Criminal Case Law Update

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Jeff Welty

School of Government

INVESTIGATION

TERRY STOPS

REASONABLE SUSPICION

State v. Barnard, 362 N.C. 244 (2008) (Newby, J.)

The defendant was driving in downtown Asheville. An officer followed the defendant for two miles, and did not notice anything suspicious about his driving. They came to a red light. After the light turned green, the defendant continued to sit at the light for thirty seconds, then turned left. The officer stopped the defendant on suspicion of DWI. A variety of charges resulted, and the defendant challenged the stop. The Supreme Court held that reasonable suspicion was present.

- The fact that the defendant sat at the green light for 30 seconds supports the officer's reasonable suspicion. While eight or ten seconds is not enough given the many distractions available to drivers, *see State v. Roberson*, 163 N.C. App. 129 (2004), 30 seconds suggests impairment.

State v. Styles, __ N.C. __, 665 S.E.2d 438 (2008) (Newby, J.)

The defendant changed lanes in without signaling, and an officer stopped him for unsafe movement. The officer detected the smell of marijuana coming from the defendant's vehicle, and further investigation led to the discovery of drugs and paraphernalia. The defendant moved to suppress, arguing that the stop was unjustified. He lost in the trial court, lost 2-1 in the court of appeals, and finally lost again in the state supreme court.

- The court took the opportunity to clarify that reasonable suspicion is the standard for all traffic stops. *State v. Ivey*, 360 N.C. 562 (2006), had created some confusion about this point, and indeed, the court of appeals had held that probable cause was required to justify a stop for a readily observable traffic violation. The court noted that reasonable suspicion is the standard for stops in other contexts, and that most federal courts had concluded that it should be the standard for traffic stops as well.

State v. Murray, __ N.C. App. __, 666 S.E.2d 205 (2008) (Wynn, J.)

An officer was patrolling an industrial park where several break-ins had recently occurred, at 3:30 in the morning. He saw a car driving out of the area, ran the tag, and determined that it was a rental car from nearby Charlotte. He did a Terry stop based on the hour, the area, etc., and smelled marijuana coming from the vehicle. The officer called for backup, and another officer ultimately obtained consent to search the defendant, who was a passenger in the car. The officer discovered that the defendant was in possession of crack cocaine. The defendant moved to suppress based on lack of reasonable suspicion for the stop. The trial court disagreed, but the court of appeals reversed the trial court.

- The late hour, the lack of residences or open businesses in the area, and the recent history of break-ins were not enough to support the stop. All of these factors were general to the area, and would have justified stopping any vehicle the officer saw that morning.

State v. Hess, 185 N.C. App. 530 (2007) (Stephens, J.)

A patrol officer followed a car for a mile or two without seeing any traffic violations. However, he ran the license plate, learning that the car was registered to the defendant, and he ran the defendant's driver's license, learning that it was suspended. Although he could not see who was driving, or even the person's race or sex, the officer decided to stop the car. The defendant was, in fact, driving, and the officer eventually charged him with DWI and driving while license suspended. The defendant moved to suppress, arguing that the officer lacked reasonable suspicion to stop the car, specifically because the officer did not know who was driving. The trial court denied the motion and the Court of Appeals affirmed.

- Following the majority of other states, the court ruled that, absent evidence to the contrary, it is reasonable to assume that the registered owner of a car will be the person driving it.

METHOD OF STOPPING SUSPECTS

Scott v. Harris, __ U.S. __, 127 S. Ct. 1769 (2007) (Scalia, J.)

An officer attempted to stop Harris for speeding, but he fled, beginning a long high-speed chase. Finally, another officer who had joined the pursuit rammed Harris's car, causing Harris to crash. Harris was rendered a quadriplegic as a result of the crash, and he sued the officer who rammed him under 42 U.S.C. § 1983, alleging that the officer violated his Fourth Amendment rights by using excessive force. The officer moved for summary judgment based on qualified immunity, i.e., that he had not violated a clearly established constitutional right, but the lower courts denied the motion. The Supreme Court held that it should have been granted, as no reasonable jury could have found a violation of Harris's rights.

- The central holding is: "A police officer's attempt to terminate a dangerous high-speed car chase that threatens the lives of innocent bystanders does not violate the Fourth Amendment, even when it places the fleeing motorist at risk of serious injury or death."

- The Court emphasized that while the officer's actions risked injury or death, so did Harris's actions in initiating the chase. If anything, Harris's actions endangered more people than the officer's actions, and they endangered innocent people, whereas the officer's actions endangered someone who elected to flee the police.

- The Court placed a great deal of weight on the videotape of the pursuit, finding it essentially incontrovertible evidence of the dangerousness of the chase.

STANDING TO CHALLENGE STOPS

Brendlin v. California, __ U.S. __, 127 S. Ct. 2400 (2007) (Souter, J.)

Officers stopped a car without reasonable suspicion. Once the car was stopped, the officers recognized the defendant, a passenger, as a parole violator. They arrested him and search him and the car, finding drugs and materials used to manufacture drugs. The defendant was charged with drug offenses, and he moved to suppress. The lower courts agreed that the stop was improper, but generally concluded that the defendant lacked standing to challenge it, as the driver, not the defendant, had been seized when the police pulled the car over. The Supreme Court reversed, concluding that a passenger's freedom of movement is limited just as much as the driver's when a car is stopped, and that a reasonable passenger would not feel free to leave, or otherwise terminate the encounter, after the car in which the passenger is riding is stopped by police.

POLICE ACTIVITIES DURING TERRY STOPS

State v. Campbell, __ N.C. App. __, 656 S.E.2d 721 (2008) (Jackson, J.)

Defendant was riding his bicycle about ¼ mi. away from a reported burglary, minutes after the burglary, at 3:40 a.m. There was no one else on the streets at that hour. However, defendant had a headlight and taillights on his bicycle and did not try to evade police. He was stopped and frisked, which led to the discovery of a Swiss Army knife that could have been used to pry open the window through which the burglar entered. He was eventually arrested for the burglary, and burglary tools were found in his backpack during the search incident to arrest. He challenged the validity of the stop. The Court of Appeals affirmed.

- While proximity to a crime, time of night, and absence of other people may not *individually* support reasonable suspicion, they do *together*.

- The officers' decision to frisk, and use of handcuffs during the stop, did not convert it into an arrest. Although officers should use the least intrusive means available to effectuate a stop, the frisk was appropriate and handcuffs were reasonable given defendant's history of running from police.

State v. Brimmer, __ N.C. App. __, 653 S.E.2d 196 (2007) (Geer, J.)

A patrol officer stopped the defendant because the license plate on the defendant's Lexus were registered to a Cadillac. After the defendant explained that the car was new and that he was in the process of transferring the tags to the vehicle, the officer decided to issue a warning ticket. Because the officer had heard narcotics officers talking about the defendant, he called for a canine officer to come to the scene. The canine officer arrived just as the patrol officer was finishing the ticket. The patrol officer gave the defendant the ticket and his license and registration, and told him that the canine officer was going to have a drug dog walk around the car. The dog alerted, and the officers searched the car, finding marijuana. The defendant argued that the use of the drug dog violated the Fourth Amendment. The superior court rejected his argument, as did the Court of Appeals.

