinions or Conclusions Drawn by Analyst

State v. Cao, ___ N.C. App. ___, 626 S.E.2d 301 (17 January 2006). The defendant was on trial for several cocaine offenses. The drug testing laboratory technician did not testify at trial. Instead, the trial judge allowed the state's investigating detective to read into evidence the technician's laboratory reports identifying the substances sold by the defendant as cocaine. The defendant argued on appeal that this testimony violated the ruling in Crawford v. Washington, 541 U.S. 36 (2004). The court discussed the analysis of "testimonial evidence" in State v. Lewis, 360 N.C. 1, 619 S.E.2d 830 (2005). The court stated that it could not discern a meaningful distinction between the investigating detective's request that the lab test the substances obtained from the defendant and the detective's request in *Lewis* that the victim view a photo lineup and attempt to identify the assailant. The detective's sole purpose in the case before the court was to obtain evidence to support the drug charges, and a reasonable lab technician would expect his or her conclusions would be used at trial. On the other hand, the court noted that *Crawford* suggested that business records by their nature may not be testimonial; the court also cited State v. Windley, ___ N.C. App. ___, 617 S.E.2d 682 (6 September 2005) (fingerprint card maintained in AFIS was business record and not testimonial under *Crawford*). The court quoted extensively from the ruling in State v. Smith, 312 N.C. 361, 323 S.E.2d 316 (1984) (upholding against constitutional challenge the admissibility in district court of Breathalyzer affidavit), and emphasized by its own italics the *Smith* court's statements that the analyst does not render an opinion or draw conclusions and is required to record alcohol concentration as indicated by the machine. The court also quoted the statement in *Smith* that the need for *and* ("and" italicized in *Smith* opinion) utility of

confrontation at a district court trial is minimal. The court stated that, based on the North Carolina Supreme Court rulings in *Lewis* and *Smith*, it holds that lab reports or lab technician's notes prepared for use in criminal prosecution are nontestimonial business records under Crawford v. Washington, 541 U.S. 36 (2004), only when testing is mechanical, as with Intoxilyzer tests, and information contained in documents are objective facts not involving opinions or conclusions drawn by the analyst. (Author's note: The court used the term "Breathalyzer," but the Intoxilyzer is the instrument currently being used.) The court stated that while cross-examination may not be necessary for blood alcohol concentrations, the same cannot be said for fiber or DNA analysis or ballistics comparisons, for example. In the case before the court, it stated that the lab reports' specification of the weight of the substances would likely qualify as an objective fact obtained through mechanical means. The record on appeal, however, did not contain enough information about the procedures involved in identifying the presence of cocaine in a substance to allow the court to determine whether that portion of the testing met the same criteria. The court ruled that, even assuming error in admitting the lab reports, the error was harmless beyond a reasonable doubt. See also State v. Melton, ___ N.C. App. ___, 625 S.E.2d 609 (7 February 2006) (court ruled that testimony of laboratory manager of Laboratory Corporation of America concerning a lab report showing that defendant had genital herpes was admissible under business records exception, but court did not decide whether the defendant's confrontation right under Crawford v. Washington, 541 U.S. 36 (2004), was violated because, even assuming a violation, any error in admitting the lab report was harmless beyond a reasonable doubt). [Author's note: The *Cao* ruling does not affect prior rulings such as State v. Delaney, 171 N.C. App. 141, 613 S.E.2d 699 (2005) (SBI lab analyst's expert opinion testimony that substances were marijuana and opium, based on analysis of drugs performed by another SBI lab analyst who did not testify at defendant's trial, did not violate *Crawford v. Washington*); State v. Lyles, 172 N.C. App. 323, 615 S.E.2d 890 (2 August 2005) (drug lab report of non-testifying analyst was properly admitted as basis of expert opinion testimony by analyst's supervisor and did not violate *Crawford v. Washington*).]

No *Crawford v. Washington* Violation When Testifying Forensic Pathologist Relied on Autopsy Report Prepared by Nontestifying Forensic Pathologist in Forming Opinion About Cause of Death

State v. Durham, ___ N.C. App. ___, 625 S.E.2d 831 (21 February 2006). The court ruled that there was no error under Crawford v. Washington, 541 U.S. 36 (2004), when a testifying forensic pathologist, accepted as an expert, relied on an autopsy report prepared by a nontestifying forensic pathologist in forming her opinion about the deceased's cause of death. The court noted that the autopsy report was not tendered to prove the truth of the matter asserted therein, but to demonstrate the basis of the testifying pathologist's opinion. The court relied on State v. Huffstetler, 312 N.C. 92, 322 S.E.2d 110 (1984), State v. Delaney, 171 N.C. App. 141, 613 S.E.2d 699 (2005), and other cases.

No *Crawford v. Washington* Violation When SBI DNA Expert Testified About Results of DNA Test Performed by Nontestifying SBI Expert

State v. Hocutt, ___ N.C. App. ___, 628 S.E.2d 832 (2 May 2006). The court ruled, relying on State v. Walker, 170 N.C. App. 632, 613 S.E.2d 330 (2005), and other cases, that there was no *Crawford v. Washington* violation when a SBI DNA expert testified about the results of a DNA test performed by a nontestifying SBI expert.

Non-Testifying Campus Police Officer's Statement to Defendant, "Campus Police Officer, Stop" Was Not Testimonial Under *Crawford v. Washington*

State v. Ferebee, ___ N.C. App. ___, 630 S.E.2d 460 (6 June 2006). The defendant was convicted of resisting, delaying, and obstructing a public officer, a Duke University campus police officer, under G.S. 14-223. The Duke officer [who had arrest authority under G.S. 74G-6(b)] and a security guard were chasing the defendant to make an investigative stop. The security guard testified that he yelled, "campus security, stop," and then the Duke officer (who did not testify at trial) yelled, "campus police officer, stop." The court ruled that the Duke officer's statement was not testimonial under Crawford v. Washington, 541 U.S. 36 (2004). The statement was not made for the purpose of later establishing in court that the defendant resisted arrest. Rather, the officer made the statement while carrying out his duties as an officer by attempting to apprehend the defendant who was suspected of improper behavior.

(1) Trial Judge Did Not Abuse Discretion in Allowing Lay Witness to Identify Substance as Methamphetamine
(2) Evidence of Defendant's Providing Methamphetamine to Involuntary Manslaughter Victim at Prior Occasion Was Admissible Under Rule 404(b) to Establish Nature of Victim's Relationship With Defendant

State v. Yelton, ___ N.C. App. ___, 623 S.E.2d 594 (3 January 2006). The defendant was convicted of involuntary manslaughter, sale and delivery of methamphetamine, and possession with intent to sell and deliver methamphetamine. The defendant provided methamphetamine to the victim, who died as a result of digesting it. (1) The court ruled that the trial judge did not abuse his discretion under Rule 701 in allowing a lay witness to identify a substance as methamphetamine. The evidence showed that the witness had extensive personal knowledge of methamphetamine, smoked the methamphetamine that the defendant had given to the victim, and her testimony was helpful to a clear understanding of her testimony or a fact in issue. (2) The state introduced statements of the defendant (during an interview with a law enforcement officer) that he provided the victim with methamphetamine two to three weeks before his death and gave him drugs for work performed by the victim. The court ruled, relying on State v. Agee, 326 N.C. 542, 391 S.E.2d 171 (1990), that these statements were admissible under Rule 404(b) to establish the nature of the victim's relationship with the defendant. The statements helped to describe the chain of circumstances leading to the provision of methamphetamine to the victim on the date of his death and provided context for the charge of selling the drug. [Author's note: It would appear that the defendant's statements were independently admissible under other rules of evidence: Rule 801(d)(A) (statement by party-opponent), and relevant under Rule 401 for the reasons given in the court's opinion.]

