CRIMINAL LAW

Case and Legislative Update

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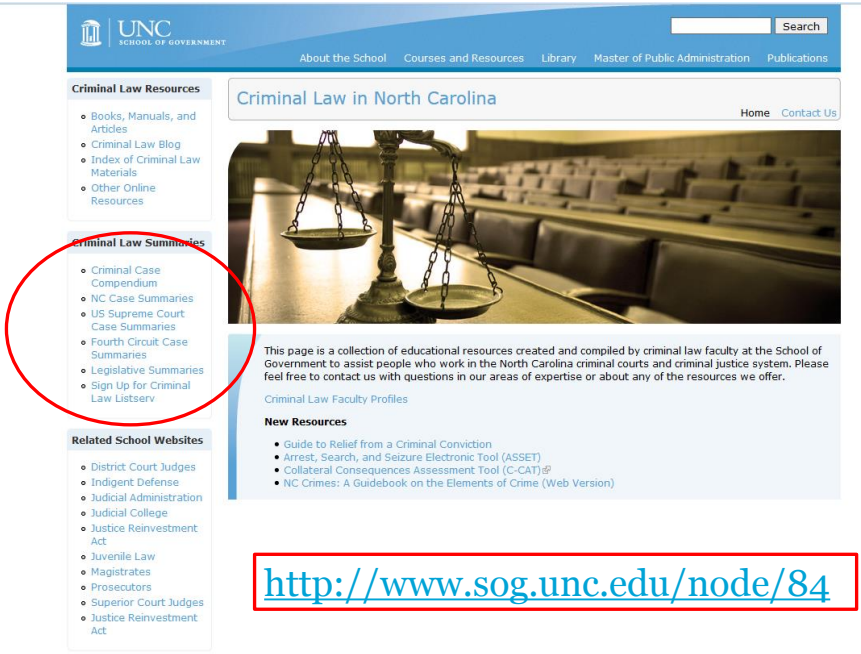

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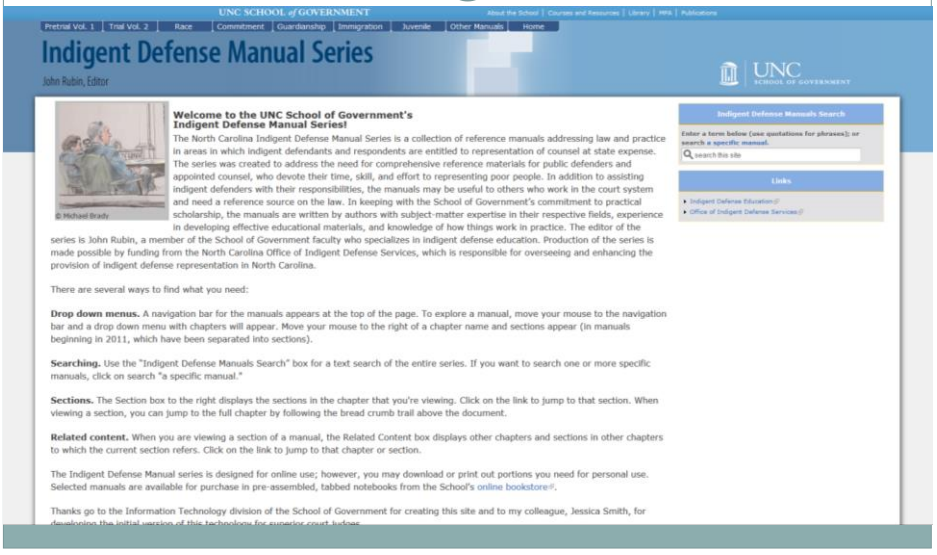


Roadmap

1. New Legislation
2. Stops & Arrests
3. Other Investigation Issues
4. Pleadings
5. Defenses
6. Impaired Driving
7. Crimes
8. Sentencing and Probation

New Legislation

Conviction Relief, SL 2014-119 (pp. 7-8)

- GS 15A-145.5
  - Less relief for older felony B & E's (and attempts)
- GS 15A-1341
  - More relief for conditional discharges

Conditional Discharge & Dismissal (eff. 12/1/14)

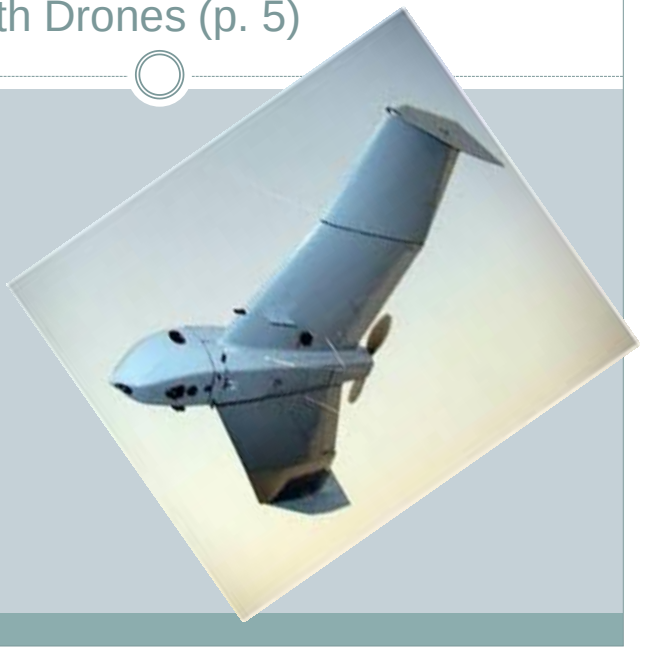
- D & D possible for any misdemeanor and any H/I felony if:
  - State and defendant agree
  - No prior felony or misdemeanor crime of moral turpitude
  - Not previously on probation
  - Unlikely to commit another offense except Class 3 misdemeanor
- Maximum of two years probation; no mandatory conditions
- If defendant succeeds
  - defendant discharged and case dismissed
  - possibility of later expunction under 15A-146

Justice Reinvestment Tweaks (p. 3-4)

- Confinement for misdemeanors
  - All misdemeanor sentences > 90 days = SMCP
  - All DWI sentences = SMCP
  - Other misdemeanors = Local jail
- Pretrial credit and CRVs
  - Felonies? No
  - Misdemeanors? Discretionary

Possession of Marijuana Paraphernalia
Reduced to Class 3 Misdemeanor (p. 8)

No Hunting with Drones (p. 5)



Other Legislation

- Waiver of jury trial
  - http://nccriminallaw.sog.unc.edu/handling-jury-trial-waivers/
- Online access to attorney fee information (p. 4)

Required Field	Required Field	Required Field	Required Field	Required Field	Required Field	Required Field	IDS Added Field	Required Field	IDS Added Field	Required Field	Required Field	Required Field	IDS Added Field
County	**File #**	**Per Session Fee?**	**Highest Charge**	**Atty Last Name**	**Atty First Name**	**Amount Paid**	**Disposition or End Date**	**Date Paid**	**Length of Time Case Pending (in days)**	**Multiple Charges**	**Account Title**	**Judge**	**Disposition**
Alamance	14CRS 5645		Misdemeanor	Simpson	Homer	$165.00	5/20/2014	7/3/2014	23	No	District Ct	Allen	GBL
Mecklenburg	59081114WCS	W	Probation Violation	Short	Carl	$880.00	5/2/2014	6/3/2014	45	Yes	District Ct	Trosch	n/a
Hoke	11CRS2333		Class A Felony	Smith	Bill	$12,345.00	2/1/2014	2/25/2014	322	Yes	Potentially Capital Trial	Maher	I

STOPS & ARRESTS

Scope of Stop

Cottrell, p. 2

Facts of *Cottrell*

- Car stop for headlights off 11:37 p.m.
- Loud music (from D's car?)
- License and reg. valid (but history felonies/drugs)
- Fragrance like incense in car
- (Still holding lic. and reg.) Consent to search?
  - No.
  - I'll get dog.
  - OK, search.
- Search 11:41 p.m.
  - Gun, drugs

p. 2

Holding of *Cottrell*

- Once purpose of stop met, no additional delay unless
  - Additional RS, or
  - Encounter has become consensual.
- Extending stop to get dog or ask for consent not justified under "de minimus" standard.
  - Dog not on scene
  - Projected time to get dog longer than in *Sellars*

p. 2

PC to Arrest

- Back over illegally parked motorcycle
- Faint smell of alcohol
- Recent drinking at bar
- Positive result on PBT
- **No probable cause**

Temp. Stay

Overocker, p. 3

Cell Phone Search Incident to Arrest

Modern cell phones are not just another technological convenience. With all they contain and all they may reveal, they hold for many Americans “the privacies of life”... The fact that technology now allows an individual to carry such information in his hand does not make the information any less worthy of the protection for which the Founders fought. Our answer to the question of what police must do before searching a cell phone seized incident to an arrest is accordingly simple—

get a warrant.

p. 5

PC to Search Car

Armstrong, p. 8

PC to Search Car

Warrant Requirement for Search
Two Exceptions

~~Search Incident to Arrest~~
~~(*Gant* analysis)~~

Automobile Exception
(PC)

OTHER INVESTIGATION ISSUES

Tracing Computer Use: S v. Bernard (p. 9)

- Application for warrant
  - IP address (11.111.11) obtained from administrator's computer
  - Search warrant for internet service provider (ISP)
    - Limited to period that computer was accessed
  - Search warrant for computer hardware in defendant's home
  - Hardware examined without modification
  - Arrest warrants

Curtilage

trespassory invasion of defendant's curtilage… [officers] had no legal right to be in that location

Gentile, p. 6

Eyewitness Identifications (pp. 10-11)

- *S v. Macon*
  - Photographic "show-up" is not a "lineup" subject to EIRA
- *S v. Harvell*
  - In-person show-up not impermissibly suggestive

Proper or Improper? (pp. 11-12)

During noncustodial questioning, officers said the following to the defendants:

1. I'll recommend that you get treatment instead of jail time and ask for leniency from the DA
2. You can walk out of here whatever you say
3. We have video of you with the child and a medical exam (neither true)

Miranda in Domestic Cases (*S v. Hogan*, p. 12)

- For officer safety reasons, deputies handcuffed defendant after they arrived on scene but did not place defendant under arrest.
  - Functional equivalent of arrest?
- Officer's questioned victim in defendant's presence, and defendant interjected his version
  - Functional equivalent of interrogation?

PLEADINGS

Legal Entity Capable of Owning Property

North Carolina State University (NCSU) and NCSU High Voltage Distribution

Manna Baptist Church

Ellis, p. 14
Campbell, p. 15

Impact of Defective Pleading

- State v. Wilson, p. 14
  - Failure to allege "malice aforethought" in short form indictment for attempted first-degree murder
  - Jury verdict vacated AND case remanded for entry of judgment of attempted voluntary manslaughter

DE  ES

Two Winning Entrapment Cases for Defense!

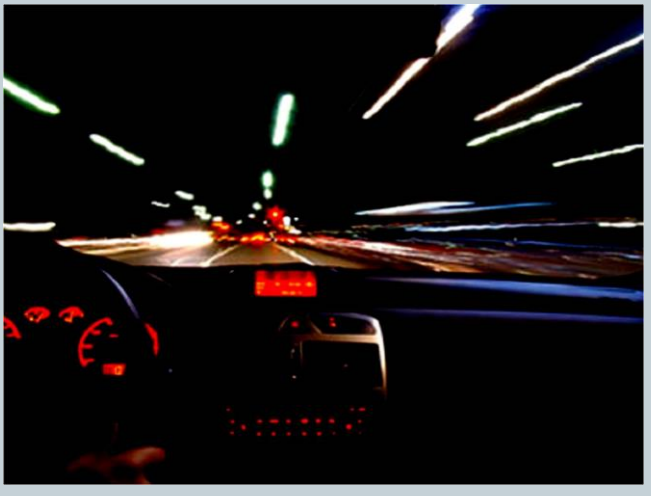
State v Ott, p. 17	State v. Foster, p. 37

• Defendant sold pills to undercover officer at urging of c/i (Eudy)
  ○ D was pill user
  ○ D had made two prior cocaine sales
• Was she predisposed to sell pills?
	• Defendant sold cocaine to undercover officer
	  ○ D was dancer at strip club
	  ○ Officer showed romantic interest in D
	• Did officer induce sale of cocaine?

Self-Defense, *S v. Rawlings* (p. 20)

- Defensive-force justification not available if person
  - "was attempting to commit, committing, or escaping after the commission of a felony" (GS 14-51.4)
- Did legislature intend for any felony to disqualify?
  - Felon in possession of firearm?
  - Felony sale or possession of controlled substances?
  - Nonviolent felonies?
  - Felonies with no causal relationship to incident?

IMPAIRED DRIVING



PVA

Ricks, p. 32

Implied Consent Rights

North Carolina Department of Health and Human Services

Rights of Person Requested to Submit to a Chemical Analysis to Determine Alcohol Concentration or Presence of an Impairing Substance Under N.C.G.S. 20-16.2(a)

Last *First* *MI*

Driver License Number / State *Date of Birth* *Citation Number*

[ ] Breath [ ] Blood [ ] Subsequent Test

1. You have been charged with an implied-consent offense. Under the implied-consent law, you can refuse any test, but your drivers license will be revoked for one year and could be revoked for a longer period of time under certain circumstances, and an officer can compel you to be tested under other laws.
2. The test results, or the fact of your refusal, will be admissible in evidence at trial.
3. Your driving privilege will be revoked immediately for at least 30 days if you refuse any test or the test result is 0.08 or more, 0.04 or more if you were driving a commercial vehicle, or 0.01 or more if you are under the age of 21.
4. After you are released, you may seek your own test in addition to this test.
5. You may call an attorney for advice and select a witness to view the testing procedures remaining after the witness arrives, but the testing may not be delayed for these purposes longer than 30 minutes from the time you are notified of these rights. You must take the test at the end of 30 minutes even if you have not contacted an attorney or your witness has not arrived.

Date _____ Time _____ [ ] a.m. [ ] p.m. _____ Signature of Person Charged

Did defendant call an attorney and/or witness? [ ] NO [ ] YES Time _____ [ ] a.m. [ ] p.m.

Williams, p. 6

Testing and Testifying

- $600 fee for private hospital expert testimony about testing (pp. 4-5)

- Remote video testimony by analyst (p. 8)
  - Advance receipt of report
  - Notice of intent to use remote testimony
  - No written objection by defendant

CRIMES

Weight of Mixture (pp. 29-30)

- *S v. Davis*
  - Still being cooked and ultimate weight will be less
- *S v. Miranda*
  - Rice and cocaine together to remove moisture from cocaine

Satellite Based Monitoring

- *S v. Jones*, p. 37
  - For court to require SBM for offense involving abuse of minor, it must make additional findings, supported by competent evidence, if DOC assessment is moderate or low risk
- *S v. Davis* (Dec. 2, 2014)
  - An offense can be considered an "aggravated offense," requiring lifetime registration and monitoring, only if committed on or after Oct. 1, 2001

http://ccat.sog.unc.edu

Resist Officer

Carter, p. 32

Burglary: Entry

2d Degree Burglary
breaks
and enters
w/o consent
dwelling/curtilage
of another
at night
w/intent to commit felony

Lucas, p. 27

SENTENCING & PROBATION

Probation Matters

- *S v. Pennell*, p. 42
  - An appellate jurisdiction case
    - A defendant should still be able to defend a probation violation in the trial court if original pleading was defective and court did not have jurisdiction to convict

More Probation

- *S v. Murchison*, p. 41-42
  - Hearsay is admissible at probation revocation hearings
  - Do rules of evidence apply in some circumstances?
    - Right to offer admissible evidence
    - Privileges apply
    - Unreliable evidence still improper—evidence must reasonably satisfy judge in exercise of sound discretion

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Criminal Law Case Update

2014 Winter Criminal Law Webinar

(Includes cases decided between June 3, 2014 and November 18, 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. To obtain the summaries automatically by email, go to the above site and click on Sign Up for Criminal Law Listserv.

Investigation Issues

Seizures

Continued detention of defendant after completion of original purpose of stop violated Fourth Amendment

State v. Cottrell, __ N.C. App. __, 760 S.E.2d 274 (July 1, 2014). The trial court erred by denying the defendant's motion to suppress where the defendant was subjected to a seizure in violation of the Fourth Amendment. Specifically, the officer continued to detain the defendant after completing the original purpose of the stop without having reasonable, articulable suspicion of criminal activity. The officer initiated a traffic stop because of a headlights infraction and a potential noise violation. The defendant turned his headlights on before he stopped and apologized to the officer for not having his headlights on. The officer asked the defendant for his license and registration and said that if everything checked out, the defendant would soon be cleared to go. The defendant did not smell of alcohol, did not have glassy eyes, was not sweating or fidgeting, and made no contradictory statements. A check revealed that the defendant's license and registration were valid. However a criminal history check revealed that the defendant had a history of drug charges and felonies. When the officer re-approached the car, he told the defendant to keep his music down because of a noise ordinance. At this point the officer smelled a strong odor that he believed was a fragrance to cover up the smell of drugs. The officer asked the defendant about the odor, and the defendant showed him a small, clear glass bottle, stating that it was a body oil. Still holding the defendant's license and registration, the officer asked for consent to search. The defendant declined consent but after the officer said he would call for a drug dog, the defendant agreed to the search. Contraband was found and the defendant moved to suppress. The court began by following *State v. Myles*, 188 N.C. App. 42, *aff'd per curiam*, 362 N.C. 344 (2008), and concluding that the purpose of the initial stop was concluded by the time the officer asked for consent to search. The court held that once the officer returned to the vehicle and told the defendant to keep his music down, the officer had completely addressed the original purpose for the stop. It continued:

> Defendant had turned on his headlights, he had been warned about his music, his license and registration were valid, and he had no outstanding warrants. Consequently, [the officer] was then required to have "defendant's consent or 'grounds which provide a reasonable and articulable suspicion in order to justify further delay' before" asking defendant additional questions.

Next, the court held that the officer had no reasonable and articulable suspicion of criminal activity in order to extend the stop beyond its original scope: "a strong incense-like fragrance, which the officer believes to be a 'cover scent,' and a known felony and drug history are not, without more, sufficient to support a finding of reasonable suspicion of criminal activity." Finally, the court rejected the argument that the detention of the defendant after the original purpose had ended was proper because it equated to a "de minimis" extension for a drug dog sniff. The court declined to extend the de minimis analysis to situations where—as here—no drug dog was at the scene prior to the completion of the purpose of the stop.

(1) Driver was not seized when officer approached his vehicle on foot, did not use his blue lights, and did not use or threaten physical force; (2) Reasonable suspicion supported subsequent detention of driver

State v. Veal, __ N.C. App. __, 760 S.E.2d 43 (July 1, 2014). (1) No seizure occurred when an officer initially approached the defendant in response to a tip about an impaired driver. The officer used no physical force, approached the defendant's vehicle on foot, and engaged in conversation with him. The officer did not activate his blue lights and there was no evidence that he removed his gun from his holster or used a threatening tone. Thus, the court concluded, the event was a voluntary encounter. (2) Reasonable suspicion supported the officer's later detention of the driver. During the voluntary encounter the officer noticed the odor of alcohol coming from the defendant and observed an unopened container of beer in his truck. These observations provide a sufficient basis for reasonable suspicion to support the subsequent stop.