- Illinois v. Caballes, 543 U.S. 405 (2005), held that using a drug dog does not invade any legitimate privacy interests, as the dog detects only contraband. Thus, the police do not need probable cause or reasonable suspicion to use a drug dog during a traffic stop.

- However, if using the dog will prolong the stop beyond the time needed to issue a ticket, the Fourth Amendment may be implicated because the delay itself is an intrusion.

- Here, the patrol officer was done writing the ticket when the canine officer arrived, and therefore, the use of the drug dog did add a minute or two to the duration of the stop. The Court of Appeals, following cases from other jurisdictions, ruled that such de minimis intrusions are acceptable and do not render the use of the dog improper.

CHECKPOINTS

State v. Gabriel, __ N.C. App. __, 665 S.E.2d 581 (2008) (Tyson, J.)

Several NCSHP troopers set up a license checkpoint in an area where there had recently been several armed robberies. Unless the flow of traffic did not permit it, the officers stopped every vehicle to verify the driver's license and registration. The defendant was stopped; he smelled of alcohol and his eyes were glassy. He was eventually charged with, inter alia, DWI. He moved to suppress, arguing that the checkpoint was illegal. When asked about the purpose of the checkpoint, one of the officers gave several inconsistent answers, including asserting that the reason for the checkpoint was because of robberies and claiming that the purpose of the checkpoint was to issue citations for "anything that came through." The trial court denied the motion to suppress but did not make specific findings of fact regarding the primary programmatic purpose of the checkpoint. The court of appeals remanded for further findings about the purpose of the checkpoint.

- The court was particularly troubled by the lack of findings given the officer's inconsistent statements about the checkpoint's purpose. Had the officer stuck to a single, legitimate purpose, it is not clear whether specific findings about the purpose of the checkpoint would have been necessary.

State v. Veazey, __ N.C. App. __, 662 S.E.2d 683 (2008) (McGee, J.)

A NCSHP trooper decided to set up a checkpoint. It appears that little planning went into the checkpoint, and that it was largely spontaneous. The defendant came through, was stopped, and although he had a valid license, he smelled of alcohol, etc., and was ultimately arrested for DWI. He challenged the validity of the checkpoint via a motion to suppress. After a hearing, the trial judge denied the motion, making brief oral findings. The defendant pled no contest reserving his right to appeal. Later, the trial judge made more detailed written findings that varied somewhat from the oral findings. After a comprehensive review of checkpoint law, the court of appeals remanded the case for further findings by the trial judge.

- The trooper testified, at various times, that the purpose of the checkpoint was to check driver's licenses; to look for any type of motor vehicle violation; and to look for any violation of the law whatsoever. The trial court merely recited this testimony, rather than making a finding about the primary purpose of the checkpoint.

- Nor did the trial court make sufficient findings about whether the checkpoint was implemented in a reasonable manner, i.e., in a manner that appropriately balanced the public's interest in the checkpoint's purpose against the checkpoint's intrusion on privacy.

SEARCH WARRANTS

State v. Taylor, __ N.C. App. __, 664 S.E.2d 421 (2008) (Martin, C.J.)

An officer applied for a search warrant, submitting an affidavit that said that a confidential, reliable informant had been to a specific address on several recent occasions and had purchased drugs there. A magistrate issued the warrant, which authorized law enforcement to search two separate houses (one mobile home, one frame home) that shared the single address. The officers who executed the warrant found drugs and guns in one of the residences, and arrested the defendant. The defendant moved to suppress, arguing that the affidavit did not establish probable cause. Both the trial court and the court of appeals agreed.

- The court of appeals was somewhat concerned about the overall weakness of the affidavit, such as the lack of detail provided about the circumstances under which the informant had bought drugs.

- However, the main problem was that the affidavit did not specify which house the informant had visited. The warrant authorized the search of two residences when there was no indication in the application that drug activity was taking place at both locations.

CONSENT SEARCHES

State v. Stone, 362 N.C. 50 (2007) (Hudson, J.)

An officer stopped a car for speeding, though the stop took place in an apartment complex parking lot in a high crime area and the record contains some indication that the officer was actually concerned about drug dealing. Defendant was a passenger in the car. The officer had previously received an anonymous tip that the defendant was a drug dealer. The officer asked the defendant if he would consent to a search of his person for drugs or weapons. The defendant consented. Towards the end of the search, the officer pulled the waistband of the defendant's sweatpants and underwear away from his body and shined his flashlight on the defendant's genitals; he located a pill bottle between the defendant's thigh and testicles, which turned out to contain contraband. The defendant argued that the search exceeded the scope of his consent, and the Supreme Court ultimately agreed.

- The scope of consent depends on what a reasonable person would have understood the officer's request to search to have entailed, i.e., what a reasonable person would have thought he was allowing.

- That is inherently fact-specific, but here, where the search occurred in a public place and involved moving the defendant's clothing to allow a direct view of his genital area, the search exceeded the scope of the defendant's consent.

State v. Neal, __ N.C. App. __, 660 S.E.2d 586 (2008) (Wynn, J.)

The police, who suspected drug activity, pulled over a car based on the driver's failure to use his turn signal. They arrested the driver for DWLR. Defendant, a female, was in the passenger seat. She exited car when requested and consented to a pat-down search of her person and a search of her purse. No contraband was found during these searches, though she did have more than $1,000 in cash in her purse. Based on that fact, among others, the police still suspected that the defendant had drugs on her. They asked her to undergo a "better" and "more thorough" search, and informed her that a female officer was on her way to conduct the search. The defendant agreed to the search, and the female officer took her to a women's room and asked her to remove her clothing. Drugs were hidden in the defendant's underwear, and she was eventually charged with PWISD cocaine and trafficking in cocaine. She moved to suppress the drugs, arguing that she had given a "general" consent that did not extend to a strip search. The trial court overruled the motion, and the court of appeals affirmed.

- The scope of a suspect's consent is determined objectively, by asking what a reasonable person would have understood by the exchange between the suspect and the officer.

- Here, given the request for a "better" and "more thorough" search, and the fact that a female officer was involved, all indicated that the scope of the defendant's consent included consent to a strip search.

- The court also relied on the fact that the defendant did not object during the course of the search as evidence that the search was within the scope of consent.

State v. Icard, __ N.C. App. __, 660 S.E.2d 142 (2008) (Wynn, J.)
[Note: the North Carolina Supreme Court has granted review in this case]

An officer, patrolling a high-crime area after midnight, saw a truck parked in a parking lot and noticed at least one person in the truck. He turned on his blue lights, parked behind the truck, and approached the person seated in the driver's seat, asking for his driver's license. While checking the driver's license, he called for backup. The backup officer arrived, parking his cruiser with its lights illuminating the passenger door. The first officer, having noticed the defendant in the passenger seat of the truck, knocked on passenger window twice; the defendant ignored both knocks. The officer then opened the passenger door himself, asked the defendant for identification, and ultimately asked for consent to search her purse, finding evidence of drug activity. The defendant was charged with a variety of offenses, and moved to suppress, arguing that she was seized without probable cause or reasonable suspicion. The trial court denied the motion to suppress, but a majority of the court of appeals voted to remand the case.