(1) Statement Made By Extremely-Upset Defendant's Girlfriend Immediately After Being Handcuffed Was Properly Admitted as Excited Utterance Under Rule 803(2)
(2) Evidence That Shotgun Was Found in Dwelling Was Properly Admitted in Drug Trafficking Trial

State v. Boyd, ___ N.C. App. ___, 628 S.E.2d 796 (18 April 2006). The defendant was convicted of trafficking in cocaine and other drug offenses. Officers executed a search warrant to search a dwelling for cocaine. They found the defendant in the dwelling attempting to stuff plastic bags in his mouth that appeared to contain cocaine. They found trafficking amounts of cocaine elsewhere in the dwelling as well as a shotgun. The defendant's girlfriend appeared at the dwelling shortly after the beginning of the execution of the search warrant. She was handcuffed and shown a copy of the search warrant. She was extremely upset and shaking. As soon as she saw the defendant, she said, "[W]e gots to be more careful" and started to cry. (1) The court ruled, relying on State v. Beaver, 317 N.C. 643, 346 S.E.2d 476 (1986), and State v. Guice, 141 N.C. App. 177, 541 S.E.2d

474 (2000), that the girlfriend's statement was properly admitted as an excited utterance under Rule 803(2) and also admissible under Rule 403. (2) The court ruled, relying on State v. Smith, 99 N.C. App. 67, 392 S.E.2d 642 (1990), and State v. Willis, 125 N.C. App. 537, 481 S.E.2d 407 (1997), that evidence that a shotgun was found in a dwelling was properly admitted because it was relevant to the drug charges (the association of weapons with illegal drug trade).

(1) State's Failure to Give Defendant Written Notice As Required Under Rule 609(b) of Its Intent to Use Over-Ten-Year-Old Convictions to Impeach Defendant Did Not Bar State's Use of Convictions When Defendant Was Aware of State's Intent Well in Advance of Trial
(2) Trial Judge Did Not Err in Admitting Under Rule 609(b) Over-Ten-Year-Old Convictions of Common Law Robbery, Felonious Larceny, and Credit Card Fraud, Which Implicate Dishonesty, Deceit, and Moral Turpitude

State v. Shelly, ___ N.C. App. ___, 627 S.E.2d 287 (21 March 2006). (1) The court ruled that the state's failure to give the defendant written notice as required under Rule 609(b) of its intent to use over-ten-year-old convictions to impeach the defendant did not bar the state's use of the convictions when the defendant was aware of state's intent well in advance of trial. The state had provided the defendant's conviction record during discovery, and the defendant had filed a motion a month before trial to bar the state from using the old convictions at trial. The court noted that it was obvious the defendant had actual notice that the state intended to use the convictions and had a fair opportunity to contest the use of the evidence. (2) The court ruled that the trial judge did not err in admitting under Rule 609(b) over-ten-year-old convictions of common law robbery, felonious larceny, and credit card fraud, which implicate dishonesty, deceit, and moral turpitude.

Victim's Reference to Defendant as Gang Member Was Relevant to Her Identification of Defendant as Perpetrator of Crimes

State v. Medina, ___ N.C. App. ___, 622 S.E.2d 176 (6 December 2005). The defendant was on trial for first-degree murder and attempted first-degree murder. The defendant's identity as the perpetrator was an issue at trial. The victim of the attempted first-degree murder told detectives at the crime scene that the defendant had worn a bandanna, blue or black in color, about his face. She testified at trial about her knowledge of the defendant's involvement with a gang and the gang's color being blue. The court ruled, relying on State v. Ruof, 296 N.C. 623, 252 S.E.2d 720 (1979), that the victim's testimony about gang involvement was admissible for the purpose of identifying the defendant.

Statement Made Before Existence of Conspiracy Was Not Admissible Under Rule 801(d)(E)

State v. Stephens, ___ N.C. App. ___, 623 S.E.2d 610 (3 January 2006). The court ruled that the trial judge erred in admitting a statement of an alleged coconspirator because the statement was made before the existence of a conspiracy and thus was not admissible under Rule 801(d)(E). (See the court's discussion of the evidence on this issue.)

Sufficient Chain of Custody to Introduce Defendant's Computers and Their Contents

State v. Brown, ___ N.C. App. ___, 626 S.E.2d 307 (21 February 2006). The defendant was convicted of several sex offenses involving a thirteen year old. Officers seized the defendant's computers and introduced some of their contents into evidence. The court rejected the defendant's argument that admission of the evidence was error because the state did not properly establish a

chain of custody for the computers and their contents from when they were seized to the time of trial. Relying on State v. Campbell, 311 N.C. 386, 317 S.E.2d 391 (1984), the court noted that a detailed chain of custody need be established only under certain conditions, not present in this case, and any weak links affect the weight to be given the evidence and not its admissibility. The court rejected the defendant's argument that the computers' contents were susceptible to alteration because of the number of officers with access to them and the failure to store them in a secure location, when the defendant failed to identify any reason to believe the contents may have been altered.

Trial Judge Did Not Abuse Discretion in Allowing Law Enforcement Officer to Testify as Expert in Murder Trial on Subjects of Lividity of Victim's Body and Approximate Time of Death

State v. Steelmon, ___ N.C. App. ___, 627 S.E.2d 492 (4 April 2006). The court ruled, relying on State v. Goode, 341 N.C. 513, 461 S.E.2d 631 (1995), and Howerton v. Arai Helmet, Ltd., 358 N.C. 440, 597 S.E.2d 674 (2004), that the trial judge did not abuse his discretion in allowing a law enforcement officer to testify as an expert in a murder trial on the subjects of lividity of victim's body and the approximate time of death. (See the court's opinion for its review of the officer's background.)

Testimony of State's Firearm Identification Expert Was Sufficiently Reliable to Be Admitted Under Rule 702

State v. Anderson, ___ N.C. App. ___, 624 S.E.2d 393 (17 January 2006). The court ruled that the testimony of the state's firearm identification expert was sufficiently reliable to be admitted under Rule 702 and the standard set out in State v. Morgan, 359 N.C. 131, 604 S.E.2d 886 (2004) [court rejects standard under Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993)].

State Was Properly Allowed to Impeach Defendant Under Rule 608(b) by Cross-Examining Defendant About His False Statements to Police Concerning Offense That Had Been Subject to Deferred Prosecution

State v. Browning, ___ N.C. App. ___, 629 S.E.2d 299 (16 May 2006). The court ruled, relying on State v. Springer, 83 N.C. App. 657, 351 S.E.2d 120 (1986), and distinguishing State v. Cook, 165 N.C. App. 630, 599 S.E.2d 67 (2004), that the state was properly allowed to impeach the defendant under Rule 608(b) by cross-examining the defendant about his false statements to police concerning an offense that had been the subject to deferred prosecution. The defendant's false statements about a theft of a camera showed the defendant's untruthfulness. The court noted that the state did not offer extrinsic evidence of the defendant's false statements.

State Was Improperly Permitted to Call Rebuttal Witness to Contradict Testimony of Defense Witness Who Had Denied Making Prior Statement to Rebuttal Witness

State v. Reid, ___ N.C. App. ___, 625 S.E.2d 575 (7 February 2006). A defense witness testified to several matters on direct examination, but not whether the defense witness had made a statement to the victim's mother that the defendant had shot the victim. The defense witness denied on cross-examination that he had made such a statement. The state was permitted to call the victim's mother on rebuttal to testify that the defense witness had made such a statement. The court ruled, relying on State v. Najewicz, 112 N.C. App. 280, 436 S.E.2d 132 (1993), and other cases, that the trial judge erred in allowing the rebuttal testimony. Once a witness denies having

made a prior inconsistent statement, the state may not introduce a prior statement in an attempt to discredit the witness—the prior statement concerns only a collateral matter, whether the statement was ever made.

Trial Judge Did Not Err in Sexual Assault Trial in Admitting Under Rule 404(b) Evidence of Assault on Another Female to Show Common Plan or Scheme

State v. Summers, ___ N.C. App. ___, 629 S.E.2d 902 (6 June 2006). The defendant was convicted of first-degree rape, three counts of first-degree sexual offense, and other offenses committed in November 1992. The defendant around midnight brandished a knife, forced the victim into her car, and committed the offenses there after driving the car a short distance. The court ruled that the trial judge did not err in admitting under Rule 404(b) evidence of an assault on another female to show a common plan or scheme. In January 1993, the defendant in the evening accosted a female with a pistol while the victim was loading items in her car. The defendant struck her with a pistol several times, grabbed her around the waist, and she fell to the ground. The victim fought off the defendant's attacks and was able to get up and run away.