(1) No probable cause supported arrest of defendant for impaired driving after left a bar, got in his SUV, and backed into a motorcycle that was illegally parked behind him; (2) Trial court erred, however, in dismissing case after granting motion to suppress

State v. Overocker, __ N.C. App. __, 762 S.E.2d 921 (Sept. 16, 2014), *temp. stay allowed*, __ N.C. __, __ S.E.2d __ (Oct. 21, 2014). (1) The trial court properly granted the defendant's motion to suppress where no probable cause supported the defendant's arrest for impaired driving and unsafe movement. The defendant was arrested after he left a bar, got in his SUV, and backed into a motorcycle that was illegally parked behind him. The officer relied on the following facts to support probable cause: the accident, the fact that the defendant had been at a bar and admitted to having three drinks (in fact he had four), the defendant's performance tests, and the odor of alcohol on the defendant. However, the trial court found that the officer testified that the alcohol odor was "light." Additionally, none of the officers on the scene observed the defendant staggering or stumbling, and his speech was not slurred. Also, the only error the defendant committed in the field sobriety tests was to ask the officer half-way through each test what to do next. When instructed to finish the tests, the defendant did so. The court concluded:

> [W]hile defendant had had four drinks in a bar over a four-hour time frame, the traffic accident . . . was due to illegal parking by another person and was not the result of unsafe movement by defendant. Further, defendant's performance on the field sobriety tests and his behavior at the accident scene did not suggest

> impairment. A light odor of alcohol, drinks at a bar, and an accident that was not defendant's fault were not sufficient circumstances, without more, to provide probable cause to believe defendant was driving while impaired.

The court also rejected the State's argument that the fact that the officer knew the defendant's numerical reading from a portable breath test supported the arrest, noting that under G.S. 20-16.3(d), the alcohol concentration result from an alcohol screening test may not be used by an officer in determining if there are reasonable grounds to believe that the driver committed an implied consent offense, such as driving while impaired. (2) After granting the defendant's motion to suppress, the trial court erred by dismissing the charges where the defendant made no written or oral motion to dismiss.

Probable cause supported arrest of defendant for impaired driving after he was stopped at a checkpoint, had a moderate odor of alcohol, admitting to drinking, tested positive on a portable breath test and performed poorly on field sobriety tests

State v. Townsend, __ N.C. App. __, 762 S.E.2d 898 (Sept. 16, 2014). (1) Probable cause supported the defendant's arrest for DWI. When the officer stopped the defendant at a checkpoint, the defendant had bloodshot eyes and a moderate odor of alcohol. The defendant admitted to "drinking a couple of beers earlier" and that he "stopped drinking about an hour" before being stopped. Two alco-sensor tests yielded positive results and the defendant exhibited clues indicating impairment on three field sobriety tests. The court rejected the defendant's argument that because he did not exhibit signs of intoxication such as slurred speech, glassy eyes, or physical instability, there was insufficient probable cause. (2) The trial court did not err by denying the defendant's motion to suppress evidence obtained as a result of a vehicle checkpoint. The checkpoint was conducted for a legitimate primary purpose of checking all passing drivers for DWI violations and was reasonable.

Grounds for Stop

Trial court properly denied defendant's motion to suppress as police had reasonable suspicion to stop vehicle based on information that firefighter transmitted to the police officers before the firefighter himself stopped the vehicle

State v. Verkerk, __ N.C. __, 758 S.E.2d 387 (June 12 2014). Reversing the court of appeals in a DWI case where the defendant was initially stopped by a firefighter, the court determined that the trial court properly denied the defendant's motion to suppress which challenged the firefighter's authority to make the initial stop. After observing the defendant's erratic driving and transmitting this information to the local police department, the firefighter stopped the defendant's vehicle. After some conversation, the driver drove away. When police officers arrived on the scene, the firefighter indicated where the vehicle had gone. The officers located the defendant, investigated her condition, and charged her with DWI. On appeal, the defendant argued that because the firefighter had no authority to stop her, evidence from the first stop was improperly obtained. However, the court determined that it need not consider the extent of the firefighter's authority to conduct a traffic stop or even whether the encounter with him amounted to a "legal stop." The court reasoned that the firefighter's observations of the

defendant's driving, which were transmitted to the police before making the stop, established that the police officers had reasonable suspicion to stop the defendant. The court noted that this evidence was independent of any evidence derived from the firefighter's stop.

Searches

The police may not, without a warrant, search digital information on a cell phone seized from an individual who has been arrested

Riley v. California, 573 U.S. __, 134 S. Ct. 2473 (June 25, 2014). This decision involved a pair of cases in which both defendants were arrested and cell phones were seized. In both cases, officers examined electronic data on the phones without a warrant as a search incident to arrest. The Court held that "officers must generally secure a warrant before conducting such a search." The Court noted that "the interest in protecting officer safety does not justify dispensing with the warrant requirement across the board." In this regard it added however that "[t]o the extent dangers to arresting officers may be implicated in a particular way in a particular case, they are better addressed through consideration of case-specific exceptions to the warrant requirement, such as the one for exigent circumstances." Next, the Court rejected the argument that preventing the destruction of evidence justified the search. It was unpersuaded by the prosecution's argument that a different result should obtain because remote wiping and data encryption may be used to destroy digital evidence. The Court noted that "[t]o the extent that law enforcement still has specific concerns about the potential loss of evidence in a particular case, there remain more targeted ways to address those concerns. If the police are truly confronted with a 'now or never' situation—for example, circumstances suggesting that a defendant's phone will be the target of an imminent remote-wipe attempt—they may be able to rely on exigent circumstances to search the phone immediately" (quotation omitted). Alternatively, the Court noted, "if officers happen to seize a phone in an unlocked state, they may be able to disable a phone's automatic-lock feature in order to prevent the phone from locking and encrypting data." The Court noted that such a procedure would be assessed under case law allowing reasonable steps to secure a scene to preserve evidence while procuring a warrant. Turning from an examination of the government interests at stake to the privacy issues associated with a warrantless cell phone search, the Court rejected the government's argument that a search of all data stored on a cell phone is materially indistinguishable the other types of personal items, such as wallets and purses. The Court noted that "[m]odern cell phones, as a category, implicate privacy concerns far beyond those implicated by the search of a cigarette pack, a wallet, or a purse" and that they "differ in both a quantitative and a qualitative sense from other objects that might be kept on an arrestee's person." It also noted the complicating factor that much of the data viewed on a cell phone is not stored on the device itself, but rather remotely through cloud computing. Concluding, the Court noted:

> We cannot deny that our decision today will have an impact on the ability of law enforcement to combat crime. Cell phones have become important tools in facilitating coordination and communication among members of criminal enterprises, and can provide valuable incriminating information about dangerous criminals. Privacy comes at a cost.

> Our holding, of course, is not that the information on a cell phone is immune from search; it is instead that a warrant is generally required before such a search, even when a cell phone is seized incident to arrest.

(Slip Op at. p. 25). And finally, the Court noted that even though the search incident to arrest does not apply to cell phones, other exceptions may still justify a warrantless search of a particular phone, such as exigent circumstances.

Search of defendant's garage pursuant to search warrant was improper where warrant was issued based in part on detective's unlawful search of residence's curtilage

State v. Gentile, __ N.C. App. __, __ S.E.2d __ (Nov. 18, 2014). A search of the defendant's garage pursuant to a search warrant was improper. Following up on a tip that the defendant was growing marijuana on his property, officers went to his residence. They knocked on the front door but received no response. They then went to the back of the house because they heard barking dogs and thought that an occupant might not have heard them knock. Once there they smelled marijuana coming from the garage and this discovery formed the basis for the search warrant. The court concluded that "the sound of barking dogs, alone, was not sufficient to support the detectives' decision to enter the curtilage of defendant's property by walking into the back yard of the home and the area on the driveway within ten feet of the garage." The court went on to conclude that when the detectives smelled the odor of marijuana, "their purported general inquiry about the information received from the anonymous tip was in fact a trespassory invasion of defendant's curtilage, and they had no legal right to be in that location." The subsequent search based, in part, on the odor of marijuana was unlawful.

State established inevitable discovery with respect to search of defendant's vehicle that had been illegally seized where search warrant for vehicle was based on untainted evidence

State v. Larkin, __ N.C. App. __, __ S.E.2d __ (Nov. 18, 2014). The trial court did not err by denying the defendant's motion to suppress. The State established inevitable discovery with respect to a search of the defendant's vehicle that had previously been illegally seized where the evidence showed that an officer obtained the search warrant for the vehicle based on untainted evidence.

Defendant entitled to suppression of blood test results as State did not re-advise the defendant, who had refused a breath test, of his implied consent rights before requesting that he take a blood test

State v. Williams, __ N.C. App. __, 759 S.E.2d 350 (June 17, 2014). In an impaired driving case involving a fatality, the trial court properly granted the defendant's motion to suppress blood test results. The defendant was taken to a breath-testing room where an officer read and gave the defendant a copy of his implied consent rights. The defendant signed the implied consent rights form acknowledging that he understood his rights. After thirty minutes, the officer, a certified chemical analyst, asked the defendant to submit to a chemical analysis of his breath, but the defendant refused. The officer then requested

that a blood testing kit be brought to the office. Although the officer did not re-advise the defendant of his implied consent rights for the blood test, he gave the defendant a consent form for the testing, which the defendant signed. The defendant's blood was then drawn. Challenging the trial court's suppression ruling, the State argued that evidence of the results of the blood test was admissible because the defendant signed a consent form for the testing. The court rejected this argument, concluding that although the State could seek to administer a blood test after the defendant refused to take a breath test, it was required, pursuant to G.S. 20-16.2(a) and G.S. 20-139.1(b5), to re-advise the defendant of his implied consent rights before requesting he take a blood test. The court also rejected the State's argument that any statutory violation was technical and not substantial and no prejudice occurred because the defendant had been advised of his implied consent rights as to the breath test less than an hour before the blood test. It reasoned: "A failure to advise cannot be deemed a mere technical and insubstantial violation."

(1) Results of blood test of sample taken from defendant pursuant to search warrant after he refused to submit to breath test were admissible under G.S. 20-139.1 and procedures for obtaining sample did not have to comply with G.S. 20-16.2; (2) Officer had reasonable suspicion to stop defendant's moped based on helmet infraction

State v. Shepley, ___ N.C. App. ___, ___ S.E.2d ___ (Nov. 4, 2014). (1) Relying on *State v. Drdak*, 330 N.C. 587, 592-93 (1992), and *State v. Davis*, 142 N.C. App. 81 (2001), the court held that where an officer obtained a blood sample from the defendant pursuant to a search warrant after the defendant refused to submit to a breath test of his blood alcohol level, the results were admissible under G.S. 20-139.1(a) and the procedures for obtaining the blood sample did not have to comply with G.S. 20-16.2. (2) The officer had reasonable suspicion to stop the defendant's moped based on a helmet infraction.

Exigent circumstances justified the warrantless withdrawal of blood from a defendant who was hospitalized after wreck

State v. Granger, __ N.C. App. __, 761 S.E.2d 923 (July 15, 2014). In this DWI case, the court held that under *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), exigent circumstances justified the warrantless blood draw. The officer was concerned about the dissipation of alcohol from the defendant's blood because it took over an hour for the officer to establish probable cause to make his request for the defendant's blood. The delay occurred because the defendant's injuries and need for medical care prevented the officer from investigating the matter until he arrived at the hospital, where the defendant was taken after his accident. The officer was concerned about the delay in getting a warrant (about 40 minutes), including the need to wait for another officer to come to the hospital and stay with the defendant while he left to get the warrant. Additionally, the officer was concerned that if he waited for a warrant, the defendant would receive pain medication for his injuries, contaminating his blood sample.

(1) Appellate court remanded for additional findings on whether exigent circumstances supported

warrantless blood draw in case where trial judge had denied motion prior to U.S. Supreme Court issuing *McNeely* decision; (2) Trial court did not err by denying defendant's motion to dismiss based on flagrant violation of constitutional rights

State v. McCrary, __ N.C. App. __, __ S.E.2d __ (Oct. 21, 2014), *temp. stay allowed*, __ N.C. __, __ S.E.2d __ (Nov. 7, 2014). (1) In this DWI case, the court—over a dissent—remanded for additional findings of fact on whether exigent circumstances supported a warrantless blood draw. The trial judge denied the motion to suppress before the U.S. Supreme Court issued its decision in *McNeely*, holding that the natural dissipation of alcohol in the bloodstream does not constitute an exigency in every DWI case sufficient to justify conducting a blood test without a warrant. The court remanded for additional findings of fact as to the availability of a magistrate and the "additional time and uncertainties" in obtaining a warrant, as well as the "other attendant circumstances" that may support the conclusion of law that exigent circumstances existed. The dissenting judge would have reversed the trial court's denial of the motion to suppress and remanded for a new trial. (2) The court rejected the defendant's argument that the trial court erred by denying his motion to dismiss, which was predicated on a flagrant violation of his constitutional rights in connection with the warrantless blood draw. Noting that the defendant's motion failed to detail irreparable damage to the preparation of his case and made no such argument on appeal, the court concluded that the only appropriate action by the trial court under the circumstances was to consider suppression of the evidence as a remedy for any constitutional violation.

(1) Search of defendant's living area that was connected to wife's permitted ABC store was lawful based on wife's consent; (2) Search of defendant's recording studio was lawful based on search warrant

State v. Allah, __ N.C. App. __, 762 S.E.2d. 524 (Sept. 2, 2014). (1) A search of the defendant's living area, which was connected to his wife's permitted ABC store, was valid where his wife consented to the ALE officers' request to search the living area. (2) A search of the defendant's recording studio, also connected to the ABC store, was proper. After the officers developed probable cause to search the recording studio but the defendant declined to give consent to search, the officers "froze" the scene and properly obtained a search warrant to search the studio.

Search of defendant's vehicle permissible under automobile exception where officer had probable cause that vehicle contained marijuana

State v. Armstrong, __ N.C. App. __, 762 S.E.2d. 641 (Sept. 2, 2014). Although a search of the defendant's vehicle was not proper under *Arizona v. Gant*, it was authorized under the automobile exception as officers had probable cause that the vehicle contained marijuana. After officers saw a vehicle execute a three-point turn in the middle of an intersection, strike a parked vehicle, and continue traveling on the left side of the road, they activated their blue lights to initiate a traffic stop. Before the vehicle stopped, they saw a brown beer bottle thrown from the driver's side window. After the driver and passenger exited the vehicle, the officers detected an odor of alcohol and marijuana from the inside of the car and discovered a partially consumed bottle of beer in the center console. The defendant was

arrested for hit and run and possession of an open container, put in handcuffs, and placed in the back of the officers' cruiser. One of the officers searched the vehicle and retrieved the beer bottle from the center console, a grocery bag containing more beer, and a plastic baggie containing several white rocks, which turned out to be cocaine, in the car's glove compartment. After the defendant was charged with possession of cocaine and other offenses, he moved to suppress the evidence found in the car. The court concluded that although a search of the car was not proper under *Gant,* it was proper under the automobile exception. Specifically, the fact that the officers smelled a strong odor of marijuana inside the vehicle provided probable cause to search.

(1) Search warrant for defendant and her home lawful where defendant's home was connected to an IP address used to unlawfully access an email account of a NC A&T employee; (2) NC A&T campus police had territorial jurisdiction to execute warrant; (3) Officer's seizure of privileged documents did not render entire search unlawful

State v. Bernard, __ N.C. App. __, 762 S.E.2d. 514 (Sept. 2, 2014). (1) In a case involving unlawful access to computers and identity theft, a search warrant authorizing a search of the defendant and her home and vehicle was supported by probable cause. The court rejected the defendant's argument that hearsay evidence was improperly considered in the probable cause determination. It went on to conclude that the warrant was supported by probable cause where the defendant's home was connected to an IP address used to unlawfully access an email account of a NC A&T employee. (2) NC A&T campus police had territorial jurisdiction to execute a search warrant at the defendant's off-campus private residence where A&T had entered into a mutual aid agreement with local police. The Agreement gave campus police authority to act off-campus with respect to offenses committed on campus. Here, the statutes governing unauthorized access to a computer—the crime in question—provide that any offense "committed by the use of electronic communication may be deemed to have been committed where the electronic communication was originally sent or where it was originally received." Here, the defendant "sent" an "electronic communication" when she accessed the email account of an A&T employee and sent a false email. The court continued, concluding that the offenses were "committed on Campus" because she sent the email through the A&T campus computer servers. (3) Although an officer "inappropriately" took documents related to the defendant's civil action against A&T and covered by the attorney-client privilege during his search of her residence, the trial court properly suppressed this material and the officer's actions did not otherwise invalidate the search warrant or its execution.

Seizure and analysis of DNA from cigarette butt that the defendant, while under arrest and handcuffed in his driveway, placed in an officer's hand after the officer offered to throw it away was lawful

State v. Borders, __ N.C. App. __, 762 S.E.2d. 490 (Sept. 2, 2014). In this rape and murder case, no Fourth Amendment violation occurred when an officer seized a cigarette butt containing the defendant's DNA. The defendant, a suspect in a murder case, refused four requests by the police to provide a DNA sample. Acting with the primary purpose of obtaining a sample of the defendant's DNA to compare to DNA from the victim's rape kit, officers went to his residence to execute an unrelated arrest warrant. After the defendant was handcuffed and taken outside to the driveway, an officer asked him if he wanted to

smoke a cigarette. The defendant said yes and after he took several drags from the cigarette the officer asked if he could take the cigarette to throw it away for the defendant. The defendant said yes. Instead of throwing away the cigarette, the officer extinguished it and placed it in an evidence bag. The DNA on the cigarette butt came back as a match to the rape kit DNA. The court acknowledged that if the defendant had discarded the cigarette himself within the curtilage of the premises, the officers could not have seized it. However, the defendant voluntarily accepted the officer's offer to throw away the cigarette butt. The court continued, rejecting the defendant's argument that he had a reasonable expectation of privacy in the cigarette butt. When the defendant, while under arrest and handcuffed, placed the cigarette butt in the officer's gloved hand—instead of on the ground or in some other object within the curtilage--the defendant relinquished possession of the butt and any reasonable expectation of privacy in it. Finally, although indicating that it was "troubled" by the officers' trickery, the court concluded that the officers' actions did not require suppression of the DNA evidence. The court reasoned that because "the police did not commit an illegal act in effectuating the valid arrest warrant and because the subjective motives of police do not affect the validity of serving the underlying arrest warrant," suppression was not required.

