Supreme Court Review

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Criminal Procedure

Appellate Issues

Failure to Raise Issue/Object at Trial & Related Issues

State v. Meadows, ___ N.C. ___, ___ S.E.2d ___ (Dec. 7, 2018)

On discretionary review of a unanimous decision of the Court of Appeals, ___ N.C. App. ___, 806 S.E.2d 682 (2017), the court modified and affirmed the decision below, holding that the defendant waived her Eighth Amendment sentencing argument by failing to raise it before the sentencing court and that although her non-constitutional sentencing issues were preserved for review despite her failure to object at trial, they are without merit. The defendant was convicted of 3 counts of drug trafficking; she was sentenced to a minimum of 70 months in prison on each count, with the sentences for two counts to be served concurrently and the third sentence to be served consecutively to the first two. The defendant appealed asserting, in relevant part, that the sentencing judge improperly overruled another judge's safekeeping order; that the trial court abused his discretion in imposing consecutive sentences on an elderly first offender for a single drug transaction; and that the sentences are grossly disproportionate in violation of the Eighth Amendment. The Court of Appeals found no error, concluding that the defendant failed to preserve her arguments as required by Appellate Rule 10(a)(1). The Supreme Court allowed discretionary review.

The Supreme Court noted that, as a general matter, Rule 10 requires parties to take action to preserve an issue for appeal. It further noted its decision in *State v. Canady*, 330 N.C. 398, 410 S.E.2d 875 (1991), inspired a series of decisions by the Court of Appeals holding that Rule 10(a)(1) does not apply to sentencing errors. The court determined that "[t]o derive such a categorical rule from *Canady*, however, one must ignore the opinion's rationale." It explained that in *Canady*, it determined that the purpose of the rule is to require a party to call an issue to the trial court's attention before the party can assign error to the matter on appeal. *Canady* determined that the rule discourages gamesmanship; a party cannot simply allow something to happen at trial as a matter of trial strategy and then assign error to the matter if the strategy does not pan out. Rather than create a categorical rule, the court explained that in *Canady* it found that the danger of gamesmanship was not present and held that no contemporaneous objection was required to preserve the issue for appellate review in that case. Here, defense counsel asked that all three sentences be consolidated, noting the defendant's advanced age, poor health, and clean criminal record. The judge however consolidated only 2 of the 3 sentences. Here, the sentencing court knew that the defendant sought the minimum possible sentence, and the defendant was not required to voice to contemporaneous objection to preserve this issue for appellate review. The court further found that the defendant's sentencing issues were preserved by statute. Specifically, G.S. 15A-1446(d) provides that certain issues are appealable without preservation, including an argument that the sentence imposed was unauthorized at the time, exceeded the maximum authorized by law, was illegally imposed, or is otherwise invalid as a matter of law.

Having found that the Court of Appeals erred by declining to address the defendant's sentencing arguments, the court went on to find them to be meritless. With respect to the safekeeping order, neither

that order nor the judge's oral remarks when it was imposed indicate that the judge intended to retain jurisdiction over the matter or to delay sentencing; in fact his oral remarks and written order indicating awareness that the defendant might be sentenced by some other judge. The court also rejected the defendant's argument that the trial court abused its discretion in imposing her sentence and her suggestion that the trial court must have been influenced by the defendant's decision to take her case to trial. The court found that this conclusory accusation lacked any support in the record.

Having found that the defendant's non-constitutional sentencing issues were preserved without contemporaneous objection consistent with *Canaday* and G.S. 15A-1446(d), the court found that the defendant's constitutional argument was not so preserved. Rule 14(b)(2) of the Rules of Appellate Procedure requires that a constitutional issue must be timely raised in the trial court in order to be preserved for appellate review. Because the defendant failed to argue to the sentencing court that the sentence imposed violated the Eighth Amendment, she may not raise that argument on appeal.

State v. Miller, ___ N.C. ___, 814 S.E.2d 81 (June 8, 2018)
On appeal from a unanimous decision of the Court of Appeals, ___ N.C. App. ___, 795 S.E.2d 374 (2016), the court reversed, holding that the defendant's Fourth Amendment claims regarding the traffic stop are not reviewable on direct appeal, even for plain error, because the defendant waived them by not moving to suppress the evidence discovered during the stop before or at trial. The defendant did not move to suppress the evidence before or at trial, but instead argued for the first time on appeal that the seizure of the evidence—here cocaine—resulted from various Fourth Amendment violations. Deciding this issue of first impression, the court held that plain error review is not available when a defendant has not moved to suppress at the trial level. It noted that when a defendant does not move to suppress in the trial court, the evidentiary record pertaining to the suppression issue is not fully developed, and may not be developed at all. Without a fully developed record, an appellate court lacks the information necessary to assess the merits of a defendant's plain error arguments. Here, for example, the Court of Appeals reviewed the officer's body camera footage and determined that the officer did not have reasonable suspicion to extend the stop. However, the officer never testified at a suppression hearing, and thus never gave testimony regarding whether he had reasonable suspicion, including testimony about facts that were not captured on the camera footage. The court reversed and remanded to the Court of Appeals for consideration of the defendant's claim that counsel rendered ineffective assistance by failing to move to suppress the evidence in question.

State v. Lee, 370 N.C. 671 (Apr. 6, 2018)
On discretionary review of a unanimous decision of the Court of Appeals, ___ N.C. App. ___, 789 S.E.2d 679 (2016), the court reversed because of errors in the jury instructions on self-defense. At trial, the parties agreed to the delivery of N.C.P.I.–Crim. 206.10, the pattern instruction on first-degree murder and self-defense. That instruction provides, in relevant part: "Furthermore, the defendant has no duty to retreat in a place where the defendant has a lawful right to be." Additionally, N.C.P.I.–Crim. 308.10, which is incorporated by reference in footnote 7 of N.C.P.I.–Crim. 206.10 and entitled "Self-Defense, Retreat," states that "[i]f the defendant was not the aggressor and the defendant was . . . [at a place the defendant had a lawful right to be], the defendant could stand the defendant's ground and repel force with force." Although the trial court agreed to instruct the jury on self-defense according to N.C.P.I.–Crim. 206.10, it ultimately omitted the "no duty to retreat" language of N.C.P.I.–Crim. 206.10 from its actual instructions without prior notice to the parties and did not give any part of the "stand-your-ground" instruction. Defense counsel did not object to the instruction as given. The jury convicted defendant of second-degree murder and the defendant appealed. The Court of Appeals affirmed the conviction, reasoning that the law limits a defendant's right to stand his ground to any place he or she has the lawful right to be, which did not include the public street where the incident occurred. The Supreme Court allowed defendant's petition for discretionary review and reversed. With respect to preservation, the court held that when a trial court agrees to give a requested pattern instruction, an erroneous deviation from that instruction is preserved for appellate review without further request or objection. Here, because the trial court agreed to instruct the

jury in accordance with N.C.P.I.–Crim. 206.10, its omission of the required stand-your-ground provision substantively deviated from the agreed-upon pattern jury instruction, thus preserving this issue for appellate review.

State v. Williams, 370 N.C. 526 (Mar. 2, 2018)
In this possession of a firearm by a felon case, the court reversed in part the decision of the Court of Appeals, ___ N.C. App. ___, 801 S.E.2d 169 (2017), for the reasons stated in the dissent. A divided panel of the court of appeals had held that the trial court erred by admitting 404(b) evidence. The current charges were filed after officers found an AK-47 rifle in the back seat of a vehicle and a Highpoint .380 pistol underneath the vehicle, next to the rear tire on the passenger side. At trial, the State offered, and the trial court admitted, evidence of a prior incident in which officers found a Glock 22 pistol in a different vehicle occupied by the defendant. The evidence was admitted to show the defendant's knowledge and opportunity to commit the crime charged. The defendant offered evidence tending to show that he had no knowledge of the rifle or pistol recovered from the vehicle. The court of appeals held that the trial court erred by admitting the evidence as circumstantial proof of the defendant's knowledge. It reasoned, in part, that "[a]bsent an immediate character inference, the fact that defendant, one year prior, was found to be in possession of a different firearm, in a different car, at a different location, during a different type of investigation, does not tend to establish that he was aware of the rifle and pistol in this case." The court of appeals found that the relevance of this evidence was based on an improper character inference. It further held that the trial court abused its discretion by admitting the evidence as circumstantial proof of the defendant's opportunity to commit the crime charged. The court of appeals noted, in part, that the State offered no explanation at trial or on appeal of the connection between the prior incident, opportunity, and possession. The court of appeals went on to hold that the trial court's error in admitting the evidence for no proper purpose was prejudicial and warranted a new trial. The dissenting judge believed that because the defendant did not properly preserve his objection, the issue should be reviewed under the plain error standard, and that no plain error occurred.

Certiorari

State v. Ledbetter, ___ N.C. ___, 814 S.E.2d 39 (June 8, 2018)
On discretionary review of a unanimous decision of the Court of Appeals, ___ N.C. App. ___, 794 S.E.2d 551 (2016) (per curiam), the court reversed, holding that the absence of a procedural rule limits neither the Court of Appeals' jurisdiction nor its discretionary authority to issue writs of certiorari. After the defendant was charged with DWI, she filed a motion to dismiss, arguing that the State violated certain statutory procedures and State v. Knoll. The trial court denied the motion and the defendant pled guilty, retaining the right to appeal the denial of the motion. The defendant gave notice of appeal and petitioned the Court of Appeals for review by writ of certiorari. The Court of Appeals dismissed the appeal and denied the petition, holding that the defendant did not have a statutory right to appeal from the trial court's denial of her motion to dismiss prior to her guilty plea and that the petition did not assert grounds included in or permitted by Rule 21. The Supreme Court then remanded to the Court of Appeals for reconsideration in light of State v. Stubbs, 368 N.C. 40 (2015), and State v. Thomsen, 369 N.C. 22 (2016). Upon reconsideration, the Court of Appeals again denied the defendant's petition for writ of certiorari and dismissed her appeal. The Court of Appeals determined in part that although the statute provides jurisdiction, it was without a procedural process under either Rule 1 or 21 to issue a discretionary writ other than by invoking Rule 2, and the Court of Appeals declined to invoke that rule. The court determined that the Court of Appeals correctly found that it had jurisdiction to issue the writ. However, it mistakenly concluded that the absence of a specific procedural process in the Rules of Appellate Procedure left the court without any authority to invoke that jurisdiction. The Court of Appeals had held that because the defendant's petition did not assert any of the procedural grounds set forth in Rule 21, it was without a procedural process to issue the writ other than by invoking Rule 2. The court determined that regardless of whether Rule 21 contemplates review of the defendant's motion to dismiss,

if a valid statute gives the Court of Appeals jurisdiction to issue a writ of certiorari, Rule 21 cannot take that jurisdiction away. The court concluded:

> Accordingly, the Court of Appeals had both the jurisdiction and the discretionary authority to issue defendant's writ of certiorari. Absent specific statutory language limiting the Court of Appeals' jurisdiction, the court maintains its jurisdiction and discretionary authority to issue the prerogative writs, including certiorari. Rule 21 does not prevent the Court of Appeals from issuing writs of certiorari or have any bearing upon the decision as to whether a writ of certiorari should be issued.