- The majority believed that the totality of the circumstances showed that the encounter went beyond a consensual one into a seizure. The court emphasized the officer's use of his blue lights; the fact that he called for backup; the fact that the backup officer parked with his headlights focused on the passenger door; and most importantly, the fact that the defendant ignored the officer when he knocked on the passenger door of the truck, yet he opened the door and pressed her for identification and to search her purse. Under these circumstances, the court found that the officer had made such a show of authority that a reasonable person would not feel free to leave or to terminate the encounter.

- The majority ordered a remand for further fact-finding regarding whether the defendant's consent to search her purse was voluntary or coerced. (Note: This is a questionable remedy. If the defendant was seized in violation of the Fourth Amendment, everything that happened as a result of the seizure should probably be viewed as fruit of the poisonous tree and therefore subject to exclusion.)

- The dissenting judge saw the interaction as consensual, noting that officers are free to approach individuals in public places and ask them questions, even persistently.

SEARCHES INCIDENT TO ARREST

State v. Carter, __ N.C. App. __, 661 S.E.2d 895 (2008) (Hunter, J.)

The defendant was driving in a high-crime area at 1:30 a.m. when he saw a parked police car. He turned to avoid passing the officer, who then began to follow the defendant's vehicle. The officer noticed that the temporary tag on the defendant's vehicle was old and worn, and that the expiration date was obscured. He therefore stopped the defendant, ultimately determining that the tag was expired and that the address for the tag did not match the defendant's driver license. Partly because the defendant seemed very nervous, the officer decided to arrest him for the expired tag offense. The officer then searched the defendant's car incident to the arrest and found papers relating to identity theft and other crimes. Before trial, the defendant moved to suppress the evidence found during the search, arguing (1) that searches incident to arrest must be limited to evidence related to the crime that was the basis of the arrest and (2) that only property that is obviously incriminating may be seized. The trial court denied the motion to suppress and the court of appeals affirmed.

- It is black letter law that a search incident to the arrest of an occupant of a vehicle may extend to the entire passenger compartment. None of the cases establishing this rule include any requirement that officer seize only evidence related to the crime that was the basis of the arrest.

- Nor do the cases impose any requirement that "the illegal nature of th[e seized] evidence be immediately apparent." (Note: The implication that officers may seize anything found during a search incident to arrest, without any reason to believe that it is relevant to a crime, is likely mistaken. *See Warden v. Hayden*, 387 U.S. 294, 307 (1967) (stating that "[t]here must, of course, be a nexus . . . between the item to be seized and criminal behavior," i.e., probable cause to seize the evidence); Wayne R. LaFave, *Search and Seizure* § 5.2(j) (concluding that probable cause is required to seize evidence found during a search incident to arrest).)

Upcoming: Arizona v. Gant

The police determined that the defendant had an outstanding warrant for driving on a suspended license. They waited for him outside his home. He drove up, parked his car, exited the vehicle, and the police asked him to come speak with them. He did, and they arrested him and put him in handcuffs in the back of a patrol car. The officers then proceeded to search the defendant's car incident to the arrest, finding cocaine and a gun. The defendant was charged based on this evidence, and he moved to suppress.

- Searches incident to arrest are a well-established exception to the warrant requirement. Such searches promote officer safety and prevent destruction of evidence, and therefore may extend to a defendant's

"grab space," not merely his person. *See Chimel v. California*, 395 U.S. 752 (1969). In *New York v. Belton*, 453 U.S. 454 (1981), the Court held that a search incident to arrest could include the passenger compartment of the arrestee's vehicle.

- In *Gant*, which divided the lower courts, the defendant noted that the passenger compartment of a vehicle may be searched only when the arrestee is a *recent* occupant of the vehicle and the search takes place *contemporaneously* with the arrest. Determining whether these criteria are met, according to the defendant, requires a court to look at the rationales for allowing searches incident to arrest to be done without warrants, i.e., protecting officers and preventing the destruction of evidence. When a defendant has already been taken into custody, handcuffed, placed in a patrol car, and the scene is otherwise secure, he is no longer a recent occupant, etc., because the rationales are not satisfied. Thus, the search should not be allowed.

- *Gant*, which carries U.S. Supreme Court case number 07-542, will be decided during the Court's 2008-09 Term.

PLAIN VIEW, FEEL, ETC.

State v. Robinson, __ N.C. App. __, 658 S.E.2d 501 (2008) (Arrowood, J.)

An officer patrolling an area notorious for drug activity saw the defendant's car speed by, jump a curb, drive across a lawn and behind a building. The officer remembered a Crime Stoppers report that the defendant sold drugs from behind that building, so he followed the vehicle, finding the defendant talking to an occupant of the building. The defendant looked surprised and began backing away with his hand in his pocket. The officer instructed him to stop and to keep his hands out of his pockets. The officer then frisked the defendant. In one pocket, he felt an item that felt similar to a film canister. It rattled. Although the defendant denied that it contained crack, the officer seized the canister and found that it did, indeed, contain crack. He arrested the defendant, who eventually moved to suppress the canister. The trial court found that the plain feel doctrine supported the seizure, so it denied the motion. The court of appeals affirmed.

- The court relied on several factors in holding that the requirements of the plain feel doctrine were satisfied, including that the officer had arrested at least three other people who had stored drugs in similar containers, the fact that the defendant was in a high-drug area, the Crime Stoppers reports, and the defendant's behavior.

EXCLUSIONARY RULE

Upcoming: Herring v. United States

An officer contacted his department's warrant clerk to ask if there were any outstanding warrants on the defendant. She said no, but agreed to contact the warrant clerk in a neighboring county. That clerk said that there was a warrant on the defendant, and when that information was passed along to the officer, he stopped the defendant's vehicle and arrested him. The officer found drugs and guns during a search incident to the arrest, but shortly after the arrest was complete, the warrant clerk contacted the officer to tell him that the warrant had actually been recalled and that there were, in fact, no outstanding warrants on the defendant. The defendant was

charged with drug and firearm offenses, and moved to suppress the drugs and guns as fruits of an illegal search. The trial court denied the motion, and the federal court of appeals affirmed.

- Generally, when an officer arrests a defendant without probable cause, evidence obtained as a result of the arrest must be suppressed. However, in *Arizona v. Evans*, 514 U.S. 1 (1995), the Court held that when the arrest is based on erroneous information attributable to the negligence of a court employee, the exclusionary rule does not apply because excluding the evidence would not be likely to deter the court employee from being negligent in the future.

- *Evans* did not decide whether evidence must be suppressed when the arrest is based on erroneous information attributable to the negligence of a police officer. *Herring* will decide that question, which probably turns on whether excluding evidence will serve to deter shoddy record-keeping, or whether there are already enough reasons to keep good records, such that a further, attenuated incentive is unlikely to change record-keeping practices.

- *Herring*, which carries U.S. Supreme Court Case No. 07-513, will be argued in the Court's 2008-09 Term.

PARTICULAR OFFENSES

RESISTING A PUBLIC OFFICER

State v. Sinclair, __ N.C. App. __, 663 S.E.2d 866 (2008) (Stephens, J.)

