Alyson Grine
John Rubin
UNC School of Government
Grine: 919.966.4248, agrine@sog.unc.edu
Rubin: 919.962.2498, rubin@sog.unc.edu

Felony and Misdemeanor Case Update

2014 Summer Criminal Law Webinar

(Includes selected cases decided between December 3, 2013 and May 27, 2014)

The summaries are drawn from criminal case summaries prepared by Jessica Smith. To view all of the summaries, go to www.sog.unc.edu/programs/crimlaw/index.html. To obtain the summaries automatically by email, go to the above site and click on Criminal Law Listserv.

Investigation Issues 2

- Seizures 2
- Grounds for Stop 3
- Checkpoints 5
- Searches 5
- *Miranda* 9
- Other Search and Investigation Issues 9

Pretrial and Trial Procedure 11

- Right to Counsel 11
- Pleadings 12
- Discovery 13
- Jury Issues: Selection, Instructions, and Deliberations 14
- Other Procedural Issues 17

Evidence 20

- Confrontation Clause 20
- Expert Opinion Testimony 21
- Other Evidence Issues 22

Crimes 25

- Generally 25
- Impaired Driving 30
- Sexual Offenses 31

Sex Offender Registration and Monitoring 32

Sentencing and Probation 33

Post Conviction 39

Investigation Issues

Seizures

Defendant was not seized nor in custody when wildlife officer asked whether he was a convicted felon after inspecting hunting license

State v. Price, __ N.C. App. __, __ S.E.2d __ (April 1, 2014), *temporary stay allowed*, __ N.C. __, __ S.E.2d __, (April 21, 2014). The trial court erred by granting the defendant's motion to suppress. A wildlife officer stopped the armed defendant and asked to see his hunting license. After the defendant showed his license, the officer asked whether the defendant was a convicted felon. The defendant admitted that he was. The officer seized the weapon and the defendant was later charged with being a felon in possession of a firearm. The court defined the issue as whether the officer exceeded the scope of a valid stop when he asked the defendant if he was a convicted felon. It concluded that the defendant was neither seized nor in custody when the officer asked about his criminal history and that therefore the trial court erred by granting the motion to suppress. The court further noted that the officer had authority to seize the defendant's rifle without a warrant under the plain view doctrine.

Remanding for further findings of fact as to whether two-hour detention converted an otherwise valid investigative stop into a de facto arrest

State v. Thorpe, __ N.C. App. __, 754 S.E.2d 213 (Feb. 18, 2014). Because the trial court failed to make adequate findings to permit review of its determination on the defendant's motion to suppress that the defendant was not placed under arrest when he was detained by an officer for nearly two hours, the court remanded for findings on this issue. The court noted that the officer's stop of the defendant was not a "de facto" arrest simply because the officer handcuffed the defendant and placed him in the front passenger seat of his police car. However, it continued, "the length of Defendant's detention may have turned the investigative stop into a de facto arrest, necessitating probable cause . . . for the detention." It added: "Although length in and of itself will not normally convert an otherwise valid seizure into a de facto arrest, where the detention is more than momentary, as here, there must be some strong justification for the delay to avoid rendering the seizure unreasonable."

As issue of first impression, officer's seizure of defendant was justified by "community caretaking" doctrine

State v. Smathers, __ N.C. App. __, 753 S.E.2d 380 (Jan. 21, 2014). In a case where the State conceded that the officer had neither probable cause nor reasonable suspicion to seize the defendant, the court decided an issue of first impression and held that the officer's seizure of the defendant was justified by the "community caretaking" doctrine. The officer stopped the defendant to see if she and her vehicle were "okay" after he saw her hit an animal on a roadway. Her driving did not give rise to any suspicion of impairment. During the stop the officer determined the defendant was impaired and she was arrested for DWI. The court noted that in adopting the community caretaking exception, "we must apply a test that strikes a proper balance between the public's interest in having officers help citizens when needed and the individual's interest in being free from unreasonable governmental intrusion." It went on adopt the following test for application of the doctrine:

> [T]he State has the burden of proving that: (1) a search or seizure within the meaning of the Fourth Amendment has occurred; (2) if so, that under the totality of the circumstances an objectively reasonable basis for a community caretaking function is shown; and (3) if so, that the public need or interest outweighs the intrusion upon the privacy of the individual.

After further fleshing out the test, the court applied it and found that the stop at issue fell within the community caretaking exception.

Grounds for Stop

911 call reporting that caller had been run off the road by a specific vehicle provided reasonable suspicion for stop where caller's eyewitness knowledge supported the tip's reliability and created reasonable suspicion of an ongoing crime

Navarette v. California, 572 U.S. __ (April 22, 2014). The Court held in this "close case" that an officer had reasonable suspicion to make a vehicle stop based on a 911 call. After a 911 caller reported that a truck had run her off the road, a police officer located the truck the caller identified and executed a traffic stop. As officers approached the truck, they smelled marijuana. A search of the truck bed revealed 30 pounds of marijuana. The defendants moved to suppress the evidence, arguing that the traffic stop violated the Fourth Amendment because the officer lacked reasonable suspicion of criminal activity. Even assuming that the 911 call was anonymous, the Court found that it bore adequate indicia of reliability for the officer to credit the caller's account that the truck ran her off the road. The Court explained: "By reporting that she had been run off the road by a specific vehicle—a silver Ford F-150 pickup, license plate 8D94925—the caller necessarily claimed eyewitness knowledge of the alleged dangerous driving. That basis of knowledge lends significant support to the tip's reliability." The Court noted that in this respect, the case contrasted with *Florida v. J. L.,* 529 U. S. 266 (2000), where the tip provided no basis for concluding that the tipster had actually seen the gun reportedly possessed by the defendant. It continued: "A driver's claim that another vehicle ran her off the road, however, necessarily implies that the informant knows the other car was driven dangerously." The Court noted evidence suggesting that the caller reported the incident soon after it occurred and stated, "That sort of contemporaneous report has long been treated as especially reliable." Again contrasting the case to *J.L.,* the Court noted that in *J.L.*, there was no indication that the tip was contemporaneous with the observation of criminal activity or made under the stress of excitement caused by a startling event. The Court determined that another indicator of veracity is the caller's use of the 911 system, which allows calls to be recorded and law enforcement to verify information about the caller. Thus, "a reasonable officer could conclude that a false tipster would think twice before using such a system and a caller's use of the 911 system is therefore one of the relevant circumstances that, taken together, justified the officer's reliance on the information reported in the 911 call." But the Court cautioned, "None of this is to suggest that tips in 911 calls are per se reliable."

The Court went on, noting that a reliable tip will justify an investigative stop only if it creates reasonable suspicion that criminal activity is afoot. It then determined that the caller's report of being run off the roadway created reasonable suspicion of an ongoing crime such as drunk driving. It stated:

> The 911 caller . . . reported more than a minor traffic infraction and more than a conclusory allegation of drunk or reckless driving. Instead, she alleged a specific and dangerous result of the driver's conduct: running another car off the highway. That

> conduct bears too great a resemblance to paradigmatic manifestations of drunk driving to be dismissed as an isolated example of recklessness. Running another vehicle off the road suggests lane positioning problems, decreased vigilance, impaired judgment, or some combination of those recognized drunk driving cues. And the experience of many officers suggests that a driver who almost strikes a vehicle or another object—the exact scenario that ordinarily causes "running [another vehicle] off the roadway"—is likely intoxicated. As a result, we cannot say that the officer acted unreasonably under these circumstances in stopping a driver whose alleged conduct was a significant indicator of drunk driving. (Citations omitted).

Officer did not have reasonable suspicion to stop defendant where on two occasions defendant and a companion walked away from each other when officer pulled into convenience store parking lot in an area known for drug activity

State v. Jackson, __ N.C. App. __, __ S.E.2d __ (May 20, 2014). Over a dissent, the court held that an officer had no reasonable suspicion for the stop. The stop occurred at approximately 9:00 pm in an area known for illegal drug sales and where numerous drug-related arrests occurred; the defendant and a companion were standing together; when they saw the officer's car, they began walking in opposite directions, with the defendant entering a store, Kim's Mart; when the officer turned his car around and returned, the two men were again standing together in front of Kim's Mart; and when the officer pulled into the parking lot, the defendant and his companion again walked away from each other, with the defendant walking toward the officer. The court concluded that "the totality of the relevant circumstances . . . consists of nothing more than . . . being in an area known for drug sales and . . . walking away from a companion in the presence of an officer twice." The court noted that no evidence suggested that the defendant took any "evasive" action or engaged in behavior that could be construed as flight.

Purpose of commercial vehicle stop was not completed until officer finished a document check despite fact that officer had already written warning citation and handed it to driver

State v. Velazquez-Perez, __ N.C. App. __, 756 S.E.2d 869 (April 15, 2014), *temporary stay allowed*, __ N.C. __, __ S.E.2d __ (May 05, 2014). In a drug trafficking case, the trial court did not err by denying the defendant's motion to suppress drugs seized from a truck during a vehicle stop. The defendant argued that once the officer handed the driver the warning citation, the purpose of the stop was over and anything that occurred after that time constituted unconstitutionally prolonged the stop. The court noted that officers routinely check relevant documentation while conducting traffic stops. Here, although the officer had completed writing the warning citation, he had not completed his checks related to the licenses, registration, insurance, travel logs, and invoices of the commercial vehicle. Thus, "The purpose of the stop was not completed until [the officer] finished a proper document check and returned the documents to [the driver and the passenger, who owned the truck]." The court noted that because the defendant did not argue the issue, it would not address which documents may be properly investigated during a routine commercial vehicle stop.

Officer had reasonable suspicion to stop and frisk defendant who made suspicious movements in high crime area

State v. Sutton, __ N.C. App. __, 754 S.E.2d 464 (Mar. 4, 2014), *temporary stay allowed*, __S.E.2d __, __ N.C. __ (Mar. 31, 2014). An officer had reasonable suspicion to stop and frisk the defendant when the

defendant was in a high crime area and made movements which the officer found suspicious. The defendant was in a public housing area patrolled by a Special Response Unit of U.S. Marshals and the DEA concentrating on violent crimes and gun crimes. The officer in question had 10 years of experience and was assigned to the Special Response Unit. Many persons were banned from the public housing area—in fact the banned list was nine pages long. On a prior occasion the officer heard shots fired near the area. The officer saw the defendant walking normally while swinging his arms. When the defendant turned and "used his right hand to grab his waistband to clinch an item" after looking directly at the officer, the officer believed the defendant was trying to hide something on his person. The officer then stopped the defendant to identify him, frisked him and found a gun in the defendant's waistband.

Checkpoints

DWI checkpoint was not unconstitutional

State v. Kostick, __ N.C. App. __, 755 S.E.2d 411 (Mar. 18, 2014). In a DWI case, the court rejected the defendant's argument that the checkpoint at issue was unconstitutional. The court first found that the checkpoint had a legitimate primary programmatic purpose, checking for potential driving violations. Next, it found that the checkpoint was reasonable.

No error where trial court found that lack of written policy at time of defendant's stop at checkpoint constituted substantial violation of G.S. 20-16.3A and warranted suppression

State v. White, __ N.C. App. __, 753 S.E.2d 698 (Feb. 4, 2014), *temporary stay allowed*, __ N.C. __, 755 S.E.2d 49 (Feb. 26, 2014). The trial court did not err by granting the defendant's motion to suppress evidence obtained as a result of a vehicle checkpoint. Specifically, the trial court did not err by concluding that a lack of a written policy in full force and effect at the time of the defendant's stop at the checkpoint constituted a substantial violation of G.S. 20-16.3A (requiring a written policy providing guidelines for checkpoints). The court also rejected the State's argument that a substantial violation of G.S. 20-16.3A could not support suppression; the State had argued that evidence only can be suppressed if there is a Constitutional violation or a substantial violation of Chapter 15A.

Searches

Search warrant for defendant's apartment was not supported by probable cause where anonymous citizen reported drug activity at apartment and an individual who had recently visited apartment was found to be in possession of marijuana, cash, and incriminating text messages during vehicle stop

State v. McKinney, __ N.C. App. __, 752 S.E.2d 726 (Jan. 7, 2014), *temporary stay allowed*, __ N.C. __, 753 S.E.2d 682 (Feb. 11, 2014). The trial court erred by denying the defendant's suppression motion where the search warrant, authorizing a search of the defendant's apartment, was not supported by probable cause. The application was based on the following evidence: an anonymous citizen reported observing suspected drug-related activity at and around the apartment; the officer then saw an individual named Foushee come to the apartment and leave after six minutes; Foushee was searched and, after he was found with marijuana and a large amount of cash, arrested; and a search of Fouchee's phone revealed text messages between Foushee and an individual named Chad proposing a drug transaction. The court acknowledged that this evidence established probable cause that Foushee had

been involved in a recent drug transaction. However, it found the evidence insufficient to establish probable cause of illegal drugs at the defendant's apartment.

Search warrant was not supported by probable cause where no facts supported assertion in affidavit that confidential informant was reliable

State v. Benters, __ N.C. App. __, 750 S.E.2d 584 (Dec. 3, 2013), *temporary stay allowed, writ allowed,* __ N.C. __, 753 S.E.2d 655 (Jan. 7, 2014). Over a dissent, the court held in this drug case that the trial court properly suppressed evidence after finding that no probable cause supported the search warrant. According to the affidavit, a confidential informant told the police that the defendant was growing marijuana indoors at a specified address. An officer, who knew that the defendant owned the premises, obtained power bills for the property. The bills showed power usage consistent with an indoor growing operation. Additionally, officers observed the premises from an open field and saw growing items, such as potting soil and starting fertilizer, and an unused greenhouse that was in disrepair. The court noted, among other things, that although the affidavit asserted that the informant was reliable, no facts supported that assertion.