Identification

Trial court did not err by admitting in-court identification of the defendant by two officers who saw defendant at scene and identified him shortly thereafter based on pictures in their computer database

State v. Macon, __ N.C. App. __, 762 S.E.2d 378 (Sept. 2, 2014). The defendant argued that the trial court erred in denying his motion to suppress the officers' in-court identifications because the procedure they used to identify him violated the Eyewitness Identification Reform Act (EIRA) and his constitutional due process rights. After the officers observed the defendant at the scene, they returned to the police station and put the suspect's name into their computer database. When a picture appeared, both officers identified the defendant as the perpetrator. The officers then pulled up another photograph of the defendant and confirmed that he was the perpetrator. This occurred within 10-15 minutes of the incident in question. The court concluded that the identification based on two photographs was not a "lineup" and therefore was not subject to the EIRA. Next, the court held that even assuming the procedure was impermissibly suggestive, the officers' in-court identification was admissible because it was based on an independent source and their clear, close, and unobstructed view of the suspect at the scene.

Trial court did not commit plain error by denying the defendant's motion to suppress the victim's show-up identification, which occurred within 20 minutes of the victim finding the defendant in his home

State v. Harvell, __ N.C. App. __, 762 S.E.2d 659 (Sept. 5, 2014). In this felony breaking and entering and larceny case, the trial court did not commit plain error by denying the defendant's motion to suppress the victim's show-up identification of the defendant as the person he found in his home on the date in question. Among other things, the court noted that the victim viewed the defendant's face three

separate times during the encounter and that during two of those observations was only 20 feet from the defendant. Additionally, the identification occurred within 15-20 minutes of the victim finding the suspect in his home. Although the show-up identification was suggestive, it was not so impermissibly suggestive as to cause irreparable mistaken identification and violate defendant's constitutional right to due process.

Interrogation

Defendant's incriminating statements were not rendered involuntary by officer's improper promises to defendant

State v. Flood, __ N.C. App. __, __ S.E.2d __ (Nov. 18, 2014). In a child sexual assault case, the trial court erred by finding that the defendant's statements were made involuntarily. Although the court found that an officer made improper promises to the defendant, it held, based on the totality of the circumstances, that the statement was voluntarily. Regarding the improper promises, Agent Oaks suggested to the defendant during the interview that she would work with and help the defendant if he confessed and that she "would recommend . . . that [the defendant] get treatment" instead of jail time. She also asserted that Detective Schwab "can ask for, you know, leniency, give you this, do this. He can ask the District Attorney's Office for certain things. It's totally up to them [what] they do with that but they're going to look for recommendations[.]" Oaks told the defendant that if he "admit[s] to what happened here," Schwab is "going to probably talk to the District Attorney and say, 'hey, this is my recommendation. Hey, this guy was honest with us. This guy has done everything we've asked him to do. What can we do?' and talk about it." Because it is clear that the purpose of Oaks' statements "was to improperly induce in Defendant a belief that he might obtain some kind of relief from criminal charges if he confessed," they were improper promises. However, viewing the totality of the circumstances (length of the interview, the defendant's extensive experience with the criminal justice system given his prior service as a law enforcement officer, etc.), the court found his statement to be voluntarily.

Miranda

(1) Defendant was not in custody for Miranda purposes during an interview at the police station about her missing child; (2) Trial court did not err by finding that defendant's statements were given freely and voluntarily

State v. Davis, __ N.C. App. __, 763 S.E.2d 585 (Oct. 21, 2014). (1) The court rejected the defendant's argument that she was in custody within the meaning of *Miranda* during an interview at the police station about her missing child. The trial court properly used an objective test to determine whether the interview was custodial. Furthermore competent evidence supported the trial court's findings of fact that the defendant was not threatened or restrained; she voluntarily went to the station; she was allowed to leave at the end of the interviews; the interview room door was closed but unlocked; the defendant was allowed to take multiple bathroom and cigarette breaks and was given food and drink; and defendant was offered the opportunity to leave the fourth interview but refused. (2) The trial court

did not err by finding that the defendant's statements were given freely and voluntarily. The court rejected the defendant's argument that they were coerced by fear and hope. The court held that an officer's promise that the defendant would "walk out" of the interview regardless of what she said did not render her confession involuntary. Without more, the officer's statement could not have led the defendant to believe that she would be treated more favorably if she confessed to her involvement in her child's disappearance and death. Next, the court rejected—as a factual matter—the defendant's argument that officers lied about information provided to them by a third party. Finally, the court rejected the defendant's argument that her mental state rendered her confession involuntary and coerced, where the evidence indicated that the defendant understood what was happening, was coherent and did not appear to be impaired.

Defendant's statements, made while a police officer who responded to a domestic violence scene questioned the defendant's girlfriend, were spontaneous and in not response to interrogation

State v. Hogan, __ N.C. App. __, 758 S.E.2d 465 (June 3, 2014). The State conceded that the defendant was in custody at the time he made the statements at issue. The court rejected the defendant's argument that asking his girlfriend what happened in front of him was a coercive technique designed to elicit an incriminating statement. Conceding that the "case is a close one," the court concluded that the officer's question to the girlfriend did not constitute the functional equivalent of questioning because the officer's question did not call for a response from the defendant and therefore was not reasonably likely to elicit an incriminating response from him.

Defendant's statements to police investigating sexual assault of child in Goodwill store were voluntary

State v. McCanless, __ N.C. App. __, 758 S.E.2d 474 (June 3, 2014). Rejecting the defendant's argument that that "[t]he detectives' lies, deceptions, and implantation of fear and hope established a coercive atmosphere", the court relied on the trial court's findings of fact and found that the defendant's statement was voluntary. The trial court found that officers told the defendant that a Child Medical Examination had been performed, hoping that the defendant would believe that the results implicated him, even though the officers did not yet have the results. The officers also told the defendant that there was a video recording of the incident, but did not reveal the contents of the recording. One officer used profanity, but it was not continuous or ongoing and did not appear to have a significant effect on the defendant. Significantly, the trial court found that the defendant arrived at the police station on his own, was not restrained during questioning, was offered water and use of the restroom, was not subject to unduly long interrogation, and left the police department on his own at the end of the interview.

Pretrial and Trial Procedure

Pretrial Release

(1) Defendant, who had several opportunities to call counsel and friends, failed to establish basis for

dismissal under *State v. Knoll*; (2) Defendant failed to show he was prejudiced by "option bond"

State v. Townsend, __ N.C. App. __, 762 S.E.2d 898 (Sept. 16, 2014). (1) The trial court properly denied the defendant's *Knoll* motion, in which the defendant argued that he was denied his right to communicate with counsel and friends. The defendant had several opportunities to call counsel and friends to observe him and help him obtain an independent chemical analysis, but the defendant failed to do so. In fact, the defendant asked that his wife be called, but only to tell her that he had been arrested. Thus, the defendant was not denied his rights under *Knoll*. (2) Even if the magistrate erred by ordering an "option bond" that gave the defendant a choice between paying a $1,000 secured bond or a $1,000 "unsecured bond and being released to a sober, responsible adult" without making written findings of fact to support the secured bond, the defendant failed to show how he was prejudiced where he was released on an unsecured bond to his wife.

Right to Counsel

No error occurred when trial court denied defense counsel's request for an overnight recess following the court's denial of the State's request that defense counsel be held in criminal contempt

State v. King, __ N.C. App. __, 760 S.E.2d 377 (July 15, 2014). The State moved during defendant's trial on charges that he raped a child to hold defendant's counsel in criminal contempt, alleging that he violated the court's order regarding the rape shield rule in cross-examining the victim. After the trial court denied the State's motion, defense counsel requested an overnight recess to "calm down" about the contempt motion. The trial court denied this request but at 11:38 am called a recess until 2 pm that day. The court rejected the defendant's arguments that there was a conflict of interest between the defendant and defense counsel and that the trial court's denial of the overnight recess resulted in ineffective assistance of counsel.

Defense counsel did not commit a *Harbison* error by admitting to assault by pointing gun in an attempted murder case

State v. Wilson, __ N.C. App. __, 762 S.E.2d 894 (Sept. 16, 2014). In an attempted murder case, counsel did not commit a *Harbison* error when he stated during closing argument: "You have heard my client basically admit that while pointing the gun at someone, he basically committed a crime: Assault by pointing a gun." Because assault by pointing a gun is not a lesser-included of the charged offense, counsel's statement fell outside of *Harbison.*

Pleadings

Juvenile petitions alleging two acts of sexual offense and two acts of crime against nature were sufficient

In re J.F., __ N.C. App. __, __ S.E.2d __ (Nov. 18, 2014). Noting that the sufficiency of a petition alleging a juvenile to be delinquent is evaluated by the same standards that apply to indictments, the court held that petitions alleging two acts of sexual offense and two acts of crime against nature were sufficient. In addition to tracking the statutory language, one sexual offense and one crime against nature petition alleged that the juvenile performed fellatio on the victim; the other sexual offense and crime against nature petitions alleged that the victim performed fellatio on the juvenile. The court rejected the defendant's argument that any more detail was required, noting that if the juvenile wanted more information about the factual circumstances underlying each charge he should have moved for a bill of particulars.

An information charging injury to personal property was fatally flawed where it failed to allege that one of the victims was a legal entity capable of owning property

State v. Ellis, __ N.C. App. __, 763 S.E.2d 574 (Oct. 7, 2014), *temp. stay allowed*, __ N.C. __, __ S.E.2d __ (Oct. 27, 2014). An information charging injury to personal property was fatally flawed where it failed to allege that one of the victims was a legal entity capable of owning property. The information alleged the victims as: "North Carolina State University (NCSU) and NCSU High Voltage Distribution." Noting that G.S. 116-4 provides that NCSU is a constituent institution of UNC, "a body politic and corporate" expressly authorized under G.S. 116-3 to own property, the court found that the words "North Carolina State University" sufficiently allege a legal entity capable of owning property. However, the allegation "NCSU High Voltage Distribution" "does not identify a legal entity necessarily capable of owning property because the additional words after 'NCSU' do not indicate what type of organization it is."

Short form murder indictment was defective where it did not allege that defendant acted with "malice aforethought" as required by statute

State v. Wilson, __ N.C. App. __, 762 S.E.2d 894 (Sept. 16, 2014). A short form indictment charging the defendant with attempted first degree murder was defective. The indictment failed to allege that the defendant acted with "malice aforethought" as required by G.S. 15-144 (short form murder indictment). The court remanded for entry of judgment on the lesser of voluntary manslaughter.

Indictment charging trafficking by manufacturing was not fatally defective where it did not describe the exact manner in which defendant allegedly manufactured cocaine

State v. Miranda, __ N.C. App. __, 762 S.E.2d 349 (Aug. 19, 2014). An indictment charging trafficking by manufacturing was not defective. The court rejected the defendant's argument that the indictment was fatally defective because it did not adequately describe the manner in which the defendant allegedly manufactured cocaine. It reasoned: "Although Defendant is correct in noting that the indictment does not explicitly delineate the manner in which he manufactured cocaine or a cocaine-related mixture, the relevant statutory language creates a single offense consisting of the manufacturing of a controlled substance rather than multiple offenses depending on the exact manufacturing activity in which Defendant allegedly engaged."

Defendant entitled to dismissal of drug paraphernalia charges where paraphernalia proved at trial was not that alleged in the indictment

State v. Satterthwaite, __ N.C. App. __, 759 S.E.2d 369 (June 17, 2014). Where a drug paraphernalia indictment charged the defendant with possession of plastic baggies used to package and repackage pills but the State introduced no evidence of plastic baggies at trial, the trial court erred by denying the defendant's motion to dismiss. At trial, the State's evidence showed that the defendant used a bottle to deliver the pills. The court stated: "We hold that the specific items alleged to be drug paraphernalia must be enumerated in the indictment, and that evidence of such items must be presented at trial."

Larceny indictment fatally defective where it failed to allege that church was an entity capable of owning property

State v. Campbell, __ N.C. App. __, 759 S.E.2d 380 (July 1, 2014), *temp. stay allowed*, __ N.C. __, 761 S.E.2d 905 (July 21, 2014). In a case involving a larceny from a church, the indictment was defective where it failed to allege the victim, Manna Baptist Church, was an entity capable of owning property. The fact that the indictment alleged a named natural person as a co-owner did not save the indictment: "If one of the owners were incapable of owning property, the State necessarily would be unable to prove that both alleged owners had a property interest."

Superior court lacked jurisdiction to try defendant on a misdemeanor statement of charges filed in superior court

State v. Wall, __ N.C. App. __, 760 S.E.2d 386 (July 15, 2014). The superior court lacked jurisdiction to try the defendant for resisting arrest where the defendant was tried on a misdemeanor statement of charges filed in superior court. The State filed the statement of charges on its own, without an objection to the magistrate's order having been made by the defendant. Under G.S. 15A-922, "the State has a limited window in which it may file a statement of charges on its own accord, and that is prior to arraignment" in district court. After arraignment, the State may only file a statement of charges when the defendant objects to the sufficiency of the pleading and the trial court rules that the pleading is insufficient.

The State was properly allowed to prove acts of abuse or neglect that were not alleged in the warrant at defendant's trial on charges that he contributed to the abuse or neglect of a juvenile

State v. Harris, __ N.C. App. __, 763 S.E.2d 302 (Sept. 16, 2014). Where the warrant charging contributing to the abuse or neglect of a juvenile alleged, in part, that the defendant knowingly caused, encouraged, and aided the child "to commit an act, consume alcoholic beverage," the State was not prohibited from showing that the defendant also contributed to the abuse or neglect of the juvenile by engaging her in sexual acts. The court noted that an indictment that fails to allege the exact manner in which the defendant contributed to the delinquency, abuse, or neglect of a minor is not fatally defective.

Other Procedural Issues

Trial court did not err by referring to the victim as the "alleged victim" in its opening remarks to jury and by referring to her as "the victim" in its final jury instructions

State v. Spence, __ N.C. App. __, __ S.E.2d __ (Nov. 18, 2014). In this child sexual abuse case, the trial court did not err by referring to the victim as the "alleged victim" in its opening remarks to the jury and referring to her as "the victim" in its final jury instructions. The court distinguished *State v. Walston*, ___ N.C. App. ___, ___, 747 S.E.2d 720, 728 (2013), *review allowed*, ___ N.C. ___, 753 S.E.2d 666 (Jan. 23, 2014), on grounds that in this case the defendant failed to object at trial and thus the plain error standard applied. Moreover, given the evidence, the court could not conclude that the trial court's word choice had a probable impact on the jury's finding of guilt.

Trial court did not err by denying defendant's motion to continue made on grounds that defense counsel learned of potential defense witness on eve of trial

State v. Blow, ___ N.C. App. ___, 764 S.E.2d 230 (Nov. 4, 2014). In a child sexual assault case, the trial court did not err by denying the defendant's motion to continue, made on grounds that defense counsel learned of a potential defense witness on the eve of trial. Specifically, defense counsel learned that a psychologist prepared reports on the defendant and the victim in connection with a prior custody determination. However, the defendant knew about the psychologist's work given his participation in it and defense counsel had two months to confer with the defendant and prepare the case for trial.

Trial court did not violate defendant's confrontation clause rights when it released an out-of-state witness from subpoena

State v. Royster, __ N.C. App. __, 763 S.E.2d 577 (Oct. 21, 2014). The court rejected the defendant's argument that his confrontation clause rights were violated when the trial court released an out-of-state witness from subpoena. The State subpoenaed the witness from New York to testify at the trial. The witness testified at trial and the defendant had an opportunity to cross-examine him. After the witness stepped down from the witness stand, the State informed the trial court judge that the defense had attempted to serve a subpoena on the witness the day before. The State argued that the subpoena was invalid. The witness refused to speak with the defense outside of court and the trial court required the defense to decide whether to call the individual as a witness before 2:00 p.m. that day. When the appointed time arrived, the defense indicated it had not yet decided whether it would be calling the individual as a witness and the trial court judge released the witness from the summons. The defendant's confrontation rights were not violated where the witness was available at trial and the defendant had the opportunity to cross-examine him. Additionally, under G.S. 15A-814, the defendant's subpoena was invalid.

Trial court did not abuse discretion by denying defendant's motions for mistrial based on juror misconduct

State v. Salentine, __ N.C. App. __, 763 S.E.2d 800 (Oct. 21, 2014). In a case where the defendant was convicted of first-degree murder and sentenced to life in prison, the trial court did not abuse its discretion by denying the defendant's mistrial motions based on juror misconduct and refusing the defendant's request to make further inquiry into whether other jurors received prejudicial outside information. During the sentencing phase of the trial, the trial court received a letter from juror Lloyd's brother-in-law claiming that Lloyd contacted his sister and said that one juror failed to disclose information during voir dire, that he went online and found information about the defendant, and that he asked his sister the meaning of the term malice. Upon inquiry by the court Lloyd denied that he conducted online research or asked about the meaning of the term malice. The trial court removed Lloyd from the jury and replaced him with an alternate. The defendant moved for a mistrial before and after removal of Lloyd and asked the trial court to make further inquiry of the other jurors to determine if they were exposed to outside information. Given the trial court's "searching" inquiry of Lloyd, the court found no abuse of discretion. With regard to the trial court's failure to inquire of the other jurors, the court emphasized that there is no rule that requires a court to hold a hearing to investigate juror misconduct when an allegation is made.

Trial court erred by denying defendant's request for an instruction on entrapment

State v. Ott, __ N.C. App. __, 763 S.E.2d 530 (Oct. 7, 2014). In this drug case, the trial court erred by denying the defendant's request for an instruction on entrapment. The court agreed with the defendant that the plan to sell the pills originated in the mind of the defendant's friend Eudy, who was acting as an agent for law enforcement, and the defendant was only convinced to do so through trickery and persuasion. It explained:

> [A]ccording to defendant's evidence, Eudy was acting as an agent for the Sherriff's office when she approached defendant, initiated a conversation about selling pills to her buyer, provided defendant the pills, and coached her on what to say during the sale. While it is undisputed that defendant was a drug user, defendant claimed that she had never sold pills to anyone before. In fact, the only reason she agreed to sell them was because she was "desperate for some pills," and she believed Eudy's story that she did not want her husband to find out what she was doing. Defendant's testimony established that Eudy told defendant exactly what to say such that, during the encounter, defendant was simply playing a role which was defined and created by an agent of law enforcement. In sum, this evidence, if believed, shows that Eudy not only came up with the entire plan to sell the drugs but also persuaded defendant, who denied being a drug dealer, to sell the pills to [the undercover officer] by promising her pills in exchange and by pleading with her for her help to keep the sale secret from her husband. Furthermore, viewing defendant's evidence as true, she had no predisposition to commit the crime of selling pills.

Defendant was not prejudiced by trial court conducting unrecorded bench conferences in a case where court had granted defendant's motion for complete recordation

State v. Foster, __ N.C. App. __, 763 S.E.2d 920 (Oct. 7, 2014). In a case where the trial court granted the defendant's motion for complete recordation, the defendant was not prejudiced by the fact that the

trial court conducted unrecorded bench conferences. The court was able to discern the evidentiary objections at issue during the bench conferences. The defense objection was sustained in connection with the first conference and the State's objection properly was sustained in connection with the second.