Arrest, Search, and Confession Issues

(1) After United States Supreme Court's Remand For Further Consideration of Prior Ruling in This Case, Court Rules That Walking Drug Dog Around Defendant's Car When Defendant Was Lawfully Detained on Reasonable Suspicion of Driver's License Violation and Failure to Appear in Court Did Not Require Additional Justification Under Fourth Amendment
(2) Entry of Ruling on Suppression Motion Made Out of Term Was Nullity; Defendant Had Consented to Trial Judge's Request to Take Motion Under Advisement and Issue Later Order, But Did Not Explicitly Consent to Order's Entry Out of Term

State v. Branch, ___ N.C. App. ___, 627 S.E.2d 506 (4 April 2006). (1) Officers were conducting a driver's license checkpoint. They stopped all cars approaching an intersection and quickly assessed whether the registration and license were valid. Officers with a drug dog unit were available for assistance. The defendant was stopped at the checkpoint by an officer who recognized her as someone whom he had previously arrested for drug possession and whose driver's license might be revoked. The defendant presented a duplicate driver's license. The officer testified at the suppression hearing that duplicate licenses are often used by drivers whose originally-issued licenses have been taken due to license revocations. Another officer, who was with the drug dog unit, testified that he saw the defendant and recalled previously issuing her a citation for a moving violation for which she had failed to appear in court—an act that would normally result in a license revocation. After the two officers conferred, the defendant was directed to the side of the road so they could check for outstanding warrants and the status of her license. While that check was being done, an officer took a drug dog for a walk around the defendant's vehicle. The dog alerted. A search resulted in the discovery of illegal drugs and the defendant's conviction. In the defendant's initial appeal to the North Carolina Court of Appeals, the court ruled, 162 N.C. App. 707, 591 S.E.2d 923 (2004), that there was reasonable suspicion to detain the defendant in her vehicle while the check was being done based on the interaction of two facts: presentation of a duplicate license and not appearing in court. However, the court also ruled in the initial appeal that these facts did not support reasonable suspicion to walk the drug dog around the car's exterior. After this ruling was issued, the United States Supreme Court ruled in Illinois v. Caballes, 543 U.S. 405 (2005), that walking a drug dog around a vehicle while the driver was lawfully detained while an officer was issuing a warning ticket for speeding did not violate Fourth Amendment. The United States Supreme Court granted the State of North

Carolina's petition for a writ of certiorari to review the *Branch* ruling, vacated the ruling, and remanded it to the North Carolina Court of Appeals for further consideration in light of *Caballes*. The court of appeals on remand stated that once the lawfulness of a defendant's detention was established, the *Caballes* ruling required no additional justification under the Fourth Amendment to walk the drug dog around the exterior of the defendant's vehicle. (2) After the suppression hearing had ended, the trial judge did not issue announce a ruling on the motion. However, with the consent of the state and defendant to the trial judge's request to take the motion under advisement and issue a later order, the trial judge did not issue an order for several months. The court ruled, relying on State v. Trent, 359 N.C. 583, 614 S.E.2d 498 (2005), that the trial judge's order was issued out of term and a nullity. (This issue had not been decided in the initial appeal because of the favorable disposition on the defendant's search issue.) The court noted the parties had consented to allow the judge to issue a later order, but it was not explicit consent to the order's entry out of term. Thus, the purported consent was insufficient. The court vacated the trial judge's order denying the defendant's motion to suppress and remanded the matter for a new suppression hearing. The court stated that the new hearing will not be bound by its previous opinion in this case nor the prior suppression order, and should necessarily address whether the officers' investigative detention at the license checkpoint while verifying her driving privileges was constitutional.

Reasonable Suspicion Did Not Exist to Make Investigative Stop

In re J.L.B.M., ___ N.C. App. ___, 627 S.E.2d 239 (21 March 2006). The court ruled, relying on State v. Fleming, 106 N.C. App. 165, 415 S.E.2d 782 (1992), that the following evidence was insufficient to support reasonable suspicion to make an investigative stop of the juvenile. The stopping officer relied solely on a dispatch that there was a suspicious person at a gas station, the juvenile matched the "Hispanic male" description of the suspicious person, the juvenile was wearing baggy clothes, and the juvenile chose to walk away from the patrol car. The officer was not aware of any graffiti or property damage before the officer stopped the juvenile, and the officer noticed a bulge in the juvenile's pocket only after the stop.

(1) Officers Lawfully Seized Defendant Under Public Intoxication Statute, G.S. 122C-303
(2) Defendant's Recorded Jail Telephone Conversations Were Properly Obtained Under Fourth, Sixth, and Fourteenth Amendments

State v. Hocutt, ___ N.C. App. ___, 628 S.E.2d 832 (2 May 2006). The defendant was convicted of first-degree murder. (1) When officers left the murder scene around 11:30 p.m., they saw the defendant walking barefoot along a road. He had scratches all over his body, was very dirty, and was staggering. The officers recognized the defendant and saw that he was very intoxicated. They placed him in handcuffs and took him to jail for "detox purposes," "to sober up." The court ruled, distinguishing Davis v. Town of Southern Pines, 116 N.C. App. 663, 449 S.E.2d 240 (1994), that the officers lawfully seized the defendant under the public intoxication statute, G.S. 122C-303. The court concluded that the defendant met the statutory criteria because he was "apparently in need of and apparently unable to provide for himself" clothing and possibly shelter. The court rejected the defendant's argument that the officers only had the authority to take the defendant to his home, but not to jail. (2) While in jail, the defendant made incriminating statements over the phone to his girlfriend and to his brother, which were recorded pursuant to jail policy. Inmates receive an informational handbook concerning this policy, notices are posted in the cell blocks telling inmates that their telephone calls are monitored, and before being connected, both the caller and the person being called hear a recorded warning that " all calls are subject to monitoring and recording," except for "attorney calls." The court ruled that the defendant's recorded jail telephone conversations were properly obtained under the Fourth, Sixth, and Fourteenth Amendments.

(1) Officer Had Authority to Enter Dwelling With Arrestee While Arrestee Got Dressed
(2) Defendant May Not Challenge Prosecutor's Questioning of Defense Witness on Ground That Questioning Violated Witness's Fifth Amendment Rights

State v. Weakley, ___ N.C. App. ___, 627 S.E.2d 315 (21 March 2006). (1) The defendant appeared at the front door of a residence and was told that officers had an arrest warrant for her. The defendant was not fully clothed. One of the officers accompanied her into the residence while she got dressed. Relying on Washington v. Chrisman, 455 U.S. 1, 1982), the court ruled that the officer's presence in the residence was lawful because the officer was entitled to monitor the defendant's movements while she got dressed. (2) The defendant argued on appeal that the state was improperly permitted to cross-examine a defense witness concerning her failure to give a statement to a law enforcement officer because the cross-examination violated the witness's Fifth Amendment rights. The court ruled, relying on State v. Lipford, 81 N.C. App. 464, 344 S.E.2d 307 (1986), and other cases, the defendant had no standing to assert the witness's constitutional right against self-incrimination.

Assuming Without Deciding That Officer Had Seized Defendant Under Fourth Amendment After Defendant's Vehicle Had Evaded Driver License Checkpoint, Officer's Seizure Was Valid Under Fourth Amendment Based on Ruling in *State v. Foreman*

State v. Bowden, ___ N.C. App. ___, ___ S.E.2d ___ (6 June 2006). Law enforcement officers established a driver license checkpoint late at night at the bottom of a hill. It was not visible to motorists until they crested the hill about 250 feet away. One officer was assigned to identify drivers who might try to elude the checkpoint. He saw a pickup truck driven by the defendant crest the hill and descend rapidly toward the checkpoint. The truck braked hard, causing the front headlights to dip low. The truck then made an abrupt turn into the parking lot of the nearest apartment complex. As the officer approached in his patrol car without blue lights on, he saw the truck pull out of a parking space into which it had apparently backed, travel towards the parking

lot's exit, but then drive head first into a new parking space as the patrol car drew near. The officer pulled his patrol car behind the truck and activated his blue lights. The court ruled, assuming without deciding that the officer had seized the defendant under the Fourth Amendment when pulling his patrol car behind the truck and activating blue lights, that the officer's seizure was supported by reasonable suspicion, based on the ruling in State v. Foreman, 351 N.C. 627, 527 S.E.2d 921 (2000) (quick, but legal, left turn immediately before DWI checkpoint supported officer's stop of defendant's vehicle for DWI). The totality of circumstances justified the officer's pursuing and stopping the defendant's vehicle to inquire why he turned before the checkpoint.