Search warrant authorizing search of apartment of defendant's girlfriend to find defendant was supported by probable cause based on various circumstances, although court would not consider evidence introduced at a suppression hearing that was not before the issuing magistrate; A common sense reading of an affidavit for a second search warrant of the apartment sufficiently connected marijuana to the apartment; Discovery of a partially smoked marijuana cigarette at the apartment was sufficient to provide probable cause to search for firearms and ammunition

State v. Inyama, __ N.C. App. __, __ S.E.2d __ (May 6, 2014). In this drug and felon in possession of a firearm case, the court held that the search warrants were supported by probable cause. The first warrant authorized officers to search the defendant's girlfriend's apartment to find the defendant. The defendant argued that the affidavit did not contain any statements supporting a belief that the defendant was inside the apartment. Rejecting the State's suggestion that it could consider evidence introduced at the suppression hearing but not before the magistrate when the warrant was issued, the court nevertheless found the affidavit sufficient. Specifically, it indicated that an identified vehicle that the defendant had been driving when previously stopped by an officer was parked outside of his girlfriend's apartment. A second vehicle registered to the defendant's girlfriend was also in the parking lot. Although the defendant's girlfriend told police that no one should be inside the apartment and the defendant was last there a few days earlier, the police heard several male voices inside the apartment. This constituted sufficient evidence from which the magistrate could find probable cause to believe the defendant was inside the apartment. After the officers entered the apartment on the first warrant, they found a partially smoked marijuana cigarette. They then applied for and obtained a second warrant to search the apartment for drugs, firearms, ammunition, and other identified material relating to the drug possession. The following statement of facts provided the basis to establish probable cause: "While executing a search warrant for a wanted person marijuana was in [sic] observed in plain view. Based on this discovery it is my reasonable belief that more narcotics will be located upon a further search." The defendant argued that the affidavit was defective because it failed to connect the marijuana to the apartment to be searched. Although the affidavit did not state that the search warrant for the defendant was executed at the address identified to be searched, the court found that "it is clear from a common sense reading of the affidavit that the place to be searched was the same place 6searched

during the execution of the prior search warrant" and thus that the affidavit was not fatally defective. Finally, the defendant argued that the trial court erred in concluding there was probable cause to believe firearms and ammunition would be found at the apartment based on the discovery of the partially smoked marijuana cigarette. The court disagreed, concluding that "Where criminal activity has been discovered at the apartment, we find the trial court did not err in concluding there was a reasonable basis for the magistrate to believe firearms would be found."

District court exceeded authority by ordering general search of defendant's person, vehicle and residence for unspecified "weapons" as provision of DVPO; court rejected State's contention that DVPO served as valid search warrant or that other warrant exception applied

State v. Elder, __ N.C. App. __, 753 S.E.2d 504 (Jan. 21, 2014), *writ allowed,* __ N.C. __, 755 S.E.2d 607 (Mar. 6, 2014). (1) The district court exceeded its statutory authority by ordering a general search of the defendant's person, vehicle, and residence for unspecified "weapons" as a provision of the ex parte DVPO under G.S. 50B-3(a)(13). Thus, the resulting search of the defendant's home was unconstitutional. (2) The court rejected the State's argument the ex parte DVPO served as a valid search warrant. (3) The court rejected the State's argument that exigent circumstances (the need to perform a "protective sweep" of the defendant's home) supported the warrantless search. The trial court made no findings as to any exigent circumstances or the need for a protective sweep and the State did not contend, nor did the trial court conclude, that the officers had probable cause to suspect any particular criminal activity when they approached the defendant's home. (4) Finally, the court rejected the State's argument that the good faith exception applied. The court noted that the good faith exception might have applied if the defendant challenged the search only under the US constitution; here, however the defendant also challenged the search under the NC Constitution, and there is a no good faith exception to the exclusionary rule applied as to violations of the state Constitution.

Defendant lacked standing to challenge search of warehouse in which he had no ownership or possessory interest

State v. Rodelo, __ N.C. App. __, 752 S.E.2d 766 (Jan. 7, 2014). Where the defendant had no ownership or possessory interest in the warehouse that was searched, he had no standing to challenge the search on Fourth Amendment grounds.

Search warrant was supported by probable cause: (1) information in affidavit that defendant had previously shown victim pornographic images was not stale where items to be searched for had enduring utility to defendant; (2) officer's mistakes in affidavit were not result of false and misleading information and affidavit was sufficient to provide probable cause absent mistaken information; (3) fact that magistrate considered officer's sworn testimony but did not record it was not basis for suppressing evidence

State v. Rayfield, __ N.C. App. __, 752 S.E.2d 745 (Jan. 7, 2014). In this child sex case, the trial court did not err by denying the defendant's motion to suppress evidence obtained pursuant to a search warrant authorizing a search of his house. The victim told the police about various incidents occurring in several locations (the defendant's home, a motel, etc.) from the time that she was eight years old until she was eleven. The affidavit alleged that the defendant had shown the victim pornographic videos and images in his home. The affidavit noted that the defendant is a registered sex offender and requested a search warrant to search his home for magazines, videos, computers, cell phones, and thumb drives. The court

first rejected the defendant's argument that the victim's information to the officers was stale, given the lengthy gap of time between when the defendant allegedly showed the victim the images and the actual search. It concluded: "Although [the victim] was generally unable to provide dates to the attesting officers . . . her allegations of inappropriate sexual touching by Defendant over a sustained period of time allowed the magistrate to reasonably conclude that probable cause was present to justify the search of Defendant's residence." It went on to note that "when items to be searched are not inherently incriminating [as here] and have enduring utility for the person to be searched, a reasonably prudent magistrate could conclude that the items can be found in the area to be searched." It concluded:

> There was no reason for the magistrate in this case to conclude that Defendant would have felt the need to dispose of the evidence sought even though acts associated with that evidence were committed years earlier. Indeed, a practical assessment of the information contained in the warrant would lead a reasonably prudent magistrate to conclude that the computers, cameras, accessories, and photographs were likely located in Defendant's home even though certain allegations made in the affidavit referred to acts committed years before.

The court also rejected the defendant's argument that the affidavit was based on false and misleading information, concluding that to the extent the officer-affiant made mistakes in the affidavit, they did not result from false and misleading information and that the affidavit's remaining content was sufficient to establish probable cause. Finally, the court held that although the magistrate violated G.S. 15A-245 by considering the officer's sworn testimony when determining whether probable cause supported the warrant but failing to record that testimony as required by the statute, this was not a basis for granting the suppression motion. Significantly, the trial court based its ruling solely on the filed affidavit, not the sworn testimony and the affidavit was sufficient to establish probable cause.

Exigent circumstances supported warrantless blood draw in DWI case

State v. Dahlquist, __ N.C. App. __, 752 S.E.2d 665 (Dec. 3, 2013). In this DWI case, the trial court properly denied the defendant's motion to suppress evidence obtained from blood samples taken at a hospital without a search warrant where probable cause and exigent circumstances supported the warrantless blood draw. Noting the U.S. Supreme Court's recent decision in *Missouri v. McNeely* (the natural dissipation of alcohol in the bloodstream does not constitute an exigency in every case sufficient to justify conducting a blood test without a warrant), the court found that the totality of the circumstances supported the warrantless blood draw. Specifically, when the defendant pulled up to a checkpoint, an officer noticed the odor of alcohol and the defendant admitted to drinking five beers. After the defendant failed field sobriety tests, he refused to take an intoxilyzer test. The officer then took the defendant to the hospital to have a blood sample taken without first obtaining a search warrant. The officer did this because it would have taken 4-5 hours to get the sample if he first had to travel to a magistrate for a warrant. The court noted however that the "'video transmission' option that has been allowed by G.S. 15A-245(a)(3) [for communicating with a magistrate] . . . is a method that should be considered by arresting officers in cases such as this where the technology is available." It also advised: "[W]e believe the better practice in such cases might be for an arresting officer, where practical, to call the hospital and the [magistrate's office] to obtain information regarding the wait times on that specific night, rather than relying on previous experiences."

Miranda

Any error in introducing defendant's statements made post-*Miranda*-warning while being transported in camera-equipped police vehicle was harmless given that statements were of limited relevance and not particularly prejudicial

State v. Council, __ N.C. App. __, 753 S.E.2d 223 (Jan. 21, 2014). No prejudicial error occurred when the trial court denied the defendant's motion to suppress statements made by him while being transported in a camera-equipped police vehicle. After being read his *Miranda* rights, the defendant invoked his right to counsel. He made the statements at issue while later being transported in the vehicle. The court explained that to determine whether a defendant's invoked right to counsel has been waived, courts must consider whether the post-invocation interrogation was police-initiated and whether the defendant knowingly and intelligently waived the right. Although the trial court did not apply the correct legal standard and failed to make the necessary factual findings, any error was harmless beyond a reasonable doubt, given that the defendant's statements contained little relevant evidence, they were not "particularly prejudicial," and the other evidence in the case in strong.

Other Search and Investigation Issues

Police acted reasonably in using deadly force to end high speed car chase

Plumhoff v. Rickard, 572 U.S. __ (May 27, 2014). Officers did not use excessive force in violation of the Fourth Amendment when using deadly force to end a high speed car chase. The chase ended when officers shot and killed the fleeing driver. The driver's daughter filed a § 1983 action, alleging that the officers used excessive force in terminating the chase in violation of the Fourth Amendment. Given the circumstances of the chase—among other things, speeds in excess of 100 mph when other cars were on the road—the Court found it "beyond serious dispute that [the driver's] flight posed a grave public safety risk, and . . . the police acted reasonably in using deadly force to end that risk." Slip Op. at 11. The Court went on to reject the respondent's contention that, even if the use of deadly force was permissible, the officers acted unreasonably in firing a total of 15 shots, stating: "It stands to reason that, if police officers are justified in firing at a suspect in order to end a severe threat to public safety, the officers need not stop shooting until the threat has ended." *Id.*

Further findings of fact were necessary as to whether officer had lawful right of access to evidence in plain view

State v. Alexander, __ N.C. App. __, 755 S.E.2d 82 (Mar. 18, 2014). The court remanded for findings of fact as to the third element of the plain view analysis. Investigating the defendant's involvement in the theft of copper coils, an officer walked onto the defendant's mobile home porch and knocked on the door. From the porch, the officer saw the coils in an open trailer parked at the home. The officer then seized the coils. The court noted that under the plain view doctrine, a warrantless seizure is lawful if the officer views the evidence from a place where he or she has legal right to be; it is immediately apparent that the items observed constitute evidence of a crime, are contraband, or are subject to seizure based upon probable cause; and the officer has a lawful right of access to the evidence itself. The court found that the officer viewed the coils from the porch, a location where he had a legal right to be. In the course of its ruling, the court clarified that inadvertence is not a necessary condition of a lawful search

pursuant to the plain view doctrine. Next, noting in part that the coils matched the description of goods the officer knew to be stolen, the court concluded that the trial court's factual findings supported its conclusion that it was immediately apparent to the officer that the coils were evidence of a crime. On the third element of the test however—whether the officer had a lawful right of access to the evidence—the trial court did not make the necessary findings. Specifically, the court noted:

> Here, the trial court failed to make any findings regarding whether the officer[] had legal right of access to the coils in the trailer. The trial court did not address whether the trailer was located on private property leased by defendant, private property owned by the mobile home park, or public property. It also did not make any findings regarding whether, assuming that the trailer was located on private property, the officer[] had legal right of access either by consent or due to exigent circumstances.

Equally divided court leaves undisturbed decision below having no precedential value regarding jurisdictional and vehicle stop issues

State v. Franklin, __ N.C. __, 752 S.E.2d 143 (Dec. 20, 2013). With one Justice taking no part in the decision and the remaining members of the court equally divided, the court left undisturbed the opinion below, which stands without precedential value. In the opinion below, *State v. Franklin*, __ N.C. App. __, 736 S.E.2d 218 (2012), the court of appeals (1) rejected the defendant's argument that the trial court lacked jurisdiction to enter its written order on his motion to suppress because the order differed materially from the court's oral ruling; (2) held that the trial court had jurisdiction to enter a written order denying the defendant's motion to suppress when the written order was entered after the defendant had given notice of appeal but had the effect of merely reducing the court's oral ruling to writing; (3) held over a dissent that where officers have probable cause to believe that a traffic infraction (here, a seatbelt violation) has occurred, it is irrelevant whether their stop of the vehicle on that basis was a pretext; (4) held over a dissent that a vehicle stop made on the basis of a seatbelt violation was sufficiently limited in scope and duration where the stop lasted ten minutes and the officer's actions related to the stop; and (5) held that although a passenger who has no possessory interest in a vehicle has standing to challenge a stop of the vehicle, that passenger does not have standing to challenge a search of the vehicle.

Consent of co-occupant to search premises was valid when given after an objecting co-occupant was arrested and removed from premises

Fernandez v. California, 571 U.S. __ (Feb. 25, 2014). Consent to search a home by an abused woman who lived there was valid when the consent was given after her male partner, who objected, was arrested and removed from the premises by the police. Cases firmly establish that police officers may search jointly occupied premises if one of the occupants consents. In *Georgia v. Randolph*, 547 U. S. 103 (2006), the Court recognized a narrow exception to this rule, holding that the consent of one occupant is insufficient when another occupant is present and objects to the search. In this case, the Court held that *Randolph* does not apply when the objecting occupant is absent when another occupant consents. The Court emphasized that *Randolph* applies only when the objecting occupant is physically present. Here, the defendant was not present when the consent was given. The Court rejected the defendant's argument that *Randolph* controls because his absence should not matter since he was absent only because the police had taken him away. It also rejected his argument that it was sufficient that he objected to the search while he was still present. Such an objection, the defendant argued should

remain in effect until the objecting party no longer wishes to keep the police out of his home. The Court determined both arguments to be unsound.

Licensed security officer was not state agent

State v. Weaver, __ N.C. App. __, 752 S.E.2d 240 (Dec. 17, 2013). In granting the defendant's motion to suppress in a DWI case, the trial court erred by concluding that a licensed security officer was a state actor when he stopped the defendant's vehicle. Determining whether a private citizen is a state actor requires consideration of the totality of the circumstances, with special consideration of the citizen's motivation for the search or seizure; the degree of governmental involvement, such as advice, encouragement, and knowledge about the nature of the citizen's activities; and the legality of the conduct encouraged by the police. Importantly, the court noted, once a private search or seizure has been completed, later involvement of government agents does not transform the original intrusion into a governmental search. In the alternative, the court held that even if the security officer was a state actor, reasonable suspicion existed for the stop. Separately, the court found that a number of the trial court's factual findings were not supported by the record.