A narcotics officer approached the defendant and said "let me talk to you," and indicated that he wanted to search the defendant. The defendant said "nope. Got to go," and took off running. He was later charged with, and convicted of, resisting the narcotics officer by fleeing. The court of appeals reversed the conviction.

- A defendant cannot be convicted of resisting an officer when he runs from a consensual encounter. In this case, the Court noted that just because the officer had told the defendant that he wanted to search him, the encounter had not lost its consensual nature.

SEX OFFENDER REGISTRATION

State v. Abshire, __ N.C. App. __, __ S.E.2d __, 2008 WL 4202264 (N.C. Ct. App. Sept. 16, 2008) (Elmore, J.)

[Note: the North Carolina Supreme Court has granted review in this case]

The defendant was a registered sex offender. Under G.S. 14-208.9(a), therefore, she was required to notify the sheriff if she "change[d] address." She registered the address of her boyfriend's father's house, and apparently stayed there for about a month. Then, the house was broken into, and the defendant's daughter's computer was stolen. As a result, the defendant began to spend most nights at her parents' home. She slept at her registered address about once per week, and continued to keep her pets there and to receive her mail there. She was charged with violating her registration obligations, and was convicted. The court of appeals reversed.

- There was insufficient evidence to sustain the conviction. What it means to "change[] address" is not defined in the statute, so the court of appeals clarified that an address is a "place where a registrant resides and where that registrant receives mail or other communication." Here, the defendant continued to receive mail at her registered address and went there most days, even though she slept there infrequently. On these facts, it was not clear that she had ceased to "reside" at the registered address.

POSSESSION OF DRUGS

State v. Spencer, __ N.C. App. __, 664 S.E.2d 601 (2008) (Stroud, J.)

The defendant was staying at a woman's home. She agreed to allow officers to search the home for drugs. The officers found, among other things, approximately three ounces of marijuana and determined that it belonged to the defendant. The defendant was charged with, among other things, felony possession of marijuana and possession of marijuana with intent to sell or deliver. He was convicted of both, and appealed, arguing that the same marijuana could not be used to support both charges. The Court of Appeals disagreed and affirmed the convictions.

- The two offenses require different elements. Felony possession of marijuana requires proof that the defendant possessed at least 1.5 ounces of marijuana, while possession with intent to sell or deliver marijuana requires proof of the defendant's intent to distribute. Thus, there is no double jeopardy problem with convicting the defendant of both offenses based on the same evidence.

State v. Miller, __ N.C. App. __, 661 S.E.2d 770 (2008) (Stroud, J.)
[Note: the North Carolina Supreme Court has granted review in this case]

Officers searched a home, finding the defendant and one other person in a small, messy bedroom. The officers found a bag of crack behind a door in the bedroom and a rock of crack, tied up in the corner of a plastic bag, in the bedding. The defendant's ID and birth certificate were on the TV stand in the room. The defendant was ultimately convicted of possession of cocaine and of being a habitual felon. A majority of the court of appeals reversed, finding insufficient evidence of possession.

- Constructive possession is decided by the totality of circumstances. The opinion contains a helpful list of relevant factors, e.g., whether the defendant owned other items found near the contraband, whether the defendant was physically near the contraband, whether he appeared nervous, whether he lived in the premises where the contraband was found, etc.

- The majority determined that few of these circumstances were present, and thus the state's evidence raised only a "strong suspicion" of guilt. The dissent would have found that the defendant's close proximity to the contraband supported a finding of constructive possession.

CARRYING A CONCEALED WEAPON

State v. Soles, __ N.C. App. __, 662 S.E.2d 564 (2008) (Stroud, J.)

The defendant was charged with, and convicted of, carrying a concealed weapon based on a gun that officers found in a backpack in the back of the van the defendant was driving. On appeal, the defendant argued that there was insufficient evidence to support the conviction, because the state failed to prove that the gun was concealed "about" the defendant's person. The Court of Appeals agreed, and reversed the conviction.

- While the state did not need to prove that the gun was on the defendant's person, it did have to be within easy reach, and there was no evidence in the record that the backpack was in the defendant's reach.

SINGLE VS. MULTIPLE CHARGES

DISCHARGING A FIREARM INTO AN OCCUPIED VEHICLE

State v. Hagans, __ N.C. App. __ , 656 S.E.2d 704 (2008) (Jackson, J.)

The defendant robbed the victim at gunpoint and drove away. The victim got in his vehicle and gave chase. On four separate occasions, the defendant reached out of his car window and fired at the victim, firing a total of seven shots, one of which hit the victim's vehicle. The defendant was charged with discharging a firearm into an occupied vehicle and with three counts of attempting to discharge a firearm into an occupied vehicle. He was convicted, and argued on appeal that the shots were fired in quick succession and therefore constituted a single, continuous offense. The Court of Appeals rejected this argument:

- The defendant was firing a pistol, not a machine gun, and so every shot he fired was a separate volitional act that required a separate thought process.

- The defendant could properly have been charged with *seven* counts total, one for each shot.

FELON IN POSSESSION OF A FIREARM

State v. Garris, __ N.C. App. __, 663 S.E.2d 340 (2008) (McCullough, J.)

Officers stopped defendant for speeding. After they learned that he was carrying drugs, he fled, ultimately shooting at the pursuing officers eight times. Officers recovered two pistols, one from the path of the defendant's flight, and one near the location where the defendant was apprehended. The defendant was charged with, among other things, two counts of possession of a firearm by a felon. He was convicted, and appealed, arguing that his simultaneous possession of two firearms could support only one count of possession of a firearm by a felon. The Court of Appeals agreed, relying on federal case law and North Carolina cases in other contexts, such as larceny of a firearm, to determine that the General Assembly probably did not intend "to impose multiple penalties for a defendant's simultaneous possession of multiple firearms."

DRUG POSSESSION

State v. Moncree, __ N.C. App. __, 655 S.E.2d 464 (2008) (Calabria, J.)

The police stopped the defendant's vehicle because of a broken taillight. The defendant consented to a search of the vehicle, which revealed a small amount of marijuana in the passenger seat. The defendant was eventually arrested and taken to the sheriff's department for booking. He was asked to remove his shoes and socks, at which point, officers noticed another bag of marijuana. The defendant was ultimately charged and convicted of, inter alia, two counts of possession of less than one-half ounce of marijuana (one for the marijuana in the car, and one for the marijuana in the sock) and one count of possession of marijuana on the premises of a confinement facility. The Court of Appeals affirmed in part and reversed in part.

- The court sustained the conviction for possession of marijuana on the premises of a confinement facility, rejecting the defendant's argument that the state must prove that he was in a secured area, accessible only to law enforcement.

- The court vacated the conviction for possession of less than one-half ounce of marijuana based on the marijuana in the sock. Possession of marijuana on the premises of a confinement facility was, in effect, an aggravated version of the simple possession offense, based on the same facts and the same substance, so the defendant should not be convicted of both.

- The court also vacated the conviction for possession of less than one-half ounce of marijuana based on the marijuana in the car. The court held that the two caches of drugs were part of one continuous act of possession, on the same day and for the same purposes.

PROCEDURE

RIGHT TO COUNSEL

Rothgery v. Gillespie County, __ U.S. __, 128 S. Ct. 2578 (2008) (Souter, J.)