Plain Error Review

State v. Maddux, ___ N.C. ___, 819 S.E.2d 367 (Oct. 26, 2018)
On discretionary review of a unanimous, unpublished decision of the Court of Appeals, ___ N.C. App. ___, 803 S.E.2d 463 (2017), the court held that although the trial court erred in giving an aiding and abetting instruction, the Court of Appeals incorrectly concluded that the error amounted to plain error. The defendant was charged with manufacturing methamphetamine and trafficking in methamphetamine by manufacture and by possession. The trial court instructed the jury—without objection—that it could find the defendant guilty either through a theory of individual guilt or as an aider and abettor. The defendant was convicted and appealed. The Court of Appeals held that the trial court erred in giving the aiding and abetting instruction because it was not supported by the evidence, and that this error constituted plain error. The State sought review. The Supreme Court agreed that the trial court erred in giving the aiding and abetting instruction but held that no plain error occurred. To demonstrate that a trial court committed plain error, the defendant must show that a fundamental error occurred. To show this, a defendant must establish prejudice—that after examining the entire record, the error had a probable impact on the jury's finding of guilt. Because plain error is to be applied cautiously and only in the exceptional case, the error will often be one that seriously affects the fairness, integrity or public reputation of judicial proceedings. Here, the Court of Appeals indicated that the lack of overwhelming and uncontroverted evidence required the conclusion that a jury probably would have reached a different result had the erroneous instruction not been given. The Supreme Court found that this was error, clarifying that its precedent does not hold that plain error is shown, and a new trial is required, unless the evidence against the defendant is overwhelming and uncontroverted. Considering the entire record, the court held that ample evidence of the defendant's individual guilt made it unlikely that the improper instruction had a probable impact on the jury's finding that the defendant was guilty. Specifically, the court noted all of the items found throughout the defendant's residence that the State's witnesses identified as being commonly used in the production of methamphetamine, including immediate precursor chemicals to the manufacture of methamphetamine, and all of the evidence found inside the one-pot meth lab and burn barrel on the defendant's property, including the plastic bottles that tested positive for methamphetamine and pseudoephedrine. It concluded: "After examining the entire record, we conclude that the erroneous aiding and abetting instruction did not have a probable impact on the jury's finding that defendant was guilty because of the evidence indicating that defendant, individually, used the components found throughout his house to manufacture methamphetamine in the one-pot meth lab on his own property."

Counsel Issues

McCoy v. Louisiana, 584 U.S. ___, 138 S. Ct. 1500 (May. 14, 2018)
Under the Sixth Amendment, a defendant has the right to insist that defense counsel refrain from admitting guilt, even when counsel's experienced-based view is that confessing guilt offers the defendant the best chance to avoid the death penalty. The defendant was charged with three counts of first-degree murder in this capital case. Throughout the proceedings, the defendant insistently maintained that he was

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

The Supreme Court granted certiorari in light of a division of opinion among state courts of last resort on the question whether it is unconstitutional to allow defense counsel to concede guilt over the defendant's intransigent and unambiguous objection. The Court held that the Sixth Amendment was violated. It stated: "When a client expressly asserts that the objective of *'his* defence' is to maintain innocence of the charged criminal acts, his lawyer must abide by that objective and may not override it by conceding guilt." The Court distinguished Florida v. Nixon, 543 U. S. 175 (2004), in which it had considered whether the Constitution bars defense counsel from conceding a capital defendant's guilt at trial when the defendant, informed by counsel, neither consents nor objects. In that case, defense counsel had several times explained to the defendant a proposed guilt phase concession strategy, but the defendant was unresponsive. The Nixon Court held that when counsel confers with the defendant and the defendant remains silent, neither approving nor protesting counsel's proposed concession strategy, no blanket rule demands the defendant's explicit consent to implementation of that strategy. The Court distinguished Nixon on grounds that there the defendant never asserted his defense objective. Here however the defendant opposed counsel's assertion of guilt at every opportunity, before and during trial and in conferences with his lawyer and in open court. The Court clarified: "If a client declines to participate in his defense, then an attorney may permissibly guide the defense pursuant to the strategy she believes to be in the defendant's best interest. Presented with express statements of the client's will to maintain innocence, however, counsel may not steer the ship the other way." It held: "counsel may not admit her client's guilt of a charged crime over the client's intransigent objection to that admission." The Court went on to hold that this type of claim required no showing of prejudice. Rather, the issue was one of structural error. Thus, the defendant must be afforded a new trial without any need to first show prejudice.

State v. McNeill, ___ N.C. ___, 813 S.E.2d 797 (June 8, 2018)

(1) Addressing the merits of the defendant's *Strickland* ineffective assistance of counsel claim in this direct appeal in a capital case, the court rejected the defendant's argument that he received ineffective assistance of counsel when his lawyers disclosed to law enforcement where to look for the five-year-old child victim. Because the trial court heard evidence and made findings on this issue in a pretrial motion, the court determined that no further investigation was required and it could address the merits of the claim on direct appeal. After the defendant was charged with kidnapping, he engaged the services of attorney Rogers, who immediately associated with attorney Brewer to assist in the matter. When Rogers and Brewer undertook representation of the defendant on 13 November, the victim had been missing since the morning of 10 November and a massive search was underway, in hope that the child would be found alive. The defendant admitted to police that he had taken the victim to a hotel. Hotel cameras and witnesses confirmed this admission. By 12 November, law enforcement agencies and volunteers were searching the area around Highway 87, where the defendant's cell phone data had placed him. Rogers had conversations with law enforcement and was aware of the evidence against the defendant and of the defendant's admission to taking the victim to the hotel. Rogers was also aware of the defendant's three

felony convictions, which constituted aggravating circumstances that could be used at a capital sentencing proceeding. Rogers and Brewer met with the defendant and discussed the fact that the child had not been found and the possibility that capital charges could be forthcoming. The defendant denied hurting or killing the victim. Rogers asked the defendant if he had any information about the victim's location, and the defendant told Rogers and Brewer that he did. Rogers and Brewer discussed the death penalty with the defendant, and the defendant agreed that it would be in his best interest to offer information that might be helpful as to the victim's location. Rogers explained that providing this information could be helpful with respect to a possible plea agreement or with respect to mitigating circumstances and could avoid a sentence of death. The defendant agreed with Rogers and Brewer that they would tell law enforcement where to search for the victim, without specifically stating the defendant's name or that he was the source of the information. According to Rogers, he was trying to give the defendant the best advice to save the defendant's life, and the defendant understood the situation and agreed with the strategy. On 14 and 15 November Brewer told law enforcement where to look for the victim. On 16 November, the victim's body was found in the specified area.

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

The defendant further argued that his lawyers should have pushed harder for better concessions for him. Recognizing that in many situations it may make strategic sense for counsel to negotiate the best possible agreement before disclosing potentially incriminating information, the court noted that that is not necessarily true in situations such as this one, where time was a substantial factor. Had law enforcement located the victim's body before the defendant's disclosure, the opportunity to obtain any benefit in return for the information would have been irrevocably lost. Additionally, given that the defendant denied causing the victim harm, there was a possibility that the victim was still alive. In the end, the court disagreed with the defendant that his attorneys acted unreasonably by targeting a plea agreement for life imprisonment and avoiding the death penalty in exchange for making the disclosure. "[U]nder the unique and difficult circumstances here--with the already heavily incriminating evidence against defendant, as well as the apparent likelihood that the discovery of further incriminating evidence could be imminent" and the presumption of reasonableness of counsels' conduct, the court held that the lawyers' decision to disclose potentially incriminating information with the sought-after goal of avoiding imposition of the death penalty did not fall below an objective standard of reasonableness.

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

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

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

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

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

Double Jeopardy

Currier v. Virginia, 585 U.S. ___, 138 S. Ct. 2144 (June 22, 2018)
When a defendant agrees to have charges against him considered in two trials, he cannot later successfully argue that the second trial offends the Double Jeopardy Clause. Facing trial on charges of burglary, grand larceny, and unlawful possession of a firearm by a felon, defendant Michael Currier worried that because the prosecution could introduce evidence of his prior convictions to prove the felon-

in-possession charge, that evidence might prejudice the jury's consideration of the other charges. Currier and the government agreed to a severance, with the burglary and larceny charges to be tried first, followed by a second trial on the felon-in-possession charge. But after the first trial ended in an acquittal, Currier argued that the second trial would violate double jeopardy. Alternatively he asked the trial court to forbid the government from relitigating in the second trial any issue resolved in his favor at the first. So, for example, he said the trial court should exclude from the new proceeding any evidence about the burglary and larceny. The trial court rejected his arguments and allowed the second trial to proceed. The jury convicted Currier on the felon-in-possession charge. After his unsuccessful appeal in the state courts, the Supreme Court granted review.

Currier argued that *Ashe v. Swenson*, 397 U. S. 436 (1970), required a ruling in his favor. The Court rejected this argument, noting, in part, that *Ashe* forbids a second trial only if to secure a conviction the prosecution must prevail on an issue the jury necessarily resolved in the defendant's favor in the first trial. It found *Ashe* distinguishable, noting that in the case before it, the defendant consented to the second trial. Instead, the Court found guidance in *Jeffers v. United States*, 432 U.S. 137 (1977), in which the defendant sought separate trials on each count against him to reduce the possibility of prejudice. The court granted his request. After the jury convicted the defendant in the first trial of a lesser-included offense, he argued that the prosecution could not later try him for a greater offense. The *Jeffers* Court concluded that if a single trial on multiple charges would suffice to avoid a double jeopardy complaint, "there is no violation of the Double Jeopardy Clause when [the defendant] elects to have the . . . offenses tried separately and persuades the trial court to honor his election." (citation omitted). The Court continued:

> What was true in *Jeffers*, we hold, can be no less true here. If a defendant's consent to two trials can overcome concerns lying at the historic core of the Double Jeopardy Clause, so too we think it must overcome a double jeopardy complaint under *Ashe*. Nor does anything in *Jeffers* suggest that the outcome should be different if the first trial yielded an acquittal rather than a conviction when a defendant consents to severance. While we acknowledge that *Ashe*'s protections apply only to trials following acquittals, as a general rule, the Double Jeopardy Clause "'protects against a second prosecution for the same offense after conviction'" as well as "'against a second prosecution for the same offense after acquittal.'" Because the Clause applies equally in both situations, consent to a second trial should in general have equal effect in both situations. (citation omitted)

The Court went on to explain that holding otherwise would create inconsistency not just with *Jeffers* but with other Court precedents as well. It concluded: "This Court's teachings are consistent and plain: the 'Clause, which guards against Government oppression, does not relieve a defendant from the consequences of his voluntary choice.'"