Pretrial and Trial Procedure

Right to Counsel

Defendant forfeited right to counsel by waiving appointed counsel, firing private counsel, refusing to state wishes regarding representation, refusing to participate in trial, and absenting himself from courtroom

State v. Mee, __ N.C. App. __, 756 S.E.2d 103 (April 15, 2014). The defendant forfeited his right to counsel where he waived the right to appointed counsel, retained and then fired counsel twice, was briefly represented by an assistant public defender, repeatedly refused to state his wishes with respect to representation, instead arguing that he was not subject to the court's jurisdiction, would not participate in the trial, and ultimately chose to absent himself from the courtroom during the trial. The court rejected the defendant's argument that he should not be held to have forfeited his right to counsel because he did not threaten counsel or court personnel and was not abusive. The court's opinion includes extensive colloquies between the trial court and the defendant.

Counsel was not ineffective; contrary to defendant's assertion, hearsay elicited by counsel did not contradict claim of self-defense; no reasonable possibility that failing to object to evidence that defendant sold drugs on prior occasion affected outcome; failing to move to dismiss charges at close of evidence not ineffective assistance where no likelihood court would have granted motion

State v. Allen, __ N.C. App. __, 756 S.E.2d 852 (April 15, 2014). Considering the defendant's ineffective assistance of counsel claim on appeal the court rejected his contention that counsel was ineffective by eliciting hearsay evidence that conflicted with his claim of self-defense, concluding that the evidence did not contradict this defense. It also rejected his contention that counsel was ineffective by failing to object to evidence that the defendant sold drugs on a prior occasion, concluding that even if this constituted deficient representation, there was no reasonable possibility that the error affected the outcome of the case. Finally, the court rejected the defendant's contention that counsel was ineffective

by failing to move to dismiss the charges at the close of the evidence, concluding that given the evidence there was no likelihood that the trial court would have granted the motion.

Trial court did not err by failing to inquire into potential conflict where defendant never asserted conflict but only that he was unhappy with counsel's performance

State v. Holloman, __ N.C. App. __, 751 S.E.2d 638 (Dec. 17, 2013). The trial court did not abuse its discretion by denying an indigent defendant's request for substitute counsel. The court rejected the defendant's argument that the trial court erred by failing to inquire into a potential conflict of interest between the defendant and counsel, noting that the defendant never asserted a conflict, only that he was unhappy with counsel's performance.

Counsel was ineffective where he made inexcusable mistake of law in failing to understand resources that state law made available to him for hiring expert witness

Hinton v. Alabama, 571 U.S. __ (Feb. 24, 2014). Defense counsel in a capital case rendered deficient performance when he made an "inexcusable mistake of law" causing him to employ an expert "that he himself deemed inadequate." Counsel believed that he could only obtain $1,000 for expert assistance when in fact he could have sought court approval for "any expenses reasonably incurred." The Court clarified:

> We wish to be clear that the inadequate assistance of counsel we find in this case does not consist of the hiring of an expert who, though qualified, was not qualified enough. The selection of an expert witness is a paradigmatic example of the type of "strategic choic[e]" that, when made "after thorough investigation of [the] law and facts," is "virtually unchallengeable." We do not today launch federal courts into examination of the relative qualifications of experts hired and experts that might have been hired. The only inadequate assistance of counsel here was the inexcusable mistake of law—the unreasonable failure to understand the resources that state law made available to him—that caused counsel to employ an expert that he himself deemed inadequate.

Slip Op. at 12 (citation omitted). The court remanded for a determination of whether counsel's deficient performance was prejudicial.

Pleadings

G.S. 15A-928 does not apply to offense of felon in possession of firearm

State v. Alston, __ N.C. App. __, 756 S.E.2d 70 (April 1, 2014). Following *State v. Jeffers*, 48 N.C. App. 663, 665-66 (1980), the court held that G.S. 15A-928 (allegation and proof of previous convictions in superior court) does not apply to the crime of felon in possession of a firearm.

District court improperly allowed charging document to be amended to charge different crime

State v. Carlton, __ N.C. App. __, 753 S.E.2d 203 (Jan. 21, 2014). The superior court lacked jurisdiction to try the defendant for possession of lottery tickets in violation of G.S. 14-290. An officer issued the defendant a citation for violating G.S. 14-291 (acting as an agent for or on behalf of a lottery). The

district court allowed the charging document to be amended to charge a violation of G.S. 14-290. The defendant was convicted in district court, appealed, and was again convicted in superior court. The court held that the district court improperly allowed the charging document to be amended to charge a different crime.

(1) Indictment charging obtaining property by false pretenses was defective; (2) Indictment charging trafficking in stolen identities was defective

State v. Jones, __ N.C. __, __ S.E.2d __ (Mar. 7, 2014). (1) Affirming the decision below in *State v. Jones*, __ N.C. App. __, 734 S.E.2d 617 (Nov. 20, 2012), the court held that an indictment charging obtaining property by false pretenses was defective where it failed to specify with particularity the property obtained. The indictment alleged that the defendant obtained "services" from two businesses but did not describe the services. (2) The court also held that an indictment charging trafficking in stolen identities was defective because it did not allege the recipient of the identifying information or that the recipient's name was unknown.

When State alleges specific felony facilitated in first-degree kidnapping indictment, it is bound by that allegation

State v. McRae, __ N.C. App. __, 752 S.E.2d 731 (Jan. 7, 2014). The trial court erred by denying the defendant's motion to dismiss a charge of first-degree kidnapping where the indictment alleged that the confinement, restraint, and removal was for the purpose of committing a felony larceny but the State failed to present evidence of that crime. Although the State is not required to allege the specific felony facilitated, when it does, it is bound by that allegation.

Discovery

(1) State had right to appeal trial court's dismissal of charges based on discovery violation, but had no right to appeal trial court's order precluding certain testimony as a sanction for a discovery violation; (2) Trial court erred by dismissing charges based on State's discovery violation where there was no evidence that exculpatory material was ever in State's possession

State v. Foushee, __ N.C. App. __, __ S.E.2d __ (May 20, 2014). (1) Although the State had a right to appeal the trial court's order dismissing charges because of a discovery violation, it had no right to appeal the trial court's order precluding testimony from two witnesses as a sanction for a discovery violation. (2) The trial court erred by dismissing charges after finding that the State violated the discovery statutes by failing to obtain and preserve a pawn shop surveillance video of the alleged transaction at issue. On 7 August 2012, defense counsel notified that State that there was reason to believe another person had been at the pawn shop on the date of the alleged offense and inquired if the State had obtained a surveillance video from the pawn shop. On 18 February 2013, trial counsel made another inquiry about the video. The prosecutor then spoke with an investigator who went to the pawn shop and learned that the video had been destroyed six months ago. Before the trial court, the defendant successfully argued that the State was "aware of evidence that could be exculpatory and acted with negligence to allow it to be destroyed." On appeal, the court rejected this argument, noting that there was no evidence that the video was ever in the State's possession and under the discovery

statutes, the State need only disclose matters in its possession; it need not conduct an independent investigation to locate evidence favorable to a defendant.

Upon request, lawyer must afford client opportunity to meaningfully review all relevant discovery material unless lawyer believes it is in the best interest of client's defense not to do so

2013 Formal Ethics Opinion 2, at http://www.ncbar.com/ethics/
January 24, 2014
Providing Defendant with Discovery During Representation

Opinion rules that if, after providing a criminal client with a summary/explanation of the discovery materials in the client's file, the client requests access to the entire file, the lawyer must afford the client the opportunity to meaningfully review all of the relevant discovery materials unless the lawyer believes it is in the best interest of the client's legal defense not to do so.

Jury Issues: Selection, Instructions, and Deliberations

Trial court did not err by denying defendant's request for instruction on self-defense in possession of firearm by felon case

State v. Monroe, __ N.C. App. __, 756 S.E.2d 376 (April 15, 2014). Over a dissent, the court held that even assuming arguendo that the rationale in *United States v. Deleveaux*, 205 F.3d 1292 (11th Cir. 2000), applies in North Carolina, the trial court did not err by denying the defendant's request to give a special instruction on self-defense as to the charge of possession of a firearm by a felon. The majority concluded that the evidence did not support a conclusion that the defendant possessed the firearm under unlawful and present, imminent, and impending threat of death or serious bodily injury.

By failing to object, defendant waived right to appeal issue of whether trial court erred by informing prospective jurors that defendant had given notice of self-defense

State v. Clark, __ N.C. App. __, 752 S.E.2d 709 (Dec. 17, 2013). By failing to object, the defendant waived his right to appeal the issue of whether the trial court erred by informing prospective jurors, pursuant to G.S. 15A-1213, that the defendant had given notice of self-defense. During jury selection, the trial court stated: "Defendant, ladies and gentlemen, has entered a plea of not guilty and given the affirmative defense of self-defense." The court rejected the defendant's argument that the trial judge acted contrary to the statutory mandate of G.S. 15A-905(c), a discovery statute providing that on the State's motion, the defendant must give notice of an intent to offer certain defenses at trial, including self-defense, and that the defendant's notice of defense is inadmissible at trial. The court stated that the trial judge did not act contrary to the statutory mandate on orienting the jury in G.S. 15A-1213 and, in fact, complied with it. Therefore, as the defendant failed to preserve the issue, the court declined to address the merits of his argument on appeal. [Note also that the defendant relied on self-defense at trial.]

Trial court did not plainly err by failing to instruct on self-defense where court stated that jury must find that defendant committed offense without excuse or justification and defendant agreed to instruction at charge conference

State v. Allen, __ N.C. App. __, 756 S.E.2d 852 (April 15, 2014). The trial court did not commit plain error by failing to instruct the jury on self-defense with respect to a charge of discharging a firearm into an occupied vehicle. The trial court instructed the jury regarding self-defense in its instructions for attempted first-degree murder and assault. For the discharging a firearm charge, the trial court did not give the full self-defense instruction, but rather stated that the jury must find whether the defendant committed the offense without justification or excuse. At the jury instruction conference the defendant agreed to this instruction. The court found that the trial court placed the burden of proof on the State to satisfy the jury beyond a reasonable doubt that the defendant did not act in self-defense when he shot at the car. It also noted that the defendant agreed to the proposed instruction and that the jury found the defendant guilty of the other charges even though each included a self-defense instruction.

In DWI case trial court did not err by denying requested special jury instructions and instead instructing using Pattern Jury Instruction 270.20A

State v. Beck, __ N.C. App. __, 756 S.E.2d 80 (April 1, 2014), *temporary stay allowed*, __ N.C. __, __ S.E.2d __ (April 23, 2014). In this impaired driving case, the trial court did not err by denying the defendant's requested special jury instruction and instructing instead using Pattern Jury Instruction 270.20A. The special instructions would have informed the jury that the results of the chemical analysis did not create a presumption that the defendant was impaired or that the defendant had an alcohol concentration of .08 or greater; the jury was permitted to find that the defendant had an alcohol concentration of .08 or greater based on the results of the chemical analysis but was not required to do so; and the jury was allowed to consider the credibility and weight to be accorded to the results of the chemical analysis.

Not error to deny request for instruction about knowing possession or transportation where defendant presented no evidence of confusion or mistake regarding nature of illegal drugs carried by accomplice

State v. Beam, __ N.C. App. __, 753 S.E.2d 232 (Jan. 21, 2014). In a case in which the defendant was convicted of possession of heroin and trafficking in opium or heroin by transportation, the trial court did not err by denying the defendant's request for an instruction about knowing possession or transportation. The court concluded that the requested instruction was not required because the defendant did not present any evidence that he was confused or mistaken about the nature of the illegal drug his accomplice was carrying.

Trial court did not abuse discretion by denying defendant's challenges for cause of two prospective jurors

State v. Sherman, __ N.C. App. __, 752 S.E.2d 782 (Jan. 7, 2014). The trial court did not abuse its discretion by denying the defendant's challenges for cause of two prospective jurors. The defendant asserted that the first juror stated that he would form opinions during trial. Because the juror stated upon further questioning that he would follow the judge's instructions, the trial court did not abuse its discretion by denying the challenge of this juror. Next, the defendant argued that the trial court erred when it denied his for-cause challenge to a second juror who was a Marine with orders to report to Quantico, Virginia, before the projected end of trial. The trial court did not abuse its discretion in refusing to allow the for-cause challenge where the juror twice asserted that despite his orders to report, he could focus on the trial if he was selected as a juror.

Trial court properly answered jury's question about State's proof regarding weapon in a robbery charge

State v. Snelling, __ N.C. App. __, 752 S.E.2d 739 (Jan. 7, 2014). Distinguishing *State v. Hockett*, 309 N.C. 794, 800 (1983) (trial court erred by refusing to answer deliberating jury's question), the court held that the trial court properly answered the jury's question about the State's proof regarding the weapon in a robbery charge.

Trial court did not err by declining to instruct jury on involuntary manslaughter where evidence showed defendant stabbed victim through a screen door after a fight

State v. Epps, __ N.C. App. __, 752 S.E.2d 733 (Jan. 7, 2014). In a first-degree murder case, the court held, over a dissent, that the trial court did not err by declining to instruct the jury on involuntary manslaughter. The evidence showed that the defendant fought with the victim in the yard. Sometime later the defendant returned to the house and the victim followed him. As the victim approached the screen door, the defendant stabbed and killed the victim through the screen door. The knife had a 10-12 inch blade, the defendant's arm went through the screen door up to the elbow, and the stab wound pierced the victim's lung, nearly pierced his heart and was approximately 4 1/2 inches deep. The court rejected the defendant's argument that his case was similar to those that required an involuntary manslaughter instruction where the "defendant instinctively or reflexively lashed out, involuntarily resulting in the victim's death." Here, the court held, the "defendant's conduct was entirely voluntary."