Officer's Search of Van Exceeded Scope of Consent Search

State v. Johnson, ___ N.C. App. ___, 627 S.E.2d 488 (4 April 2006). **(Author's note: On June 29, 2006, the North Carolina Supreme Court ordered that this case be remanded to the trial court for findings of fact and conclusions of law on the issue whether probable cause supported the officer's search of the van.]** An officer stopped a passenger van and issued a warning ticket for a license plate display violation. The officer asked the defendant if he had in the van any illegal guns or drugs or amounts of money exceeding $10,000. The defendant said "no" several times. The defendant then gave consent to a search of the van. The officer discovered a piece of rubber that had been glued where it normally is not on a plastic wall panel inside the van. The officer pulled back the wall panel and discovered cocaine. The court ruled, applied the objective reasonableness test of Florida v. Jimeno, 500 U.S. 248 (1991), and other cases, that the defendant's general statement of consent to search could not reasonably have been interpreted to include the intentional infliction of damage to the van.

Confidential Informant's Information Provided Officer With Probable Cause to Arrest Defendant

State v. Stanley, ___ N.C. App. ___, 622 S.E.2d 680 (20 December 2005). A law enforcement officer received a call from a confidential informant concerning a person selling drugs outside a local convenience store. The officer had worked with the informant for 14 years, and the informant's information had proven to be reliable, leading to at least 100 arrests and convictions. The person was described by the informant as a black male wearing a blue ski hat, dark jacket, and blue jeans, standing beside a Citgo gas station on Sugar Creek Road, and the person possessed crack cocaine and was selling it. Approximately 30 to 45 minutes later, the officer and another officer met with the informant a short distance from the Citgo. The informant told him that the person was still there and selling crack cocaine. The two officers went to the Citgo and saw the person (along with two or three others in the parking lot who did not match the informant's description), later identified as the defendant, matching the description given by the informant. The court ruled that this information provided the officers with probable cause to arrest the defendant.

Officer's Statement to Arrestee Before Conducting Strip Search Was Not Interrogation Under *Rhode Island v. Innis*

State v. Dent, 174 N.C. App. 459, 621 S.E.2d 274 (15 November 2005). An officer arrested the defendant for driving while license revoked. He did not administer *Miranda* warnings to the defendant. While searching him, the officer noted the smell of burnt marijuana but did not find any marijuana. When the officer asked the defendant several times whether he had any marijuana, the defendant said no. Before taking the defendant inside the detention facility, the officer asked the defendant whether he had any controlled substances. The defendant said no. Once in the detention center and inside a search room, the officer informed the defendant that he would be

strip searched. The defendant then stated that he had "residue" in his right sock. Distinguishing State v. Phelps, 156 N.C. App. 119, 575 S.E.2d 818 (2003), *reversed*, 358 N.C. 142, 592 S.E.2d 687 (2004), and relying on Rhode Island v. Innis, 446 U.S. 291 (1980), and State v. Golphin, 352 N.C. 364, 533 S.E.2d 168 (2000), the court ruled that the officer's statement before the strip search (that the defendant would be strip searched) was not intended or reasonably expected to elicit an incriminating response from the defendant and therefore did not constitute interrogation under *Miranda*. The officer was merely informing him of the extent of the then-impending search. [Author's note: The officer's questions to the defendant whether he had any marijuana or controlled substances clearly were interrogation, although the admissibility of the defendant's responses was not an issue in this case.]

Defendant's Request for Aunt to Be Present During Custodial Interrogation Did Not Require Officers to Stop Interrogation, Because Aunt Was Not "Guardian" Under Juvenile Interrogation Statute, G.S. 7B-2101

State v. Oglesby, ___ N.C. App. ___, 622 S.E.2d 152 (6 December 2005). The court ruled that the request of the defendant (who was sixteen years old) for his aunt to be present custodial interrogation did not require officers to stop interrogation, because his aunt was not a "guardian" under the juvenile interrogation statute, G.S. 7B-2101. Distinguishing State v. Jones, 147 N.C. App. 527, 556 S.E.2d 644 (2001), the court noted that no governmental entity had conferred legal authority over the defendant to the aunt.

Officer's Question About Home Address During Booking Process of In-Custody Defendant Who Had Not Been Given *Miranda* Warnings Did Not Qualify Under *Miranda* Booking Question Exception Because Question Was Reasonably Likely To Elicit Incriminating Response

State v. Boyd, ___ N.C. App. ___, 628 S.E.2d 796 (18 April 2006). The defendant was arrested for drug trafficking and other drug offenses. Before *Miranda* warnings were administered, an officer asked booking questions, including the location of the defendant's residence. The defendant gave as his address the place where officers had seized illegal drugs. One of the issues in the case was the defendant's relationship to the dwelling where the illegal drugs had been seized. The court ruled, relying on the *Miranda* bookings question exception discussed in State v. Golphin, 352 N.C. 364, 533 S.E.2d 168 (2000), that the exception did not apply to this question because it was reasonably likely to elicit an incriminating response.

Defendant's Reply Letters While in Custody Awaiting Trial to Letters Written by Mother of Child Victim Were Not Inadmissible Under *Miranda*

State v. Pittman, ___ N.C. App. ___, 622 S.E.2d 135 (6 December 2005). The defendant was convicted of various offenses involving a six-week-old infant, including attempted first-degree murder. While in custody awaiting trial, the mother of the infant wrote letters to the defendant asking him why he had committed the crimes. The mother testified at trial that although the defendant replied to the letters, he never answered her questions. The court ruled that the admission of the mother's testimony did not violate Doyle v. Ohio, 426 U.S. 610 (1976) (impermissible use of defendant's post-arrest silence after giving *Miranda* warnings), because any silence of the defendant was not in response to questioning by law enforcement officers. Nor was the mother acting as the agent of officers in writing these letters. [Author's note: It is questionable whether North Carolina rulings applying the *Miranda* ruling to agents of law enforcement officers are still valid after the ruling in Illinois v. Perkins, 496 U.S. 292 (1990). See the discussion of *Perkins* and Alexander v. Connecticut, 917 F.3d 747 (2d Cir. 1990), on pages

429-30 of Robert L. Farb, Arrest, Search, and Investigation in North Carolina (3d ed. 2003)]. The court ruled, alternatively, that even if *Miranda* were applicable, the defendant did not choose to remain silent. Instead, he voluntarily wrote back to the mother, and the state may inquire about the defendant's failure to disclose certain information in the reply letters.

Sentencing

Defendant Was Entitled to Credit Against Sentence For Time Spent in DART, Which Had Been Required As Special Condition of Probation

State v. Lutz, ___ N.C. App. ___, 628 S.E.2d 34 (4 April 2006). The court ruled, relying on State v. Hearst, 356 N.C. 138, 567 S.E.2d 129 (2002) (defendant entitled to credit against sentence for attending IMPACT), that the defendant was entitled to 91 days credit against his sentence for time spent in DART, a substance abuse program, which had been required as a condition of special probation. The trial judge had revoked the defendant's probation and activated his suspended sentence.

(1) When Court of Appeals Granted Defendant's Writ of Certiorari and Limited Review to Defendant's Sentence Under G.S. 15A-1444(a1) and (a2) Resulting From Defendant's 1995 Guilty Plea, Defendant Could Not Raise *Blakely* Issue
(2) Trial Judge Erred in Finding Statutory Aggravating Factor for Sentencing of Armed Robbery Conviction That $1,300 Taken in Robbery Was Property of Great Monetary Value

State v. Pender, ___ N.C. App. ___, 627 S.E.2d 343 (21 March 2006). (1) The court ruled that when it granted the defendant's writ of certiorari and limited review to the defendant's sentence under G.S. 15A-1444(a1) and (a2) resulting from 1995 guilty plea, defendant could not raise *Blakely* issue. The court's ruling rested on the retroactivity ruling in State v. Allen, 359 N.C. 425, 615 S.E.2d 256 (2005). (2) The court ruled, distinguishing State v. Simmons, 65 N.C. App. 804, 310 S.E.2d 139 (1984) ($2,500 was property of great monetary value), that the trial judge erred in finding a statutory aggravating factor for sentencing of an armed robbery conviction that $1,300 taken in the robbery was property of great monetary value.