The Court continued in Part III of the Opinion, which garnered only four votes, rejecting Currier's argument that even if he voluntarily consented to holding the second trial, that consent did not extend to the relitigation of any issues the first jury resolved in his favor. This argument turned on issue preclusion principles in civil cases that Currier invited the Court to import into the criminal law through the Double Jeopardy Clause. As noted, however, this aspect of the Court's opinion did not enjoy the support of a majority of the Court.

Indictment & Pleading Issues
Citation

State v. Jones, ___ N.C. ___, 819 S.E.2d 340 (Oct. 26, 2018)
On appeal from a decision of a divided panel of the Court of Appeals, ___ N.C. App. ___, 805 S.E.2d 701 (2017), the court affirmed, holding that the citation charging the offense in question was legally sufficient to properly invoke the trial court's subject matter jurisdiction. The defendant was cited for speeding and

charged with operating a motor vehicle when having an open container of alcohol while alcohol remained in his system. With respect to the open container charge, the citation stated that the defendant "did unlawfully and willfully WITH AN OPEN CONTAINER OF ALCOHOLIC BEVERAGE AFTER DRINKING (G.S. 20-138.7(A))[.]" The defendant moved to dismiss the open container charge on grounds that the citation was fatally defective. The District Court denied the motion and found the defendant guilty of both offenses. The defendant appealed to Superior Court and a jury found him guilty of the open container offense. Before the Court of Appeals, the defendant argued that the trial court lacked jurisdiction to try him for the open container offense because the citation failed to allege all of the essential elements of the crime. The Court of Appeals found no error and the Supreme Court affirmed. Relying in part on the Official Commentary to the statutes, the Supreme Court held that a citation need only identify the crime at issue; it need not provide a more exhaustive statement of the crime as is required for other criminal pleadings. If the defendant had concerns about the level of detail contained in the citation, G.S. 15A-922(c) expressly allowed him to move that the offense be charged in a new pleading. The court further determined that because the defendant did not move in District Court to have the State charge him in a new pleading while the matter was pending in the court of original jurisdiction, the defendant was precluded from challenging the citation in another tribunal on those grounds. The court concluded: "A citation that identifies the charged offense in compliance with N.C.G.S. § 15A-302(c) sufficiently satisfies the legal requirements applicable to the contents of this category of criminal pleadings and establishes the exercise of the trial court's jurisdiction. Under the facts and circumstances of the present case, the citation at issue included sufficient criminal pleading contents in order to properly charge defendant with the misdemeanor offense for which he was found guilty, and the trial court had subject-matter jurisdiction to enter judgment in this criminal proceeding."

Indictment

State v. Brawley, 370 N.C. 626 (Apr. 6, 2018)
On appeal from the decision of a divided panel of the Court of Appeals, ___ N.C. App. ___, 807 S.E.2d 159 (2017), the court per curiam reversed for the reasons stated in the dissenting opinion below, thus holding that a larceny from a merchant indictment was not fatally defective. A majority of the panel of the Court of Appeals held that the indictment, which named the victim as "Belk's Department Stores, an entity capable of owning property," failed to adequately identify the victim. The court of appeals stated:

> In specifying the identity of a victim who is not a natural person, our Supreme Court provides that a larceny indictment is valid only if either: (1) the victim, as named, itself imports an association or a corporation [or other legal entity] capable of owning property[;] or, (2) there is an allegation that the victim, as named, if not a natural person, is a corporation or otherwise a legal entity capable of owning property[.]" (quotations omitted).

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

indictment is a legal entity capable of owning property is sufficient to meet the requirements that an indictment apprise the defendant of the conduct which is the subject of the accusation." As noted, the Supreme Court reversed for reasons stated in the dissent.

State v. Mostafavi , 370 N.C. 681 (Apr. 6, 2018)
On appeal from the decision of a divided panel of the Court of Appeals, ___ N.C. App. ___, 802 S.E.2d 508 (2017), the court reversed, holding that the obtaining property by false pretenses indictment was not defective. The indictment, that described the property obtained as "United States Currency" was not fatally defective. The indictment charged the defendant with two counts of obtaining property by false pretenses, alleging that the defendant, through false pretenses, knowingly and designedly obtained "United States Currency from Cash Now Pawn" by conveying specifically referenced personal property, which he represented as his own. The indictment described the personal property used to obtain the money as an Acer laptop, a Vizio television, a computer monitor, and jewelry. An indictment for obtaining property by false pretenses must describe the property obtained in sufficient detail to identify the transaction by which the defendant obtained money. Here, the indictment sufficiently identifies the crime charged because it describes the property obtained as "United States Currency" and names the items conveyed to obtain the money. As such, the indictment is facially valid; it gave the defendant reasonable notice of the charges against him and enabled him to prepare his defense. The transcript makes clear that the defendant was not confused at trial regarding the property conveyed. Had the defendant needed more detail to prepare his defense, he could have requested a bill of particulars. In so holding the court rejected the defendant's argument that the indictment was fatally defective for failing to allege the amount of money obtained by conveying the items.

State v. Langley, ___ N.C. ___, 817 S.E.2d 191 (Aug. 17, 2018)
On discretionary review of a unanimous decision of the Court of Appeals, ___ N.C. App. ___, 803 S.E.2d 166 (2017), the court reversed, holding that a habitual felon indictment was not fatally defective. The statute requires that a habitual felon indictment set forth "the date that prior felony offenses were committed;" "the name of the state or other sovereign against whom said felony offenses were committed;" "the dates that pleas of guilty were entered to or convictions returned in said felony offenses;" and "the identity of the court wherein said pleas or convictions took place." Here, the indictment alleged that the three prior felony offenses were committed on 11 September 2006, 8 October 2009, and 24 August 2011; that the offenses that led to defendant's felony convictions were committed against the State of North Carolina; that defendant was convicted of committing these offenses, the identity of which was specified in the body of the habitual felon indictment, on 15 February 2007, 21 September 2010, and 5 May 2014; and that each of these convictions occurred in the Superior Court, Pitt County. As a result, the habitual felon indictment contains all of the information required by G.S. 14-7.3 and provides defendant with adequate notice of the bases for the State's contention that defendant had attained habitual felon status. The court noted that the indictment alleged that the defendant had committed the offenses of armed robbery and had been convicted of the lesser included offenses of common-law robbery. Because an indictment for an offense includes all lesser offenses, when the defendant allegedly committed the offense of armed robbery 8 October 2009 and 24 August 2011, he also committed the lesser included offense of common law robbery. Thus, the Court of Appeals was incorrect to state that "[i]t would be an impermissible inference to read into the indictment that common law robbery took place on 8 October 2009 or 24 August 2011 because that is not what the grand jury found when it returned its bill of indictment."

Jury Argument

State v. McNeill, ___ N.C. ___, 813 S.E.2d 797 (June 8, 2018)
(1) In this capital case, the court rejected the defendant's argument that the trial court abused its discretion by denying his requests for a mistrial because of two statements made by the State during closing

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

(2) The court rejected the defendant's argument that the trial court erred by failing to intervene ex mero motu during the State's closing argument during the sentencing phase of the trial. On appeal the defendant pointed to two statements made by prosecutors during the State's closing arguments which refer to the defendant's decision not to present mitigating evidence or closing statements. The court found no gross impropriety in the prosecutor's remarks, noting in part that it is not impermissible for prosecutors to comment on the defendant's lack of mitigating evidence.

State v. Reed, __ N.C. ___, 813 S.E.2d 215 (May. 11, 2018)
In case where the defendant was convicted of misdemeanor child abuse and contributing to the delinquency of a minor, the court reversed the opinion below, ___ N.C. App. ___, 789 S.E.2d 703 (2016), for the reasons stated in the dissent. The case involved the drowning of a child under the defendant's supervision. Over a dissent, a majority of the Court of Appeals held that the State's jury argument regarding 404(b) evidence involving the drowning of another child in the defendant's care "amounted to plain error." The dissenting judge rejected the contention that the trial court erred by failing to intervene ex mero motu to this argument, arguing that plain error was not the appropriate standard of review with respect to jury argument that fails to provoke a timely objection. Applying the gross impropriety standard, the dissenting judge found no error.

Jury Instructions

State v. Malachi, ___ N.C. ___, ___ S.E.2d ___ (Dec. 7, 2018)
On discretionary review of a unanimous decision of the Court of Appeals, ___ N.C. App. ___, 799 S.E.2d 645 (2017), in this felon in possession of a firearm case, the court reversed, holding that although the trial court erred in its jury instructions with respect to possession of a firearm, the error did not require a new trial. At trial, the defendant objected to any reference in the jury instructions to constructive possession, arguing that the facts showed only actual possession. The trial court overruled the defendant's objection and instructed that possession could be either actual or constructive. During deliberations, the jury requested "a legal definition of possession of a firearm," and the court re-instructed the jury consistent with its prior instructions. The defendant was convicted and he appealed. The Court of Appeals awarded the defendant a new trial, finding that the evidence supported an instruction only for actual possession and that the trial court erred by instructing on constructive possession. That court reasoned that inclusion of a jury instruction unsupported by the evidence is reversible error. The State sought discretionary review and the Supreme Court reversed.

The Supreme Court began by noting that it has treated actual and constructive possession as alternative means of showing possession of an item necessary for guilt. Thus, the Court of Appeals

correctly determined that the trial court erred by allowing the jury to potentially convict the defendant of possession of a firearm by a felon on the basis of constructive possession where no evidence supported that theory.