(1) Trial court did not err by failing to intervene ex mero motu when prosecutor referred to complainants as "victims"; (2) Trial court did not commit plain error by using word "victim" in jury instructions

State v. Jones, __ N.C. App. __, 752 S.E.2d 212 (Dec. 17, 2013). (1) In this child sex case, the trial court did not err by failing to intervene ex mero motu when the prosecutor referred to the complainants as "victims." (2) The trial court did not commit plain error by using the word "victim" in the jury instructions. The court distinguished *State v. Walston*, __ N.C. App. __, 747 S.E.2d 720, 726, 728 (2013) (trial court's use of the term "victim" in jury instructions was prejudicial error). First, in *Walston,* the trial court denied the defendant's request to modify the pattern jury instructions to use the term "alleged victim" in place of the term "victim," and objected repeatedly to the proposed instructions; here, no such request or objection was made. Second, in *Walston*, the evidence was conflicting as to whether the alleged sexual offenses occurred; here no such conflict existed. Finally, in *Walston* the trial court committed prejudicial error; here, the defendant did not assert that he suffered any prejudice because of the use of the term "victim."

No plain error occurred when trial court failed to instruct that jury must return "not guilty" verdict if it did not conclude that defendant committed first-degree murder on basis of premeditation and deliberation

State v. Gosnell, __ N.C. App. __, 750 S.E.2d 593 (Dec. 3, 2013). Distinguishing *State v. McHone*, 174 N.C. App. 289, 294 (2005), the court held that no plain error occurred when the trial court failed to instruct that the jury would or must return a "not guilty" verdict if it did not conclude that the defendant committed first-degree murder on the basis of premeditation and deliberation. The court noted that the verdict sheet provided a space for a "not guilty" verdict and the trial court's instructions on second-degree murder and the theory of lying in wait comported with the *McHone* final mandate requirement.

With respect to premeditation and deliberation, the instruction stated, in part: "If you do not so find or have a reasonable doubt as to one or more of these things you would not return a verdict of "guilty of first-degree murder" on the basis of malice, premeditation and deliberation."

Other Procedural Issues

Double jeopardy barred State's appeal of trial court order dismissing charges for insufficiency of the evidence after State declined to participate in trial

Martinez v. Illinois, 572 U.S. __ (May 27, 2014). Double jeopardy barred the State's appeal of a trial court order dismissing charges for insufficiency of the evidence. After numerous continuances granted to the State because of its inability to procure its witnesses for trial, the defendant's case was finally called for trial. When the trial court expressed its intention to proceed the prosecutor unsuccessfully asked for another continuance and informed the court that without a continuance "the State will not be participating in the trial." The jury was sworn and the State declined to make an opening statement or call any witnesses. The defendant then moved for a directed not-guilty verdict, which the court granted. The State appealed. The Court held that double jeopardy barred the State's attempt to appeal, reasoning that jeopardy attached when the jury was sworn and that the dismissal constituted an acquittal.

(1) Trial court did not err by denying motion to dismiss second-degree murder charge where court submitted jury instructions on both second-degree murder and voluntary manslaughter; (2) It was not an abuse of discretion to require defendant to wear restraint at trial where restraint was not visible to jury and trial court considered defendant's past convictions and failures to appear

State v. Posey, __ N.C. App. __, __ S.E.2d __ (May 6, 2014). (1) In this murder case where the trial court submitted jury instructions on both second-degree murder and voluntary manslaughter, the court rejected the defendant's argument that the trial court erred by denying his motion to dismiss the second-degree murder charge. The defendant argued that there was insufficient evidence that he acted with malice and not in self-defense. The court noted that any discrepancy between the State's evidence and the defendant's testimony was for the jury to resolve. (2) The trial court did not abuse its discretion by requiring the defendant to wear restraints at trial. The defendant, who was charged with murder and other crimes, objected to having to wear a knee brace at trial. The brace was not visible to the jury and made no noise. At a hearing on the issue, a deputy testified that it was "standard operating procedure" to put a murder defendant "in some sort of restraint" whenever he or she was out of the sheriff's custody. Additionally, the trial court considered the defendant's past convictions and his five failures to appear, which it found showed "some failure to comply with the [c]ourt orders[.]" The trial court also considered a pending assault charge that arose while the defendant was in custody.

Possession of firearm by felon is not a "civil regulatory measure" but rather a criminal offense that can be joined with another criminal charge

State v. Alston, __ N.C. App. __, 756 S.E.2d 70 (April 1, 2014). The court rejected the defendant's argument that he received ineffective assistance of counsel when his lawyer failed to object to joinder of the defendant's charges of armed robbery and possession of a firearm by a felon. The defendant argued that the felon in possession statute was a "civil regulatory measure" that could not be joined

with a criminal charge. The court held that felon in possession is a criminal offense that was properly joined for trial.

Trial court not required to intervene ex mero motu regarding possibly improper comments

State v. Sargent, __ N.C. App. __, 755 S.E.2d 91 (Mar. 18, 2014). Where the defendant opened the door to the credibility of a defense witness, the prosecutor's possibly improper comments regarding the witness's credibility were not so grossly improper as to require intervention by the trial court ex mero motu. Among other things, the prosecutor stated: "that man would not know the truth if it came up and slapped him in the head."

(1) No speedy trial violation where no evidence to show neglect or willfulness caused delay and no showing of actual substantial prejudice; (2) Comment in closing statements about defendant's failure to produce witnesses or evidence was not impermissible comment on right to remain silent

State v. Goins, __ N.C. App. __, 754 S.E.2d 195 (Feb. 18, 2014). (1) No speedy trial violation occurred when there was a 27-month delay between the indictments and trial. Among other things, the defendant offered no evidence that the State's neglect or willfulness caused a delay and failed to show actual, substantial prejudice caused by the delay. (2) By commenting in closing statements that the defendant failed to produce witnesses or evidence to contradict the State's evidence, the prosecutor did not impermissibly comment on the defendant's right to remain silent.

Retrial following dismissal due to fatal variance in charging instrument was not double jeopardy violation

State v. Chamberlain, __ N.C. App. __, 753 S.E.2d 725 (Feb. 4, 2014). No double jeopardy violation occurs when the State retries a defendant on a charging instrument alleging the correct offense date after a first charge was dismissed due to a fatal variance.

G.S. 15A-267(c) (defendant's access to DNA samples) is not intended to establish the absence of DNA evidence

State v. McLean, __ N.C. App. __, 753 S.E.2d 235 (Jan. 21, 2014). In a case involving attempted murder and other charges related to a discharge of a firearm, the court held that the trial court did not err by denying the defendant's pre-trial motion for DNA testing, pursuant to G.S. 15A-267(c), of shell casings recovered from the crime scene. The defendant's motion indicated that he wanted "to test the shell casings to see if there is any DNA material on the shell casings that may be compared to the Defendant." The defendant also moved for fingerprint testing on the shell casings. The trial court denied the motion for DNA testing but ordered that the shell casings be subjected to fingerprint testing. The casings were tested and no fingerprints were found. The court determined that the absence of the defendant's DNA on the shell casings, even if established, would not have a logical connection or be significant to the defendant's alibi defense. Additionally, the court noted that the purpose of the defendant's request was to demonstrate the absence of his DNA on the shell casings but the plain language of G.S. 15A-267(c) contemplates DNA testing for ascertained biological material—it is not intended to establish the absence of DNA evidence.

Not a violation of right to public trial to close courtroom during presentation of sexual images at issue in sexual exploitation of minor case

State v. Williams, __ N.C. App. __, 754 S.E.2d 418 (Jan. 21, 2014). In a sexual exploitation of a minor case, the trial court did not violate the defendant's constitutional right to a public trial by closing the courtroom during the presentation of the sexual images at issue.

(1) Trial court did not err by failing to conduct sua sponte competency hearing where defendant voluntarily ingested intoxicants with apparent intent of affecting his competency; (2) By such conduct, defendant waived right to be present

State v. Minyard, __ N.C. App. __, 753 S.E.2d 176 (Jan. 7, 2014). (1) Where the defendant voluntarily ingested a large quantity of sedative, hypnotic or anxiolytic medications and alcohol during jury deliberations of his non-capital trial, the trial court did not err by failing to conduct a sua sponte competency hearing. The court relied on the fact that the defendant voluntarily ingested the intoxicants in a short period of time apparently with the intent of affecting his competency. (2) Defendant waived constitutional right to be present by engaging in such conduct.

A written order is not required on a motion to suppress where court gives rationale from bench and there are no material conflicts in the evidence

State v. Bartlett, __ N.C. App. __, 752 S.E.2d 237 (Dec. 17, 2013). A written order is not required on a motion to suppress when the trial court gives its rationale from the bench and there are no material conflicts in the evidence. Thus, the court determined it need not reach the issue of whether a judge who had not heard the evidence at the suppression hearing had authority to sign a written order granting the suppression motion.

(1) Trial court did not err on remand when it conducted a retrospective hearing to determine whether closure of the courtroom during the victim's testimony was proper under *Waller v. Georgia*

State v. Rollins, __ N.C. App. __, 752 S.E.2d 230 (Dec. 17, 2013). The trial court did not err on remand when it conducted a retrospective hearing to determine whether closure of the courtroom during the victim's testimony was proper under *Waller v. Georgia* and decided that question in the affirmative. The court rejected the defendant's argument that the trial court's findings of fact had to be based solely on evidence presented prior to the State's motion for closure; it also determined that the evidence supported the trial court's factual findings.

Jurisdiction was established where evidence showed that part of a child abduction occurred in North Carolina

State v. Lalinde, __ N.C. App. __, 750 S.E.2d 868 (Dec. 3, 2013). Where the evidence showed that part of a child abduction occurred in North Carolina jurisdiction was established and no jury instruction on jurisdiction was required. The defendant took the child from North Carolina to Florida. The court noted that jurisdiction over interstate criminal cases is governed by G.S. 15A-134 ("[i]f a charged offense occurred in part in North Carolina and in part outside North Carolina, a person charged with that offense may be tried in this State"). It was undisputed that the defendant picked up the child in North Carolina. Therefore, the child abduction occurred, at least in part, in North Carolina.

Evidence

Confrontation Clause

(1) *Melendez-Diaz* did not impact "continuing vitality" of notice and demand statute; (2) Notice in this case was deficient, but issue was not preserved for appeal

State v. Whittington, __ N.C. __, 753 S.E.2d 320 (Jan. 24, 2014). (1) *Melendez-Diaz* did not impact the "continuing vitality" of the notice and demand statute in G.S. 90-95(g); when the State satisfies the requirements of the statute and the defendant fails to file a timely written objection, a valid waiver of the defendant's constitutional right to confront the analyst occurs. (2) The State's notice under the statute in this case was deficient in that it failed to provide the defendant a copy of the report and stated only that "[a] copy of report(s) will be delivered upon request." However, the defendant did not preserve this issue for appeal. At trial he asserted only that the statute was unconstitutional under *Melendez-Diaz*; he did not challenge the State's notice under the statute. Justice Hudson dissented, joined by Justice Beasley, arguing that the majority improperly shifts the burden of proving compliance with the notice and demand statute from the State to defendant.

Trial court did not violate defendant's confrontation rights by precluding cross-examination of two State's witnesses regarding criminal charges pending against them in different prosecutorial districts

State v. Alston, __ N.C. App. __, 756 S.E.2d 70 (April 1, 2014). The trial court did not violate the defendant's confrontation rights by barring him from cross-examining two of the State's witnesses, Moore and Jarrell, about criminal charges pending against them in counties in different prosecutorial districts than the district in which defendant was tried. The court noted that the Sixth Amendment right to confrontation generally protects a defendant's right to cross-examine a State's witness about pending charges in the same prosecutorial district as the trial to show bias in favor of the State, since the jury may understand that pending charges may be used by the State as a weapon to control the witness. However, the trial judge has wide latitude to impose reasonable limits on such cross-examination based on, for example, concern that such interrogation is only marginally relevant. Here, the defendant failed to provide any evidence of discussions between the district attorney's office in the trial county and district attorneys' offices in the other counties where the two had pending charges. Additionally, Jarrell testified on cross-examination and Moore testified on voir dire that each did not believe testifying in this case could help them in any way with proceedings in other counties. On these facts, the court concluded that testimony regarding the witnesses' pending charges in other counties was, at best, marginally relevant. Moreover, the court noted, both Jarrell and Moore were thoroughly impeached on a number of other bases separate from their pending charges in other counties.

Expert Opinion Testimony

(1) Trial court did not abuse its discretion by excluding expert testimony after concluding that testimony was not based on sufficient facts or data or the product of reliable principles and methods; (2) Trial court did not err by excluding testimony of different expert regarding victim's proclivity for violence

State v. McGrady, __ N.C. App. __, 753 S.E.2d 361 (Jan. 21, 2014). (1) In murder case involving a claim of self-defense, the court applied amended NC Evidence Rule 702 and held that the trial court did not abuse its discretion by excluding defense expert testimony regarding the doctrine of "use of force." The trial court concluded, among other things, that the expert's testimony was not based on sufficient facts or data or the product of reliable principles and methods. The court also rejected the defendant's argument that the trial court's ruling deprived him of a right to present a defense, noting that right is not absolute and defendants do not have a right to present evidence that the trial court, in its discretion, deems inadmissible under the evidence rules. (2) The trial court did not err by excluding defense expert testimony (from a different expert), characterized by the defendant as pertaining to the victim's proclivity toward violence. The court noted that where self-defense is at issue, evidence of a victim's violent or dangerous character may be admitted under Rule 404(a)(2) when such character was known to the accused or the State's evidence is entirely circumstantial and the nature of the transaction is in doubt. The court concluded that the witness's testimony did not constitute evidence of the victim's character for violence. On voir dire, the witness testified only that that the victim was an angry person who had thoughts of violence; the witness admitted having no information that the victim actually had committed acts of violence. Additionally, the court noted, there was no indication that the defendant knew of the victim's alleged violent nature and the State's case was not entirely circumstantial. The court also rejected the defendant's argument that the trial court's ruling deprived him of a right to present a defense, noting that right is not absolute and defendants do not have a right to present evidence that the trial court, in its discretion, deems inadmissible under the evidence rules.