Prosecutor's statements during closing argument were improper

State v. Watlington, __ N.C. App. __, 759 S.E.2d. 392 (July 1, 2014) (No. COA13-925), *temp. stay allowed* __ N.C. __, 761 S.E.2d 904 (July 18, 2014). Although the prosecutor's statements during closing argument in a robbery case were improper, a new trial was not required. The prosecutor argued that if the defendant "had gotten hold" of a rifle loaded with 14 rounds, "one each for you jurors," "this might have been an entirely different case." The court held that "the remarks by the State were improper, and should have been precluded by the trial court." However, under the appropriate standards of review, a new trial was not required.

Appellate court denied defendant's motion to strike State's untimely brief but "strongly admonished" counsel for the State to refrain from such conduct in the future

State v. Watlington, __ N.C. App. __, 759 S.E.2d. 116 (July 1, 2014) (No. COA13-661). The court denied the defendant's motion to strike the State's brief, which was filed in an untimely manner without any justification or excuse and after several extensions of the time within which it was authorized to do so had been obtained. However, the court "strongly admonished" counsel for the State "to refrain from engaging in such inexcusable conduct in the future" and that counsel "should understand that any repetition of the conduct disclosed by the present record will result in the imposition of significant sanctions upon both the State and himself personally."

Trial court did not err by refusing to give defendant's requested jury instruction regarding results of research about accuracy of eyewitness identification evidence

State v. Watlington, __ N.C. App. __, 759 S.E.2d. 116 (July 1, 2014) (No. COA13-661). The trial court did not err by refusing to instruct the jury about the results of recent research into factors bearing upon the accuracy of eyewitness identification evidence. The eyewitness identification instruction requested by the defendant was eight pages long and strongly resembled a New Jersey jury instruction. The trial court declined to give the defendant's proffered instruction and gave an alternate one, as well as an instruction relating to the manner in which the jury should evaluate the validity of photographic identification procedures as required by G.S. 15A-284.52(d)(3), with this instruction including a lengthy recitation of the criteria for a proper identification procedure set out in G.S. 15A-284.52(b). Citing prior NC cases, the court held that "existing pattern jury instructions governing the manner in which jurors should evaluate the weight and credibility of the evidence and the necessity for the jury to find that the defendant perpetrated the crime charged beyond a reasonable doubt sufficiently address the issues arising from the presentation of eyewitness identification testimony." The court went on to note the absence of any evidentiary support for the requested instruction.

(1) Trial court did not err with respect to questioning prospective juror about prospective jurors discussing case in jury room; (2) Trial court erred by failing to follow statutory procedure for jury selection; (3) Trial court did not plainly err by failing to submit involuntary manslaughter to the jury where jury found defendant guilty of homicide requiring malice; (4) Trial court did not err by failing to instruct jury on self-defense

State v. Gurkin, __ N.C. App. __, 758 S.E.2d 450 (June 3, 2014). (1) In this murder case, the trial court did not err by failing to make further inquiry when a prospective juror revealed during voir dire that prospective jurors were discussing the case in the jury room. Questioning of the juror revealed that "a few" prospective jurors spoke about whether they knew the defendant, what had happened, and news coverage of the crime. The juror indicated that no one knew the defendant or anything about the case. The trial court acted within its discretion by declining to conduct any further examination and limiting its inquiry to the juror's voir dire. (2) Although the trial court erred by failing to follow the statutory procedure for jury selection in G.S. 15A-1214 (specifically, that the prosecutor must pass 12 jurors to the defense), the defendant failed to show prejudice. The court rejected the defendant's argument that the error was reversible per se. (3) The trial court did not commit plain error by failing to submit involuntary manslaughter to the jury. The trial court submitted first-degree murder, second-degree murder, voluntary manslaughter, and not guilty to the jury. The jury found the defendant guilty of second-degree murder. By finding the defendant guilty of this offense, the jury necessarily found, beyond a reasonable doubt, that the defendant acted with malice. Involuntary manslaughter is a homicide without malice, a fact rejected by the jury. (4) The trial court did not err by denying the defendant's request to instruct the jury on self-defense and imperfect self-defense. The defendant never testified that he thought it was necessary or reasonably necessary to kill his wife, the victim, to protect himself from death or great bodily harm; he only testified that his wife was holding a stun gun and that he pushed her up against the bathroom cabinets to keep her from using it. The defendant was able to push the stun gun into his wife's side and ultimately subdued her. He did not state that he feared for his life or that he feared he might suffer great bodily harm.

(1) Trial court properly ordered that defendant be physically restrained during trial where defendant had attempted to escape mid-trial; (2) Trial court did not make improper judicial comment on defendant's dangerousness by ordering additional security after escape attempt; (3) Trial court's procedure for inquiring into jury's exposure to media coverage of escape attempt was adequate

State v. Jackson, __ N.C. App. __, 761 S.E.2d 724 (Aug. 5, 2014). (1) In a first-degree murder case, the trial court did not abuse its discretion or violate defendant's constitutional rights by ordering the defendant to be physically restrained during trial after the defendant attempted to escape mid-trial, causing a lockdown of the courthouse. (2) The court rejected the defendant's argument that the trial court made an improper judicial comment on his dangerousness in violation G.S. 15A-1222 and -1232. The defendant had argued that the trial court's decision to order additional security after his mid-trial escape attempt, including physical restraints and an escort for the jury, was akin to a statement that defendant was highly dangerous and probably guilty. The court rejected this argument, concluding that

the trial court did not abuse its discretion or violate the defendant's constitutional rights by ordering additional security measures after the defendant attempted to escape, causing a lockdown of the courthouse. The court also rejected the defendant's argument that the trial court should have instructed the jury that they should not consider the fact that they had been escorted to their cars or the additional security personnel in the courtroom. (3) Where the defendant attempted to escape mid-trial, causing a lockdown of the courthouse and the trial court to order a security escort for the jury, the trial court's procedure for inquiring about the juror's exposure to media coverage was adequate. When court reconvened the next day, the trial court had the bailiff ask the jurors whether any of them had seen any reports about the events of the previous day. None indicated that they had. The trial court decided that it was unnecessary to individually inquire of the jurors and once the jury was back in the courtroom, the trial court asked them, as a whole, whether they had followed the court's instructions to avoid any coverage of the trial. None indicated that they had violated the court's instructions.

Trial court committed reversible error by failing to instruct jury to disregard evidence about habitual felon indictment when that evidence was elicited during the trial on the underlying charges

State v. Rogers, __ N.C. App. __, 762 S.E.2d. 511 (Sept. 2, 2014). The trial court committed reversible error by failing to instruct the jury to disregard evidence about the defendant's habitual felon indictment when that evidence was elicited during the trial on the underlying charges. Although the trial court sustained defense counsel's objection and instructed the jury to strike a portion of the testimony given by an officer, it was required to give a curative instruction as to additional testimony offered by the officer.

Trial court erred by instructing jury based on statute enacted in 2011 that did not apply to the 2006 incident in question

State v. Rawlings, __ N.C. App. __, 762 S.E.2d 909 (Sept. 16, 2014). The trial court erred by instructing the defendant pursuant to G.S. 14-51.4 (justification for defensive force not available) where the statute, enacted in 2011, did not apply to the 2006 incident in question.

The trial court did not err by joining for trial offenses committed on two different child victims

State v. McCanless, __ N.C. App. __, 758 S.E.2d 474 (June 3, 2014). The State alleged that on 3 September 2010, the defendant committed indecent exposure by showing his privates to a child victim, M.S., and committed indecent liberties with M.S. It also alleged that on 1 July 2011 he engaged in a sexual act with a child victim, K.C., committed first-degree kidnapping, and committed indecent liberties on K.C. The evidence in the cases was similar with respect to victim, location, motive, and modus operandi. Both victims were prepubescent girls, the acts occurred within months of one another in a donation store while the girls were momentarily alone, and in both cases the defendant immediately fled the scene and engaged in sexual misconduct.

Closing the courtroom for testimony by a child sexual abuse victim was proper

State v. Godley, __ N.C. App. __, 760 S.E.2d 285 (July 1, 2014). On appeal after a remand for the trial court to conduct a hearing and make appropriate findings of fact and conclusions of law regarding a closure of the courtroom during testimony by a child sexual abuse victim, the court held that the closure of the courtroom was proper and that the defendant's constitutional right to a public trial was not violated.

Trial court did not abuse its discretion in quashing defendant's subpoena of prosecutor who represented State at plea hearing

State v. Hurt, __ N.C. App. __, 760 S.E.2d 341 (July 15, 2014). The trial court did not abuse its discretion by granting the State's motion to quash the subpoena of a prosecutor involved in an earlier hearing on the defendant's guilty plea. The court rejected the defendant's argument that the prosecutor's recitation of the factual basis for the plea was a judicial admission. Thus, the court rejected the defendant's argument that the trial court's decision to quash the subpoena deprived him of the opportunity to elicit binding admissions on the State. Additionally, the defendant could have proffered the prosecutor's statements through a transcript of the plea proceeding, which he introduced with respect to other matters.

Evidence

Authentication

State adequately authenticated photographs of text messages sent between accomplices to an attempted robbery

State v. Gray, __ N.C. App. __, 758 S.E.2d 699 (June 3, 2014). The State adequately authenticated photographs of text messages sent between accomplices to an attempted robbery. A detective testified that he took pictures of text messages on an accomplice's cell phone while searching the phone incident to arrest. The detective identified the photographs in the exhibit as screen shots of the cell phone and testified that they were in substantially the same condition as when he obtained them. Another accomplice, with whom the first accomplice was communicating in the text messages, also testified to the authenticity of the exhibit. The court rejected the defendant's argument that to authenticate the text messages, the State had to call employees of the cell phone company.

Affidavit of indigency was self-authenticating and trial court properly allowed jury to compare signature on affidavit with signature on pawn shop buy ticket introduced at trial

State v. McCoy, __ N.C. App. __, 759 S.E.2d 330 (June 3, 2014). (1) An affidavit of indigency sworn to by the defendant before a court clerk was a self-authenticating document under Evidence Rule 902 and thus need not be authenticated under Rule 901. (2) The trial court properly allowed the jury to consider whether a signature on a pawn shop buy ticket matched the defendant's signature of his affidavit of

indigency. The court compared the signatures and found that there was enough similarity between them for the documents to have been submitted to the jury for comparison.

Opinion Testimony

(1) Officer properly offered lay opinion testimony regarding shoeprint found near the scene; (2) Evidence of shoeprint and defendant's possession of victim's property was sufficient to sustain convictions for burglary and larceny

State v. Larkin, __ N.C. App. __, __ S.E.2d __ (Nov. 18, 2014). (1) In a burglary and felony larceny case, an officer properly offered lay opinion testimony regarding a shoeprint found near the scene. The court found that the shoeprint evidence satisfied the *Palmer* "triple inference" test:

> [E]vidence of shoeprints has no legitimate or logical tendency to identify an accused as the perpetrator of a crime unless the attendant circumstances support this triple inference: (1) that the shoeprints were found at or near the place of the crime; (2) that the shoeprints were made at the time of the crime; and (3) that the shoeprints correspond to shoes worn by the accused at the time of the crime.

(2) Shoeprint evidence and evidence that the defendant possessed the victim's Bose CD changer and radio five months after they were stolen was sufficient to sustain the defendant's convictions for burglary and larceny.

No error occurred when State's experts testified that victim's physical injuries were consistent with the sexual assault she described

State v. Walton, __ N.C. App. __, __ S.E.2d __ (Oct. 21, 2014). No error occurred when the State's experts in a sexual assault case testified that the victim's physical injuries were consistent with the sexual assault she described.

Trial court did not err by permitting pediatrician to testify about common characteristics she observed in sexually abused children and a possible basis for those characteristics

State v. King, __ N.C. App. __, 760 S.E.2d 377 (July 15, 2014). In this child sex abuse case, the trial court did not err by allowing the State's expert in pediatric medicine and the evaluation and treatment of sexual abuse to testify that children who have been abused frequently do not immediately disclose the abuse or only partially disclose the abuse. The expert explained that children often do not disclose abuse because the alleged perpetrator is a parent, parental figure, or someone they love and trust, and the child does not want to get them in trouble. The court rejected the defendant's argument that the expert's testimony constituted opinion testimony on the victim's credibility.

Opinion testimony by State's medical examiner experts was properly admitted in case where old *"Howerton"* version of Evidence Rule 702 applied

State v. Borders, __ N.C. App. __, 762 S.E.2d. 490 (Sept. 2, 2014). In this rape and murder case in which the old "*Howerton*" version of Rule 702 applied, the court rejected the defendant's argument that opinion testimony by the State's medical examiner experts as to cause of death was unreliable and should not have been admitted. The court concluded:

> [T]he forensic pathologists examined the body and eliminated other causes of death while drawing upon their experience, education, knowledge, skill, and training. Both doctors knew from the criminal investigation into her death that [the victim's] home was broken into, that she had been badly bruised, that she had abrasions on her arm and vagina, that her panties were torn, and that DNA obtained from a vaginal swab containing sperm matched Defendant's DNA samples. The doctors' physical examination did not show a cause of death, but both doctors drew upon their experience performing such autopsies in stating that suffocation victims often do not show physical signs of asphyxiation. The doctors also eliminated all other causes of death before arriving at asphyxiation, which Defendant contends is not a scientifically established technique. However, the reliability criterion at issue here is nothing more than a preliminary inquiry into the adequacy of the expert's testimony. Accordingly, the doctors' testimony met the first prong of *Howerton* so that "any lingering questions or controversy concerning the quality of the expert's conclusions go to the weight of the testimony rather than its admissibility."

(Citations omitted.)

The court then concluded that the witnesses were properly qualified as experts in forensic pathology.

Trial court did not commit plain error in admitting testimony from victim's grandmother in sexual abuse trial

State v. Harris, __ N.C. App. __, 763 S.E.2d 302 (Sept. 16, 2014). In a case where the defendant was convicted of sexual battery and contributing to the abuse or neglect of a juvenile, the trial court did not commit plain error by allowing the victim's grandmother to testify about what happened when her granddaughter told her she had been assaulted by the defendant shortly after it occurred. The court of appeals deemed the evidence relevant because it established that the victim immediately reported the incident and that she gave a consistent account of what occurred. It also helped complete the story of the assault for the jury. The appellate court rejected the defendant's argument that the grandmother vouched for the victim's credibility, noting that she never expressly stated that she believed her granddaughter. The court further concluded that it could not construe the grandmother's testimony, which included her recounting of how she threw the defendant out of her home and told him she would kill him if he came back, to imply that she believed her granddaughter. Finally, the court stated that even if the grandmother's testimony was impermissible vouching, the admission of her statements did not rise to the level of plain error as any vouching was incidental and most jurors are likely to assume that a grandmother would believe an accusation of sexual abuse by one of her grandchildren.

Other Evidence Issues

Trial court abused its discretion by admitting officer's testimony that field test kit indicated presence of cocaine in the residence in question

State v. Carter, __ N.C. App. __, __ S.E.2d __ (Nov. 18, 2014). Relying on *State v. Meadows*, 201 N.C. App. 707 (2010) (trial court abused its discretion by allowing an officer to testify that substances were cocaine based on NarTest field test), the court held that the trial court abused its discretion by admitting an officer's testimony that narcotics indicator field test kits indicated the presence of cocaine in the residence in question.

Improper admission of results from portable breath test did not warrant new trial

State v. Townsend, __ N.C. App. __, 762 S.E.2d 898 (Sept. 16, 2014). Although the trial court erred by admitting evidence of the numerical result of an alco-sensor test during a pretrial hearing on the defendant's motion to suppress, a new trial was not warranted. The numerical results were admitted only in the pre-trial hearing, not at trial and even without the numerical result, the State presented sufficient evidence to defeat the suppression motion.

(1) The trial court did not abuse its discretion by allowing the prosecution to use leading questions when examining a child sexual assault victim; (2) The trial court did not err by allowing the prosecutor to ask a 14-year-old child sexual assault victim to write down what the defendant did to her and then allowing the prosecutor to read the note to the jury

State v. Earls, __ N.C. App. __, 758 S.E.2d 654 (June 3, 2014). (1) The trial court did not abuse its discretion by allowing the prosecution to use leading questions when examining a child sexual assault victim. The prosecutor was attempting to ask a 14-year-old victim questions about her father's sexual conduct toward her. She was very reluctant to testify. The prosecutor repeatedly urged the victim to tell the truth, regardless of what her answer would be. The prosecutor attempted to refresh her recollection with her prior statements, but she still refused to specify what the defendant did. The court concluded: "Leading questions were clearly necessary here to develop the witness's testimony." (2) The trial court did not err by allowing the prosecutor to ask a 14-year-old child sexual assault victim to write down what the defendant did to her and then allowing the prosecutor to read the note to the jury. Although the child answered some questions, she was reluctant to verbally answer the prosecutor's question about what the defendant did to her. The prosecutor then asked the victim to write down the answer to the question. The victim wrote that the defendant penetrated her vaginally.

(1) Evidence of ammunition found at defendant's house was relevant because it tended to link defendant to scene of crime; (2) Defendant opened the door to admission of evidence of gun found in his house

State v. Royster, __ N.C. App. __, 763 S.E.2d 577 (Oct. 21, 2014). In a murder case, the trial court did not err by admitting testimony concerning nine-millimeter ammunition and a gun found at the defendant's house. Evidence concerning the ammunition was relevant because it tended to link the defendant to the scene of the crime, where eleven shell casings of the same brand and caliber were found, thus allowing the jury to infer that the defendant was the perpetrator. The trial court had ruled that evidence of the gun—which was not the murder weapon—was inadmissible and the State complied with this ruling on

direct. However, in order to dispel any suggestion that the defendant possessed the nine-millimeter gun used in the shooting, the defendant elicited testimony that a nine-millimeter gun found in his house, in which the nine-millimeter ammunition was found, was not the murder weapon. The court held that the defendant could not challenge the admission of testimony that he first elicited.

(1) Trial court did not abuse discretion by refusing to exclude, under Evidence Rule 403, evidence of defendant's mid-trial escape attempt; (2) Trial court did not err by admitting incriminating jail letter written in gang code

State v. Jackson, __ N.C. App. __, 761 S.E.2d 724 (Aug. 5, 2014). (1) In a first-degree murder trial, the trial court did not abuse its discretion by declining to exclude, under Rule 403, evidence of the defendant's mid-trial escape attempt. The court reasoned: "[T]he jury may have inferred from the fact that defendant attempted to escape that defendant was guilty of the charges against him. That inference is precisely the inference that makes evidence of flight relevant and it is not an unfair inference to draw." (2) The trial court did not err by admitting a jail letter that the defendant wrote to an accomplice in "Crip" gang code. In the letter, the defendant asked the accomplice to kill a third accomplice because he was talking to police. Rejecting the defendant's argument that the evidence should have been excluded under Rule 403, the court determined that the fact that the defendant solicited the murder of a State's witness was highly relevant and that the defendant's gang membership was necessary to understand the context and relevance of the letter, which had to be translated by an accomplice. Additionally, the trial court repeatedly instructed the jury that they were only to consider the gang evidence as an explanation for the note.