(1) Alleged *Blakely v. Washington* Error Not Retroactively Applicable to Defendant's Case That Became Final As of December 23, 2003
(2) Defendant Did Not Receive Ineffective Assistance of Appellate Counsel Who Had Not Asserted Sentencing Error After Rulings in *Apprendi v. New Jersey* and *Ring v. Arizona* But Before Ruling in *Blakely v. Washington*

State v. Simpson, ___ N.C. App. ___, 637 S.E.2d 271 (21 March 2006). In July 2002 the defendant pled guilty to various offenses. The trial judge found as an aggravating factor that the victim was physically infirm and sentenced the defendant in the aggravated range. The defendant appealed his sentence to the North Carolina Court of Appeals, which upheld his sentence in a ruling that became "final" on December 23, 2003 (for retroactivity purposes, the date the defendant's time expired for seeking discretionary review by the North Carolina Supreme Court of the North Carolina Court of Appeals opinion). On October 15, 2004, a trial judge denied the defendant's motion for appropriate relief based on *Blakely* error (failing to submit aggravating factor to jury when sentence had been imposed in aggravated range). The North Carolina Court of Appeals allowed the defendant's writ of certiorari limited to the issues of retroactive application of *Blakely* and ineffective assistance of counsel. (1) The court noted that the defendant's case was before it on collateral, not direct review. The court ruled, relying on State v. Allen, 359 N.C. 425, 615 S.E.2d 256 (2005) (ruling applicable to cases not yet indicted, on direct review, or not yet final as of *Allen*'s certification date, July 21, 2005). that *Blakely* was not retroactively applicable to defendant's sentence because his case had become final before July 21, 2005. (2) The court ruled that the defendant did not receive ineffective assistance by appellate counsel who had not asserted sentencing error after the rulings in Apprendi v. New Jersey, 530 U.S. 466 (2000), and

Ring v. Arizona, 536 U.S. 584 (2002), but before the ruling in Blakely v. Washington, 542 U.S. 296 (2004). The court also rejected an ineffective-assistance-of-counsel claim based on the assertion that appellate counsel in 2003 should have pursued the case to the North Carolina Supreme Court and United States Supreme Court. The court ruled that the defendant had no constitutional right to counsel after the initial appeal, and thus there cannot be ineffective assistance of counsel for failing to pursue an appeal after the initial appeal.

Court Applies Ruling in *Blakely v. Washington* to 1988 Conviction When Direct Appellate Review Had Been Allowed by Writ of Certiorari in 2000 and Was Pending in 2004 When *Blakely* Was Decided

State v. Upshur, ___ N.C. App. ___, 625 S.E.2d 911 (21 February 2006). The defendant was convicted in 1988 of first-degree rape and assault with a deadly weapon inflicting serious injury. The defendant did not exercise his right to appeal his convictions. The court of appeals in 2000 allowed review of the convictions by writ of certiorari. The court applied the ruling in Blakely v. Washington, 542 U.S. 296 (2004), to the imposition of an aggravated range sentence for the 1988 conviction of assault with a deadly weapon inflicting serious injury and remanded for a new sentencing hearing. The court noted that the defendant's appeal of this conviction was pending in the court of appeals when *Blakely* was decided.

There Was No Factual Basis to Find That Any Stipulation to Aggravating Factors by Defendant or Defense Counsel Was Knowing and Intelligent Waiver of Constitutional Right to Jury Determination of Existence of Aggravating Factors Under *Blakely v. Washington*

State v. Harris, ___ N.C. App. ___, 623 S.E.2d 588 (3 January 2006). The defendant was convicted of second-degree murder and was sentenced by a judge to an aggravated range punishment. The judge, not a jury, found the existence of the aggravating factors. The court ruled that there was no factual basis to find that any stipulation to aggravating factors by the defendant or defense counsel was a knowing and intelligent waiver of the constitutional right to a jury determination of the existence of aggravating factors under Blakely v. Washington, 542 U.S. 296 (2004). The court stated that in light of *Blakely* and State v. Allen, 359 N.C. 425, 615 S.E.2d 256 (2005), the relevant inquiry is not whether the defendant stipulated to a factual basis for a finding of an aggravating factor by the trial judge, but rather whether the defendant effectively waived his or her constitutional right to have a jury determine the existence of an aggravating factor. The court remanded for a resentencing hearing where the state either proves aggravating factors before a jury or the defendant admits to the existence of aggravating factors by a waiver of the constitutional right to a jury trial through a knowing and intelligent surrender of that right.

No *Blakely v. Washington* Error When Judge Found Aggravating Factor and Sentenced Defendant to Minimum Term of Imprisonment in Aggravated Range for Class C Felony, Prior Record Level IV, When Minimum Term Was the Same Number of Months (133) as Highest Number of Months (133) Authorized in Presumptive Range for Class C Felony, Prior Record Level IV

State v. Garcia, 174 N.C. App. 498, 621 S.E.2d 292 (15 November 2005). The court ruled that there was no error under Blakely v. Washington, 542 U.S. 296 (2004), when the sentencing judge found an aggravating factor and sentenced the defendant to a minimum term of imprisonment in the aggravated range for a Class C felony, Prior Record Level IV, when the minimum term was the same number of months (133) as the highest number of months (133) authorized in the presumptive range for a Class C felony, Prior Record Level IV. The court stated, relying on the ruling in State v. Allen, 359 N.C. 425, 615 S.E.2d 256 (2005), that because the defendant's

sentence fell within the presumptive range, the trial judge's finding of an aggravating factor not admitted by the defendant or submitted to the jury did not violate *Blakely*.

Error Under Ruling in *Blakely v. Washington* Occurred When Judge Revoked Probation and Activated Suspended Sentences That Had Been Unconstitutionally Aggravated Under *Blakely*

State v. McMahan, 174 N.C. App. 586, 621 S.E.2d 319 (15 November 2005). The court ruled that error occurred under the ruling in Blakely v. Washington, 542 U.S. 296 (2004), when a judge revoked the defendant's probation and activated suspended sentences that had been unconstitutionally aggravated under *Blakely.* The judge who imposed the probationary sentence had found an aggravating factor and imposed a suspended sentence in the aggravated range. The court also ruled that the *Blakely* rulings in State v. Allen, 359 N.C. 425, 615 S.E.2d 256 (2005), and State v. Speight, 359 N.C. 602, 614 S.E.2d 262 (2005), applied to this case because the defendant's assignment of sentencing error was pending on appeal on the date the *Allen* and *Speight* opinions were certified.

Defendant's Prior Record Calculation Properly Included Three Prior DWI Convictions Even Though Those Convictions Formed Basis for Two Habitual DWI Convictions, Which Also Were Included in Calculation

State v. Hyden, ___ N.C. App. ___, 625 S.E.2d 125 (17 January 2006). The court ruled, relying on State v. Vardiman, 146 N.C. App. 381, 552 S.E.2d 697 (2001), and distinguishing State v. Baldwin, 117 N.C. App. 713, 453 S.E.2d 193 (1995), that the defendant's prior record calculation properly included three prior DWI convictions even though those convictions formed the basis of two habitual DWI convictions, which also were included in the calculation. The trial judge properly counted all five convictions in determining the defendant's prior record level. Each conviction resulted from a separate offense.

Prior DWI Convictions Admitted at Trial to Prove Malice for Second-Degree Vehicular Murder Were Properly Used as Points in Calculating Defendant's Prior Record Level

State v. Bauberger, ___ N.C. App. ___, 626 S.E.2d 700 (7 March 2006). **(Author's note There was a dissenting opinion in this case, but not on this issue.)** The defendant was convicted of second-degree murder involving a vehicular crash. The court ruled that the defendant's prior DWI convictions admitted at trial to prove malice for second-degree vehicular murder were properly used as points in calculating the defendant's prior record level. The court stated that the prohibition in G.S. 15A-1340.16(d) (proof of element of offense may not also be used to prove aggravating factor) does bar the use of the same evidence to calculate a prior record level. The court noted that the legislature in G.S. 14-7.6 has specifically prohibited using prior convictions to calculate a prior record level when the convictions were used to prove habitual felon status. [Author's note: The court also ruled in State v. Gentry, 135 N.C. App. 107, 519 S.E.2d 68 (1999), that DWI convictions used to prove habitual DWI may not be used to calculate the defendant's prior record level.]

(1) Computer Printouts of Defendant's Prior Convictions from Other Jurisdictions Were Admissible at Sentencing Hearing Under G.S. 15A-1340.14(f)(4)
(2) State Failed to Prove Defendant's Out-of-State Convictions Were Felonies and Substantially Similar to North Carolina Class I Felony Offenses

State v. Cao, ___ N.C. App. ___, 626 S.E.2d 301 (17 January 2006). (1) At a sentencing hearing, the state submitted computer printouts as evidence of the defendant's prior convictions in other jurisdictions. The printouts stated that they contain information from "NLETS," "Crime Records Service DPS Austin TX," and the FBI. The court ruled that these printouts were admissible under

G.S. 15A-1340.14(f)(4). (2) The court ruled that the state failed to prove defendant's out-of-state convictions were felonies and substantially similar to North Carolina Class I felony offenses.