Fifth Amendment does not prohibit government from introducing evidence from court-ordered mental evaluation of defendant to rebut defendant's presentation of expert testimony in support of defense of voluntary intoxication

Kansas v. Cheever, 571 U.S. __ (Dec. 11, 2013). The Fifth Amendment does not prohibit the government from introducing evidence from a court-ordered mental evaluation of a criminal defendant to rebut that defendant's presentation of expert testimony in support of a defense of voluntary intoxication. It explained:

> [We hold] that where a defense expert who has examined the defendant testifies that the defendant lacked the requisite mental state to commit an offense, the prosecution may present psychiatric evidence in rebuttal. Any other rule would undermine the adversarial process, allowing a defendant to provide the jury, through an expert operating as proxy, with a one-sided and potentially inaccurate view of his mental state at the time of the alleged crime.

Slip Op. at 5-6 (citation omitted). The Court went on to note that "admission of this rebuttal testimony harmonizes with the principle that when a defendant chooses to testify in a criminal case, the Fifth Amendment does not allow him to refuse to answer related questions on cross-examination." *Id.* at 6.

Other Evidence Issues

It was not plain error to allow introduction of certain photos of "defendant and others making various hand gestures" though appellate court was "uncertain of the relevance" of the photos

State v. Sterling, __ N.C. App. __, __ S.E.2d __ (May 6, 2014). In this felony-murder case, although the court was "uncertain of the relevance" of certain photos that the State introduced and questioned the defendant about regarding gang activity, the court found no plain error with respect to their introduction.

(1) Reversible error to allow complaint from wrongful death suit into evidence for purpose of proving fact alleged at criminal trial; (2) Reversible error to allow child custody complaint into evidence at criminal trial; (3) Child's statements to daycare workers were relevant to identity of assailant and admissible as excited utterances; (4) Trial court did not err by instructing that Fifth Amendment right to remain silent does not extend to questions asked by civilians

State v. Young, __ N.C. App. __, 756 S.E.2d 768 (April 1, 2014), *temporary stay allowed*, __ N.C. __, __ S.E.2d __ (Apr. 16, 2014). In this murder trial where the defendant was charged with killing his wife, various evidentiary issues arose: (1) The trial court committed reversible error by allowing into evidence a default judgment and complaint in a wrongful death suit stating that the defendant killed the victim. Admission of this evidence violated G.S. 1-149 (providing that "[n]o pleading can be used in a criminal prosecution against the party as proof of a fact admitted or alleged in it"). Although the State offered several cases where civil pleadings and judgments were admitted in subsequent criminal trials, the court noted that none of them "[i]involve default judgments against a defendant, wrongful death judgments against a defendant, or non-testifying defendants." Slip Op. at 33. Additionally, it noted, "these cases involve admitting pleadings and/or judgments in a civil case at a subsequent criminal trial for a different purpose than as proof of a fact alleged in the criminal trial." *Id.* (2) For the same reason, the trial court committed reversible error by allowing into evidence a child custody complaint that included statements that the defendant had killed his wife. (3) statements by the couple's child to daycare workers were relevant to the identity of the assailant. The child's daycare teacher testified that the child asked her for "the mommy doll." When the teacher gave the child a bucket of dolls, the child picked two dolls, one female with long hair and one with short hair, and hit them together. The teacher testified that she saw the child strike a "mommy doll" against another doll and a dollhouse chair while saying, "[M]ommy has boo-boos all over" and "[M]ommy's getting a spanking for biting. . . . [M]ommy has boo-boos all over, mommy has red stuff all over." The statemetns were admissible as excited utterances; (4) The trial court did not err by instructing the jury that "[e]xcept as it relates to the defendant's truthfulness, you may not consider the defendant's refusal to answer police questions as evidence of guilt in this case" but that "this Fifth Amendment protection applies only to police questioning. It does not apply to questions asked by civilians, including friends and family of the defendant and friends and family of the victim." The court rejected the defendant's argument that the trial court committed plain error by instructing the jury that it could consider his failure to speak with friends and family as substantive evidence of guilt, noting that the Fifth Amendment's protection against self-incrimination does not extend to questions asked by civilians.

Defendant's own statement was admissible as a statement of a party opponent

State v. Marion, __ N.C. App. __, 756 S.E.2d 61 (April 1, 2014). The defendant's own statements were admissible under the hearsay rule. The statements were recorded by a police officer while transporting the defendant from Georgia to North Carolina. The court noted that "[a] defendant's statement that is not purported to be a written confession is admissible under the exception to the hearsay rule for statements by a party-opponent and does not require the defendant's acknowledgement or adoption." Slip Op. at 8.

Evidence of victim's gang membership was irrelevant to self-defense claim

State v. Gayles, __ N.C. App. __, 756 S.E.2d 46 (April 1, 2014). In this murder case, the trial court did not err by excluding the defendant's proffered evidence about the victim's gang membership. The defendant asserted that the evidence was relevant to self-defense. However, none of the proffered evidence pertained to anything that the defendant actually knew at the time of the incident.

Defendant could not assert a Rule 404(b) argument for the first time on appeal

State v. Howard, __ N.C. __, 754 S.E.2d 417 (Mar. 7, 2014). The court affirmed per curiam the decision below in *State v. Howard,* __ N.C. App. __, 742 S.E.2d 858 (June 18, 2013) (over a dissent, the court dismissed the defendant's appeal where the defendant objected to the challenged evidence at trial under Rule 403 but on appeal argued that it was improper under Rule 404(b); the court stated: "A defendant cannot 'swap horses between courts in order to get a better mount'"; the dissenting judge believed that the defendant preserved his argument and that the evidence was improperly admitted).

(1) Trial court did not abuse discretion by allowing State to impeach its own witness; (2) Evidence elicited by State of defendant's recent incarceration was not improper under Rule 404(b)

State v. Goins, __ N.C. App. __, 754 S.E.2d 195 (Feb. 18, 2014). (1) The trial court did not abuse its discretion by allowing the State to impeach its own witness where the impeachment was not mere subterfuge to introduce otherwise inadmissible evidence. The court held that it need not decide whether the record showed that the State was genuinely surprised by the witness's reversal because the witness's testimony was "vital" to the State's case and the trial court gave a proper limiting instruction. (2) The court rejected the defendant's 404(b) challenge to evidence elicited by the State that a witness corresponded by mail with the defendant when he was in prison. The fact of "recent incarceration, in and of itself" does not constitute evidence of other crimes, wrongs, or acts within the meaning of the rule.

Not plain error to preclude defendant from questioning victim about unrelated first-degree murder charge pending against victim in another county because victim's credibility was otherwise impeached and victim's identification of defendant occurred before murder allegedly committed by victim

State v. Council, __ N.C. App. __, 753 S.E.2d 223 (Jan. 21, 2014). In a felony assault and robbery case, no plain error occurred when the trial court ruled that the defendant could not question the victim about an unrelated first-degree murder charge pending against him in another county at the time of trial. Normally it is error for a trial court to bar a defendant from cross-examining a State's witness regarding pending criminal charges, even if those charges are unrelated to those at issue. In such a situation, cross-examination can impeach the witness by showing a possible source of bias in his or her testimony,

to wit, that the State may have some undue power over the witness by virtue of its ability to control future decisions related to the pending charges. However, in this case the plain error standard applied. Given that the victim's "credibility was impeached on several fronts at trial" the court found that no plain error occurred. Moreover the court noted, the victim's most important evidence—his identification of the defendant as the perpetrator—occurred before the murder allegedly committed by the victim took place. As such, the court reasoned, his identification could not have been influenced by the pending charge. For similar reasons the court rejected the defendant's claim that counsel rendered ineffective assistance by failing to object to the State's motion in limine to bar cross-examination of the victim about the charge.

(1) Adult pornography found in defendant's home was admissible to establish motive or intent in child sex case; (2) Trial court did not err by allowing child witness to testify to sexual intercourse with defendant despite seven-year gap between incident with witness and incident with victim

State v. Rayfield, __ N.C. App. __, 752 S.E.2d 745 (Jan. 7, 2014). (1) In a child sex case, the trial court did not err by admitting adult pornography found in the defendant's home to establish motive or intent where the defendant showed the victim both child and adult pornography. Furthermore the trial court did not abuse its discretion by admitting this evidence under Rule 403. The trial court limited the number of magazines that were admitted and gave an appropriate limiting instruction. (2) The trial court did not err by allowing a child witness, A.L., to testify to sexual intercourse with the defendant. The court found the incidents sufficiently similar, noting among other things, that A.L. was assaulted in the same car as K.C. Although A.L. testified that the sex was consensual, she was fourteen years old at the time and thus could not legally consent to the sexual intercourse. The court found the seven-year gap between the incidents did not make the incident with A.L. too remote.

(1) A party is not required to establish a prior conviction before cross-examining a witness about the offense; (2) While generally limited in scope, broader cross-examination under Rule 609 may be permissible when defendant opens the door; (3) No error to allow State to impeach defendant with prior convictions despite fact that defendant stipulated he was convicted felon for felon in possession charge

State v. Gayles, __ N.C. App. __, 756 S.E.2d 46 (April 1, 2014). (1) Under Rule 609, a party is not required to establish a prior conviction before cross-examining a witness about the offense. (2) Although cross-examination under Rule 609 is generally limited to the name of the crime, the time and place of the conviction, and the punishment imposed, broader cross-examination may be allowed when the defendant opens the door. Here that occurred when the defendant tried to minimize his criminal record. (3) The trial court did not err by allowing the State to impeach the defendant with prior convictions when the defendant had stipulated that he was a convicted felon for purposes of a felon in possession of a firearm charge. The court declined to apply *Old Chief v. United States,* 519 U.S. 172 (1997), to this case where the defendant testified at trial and was subject to impeachment under Rule 609.

(1) In murder case, evidence of firearms, ammunition, and instructions for explosives was relevant to show defendant's advanced planning and state of mind; (2) Crime scene and autopsy photos were properly admitted

State v. Stewart, __ N.C. App. __, 750 S.E.2d 875 (Dec. 3, 2013). (1) In this multiple murder case where the defendant killed the victims with a shotgun, evidence of firearms and ammunition found in the defendant's residence, ammunition found in his truck, instructions for claymore mines found on his

kitchen table, and unfruitful searches of two residences for such mines was relevant to show the defendant's advanced planning and state of mind. (2) The trial court properly admitted crime scene and autopsy photographs of the victims' bodies. Forty-two crime scene photos were admitted to illustrate the testimony of the crime scene investigator who processed the scene. The trial court also admitted crime scene diagrams containing seven photographs. Additionally autopsy photos were admitted. The court easily concluded that the photos were relevant. Furthermore, the trial court did not abuse its discretion by finding the photographs admissible over the defendant's Rule 403 objection.

Crimes

Generally

(1) In trafficking and possession with intent drug case, evidence was insufficient to establish that defendant knowingly possessed controlled substance found in secret compartment of truck driven by defendant but owned by passenger; (2) Evidence was insufficient to support trafficking by conspiracy conviction

State v. Velazquez-Perez, __ N.C. App. __, 756 S.E.2d 869 (April 15, 2014), *temporary stay allowed*, __ N.C.__, __ S.E.2d __ (May 05, 2014). (1) In a case involving trafficking and possession with intent charges, the evidence was insufficient to establish that the defendant Villalvavo knowingly possessed the controlled substance. The drugs were found in secret compartments of a truck. The defendant was driving the vehicle, which was owned by a passenger, Velazquez-Perez, who hired Villalvavo to drive the truck. The court found insufficient incriminating circumstances to support a conclusion that Villalvavo acted knowingly with respect to the drugs; while evidence regarding the truck's log books may have been incriminating as to Velazquez-Perez, it did not apply to Villalvavo, who had not been working for Velazquez-Perez long and had no stake in the company or control over Velazquez-Perez. The court was unconvinced that Villalvavo's nervousness during the stop constituted adequate incriminating circumstances. (2) For similar reasons, the court held that the evidence was insufficient to support trafficking by conspiracy convictions against both defendants.

There was insufficient evidence that defendant had constructive possession of a rifle found in car in which defendant was a passenger

State v. Bailey, __ N.C. App. __, __ S.E.2d __ (May 6, 2014). In a possession of a firearm by a felon case, the State failed to produce sufficient evidence that the defendant had constructive possession of the rifle. The rifle, which was registered to the defendant's girlfriend was found in a car registered to the defendant but driven by the girlfriend. The defendant was a passenger in the car at the time. The rifle was found in a place where both the girlfriend and the defendant had equal access. There was no physical evidence tying the defendant to the rifle; his fingerprints were not found on the rifle, the magazine, or the spent casing. Although the gun was warm and appeared to have been recently fired, there was no evidence that the defendant had discharged the rifle because the gunshot residue test was inconclusive. Although the defendant admitted to an officer that he knew that the rifle was in the car, awareness of the weapon is not enough to establish constructive possession. In sum, the court concluded, the only evidence linking the defendant to the rifle was his presence in the vehicle and his knowledge that the gun was in the backseat.

(1) Trial court did not err by denying motion to dismiss charge of accessory after the fact where defendant gave conflicting statements and was not truthful regarding his knowledge of a murder; (2) Trial court did not err by denying motion to dismiss obstruction of justice charge based on same conduct; (3) No double jeopardy violation in sentencing defendant for obstruction of justice and accessory after the fact based on same conduct

State v. Cousin, __ N.C. App. __, __ S.E.2d __ (April 15, 2014). (1) The trial court did not err by denying the defendant's motion to dismiss a charge of accessory after the fact to murder where the defendant gave eight different written statements to authorities providing a wide array of scenarios surrounding the victim's death. In his statements the defendant identified four different individuals as being the perpetrator. He also admitted that he had not been truthful to investigators. The court concluded: "The jury could rationally have concluded that his false statements were made in an effort to shield the identity of the actual shooter." The court noted that competent evidence suggested that the defendant knew the identity of the shooter and was protecting that person, including knowledge of the scene that could only have been obtained by someone who had been there and statements made by the defendant to his former girlfriend. Additionally, the defendant admitted to officers that he named one person "as a block" and acknowledged that his false statement made the police waste time. (2) The trial court did not err by denying defendant's motion to dismiss a charge of felonious obstruction of justice based on the same conduct underlying the accessory after the fact charge. (3) No double jeopardy violation occurred when the trial court sentenced the defendant for obstruction of justice and accessory after the fact arising out of the same conduct. Comparing the elements of the offenses, the court noted that each contains an element not in the other and thus no double jeopardy violation occurred.