Where the State failed to produce substantial, independent corroborative evidence to support the facts underlying the defendant's extrajudicial statement in violation of the corpus delicti rule, the trial court erred by denying the defendant's motion to dismiss charges of participating in the prostitution of a minor

State v. Parks, __ N.C. App. __, 759 S.E.2d 355 (June 17, 2014). The defendant told a police officer that he agreed to supply two 17-year-old girls (A.J. and D.T.) with marijuana if they came to his house. He told police that he had the following exchange with one of the girls:

> "[A.J.] asked if I had any money. I said, 'Yeah, I got some money.' She said she was waiting on her friend. She called me back about three times and asked which house to come to. . . . [A.J.] asked, and said, "You are supposed to have something waiting on me." I said, "Why, did you bring something?" We went back to my room and I asked what they were working with. They both took their clothes off. [A.J.] asked about the money, again, and I played it off, because I didn't have much money for them."

Both A.J. and D.T. testified at trial that defendant performed a sexual act on both of them, but that he did not solicit sex from them in exchange for money or marijuana. The court rejected the State's argument that an agreement to exchange sex for marijuana could be inferred even without the defendant's statements and that other independent evidence corroborated the defendant's extrajudicial confession. The court found the record insufficient to strongly corroborate the essential element that defendant patronized a minor prostitute.

Trial court did not err by barring testimony that defendant possessed the character trait of working well with children and not having an unnatural lust or desire to have sexual relations with children

State v. Clapp, __ N.C. App. __, 761 S.E.2d 710 (Aug. 5, 2014). In a child sexual assault case, in which the defendant was charged with having sexual contact with student athletes who came to him for help with sports injuries, the trial court did not err by refusing to allow a defense witness to testify that the defendant possessed the character trait of working well with children and not having an unnatural lust or desire to have sexual relations with children. The defendant argued that the evidence should have been admitted since it related to a pertinent character trait that had a special relationship to the charged crimes. Citing *State v. Wagoner*, 131 N.C. App. 285, 293 (1998) (the trial court properly excluded evidence showing the defendant's "psychological make-up," including testimony that he was not a high-risk sexual offender, on the theory that such evidence, which amounted to proof of the defendant's normality, did not tend to show the existence or non-existence of a pertinent character trait), the court concluded that the evidence in question "constituted nothing more than an attestation to Defendant's normalcy" and was properly excluded.

Trial court committed reversible error by prohibiting the defendant from introducing a voice mail message by a key witness for the State to show her bias and attack her credibility

State v. Triplett, __ N.C. App. __, 762 S.E.2d 632 (Sept. 2, 2014), *temp. stay allowed*, __ N.C. __, 763 S.E.2d 151 (Sept. 19, 2014). In this murder case the trial court committed reversible error by prohibiting—under Rules 402 and 403—the defendant from introducing a tape-recorded voice mail message by the defendant's sister, a key witness for the State, to show her bias and attack her credibility.

Crimes

Abuse and Neglect

(1) A defendant who places a child in a position where she may be abused or neglected may be convicted of contributing to a juvenile's being abused or neglected; (2) Evidence was sufficient to show that defendant placed child in a position in which she could be abused or neglected; (3) Erroneous jury instructions did not rise to the level of plain error

State v. Harris, __ N.C. App. __, 763 S.E.2d 302 (Sept. 16, 2014). (1) Following *State v. Stevens*, ___ N.C. App. ___, 745 S.E.2d 64, 67 (2013), the court held that the offense of contributing to a juvenile's being delinquent, undisciplined, abused, or neglected (G.S. 14-316.1) does not require the defendant to be the juvenile's parent, guardian, custodian, or caretaker; the defendant need only be a person who causes a juvenile to be in a place or condition where the juvenile does not receive proper care from a caretaker or is not provided necessary medical care. (2) The evidence was sufficient to show that the defendant placed the child in a position in which she could be found to be abused or neglected. The defendant

entered the child's bedroom when she was trying to sleep, tried to get her to drink alcohol, squeezed her buttocks, asked her to suck his thumb and asked to suck her chest. (3) Although the trial court's instruction to the jury that "[a]n abused and neglected juvenile is a person who has not reached her 18th birthday, and is not married, emancipated, or a member of the armed forces of the United States" misstated the law, the error did not rise to the level of plain error.

Assaults

(1) Evidence was sufficient to establish that the defendant inflicted serious bodily injury; (2) Defendant could not be convicted and sentenced for both assault inflicting serious bodily injury and assault on a female based on the same conduct

State v. Jamison, __ N.C. App. __, 758 S.E.2d 666 (June 3, 2014). (1) The evidence was sufficient to establish that the defendant inflicted serious bodily injury on the victim. The beating left the victim with broken bones in her face, a broken hand, a cracked knee, and an eye so beat up and swollen that she could not see properly out of it at the time of trial. The victim testified that her hand and eye "hurt all of the time." (2) The defendant could not be convicted and sentenced for both assault inflicting serious bodily injury and assault on a female when the convictions were based on the same conduct. The court concluded that language in the assault on a female statute ("[u]nless the conduct is covered under some other provision of law providing greater punishment . . . .") reflects a legislative intent to limit a trial court's authority to impose punishment for assault on a female when punishment is also imposed for higher class offenses that apply to the same conduct (here, assault inflicting serious bodily injury).

Burglary and related offenses

(1) Evidence that defendants broke back window but did not enter home was insufficient to prove burglary; (2) Evidence that defendants were casing the neighborhood at night and the absence of any innocent explanation for their behavior was sufficient to establish that defendants intended to commit a felony or larceny in the home; (3) Trial court did not err by failing to instruct on trespass; (4) Trial court did not err by failing to define larceny for jury

State v. Lucas, __ N.C. App. __, 758 S.E.2d 672 (June 3, 2014). (1) In this burglary case, the evidence was insufficient to establish that the defendants entered the premises where it showed that the defendants used landscaping bricks and a fire pit bowl to break a back window of the home but no evidence showed that any part of their bodies entered the home (no items inside the home were missing or had been tampered with) or that the instruments of breaking were used to commit an offense inside. (2) The evidence was sufficient to establish that the defendants intended to commit a felony or larceny in the home. Among other things, an eyewitness testified that the defendants were "casing" the neighborhood at night. Additionally, absent evidence of other intent or explanation for a breaking and entering at night, the jury may infer that the defendant intended to steal. (3) Although first-degree trespass is a lesser-included offense of felonious breaking or entering, the trial court did not err by failing to instruct the jury on the trespass offense when the evidence did not permit a reasonable inference that would

dispute the State's contention that the defendants intended to commit a felony. (4) The trial court did not commit plain error by failing to define larceny in instructions it provided to the jury on burglary. Because evidence was presented permitting the inference that the defendants intended to steal property and there was no evidence suggesting that they intended to merely borrow it, the jury did not need a formal definition of the term "larceny" to understand its meaning and to apply that meaning to the evidence.

(1) Trial court did not err by instructing jury that it could find the defendant guilty if he broke or entered the vehicle, notwithstanding indictment's charge that he broke and entered the vehicle; (2) Evidence was sufficient to establish that defendant or his accomplice entered the vehicle; (3) Evidence was sufficient to show that the defendant broke into the vehicle with intent to commit a felony or larceny therein

State v. Mitchell, __ N.C. App. __, 759 S.E.2d 335 (June 17, 2014). (1) When an indictment charging breaking or entering into a motor vehicle alleged that the defendant broke *and* entered the vehicle, the trial court did not err by instructing the jury that it could find the defendant guilty if he broke *or* entered the vehicle. The statute required only a breaking or entering, not both. (2) There was sufficient evidence to establish that either the defendant or his accomplice entered the vehicle where among other things, the defendant was caught standing near the vehicle with its door open, there was no pollen inside the vehicle although the outside of the car was covered in pollen, the owner testified that the door was not opened the previous day, and the defendant and his accomplice each testified that the other opened the door. (3) There was sufficient evidence that the defendant broke into the vehicle "with intent to commit any felony or larceny therein." Citing prior case law, the court held that the intent to steal the motor vehicle itself may satisfy the intent element.

Evidence was insufficient to establish that defendant intended to steal from the church he entered, requiring dismissal of charges of felony breaking or entering a place of worship

State v. Campbell, __ N.C. App. __, 759 S.E.2d 380 (July 1, 2014), *temp. stay allowed*, __ N.C. __, 761 S.E.2d 905 (July 21, 2014). The trial court erred by denying the defendant's motion to dismiss a charge of felony breaking or entering a place of worship where there was insufficient evidence of the defendant's intent to commit a larceny therein. The defendant admitted entering the church in question, but he explained that he entered to seek sanctuary, drink water, and pray and without the intent to steal. None of the State's evidence contradicted this testimony and no evidence showed that the defendant ever possessed the missing items. Although the law holds that an intent to commit larceny may be reasonably inferred from an unlawful entry, here the evidence showed an innocent reason for the defendant's entering of the church and the inference did not apply.

Robbery

(1) Trial court properly denied defendant's motion to dismiss one of two charges of attempted robbery where defendant and accomplices attempted to rob two individuals inside a single residence;

(2) Attempted robbery of second individual inside residence was part of group's common plan

State v. Jastrow, __ N.C. App. __, __ S.E.2d __ (Nov. 18, 2014). (1) Where the defendant and his accomplices attempted to rob two victims inside a residence, the trial court properly denied the defendant's motion to dismiss one of the charges. The defendant argued that because only one residence was involved, only one charge was proper. Distinguishing cases holding that only one robbery occurs when the defendant robs a business of its property by taking it from multiple employees, the court noted that here the defendant and his accomplices demanded that both victims turn over their own personal property. (2) Although the group initially planned to rob just one person, the defendant properly was convicted of attempting to rob a second person they found at the residence. The attempted robbery of the second person was in pursuit of the group's common plan.

Drug Crimes

Evidence was sufficient to establish that defendant (1) manufactured methamphetamine; (2) constructively possessed methamphetamine and drug paraphernalia; (3) participated in a drug trafficking conspiracy; and that (4) there was a trafficking amount of methamphetamine

State v. Davis, __ N.C. App. __, 762 S.E.2d 886 (Sept. 16, 2014). (1) There was sufficient evidence of manufacturing methamphetamine. An officer observed the defendant and another person at the scene for approximately 40 minutes. Among the items recovered were a handbag containing a syringe and methamphetamine, a duffle bag containing a clear two liter bottle containing methamphetamine, empty boxes and blister packs of pseudoephedrine, a full pseudoephedrine blister pack, an empty pack of lithium batteries, a lithium battery from which the lithium had been removed, iodized salt, sodium hydroxide, drain opener, funnels, tubing, coffee filters, syringes, various items of clothing, and a plastic bottle containing white and pink granular material. The defendant's presence at the scene, the evidence recovered, the officer's testimony that the defendant and his accomplice were going back and forth in the area, moving bottles, and testimony that the defendant gave instructions to his accomplice to keep the smoke out of her eyes was sufficient evidence of manufacturing. (2) The evidence was sufficient to establish that the defendant constructively possessed the methamphetamine and drug paraphernalia. Agreeing with the defendant that the evidence tended to show that methamphetamine found in a handbag belonged to the defendant's accomplice, the court found there was sufficient evidence that he constructively possessed methamphetamine found in a duffle bag. Among other things, the defendant and his accomplice were the only people observed by officers at the scene of the "one pot" outdoor meth lab, the officer watched the two for approximately forty minutes and both parties moved freely about the site where all of the items were laid out on a blanket. (3) The evidence was sufficient to show a drug trafficking conspiracy where there was evidence of an implied agreement between the defendant and his accomplice. The defendant was present at the scene and aware that his accomplice was involved producing methamphetamine and there was sufficient evidence that the defendant himself was involved in the manufacturing process. The court concluded: "Where two subjects are involved together in the manufacture of methamphetamine and the methamphetamine recovered is enough to sustain trafficking charges, we hold the evidence sufficient to infer an implied agreement between the subjects to traffic in methamphetamine by manufacture and withstand a motion to dismiss." (4) The evidence was sufficient to prove a trafficking amount of methamphetamine. The court rejected the defendant's argument that the entire weight of a mixture containing methamphetamine at an intermediate stage in

the manufacturing process cannot be used to support trafficking charges because the mixture is not ingestible, is unstable, and is not ready for distribution. The defendant admitted that the methamphetamine had already been formed in the liquid and it was only a matter of extracting it from the mixture. Also, the statute covers mixtures.

(1) In trafficking by manufacturing case trial court did not plainly err by failing to instruct on lesser included offense where evidence showed defendant possessed mixture that exceeded statutory trafficking amount; (2) Trial court did not plainly err by failing to give certain jury instruction where defendant failed to establish that jury probably would have reached different result had instruction been given; (3) Evidence was sufficient to prove trafficking by manufacture

State v. Miranda, __ N.C. App. __, 762 S.E.2d 349 (Aug. 19, 2014). (1) In a case in which the defendant was charged with trafficking in cocaine by manufacturing, the trial court did not commit plain error by failing to instruct the jury on manufacturing cocaine. The evidence showed that the defendant possessed cocaine and a mixture of cocaine and rice that exceeded the statutory trafficking amount. The defendant admitted to having mixed rice with the cocaine to remove moisture. The court rejected the defendant's argument that the combination of cocaine base and rice does not constitute a "mixture" as used in the trafficking statutes and concluded that the statutory reference to a "mixture" encompasses the mixture of a controlled substance with any other substance regardless of the reason for which that mixture was prepared. (2) The trial court did not commit plain error by failing to instruct the jury that to convict the defendant for trafficking by compounding it had to find he did so with an intent to distribute. Because the evidence showed that the defendant also manufactured by packaging and repackaging, the court concluded that the defendant failed to establish that a different outcome would probably have been reached had the instruction at issue been delivered at trial. (3) The court rejected the defendant's argument that the evidence was insufficient to show trafficking in cocaine by manufacture. Where officers find cocaine or a cocaine-related mixture and an array of items used to package and distribute that substance, the evidence suffices to support a manufacturing conviction. Here, State's evidence showed that more than 28 grams of cocaine and several items that are commonly used to weigh, separate, and package cocaine for sale were seized from the defendant's bedroom.

There was insufficient evidence that defendant conspired with another to sell and deliver cocaine where evidence showed only that drugs were found in a car in which defendant was a passenger

State v. McClaude, __ N.C. App. __, __ S.E.2d __ (Nov. 18, 2014). Finding *State v. Euceda-Valle,* 182 N.C. App. 268, 276 (2007), controlling, the court held that there was insufficient evidence that the defendant and another person named Hall conspired to sell and deliver cocaine. The evidence showed only that the drugs were found in a car driven by Hall in which the defendant was a passenger.

DVPO Violations

Knife used by defendant was not a deadly weapon per se and trial court was required to instruct jury on lesser included offense of misdemeanor violation of a DVPO

State v. Edgerton, __ N.C. App. __, 759 S.E.2d 669 (June 17, 2014), *temp. stay allo*wed, __ N.C. __, 759 S.E.2d 103 (June 20, 2014), *writ of supersedeas allowed*, __ N.C. __, 761 S.E.2d 906 (July 22, 2014). In a felony violation of a DVPO case, the trial court properly determined that a knife used by the defendant was not a deadly weapon per se. There was conflicting evidence as to whether or not the knife was capable of producing death or great bodily harm, including testimony that the knife was so dull that even though the defendant "saw[ed]" the victim's neck with the knife, it left only "knicks" on her neck. The defendant was found guilty of violation of a DVPO with a deadly weapon. The appellate court held, over a dissent, that the trial court committed plain error by failing to instruct the jury on the lesser included offense, misdemeanor violation of a DVPO, where the court had determined that the weapon at issue was not a deadly weapon per se.

Generally

Bail bondsmen cannot violate motor vehicle laws in order to make an arrest

State v. McGee, __ N.C. App. __, 758 S.E.2d 661 (June 3, 2014). (1) In an involuntary manslaughter case where a death occurred during a high speed chase by a bail bondsman in his efforts to arrest a principal, the trial court did not err by instructing the jury that bail bondsmen cannot violate motor vehicle laws in order to make an arrest. While the statute contains specific exemptions to the motor vehicle laws pertaining to speed for police, fire, and emergency service vehicles, no provision exempts a bail bondsman from complying with speed limits when pursuing a principal. (2) The trial court did not err by failing to submit to the jury the question whether the defendant's means in apprehending his principal were reasonable. Under the law the defendant bail bondsman was not authorized to operate his motor vehicle at a speed greater than was reasonable and prudent under the existing conditions because of his status as a bail bondsman. It concluded:

> Just as the bail bondsmen cannot enter the homes of third parties without their consent, a bail bondsmen pursuing a principal upon the highways of this State cannot engage in conduct that endangers the lives or property of third parties. Third parties have a right to expect that others using the public roads, including bail bondsmen, will follow the laws set forth in Chapter 20 of our General Statutes.

Evidence sufficient to establish misdemeanor assault when student body-checked a parent in the school gymnasium and disorderly conduct where juvenile's conduct disrupted operation of school

In re M.J.G., __ N.C. App. __, 759 S.E.2d 361 (June 17, 2014). The evidence established that the juvenile began arguing with a teacher during a school gathering in the gymnasium before a volleyball game. He then "stormed off" the bleachers toward the teacher and a parent, ramming his shoulder into the parent. The teacher described the student as "very defiant," and other evidence about the juvenile's actions supported the trial court's determination that the juvenile's actions were intentional. Thus, the trial court did not err in denying the juvenile's motion to dismiss the petition for misdemeanor assault. The evidence was sufficient to establish that the juvenile engaged in disorderly conduct by disrupting students (G.S. 14-288.4(a)(6)), where the juvenile's conduct caused a substantial interference with,

disruption of, and confusion of the operation of the school. The juvenile's conduct "merited intervention by several teachers, the assistant principal, as well as the school resource officer" and "caused such disruption and disorder . . . that a group of special needs students missed their buses."

There was insufficient evidence of resisting an officer where defendant refused to allow officer to search him pursuant to warrant where officer was not lawfully serving warrant

State v. Carter, __ N.C. App. __, __ S.E.2d __ (Nov. 18, 2014). There was insufficient evidence to support a conviction of resisting an officer in a case that arose out of the defendant's refusal to allow the officer to search him pursuant to a search warrant. Because the arresting officer did not read or produce a copy of the warrant to the defendant prior to seeking to search the defendant's person as required by G.S. 15A-252, the officer was not engaged in lawful conduct and therefore the evidence was insufficient to support a conviction.

Impaired Driving

In felony death by vehicle case, evidence that defendant drank a large quantity of beer, wrecked her car, and appeared intoxicated after the collision was sufficient to establish that defendant was impaired by alcohol

State v. Hawk, __ N.C. App. __, 762 S.E.2d. 883 (Sept. 2, 2014). In this felony death by vehicle case, even without evidence of the defendant's blood-alcohol, the evidence was sufficient to establish that the defendant was impaired. After drinking beer, the defendant ran off a rural road, over-corrected, and flipped her vehicle. When an officer interviewed the defendant at the hospital, she admitted drinking "at least a 12-pack" before driving. The defendant admitted at trial that she drank at least seven or eight beers, though she denied being impaired. The first responding officer testified that when he arrived on the scene, he noticed the strong odor of alcohol and when he spoke with defendant, she kept asking for a cigarette, slurring her words. He opined that she seemed intoxicated. Finally, the doctor who treated the defendant at the hospital diagnosed her with alcohol intoxication, largely based on her behavior.