(1) Defendant Failed Under G.S. 15A-980 to Meet Burden of Proof in Suppressing Prior Convictions Used in Calculating Prior Record Level Based on Denial of Right to Counsel
(2) Defendant Has No Sixth Amendment Right to Have Jury Determine Whether Prior Convictions Used in Calculating Prior Record Level Were Obtained in Violation of Right to Counsel

State v. Jordan, 174 N.C. App. 479, 621 S.E.2d 229 (15 November 2005). The trial judge determined that the defendant was in Prior Record Level III based on several prior convictions. (1) The court ruled that the defendant failed under G.S. 15A-980 to meet his burden of proof on a motion to suppress prior convictions used in calculating his prior record level based on the denial of the right to counsel. The defendant's only evidence was his testimony that he did not have an attorney for each conviction and he was not able to afford one at that time. Relying on State v. Rogers, 153 N.C. App. 203, 569 S.E.2d 657 (2002), and State v. Brown, 87 N.C. App. 13, 359 S.E.2d 265 (1987), the court ruled that the defendant's testimony was insufficient to support a finding of indigency. (2) The court ruled that the defendant had no Sixth Amendment right to have a jury determine whether prior convictions used in calculating the defendant's prior record level were obtained in violation of his right to counsel.

No Right to Jury Trial Under *Blakely v. Washington* on Finding of Prior Convictions in Determining Defendant's Prior Record Level or Finding That Defendant's Out-of-State Convictions Were Substantially Similar to Offense Under North Carolina Law

State v. Hadden, ___ N.C. App. ___, 624 S.E.2d 417 (17 January 2006). The court ruled, distinguishing Shepard v. United States, 544 U.S. 13 (2005), that the defendant in this case did not have a right to a jury trial under Blakely v. Washington, 542 U.S. 296 (2004), concerning the findings of prior convictions in determining the defendant's prior record level or that the defendant's out-of-state convictions were substantially similar to offenses under North Carolina law.

Defense Lawyer's Colloquy With Judge at Sentencing Hearing Constituted Stipulation to Defendant's Convictions Set Out in Sentencing Worksheet

State v. Cromartie, ___ N.C. App. ___, 627 S.E.2d 677 (4 April 2006). The court ruled, relying on State v. Alexander, 359 N.C. 824, 616 S.E.2d 914 (2005), that although a sentencing worksheet, without more, is insufficient to prove the defendant's convictions set out in the worksheet, the defense lawyer's colloquy with the trial judge at the sentencing hearing constituted a stipulation to the defendant's convictions. Defense counsel specifically acknowledged some of the convictions in the worksheet and then used information in it to minimize the defendant's prior record as nonviolent. Counsel never disputed any of the convictions in the worksheet.

Although Judge Must Consider Mitigating Factors, Judge Has No Duty to Find Mitigating Factors, Even If Preponderance of Evidence Supports Their Finding, When Judge Imposes Sentence in Presumptive Range

State v. Brown, ___ N.C. App. ___, 626 S.E.2d 307 (21 February 2006). The court noted that although a judge must consider evidence of mitigating factors, it is within the judge's discretion whether to depart from the presumptive range. A judge has no duty to find mitigating factors,

even if a preponderance of evidence supports their finding, when the judge imposes a sentence in the presumptive range.

New Department of Correction Rules Providing for Loss of Good Behavior Time Credits for Minor Infractions Did Not Violate Ex Post Facto or Due Process Clauses or State Law

Smith v. Beck, ___ N.C. App. ___, 627 S.E.2d 284 (21 March 2006). The court ruled, relying on Ewell v. Murray, 11 F.3d 482 (4th Cir. 1993), distinguishing Weaver v. Graham, 450 U.S. 24 (1981), and interpreting state legislation, that new Department of Correction rules providing for the loss of good behavior time credits for minor infractions did not violate the Ex Post Facto or Due Process clauses or state law.

Civil Liability

Court Rules on Civil Liability Issues Concerning Officers' Obligations With Enforcing Domestic Violence Protective Order

Cockerham-Ellerbee v. Town of Jonesville, ___ N.C. App. ___, 626 S.E.2d 685 (7 March 2006). The court ruled: (1) the "shall arrest" and "shall enforce" language in G.S. 50B-4.1 (arrest of violator and enforcement of domestic violence protective order) allows discretionary enforcement, and therefore the public duty doctrine is applicable in a civil lawsuit against law enforcement officers for negligent failure to enforce a domestic violence protective order; and (2) the plaintiff demonstrated an exception to the public duty doctrine to survive the defendants' motion to dismiss the lawsuit: the officers' promise to protect her and her daughter, their failure to fulfill their promise to arrest the alleged violator for violating the protective order, and the plaintiff's and her daughter's reliance on the promise of protection to their detriment.

2005-2006 United States Supreme Court Term: Cases Affecting Criminal Law and Procedure

Robert L. Farb
Institute of Government

Evidence

(1) Court Rules, in Case from State of Washington, Statements Identifying Assailant Made in 911 Call by Non-Testifying Assault Victim Were Not Testimonial Under *Crawford v. Washington*, 541 U.S. 36 (2004)

(2) Court Rules, in Case from State of Indiana, Statements at Crime Scene by Non-Testifying Assault Victim in Response to Interrogation by Law Enforcement Officer During Investigation of Assault Were Testimonial Under *Crawford v. Washington*, 541 U.S. 36 (2004)

(3) Court States That Indiana Courts May, on Remand, Determine Whether State Properly Raised Claim of Defendant's Forfeiture by Wrongdoing That Would Forfeit Defendant's Sixth Amendment Right to Confrontation, and If So, Whether Claim Was Meritorious

Davis v. Washington, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (19 June 2006). This case, decided under the name Davis v. Washington, involved appeals from two separate state criminal prosecutions, one from the state of Washington (Davis v. Washington) and the other from the state of Indiana (Hammon v. Indiana). In Davis v. Washington, a 911 operator conversed with an alleged assault victim who reported an assault and other ongoing events and, in response to the operator's questioning, named her assailant. In Hammon v. Indiana, law enforcement officers responded to a reported domestic disturbance at the home of Hershel Hammon (defendant) and Amy Hammon (alleged assault victim). Amy Hammon appeared frightened but told the officers that nothing had occurred. The defendant told the officers there had been an argument but it had never become physical. The officers noticed a gas heating unit with flames emanating from the glass front and pieces of glass on the floor. After officers separated them, Amy Hammon told an officer that Hershel had assaulted her. She also completed an affidavit at the scene that described the incident. The Court stated that, without attempting to produce an exhaustive classification of all statements as testimonial or nontestimonial under Crawford v. Washington, 541 U.S. 36 (2004), it sufficed to decide these two cases with the following definitions: "Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." (1) In Davis v. Washington, the Court ruled that the early statements in the 911 call in which the assault victim identified her assailant were not testimonial. The 911 operator's questions objectively indicated their primary purpose was to enable law enforcement assistance to meet an ongoing emergency. The Court indicated that statements in a 911 call after an emergency has ended may be testimonial. (2) In Hammon v. Indiana, the Court ruled that Amy Hammon's statements to the officer after she was separated from Hershel Hammon were testimonial. The officer was not seeking to determine "what is happening," but rather "what happened." Objectively viewed, the primary, if not the sole, purpose of the interrogation was to investigate a possible crime. The Court indicated that not all questions at a crime scene will be testimonial. Exigencies—such as officers' needing to know

whom they are dealing with to assess the situation, the threat to their own safety, and possible danger to the potential victim—may often mean that initial inquires produce nontestimonial statements. [Author's note: The Court's analysis and ruling that Amy Hammon's statements were testimonial cast doubt on the analysis and ruling in State v. Lewis, 360 N.C. 1, 619 S.E.2d 830 (2005), that the victim's statements to the initial responding officer were not testimonial.] (3) The Court stated that Indiana state courts in Hammon v. Indiana may, on remand, determine whether the state properly raised a claim of the defendant's forfeiture by wrongdoing that would forfeit the defendant's Sixth Amendment right to confrontation, and if so, whether the claim was meritorious.