Turning to whether that error required a new trial, the court held that it did not. Concluding that its "existing jurisprudence does not conclusively establish that existing North Carolina law encompasses an automatic reversal rule" in these circumstances, it turned to a determination of whether it should adopt such a rule. It declined to do so, holding that the defendant's challenge to an unsupported constructive possession instruction is subject to traditional harmless error analysis. The court went on to note that as a general matter, a defendant seeking to obtain appellate relief on the basis of an error to which there was an objection at trial must establish that there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises. It noted however that cases involving submission of erroneous jury instructions are "exceedingly serious and merit close scrutiny to ensure that there is no 'reasonable possibility' that the jury convicted the defendant on the basis of such an unsupported legal theory." However, if the State presents exceedingly strong evidence of guilt on the basis of a theory and that evidence is neither in dispute nor subject to serious credibility-related questions, "it is unlikely that a reasonable jury would elect to convict the defendant on the basis of an unsupported legal theory." Turning to the case at hand, it noted that the undisputed evidence showed that officers went to a location after receiving report that an individual possessed a firearm. They discovered the weapon while searching the defendant, who matched the description that had been provided. On these facts the defendant failed to establish that there is a reasonable possibility that, in the absence of the erroneous instruction, the jury would have acquitted. Justice Morgan dissented.

State v. Fowler, ___ N.C. ___, ___ S.E.2d ___ (Dec. 7, 2018)
On discretionary review of a unanimous decision of the Court of Appeals, ___ N.C. App. ___, 800 S.E.2d 724 (2017), the court, in a per curiam opinion, vacated and remanded to the Court of Appeals for reconsideration in light of State v. Malachi, ___ N.C. ___, ___ S.E.2d ___ (2018). In this impaired driving case, the Court of Appeals had held that the trial court committed reversible error by instructing the jury that it could find the defendant guilty if he was driving under the influence of an impairing substance or had a blood alcohol concentration of .08 or more, where no evidence supported a conviction under the .08 prong of the impaired driving statute. The Court of Appeals reasoned that although disjunctive jury instructions generally are permissible for impaired driving, in this case the State presented no evidence supporting the .08 prong. That court thus concluded that the trial court improperly instructed the jury on alternative theories, one of which is not supported by the evidence. It further held that because it is impossible to conclude, based on the record and the general verdict form, upon which theory the jury based its verdict, it must assume that the jury based its verdict on the theory for which it received an improper instruction. The Court of Appeals went on to reject the State's argument that the error was harmless or non-prejudicial and noted that this is not a case where there is overwhelming evidence of impaired driving.

State v. McNeill, ___ N.C. ___, 813 S.E.2d 797 (June 8, 2018)
In this capital case the court rejected the defendant's argument that the trial court erred in the guilt phase by instructing the jury that it could find the defendant guilty of sexual offense if it found either vaginal or anal penetration where the State failed to present any evidence of anal penetration and it cannot be discerned from the record upon which theory or theories the jury relied in arriving at its verdict. The court also rejected the defendant's related argument that the trial court erred in the sentencing phase by instructing the jury that it could find the (e)(5) aggravating circumstances that the capital felony was committed while the defendant was engaged in the commission of, or flight after committing, the act of sexual offense with a child. Noting that the trial judge should never give instructions to a jury which are not based upon facts presented by some reasonable view of the evidence, the court found that here there was sufficient evidence of anal penetration.

Motion to Dismiss

State v. Rodriguez, ___ N.C. ___, 814 S.E.2d 11 (June 8, 2018)
In this capital murder case, the trial court did not err by denying the defendant's motion to dismiss a first-degree murder charge. The defendant argued that the State failed to present sufficient evidence to establish that he was the perpetrator. The court noted that the State's evidence tended to show that the defendant had a history of abusing the victim, that the defendant had threatened to kill the victim and to dispose of her body, that the defendant violently attacked the victim, that the defendant was the last person to see the victim alive, that the defendant had been seen in the general area in which the victim's body had been discovered, that the defendant had attempted to clean up the location at which he assaulted the victim, that the defendant sent text messages from the victim's phone to another person in an attempt to establish that the victim had voluntarily left the area, that the victim's clothing and blood were found in the defendant's vehicle, that the defendant made conflicting statements concerning the circumstances surrounding the victim's disappearance to various people, and that the autopsy performed upon the victim's body indicated, consistently with other evidence tending to show that blood was emanating from the victim's nose as the defendant carried her away, that the victim had aspirated blood prior to her death. On these facts, the trial court did not err by denying the defendant's motion to dismiss the first-degree murder charge for insufficiency of the evidence.

Sentencing

Constitutional Issues

State v. James, ___ N.C. ___, 813 S.E.2d 195 (May 11, 2018)
On discretionary review of a unanimous decision of the Court of Appeals, ___ N.C. App. ___, 786 S.E.2d 73 (2016), in this murder case where the defendant, who was a juvenile at the time of the offense, was resentenced to life in prison without parole under the state's *Miller*-compliant sentencing scheme (G.S. 15A-1340.19A to -1340.19D), the court modified and affirmed the opinion below and remanded for further proceedings. In the Court of Appeals, the defendant argued that the trial court had, by resentencing him pursuant the new statutes, violated the constitutional prohibition against the enactment of ex post facto laws, that the statutory provisions subjected him to cruel and unusual punishment and deprived him of his rights to a trial by jury and to not be deprived of liberty without due process of law, and that the trial court failed to make adequate findings of fact to support its decision to impose a sentence of life without parole. In a unanimous opinion, the Court of Appeals upheld the constitutionality of the statutes while reversing the trial court's resentencing order and remanding for further proceedings. The Court of Appeals remanded for the trial court to correct what it characterized as inadequate findings as to the presence or absence of mitigating factors to support its determination. Before the Supreme Court, the defendant argued that the Court of Appeals erred by holding that the statute creates a presumption in favor of life without parole and by rejecting his constitutional challenges to the statutory scheme.

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

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

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

Drug Offenses

State v. Howell, 370 N.C. 647 (Apr. 6, 2018)
On discretionary review of a unanimous decision of the Court of Appeals, ___ N.C. App. ___, 792 S.E.2d 898 (2016), the court held that G.S. 90-95(e)(3), which provides that a Class 1 misdemeanor "shall be punished as a Class I felon[y]" when the misdemeanant has committed a previous offense punishable under the controlled substances act, establishes a separate felony offense rather than merely serving as a sentence enhancement of the underlying misdemeanor. The trial court treated the conviction as a Class I felony because of the prior conviction, and then elevated punishment to a Class E felony because of the defendant's habitual felon status. The defendant appealed to the Court of Appeals, which reversed, reasoning that while the Class 1 misdemeanor was punishable as a felony under the circumstances presented, the substantive offense remained a misdemeanor to which habitual felon status could not apply. The State sought discretionary review. The Supreme Court reversed, holding that 90-95(e)(3) creates a substantive felony offense which may be subject to habitual felon status.

Prior Record Level

State v. Arrington, ___ N.C. ___, 819 S.E.2d 329 (Oct. 26, 2018)
On appeal from a decision of a divided panel of the Court of Appeals, ___ N.C. App. ___, 803 S.E.2d 845 (2017), the court reversed, holding that as part of a plea agreement a defendant may stipulate on his sentencing worksheet that a second-degree murder conviction justified a B1 classification. In 2015 the defendant entered into a plea agreement with the State requiring him to plead guilty to two charges and having attained habitual felon status. Under the agreement, the State consolidated the charges, dismissed a second habitual felon status count, and allowed the defendant to be sentenced in the mitigated range. As part of the agreement, the defendant stipulated to the sentencing worksheet showing his prior offenses, one of which was a 1994 second-degree murder conviction, designated as a B1 offense. Over a dissent, the Court of Appeals vacated the trial court's judgment and set aside the plea, holding that the defendant

improperly stipulated to a legal matter. The Court of Appeals reasoned that because the legislature divided second-degree murder into two classifications after the date of the defendant's second-degree murder offense, determining the appropriate offense classification would be a legal question inappropriate for a stipulation. Reversing, the Supreme Court noted that the crime of second-degree murder has two potential classifications, B1 and B2, depending on the facts. It continued: "By stipulating that the former conviction of second-degree murder was a B1 offense, defendant properly stipulated that the facts giving rise to the conviction fell within the statutory definition of a B1 classification. Like defendant's stipulation to every other offense listed in the worksheet, defendant's stipulation to second-degree murder showed that he stipulated to the facts underlying the conviction and that the conviction existed." The court went on to reject the defendant's argument that he could not legally stipulate that his prior second-degree murder conviction constituted a B1 felony. It noted that before 2012, all second-degree murders were classified at the same level for sentencing purposes. However, in 2012 the legislature amended the statute, elevating second-degree murder to a B1 offense, except when the murder stems from either an inherently dangerous act or omission or a drug overdose. Generally, a second-degree murder conviction is a B1 offense which receives nine sentencing points; when the facts of the murder meet one of the statutory exceptions thereby making it a B2 offense, it receives six points. It is undisputed that the State may prove a prior offense through a stipulation. "Thus," the court continued "like a stipulation to any other conviction, when a defendant stipulates to the existence of a prior second-degree murder offense in tandem with its classification as either a B1 or B2 offense, he is stipulating that the facts underlying his conviction justify that classification." Here, the defendant could properly stipulate to the facts surrounding his offense by either recounting the facts at the hearing or stipulating to a general second-degree murder conviction that has a B1 classification. By stipulating to the worksheet, the defendant simply agreed that the facts underlying his second-degree murder conviction fell within the general B1 category because the offense did not involve either of the two factual exceptions recognized for B2 classification.

Probation Violations

State v. Krider, ___ N.C. ___, 818 S.E.2d 102 (per curiam) (Sept. 21, 2018)
On appeal from the decision of a divided panel of the Court of Appeals, ___ N.C. App. ___, 810 S.E.2d 828 (2018), the court affirmed per curiam, holding that the State failed to carry its burden of presenting sufficient evidence to support the trial court's decision to revoke the defendant's probation based upon a finding that the defendant willfully absconded probation. It went on, however, to "disavow the portion of the opinion analyzing the pertinence of the fact that defendant's probationary term expired prior to the date of the probation violation hearing and holding 'that the trial court lacked jurisdiction to revoke defendant's probation after his case expired.'" In the opinion below, the Court of Appeals held that because the State presented insufficient evidence to support a finding of willful absconding, the trial court lacked jurisdiction to revoke the defendant's probation after the term of probation ended. When the defendant's probation officer visited his reported address, an unidentified woman advised the officer that the defendant did not live there. The State presented no evidence regarding the identity of this person or her relationship to the defendant. The officer never attempted to contact the defendant again. However when the defendant contacted the officer following his absconding arrest, the officer met the defendant at the residence in question. The Court of Appeals held that the evidence was insufficient to establish absconding. It went on to hold that the trial court's decision was not only an abuse of discretion but also was an error that deprived the court of jurisdiction to revoke the defendant's probation after his probationary term expired.