(1) There was insufficient evidence that a cut through on a vacant lot was a public vehicular area within the meaning of G.S. 20-4.01(32); (2) Assuming there was sufficient evidence to submit issue to jury, trial court erred by abbreviating definition of public vehicular area in jury instructions

State v. Ricks, __ N.C. App. __, __ S.E.2d __ (Nov. 18, 2014). (1) In this impaired driving case, there was insufficient evidence that a cut through on a vacant lot was a public vehicular area within the meaning of G.S. 20-4.01(32). The State argued that the cut through was a public vehicular area because it was an area "used by the public for vehicular traffic at any time" under G.S. 20-4.01(32)(a). The court concluded that the definition of a public vehicular area in that subsection "contemplates areas generally open to and used by the public for vehicular traffic as a matter of right or areas used for vehicular traffic that are associated with places generally open to and used by the public, such as driveways and parking lots to institutions and businesses open to the public." In this case there was no evidence concerning the lot's

ownership or that it had been designated as a public vehicular area by the owner. (2) Even if there had been sufficient evidence to submit the issue to the jury, the trial court erred in its jury instructions. The trial court instructed the jury that a public vehicular area is "any area within the State of North Carolina used by the public for vehicular traffic at any time including by way of illustration and not limitation any drive, driveway, road, roadway, street, alley or parking lot." The court noted that:

> the entire definition of public vehicular area in [G.S.] 20-4.01(32)(a) is significant to a determination of whether an area meets the definition of a public vehicular area; the examples are not separable from the statute. . . . [As such] the trial court erred in abbreviating the definition of public vehicular area in the instructions to the jury and by preventing defendant from arguing his position in accordance with [G.S.] 20-4.01(32)(a)."

Larceny

Larceny of laptop was from person of victim who was three feet away

State v. Hull, __ N.C. App. __, 762 S.E.2d 915 (Sept. 16, 2014). The evidence was sufficient to show that a larceny of a laptop was from the victim's person. At the time the laptop was taken, the victim took a momentary break from doing her homework on the laptop and she was about three feet away from it. Thus, the court found that the laptop was within her protection and presence at the time it was taken.

Unauthorized use of a stolen vehicle is not a lesser-included offense of possession of a stolen vehicle, by virtue of binding precedent from another panel, but supreme court could clarify law in this area

State v. Robinson, __ N.C. App. __, 763 S.E.2d 178 (Sept. 16, 2014). Following *State v. Oliver*, 217 N.C. App. 369 (2011), the court determined that unauthorized use of a stolen vehicle is not a lesser-included offense of possession of a stolen vehicle. However, the court found that *Oliver* had mistakenly relied on *State v. Nick*erson, 365 N.C. 279 (2011), "for a proposition not addressed, nor a holding reached, in that case." Concluding that it was bound by *Oliver,* the court expressed the hope that "the Supreme Court may take this opportunity to clarify our case law" and decide whether unauthorized use of a motor vehicle is a lesser-included offense of possession of a stolen motor vehicle.

Sexual Offenses

(1) Statute criminalizing a sex offender's failure to report a change of address not void for vagueness as applied to homeless defendant; (2) Evidence was sufficient to convict defendant of failure to notify of change in address

State v. McFarland, __ N.C. App. __, 758 S.E.2d 457 (June 3, 2014). (1) The court rejected the defendant's argument that G.S. 14-208.11 (2011) (failure to notify of a change in address) is void for vagueness as applied to him. He argued that because he is homeless, a person of ordinary intelligence could not know what "address" means in his case. The court noted that in *State v. Abshire*, 363 N.C. 322

(2009), the N.C. Supreme Court clearly and unambiguously defined the term "address" as used in the statute well before the defendant was released from prison. It further noted that in *State v. Worley*, 198 N.C. App. 329 (2009), it rejected the defendant's argument that homeless sex offenders have no address for purposes of the registration statutes. It concluded:

> Even assuming that the language of the statute is ambiguous, defendant had full notice of what was required of him, given the judicial gloss that the appellate courts have put on it. Certainly after *Abshire* and *Worley*, if not before, a person of reasonable intelligence would understand that a sex offender is required to inform the local sheriff's office of the physical location where he resides within three business days of a change, even if that location changes from one bridge to another, or one couch to another. Although this obligation undoubtedly places a large burden on homeless sex offenders, it is clear that they bear such a burden under [G.S.] 14-208.9 and that under [G.S.] 14-208.11(a)(2) they may be punished for willfully failing to meet the obligation. Moreover, the fact that it may sometimes be difficult to discern when a homeless sex offender changes addresses does not make the statute unconstitutionally vague or relieve him of the obligation to inform the relevant sheriff's office when he changes addresses.

(Citations omitted).

(2) The evidence was sufficient to convict the defendant for failing to notify of a change in address. Conceding that the State presented evidence that he was not residing at his registered address, the defendant argued that the State failed to presented evidence of where he was actually residing. The court rejected this argument, reasoning that the State is not required to prove the defendant's new address, only that he failed to register a change of address. It stated: "proof that [the] defendant was not living at his registered address is proof that his address had changed."

(1) In indecent liberties with student case, trial court did not err by failing to instruct on specific acts alleged in bill of particulars; (2) Trial court did not err by denying motion to dismiss for insufficient evidence that victim was student

State v. Stephens, __ N.C. App. __, 758 S.E.2d 695 (June 3, 2014). (1) In a multi-count indecent liberties with a student case, the trial court did not err by failing to instruct the jury using the specific acts alleged in the amended bill of particulars. The trial court properly instructed the jury that it could find the defendant guilty if it concluded that he willfully took "any immoral, improper, or indecent liberties" with the victim. The actual act by the defendant committed for the purpose of arousing himself or gratifying his sexual desire was immaterial. The victim's testimony included numerous acts, any one of which could have served as the basis for the offenses. (2)The court rejected the defendant's argument that the trial court erred by denying his motion to dismiss because there was insufficient evidence that the victim was a "student." The trial court instructed the jury that a "student," for purposes of G.S. 14-202.4(A), means "a person enrolled in kindergarten, or in grade one through 12 in any school." The court rejected the defendant's argument that a person is only "enrolled" during the academic year and that since the offenses occurred during the summer, the victim was not a student at the time.

Sexual Assaults

The term "sexual act" in G.S. 14-318.4(a2) includes vaginal intercourse

State v. McClamb, __ N.C. App. __, 760 S.E.2d 337 (July 1, 2014). A defendant may be convicted of child abuse by sexual act under G.S. 14-318.4(a2) when the underlying sexual act is vaginal intercourse.

State presented sufficient evidence in indecent liberties prosecution that defendant committed the act for the specified statutory purpose

State v. Godley, __ N.C. App. __, 760 S.E.2d 285 (July 1, 2014). With respect to an indecent liberties charge, the State presented sufficient evidence that the defendant committed the relevant act for the purpose of arousing or gratifying sexual desire. The court noted the defendant's purpose "may be inferred from the evidence of the defendant's actions." Here, the victim stated that the defendant kissed her on the mouth, told her not to tell anyone about what happened, and continued to kiss her even after she asked him to stop. The victim told the police that the defendant made sexual advances while he was drunk, kissed her, fondled her under her clothing, and touched her breasts and vagina. This evidence, along with other instances of the defendant's alleged sexual misconduct giving rise to first-degree rape charges, is sufficient evidence to infer the defendant's purpose.

Trial court erred by failing to dismiss one of three charged counts of rape where victim ambiguously characterized the number of times defendant penetrated her vagina as "a couple" of times

State v. Blow, ___ N.C. App. ___, 764 S.E.2d 230 (Nov. 4, 2014). In a child sexual assault case in which the defendant was convicted of three counts of first-degree rape, the court held, over a dissent, that the trial court erred by failing to dismiss one of the rape charges. The court agreed with the defendant that because the victim testified that the defendant inserted his penis into her vagina "a couple" of times, without identifying more than two acts of penetration, the State failed to present substantial evidence of three counts of rape. The court found that the defendant's admission to three instances of "sex" with the victim was not an admission of vaginal intercourse because the defendant openly admitted to performing oral sex and other acts on the victim but denied penetrating her vagina with his penis.

Trial court erred by denying defendant's motion to dismiss first-degree sex offense charges where there was no substantive evidence of a sexual act

State v. Spence, __ N.C. App. __, __ S.E.2d __ (Nov. 18, 2014). In this child sexual abuse case, the trial court erred by denying the defendant's motion to dismiss first-degree sex offense charges where there was no substantive evidence of a sexual act; the evidence indicated only vaginal penetration, which cannot support a conviction of sexual offense.

(1) Sexual offense and crime against nature do not require that the accused perform a sexual act on the victim, but rather that the accused engage in a sexual act with the victim; (2) Neither first-degree

statutory sexual offense nor crime against nature require proof of a sexual purpose; (3) Proof of penetration is not required in sexual offense case involving fellatio; (4) There was insufficient evidence of penetration to support conviction for crime against nature

In re J.F., __ N.C. App. __, __ S.E.2d __ (Nov. 18, 2014). (1) In a delinquency case where the petitions alleged sexual offense and crime against nature in that the victim performed fellatio on the juvenile, the court rejected the juvenile's argument that the petitions failed to allege a crime because the victim "was the actor." Sexual offense and crime against nature do not require that the accused perform a sexual act on the victim, but rather that the accused engage in a sexual act with the victim. (2) The court rejected the juvenile's argument that to prove first-degree statutory sexual offense and crime against nature the prosecution had to show that the defendant acted with a sexual purpose. (3) In a sexual offense case involving fellatio, proof of penetration is not required. (4) Penetration is a required element of crime against nature and in this case insufficient evidence was presented on that issue. The victim testified that he licked but did not suck the juvenile's penis. Distinguishing *In re Heil*, 145 N.C. App. 24 (2001) (concluding that based on the size difference between the juvenile and the victim and "the fact that the incident occurred in the presumably close quarters of a closet, it was reasonable for the trial court to find . . . that there was some penetration, albeit slight, of juvenile's penis into [the four-year-old victim's] mouth"), the court declined the State's invitation to infer penetration based on the surrounding circumstances.

Sex Offender Crimes

(1) Indictment charging defendant with violating G.S. 14-208.18(a) not defective; (2) State failed to present sufficient evidence to establish that the defendant's presence at a public park violated statute

State v. Simpson, __ N.C. App. __, 763 S.E.2d 1 (Aug. 5, 2014). (1) An indictment charging the defendant with violating G.S. 14-208.18(a) (prohibiting registered sex offenders from being "[w]ithin 300 feet of any location intended primarily for the use, care, or supervision of minors when the place is located on premises that are not intended primarily for the use, care, or supervision of minors") was not defective. The charges arose out of the defendant's presence at a Wilkesboro public park, specifically, sitting on a bench within the premises of the park and in close proximity to the park's batting cage and ball field. The indictment alleged, in relevant part, that the defendant was "within 300 feet of a location intended primarily for the use, care, or supervision of minors, to wit: a batting cage and ball field of Cub Creek Park located in Wilkesboro, North Carolina." The court rejected the defendant's argument that the indictment was defective because it failed to allege that the batting cages and ball field were located on a premise not intended primarily for the use, care, or supervision of minors. (2) The trial court erred by denying the defendant's motion to dismiss a charge that the defendant was a registered sex offender unlawfully on premises used by minors in violation of G.S. 14-208.18(a). The court agreed with the defendant that the State failed to present substantial evidence that the batting cages and ball fields constituted locations that were primarily intended for use by minors. At most, the State's evidence established that these places were sometimes used by minors.

Defenses

Trial court erred by refusing to instruct jury on defense of entrapment where defendant presented sufficient evidence of the essential elements of the defense

State v. Foster, __ N.C. App. __, 761 S.E.2d 208 (Aug. 5, 2014). (1) In a delivery of cocaine case where the defendant presented sufficient evidence of the essential elements of entrapment, the trial court erred by refusing to instruct the jury on that defense. The defendant's evidence showed that an undercover officer tricked the defendant into believing that the officer was romantically interested in the defendant in order to persuade the defendant to obtain cocaine for him, that the defendant had no predisposition to commit a drug offense such as delivering cocaine, and that the criminal design originated solely with the officer. The court rejected the State's argument that the evidence showed that the officer merely afforded the defendant the opportunity to commit the offense. (2) The trial court abused its discretion by denying the defendant's request for an entrapment instruction as a sanction under G.S. 15A-910(a) for failure to provide "specific information as to the nature and extent of the defense" as required by G.S. 15A-905(c)(1)(b). The trial court made no findings of fact to justify the sanction and the State did not show prejudice from the lack of detail in the notice filed eight months prior to trial. The court held:

> [I]n considering the totality of the circumstances prior to imposing sanctions on a defendant, relevant factors for the trial court to consider include without limitation: (1) the defendant's explanation for the discovery violation including whether the discovery violation constituted willful misconduct on the part of the defendant or whether the defendant sought to gain a tactical advantage by committing the discovery violation, (2) the State's role, if any, in bringing about the violation, (3) the prejudice to the State resulting from the defendant's discovery violation, (4) the prejudice to the defendant resulting from the sanction, including whether the sanction could interfere with any fundamental rights of the defendant, and (5) the possibility of imposing a less severe sanction on the defendant.

Slip op. at pp. 29-30. The court held that assuming that the defendant's notice constituted a discovery violation, the trial court abused its discretion by refusing to instruct on entrapment as a sanction.

Sex Offender Registration and Satellite-Based Monitoring

(1) Requirement that SBM hearing be held in county where defendant resides relates to venue and may be waived; (2) Trial court's findings supporting its order of lifetime SBM were not supported by evidence

State v. Jones, __ N.C. App. __, 758 S.E.2d 444 (June 3, 2014). (1) The court rejected the defendant's argument that the trial court lacked subject matter jurisdiction to hold the SBM hearing in Craven County. The requirement that the SBM hearing be held in the county in which the defendant resides relates to venue and the defendant's failure to raise the issue before the trial court waives his ability to raise it for the first time on appeal. (2) The trial court erred by requiring the defendant to enroll in

lifetime SBM. Two of the trial court's additional findings supporting its order that the defendant—who tested at moderate-low risk on the Static 99—enroll in lifetime SBM were not supported by the evidence. Also, the additional finding that there was a short period of time between the end of probation for the defendant's 1994 nonsexual offense and committing the sexual offense at issue does not support the conclusion that he requires the highest possible level of supervision and monitoring. Although the 1994 offense was originally charged as a sexual offense, it was pleaded down to a non-sexual offense. The trial court may only consider the offense of conviction for purposes of the SBM determination.

Trial court did not err by ordering the defendant to enroll in lifetime SBM

State v. Williams (No. COA13-1280), __ N.C. App. __, 761 S.E.2d 662 (July 15, 2014). The court rejected the defendant's argument that the SBM statute violates substantive due process by impermissibly infringing upon his right to be free from government monitoring of his location. The court also rejected the defendant's argument that as applied to him the statute violates substantive due process because it authorizes mandatory lifetime participation without consideration of his risk of reoffending.

Falsely stating an address on any verification form required by the sex offender registration program supports a conviction for failing to register as a sex offender

State v. Pressley, __ N.C. App. __, 762 S.E.2d 374 (Aug. 19, 2014). The court rejected the defendant's argument that the only verification forms that count are the initial verification form and those required to be filed every 6 months thereafter, noting that under G.S. 14-208.9A(b) additional verification may be required. The court also rejected the defendant's argument that his false reporting of his address on two separate verification forms constituted a continuing offense and could support only one conviction. The court concluded that the submission of each form was a distinct violation of the statute.

Sentencing and Probation

Appellate court treated trial court's miscalculation of defendant's prior record level as clerical error and remanded for correction where correct calculation would not change sentence

State v. Everette, __ N.C. App. __, __ S.E.2d __ (Oct. 21, 2014). Where the trial court miscalculated the defendant's prior record level but where a correction in points would not change the defendant's sentence, the court treated the error as clerical and remanded for correction. A dissenting judge would have concluded that the error was judicial not clerical.

Trial court's error in accepting defendant's admission to aggravating factor without complying with statute was harmless based on uncontroverted overwhelming evidence of factor

State v. Edmonds, __ N.C. App. __, 763 S.E.2d 552 (Oct. 7, 2014). Although the trial court erred in accepting the defendant's admission to an aggravating factor without complying with G.S. 15A-1022, as

required by G.S. 15A-1022.1, the error was harmless beyond a reasonable doubt based on the uncontroverted and overwhelming evidence of the relevant factor.

Trial court erred by increasing defendant's sentence based on convictions for charges that originally had been joined for trial with the charges currently before the court

State v. Watlington, __ N.C. App. __, 759 S.E.2d. 392 (July 1, 2014) (No. COA13-925), *temp. stay allowed* __ N.C. __, 759 S.E.2d 392 (July 1, 2014). Citing, *State v. West*, 180 N.C. App. 664 (2006), the court held that the trial court erred by increasing the defendant's sentence based on convictions for charges that originally had been joined for trial with the charges currently before the court. The charges were joined for trial and at the first trial, the defendant was found guilty of some charges, not guilty of others and there was a jury deadlock as to several others. The defendant was retried on charges that resulted in a deadlock and convicted. The trial court used the convictions from the first trial when calculating the defendant's PRL.

Trial court did not abuse discretion by imposing term of special probation where sentence was in presumptive range; Appellate court rejected defendant's argument that sentence was discriminatory

State v. Massenburg, __ N.C. App. __, 759 S.E.2d. 703 (July 1, 2014). Where the defendant's sentence was within the presumptive range, the trial court did not abuse its discretion by imposing an intermediate sanction of a term of special probation of 135 days in the Division of Adult Correction. The court rejected the defendant's argument that the sentence was a discriminatory sentence predicated on poverty, namely that the trial court chose a sentence with active time as opposed to regular probation because the defendant would never make enough money at his current job to pay monies as required.

Defendant found guilty under theory of acting in concert is subject to aggravating factor of joining with more than one other person in committing the offense and not being charged with conspiracy

State v. Facyson, __ N.C. __, 758 S.E.2d 359 (June 12 2014). Reversing the court of appeals, the court held the evidence necessary to prove a defendant guilty under the theory of acting in concert is not the same as that necessary to establish the aggravating factor that the defendant joined with more than one other person in committing the offense and was not charged with committing a conspiracy. Because the aggravating factor requires additional evidence beyond that necessary to prove acting in concert, the trial court properly submitted the aggravating factor to the jury. Specifically, the aggravating factor requires evidence that the defendant joined with at least two other individuals to commit the offense while acting in concert only requires proof that the defendant joined with at least one other person. Additionally, the aggravating factor requires proof that the defendant was not charged with committing a conspiracy, which need not be proved for acting in concert.