Officers mistakenly believed that the defendant had a felony conviction, and they arrested him for being a felon in possession of a firearm. They took him before a magistrate for an initial appearance, and the magistrate found probable cause and set bond. The defendant posted bond, and asked for a lawyer to be appointed. No lawyer was appointed, and nothing happened in the case for six months, when the defendant was indicted, rearrested, and subjected to an increased bond. He could not afford to post bond, and remained in jail for three weeks. At that point, a lawyer was assigned, and the lawyer assembled the paperwork that proved that the defendant did not have a felony conviction after all. The charges were dismissed.

The defendant then sued the state, arguing that he had requested a lawyer when he was first arrested, and that the state's failure to appoint one at that time violated his Sixth Amendment right to counsel and resulted in his spending three weeks in jail. Because prior Supreme Court precedent established that the right to counsel "attaches" only when "adversary judicial proceedings" have commenced, the case came down to whether such proceedings had commenced at the defendant's initial appearance. The defendant argued that they had, while the state argued that such proceedings did not begin until the defendant was indicted (at which point, he was

given a lawyer). The Supreme Court held that adversary judicial proceedings have commenced, and so the right to counsel attaches, no later than the defendant's initial appearance before a magistrate. At that point, his liberty is at risk, prosecution is all but inevitable, and he must deal with the intricacies of criminal procedure.

However, the Court did not actually decide whether the defendant was improperly denied a lawyer. Even though his right to counsel had "attached" at his initial appearance, some of the Justices appeared to believe that he was not actually entitled to a lawyer until his case reached a "critical stage," and since he was out on bond for six months with no court appearances or other developments, no such stage had arrived. Other Justices seemed to suggest that once the right to counsel attaches, a lawyer must be provided shortly.

It is now clear that in North Carolina, the right to counsel attaches no later than a defendant's initial appearance before a magistrate. However, a defendant is almost certainly not entitled to an appointed lawyer at his initial appearance, and defendants who proceed to a first appearance in the next few days, and who have lawyers appointed at that time, are probably not being denied their constitutional rights. The situation with regard to defendants who do not have first appearances in the next few days – mostly misdemeanor defendants in smaller districts, as well as some felony defendants who are released on bond – is not as clear. Rothgery also raises questions about whether a defendant must be advised of his right to counsel at his initial appearance – which is not current practice – and how, if at all, a magistrate should record or respond to a defendant's request for counsel. The School of Government, the AOC, and others are thinking through these issues, and may provide some guidance at a later time.

State v. Cummings, __ N.C. App. __, 656 S.E.2d 329 (2008) (Wynn, J.)

The defendant and four accomplices attempted to rob a drug house. They met resistance, and shot and killed an occupant of the house. The police suspected the defendant, and interviewed him several times. During the second interview, which was custodial, the defendant requested an attorney. The police stopped questioning him, but did ask him for consent to search his SUV. The defendant signed a form consenting to the search, and the search produced incriminating evidence. The defendant moved to suppress the evidence, arguing that the police violated *Miranda* when they asked him for consent to search after he invoked his right to an attorney, or in the alternative, that his consent was coerced. The trial court denied the motion, and the Court of Appeals affirmed.

- The court held, following several federal appellate courts, that asking for consent to search is not "interrogation" within the meaning of *Miranda.*
- It also found that the defendant's consent was voluntary under all the circumstances because, although the defendant was in custody, he was not handcuffed, he was allowed personal freedoms, and he failed to present any evidence of coercion or duress.

DISCOVERY

State v. Zamora-Ramos, __ N.C. App. __, 660 S.E.2d 151 (2008) (McCullough, J.)

An informant bought small amounts of cocaine from the defendant on several occasions, then asked to buy 500 grams of cocaine from him. The defendant agreed. He met with the informant, then instructed the informant to wait for a blue Honda to deliver the drugs. Several hours later, the defendant made several phone calls, apparently to a friend who was holding the drugs for the defendant. The friend promptly delivered just over

500 grams of cocaine to the informant. The defendant was convicted of, inter alia, trafficking in cocaine by transportation and trafficking in cocaine by sale and delivery. The Court of Appeals reversed the conviction for trafficking by transportation.

- The defendant argued that the state had violated the discovery statute, G.S. 15A-903, when it provided only short summaries of the interviews the police conducted with the informant after each controlled buy. The defendant contended that the statute required *detailed* reports regarding each interview the police conduct with a witness. The Court of Appeals noted that the state turned over its entire file, including all police reports regarding the case, and held that while the reports may not have been extensive, they were sufficient to put the defendant on notice of the evidence against him and to prevent unfair surprise.

State v. Gillespie, 362 N.C. 150 (2008) (Brady, J.)

The defendant was charged, non-capitally, with the first-degree murder of his girlfriend. He gave notice of his intent to present an insanity defense. The trial judge, pursuant to G.S. 15A-905(c)(2), ordered him to disclose to the state certain evidence regarding the expert witnesses he intended to call to establish the defense. Although the court ordered the defendant to provide the information not later than two weeks before trial, the defendant's experts failed to produce reports in a timely manner. One week before trial, the state moved to exclude any evidence regarding the insanity defense. The trial court largely agreed, entering an order prohibiting the defendant from calling the tardy experts under G.S. 15A-910. The Supreme Court ordered a new trial, finding that the trial court's order was an abuse of discretion.

- It held that G.S. 15A-910, by its terms, only allows the court to sanction parties for their own discovery violations, not for violations committed by third parties.

- Here, the trial court clearly indicated that the problem was the experts' failure to produce reports, not the defendant's (or defense counsel's) failure to disclose them.

State v. Cook, 362 N.C. 285 (2008) (Edmunds, J.)

The defendant spent the evening drinking and playing poker. He left the game and was seen driving erratically on the highway shortly before crashing his car into a vehicle parked along the side of the road. One of the occupants of the parked car was killed. The defendant was injured and was taken to the hospital. Two blood draws revealed the presence of alcohol, at concentrations under 0.08. The defendant was charged with, inter alia, second-degree murder. He requested discovery from the state, and the state provided some discovery. However, although the state retained an expert in retrograde extrapolation of blood alcohol content at least five weeks before the trial, it did not disclose the existence of the expert until five days before trial, and did not disclose the expert's report until the Friday afternoon before the Monday trial. (Apparently, although the expert had completed the report earlier, he did not send it to the prosecutor's office until that Friday.) The defendant moved for a continuance to be able to prepare to meet the expert's testimony and/or to hire his own expert. The trial judge denied the motion. The Supreme Court held that the denial of the motion was an abuse of discretion.

- The state violated G.S. 15A-903 because it did not disclose the expert's existence, provide the CV, and provide the report to the defense within a "reasonable time prior to trial." Although the court did not

indicate what would have been a reasonable time, it characterized the state's disclosure as "last minute" and "piecemeal."

- Therefore, the trial court abused its discretion in denying the defense motion for a continuance. A continuance would have alleviated the risk of surprise.

- However, the trial court's ruling was harmless error. Even aside from the retrograde extrapolation testimony, there was plenty of other evidence that the defendant was impaired, including his own admissions regarding drug use and witnesses' statements about his driving.