State Supreme Court's Rule on Admissibility of Proposed Defense Evidence of Third Party Guilt Was Arbitrary and Violated Defendant's Right to Present Defense

Holmes v. South Carolina, 126 S. Ct. 1727, 164 L. Ed. 2d 503 (1 May 2006). The defendant was convicted of f murder and other offenses and sentenced to death. The state relied heavily on forensic evidence: DNA, palm print, and fiber evidence. The defendant offered evidence that sought to undermine the state's forensic evidence. The trial judge prohibited the defendant from introducing evidence that a third party (White) had murdered the victim: several witnesses placed White in the victim's neighborhood on the morning of the murder and White acknowledged that the defendant was innocent or had actually admitted to committing the offenses. The state supreme court, in affirming the trial judge's ruling, applied a rule that when there is strong evidence of a defendant's guilt, such as strong forensic evidence, the defendant's proffered evidence of a third party's guilt may be excluded. The United States Supreme Court categorized this rule as focusing solely on the strength of the state's evidence in determining whether to admit the defense evidence. The Court ruled that the rule was arbitrary and violated the defendant's right to present a defense.

Arrest, Search, and Confession Issues

Court Rules That When Physically-Present Occupant Refuses to Consent to Search of Dwelling Even Though Co-Occupant Has Consented to Search, Fourth Amendment Prohibits Search of Dwelling Based on Co-Occupant's Consent

Georgia v. Randolph, 126 S. Ct. 1515, 164 L. Ed. 2d 208 (22 March 2006). The defendant's wife called law enforcement about a domestic dispute with her husband, the defendant. She told law enforcement about the defendant's drug use and that there was drug evidence in the house. The defendant, who was physically present, unequivocally refused to consent to a search of the house. She then consented to a search. Officers relied on her consent and entered the house. They found drug evidence that was used to prosecute the defendant. The Court ruled, distinguishing United States v. Matlock, 415 U.S. 164 (1974) (valid consent of co-occupant with common authority over premises against absent occupant), and Illinois v. Rodriguez, 497 U.S. 177 (1990) (valid consent by person whom officer reasonably, but erroneously, believed to possess shared authority as an occupant), that when a physically-present occupant refuses to consent to a search of a dwelling even though another co-occupant has consented to a search, the Fourth Amendment prohibits a search of the dwelling based on the co-occupant's consent.

The Court made clear that its ruling applies only to a physically-present occupant who refuses to consent, as long as officers do not remove a potentially-objecting occupant from the entrance to the residence to avoid a possible refusal to consent. The Court stated that when officers have obtained consent from a co-occupant, they have no obligation to seek out any other occupants to determine if they want to refuse to allow consent.

The Court noted that the issue of consent is irrelevant when an occupant on his or her own initiative brings evidence from a residence to law enforcement, citing Coolidge v. New Hampshire, 403 U.S. 443 (1971). The Court also noted that an occupant can tell law enforcement what he or she knows, which in turn can lead to the issuance of a search warrant. In footnote six, the Court stated that the exchange of this information in the presence of the non-consenting occupant may render consent irrelevant by creating an exigency that justifies immediate action. If the occupant cannot be prevented from destroying easily disposable evidence during the time required to get a search warrant, Illinois v. McArthur, 531 U.S. 326 (2001) (preventing suspect's access to residence while law enforcement sought search warrant), a fairly perceived need to act then to preserve evidence may justify entry and search under the exigent circumstances exception to the warrant requirement. The Court also stated that additional exigent circumstances might justify warrantless searches: hot pursuit, protecting officers' safety, imminent destruction to a residence, or likelihood that suspect will imminently flee.

The Court stated that this case has no bearing on the authority of law enforcement to protect domestic violence victims. The issue in this case is about an entry to search for evidence. The Court stated that no question could reasonably be made about law enforcement authority to enter a residence without consent to protect an occupant from domestic violence: as long as officers have a good reason to believe such a threat exists, officers could enter without consent to give an alleged victim the opportunity to collect belongings and get out safely, or to determine whether violence or a threat of violence has just occurred or is about to (or soon will) occur. And because officers would be lawfully on the premises, they could seize any evidence in plain view or take further action supported by consequent probable cause.

[Author's note: When an occupant has a superior privacy interest over another occupant of a residence, such as most living arrangements involving a parent and child, the parent's consent would override any expressed refusal to consent by a physically-present child.]

Law Enforcement Officers May Enter a Home Without a Search Warrant When They Have an Objectively Reasonable Basis for Believing That an Occupant Is Seriously Injured or Imminently Threatened With Such Injury

Brigham City v. Stuart, 126 S. Ct. 1943, 164 L. Ed. 2d 650 (22 May 2006). About 3:00 a.m., four law enforcement officers responded to a call concerning a loud party at a residence. They heard shouting from inside and entered the driveway to investigate. They saw two juveniles drinking beer in the backyard. They entered the backyard, and saw—through a screen door and windows—four adults attempting with some difficulty to restrain a juvenile. The juvenile eventually broke free, swung a fist and struck one of the adults in the face. One of the officers saw the victim of the blow spitting blood into a nearby sink. The other adults continued to attempt to restrain the juvenile, pressing him against a refrigerator with such force that the refrigerator began moving across the floor. An officer opened the screen door and announced the officers' presence. Amid the tumult, nobody noticed the officer. The officer entered the kitchen and again spoke, and as the occupants slowly became aware that the officers were there, the altercation stopped. The Court ruled that law enforcement officers may enter a home without a search warrant when they have an objectively reasonable basis for believing that an occupant is seriously injured or imminently threatened with such injury. The Court found that the officers' entry in this case was reasonable under the Fourth Amendment. The officers had an objectively reasonable basis for believing that the injured adult might need help and the violence in the kitchen was just beginning. Also, the manner of the officers' entry was also reasonable. Once they made an announcement, they were free to enter. They were not required to await a response while those within fought, oblivious to their presence. The Court, relying on its prior Fourth Amendment cases, rejected an inquiry into the officers' subjective motivation in entering the residence. An action is reasonable under the Fourth Amendment, regardless of an officer's state of mind, as

long as the circumstances, viewed objectively, justify the action. It did not matter whether the officers entered the kitchen to make an arrest and gather evidence against those inside or to assist the injured and prevent further violence. The circumstances, viewed objectively, supported the entry based on a belief that an occupant was seriously injured or imminently threatened with such injury.

Fourth Amendment's Exclusionary Rule Does Not Apply to Bar Admission of Evidence Seized Pursuant to Valid Search Warrant for Home Even Though Officers Violated Fourth Amendment's Knock-and-Announce Requirement

Hudson v. Michigan, 126 S. Ct. 2159, 165 L. Ed. 2d 56 (15 June 2006). Officers with a valid search warrant entered the defendant's home in violation of the Fourth Amendment's knock-and-announce requirement. The officers seized drugs and a firearm. The Court ruled that the Fourth Amendment's exclusionary rule did not apply to bar the admission of the seized evidence even though the officers violated the knock-and-announce requirement. The Court reasoned that because the privacy interests violated in this case had nothing to do with the seizure of the evidence, the exclusionary rule was inapplicable. The Court rejected the defendant's argument that there would be no deterrence without suppression of the seized evidence. The Court noted that misconduct by law enforcement officers is subject to a civil lawsuit under 42 U.S.C. § 1983 and by discipline of officers by their law enforcement agencies. [Author's note: A substantial violation of state law that requires notice of identity and purpose before executing a search warrant (G.S. 15A-249, with an exception in G.S. 15A-251(2)) would subject the seized evidence to suppression under North Carolina's statutory exclusionary rule set out in G.S. 15A-974(2).]