Evidence

Rape Shield

State v. Jacobs, 370 N.C. 661 (Apr. 6, 2018)
On discretionary review of a unanimous decision of the Court of Appeals, ___ N.C. App. ___, 798 S.E.2d 532 (2017), the court reversed, holding that at the trial court erred by excluding defense evidence of the victim's history of STDs. The case involved allegations that the defendant had sexual relations with the victim over a period of several years. Evidence showed that the victim had contracted Trichomonas vaginalis and the Herpes simplex virus, Type II, but that testing of the defendant showed no evidence of those STDs. At trial the defense proffered as an expert witness a doctor who was a certified specialist in infectious diseases who opined, in part, that given this, it was unlikely that the victim and the defendant had engaged in unprotected sexual activity over a long period of time. The trial court determined that the defendant could not introduce any STD evidence unless the State open the door. The defendant was convicted and appealed. The Court of Appeals rejected the defendant's argument that the trial court erred by excluding this evidence. The Supreme Court reversed and ordered a new trial. The Rule 412(b)(2) exception allows for admission of "evidence of specific instances of sexual behavior offered for the purpose of showing that the act or acts charged were not committed by the defendant." The court concluded:

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

Character Evidence

State v. Bass, ___ N.C. ___, 819 S.E.2d 322 (Oct. 26, 2018)
On appeal from a decision of a divided panel of the Court of Appeals, ___ N.C. App. ___, 802 S.E.2d 477 (2017), the Supreme Court reversed, holding that the trial court properly excluded specific instances of the victim's violent conduct for the purpose of proving that he was the first aggressor. The charges arose from the defendant's shooting of the victim. The defendant asserted self-defense. In his case in chief, the defendant sought to introduce testimony describing specific instances of violent conduct by the victim, specifically testimony from three witnesses about times when they had experienced or witnessed the victim's violent behavior. The trial court excluded this evidence but allowed each witness to testify to his or her opinion of the victim's character for violence and the victim's reputation in the community. Construing the relevant evidence rules, the Supreme Court determined that character is not an essential element of self-defense. Therefore, with regard to a claim of self-defense, the victim's character may not be proved by evidence of specific acts. Here, the excluded evidence consisted of specific incidents of violence committed by the victim. Because Rule 405 limits the use of specific instances of past conduct to cases in which character is an essential element of the charge, claim, or defense, the trial court properly excluded testimony regarding these specific prior acts of violence by the victim.

Crawford & the Confrontation Clause

State v. Miller, ___ N.C. ___, 814 S.E.2d 93 (June 8, 2018)
On discretionary of a unanimous decision of the Court of Appeals, ___ N.C. App. ___, 801 S.E.2d 696 (2017), in this murder case the court reversed, holding that the Court of Appeals erred by concluding that certain evidence was admitted in violation of the defendant's confrontation rights. The defendant was

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

Impeachment

State v. Rodriguez, ___ N.C. ___, 814 S.E.2d 11 (May 5, 2018)
In this capital case, the trial court did not err by allowing the State to elicit testimony that defense counsel had previously hired the State's expert to testify on behalf of another client. The defendant argued that this allowed the State to improperly vouch for its expert's credibility. The State's expert testified that he disagreed with a defense expert's opinion that the defendant suffers from mild intellectual disability. In light of the differences between the experts' opinions it was proper to elicit testimony regarding potential witness bias or lack thereof. The court noted:

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

Prior Acts--404(b) Evidence

State v. Reed, ___ N.C. ___, 813 S.E.2d 215 (May 11, 2018)
In a case where the defendant was convicted of misdemeanor child abuse and contributing to the delinquency of a minor, the court reversed the opinion below, ___ N.C. App. ___, 789 S.E.2d 703 (2016), for the reasons stated in the dissent. The case involved the drowning of a child under the defendant's supervision in 2013. A majority of the Court of Appeals panel determined that evidence of a prior incident involving the drowning of a child under the defendant's supervision in 2010 was properly admitted under Rule 404(b). The majority went on to conclude, however, that the State used the 404(b) evidence "far beyond the bounds allowed by the trial court's order" based on extensive references to the evidence, and that this constituted reversible error. The dissenting judge agreed that the 404(b) evidence was properly admitted but disagreed that the State's use of that evidence warranted reversal. According to

the dissent, the defendant's argument regarding the State's use of the 404(b) evidence should be treated as a challenge to jury argument in the absence of an objection, a claim assessed under the gross impropriety standard, which the defendant could not meet.

Hearsay

State v. McNeill, ___ N.C. ___, 813 S.E.2d 797 (June 8, 2018)
In this capital case, the court rejected the defendant's argument that a law enforcement officer's testimony that he received information about the location of the victim from the defendant's attorneys was inadmissible hearsay. The trial court properly determined that these statements were admissible under Rule 801(d) as admissions by a party opponent.

Attorney-Client Privilege

State v. McNeill, ___ N.C. ___, 813 S.E.2d 797 (June 8, 2018)
In this capital case, the court rejected the defendant's argument that information he provided his lawyers regarding the location of the victim's body was inadmissible by virtue of the attorney-client privilege. Here, the trial court correctly determined that the information was not protected by the privilege. Specifically, testimony of defense counsel at a hearing before the trial court plainly established that the defendant communicated the information to counsel with the purpose that it be relayed to law enforcement to assist in the search for the victim. Because the communication was made for the purpose of being conveyed by counsel to others, it was not privileged.

Arrest, Search, and Investigation

Reasonable Suspicion for a Stop

State v. Nicholson, ___ N.C. ___, 813 S.E.2d 840 (June 8, 2018)
On appeal from the decision of a divided panel of the Court of Appeals, ___ N.C. App. ___, 805 S.E.2d 348 (2017), the court reversed, holding that an officer's decision to briefly detain the defendant for questioning was supported by reasonable suspicion of criminal activity. While on patrol at 4 AM, Lieutenant Marotz noticed a car parked in a turn lane of the street, with its headlights on but no turn signal blinking. Marotz saw two men inside the vehicle, one in the driver's seat and the other—later identified as the defendant—in the seat directly behind the driver. The windows were down despite rain and low temperatures. As Marotz pulled alongside of the vehicle, he saw the defendant pull down a hood or toboggan style mask with holes in the eyes, but then push the item back up when he saw the officer. Martoz asked the two whether everything was okay and they responded that it was. The driver said that the man in the back was his brother and they had been arguing. The driver said the argument was over and everything was okay. Sensing that something was not right, the officer again asked if they were okay, and they nodded that they were. Then the driver moved his hand near his neck, "scratching or doing something with his hand," but Marotz was not sure how to interpret the gesture. Still feeling that something was amiss, Marotz drove to a nearby gas station to observe the situation. After the car remained immobile in the turn lane for another half minute, Marotz got out of his vehicle and started on foot towards the car. The defendant stepped out of the vehicle and the driver began to edge the car forward. Marotz asked the driver what he was doing and the driver said he was late and had to get to work. The officer again asked whether everything was okay and the men said that everything was fine. However, although the driver responded "yes" to the officer's question, he shook his head "no." This prompted the officer to further question the defendant. The driver insisted he just had to get to work and the officer told him to go. After the driver left, the defendant asked the officer if he could walk to a nearby store. The officer responded, "[H]ang tight for me just a second . . . you don't have any weapons on you do you?" The defendant said he had a knife but a frisk by a backup officer did not reveal a

weapon. After additional questioning the officers learned the defendant's identity and told him he was free to go. Later that day the driver reported to the police that the defendant was not his brother and had been robbing him when Marotz pulled up. The defendant held a knife to the driver's throat and demanded money. Officers later found a steak knife in the back seat of the vehicle. The defendant was charged with armed robbery and he moved to suppress the evidence obtained as a result of his seizure by Marotz. The parties agreed that the defendant was seized when Marotz told him to "hang tight." The court found that the circumstances established a reasonable, articulable suspicion that criminal activity was afoot. Although the facts might not establish reasonable suspicion when viewed in isolation, when considered in their totality they could lead a reasonable officer to suspect that he had just happened upon a robbery in progress. The court also found that the Court of Appeals placed undue weight on Marotz's subjective interpretation of the facts (the officer's testimony suggested that he did not believe he had reasonable suspicion of criminal activity), rather than focusing on how an objective, reasonable officer would have viewed them. The court noted that an action is reasonable under the fourth amendment regardless of the officer's state of mind, if the circumstances viewed objectively justify the action. Here they do.

Duration of a Stop

State v. Downey, 370 N.C. 507 (Mar. 2, 2018)
The court per curiam affirmed a divided decision of the Court of Appeals, ___ N.C. App. ___, 796 S.E.2d 517 (2017), affirming an order denying the defendant's motion to suppress. Over a dissent, the court of appeals had held that reasonable suspicion supported extension of the traffic stop. After an officer stopped the defendant for a traffic violation, he approached the vehicle and asked to see the driver's license and registration. As the defendant complied, the officer noticed that his hands were shaking, his breathing was rapid, and that he failed to make eye contact. He also noticed a prepaid cell phone inside the vehicle and a Black Ice air freshener. The officer had learned during drug interdiction training that Black Ice freshener is frequently used by drug traffickers because of its strong scent and that prepaid cell phones are commonly used in drug trafficking. The officer determined that the car was not registered to the defendant, and he knew from his training that third-party vehicles are often used by drug traffickers. In response to questioning about why the defendant was in the area, the defendant provided vague answers. When the officer asked the defendant about his criminal history, the defendant responded that he had served time for breaking and entering and that he had a cocaine-related drug conviction. After issuing the defendant a warning ticket for the traffic violation and returning his documentation, the officer continued to question the defendant and asked for consent to search the vehicle. The defendant declined. He also declined consent to a canine sniff. The officer then called for a canine unit, which arrived 14 minutes after the initial stop ended. An alert led to a search of the vehicle and the discovery of contraband. The court of appeals rejected the defendant's argument that the officer lacked reasonable suspicion to extend the traffic stop, noting that before and during the time in which the officer prepared the warning citation, he observed the defendant's nervous behavior; use of a particular brand of powerful air freshener favored by drug traffickers; the defendant's prepaid cell phone; the fact that the defendant's car was registered to someone else; the defendant's vague and suspicious answers to the officer's questions about why he was in the area; and the defendant's prior conviction for a drug offense. These circumstances, the court of appeals held, constituted reasonable suspicion to extend the duration of stop.