SPEEDY TRIAL

State v. Washington, __ N.C. App. __, 665 S.E.2d 799 (2008) (McCullough, J.)

The defendant was charged with burglary, robbery with a dangerous weapon, two counts of kidnapping, attempted sexual offense, and other crimes as a result of allegedly breaking into a Durham home. After he was arrested and charged, he spent 366 days in jail before his bond was reduced to a level that he was able to make. The state attributed the slow movement of the case to the SBI's failure to analyze the physical evidence collected by the police. The defendant twice moved to compel the SBI to analyze the evidence, and, when that did not work, moved to dismiss the charges based on what he contended was a violation of his speedy trial rights. His speedy trial motion was denied, and the case came to trial 4 years and 9 months after the defendant was charged. He was convicted. However, the Court of Appeals reversed, finding a speedy trial violation.

- The court applied the four factors from *Barker v. Wingo*, 407 U.S. 514 (1972), namely, (1) the length of the delay; (2) the reason for the delay; (3) defendant's assertion of his right to a speedy trial; and (4) prejudice to defendant resulting from the delay. It noted that courts start to look at (2) through (4) only after (1) approaches a year. It blamed the state for the delay, and found that the defendant asserted his right to speedy trial, both through his motion to dismiss and through his motions to compel the state to hurry up and do the testing. It also determined that the defendant was prejudiced, both in the sense of being locked up for 366 days away from his family, but also because at trial, several witnesses could not remember details of the case that could have been significant.

JURY SELECTION

State v. Wright, __ N.C. App. __, 658 S.E.2d 60 (2008) (Stroud, J.)

The defendant was convicted of AWDWIKISI and first-degree burglary after participating in a home invasion. During jury selection, the state excused seven black prospective jurors and did not excuse any other jurors. The defense made a *Batson* challenge. The prosecutor volunteered race-neutral explanations for her decision to excuse some of the jurors, and indicated that she could "go on and on with each of the jurors." The trial judge rejected the *Batson* claim but the Court of Appeals reversed and ordered a new trial.

- The defendant must establish a prima facie case of discrimination before the state can be required to provide race-neutral reasons for its strikes. However, where, as here, the state volunteers race-neutral

reasons before the court rules on whether a prima facie case has been made, the state moots the requirement of the prima facie case.

- The prosecutor did not offer a race-neutral explanation for "each" excused juror. She gave reasons for dismissing five of the jurors, but as to the others said merely that she could "go on and on" and that she did not dismiss them because of their race. Once a prima facie case has been established (or mooted), the state bears the burden of providing a race-neutral explanation for each and every strike. Without such an explanation, the trial court cannot properly assess whether the state's actions were discriminatory.

State v. Cummings, 361 N.C. 438 (2007) (Brady, J.)

Defendant was charged capitally with murdering his neighbor. During jury selection, he challenged for cause a prospective juror who was a police lieutenant and who expressed strong support for capital punishment, suspicion of mitigating evidence, and a tendency, in certain circumstances, to believe law enforcement officers over other people. The challenge for cause was denied by the trial judge. At various times during jury selection, defense counsel sought to ask prospective jurors how they thought about various specific kinds of mitigating evidence, e.g., what they saw as the harms of domestic violence, or why they believed that some people abused drugs. The trial judge did not permit these inquiries, finding that they were "stake out" questions designed to test prospective jurors' responses to the defendant's specific defense theory. The North Carolina Supreme Court affirmed.

- Although the lieutenant had strong personal convictions about capital punishment and related matters, such convictions do not disqualify a prospective juror. The lieutenant repeatedly indicated that he would follow the law, and the trial judge, who had the opportunity to observe his demeanor, credited those statements.

- The Supreme Court emphasized that the trial court made extensive findings regarding the juror and made a record of the court's reason for denying the challenge for cause; these helped to show that the trial court's decision was not arbitrary or without reason.

- As to the questions about specific types of mitigation, the Supreme Court emphasized the trial judge's discretion in regulating jury selection. It stated that the defendant's questions were "hypothetical and speculative," and could reasonably be viewed as an attempt to conduct a mini-trial of the defendant's case during voir dire.

RIGHT TO PRESENCE

State v. Russell, __ N.C. App. __, 655 S.E.2d 887 (2008) (Wynn, J.)

The defendant was charged with breaking or entering a motor vehicle, and with being a habitual felon. He was present for first day of trial, but was absent afterwards. At first, his absence was totally unexplained. Later, the defendant contacted a defense witness to say that he was in the hospital with chest pains; the defendant did not contact defense counsel or the court directly about his hospitalization. Defense counsel was ultimately able to procure a letter from a physician stating that the defendant was in the hospital for "observation." Defense counsel repeatedly moved to continue the case, arguing that his client's Confrontation

Clause rights were being violated by the trial in absentia. The trial court denied the motions, and the jury convicted the defendant. The Court of Appeals affirmed.

- A defendant's right to be present is grounded in the Confrontation Clause, but it is waivable, and when a defendant is absent from trial, the burden is on the defendant to provide an explanation; absent an explanation, the trial court may presume that the defendant's absence is voluntary and constitutes a waiver of his right to be present.

- The fact that the defendant contacted a witness, rather than his attorney or the court, to report his whereabouts, left the court with second- or third-hand information about why the defendant was absent; such evidence was insufficient to rebut the inference of voluntary absence.

- Even the letter did not rebut the inference. It did not offer a specific diagnosis, and the fact that the defendant was in the hospital for "observation" was consistent with the theory that the defendant had feigned chest pains as a way of avoiding his trial.

EVIDENCE

RULE 404(B)

State v. Bowman, __ N.C. App. __, 656 S.E.2d 638 (2008) (Calabria, J.)

The defendant helped two of his friends engage in sexual activity with underage girls, by driving his friends and the girls around, providing alcohol to the group, and allowing the his friends and the girls use his home to have sex. As a result, he was charged with numerous offenses, including aiding and abetting statutory rape, taking indecent liberties with a child, and second-degree kidnapping. The trial court admitted, over objection, evidence of the defendant's prior sexual misconduct, including an incident eight years earlier in which the defendant grabbed the genitals of a teenage boy during a golf lesson. The Court of Appeals affirmed on this issue.

- The evidence was offered for a proper purpose, namely, to show absence of mistake of age, specific intent regarding the kidnapping, and intent for sexual gratification.

- When there is a proper purpose under Rule 404(b), evidence of other bad acts should be admitted if they are similar to the charged offense and not too remote in time.

- The evidence in question was similar, because it involved sexual activity, with a victim of about the same age as the victims in the current offense. It was not too remote in time because it was only eight years earlier, and the defendant had been in prison for several of those years.

- However, evidence of the defendant's prior *convictions* for the misconduct was wrongly admitted. The "bare fact of conviction" is normally inadmissible under Rule 404(b), and while this may not be absolute in the sexual assault context, the fact of the prior conviction in this case added nothing (but the error was harmless).

THE CONFRONTATION CLAUSE

TESTIMONIAL VS. NON-TESTIMONIAL STATEMENTS

State v. Little, __ N.C. App. __, 654 S.E.2d 760 (2008) (Elmore, J.)