Trial court did not err by denying motion to dismiss charge of PWISD where significant quantity of marijuana packaged in multiple containers along with sandwich bags, digital scales, and large quantity of cash in small denominations discovered in defendant's vehicle

State v. Blakney, __ N.C. App. __, 756 S.E.2d 844 (April 15, 2014). The trial court did not err by denying the defendant's motion to dismiss a charge of possession with intent to sell or deliver. The defendant argued that the amount of marijuana found in his car—84.8 grams—was insufficient to show the required intent. The court rejected this argument noting that the marijuana was found in multiple containers and a box of sandwich bags and digital scales were found in the vehicle. This evidence shows not only a significant quantity of marijuana, but the manner in which the marijuana was packaged raised more than an inference that defendant intended to sell or deliver the marijuana. Further, it noted, the presence of items commonly used in packaging and weighing drugs for sale—a box of sandwich bags and digital scales—along with a large quantity of cash in small denominations provided additional evidence that defendant intended to sell or deliver marijuana.

Attempted first-degree felony murder does not exist under the laws of North Carolina

State v. Marion, __ N.C. App. __, 756 S.E.2d 61 (April 1, 2014). Because attempted first-degree felony murder does not exist under the laws of North Carolina, the court vacated the defendant's conviction with respect to this charge.

Neither acting in concert nor aiding and abetting require a defendant to expressly vocalize her assent to the criminal conduct; all that is required is an implied mutual understanding or agreement

State v. Marion, __ N.C. App. __, 756 S.E.2d 61 (April 1, 2014). The evidence was sufficient to support convictions for murder, burglary, and armed robbery on theories of acting in concert and aiding and abetting. The court noted that neither acting in concert nor aiding and abetting require a defendant to expressly vocalize her assent to the criminal conduct; all that is required is an implied mutual understanding or agreement. The State's evidence showed that the defendant was present for the discussions and aware of the group's plan to rob the victim Wiggins; she noticed an accomplice's gun; she was sitting next to another accomplice in a van when he loaded his shotgun; she told the group that she did not want to go up to the house but remained outside the van; she walked toward the house to inform the others that two victims had fled; she told two accomplices "y'all need to come on;" she attempted to start the van when an accomplice returned but could not release the parking brake; and she assisted in unloading the goods stolen from Wiggins' house into an accomplice's apartment after the incident.

Trial court erred by dismissing charge of felon in possession as unconstitutional pursuant to *Britt* analysis

State v. Price, __ N.C. App. __, __ S.E.2d __ (April 1, 2014), *temporary stay allowed*, __ N.C. __, __ S.E.2d __ (April 21, 2014). The trial court erred by dismissing a charge of felon in possession of a firearm on the basis that the statute was unconstitutional as applied to the defendant under a *Britt* analysis. Here, the defendant had two felony convictions for selling a controlled substance and one for felony attempted assault with a deadly weapon. While the defendant was convicted of the drug offenses in 1989, he was more recently convicted of the attempted assault with a deadly weapon in 2003. Although there was no evidence to suggest that the defendant misused firearms, there also was no evidence that the defendant attempted to comply with the 2004 amendment to the felon in possession statute. The court noted that the defendant completed his sentence for the assault in 2005, after the 2004 amendment to the statute was enacted. Thus, he was on notice of the changes in the legislation, yet took no action to relinquish his hunting rifle on his own accord.

Evidence of defendant's intent to fraudulently use credit card numbers was sufficient to establish identity theft

State v. Jones, __ N.C. __, __ S.E.2d __ (Mar. 7, 2014). Affirming the decision below in *State v. Jones*, __ N.C. App. __, 734 S.E.2d 617 (Nov. 20, 2012), the court held that the evidence was sufficient to establish identity theft. The case arose out of a scheme whereby one of the defendants, who worked at a hotel, obtained the four victim's credit card information when they checked into the premises. The defendant argued the evidence was insufficient on his intent to fraudulently use the victim's cards. However, the court found that based on evidence that the defendant had fraudulently used other individuals' credit card numbers, a reasonable juror could infer that he possessed the four victim's credit card numbers with the intent to fraudulently represent that he was those individuals for the purpose of making financial transactions in their names. The defendant argued further that the transactions involving other individuals' credit cards actually negated the required intent because when he made them, he used false names that did not match the credit cards used. He continued, asserting that this negates the suggestion that he intended to represent himself as the person named on the cards. The court rejected that argument, stating: "We cannot conclude that the Legislature intended for individuals to escape criminal liability simply by stating or signing a name that differs from the cardholder's name. Such a result would

be absurd and contravene the manifest purpose of the Legislature to criminalize fraudulent use of identifying information."

Sufficient evidence supported robbery conviction where two eyewitnesses identified defendant and accomplice

State v. Carpenter, __ N.C. App. __, 754 S.E.2d 478 (Mar. 4, 2014). Sufficient evidence supported the defendant's armed robbery conviction where two eyewitnesses identified the defendant and an accomplice. The court was unpersuaded by the defendant's citation of articles and cases from other states discussing the weaknesses of eyewitness identification, noting that such arguments have no bearing on the sufficiency of the evidence when considering a motion to dismiss. It continued: "If relevant at all, these arguments would go only to the credibility of an eyewitness identification."

(1) Sufficient evidence of constructive possession where various incriminating circumstances surrounded discovery of defendant in warehouse with cocaine and cash; (2) Conspiracy to traffic in cocaine is not lesser-included of trafficking

State v. Rodelo, __ N.C. App. __, 752 S.E.2d 766 (Jan. 7, 2014). (1) In a trafficking by possession case, there was sufficient evidence of constructive possession. The court rejected the defendant's argument that the State's evidence showed only "mere proximity" to the drugs. Among other things, the defendant hid from the agents when they entered the warehouse; he was discovered alone in a tractor-trailer where money was hidden; no one else was discovered in the warehouse; the cocaine was found in a car parked, with its doors open, in close proximity to the tractor-trailer containing the cash; the cash and the cocaine were packaged similarly; wrappings were all over the tractor-trailer, in which the defendant was hiding, and in the open area of a car parked close by; the defendant admitted knowing where the money was hidden; and the entire warehouse had a chemical smell of cocaine. (2) Conspiracy to traffic in cocaine is not a lesser-included offense of trafficking in cocaine. The former offense requires an agreement; the latter does not.

Sufficient evidence of premeditation and deliberation in first-degree murder case

State v. Clark, __ N.C. App. __, 752 S.E.2d 709 (Dec. 17, 2013). In a first-degree murder case, there was sufficient evidence of premeditation and deliberation. The court noted that the victim did not provoke the defendant and that the evidence was inconsistent with the defendant's claim of self-defense.

Defendant guilty of assault inflicting serious injury even if injuries he inflicted did not constitute "serious injury" where he acted in concert with others

State v. Rowe, __ N.C. App. __, 752 S.E.2d 223 (Dec. 17, 2013). In an assault inflicting serious injury case, the evidence was sufficient to show that the defendant acted in concert with other assailants and thus that he was guilty of the offense even if the injuries he personally inflicted did not constitute "serious injury."

Evidence supported jury instruction for first-degree murder by lying in wait

State v. Gosnell, __ N.C. App. __, 750 S.E.2d 593 (Dec. 3, 2013). The evidence supported a jury instruction for first-degree murder by lying in wait. The evidence showed that the defendant parked outside the victim's house and waited for her. All of the following events occurred 15-20 minutes after

the victim exited her home: the defendant confronted the victim and an argument ensued; the defendant shot the victim; a neighbor arrived and saw the victim on the ground; the defendant shot the victim again while she was lying on the ground; the neighbor drove away and called 911; and an officer arrived on the scene. This evidence suggests that the shooting immediately followed the defendant's ambush of the victim outside the house.

Evidence of restraint was sufficient in felonious restraint case where defendant restrained the victim by defrauding her into entering his car and driving to Florida with him

State v. Lalinde, __ N.C. App. __, 750 S.E.2d 868 (Dec. 3, 2013). In a felonious restraint case, the evidence was sufficient to show that the defendant restrained the victim by defrauding her into entering his car and driving to Florida with him. The defendant, a man in this thirties, formed an inappropriate relationship with the nine-year-old female victim. He gained her trust and strengthened the secret relationship over a five-year period. The victim confided to him that she had been sexually abused by her brother and that she feared he would rape her again when he moved back to North Carolina. When her brother tried to break into her room, the victim called the defendant, and he offered to get her and bring her to Florida to live with him. The court viewed this action as an offer to rescue the victim from her brother. When the victim met the defendant at the end of her street, he did not greet her in a sexual way, but rather gave her a "deceptively innocent kiss on the cheek." Then, shortly after arriving in Florida, he took away her clothes, pinned her to the bed, and had non-consensual sex with her. On these facts, a reasonable juror could conclude that the defendant duped the victim into getting into his car and traveling to Florida by assuring her that his intent was to rescue her from further sexual assaults by her brother when instead his intent was to isolate her so that he could sexually assault her himself. Furthermore, a reasonable juror could conclude that the defendant's failure to tell the victim that he intended to have sex with her and his kiss on her cheek were each intended to conceal from her his true intentions and that she would not have gone with him had he been honest with her. The court rejected the defendant's argument that there is no evidence of fraud because his promise to help the victim escape from her brother was not false, reasoning that fraud may be based upon an omission.

Error to deny motion to dismiss second-degree murder charge where evidence of malice was insufficient

State v. Hatcher, __ N.C. App. __, 750 S.E.2d 598 (Dec. 3, 2013). The trial court erred by denying the defendant's motion to dismiss a second-degree murder charge where there was insufficient evidence of malice and the evidence showed that the death resulted from a mishap with a gun. The court remanded for entry of judgment for involuntary manslaughter.

Sufficient evidence of AWIK where defendant ignored instructions to drop gun, continued reloading it, and shot at officer

State v. Stewart, __ N.C. App. __, 750 S.E.2d 875 (Dec. 3, 2013). The evidence was sufficient to show an assault with intent to kill an officer when, after having fatally shot eight people, the defendant ignored the officer's instructions to drop his shotgun and continued to reload it. The defendant then turned toward the officer, lowered the shotgun, and fired one shot at the officer at the same time that the officer fired at the defendant.

Defendant could not have intended to commit felonious restraint inside an apartment because crime requires that defendant transport victim by motor vehicle or other conveyance; Rejecting State's argument that intent to commit a felony within the premises exists as long as the defendant commits any element of the intended offense inside

State v. Allah, __ N.C. App. __, 750 S.E.2d 903 (Dec. 3, 2013), *temporary stay allowed*, __ N.C. __, 752 S.E.2d 145 (Dec. 18, 2013). In a first-degree burglary case, the evidence was insufficient to establish that the defendant broke and entered an apartment with the intent to commit a felonious restraint inside. Felonious restraint requires that the defendant transport the person by motor vehicle or other conveyance. The evidence showed that the defendant left his car running when he entered the apartment, found the victim, pulled her to the vehicle and drove off. The court reasoned: "In view of the fact that the only vehicle in which Defendant could have intended to transport [the victim] was outside in a parking lot, the record provides no indication Defendant could have possibly intended to commit the offense of felonious restraint against [the victim] within the confines of [the] apartment structure . . . ." The court rejected the State's argument that the intent to commit a felony within the premises exists as long as the defendant commits any element of the intended offense inside.

Impaired Driving

(1) Sufficient evidence of reckless driving where intoxicated defendant flipped vehicle off road; (2) Trial court committed *Blakely* error by finding aggravating factor in DWI case; (3) State failed to provide notice of intent to seek aggravating factors as required by G.S. 20-179(a1)(1)

State v. Geisslercrain, __ N.C. App. __, 756 S.E.2d 92 (April 1, 2014). (1) There was sufficient evidence of reckless driving where the defendant was intoxicated; all four tires of her vehicle went off the road; distinctive "yaw" marks on the road indicated that she lost control of the vehicle; the defendant's vehicle overturned twice; and the vehicle traveled 131 feet from the point it went off the road before it flipped, and another 108 feet after it flipped. (2) In this DWI case the trial court committed a *Blakely* error by finding an aggravating factor. The trial court found the aggravating factor, determined that it was counterbalanced by a mitigating factor and sentenced the defendant at Level Four. If the aggravating factor had not been considered the trial court would have been required to sentence the defendant to a Level Five punishment. Thus, the aggravating factor, which was improperly found by the judge, increased the penalty for the crime beyond the prescribed maximum. (3) The State failed to provide notice that it intended to seek aggravating factors as required by G.S. 20-179(a1)(1).

(1) Trial court did not err by denying the defendant's *Knoll* motion; (2) State had jurisdiction over DWI on Indian land

State v. Kostick, __ N.C. App. __, 755 S.E.2d 411 (Mar. 18, 2014). (1) In this DWI case, the trial court did not err by denying the defendant's *Knoll* motion. The defendant argued that the magistrate violated his rights to a timely pretrial release by setting a $500 bond and holding him in jail for approximately three hours and 50 minutes. The court found that evidence supported the conclusion that the magistrate properly informed the defendant of his rights and that the magistrate properly considered all of the evidence when setting the $500 bond. (2) In this DWI case in which a State Highway Patrol officer arrested the defendant, a non-Indian, on Indian land, the court rejected the defendant's argument that the State lacked jurisdiction over the crime. The court noted that pursuant to the Tribal Code of the Eastern Band of the Cherokee Indians and mutual compact agreements between the Tribe and other law

enforcement agencies, the North Carolina Highway Patrol has authority to patrol and enforce the motor vehicle laws of North Carolina within the Qualla boundary of the Tribe, including authority to arrest non-Indians who commit criminal offenses on the Cherokee reservation. Thus, the court concluded, "Our State courts have jurisdiction over the criminal offense of driving while impaired committed by a non-Indian, even where the offense and subsequent arrest occur within the Qualla boundary of the Cherokee reservation."