(1) Anticipatory Search Warrants Do Not Categorically Violate Fourth Amendment
(2) Fourth Amendment Does Not Require Conditions Precedent to Execution of Anticipatory Search Warrant Be Set Out in Warrant Itself

United States v. Grubbs, 126 S. Ct. 1494, 164 L. Ed. 2d 195 (21 March 2006). Federal postal inspectors planned a controlled delivery of a child pornography videotape purchased by the defendant for delivery at his home. They obtained a search warrant to search the defendant's home contingent on the delivery of the videotape and its being taken into the residence. The contingency language was contained in the affidavit to the search warrant, but the affidavit was not incorporated into the search warrant. [Author's note: North Carolina's search warrant form, AOC-CR-119, incorporates the application for a search warrant, which includes the affidavit. See State v. Carrillo, 164 N.C. App. 204, 595 S.E.2d 219 (2004) (anticipatory search warrant was valid under Fourth Amendment when contingency language for executing the search warrant was set out in affidavit and warrant incorporated the affidavit by reference).] (1) The Court ruled that anticipatory search warrants do not categorically violate the Fourth Amendment. Two prerequisites must be satisfied, however. There is a fair probability (probable cause) that contraband or evidence of a crime will be found in a particular place, and probable cause to believe that the triggering condition will occur. (2) The Court also ruled that the Fourth Amendment does not require that the conditions precedent to the execution of an anticipatory search warrant must be set out in the warrant itself. In this case, the conditions precedent to the warrant's execution were set out in the affidavit to the search warrant. [Author's note: For a discussion of anticipatory search warrants under North Carolina case law, see page 140 of Robert L. Farb, *Arrest, Search, and Investigation in North Carolina* (3d ed. 2003), and the *Carrillo* ruling, discussed above, that was decided after the book's publication.

Fourth Amendment Did Not Prohibit Law Enforcement Officer from Conducting Suspicionless Search of Parolee as Permitted Under California Law

Samson v. California, 126 S. Ct. 2193, 165 L. Ed. 2d 250 (19 June 2006). A California law requires every prisoner eligible for release on parole to agree in writing to be subject to a search or seizure by a parole officer or law enforcement officer without a search warrant and with or without cause. The Court ruled that the Fourth Amendment did not prohibit a law enforcement officer from conducting a suspicionless search of a parolee as permitted under this California law. The Court noted that California law prohibits such a search if it is arbitrary, capricious, or harassing.

Suppression of Statement Taken in Violation of Vienna Convention on Consular Relations (International Treaty Requiring Law Enforcement to Inform Arrested Foreign National of Right to Consular Notification) Is Not Remedy for Violation of Treaty

Sanchez-Llamas v. Oregon, 126 S. Ct. 2669, 165 L. Ed. 2d 557 (28 June 2006). The Court ruled, assuming without deciding that the Vienna Convention on Consular Relations (an international treaty requiring law enforcement to inform an arrested foreign national of the right to consular notification) creates judicially enforceable rights, (1) suppression of a defendant's statements to law enforcement is not a remedy for a violation of the treaty; and (2) a state may subject claims of treaty violations to the same procedural default rules that apply generally to other federal law claims. [Author's note: For a discussion of law enforcement obligations under the treaty, see the text on page 44 and note 347 on page 63 of Robert L. Farb, *Arrest, Search, and Investigation in North Carolina* (3d ed. 2003).]

Miscellaneous

Blakely v. Washington, 542 U.S. 296 (2004), Error Is Not Structural Error and Is Subject to Standard of Harmless Error Beyond Reasonable Doubt

Washington v. Recuenco, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (26 June 2006). The Court ruled that Blakely v. Washington, 542 U.S. 296 (2004), sentencing error is not structural error and thus is subject to review by the standard of harmless error beyond a reasonable doubt. [Author's note: In State v. Norris, 360 N.C. 507, 630 S.E.2d 915 (2006), the North Carolina Supreme Court recognized that its ruling in State v. Allen, 359 N.C. 425, 615 S.E.2d 256 (2005) (*Blakely* error is structural error automatically requiring reversal of sentence), is in direct conflict with *Recuenco*.]

Erroneous Deprivation of Defendant's Counsel of Choice Is Structural Error

United States v. Gonzalez-Lopez, 126 S. Ct. 2557, 165 L. Ed. 2d 409 (26 June 2006). The Court ruled that the erroneous deprivation of the defendant's counsel of choice is a structural defect requiring the automatic reversal of the defendant's conviction.

Arizona's Narrowing of M'Naghten Test on Issue of Insanity Did Not Violate Due Process Clause

Clark v. Arizona, 126 S. Ct. 2709, 165 L. Ed. 2d 842 (29 June 2006). The Court ruled that the Arizona's narrowing of the M'Naghten test on the issue of insanity did not violate the Due Process Clause.

Assigning Burden of Proof to Defendant on Duress Defense in Federal Firearms Prosecution Did Not Violate Due Process

Dixon v. United States, 126 S. Ct. 2437, 165 L. Ed. 2d 299 (22 June 2006). The Court ruled that requiring a defendant charged with firearms offenses to prove her defense of duress by a preponderance of the evidence instead of requiring the government to prove beyond a reasonable doubt that she did not act under duress did not violate her due process rights.

Court Rules That Death Sentence Remained Valid When Some But Not All of The Factors Qualifying Case For Death Penalty Were Later Found Invalid

Brown v. Sanders, 126 S. Ct. 884, 163 L. Ed. 2d 723 (11 January 2006). The court ruled that a death sentence remained valid when some but not all of the factors qualifying the case for the death penalty were later found invalid. An invalidated sentencing factor will not render a death sentence unconstitutional if another sentencing factor enables the sentencing body (jury or judge) to give similar aggravating weight to the facts and circumstances of the case.

Eighth and Fourteenth Amendments Do Not Grant Defendant Constitutional Right To Present At Capital Sentencing Hearing New Evidence That He Was Not Present At The Murder Scene That Was Inconsistent With Defendant's Conviction Of That Murder

Oregon v. Guzek, 126 S. Ct. 1226, 163 L. Ed. 2d 1112 (22 February 2006). The Court ruled that the Eighth and Fourteenth amendments do not grant a defendant a constitutional right to present at a capital sentencing hearing new evidence that he was not present at the murder scene that was inconsistent with the defendant's conviction of that murder.

Kansas Death Penalty Statute Is Not Unconstitutional When It Imposes Death Penalty When Aggravating and Mitigating Facts Are in Equipose

Kansas v. Marsh, 126 S. Ct. 2516, 165 L. Ed. 2d 429 (26 June 2006). The Court ruled that the Kansas death penalty stature is not unconstitutional when it imposes the death penalty when aggravating and mitigating factors are in equipoise.

Court Rules That Death Row Inmate May Sue State Correction Officials Under 42 U.S.C. § 1983 to Challenge Particular Method of Execution by Lethal Injection as Cruel and Unusual Under Eighth Amendment

Hill v. McDonough, 126 S. Ct. 2096, 165 L. Ed. 2d 44 (12 June 2006). The Court ruled that a death row inmate may sue state correction officials under 42 U.S.C. § 1983 to challenge a particular method of execution by lethal injection as cruel and unusual under the Eighth Amendment.

Court Rules That State Prison Inmate Could Bring Federal Habeas Corpus Petition Challenging Conviction Under Actual Innocence Exception to Procedural Bar Rule

House v. Bell, 126 S. Ct. 2064, 165 L. Ed. 2d 1 (12 June 2006). The Court ruled that a state prison inmate could bring a federal habeas corpus petition challenging his conviction under the actual innocence exception to the procedural bar rule. (See the Court's opinion for a detailed discussion of the facts that supported its ruling.)

Court Rules That Federal Controlled Substances Act Does Not Allow U.S. Attorney General to Prohibit Doctors from Prescribing Regulated Drugs for Use in Physician-Assisted Suicide Under State Law Permitting Procedure

Gonzales v. Oregon, 126 S. Ct. 904, 163 L. Ed. 2d 748 (17 January 2006). The Court ruled that the federal Controlled Substances Act does not allow the Attorney General of the United States to prohibit doctors from prescribing regulated drugs for the use in physician-assisted suicide under state law permitting such a procedure..

Prison's Denial of Access to Magazines and Newspapers by Inmates in Long-Term Segregation Unit Was Not Unlawful

Beard v. Banks, 126 S. Ct. 2572, 126 L. Ed. 2d 697 (28 June 2006). The Court ruled that Pennsylvania prison officials set forth adequate legal support for a policy restricting access to newspapers, magazines, and photographs by inmates in the most restricted level of the prison's long-term segregation unit.

PLRA's Requirement That Prisoner Exhaust Administrative Remedies Is Not Satisfied When Prisoner Files Untimely or Otherwise Procedurally Defective Administrative Grievance or Appeal

Woodford v. Ngo, 126 S. Ct. 2378, 165 L. Ed. 2d 368 (22 June 2006). The Court ruled that the Prison Litigation Reform Act's requirement that a prison inmate exhaust all available administrative remedies before challenging prison conditions in federal court, 42 U.S.C. §1997(e)(a), is not satisfied where the prisoner filed an untimely or otherwise procedurally defective administrative grievance or appeal.