Probable Cause for Arrest

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

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

Juvenile Interrogations

State v. Saldierna, ___ N.C. ___, 817 S.E.2d 174 (Aug. 17, 2018)
On discretionary review of a unanimous decision of the Court of Appeals, ___ N.C. App. ___, 803 S.E.2d 33 (2017), the court reversed, holding that the trial court's order denying the defendant's motion to suppress contained sufficient findings of fact to support its conclusion that the defendant knowingly and voluntarily waived his juvenile rights pursuant to G.S. 7B-2101 before making certain incriminating statements. After the trial court denied the defendant's suppression motion, the defendant entered a negotiated plea reserving his right to seek review of the denial of suppression motion. After sentencing, the defendant appealed. The Court of Appeals held that the trial court erred by denying the suppression motion because the defendant's statement, "Can I call my mom," required the officer to clarify whether the defendant was invoking his right to have a parent present during the interview. The Supreme Court granted the State's petition seeking discretionary review of that decision, reversed that decision, and remanded to the Court of Appeals for consideration of the defendant's other challenges to the suppression order. In reversing the Court of Appeals in *Saldierna I,* the Supreme Court concluded that the statement "Can I call my mom" did not constitute a clear and unambiguous invocation of his right to have his parent or guardian present. On remand in (*Saldierna II)* the Court of Appeals found that the trial court's findings of fact did not support its conclusion of law that the State carried its burden of showing that the defendant knowingly, willingly, and understandingly waived his juvenile rights. The Supreme Court granted the State's petition for discretionary review of the Court of Appeals' remand decision in *Saldierna II.* The court noted that the totality of the circumstances analysis requires inquiry into all of the circumstances surrounding the interrogation, including evaluation of the juvenile's age, experience, education, background, and intelligence, and into whether the juvenile has the capacity to understand the warnings given, the nature of his or her rights, and the consequences of waiving those rights. In applying this test to the custodial interrogation of juveniles, the record must be carefully scrutinized, with particular attention to both the characteristics of the accused and the details of the interrogation. However, a defendant's juvenile status does not compel a determination that the juvenile did not knowingly and intelligently waive his or her rights. Instead, the juvenile's age is a factor to consider in the analysis. Turning to the record before it, the court found that the trial court's findings of fact have adequate evidentiary support and that those findings support the trial court's conclusion that the defendant knowingly and voluntarily waived his juvenile rights. In reaching a contrary conclusion, the Court of Appeals failed to focus on the sufficiency of the evidence to support the findings of fact that the trial court actually made and to give proper deference to those findings. Thus, the Court of Appeals erred in determining that the record did not support the trial court's findings to the effect that the defendant understood his juvenile rights. Although the record contains evidence that would have supported a different determination, it was, at most, in conflict. Evidentiary conflicts are a matter for the trial court, which has the opportunity to see and hear the

witnesses. The court further found that the trial court's findings support its conclusion of law that the defendant knowingly, willingly, and understandingly waived his juvenile rights.

Plain View & Protective Sweep

State v. Smith, ___ N.C. ___, 818 S.E.2d 100 (per curiam) (Sept. 21, 2018)
In a per curiam opinion in this felon in possession of a firearm case, the court reversed the Court of Appeals for reasons stated in the dissenting opinion below, thus holding that the shotgun was in plain view. In the opinion below, ___ N.C. App. ___, 804 S.E.2d 235 (2017), the Court of Appeals held that the trial court erred by denying the defendant's motion to suppress. Three officers entered the defendant's apartment to execute arrest warrants issued for misdemeanors. While two officers made the in-home arrest, the third conducted a protective sweep of the defendant's apartment, leading to the discovery and seizure of the stolen shotgun. The shotgun was leaning against the wall in the entry of the defendant's bedroom. The bedroom door was open and the shotgun was visible, in plain view, from the hallway. The officer walked past the shotgun when checking the defendant's bedroom to confirm that no other occupants were present. After completing the sweep, the officer secured the shotgun "to have it in . . . control and also check to see if it was stolen." The officer located the serial number on the shotgun and called it into the police department, which reported that the gun was stolen. The officer then seized the weapon. The defendant moved to suppress the shotgun, arguing that the officer lacked authority to conduct a protective sweep and that the seizure could not be justified under the plain view doctrine. The trial court denied the defendant's motion to suppress. The Court of Appeals began by finding that the protective sweep was proper, and there was no dissent on this issue. It held that the officer was authorized to conduct a protective sweep, without reasonable suspicion, because the rooms in the apartment—including the bedroom where the shotgun was found--were areas immediately adjoining the place of arrest from which an attack could be immediately launched. The court rejected the defendant's argument that the bedroom area was not immediately adjoining the place of arrest. The defendant was in the living room when the officers placed him in handcuffs. The third officer immediately conducted the protective sweep of the remaining rooms for the sole purpose of determining whether any occupants were present who could launch an attack on the officers. Every room in the apartment was connected by a short hallway and the apartment was small enough that a person hiding in any area outside of the living room could have rushed into that room without warning. Based on the size and layout of the apartment, the trial court properly concluded that all of the rooms, including the bedroom where the shotgun was found, were part of the space immediately adjoining the place of arrest and from which an attack could have been immediately launched.

(2) The Court of Appeals went on to hold however, over a dissent, that the plain view doctrine could not justify seizure of the shotgun. The defendant argued that the seizure could not be justified under the plain view doctrine because the incriminating nature of the shotgun was not immediately apparent. He also argued that the officer conducted an unlawful search, without probable cause, by manipulating the shotgun to reveal its serial number. The court concluded that observing the shotgun in plain view did not provide the officer with authority to seize the weapon permanently where the State's evidence failed to establish that, based on the objective facts known to him at the time, the officer had probable cause to believe that the weapon was contraband or evidence of a crime. The officers were executing arrest warrants for misdemeanor offenses and were not aware that the defendant was a convicted felon. Before the seizure, the officer asked the other officers in the apartment if the defendant was a convicted felon, which they could not confirm. The court went on to find that the incriminating character of the shotgun became apparent only upon some further action by the officers, here, exposing its serial number and calling that number into the police department. Such action constitutes a search, separate and apart from the lawful objective of the entry. The search cannot be justified under the plain view doctrine because the shotgun's incriminating nature was not immediately apparent. There was no evidence to indicate that the officer had probable cause to believe that the shotgun was stolen. It was only after the unlawful search

that he had reason to believe it was evidence of a crime. The dissenting judge concluded that regardless of whether the officer knew that defendant was a felon or knew that the shotgun was stolen, it was immediately apparent that the shotgun was contraband. One of the regular conditions of the defendant's probation was that he possess no firearms. Thus, the dissenting judge concluded, under the regular terms and conditions of probation, the shotgun was contraband. The dissenting judge continued: "Given that the officers were serving a warrant for a probation violation, it was immediately apparent that the shotgun was contraband."

Search Warrants

State v. Frederick, ___ N.C. ___, 819 S.E.2d 346 (Oct. 26, 2018)
On appeal from a decision of a divided panel of the Court of Appeals, ___ N.C. App. ___, 814 S.E.2d 855 (2018), the court per curiam affirmed. The Court of Appeals had held, over a dissent, that the search warrant of the defendant's residence was supported by probable cause. The warrant was supported by the following information: A detective received information from a reliable confidential source regarding a mid-level drug dealer who sold MDMA, heroin, and crystal methamphetamine. The source had previously provided truthful information that the detective could corroborate, and the source was familiar with the packaging and sale of the drugs in question. The source had assisted the detective with the purchase of MDMA one week prior to the issuance of the search warrant. For that purchase, the detective gave the source money to purchase the drugs. The source met a middleman with whom he then traveled to the defendant's residence. The detective saw the middleman enter the residence and return to the source after approximately two minutes. The detective found this conduct indicative of drug trafficking activity based on his training and experience. The source then met with the detective, and provided him with MDMA. A subsequent purchase of drugs occurred 72 hours prior to the issuance of the search warrant. The details of that transaction were very similar, except that the officer also saw two males enter the residence and exit approximately two minutes later, conduct he believed to be indicative of drug trafficking activity. The Court of Appeals held that this was sufficient to establish probable cause.

Searches

Collins v. Virginia, 584 U.S. ___, 138 S. Ct. 1663 (May. 29, 2018)
The automobile exception to the Fourth Amendment does not permit an officer, uninvited and without a warrant, to enter the curtilage of a home to search a vehicle parked there. Officer McCall saw the driver of an orange and black motorcycle with an extended frame commit a traffic infraction. The driver eluded McCall's attempt to stop the motorcycle. A few weeks later, Officer Rhodes saw an orange and black motorcycle traveling well over the speed limit, but the driver got away from him, too. The officers compared notes, determined that the two incidents involved the same motorcyclist, and that the motorcycle likely was stolen and in the possession of Ryan Collins. After discovering photographs on Collins' Facebook page showing an orange and black motorcycle parked at the top of the driveway of a house, Rhodes tracked down the address of the house, drove there, and parked on the street. It was later established that Collins' girlfriend lived in the house and that Collins stayed there a few nights per week. From the street, Rhodes saw what appeared to be a motorcycle with an extended frame covered with a white tarp, parked at the same angle and in the same location on the driveway as in the Facebook photo. Rhodes, who did not have a warrant, walked toward the house. He stopped to take a photograph of the covered motorcycle from the sidewalk, and then walked onto the residential property and up to the top of the driveway to where the motorcycle was parked. Rhodes removed the tarp, revealing a motorcycle that looked like the one from the speeding incident. He ran a search of the license plate and vehicle identification numbers, which confirmed that the motorcycle was stolen. Rhodes photographed the uncovered motorcycle, put the tarp back on, left the property, and returned to his car to wait for Collins. When Collins returned, Rhodes approached the door and knocked. Collins answered, agreed to speak with Rhodes, and admitted that the motorcycle was his and that he had bought it without title. Collins was

charged with receiving stolen property. He unsuccessfully sought to suppress the evidence that Rhodes obtained as a result of the warrantless search of the motorcycle. He was convicted and his conviction was affirmed on appeal. The U.S. Supreme Court granted certiorari and reversed. The Court characterized the case as arising "at the intersection of two components of the Court's Fourth Amendment jurisprudence: the automobile exception to the warrant requirement and the protection extended to the curtilage of a home." After reviewing the law on these doctrines, the Court turned to whether the location in question is curtilage. It noted that according to photographs in the record, the driveway runs alongside the front lawn and up a few yards past the front perimeter of the house. The top portion of the driveway that sits behind the front perimeter of the house is enclosed on two sides by a brick wall about the height of a car and on a third side by the house. A side door provides direct access between this partially enclosed section of the driveway and the house. A visitor endeavoring to reach the front door would have to walk partway up the driveway, but would turn off before entering the enclosure and instead proceed up a set of steps leading to the front porch. When Rhodes searched the motorcycle, it was parked inside this partially enclosed top portion of the driveway that abuts the house. The Court concluded that the driveway enclosure here is properly considered curtilage. The Court continued, noting that by physically intruding on the curtilage, the officer not only invaded the defendant's fourth amendment interest in the item searched—the motorcycle—but also his fourth amendment interest in the curtilage of his home. Finding the case an "easy" one, the Court concluded that the automobile exception did not justify an invasion of the curtilage. It clarified: "the scope of the automobile exception extends no further than the automobile itself." The Court rejected Virginia's request that it expand the scope of the automobile exception to permit police to invade any space outside an automobile even if the Fourth Amendment protects that space. It continued:

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

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

Byrd v. United States, 584 U.S. ___, 138 S. Ct. 1518 (May. 14, 2018)
Pennsylvania State Troopers pulled over a car driven by Terrence Byrd. Byrd was the only person in the car. During the traffic stop the troopers learned that the car was rented and that Byrd was not listed on the rental agreement as an authorized driver. For this reason, the troopers told Byrd they did not need his consent to search the car, including its trunk where he had stored personal effects. A search of the trunk uncovered body armor and 49 bricks of heroin. The defendant was charged with federal drug crimes. He moved to suppress the evidence. The Federal District Court denied the motion and the Third Circuit affirmed. Both courts concluded that, because Byrd was not listed on the rental agreement, he lacked a reasonable expectation of privacy in the car. The Supreme Court granted certiorari to address the question whether a driver has a reasonable expectation of privacy in a rental car when he or she is not listed as an authorized driver on the rental agreement. The Government argued, in part, that drivers who are not listed on rental agreements always lack an expectation of privacy in the automobile based on the rental

company's lack of authorization alone. The Court found that "[t]his per se rule rests on too restrictive a view of the Fourth Amendment's protections." It held, in part: "the mere fact that a driver in lawful possession or control of a rental car is not listed on the rental agreement will not defeat his or her otherwise reasonable expectation of privacy." The Court remanded on two arguments advanced by the Government: that one who intentionally uses a third party to procure a rental car by a fraudulent scheme for the purpose of committing a crime is no better situated than a car thief (who, the Court noted, would lack a legitimate expectation of privacy); and that probable cause justified the search in any event.

Carpenter v. United States, 585 U.S. ___, 138 S. Ct. 2206 (June 22, 2018)
The Government conducts a search under the Fourth Amendment when it accesses historical cell phone records that provide a comprehensive chronicle of the user's past movements. Police officers arrested four men suspected of robbing Radio Shack and TMobile stores in Detroit. One of the men confessed to a series of robberies in Michigan and Ohio, identified 15 accomplices, and gave law enforcement some of their cell phone numbers. Based on this information, prosecutors applied for court orders under the Stored Communications Act (SCA) to obtain cell phone records for defendant Timothy Carpenter. The SCA permits the Government to compel the disclosure of certain telecommunications records when it "offers specific and articulable facts showing that there are reasonable grounds to believe" that the records sought "are relevant and material to an ongoing criminal investigation." Federal Magistrate Judges issued two orders directing Carpenter's wireless carriers—MetroPCS and Sprint—to disclose "cell/site sector [information] for [Carpenter's] telephone[ ] at call origination and at call termination for incoming and outgoing calls" during the four-month period when the string of robberies occurred. The first order sought 152 days of cell-site records from MetroPCS, which produced records spanning 127 days. The second order requested seven days of CSLI from Sprint, which produced two days of records covering the period when Carpenter's phone was "roaming" in northeastern Ohio. Altogether the Government obtained 12,898 location points cataloging Carpenter's movements—an average of 101 data points per day.

Carpenter was charged with six counts of robbery and six counts of carrying a firearm during a federal crime of violence. He moved to suppress the cell-site data provided by the wireless carriers, arguing that the Government's seizure of the records violated the Fourth Amendment because they had been obtained without a warrant supported by probable cause. The District Court denied the motion. At trial FBI agent Christopher Hess offered expert testimony about the cell-site data. Hess explained that each time a cell phone taps into the wireless network, the carrier logs a time-stamped record of the cell site and particular sector that were used. With this information, Hess produced maps that placed Carpenter's phone near four of the charged robberies. Carpenter was convicted on all but one count. After an unsuccessful appeal to the Sixth Circuit, the Supreme Court agreed to take the case.

The Court began by noting that for many years Fourth Amendment search doctrine was "tied to common-law trespass" and focused on whether the Government "obtains information by physically intruding on a constitutionally protected area." But, in *Katz v. United States*, 389 U.S. 347, 351 (1967), the Court established that "the Fourth Amendment protects people, not places," and expanded its conception of the Amendment to protect certain expectations of privacy as well. It explained: "When an individual seeks to preserve something as private, and his expectation of privacy is one that society is prepared to recognize as reasonable, we have held that official intrusion into that private sphere generally qualifies as a search and requires a warrant supported by probable cause." (quotations omitted).

The Court noted that the digital data at issue in this case does not fit neatly under existing precedents. Instead, requests for cell-site records lie at the intersection of two lines of cases. The first set of cases addresses a person's expectation of privacy in his physical location and movements, including *United States v. Knotts*, 460 U. S. 276 (1983) (monitoring a beeper signal in a container in an automobile on public highways did not violate the Fourth Amendment), and *United States v. Jones*, 565 U.S. 400 (2012)(the government's installation of a GPS tracking device on a vehicle and its use of that device to monitor the vehicle's movements on public streets constitutes a search within the meaning of the Fourth Amendment). In the second set of cases, including *Smith v. Maryland*, 442 U.S. 735 (1979),and *United States v. Miller*, 425 U.S. 435 (1976), the Court applied the "third-party doctrine" and

has drawn a line between what a person keeps to himself and what he shares with others, holding that "a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties." Against this review, the Court presented the issue as follows:

> The question we confront today is how to apply the Fourth Amendment to a new phenomenon: the ability to chronicle a person's past movements through the record of his cell phone signals. Such tracking partakes of many of the qualities of the GPS monitoring we considered in *Jones*. Much like GPS tracking of a vehicle, cell phone location information is detailed, encyclopedic, and effortlessly compiled.
>
> At the same time, the fact that the individual continuously reveals his location to his wireless carrier implicates the third-party principle of *Smith* and *Miller*. But while the third-party doctrine applies to telephone numbers and bank records, it is not clear whether its logic extends to the qualitatively different category of cell-site records. After all, when *Smith* was decided in 1979, few could have imagined a society in which a phone goes wherever its owner goes, conveying to the wireless carrier not just dialed digits, but a detailed and comprehensive record of the person's movements

It held:

> We decline to extend *Smith* and *Miller* to cover these novel circumstances. Given the unique nature of cell phone location records, the fact that the information is held by a third party does not by itself overcome the user's claim to Fourth Amendment protection. Whether the Government employs its own surveillance technology as in *Jones* or leverages the technology of a wireless carrier, we hold that an individual maintains a legitimate expectation of privacy in the record of his physical movements as captured through CSLI. The location information obtained from Carpenter's wireless carriers was the product of a search.

The Court characterized its decision as "a narrow one," noting:

> We do not express a view on matters not before us: real-time CSLI or "tower dumps" (a download of information on all the devices that connected to a particular cell site during a particular interval). We do not disturb the application of *Smith* and *Miller* or call into question conventional surveillance techniques and tools, such as security cameras. Nor do we address other business records that might incidentally reveal location information. Further, our opinion does not consider other collection techniques involving foreign affairs or national security.

Having found that the acquisition of Carpenter's CSLI was a search, the Court went on to conclude that the Government must generally obtain a warrant supported by probable cause before acquiring such records. It noted that the showing required in the SCA "falls well short of the probable cause required for a warrant." Thus, an order issued under the SCA "is not a permissible mechanism for accessing historical cell-site records. Before compelling a wireless carrier to turn over a subscriber's CSLI, the Government's obligation is a familiar one—get a warrant." The Court continued, noting that while the Government will generally need a warrant to access CSLI, case-specific exceptions may support a warrantless search of an individual's cellsite records, such as exigent circumstances.

Criminal Offenses

Aiding & Abetting

State v. Cannon, 370 N.C. 487 (Mar. 2, 2018)
The court per curiam affirmed a divided panel of the Court of Appeals, ___ N.C. App. ___, 804 S.E.2d 199 (2017). Over a dissent, the court of appeals had held that the trial court did not err by denying the defendant's motion to dismiss a charge of aiding and abetting larceny. The charges arose out of the defendant's involvement with store thefts. A Walmart loss prevention officer observed Amanda Eversole try to leave the store without paying for several clothing items. After apprehending Eversole, the loss prevention officer reviewed surveillance tapes and discovered that she had been in the store with William Black, who had taken a number of items from store shelves without paying. After law enforcement was contacted, the loss prevention officer went to the parking lot and saw Black with the officers. Black was in the rear passenger seat of an SUV, which was filled with goods from the Walmart. A law enforcement officer testified that when he approached Black's vehicle the defendant asked what the officers were doing. An officer asked the defendant how he knew Black and the defendant replied that he had only just met "them" and had been paid $50 to drive "him" to the Walmart. The defendant also confirmed that he owned the vehicle. Citing this and other evidence, the court of appeals held that the trial court did not err by denying the motion to dismiss.

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

Attempt

State v. Melton, ___ N.C. ___, ___ S.E.2d ___ (Dec. 7, 2018)
On discretionary review of a unanimous, unpublished decision of the Court of Appeals, ___ N.C. App. ___, 801 S.E.2d 392 (2017), the court reversed, holding that the evidence was insufficient to sustain a conviction for attempted murder. The evidence showed that the defendant solicited an undercover officer—who he thought to be a hired killer--to kill his former wife. He gave the officer $2,500 as an initial payment, provided the officer details necessary to complete the killing, and helped the officer plan how to get his former wife alone and how to kill her out of the presence of their daughter. The defendant was arrested after he left his meeting with the officer; he was charged—and later convicted—of attempted murder and solicitation to commit murder.

The court concluded that while the evidence was sufficient to show solicitation, it "fell short of showing the required overt acts for attempted first-degree murder." Specifically, none of the defendant's preparatory acts "amount to proof of overt acts amounting to attempt under our law." In so ruling, the court determined that the Court of Appeals inappropriately looked to decisions from other jurisdictions to conclude that "although mere solicitation is insufficient to constitute attempt, specific acts taken to complete a murder-for-hire, such as those taken by [defendant] here, can satisfy the elements of attempted murder," where the law regarding attempt in each of those jurisdictions is materially different from North Carolina law. Justice Morgan dissented, joined by Chief Justice Martin and Justice Newby.