Sexual Offenses

Fact that victim was surprised by defendant's action of putting his hand up her skirt and penetrating her vagina did not preclude finding that act was by force and against victim's will

State v. Henderson, __ N.C. App. __, 756 S.E.2d 860 (April 15, 2014). The court affirmed a conviction for second-degree sexual offense in a case where the defendant surprised a Target shopper by putting his hand up her skirt and penetrating her vagina. The court rejected the defendant's argument that because his action surprised the victim, he did not act by force and against her will.

Reversible error to fail to instruct jury on affirmative defense to sexual offense felony underlying felony murder conviction that, under G.S. 14-27.1(4), penetration was for "accepted medical purpose"

State v. Stepp, __ N.C. App. __, 753 S.E.2d 485 (Jan. 21, 2014), *writ allowed,* __ N.C. __, 755 S.E.2d 48 (Feb. 26, 2014). Over a dissent, the court held that the trial court committed reversible error by failing to instruct the jury on an affirmative defense to a felony that was the basis of a felony-murder conviction. The jury convicted the defendant of first-degree felony-murder of a 10-month old child based on an underlying sexual offense felony. The jury's verdict indicated that it found the defendant guilty of sexual offense based on penetration of the victim's genital opening with an object. At trial, the defendant admitted that he penetrated the victim's genital opening with his finger; however, he requested an instruction on the affirmative defense provided by G.S. 14-27.1(4), that the penetration was for "accepted medical purposes," specifically, to clean feces and urine while changing her diapers. The trial court denied the request. The court found this to be error, noting that the defendant offered evidence supporting his defense. Specifically, the defendant testified at trial to the relevant facts and his medical expert stated that the victim's genital opening injuries were consistent with the defendant's stated purpose. The court stated:

> We believe that when the Legislature defined "sexual act" as the penetration of a genital opening with an object, it provided the "accepted medical purposes" defense, in part, to shield a parent – or another charged with the caretaking of an infant – from prosecution for engaging in sexual conduct with a child when caring for the cleanliness and health needs of an infant, including the act of cleaning feces and urine from the genital opening with a wipe during a diaper change. To hold otherwise would create the absurd result that a parent could not penetrate the labia of his infant daughter to clean away feces and urine or to apply cream to treat a diaper rash without committing a Class B1 felony, a consequence that we do not believe the Legislature intended. (Footnote omitted).

The court added that in this case, expert testimony was not required to establish that the defendant's conduct constituted an "accepted medical purpose."

Act of downloading image from internet constitutes duplication for purposes of second-degree sexual exploitation of a minor; (2) court rejected argument that it was not legislature's intent to punish both receiving and possessing the same image in third-degree sexual exploitation cases

State v. Williams, __ N.C. App. __, 754 S.E.2d 418 (Jan. 21, 2014). (1) Deciding an issue of first impression the court held that the act of downloading an image from the Internet constitutes a duplication for purposes of second-degree sexual exploitation of a minor under G.S. 14-190.17. (2) The court rejected the defendant's argument that in third-degree sexual exploitation of a minor cases, the General Assembly did not intend to punish criminal defendants for both receiving and possessing the same images.

(1) Evidence of intent in attempted first-degree statutory sex offense was sufficient where defendant placed penis on child's buttocks; (2) Multiple sex acts even in a single incident can support multiple indictments for indecent liberties

State v. Minyard, __ N.C. App. __, 753 S.E.2d 176 (Jan. 7, 2014) (1) In a child sex case, the court held that the evidence was sufficient to support a charge of attempted first-degree statutory sexual offense. On the issue of intent to commit the crime, the court stated: "The act of placing one's penis on a child's buttocks provides substantive evidence of intent to commit a first degree sexual offense, specifically anal intercourse." (2) The evidence was sufficient to support five counts of indecent liberties with a minor where the child testified that the defendant touched the child's buttocks with his penis "four or five times." The court rejected the defendant's argument that this testimony did not support convictions on five counts or that the contact occurred during separate incidents. Acknowledging that the child's testimony showed neither that the alleged acts occurred either on the same evening or on separate occasions, the court noted that "no such requirement for discrete separate occasions is necessary when the alleged acts are more explicit than mere touchings." The court cited *State v. Williams*, 201 N.C. App. 161 (2009), for the proposition that unlike "mere touching" "multiple sexual acts, even in a single encounter, may form the basis for multiple indictments for indecent liberties."

Sex Offender Registration and Satellite-Based Monitoring

Second-degree rape of a physically helpless victim was an "aggravated offense" for purposes of lifetime SBM

State v. Talbert, __ N.C. App. __, 756 S.E.2d 98 (April 1, 2014). The trial court did not err by requiring the defendant to enroll in lifetime SBM after finding at the bring-back hearing that he committed an aggravated offense, second-degree rape on a physically helpless victim (G.S. 14-27.3(a)(2)). The court followed *State v. Oxendine*, 206 N.C. App. 205 (2010), and held that second-degree rape was an aggravated offense.

Adam Walsh Act defines offender status by the offense charged rather than by facts underlying case

State v. Moir, __ N.C. App. __, 753 S.E.2d 195 (Jan. 7, 2014). In considering a petition to terminate registration, the trial court erred by concluding that the defendant was not a Tier 1 offender under the Adam Walsh Act. The Act, the court explained, defines offender status by the offense charged, not by

the facts underlying the case. Here, the trial court based its ruling on the facts underlying the plea, not on the pled-to offense of indecent liberties.

Enrollment in lifetime SBM was not an unreasonable search and seizure

State v. Jones, __ N.C. App. __, 750 S.E.2d 883 (Dec. 3, 2013). The trial court did not err by requiring the defendant to enroll in lifetime SBM. The court rejected the defendant's argument that under *United States v. Jones* (U.S. 2012) (government's installation of a GPS tracking device on a vehicle and its use of that device to monitor the vehicle's movements on public streets constitutes a "search"), SBM was an unreasonable search and seizure. The court found *Jones* irrelevant to a civil SBM proceeding.

Sentencing and Probation

Florida law defining intellectual disability for purposes of qualification for the death penalty as requiring IQ test of 70 or less held unconstitutional

Hall v. Florida , 572 U.S. __ (May 27, 2014). The Court held unconstitutional a Florida law strictly defining intellectual disability for purposes of qualification for the death penalty. The Eighth and Fourteenth Amendments forbid the execution of persons with intellectual disability. Florida law defines intellectual disability to require an IQ test score of 70 or less. If, from test scores, a prisoner is deemed to have an IQ above 70, all further exploration of intellectual disability is foreclosed. The Court held: "This rigid rule . . . creates an unacceptable risk that persons with intellectual disability will be executed, and thus is unconstitutional." Slip Op. at 1. The Court concluded:

> Florida seeks to execute a man because he scored a 71 instead of 70 on an IQ test. Florida is one of just a few States to have this rigid rule. Florida's rule misconstrues the Court's statements in *Atkins* that intellectually disability is characterized by an IQ of "approximately 70." 536 U. S., at 308, n. 3. Florida's rule is in direct opposition to the views of those who design, administer, and interpret the IQ test. By failing to take into account the standard error of measurement, Florida's law not only contradicts the test's own design but also bars an essential part of a sentencing court's inquiry into adaptive functioning. [Defendant] Freddie Lee Hall may or may not be intellectually disabled, but the law requires that he have the opportunity to present evidence of his intellectual disability, including deficits in adaptive functioning over his lifetime.

The death penalty is the gravest sentence our society may impose. Persons facing that most severe sanction must have a fair opportunity to show that the Constitution prohibits their execution. Florida's law contravenes our Nation's commitment to dignity and its duty to teach human decency as the mark of a civilized world. The States are laboratories for experimentation, but those experiments may not deny the basic dignity the Constitution protects.
Slip Op. at 22.

Trial court erred by allowing defendant to proceed pro se at a probation hearing without taking a waiver of counsel as required by G.S. 15A-1242; though defendant signed a waiver form, the trial court did not inquire as to whether defendant understood the range of permissible punishments

State v. Jacobs, __ N.C. App. __, __ S.E.2d __ (May 6, 2014). The trial court erred by allowing the

defendant to proceed pro se at a probation revocation hearing without taking a waiver of counsel as required by G.S. 15A-1242. The defendant's appointed counsel withdrew at the beginning of the revocation hearing due to a conflict of interest and the trial judge allowed the defendant to proceed pro se. However, the trial court failed to inquire as to whether the defendant understood the range of permissible punishments. The court rejected the State's argument that the defendant understood the range of punishments because "the probation officer told the court that the State was seeking probation revocation." The court noted that as to the underlying sentence, the defendant was told only that, "[t]here's four, boxcar(ed), eight to ten." The court found this insufficient, noting that it could not assume that the defendant understood this legal jargon as it related to his sentence. Finally, the court held that although the defendant signed the written waiver form, "the trial court was not abrogated of its responsibility to ensure the requirements of [G.S.] 15A-1242 were fulfilled."

North Carolina's "*Miller* Fix" statute is constitutional; evidence was sufficient to support trial court's findings of fact in connection with resentencing defendant who was 17 years old at the time of a murder to life imprisonment without parole

State v. Lovette, __ N.C. App. __, __ S.E.2d __ (May 6, 2014). In this case, arising from the defendant's conviction for first-degree murder of UNC student Eve Carson, the court upheld the constitutionality of the State's "Miller fix" statute and determined that the trial court's findings supported a sentence to life in prison without the possibility of parole. The defendant—who was 17 years old at the time of the murder—was originally sentenced to life in prison without parole. In his first appeal the court vacated the sentence and remanded for resentencing under G.S. 15A-1340.19A et. seq., the new sentencing statute enacted by the N.C. General Assembly in response to the U.S. Supreme Court's ruling in Miller v. Alabama, 567 U.S. ___, ___, 183 L.Ed. 2d 407, 421-24 (2012). On remand, the trial court held a new sentencing hearing and resentenced the defendant under the new sentencing statute to life imprisonment without parole after making extensive findings of fact as to any potential mitigating factors revealed by the evidence. Among other things, the court rejected the defendant's argument that the Miller fix statute was constitutionally infirm because it "vests the sentencing judge with unbridled discretion providing no standards." It also rejected the defendant's arguments that the evidence was insufficient to support the trial court's findings of fact in connection with the resentencing and that without findings of irretrievable corruption and no possibility of rehabilitation the trial court should not have imposed a sentence of life imprisonment without parole. It concluded:

> As noted by Miller, the "harshest penalty will be uncommon[,]" but this case is uncommon. Miller, 567 U.S. at ___, 183 L.E. 2d at 424. The trial court's findings support its conclusion. The trial court considered the circumstances of the crime and defendant's active planning and participation in a particularly senseless murder. Despite having a stable, middleclass home, defendant chose to take the life of another for a small amount of money. Defendant was 17 years old, of a typical maturity level for his age, and had no psychiatric disorders or intellectual disabilities that would prevent him from understanding risks and consequences as others his age would. Despite these advantages, defendant also had an extensive juvenile record, and thus had already had the advantage of any rehabilitative programs offered by the juvenile court, to no avail, as his criminal activity had continued to escalate. Defendant was neither abused nor neglected, but rather the evidence indicates for most of his life he had two parents who cared deeply for his well-being in all regards.

***Miller v. Alabama* applies only to defendants who commit crimes prior to the age of 18**

State v. Sterling, __ N.C. App. __, __ S.E.2d __ (May 6, 2014). The court declined to extend Miller to this felony-murder case, where the defendant turned 18 one month before the crime in question.

G.S. 7A-304(a)(8) does not allow recovery of lab costs for fingerprint analysis

State v. Velazquez-Perez, __ N.C. App. __, 756 S.E.2d 869 (April 15, 2014), *temporary stay allowed*, __ N.C. __, __ S.E.2d __ (May 05, 2014). The trial court erred by ordering costs for fingerprint examination as lab fees. G.S. 7A-304(a)(8) does not allow recovery of lab costs for fingerprint analysis.

Trial court erred by failing to arrest judgment on one underlying felony of felony-murder conviction; trial court may exercise discretion in selecting which felony judgment to arrest in cases where jury does not specifically determine which felony is underlying felony

State v. Marion, __ N.C. App. __, 756 S.E.2d 61 (April 1, 2014). The trial court erred by failing to arrest judgment on one of the underlying felonies supporting the defendant's felony-murder convictions. The court rejected the defendant's argument that judgment must be arrested on all of the felony convictions. The defendant asserted that because the trial court's instructions were disjunctive and permitted the jury to find her guilty of felony-murder if it found that she committed "the felony of robbery with a firearm, burglary, and/or kidnapping," the trial court should have arrested judgment on all of the felony convictions on the theory that they all could have served as the basis for the felony murder convictions. Citing prior case law the court rejected this argument, stating that "[i]n cases where the jury does not specifically determine which conviction serves as the underlying felony, we have held that the trial court may, in its discretion, select the felony judgment to arrest."

Double jeopardy precluded convicting defendant of speeding and reckless driving offenses that served as aggravating factors raising a speeding to elude charge from a misdemeanor to a felony

State v. Mulder, __ N.C. App. __, 755 S.E.2d 98 (Mar. 18, 2014). Double jeopardy barred convicting the defendant of speeding and reckless driving when he also was convicted of felony speeding to elude arrest, which was raised from a misdemeanor to a felony based on the aggravating factors of speeding and driving recklessly. The court determined that the aggravating factors used in the felony speeding to elude conviction were essential elements of the offense for purposes of double jeopardy. Considering the issue of whether legislative intent compelled a different result, the court determined that the General Assembly did not intend punishment for speeding and reckless driving when a defendant is convicted of felony speeding to elude arrest based on the aggravating factors of speeding and reckless driving. Thus, the court arrested judgment on the speeding and reckless driving convictions.