The defendant was charged with rape and assault by strangulation. A rape kit was administered to the victim, and DNA was obtained from the kit. An SBI DNA analyst tested the DNA and found that it matched the defendant. However, that analyst was out-of-state at the time of trial, so another analyst reviewed the first analyst's work and testified to the match. The defendant argued that this violated the Confrontation Clause because the first analyst was not available for cross-examination. The Court of Appeals affirmed.

- Laboratory reports are testimonial, and so create Confrontation Clause concerns, when they include judgments, opinions, or conclusions drawn by the analyst. When they reflect mechanical processes with objective data (as with a Breathalyzer) they are non-testimonial.
- DNA analysis involves a mechanical process of isolating and analyzing DNA, as well as a subjective process of data analysis requiring professional judgment.
- Here, the testifying DNA analyst did not repeat the mechanical process, but conducted a "technical review" of the first analyst's work, essentially undertaking the subjective process herself and reaching her own conclusions.
- She was, therefore, available for cross-examination about any portion of the DNA analysis covered by the Confrontation Clause.

State v. Hinchman, __ N.C. App. __, 666 S.E.2d 199 (2008) (Martin, C.J.)

The defendant was arrested after a wreck and charged with DWI. The trooper who arrested him took him to a hospital to have his blood drawn. The blood was analyzed by an SBI laboratory analyst, and his report was admitted at trial. The analyst himself did not testify. The defendant contented on appeal that the laboratory report was a testimonial statement, and that its admission therefore violated the Confrontation Clause under the rule of *Crawford v. Washington.* Following precedent, the Court of Appeals held that the laboratory report was akin to a business record in that it did not contain opinions or subjective conclusions, but rather reflected objective, mechanical processes. Therefore, it was not testimonial and was not subject to the Confrontation Clause.

Upcoming: Melendez-Diaz v. Massachusetts

The defendant was arrested in Boston and charged with trafficking in cocaine. At trial, the prosecution introduced laboratory reports showing that the substance on which the charges were based was, in fact, cocaine The analyst who prepared the reports did not testify. At trial and again on appeal, the defendant argued that the reports were "testimonial" statements by the analyst, and that the admission of the reports therefore violated the

rule of *Crawford v. Washington.* Both the trial judge and the state appellate court rejected this argument. The appellate court relied on an earlier case that had held that (1) laboratory reports are business records, and (2) business records are inherently nontestimonial and so not subject to the Confrontation Clause. The United States Supreme Court granted *certiorari* to address whether or not the laboratory reports were testimonial.

- *Melendez-Diaz*, which carries U.S. Supreme Court case number 07-591, will be decided during the Court's 2008-09 Term.

FORFEITURE BY WRONGDOING

Giles v. California, __ U.S. __, 128 S.Ct. 2678 (2008) (Scalia, J.)

The defendant shot and killed his ex-girlfriend. At his murder trial, he claimed that she had a history of violent and threatening behavior and argued that he had acted in self-defense. The state sought to introduce statements made by the ex-girlfriend to police three weeks earlier, when the police had responded to a domestic disturbance call. (She told the officers that the defendant had choked and beaten her, menaced her with a knife, and threatened to kill her if she cheated on him.) The ex-girlfriend's statements were admitted, and the defendant was convicted. On appeal, the issue was whether the admission of the statements violated the Confrontation Clause. The defendant argued that the statements were testimonial and that he had no way of cross-examining the ex-girlfriend about them, which made them inadmissible. The state appellate court disagreed, finding that the defendant had forfeited his right to confront and cross-examine the ex-girlfriend about her statements when he killed her. The United States Supreme Court remanded for further fact-finding.

- Forfeiture by wrongdoing is, in fact, an exception to the right to confront witnesses. It was a recognized exception at the time of the founding.

- The exception required then, and so requires now, a showing that the defendant procured or caused the absence of the witness *with an intent to silence* the witness.

- Here, the state courts did not determine whether the defendant had the requisite intent to silence, because they did not believe that such an intent was required. The case was therefore remanded to the state courts for further proceedings, including an assessment of the defendant's intent. The Court did note that homicides in domestic relationships may express the defendant's "intent to isolate the victim and to stop her from reporting abuse to the authorities or cooperating with a criminal prosecution—rendering her prior statements admissible under the forfeiture doctrine. Earlier abuse, or threats of abuse, intended to dissuade the victim from resorting to outside help would be highly relevant to this inquiry, as would evidence of ongoing criminal proceedings at which the victim would have been expected to testify."

DYING DECLARATIONS

State v. Calhoun, __ N.C. App. __, 657 S.E.2d 424 (2008) (Hunter, J.)

A woman went out shopping. When she returned, she found police responding to a shots fired call at her home. She and an officer entered the home, and she encountered an acquaintance lying on her living room floor.

The acquaintance had been shot. The woman asked the acquaintance who had shot her, and the acquaintance named the defendant and another man. The officer witnessed the conversation. The acquaintance died shortly thereafter, and her statement to the woman was introduced at defendant's murder trial. The defendant argued on appeal that the statement was testimonial and that its introduction violated his Confrontation Clause rights.

- The statement was not testimonial because it was not made to a police officer.

- Furthermore, even if it were viewed as having been made to a police officer, it was in response to an ongoing emergency (a recent shooting by unknown perpetrators).

- Finally, even if the statement were testimonial, a victim's dying declaration is a common-law exception to the right of confrontation.

VERDICTS, SENTENCING, AND PUNISHMENT

INCONSISTENT VERDICTS

State v. Tanner, __ N.C. App. __, __ S.E.2d __, 2008 WL 4471890 (N.C. Ct. App. Oct. 7, 2008) (Tyson, J.)

The police developed evidence implicating the defendant in a break-in at a barber shop. He was charged with felony breaking or entering, felony larceny, and felony possession of stolen goods. The possession of stolen goods charge was submitted to the jury as a felony only by virtue of its connection to the breaking or entering; it was not submitted as a felony by virtue of the value of the stolen goods. The jury found the defendant guilty only of felony possession of stolen goods. The trial judge entered judgment, but on appeal, the defendant argued that he could not be convicted of felony possession of stolen goods given that he had been acquitted of the breaking or entering. The Court of Appeals agreed, citing several earlier cases on point.

State v. Shaffer, __ N.C. App. __, __ S.E.2d __, 2008 WL 4471664 (N.C. Ct. App. Oct. 7, 2008) (Tyson, J.)

The defendant and the victim, along with other people, went fishing and then went out to eat. The defendant offered the victim a ride home from the restaurant. On the way to her house, he asked her if she would have sex with him, and she said no. He then drove her to a secluded location, and the state's uncontradicted evidence showed that he choked her, threatened her, and struck her, coercing her into sexual activity, which included vaginal and anal intercourse and fellatio. The defendant was charged with first-degree rape, first-degree sexual offense, crime against nature, and assault by strangulation. The jury convicted him of first-degree sexual offense and crime against nature, but acquitted him of rape and assault. On appeal, the defendant argued that the jury's verdicts were inconsistent and that his convictions therefore could not stand. The Court of Appeals, following the reasoning of *United States v. Powell*, 469 U.S. 57 (1984), held that the mere fact that a jury returns inconsistent verdicts does not justify setting those verdicts aside. Such verdicts may simply reflect a jury's desire to show some leniency to a guilty defendant, and in any event, there is no way to know what motivated a particular combination of verdicts without inquiring into the jury's deliberations, which courts normally do not do.