The trial court erred when it failed to hold a charge conference before instructing the jury during the sentencing phase of the trial, as required by G.S. 15A-1231(b); holding a charge conference is mandatory

State v. Hill, __ N.C. App. __, 760 S.E.2d 85 (July 15, 2014), *temp. stay allowed*, __ N.C. __, 761 S.E.2d 909 (Aug. 04, 2014). Remanding for a new sentencing hearing, the court held that the trial court erred when it failed to hold a charge conference before instructing the jury during the sentencing phase of the trial, as required by G.S. 15A-1231(b). The court concluded that holding a charge conference is mandatory, and a trial court's failure to do so is reviewable on appeal even in the absence of an objection at trial. The court rejected the State's argument that the statute should not apply to sentencing proceedings in non-capital cases. It concluded:

> If, as occurred in this case, the trial court decides to hold a separate sentencing proceeding on aggravating factors as permitted by [G.S.] 15A-1340.16(a1), and the parties did not address aggravating factors at the charge conference for the guilt-innocence phase of the trial, [G.S.] 15A-1231 requires that the trial court hold a separate charge conference before instructing the jury as to the aggravating factor issues.

Although G.S. 15A-1231(b) provides that "[t]he failure of the judge to comply fully with the provisions of this subsection does not constitute grounds for appeal unless his failure, not corrected prior to the end of the trial, materially prejudiced the case of the defendant," in this case, the court noted, the trial court did not comply with the statute at all.

Although the trial court erred by referencing the Bible or divine judgment in sentencing, the defendant failed to show prejudice or that his sentence was based on the trial court's religious invocation

State v. Earls, __ N.C. App. __, 758 S.E.2d 654 (June 3, 2014). Before pronouncing its sentence on the defendant, who was found guilty of sexually abusing his children, the trial court addressed the defendant as follows:

> Well, let me say this: I think children are a gift of God and I think God expects when he gives us these gifts that we will treat them as more precious than gold, that we will keep them safe from harm the best as we're able and nurture them and the child holds a special place in this world. In the 19th chapter of Matthew Jesus tells his disciples, suffer the little children, to come unto me, forbid them not: for such is the kingdom of heaven. And the law in North Carolina, and as it is in most states, treats sexual abuse of children as one of the most serious crimes a person can commit, and rightfully so, because the damage that's inflicted in these cases is incalculable. It's murder of the human spirit in a lot of ways. I'm going to enter a judgment in just a moment. But some day you're going to stand before another judge far greater than me and you're going to have to answer to him why you violated his law and I hope you're ready when that day comes.

Although finding no basis for a new sentencing hearing, the court "remind[ed] trial courts that judges must take care to avoid using language that could give rise to an appearance that improper factors have played a role in the judge's decision-making process even when they have not." Slip Op. at 18 (quotation omitted).

The trial court did not err in calculating the defendant's prior record level when it counted a New

Jersey third-degree theft conviction as a Class I felony

State v. Hogan, __ N.C. App. __, 758 S.E.2d 465 (June 3, 2014). The court rejected the defendant's argument that because New Jersey does not use the term "felony" to classify its offenses, the trial court could not determine that third-degree theft is a felony for sentencing purposes, noting that the State presented a certification that third-degree theft is considered a felony in New Jersey. The court also rejected the defendant's argument that the offense was substantially similar to misdemeanor larceny.

Verdicts finding the defendant guilty of felony child abuse in violation of G.S. 14-318.4(a3) and felony child abuse resulting in violation of G.S. 14-318.4(a4) were not mutually exclusive

State v. Mosher, __ N.C. App. __, 761 S.E.2d 204 (Aug. 5, 2014). The jury did not return mutually exclusive verdicts when it found the defendant guilty of felony child abuse in violation of G.S. 14-318.4(a3) (the intentional injury version of this offense) and felony child abuse resulting in violation of G.S. 14-318.4(a4) (the willful act or grossly negligent omission version of this offense). The charges arose out of an incident where the victim was severely burned in a bathtub while under the defendant's care. Citing *State v. Mumford*, 364 N.C. 394, 400 (2010), the court noted that criminal offenses are mutually exclusive if "guilt of one necessarily excludes guilt of the other." The defendant argued that the mens rea component of the two offenses makes them mutually exclusive. The court concluded, however, that substantial evidence permitted the jury to find that two separate offenses occurred in succession such that the two charges were not mutually exclusive. Specifically, that the defendant acted in reckless disregard for human life by initially leaving the victim and her brother unattended in a tub of scalding hot water and that after a period of time, the defendant returned to the tub and intentionally held the victim in that water.

Probation

Trial court did not abuse its discretion by revoking defendant's probation based on hearsay evidence

State v. Murchison, __ N.C. __, 758 S.E.2d 356 (June 12, 2014). The defendant's probation officer filed a violation report alleging that he had been charged with first-degree burglary, first-degree kidnapping, and assault with a deadly weapon. The officer testified during the violation hearing that the defendant's mother had called her and reported that the defendant had "'broken into her house and held her and his girlfriend in a closet, and he had knives.'" The officer testified that she believed the defendant would kill someone if allowed to remain on probation. The State also introduced a printout from the Administrative Office of the Courts showing that the defendant had been indicted for first-degree burglary in another county. The trial court found that the defendant had violated his probation by committing one or more subsequent offenses as alleged in the violation report. Reversing an unpublished decision of the court of appeals, the court held that the trial court did not abuse its discretion by basing its decision to revoke the defendant's probation on the hearsay evidence presented by the State. The court noted that probation is an act of grace and a probation revocation proceeding is not a formal criminal trial. Moreover, the court held that under Rule 1101, the formal rules of evidence

do not apply in probation revocation hearings. The court concluded that "[g]iven the statements of defendant's mother, the document indicating defendant had been indicted for first-degree burglary, defendant's demonstrated propensity for violence, and Officer Tyree's concern that defendant would kill somebody if allowed to remain on probation," the trial court did not abuse its discretion in revoking defendant's probation.

A defendant may not challenge the jurisdictional validity of the indictment that led to his original conviction in an appeal from an order revoking probation

State v. Pennell, __ N.C. __, 758 S.E.2d 383 (June 12, 2014). Reversing the court of appeals, the court held that on direct appeal from the activation of a suspended sentence, a defendant may not challenge the jurisdictional validity of the indictment underlying his original conviction. The court reasoned that a challenge to the validity of the original judgment constitutes an impermissible collateral attack. It explained:

> [D]efendant failed to appeal from his original judgment. He may not now appeal the matter collaterally via a proceeding contesting the activation of the sentence imposed in the original judgment. As such, defendant's present challenge to the validity of his original conviction is improper. Because a jurisdictional challenge may only be raised when an appeal is otherwise proper, we hold that a defendant may not challenge the jurisdiction over the original conviction in an appeal from the order revoking his probation and activating his sentence. The proper procedure through which defendant may challenge the facial validity of the original indictment is by filing a motion for appropriate relief under [G.S.] 15A-1415(b) or petitioning for a writ of habeas corpus. Our holding here does not prejudice defendant from pursuing these avenues.

Slip Op. at 9-10 (footnote and citation omitted).

Restitution

Court of appeals vacated trial court's restitution order in light of State's concession that no evidence supported award

State v. Lucas, __ N.C. App. __, 758 S.E.2d 672 (June 3, 2014). In the face of the State's concession that there was no evidence supporting a restitution award, the court vacated the trial court's restitution order and remanded for a rehearing on the issue.

State v. Talbot, __ N.C. App. __, 758 S.E.2d 441 (June 3, 2014). In the face of the State's concession that there was no evidence supporting a restitution award, the court vacated the trial court's restitution order and remanded for a rehearing on the issue. The court noted: "In the interest of judicial economy, we urge prosecutors and trial judges to ensure that this minimal evidentiary threshold is met before entering restitution awards."

Post Conviction

Trial court properly denied pro se motion for post-conviction DNA testing

State v. Collins, __ N.C. App. __, 761 S.E.2d 914 (June 17, 2014). The trial court properly denied the defendant's pro se motion for post-conviction DNA testing where the defendant failed to adequately establish that newer and more accurate tests would identify the perpetrator or contradict prior test results. It reasoned:

> Defendant's mere allegations that "newer and more accurate testing" methods exist, "which would provide results that are significantly more accurate and probative of the identity of the perpetrator [o]r accomplice, or have a reasonable probability of . . . contradicting prior test results" are incomplete and conclusory. Even though he named a new method of DNA testing, he provided no information about how this method is different from and more accurate than the type of DNA testing used in this case. Without more specific detail from Defendant or some other evidence, the trial court could not adequately determine whether additional testing would be significantly more accurate and probative or have a reasonable probability of contradicting past test results.

2014 Legislation Affecting Criminal Law and Procedure

Robert L. Farb, © UNC School of Government

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Below are summaries of recently enacted legislation affecting criminal law and procedure. To obtain the text of the legislation, click on the link provided below or go to the North Carolina General Assembly's website, www.ncleg.net. (Once there, click on "Session Laws" on the right side of the page and then "2013-2014 Session" under "Browse Session Laws.") Be careful to note the effective date of each piece of legislation.

1. **S.L. 2014-3 (H 1050): Controlled substances excise tax change; vapor products regulated in prisons and jails.** This 48-page session law amends various revenue laws and includes a few changes affecting criminal law. The section numbers and pages of the session law are noted to facilitate locating the provisions.

   Effective May 29, 2014, amended G.S. 105-113.107(a) (controlled substances excise tax) adds an excise tax at the rate of $50.00 for each gram, or fraction thereof, of any "low-street-value drug" (defined in G.S. 105-113.106(4d)) that is sold by weight. Section 14.25 (pages 44-45).

   Effective for offenses committed on or after December 1, 2014, G.S. 14-344.1(a)(3) is revised concerning the sales and use tax requirements when reselling admission tickets on the Internet. Section 14.27 (page 45).

   Effective July 1, 2014, amended G.S. 148-23.1 prohibits the possession or use of "vapor products" (defined in amended G.S. 148-23.1(d) to include electronic cigarettes, cigars, etc.) at a state correctional facility. The sanctions for violations of G.S. 148-23.1 remain as disciplinary actions against inmates or employees or loss of visitation privileges of visitors as specified in the statute. Section 15.2 (page 47).

   Effective for offenses committed on or after December 1, 2014, amended G.S. 14-258.1(c) and (e) prohibit the sale or delivery of vapor products to an inmate in a prison or jail and prohibit a jail inmate from possessing vapor products. A violation of G.S. 14-258.1(c) or (e) remains a Class 1 misdemeanor. Section 15.2 (page 47).

2. **S.L. 2014-4 (S 786): Oil and gas exploration, development, and production.** This lengthy session law contains many provisions concerning oil and gas exploration, development, and production. Some pertinent criminal law provisions are summarized here. New G.S. 113-391.1 (trade secret and confidential information) provides that the knowing and willful disclosure of confidential information to an unauthorized person is a Class 1 misdemeanor. New G.S. 113-395.2 provides that the unlawful subsurface injection of waste in connection with oil and gas exploration is a Class 1 misdemeanor. New G.S. 113-395.4 provides that conducting seismic or geophysical data collection activities through physical entry to land without a landowner's written consent is a Class 1 misdemeanor. These provisions are effective December 1, 2014.

3. **S.L. 2014-21 (H 777): Sex offender prohibited from residing with 1,000 feet of Boys and Girls Clubs of America site.** This session law amends the definition of "child care center" in G.S. 14-208.16(b) to prohibit a registered sex offender or a person who is required to register from residing within 1,000 feet of a permanent location of an organized club of Boys and Girls Clubs of America. The law is applicable to all people registered or required to register as a sex offender on or after June 24, 2014. However, the session law does not apply to a person who has established a residence before June 24, 2014, in accordance with G.S. 14-208.16(d)(1), (2), or (3).

4. **S.L. 2014-22 (S 463): Law expanded statewide that provides that county detention facility may house up to 64 inmates per dormitory under certain conditions.** G.S. 153A-221(d) provides that a dormitory in a county detention facility may house up to 64 inmates as long as the dormitory meets certain conditions. This session law, effective June 18, 2014, makes this statutory subdivision applicable to all counties in the state by deleting the provision that limited its applicability to counties with a population exceeding 300,000 according to the most recent decennial federal census.

5. **S.L. 2014-27 (H 698): Criminal history checks authorized of current members of volunteer or paid fire departments and emergency medical services; urban search and rescue program created.** This session law amends G.S. 114-19.12, effective January 1, 2015, to authorize criminal history checks of current members of volunteer or paid fire departments and emergency medical services. The current statute only authorizes checks of applicants for these positions. The session law also adds a new Article 6 to G.S. Chapter 166A, effective July 1, 2014, to create a statewide urban search and rescue program to be maintained by the Division of Emergency Management of the state Department of Public Safety. The program will provide, among other things, for an urban search and rescue team to assist in the removal of trapped victims during emergencies, including collapsed structures, trench excavations, elevated locations, and in other technical rescue situations. The program must include contract response teams located strategically across the state that are available to provide 24-hour dispatch from the Division of Emergency Management Operations Center. The Secretary of Public Safety may contract with local government units to provide contract response teams to implement the program. Before implementation of the program, the department must study its costs, including the apportionment of costs between State and local government entities, and a report of the results of the study must be provided to a designated legislative committee and the Fiscal Research Division by January 15, 2015.

6. **S.L. 2014-53 (H 1220): Pilot study on safety and efficacy of hemp extract treatment for intractable epilepsy.** This session law authorizes university-based studies of the safety and efficacy of hemp extract treatment for intractable epilepsy. In doing so, it enacts new G.S. 90-94.1 to exempt from criminal penalties the people involved in the study who possess or administer "hemp extract" as defined in the statute, which is effective on the adoption of rules by the state Department of Health and Human Resources. The rules must be adopted by October 1, 2014.

7. **S.L. 2014-58 (H 1025): Ramp meter violation created.** This session law contains several changes involving the state Department of Transportation. Of direct relevance to criminal law, section 10 amends G.S. 20-4.01 to define "ramp meter" as a traffic control device that consists of a circular red and circular green display placed at a point along an interchange entrance ramp. New G.S. 20-158(c)(6), effective for offenses committed on or after December 1, 2014, provides that when a ramp meter is displaying a circular red display, vehicles facing the red light must stop. When displaying green, a vehicle may proceed for each lane of traffic facing the meter. When the display is dark or not red or green, a vehicle may proceed without stopping. A violation of the subdivision is an infraction without assessment of driver's license points or insurance surcharge.

8. **S.L. 2014-77 (S 794): Presumptive child support guidelines to include retroactive support obligation.** G.S. 50-13.4(c1) requires the Conference of Chief District Court Judges to prescribe statewide presumptive guidelines to compute a parent's child support obligations and to review them at least once every four years. This session law, effective July 22, 2014, amends the statute to

require the guidelines to include retroactive support obligations.

9. **S.L. 2014-100 (S 744): 2014 Appropriations Act.** This session law makes base budget appropriations for current operations and other changes. Unless otherwise noted, the provisions are effective July 1, 2014. The section numbers and pages of the session law are noted to facilitate locating the provisions.

Medical examiner system. Amended G.S. 130A-382 provides that the Chief Medical Examiner in appointing medical examiners for each county must give preference to physicians but may also appoint physician assistants, nurse practitioners, nurses, coroners, or emergency medical technician paramedics. Studies are authorized of the Office of Chief Medical Examiner and the medical examiner system. Sections 12E.5 and 12E.6 (pages 79-80).

Specified legislative committees are required jointly to study the merger of the State Crime Laboratory and the Office of the State Medical Examiner into a single independent state agency and to report to the 2015 legislative session. Section 17.3 (page 183).

Marine fisheries joint enforcement agreement. Amended G.S. 113-224 authorizes the marine fisheries director or designee to enter an agreement with the National Marine Fisheries Service of the U.S. Department of Commerce allowing Division of Marine Fisheries inspectors to accept delegation of law enforcement powers over matters within the jurisdiction of the service. Section 14.11 (page 126).

Alcohol Beverage Control (ABC) Commission. Effective October 1, 2014, the ABC Commission is transferred administratively from the Department of Commerce to the Department of Public Safety, but the commission will exercise its powers independently of the Secretary of Public Safety. Section 15.2A (page 137).

Effective for criminal charges brought on or after October 1, 2014, amended G.S. 18B-904 requires the ABC Commission to immediately suspend permits issued by it for 30 days if (1) ALE agents or local ABC Board officers provide advance notice to the commission's legal division staff of an ongoing undercover operation; and (2) after executing a search warrant resulting from the undercover operation, five or more people are criminally charged with violations of gambling, disorderly conduct, prostitution, controlled substance, or felony counterfeit trademark laws. Section 15.2A1 (page 137).

All misdemeanants to serve sentences in local confinement facilities. Various statutes are amended to remove all misdemeanants, including impaired driver (DWI) defendants, from the state prison system, expanding on changes made in 2011. All misdemeanor sentences in excess of 90 days and all DWI sentences, regardless of length, are served through the State Misdemeanant Confinement Program. Amended G.S. 15A-1351(a) provides that all terms of special probation imposed at sentencing for misdemeanors, including impaired driving, must be served in a local confinement or treatment facility, not in prison. This section is effective October 1, 2014, and applies to (1) defendants placed on probation or sentenced to imprisonment for impaired driving under G.S. 20-138.1 on or after January 1, 2015; and (2) defendants placed on probation or sentenced to imprisonment for all other misdemeanors other than impaired driving under G.S. 20-138.1 on or after October 1, 2014. Section 16C.1 (pages 155-59).

Confinement in response to violation (CRV) for probationers. Amended G.S. 15A-1344(d2), effective for probation violations occurring on or after October 1, 2014, provides that the 90-day term of confinement ordered for a felony shall not be reduced by credit for time already served in the case; instead, the credit shall be applied to the suspended sentence. The statute is also amended to delete the provision for misdemeanors that confinement awaiting the probation hearing must be first credited to any CRV imposed. For a comprehensive analysis of these credit changes, see Jamie Markham, *Sentencing Legislation Review Part I: New Credit Rules for CRV*, North

Carolina Criminal Law (UNC School of Government, September 8, 2014), http://nccriminallaw.sog.unc.edu/?p=4921. The amended statute also makes clear that CRV confinement for felonies will be in a state correctional facility, and misdemeanor CRV will be served where the defendant would have served an active sentence (either the local jail or the Statewide Misdemeanant Confinement program, depending on the length of the sentence). Section 16C.10 (page 161) authorizes the Department of Public Safety to convert closed facilities into "treatment and behavior modification facilities" for probationers serving a CVR period. Section 16C.8 (page 161).