(1) Error to enter period of probation longer than 18 months without appropriate findings; (2) Appellate court lack authority to consider challenge to imposition of special condition of probation

State v. Sale, __ N.C. App. __, 754 S.E.2d 474 (Mar. 4, 2014). (1) The trial court erred by entering a period of probation longer than 18 months without making the findings that the extension was necessary. (2) The court held that it had no authority to consider the defendant's challenge to the trial court's imposition of a special condition of probation.

(1) Sampson County superior court judge had jurisdiction to revoke probation where defendant resided in that county; (2) Probation violation report provided sufficient notice of State's intent to revoke probation; (3) Trial court's failure to check box on AOC form was clerical error

State v. Lee, __ N.C. App. __, 753 S.E.2d 721 (Feb. 4, 2014). (1) A Sampson County superior court judge had jurisdiction to revoke the defendant's probation where the evidence showed that the defendant resided in that county. (2) A probation violation report provided the defendant with adequate notice that the State intended to revoke his probation on the basis of a new criminal offense. The report alleged that the defendant violated the condition that he commit no criminal offense in that he had several new pending charges which were specifically identified. The report further stated that "If the defendant is convicted of any of the charges it will be a violation of his current probation." (3) The trial court's failure to check a box on the "Judgment and Commitment Upon Revocation of Probation—Felony," AOC Form CR-607, was clerical and the court remanded for correction of the judgment.

G.S. 15A-1022 (advising defendant of consequences of guilty plea) is only applicable when the defendant actually pleads guilty

State v. Ruffin, __ N.C. App. __, 754 S.E.2d 685 (Mar. 4, 2014). In a rape case, any error made by the trial court regarding the maximum possible sentence did not entitle the defendant to relief. The trial court's statement was made in connection with noting for the record—on defense counsel's request—that the defendant had rejected a plea offer by the State. The court rejected the defendant's argument that the provisions of G.S. 15A-1022 should apply, noting that statute only is applicable when the defendant actually pleads guilty; a trial court is not required to make an inquiry into a defendant's decision not to plead guilty.

Error to sentence defendant for both selling and delivering marijuana when acts occurred in single transaction

State v. Fleig, __ N.C. App. __, 754 S.E.2d 461 (Mar. 4, 2014). The trial court erred by sentencing the defendant for both selling marijuana and delivering marijuana when the acts occurred as part of a single transaction.

(1) Appellate court assumed State presented correct version of Tennessee statutes to trial court for purposes of prior record level where defendant offered no relevant authority on point; (2) No error to conclude Tennessee offense of theft substantially similar to misdemeanor larceny; (3) Error to conclude Tennessee offense of domestic assault substantially similar to assault on female

State v. Sanders, __ N.C. App. __, 753 S.E.2d 713 (Feb. 4, 2014), *temporary stay allowed, writ allowed,* __ N.C. __, 755 S.E.2d 48 (Feb. 26, 2014). (1) Because the defendant presented no relevant Tennessee authority on point, the court concluded that it must assume that the State presented the correct versions of Tennessee statutes to the trial court when offering Tennessee convictions for purposes of prior record level. (2) The trial court did not err by finding the Tennessee offense of theft substantially similar to the North Carolina offense of misdemeanor larceny for purposes of prior record level points. The court rejected the defendant's argument that the out-of-state crime did not require an intent to permanently deprive. (3) Over a dissent, the court held that the trial court erred by finding the Tennessee offense of domestic assault substantially similar to the North Carolina offense of assault on a female. Among other things, the out-of-state crime is gender-neutral and applies to several categories of

victims with special relationships with the defendant, whereas the in-state offense only applies to assaults on female victims.

(1) Trial court did not abuse discretion by failing to find two statutory mitigating factors; (2) Court rejected defendant's argument that trial court erred in defendant's sentencing by relying on evidence obtained during proceedings related to co-defendants where defense counsel relied on same evidence

State v. Dahlquist, __ N.C. App. __, 753 S.E.2d 355 (Jan. 7, 2014). (1) The trial court did not abuse its discretion by failing to find two statutory mitigating factors with respect to a 17-year-old defendant: G.S. 15A-1340.16(e)(4) (defendant's "age, or immaturity, at the time of the commission of the offense significantly reduced defendant's culpability for the offense") and G.S. 15A-1340.16(e)(18) ("defendant has a support system in the community"). (2) The court rejected the defendant's argument that the trial court erred in connection with her sentencing hearing by relying on evidence obtained during the trial of one of her co-defendants and during the sentencing hearing of another co-defendant. Citing G.S. 15A-1443 (a defendant is not prejudiced by the granting of relief which he has sought or by error resulting from his own conduct), the court rejected the defendant's argument, noting that defense counsel repeatedly relied on this same evidence at the sentencing hearing.

(1) Trial court did not err by assigning PRL point for offense committed while on probation in absence of jury finding to that effect where context clearly indicated that such procedural requirement was inappropriate; (2) Trial court erred by sentencing defendant using probation PRL point where State failed to provide notice of intent to prove PRL point as required by G.S. 15A-1340.16(a6)

State v. Snelling, __ N.C. App. __, 752 S.E.2d 739 (Jan. 7, 2014). (1) The court rejected the defendant's argument that the trial court erred by sentencing the defendant as a PRL III offender without complying with G.S. 15A-1022.1 (procedure for admissions in connection with sentencing). At issue was a point assigned under G.S. 15A-1340.14 (b)(7) (offense committed while on probation). As a general rule, this point must be determined by a jury unless admitted to by the defendant pursuant to G.S. 15A-1022.1. However, the court noted, "these procedural requirements are not mandatory when the context clearly indicates that they are inappropriate" (quotation omitted). Relying on *State v. Marlow*, ___ N.C. App. ___, 747 S.E.2d 741, 748 (2013), the court noted that the defendant stipulated to being on probation when he committed the crimes, defense counsel signed the PRL worksheet agreeing to the PRL, and at sentencing, the defendant stipulated that he was a PRL III. (2) The trial court erred by sentencing the defendant as a PRL III offender when State failed to provide the notice required by G.S. 15A-1340.16(a6) and the defendant did not waive the required notice.

Statute did not authorize certain jail fees where defendant received active sentence

State v. Rowe, __ N.C. App. __, 752 S.E.2d 223 (Dec. 17, 2013). The trial court erred by imposing jail fees of $2,370 pursuant to G.S. 7A-313. The trial court orally imposed an active sentence of 60 days, with credit for 1 day spent in pre-judgment custody. The written judgment included a $2,370.00 jail fee. Although the trial court had authority under G.S. 7A-313 to order the defendant to pay $10 in jail fees the statute did not authorize an additional $2,360 in fees where the defendant received an active sentence, not a probationary one.

Trial court did not violate law of the case doctrine at de novo resentencing

State v. Paul, __ N.C. App. __, 752 S.E.2d 252 (Dec. 17, 2013). On remand for resentencing, the trial court did not violate the law of the case doctrine. The resentencing was de novo and the trial court properly considered the State's evidence of an additional prior felony conviction when calculating prior record level.

Defendant not entitled to credit for time served pre-trial in federal custody

State v. Lewis, __ N.C. App. __, 752 S.E.2d 216 (Dec. 17, 2013). The trial court did not err by failing to grant the defendant credit for 18 months spent in federal custody prior to trial. After the defendant was charged in state court, the State dismissed the charges to allow for a federal prosecution based on the same conduct. After the defendant's federal conviction was vacated, the State reinstated the state charges. The defendant was not entitled to credit for time served in federal custody under G.S. 15-196.1 because his confinement was in a federal institution and was a result of the federal charge.

Error to convict defendant of both first-degree kidnapping and sexual assault that raised kidnapping to first-degree

State v. Holloman, __ N.C. App. __, 751 S.E.2d 638 (Dec. 17, 2013). The trial court erred by convicting the defendant of both first-degree kidnapping and the sexual assault that raised the kidnapping to first-degree. The trial court instructed the jury that to convict defendant of first-degree kidnapping, it had to find that the victim was not released in a safe place, had been sexually assaulted, or had been seriously injured. The jury returned guilty verdicts for both first-degree kidnapping and second-degree sexual offense but did not specify the factor that elevated kidnapping to first-degree. The court concluded that it must construe the ambiguous verdict in favor of the defendant and assume that the jury relied on the sexual assault in finding the defendant guilty of first-degree kidnapping.

Prohibition on imposing more severe sentence after appellate review (G.S. 15A-1335) did not apply where higher initial sentence was statutorily mandated

State v. Powell, __ N.C. App. __, 750 S.E.2d 899 (Dec. 3, 2013). In a case where the trial court initially sentenced the defendant correctly but then erroneously thought it had used the wrong sentencing grid and re-sentenced the defendant to a lighter sentence using the wrong grid, the court remanded for imposition of the initial correct but more severe sentence. The court noted that G.S. 15A-1335 did not apply because the higher initial sentence was statutorily mandated.

Not abuse of discretion to order defendant's visits with daughter be supervised

State v. Allah, __ N.C. App. __, 750 S.E.2d 903 (Dec. 3, 2013), *temporary stay allowed*, __ N.C. __, 752 S.E.2d 145 (Dec. 18, 2013). The trial court did not abuse its discretion by ordering, as a condition of probation, that the defendant's visits with his daughter be supervised, where the offense of conviction involved an attack on the mother of his child.

Post Conviction

Defendant was denied constitutional right to counsel where trial court held resentencing hearing on defendant's pro se MAR while defendant was unrepresented

State v. Rouse, __ N.C. App. __, __ S.E.2d __ (May 20, 2014). The defendant was denied his constitutional right to counsel when the trial court held a resentencing hearing on the defendant's pro se MAR while the defendant was unrepresented. The court vacated the judgment and remanded for a new sentencing hearing.

Remanding case challenging drug protocol for lethal injection to trial court to determine in first instance whether new "Execution Procedure Manual for Single Drug Protocol (Pentobarbital)" must be promulgated through rule-making under Administrative Procedure Act

Robinson v. Shanahan, __ N.C. App. __, 755 S.E.2d 398 (Mar. 18, 2014). The court remanded to the trial court this case challenging North Carolina's drug protocol for lethal injections. The plaintiffs appealed a trial court order granting summary judgment to the defendants on the plaintiffs' challenge to North Carolina's previously used three-drug protocol for the administration of lethal injections ("the 2007 Protocol"). During the appeal, the 2007 Protocol was replaced by the "Execution Procedure Manual for Single Drug Protocol (Pentobarbital)" ("the new Manual") after a statutory amendment vested the Secretary of NC Department of Public Safety with the authority to determine execution procedures. As a result, the plaintiffs' only remaining contention on appeal was that the new Manual must be promulgated through rule-making under the Administrative Procedure Act. The court remanded so that the trial court could determine this issue in the first instance.

(1) Trial court erred by concluding that that 50-year sentence for non-homicide crimes by juvenile defendant violated Eighth Amendment; (2) Appellate court found that it had authority to grant State's petition for cert. regarding trial court's grant of defendant's MAR; (3) Defendant's Eighth Amendment claim was properly asserted under G.S. 15A-1415(b)(4) & (b)(8)

State v. Wilkerson, __ N.C. App. __, 753 S.E.2d 829 (Feb. 18, 2014). (1)The trial court erred by concluding that a 50-year sentence with the possibility of parole on a defendant who was a juvenile at the time the crimes were committed subjected him to cruel and unusual punishment in violation of the Eighth Amendment. The defendant was convicted of second degree burglary (1 count), felonious breaking or entering (3 counts), felonious larceny (four counts), and possession of stolen property (2 counts). Assessing the number of felony convictions, the fact that one was particularly serious, and the fact that the defendant's conduct involved great financial harm and led to criminal activity on the part of a younger individual, the court concluded that the sentence was not "grossly disproportionate." (2) The court rejected the defendant's argument that the State had no avenue to obtain review of a trial court order granting his G.S. 15A-1415 MAR (MAR made more than 10 days after entry of judgment) on grounds that his sentence violated the Eighth Amendment. The court found that it had authority to grant the State's petition for writ of certiorari. The court rejected the contention that *State v. Starkey*, 177 N.C. App. 264, 268 (2006), required a different conclusion, noting that case conflicts with state Supreme Court decisions. (3) The defendant's claim that his sentence violated the Eighth Amendment was properly asserted under G.S. 15A-1415(b)(4) (convicted/sentenced under statute in violation of US or NC Constitutions) and (b)(8) (sentence unauthorized at the time imposed, contained a type of

disposition or a term of imprisonment not authorized for the particular class of offense and prior record or conviction level, was illegally imposed, or is otherwise invalid as a matter of law.

Trial court erred by concluding that sentence of life in prison with possibility of parole for non-homicide crimes by juvenile defendant violated Eighth Amendment; Defendant's Eighth Amendment claim was properly asserted under G.S. 15A-1415(b)(4) & (b)(8)

State v. Stubbs, __ N.C. App. __, 754 S.E.2d 174 (Feb. 4, 2014). Over a dissent, the court held that the trial court erred by concluding that the defendant's sentence of life in prison with the possibility of parole violated the Eighth Amendment. In 1973, the 17-year-old defendant was charged with first-degree burglary and other offenses. After he turned 18, the defendant pleaded guilty to second-degree burglary and another charge. On the second-degree burglary conviction, he was sentenced to an active term for "his natural life." In 2011 the defendant filed a MAR challenging his life sentence, asserting, among other things, a violation of the Eighth Amendment. The trial court granted relief and the State appealed. The court began by noting that the defendant had properly asserted a claim in his MAR under G.S. 15A-1415(b)(8) (sentence invalid as a matter of law) and (b)(4) (unconstitutional sentence). On the substance of the Eighth Amendment claim, the court noted that under the statutes in effect at that time, prisoners with life sentences were eligible to have their cases considered for parole after serving 10 years. Although the record was not clear how often the defendant was considered for parole, it was clear that in 2008, after serving over 35 years, he was paroled. After he was convicted in 2010 of driving while impaired, his parole was revoked and his life sentence reinstated. Against this background, the court concluded that the "defendant's outstanding sentence of life in prison with possibility of parole for second-degree burglary, though severe, is not cruel or unusual in the constitutional sense." The dissenting judge believed that the court lacked jurisdiction to consider the State's appeal.