SENTENCING

State v. Walston, __ N.C. App. __, __ S.E.2d __, 2008 WL 4470499 (N.C. Ct. App. Oct. 7, 2008) (Martin, C.J.)

The defendant was convicted of trafficking in cocaine and conspiracy to traffic in cocaine. The trafficking statutes requires that "[s]entences imposed pursuant to this subsection shall run consecutively with and shall commence at the expiration of any sentence being served by the person sentenced hereunder." G.S. 90-95(h)(6). The sentencing judge appears to have believed that he was required to run the two sentences that he was imposing consecutive to one another. Citing previous case law to the contrary, the Court of Appeals reiterated that although the statute requires that trafficking sentences run consecutive to any prior sentence still being served at the time of sentencing, multiple trafficking sentences imposed at the same time may run concurrently with one another.

CAPITAL PUNISHMENT

Kennedy v. Louisiana, __ U.S. __, 128 S.Ct. 2641 (2008) (Kennedy, J.)

The defendant brutally raped his eight-year-old stepdaughter. Louisiana law allowed certain child rape cases to be prosecuted capitally, and the defendant was convicted and sentenced to death. On appeal, he argued that the imposition of a death sentence constituted cruel and unusual punishment under the Eighth Amendment. The United States Supreme Court agreed in a 5-4 decision.

- The Eighth Amendment does not permit the death penalty to be used as a punishment for child rape or any non-homicide offense against an individual victim.

- The majority reasoned that evolving standards of decency do not permit the death penalty to be imposed in such cases. Few states authorize the death penalty for such crimes; no one has been executed for such an offense since 1964; and only two defendants, both in Louisiana, have been sentenced to death for child rape since that time.

- Furthermore, the majority argued, rape is not as permanent and irrevocable as murder, and so does not call for an equally harsh sanction.

- Finally, the majority contended that applying the death penalty in cases of child rape would entail practical difficulties, such as the risks of imposing a death sentence based on unreliable child victim testimony.

- Justice Alito, joined by three other Justices, vigorously dissented.

Baze v. Rees, __ U.S. __, 128 S.Ct. 1520 (2008) (Roberts, C.J.)

The petitioner committed a murder in Kentucky and was sentenced to death. As his execution neared, he filed a federal lawsuit alleging that the three-drug cocktail used by Kentucky to execute condemned prisoners constituted cruel and unusual punishment. Essentially, he argued that there was a risk that the first drug, which is intended to render the condemned insensible to pain, would not take effect prior to the injection of the other two drugs, which stop the heart and lungs from working, and that he therefore might experience suffocation and cardiac arrest while conscious. He sought a decree that the state not be permitted to use that method of execution. Many other states, including North Carolina, use similar execution protocols.

- The lead opinion is by Chief Justice Roberts, and although it was a plurality opinion and the Court was fractured, it appears to be controlling.

- It concluded that the petitioner failed to prove that Kentucky's cocktail carried a "substantial" or "objectively intolerable" risk of serious harm. The execution protocol should work and appears to work; it is used by most jurisdictions that have capital punishment; and the alternatives are unproven or at best represent marginal improvements.

- The opinion does not totally close the door to future litigation about the constitutionality of lethal injection litigation, if a future petitioner can show that problems are more likely than the Court believed, or that alternatives are far superior.

PROBATION REVOCATIONS

State v. Satanek, __ N.C. App. __, 660 S.E.2d 623 (2008) (Hunter, J.)

The defendant pled guilty to indecent liberties and received a suspended sentence with three years of probation. The defendant had problems with compliance. Shortly after the defendant's probation expired, a superior court judge extended it by two years (perhaps based on a consent motion filed by the probation officer, though the opinion is not clear on this point). The period of probation was later extended again, and then revoked. The defendant appealed from the order revoking probation, and the Court of Appeals held that the original order extending the period of probation was improper.

- Although there is statutory authority to revoke probation after it expires under certain circumstances, there is no authority to extend probation after it expires. Under G.S. 15A-1344(d), a court may only extend probation "[a]t any time *prior* to the expiration . . . of the probation period."

- Because the original extension was improper, the defendant's probation terminated after three years, and all actions since that time, including the revocation, were done without subject-matter jurisdiction.

State v. Patterson, __ N.C. App. __, 660 S.E.2d 155 (2008) (Martin, C.J.)

The defendant pled guilty to, inter alia, forgery and uttering and was placed on probation. The period of probation was scheduled to expire on April 1, 2007. In July 2006 and February 2007, violation reports were filed against the defendant, but the matter was not heard until April 4, 2007. The court revoked the defendant's probation, and the defendant appealed, arguing that his probation had expired and that the court lacked jurisdiction to revoke his probation. The Court of Appeals affirmed.

- Under G.S. 15A-1344(d), the period of probation is tolled during pendency of any new charges.

- The defendant in this case was charged with additional offenses during his period probation. Although the pleadings for the new charges were not made part of the record, the existence of the charges was established by the fact that the violation report stated that the charges had been brought, and the fact that the defendant effectively acknowledged as much during the revocation hearing.

- Because the pleadings for the new charges were not made part of the record, it was not possible to determine exactly when they were brought. However, they were certainly brought by the time the violation report was filed, and they were still pending at the time of the revocation hearing. Thus, it was clear that the period of tolling was long enough to bring the revocation hearing within the period of probation.

- Because the revocation hearing was within the period of probation, the court did not need to make the findings set forth in G.S. 15A-1344(f), which must be made for revocation hearings taking place after the expiration of probation.

State v. Jackson, __ N.C. App. __, 660 S.E.2d 165 (2008) (Bryant, J.)

The defendant pled guilty to several offenses and was placed on probation. Shortly before the period of probation was set to expire, a violation report was filed. Because the period of probation was almost over, the state filed a written notice reflecting its intent to seek revocation. The defendant was brought before the court and the court asked him if he wanted to be represented by a lawyer; the defendant said no. Several days later, just after the defendant's period of probation expired, the court held a revocation hearing and revoked the defendant's probation. The defendant appealed, arguing (1) that his waiver of his right to counsel was invalid, and (2) that the court lacked jurisdiction to revoke his probation because it had expired prior to the revocation hearing. The Court of Appeals agreed and remanded.

- There is a right to counsel at revocation hearings. Waivers must comply with G.S. 15A-1242, which requires, inter alia, that the defendant comprehend "the nature of the charges and proceedings" and "the range of permissible punishments." The trial court did not remonstrate with the defendant about these matters, so the record contained no evidence that the defendant comprehended them.

- The revocation hearing took place after the expiration of the period of probation. This is permitted, under G.S. 15A-1344(f), only if the state filed a notice of its intent to revoke before probation ended and the court finds that the state tried to notify the defendant and conduct the hearing earlier. Here, the state

filed the required notice, but the court made no such findings. However, because the record supports the findings, the case was remanded for the lower court to make the findings.