Reorganization of State Bureau of Investigation (SBI), Division of Criminal Information, and Alcohol Law Enforcement Section. The Division of Criminal Information is transferred from the Department of Justice to the Department of Public Safety. The remainder of the State Bureau of Investigation is transferred from the Department of Justice as a new section within the Law Enforcement Division of the Department of Public Safety. However, the SBI will be an independent agency under the direction and supervision of the SBI Director, who will be appointed for an eight-year term by the Governor subject to confirmation by the General Assembly. The Alcohol Law Enforcement Section is relocated as a branch (Alcohol Law Enforcement Branch) under the SBI, but the branch will be separate and discrete. Amended G.S. 18B-500(b) provides that an alcohol law enforcement agent's primary responsibility is the enforcement of ABC and lottery laws, deleting both the Controlled Substances Act and any duty assigned by the Secretary of Public Safety or the Governor. Section 17.1 (pages 164-83).

Transfer of Private Protective Services Board and Alarm Systems Licensing Board to Department of Public Safety. The Private Protective Services Board and the Alarm Systems Licensing Board are transferred from the Department of Justice to the Department of Public Safety. Section 17.5 (page 185).

Indigent Defense Services fee transparency. The Office of Indigent Defense Services (IDS), in consultation and cooperation with the Office of State Controller and Office of State Budget and Management, is required to develop and implement a plan for making certain information in fee applications by attorneys publicly available online, with guidelines set out in the section. IDS must report by October 1, 2014, to specified legislative subcommittees on its progress in developing the plan. Section 18A.1 (page 186).

Four special superior court judgeships abolished and two new special superior court judgeships requested to be designated by the Chief Justice as business court judgeships. Four special superior court judgeships are abolished as specified in the section, and the Chief Justice of the North Carolina Supreme Court is requested to designate two newly-created special superior court judgeships as business court judgeships, which will involve the Governor appointing the judges subject to confirmation by the General Assembly. Section 18B.6 (page 190).

Determination of allocation of assistant district attorneys to prosecutorial districts to include consideration of National Center for State Courts workload formula. The determination of the allocation of assistant district attorneys to prosecutorial districts to be recommended by the Administrative Office of the Courts to the General Assembly (G.S. 7A-60) and developed by the General Assembly (G.S. 7A-63) must consider the workload formula established by the National Center for State Courts. Section 18B.7 (page 191).

Court costs assessed for private hospital performing toxicological testing for prosecutorial district as well as expert witness fees. Amended G.S. 7A-304(a), applicable to fees assessed on or after December 1, 2014, creates two new court cost provisions for convicted defendants under specified circumstances: (1) for a private hospital performing toxicological testing (bodily fluids for the presence of alcohol or controlled substances) under contract with a prosecutorial district, the sum of $600 is to be remitted to the State Treasurer for the General Court of Justice; and (2) for an

expert witness employed by a private hospital performing toxicological testing under contract with a prosecutorial district who completes a chemical analysis under G.S. 20-139.1 and testifies at trial, the sum of $600 is to be remitted to the State Treasurer for the General Court of Justice. Section 18B.14 (pages 191-93).

State Auditor to report criminal misconduct. Amended G.S. 147-64.6(c) provides that whenever the State Auditor believes that information received or collected by the Auditor may be evidence of criminal misconduct, the Auditor must report that information to either the State Bureau of Investigation or the district attorney of the county where the alleged misconduct occurred. Section 25.3 (pages 208-209).

Remote driver's license renewal. Amended G.S. 20-7(f), applicable to driver's licenses renewed on or after the date when the Division of Motor Vehicles (DMV) adopts rules, authorizes the DMV to offer remote renewal of a driver's license by mail, telephone, electronic device, or secure means as specified in the new statutory provision. Section 34.8 (pages 213-14).

Regulation of unmanned aircraft systems (commonly known as drones). New G.S. 15A-300.1 and -300.2, applicable to acts occurring on or after October 1, 2014, generally prohibits using an "unmanned aircraft" (defined as an aircraft operated without the possibility of human intervention from within or on the aircraft and is not a model aircraft) system to: (1) conduct surveillance of a person, an occupied dwelling, or private real property without consent; or (2) photograph a person without consent for the purpose of publishing or otherwise publicly disseminating the photograph. There are five law enforcement exceptions: (i) to counter a high risk of a terrorist attack, (ii) to conduct surveillance within an officer's plain view when the officer has a legal right to be at the location, (iii) execute a search warrant authorizing the use of unmanned aircraft system, (iv) having reasonable suspicion of specified imminent circumstances, and (v) photograph gatherings where the general public is invited. A civil remedy is authorized for statutory violations. Evidence obtained in violation of the statute is inadmissible in a criminal prosecution except when obtained under an objectively reasonable, good-faith belief that the actions were lawful. An unmanned aircraft system may not be launched or recovered from any state or private property without consent. A local government may adopt an ordinance to regulate the use of a local government's property for the launch or recovery of an unmanned aircraft system. Section 34.30 (pages 227-28).

The following new or amended criminal offenses are effective for offenses committed on or after December 1, 2014. New G.S. 14-7.45 provides that all crimes committed by use of an unmanned aircraft system while in flight over the state shall be governed by state laws, which will determine whether the conduct of the unmanned aircraft system while in flight over the state constitutes a crime by the owner. New G.S. 14-280.3 provides that a person who interferes with a manned aircraft by an unmanned aircraft system is guilty of a Class H felony. New G.S. 14-401.24 provides that a person who (1) possesses or uses an unmanned aircraft or aircraft system with an attached weapon is guilty of a Class E felony, or (2) fishes or hunts using an unmanned aircraft system is guilty of a Class 1 misdemeanor. New G.S. 14-401.25 provides that under certain circumstances the unlawful distribution of images taken by an unmanned aircraft system is a Class A1 misdemeanor. Amended G.S. 113-295 provides that the use of an unmanned aircraft system to unlawfully interfere under subsection (a) of the statute with a person taking wildlife resources is a Class 1 misdemeanor. Section 34.30 (pages 228-29).

New Article 10 (G.S. 63-95 and -96) of G.S. Chapter 63 prescribes the training (including a knowledge and skills test) required to operate an unmanned aircraft system and the license required for the commercial operation of such a system. New G.S. 63-96(e) provides that the operation of an unmanned aircraft system for commercial purposes unless otherwise permitted under the statute is a Class 1 misdemeanor. Section 34.30 (pages 229-30).

The ban on the procurement or operation of an unmanned aircraft system by a state or local

government is effectively extended until December 31, 2015, unless the Office of the State Chief Information Officer approves an exception. Section 7.16 (page 26).

10. **S.L. 2014-103 (H 366): Trespass law changes; periodic inspections by N.C. Housing Finance Agency.** Amended G.S. 14-159.12 (first-degree trespass) adds to the Class A1 misdemeanor in subsection (c) a trespass on the premises of any facility used or operated for agricultural activities as defined in G.S. 106-581.1. Amended G.S. 14-159.3 (trespass to land on motorized all-terrain vehicle) (1) requires that the owner's consent to allow a person to use the vehicle must be in writing; and (2) provides that a landowner who gives a person written consent to operate an all-terrain vehicle on his or her property owes the person the same duty of care that he or she owes a trespasser. Both trespass law changes are effective for offenses committed on or after December 1, 2014.

    Amended G.S. 153A-364 (county periodic inspections) and G.S. 160A-424 (city periodic inspections), effective August 6, 2014, provide that a residential building or structure that is subject to periodic inspections by the N.C. Housing Finance Agency shall not be subject to periodic inspections if the agency has issued a finding that the building or structure is in compliance with federal standards.

11. **S.L. 2014-107 (S 773): Videoconferencing of inpatient commitment hearing; slayer statute modified.** Amended G.S. 122C-268(g), effective August 6, 2014, provides that an inpatient commitment hearing may be held by interactive videoconferencing between a treatment facility and a courtroom. Amended G.S. 31A-6, effective for property subject to Article 3 of G.S. Chapter 31A for decedents dying on or after October 1, 2014, modifies the slayer statute (barring slayer from inheriting homicide victim's property) to account for property held in joint tenancy in unequal shares.

12. **S.L. 2014-108 (H 272): Modification of site of Division of Motor Vehicles (DMV) hearing considering alleged ignition interlock violation; single registration renewal sticker.** Amended G.S. 20-17.8(j), applicable to hearings requested on or after October 1, 2014, provides that the site of a DMV hearing considering an alleged ignition interlock violation may be conducted in the county where the person resides when evidence of the violation is an alcohol concentration report from an ignition interlock system. All ignition interlock violation hearings under this statute were previously required to be conducted in the county where the charge was brought. The act also modifies G.S. 20-66(c), effective January 1, 2015, to provide that a *single* registration renewal sticker issued by DMV must be displayed on the registration plate that it renews in the place prescribed by the Commissioner.

13. **S.L. 2014-114 (H 1145): Mopeds required to be registered with Division of Motor Vehicles (DMV).** Effective for offenses committed on or after July 1, 2015 (note the year in this date), new G.S. 20-53.4 provides that mopeds must be registered with the DMV, and the moped owner must pay the same base fee and be issued the same type of registration card and plate as for a motorcycle. To be registered and to operate on a highway or public vehicular area (PVA), (1) a moped must have a manufacturer's certificate of origin; and (2) the moped must be designed and manufactured for use on highways and PVAs. Amended G.S. 20-76 sets out procedures when an applicant for registration of a moped is unable to present a manufacturer's certificate of origin. Effective August 6, 2014, the Joint Legislative Transportation Oversight Committee must study whether additional statutory changes are needed to ensure a moped's safe operation, including whether insurance should be required. The committee must report to the 2015 legislative session.

14. **S.L. 2014-115 (H 1133): Miscellaneous criminal law changes-1.** This 58-page session law makes miscellaneous changes to a variety of statutes, including criminal provisions, which are effective on August 11, 2014, unless otherwise noted. The section numbers and pages of the session law are noted to facilitate locating the provisions.

    Crime Victims' Rights Act changes. Amended G.S. 15A-830(a)(7), involving the Crime Victims' Rights Act, revises the listing of offenses included within the act to reflect reclassifications and repeals, and specifically states that the changes do not adversely affect the rights granted to victims before these changes become effective. Section 2.1 (pages 2-3).

    Magistrates' authority to take guilty pleas. Amended G.S. 7A-273(2) (magistrates' authority to accept guilty pleas) includes open burning offenses under Article 78 of G.S. Chapter 106. Section 20 (page 13).

    Local jail may sell or give vapor products to inmates. Effective for offenses committed on or after December 1, 2014, amended G.S. 14-258.1 allows local confinement facilities to give or sell vapor products or FDA-approved tobacco cessation products to inmates in their custody. Section 23 (page 13).

    Superior court clerk's reporting duties. A clerk of superior court's reporting duties under G.S. 14-404(c1) to the National Instant Criminal Background Check System (NICS) involving pistol permits issued by sheriffs are delayed from beginning on July 1, 2014, to January 1, 2015, and clarifies that the clerk must determine which information can "practicably be transmitted" to NICS. Section 23.5 (pages 13-14).

    Transferring seized firearm to law enforcement agency. Amended G.S. 15-11.1(b1)(4) allows a court order transferring a seized firearm to a law enforcement agency to be issued without a written request of the head of the agency. Section 24.5 (page 14).

    Motor vehicle law definition of "serious traffic violation." Amended G.S. 20-4.01(41a) includes within the definition of a "serious traffic violation" the unlawful use of a mobile telephone while operating a commercial motor vehicle. Section 28.3 (pages 18-19).

    Commercial driver's license law changes. Amended G.S. 20-37.13 provides that the issuance of a commercial driver's learner's permit is a precondition to the initial issuance of a commercial driver's license and also a precondition to the upgrade of a commercial driver's license if the upgrade requires a skills test. Section 28.5 (page 19).

    Repeal of local acts governing disposition of deadly weapons. Local acts for five counties (Harnett, Pamlico, Perquimans, Scotland, and Warren) are repealed that had governed the disposition of deadly weapons after a conviction. Disposition in these counties are now governed by G.S. 14-269.1 (confiscation and disposition of deadly weapons) in the same manner as the other 95 counties. Section 61 (page 53).

15. **S.L. 2014-119 (H 369): Miscellaneous criminal law changes-2.** This session law makes miscellaneous changes to a variety of statutes affecting criminal law. The changes are effective September 18, 2014, unless otherwise noted.

    Expunction changes. Amended G.S. 15A-145.5 (expunction of certain misdemeanors and felonies; no age limitation) adds to the list of offenses that are not considered a "nonviolent misdemeanor" or "nonviolent felony": (1) an offense under G.S. 14-54(a) (felony breaking or entering), 14-54(a1) (breaking or entering with intent to terrorize), or 14-56 (breaking or entering motor vehicle), and (2) any offense that is an attempt to commit an offense described in G.S. 15A-145.5(a)(1) through (8). This change applies to petitions filed on or after December 1, 2014, but petitions filed before that date are not abated by the change. Amended G.S. 15A-145.5(f), effective September 18, 2014, and applicable to expunctions issued under this statute before, on, or after that date, effectively provides that fingerprint records related to this expunction must be expunged.

New conditional discharge provisions. Amended G.S. 15A-1341 (probation), effective December 1, 2014, provides that when a defendant pleads guilty or is found guilty of a Class H or I felony or a misdemeanor, the court may, on joint motion of the defendant and the prosecutor, defer further proceedings for the possibility of conditional discharge. The court must make certain findings (defendant has not been convicted of a felony or a misdemeanor involving moral turpitude, not previously placed on probation, etc.) without entering a judgment of guilt and place the defendant on probation to allow the defendant to demonstrate good conduct. Another conditional discharge provision provides that when a defendant is eligible for the drug treatment court program under Article 62 of G.S. Chapter 7A, a court may, without entering a judgment of guilt and with the defendant's consent, defer proceedings and place the defendant on probation to allow participation in and completion of the drug treatment court program.

On fulfillment of the terms and conditions of a conditional discharge, a plea or finding of guilt previously entered must be withdrawn and the court must discharge the defendant and dismiss the proceedings. However, if there is a violation of a term or condition of conditional discharge, the court may enter an adjudication of guilt and proceed as otherwise provided.

Reduced punishment if defendant possesses marijuana paraphernalia. New G.S. 90-113.22A creates the Class 3 misdemeanor of possession of marijuana paraphernalia, and marijuana is removed from the current Class 1 misdemeanor of possession of drug paraphernalia in G.S. 90-113.22. Also, the new Class 3 misdemeanor is made a lesser-included offense of the Class 1 misdemeanor. These changes are effective for offenses committed on or after December 1, 2014.

Cell phone offenses in prisons or jails. Effective for offenses committed on or after December 1, 2014, amended G.S. 14-258.1: (1) increases the punishment from a Class 1 misdemeanor to a Class H felony under subsection (d) for giving or selling a cell phone or other device to a state prisoner or local confinement facility inmate; and (2) provides that a state prisoner or local confinement facility inmate who possesses a cell phone or other device commits a Class H felony.

Broaden scope of assault on or threat against legislative, executive, or court officials. The criminal statutes (G.S. 14-16.6 and 14-16.7) punishing assaults on and threats against legislative, executive, and court officials are broadened to include an assault or threat on another person as retaliation against these officials. These changes are effective for offenses committed on or after December 1, 2014.

Course exemption for concealed handgun permit for retired correctional officer. Amended G.S. 14-415.12A(a) adds a "qualified retired correctional officer" (as defined in new G.S. 14-415.10(4c)) to officers who are exempt from the course requirement to obtain a concealed handgun permit.

Remote video testimony by forensic and chemical analysts. New G.S. 15A-1225.3 (forensic analyst's remote testimony involving the results of forensic testing under G.S. 8-58.20 in criminal proceeding or juvenile court) and new G.S. 20-139.1 (chemical analyst's remote testimony involving results of blood or urine analysis in any court or administrative hearing), effective for testimony admitted on or after September 1, 2014, authorizes remote testimony if: (1) the State has provided a copy of the analyst's report to the defendant's attorney or an unrepresented defendant; (2) the State notifies the attorney or an unrepresented defendant at least 15 business days before the proceeding of its intention to use remote testimony; and (3) the defendant's attorney or an unrepresented defendant fails to file a written objection with the court, with a copy to the State, at least five business days before the proceeding of the defendant's objection to the introduction of the remote testimony.

Detention officers authorized to carry weapons on educational property. Amended G.S. 14-269.2 (weapons on campus or other educational property), effective for offenses committed on or after December 1, 2014, authorizes detention officers employed by and authorized by the sheriff to carry firearms on campus or educational property when discharging official duties.

Dangerous firearms in G.S. 14-316 (permitting child under 12 to use dangerous firearms only under limited conditions). Subsection (b) of G.S. 14-316 (permitting child under 12 to use dangerous firearms only under limited conditions) provides that air rifles, air pistols, and BB guns are not considered dangerous firearms except in certain listed counties. This session law, effective for offenses committed on or after December 1, 2014, removes Anson, Caswell, Chowan, Cleveland, Cumberland, Harnett, Stanly, and Surry counties from that list of counties.

Punishments for carrying concealed weapon. Amended G.S. 14-269(c), effective for offenses committed on or after December 1, 2014, makes the following changes: (1) the punishment for a second or subsequent offense for a violation of G.S. 14-269(a1) (carrying concealed gun when not otherwise permitted to do so) is increased from a Class I felony to a Class H felony; and (2) provides that a violation of G.S. 14-269(a1) that is punishable under G.S. 14-415.21(a) (infraction for person with concealed handgun permit to carry concealed handgun without permit in one's possession or fails to disclose to officer that person holds permit and is carrying a concealed handgun) is not punishable under G.S. 14-269.

16. **S.L. 2014-120 (S 734): Miscellaneous criminal law changes-3.** This 40-page session law makes miscellaneous changes to a variety of statutes, including criminal provisions, which are effective on September 18, 2014, unless otherwise noted. The section numbers and pages of the session law are noted to facilitate locating the provisions.

Surety may use assistance of other bondsmen and runners to effect arrest or surrender of defendant. Amended G.S. 15A-540 provides that a surety may utilize the services and assistance of any surety bondsman, professional bondsman, or runner licensed under G.S. 58-71-40 to effect the arrest or surrender of a defendant under G.S. 15A-540. Section 12 (page 9).

Euthanasia of venomous reptile clarified. Amended G.S. 14-419(b) clarifies that the final disposition of a venomous reptile for which antivenin approved by the U.S. Food and Drug Administration is not readily available must be euthanized unless the species is protected under federal law. Section 39 (page 28).

Felony taking of Venus flytrap; taking certain wild plants from another's land. New G.S. 14-129.3 provides that the unlawful taking of any Venus flytrap is a Class H felony. Amended G.S. 14-129 increases the Class 3 misdemeanor punishment for taking certain wild plants from another's land from a minimum fine of $10 to $75 and from a maximum fine of $50 to $175, and specifies that each plant taken constitutes a separate offense. The exemption of various counties from the provisions of this statute is deleted. The clerk of superior where a conviction occurs that involves any species that also appears in the North Carolina Protected Plants list created under Article 19B of G.S. Chapter 106 must report the conviction to the Plant Conservation Board, which may consider a civil penalty. All these provisions are applicable to offenses committed on or after December 1, 2014. Section 52 (pages 36-37).