Conspiracy

State v. Stimpson, ___ N.C. ___, 818 S.E.2d 101 (per curiam) (Sept. 21, 2018)
In a per curiam opinion, the court affirmed the decision of a divided panel of the Court of Appeals, ___ N.C. App. ___, 807 S.E.2d 603 (2017). The defendant was charged with five indictments alleging five separate offenses of conspiracy to commit robbery arising from five separate incidents. The Court of Appeals held, over a dissent, that the trial court did not err by denying the defendant's motion to dismiss four of the charges. On appeal, the defendant argued that there was only one agreement and thus only one

conspiracy charge was proper. The majority disagreed, concluding, in part, that the random nature and happenstance of the robberies did not indicate a one-time, pre-planned conspiracy. It noted that the victims and crimes committed arose at random and by pure opportunity.

Child Abuse & Contributing to Delinquency

State v. Reed, __ N.C. ___, 813 S.E.2d 215 (May 11, 2018)
In case where the defendant was convicted of misdemeanor child abuse and contributing to the delinquency of a minor, the court reversed the opinion below, State v. Reed, ___ N.C. App. ___, 789 S.E.2d 703 (2016), for the reasons stated in the dissent. Considering the defendant's evidence, along with the State's evidence, in this appeal from a denial of a motion to dismiss, the Court of Appeals held, over a dissent, that the evidence was insufficient to support a conviction of misdemeanor child abuse. The evidence showed that the defendant went to use the bathroom in her home for a few minutes, and her toddler, Mercadiez, managed to fall into their outdoor pool and drown. The defendant's evidence, which supplemented and did not contradict the State's evidence, showed that the defendant left the child in the care of another responsible adult while she used the bathroom. Although the concurring judge did not agree, the court went on to hold that the motion should also have been granted even without consideration of the defendant's evidence. Specifically, the State's evidence failed to establish that the defendant's conduct was "by other than accidental means." Reviewing prior cases, the court found: "the State's evidence never crossed the threshold from 'accidental' to 'nonaccidental.'" It continued:

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

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

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

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

Kidnapping

State v. China, 370 N.C. 627 (Apr. 6, 2018)
On appeal from the decision of a divided panel of the Court of Appeals, ___ N.C. App. ___, 797 S.E.2d 324 (2017), the court reversed, holding that because there was evidence of restraint beyond that inherent in the commission of the sex offense the defendant could be convicted of both the sex offense and kidnapping. The defendant was convicted of a number of several offenses, including first-degree sexual offense and second-degree kidnapping. The Court of Appeals concluded that there was insufficient evidence of restraint separate and apart from that inherent in the sex offense to support the kidnapping conviction. The Supreme Court disagreed. Here, the defendant exercised restraint over the victim during the sexual offense. However, after that offense was completed, the defendant pulled the victim off the bed, causing his head to hit the floor, and called to an accomplice who then, with the defendant, physically attacked the victim, kicking and stomping him. These additional actions increased the victim's helplessness and vulnerability beyond the initial attack that enabled the defendant to commit the sex offense. The court concluded: these actions constituted an additional restraint, which exposed the victim to greater danger than that inherent in the sex offense. For example, the victim testified that as a result of the kicking and stomping on his knees and legs, which had not been targeted or harmed during the sex offense, he was unable to walk for 2 to 3 weeks after the attack.

Obtaining Property by False Pretenses

State v. Mostafavi, 370 N.C. 681 (Apr. 6, 2018)
On appeal from the decision of a divided panel of the Court of Appeals, ___ N.C. App. ___, 802 S.E.2d 508 (2017), the court reversed, holding that the evidence was sufficient to sustain the conviction of obtaining property by false pretenses. The State presented sufficient evidence of the defendant's false representation that he owned the stolen property to support his conviction for obtaining property by false pretenses. The pawnshop employee who completed the transaction verified the pawn tickets, which described the conveyed items and contained the defendant's name, address, driver's license number, and date of birth. The tickets included language explicitly stating that the defendant was "giving a security interest in the . . . described goods." On these facts, the State presented sufficient evidence of the defendant's false representation that he owned the stolen property that he conveyed.

Drug Offenses

Maintaining a Dwelling, Etc.

State v. Rogers, ___ N.C. ___, 817 S.E.2d 150 (Aug. 17, 2018)

On appeal from a decision of a divided panel of the Court of Appeals, ___ N.C. App. ___, 796 S.E.2d 91 (2017), the court reversed, holding that the evidence was sufficient to support a conviction of maintaining a vehicle for the purpose of keeping controlled substances in violation of G.S. 90-108(a)(7). The issues before the court were whether the defendant kept or maintained the vehicle and, if so, whether there was substantial evidence that the vehicle was used for the keeping of controlled substances. Considering the first question, the court found that the word "keep" with respect to "keeping or maintaining" "refers to possessing something for at least a short period of time—or intending to retain possession of something in the future—for a certain use." Here, officers conducted surveillance for about an hour and a half before searching the vehicle and the defendant's hotel room. During that surveillance, they saw the defendant arrive at the hotel in the vehicle, stay in his room for a period of time, and then leave the vehicle. The defendant was the only person seen using the car. Additionally, a service receipt bearing the defendant's name was found inside the vehicle and was dated about 2½ months before the defendant's arrest. From these facts a reasonable jury could conclude that the defendant had possessed the car for at least 2½ months. This was sufficient evidence that the defendant kept the vehicle.

The court then turned to the second issue: whether there was sufficient evidence that the defendant used the vehicle for the keeping of illegal drugs. The court determined that in this context the word "keeps" refers to storing objects in the vehicle. The court found that here, there was substantial evidence that the defendant was using the vehicle to store crack cocaine, not merely to transport it, noting, among other things, the fact that the drugs were found in a hidden compartment and evidence suggesting that the defendant was involved in selling drugs. The court emphasized however that the statute does not create a separate crime simply because controlled substances are temporarily in a vehicle. It clarified:

> In other words, merely possessing or transporting drugs inside a car—because, for instance, they are in an occupant's pocket or they are being taken from one place to another—is not enough to justify a conviction under the "keeping" element of subsection 90-108(a)(7). Rather, courts must determine whether the defendant was using a car for the *keeping* of drugs—which, again, means the *storing* of drugs—and courts must focus their inquiry "on the *use*, not the contents, of the vehicle."" (citation omitted)

The court went on to disavow its statement in State v. Mitchell, 336 N.C. 22 (1994), that keeping of drugs means "not just possession, but possession that occurs over a duration of time." The court concluded that the statute does not require that the drugs be kept for a duration of time. Rather, "the linchpin of the inquiry into whether a defendant was using a vehicle, building, or other place 'for the keeping . . . of' drugs is whether the defendant was using that vehicle, building, or other place for the storing of drugs." The court continued:

> So, for instance, when the evidence indicates that a defendant has possessed a car for at least a short period of time, but that he had just begun storing drugs inside his car at the time of his arrest, that defendant has still violated subsection 90-108(a)(7)—even if, arguably, he has not stored the drugs for any appreciable "duration of time." The critical question is *whether* a defendant's car is used to store drugs, not *how long* the defendant's car has been used to store drugs for. As a result, we reject any notion that subsection 90-108(a)(7) requires that a car kept or maintained by a defendant be used to store drugs for a certain minimum period of time—or that evidence of drugs must be found in the vehicle, building, or other place on more than one occasion—for a defendant to have violated subsection 90-108(a)(7). But again, merely having drugs in a car (or other place) is not enough to justify a conviction under subsection 90-108(a)(7). The evidence and all

> reasonable inferences drawn from the evidence must indicate, based "on the totality of the circumstances," that the drugs are also being stored there. To the extent that *Mitchell*'s "duration of time" requirement conflicts with the text of subsection 90-108(a)(7), therefore, this aspect of *Mitchell* is disavowed. (citation omitted)

State v. Dunston, __ N.C. ___, 813 S.E.2d 218 (May 11, 2018)
The Court per curiam affirmed the opinion below, ___ N.C. App. ___, 806 S.E.2d 697 (2017). Over a dissent, the Court of Appeals held that the trial court did not err by denying the defendant's motion to dismiss a charge of maintaining a vehicle for keeping or selling controlled substances. The court disagreed with the defendant's argument that case law establishes a bright-line rule that one incident of keeping or selling controlled substances always is insufficient to sustain a conviction for maintaining a vehicle. The determination, the court said, is based on the totality of the circumstances. Here, the defendant was in the vehicle at a location known for a high level of illegal drug activity. He was observed by officers unwrapping cigars and rerolling them after manipulating them. Based on the officer's training and experience, the defendant's actions were consistent with those used in distributing marijuana. The driver was observed in hand-to-hand exchange of cash with another person. When searched by officers, the driver was discovered to have marijuana and the defendant was no longer in possession of the "cigars." Additionally, the defendant possessed a trafficking quantity of heroin along with plastic bags, two sets of digital scales, three cell phones, and $155 in cash. Additionally, the defendant's ex-girlfriend testified that she was concerned about his negative influence on his nephew because she "knew the lifestyle."

Possession

State v. Chekanow, 370 N.C. 488 (Mar. 2, 2018)
The court reversed a unanimous, unpublished decision of the Court of Appeals and held, in this drug case, that the State presented sufficient evidence of constructive possession of marijuana. While engaged in marijuana eradication operations by helicopter, officers saw marijuana plants growing on a three-acre parcel of land owned by the defendants. When the officers arrived at the home they found the defendant Chekanow leaving the house by vehicle. They directed her back to the home, and she complied. She was the only person at the residence and she consented to a search of the area where the plants were located, the outbuildings, and her home. The officers found 22 marijuana plants growing on a fenced-in, ½ acre portion of the property. The area was bordered by a woven wire fence and contained a chicken coop, chickens and fruit trees. The fence was approximately 4 feet high. The single gate to the area was adjacent to the defendants' yard. At trial, an officer testified that a trail leading from the house to the plants was visible from the air. The plants themselves were located 60-70 yards beyond the gate; 50-75 yards from the defendant's home; and 10-20 yards from a mowed and maintained area with a trampoline. The plants and the ground around them were well maintained. An officer testified that the plants appeared to have been started individually in pots and then transferred into the ground. No marijuana or related paraphernalia was found in the home or outbuildings; however officers found pots, shovels, and other gardening equipment. Additionally, they found a "small starter kit," which an officer testified could be used for starting marijuana plants. The officer further testified that the gardening equipment could have been used for growing marijuana or legitimate purposes, because the defendants grew regular plants on the property. One of the shovels, however, was covered in dirt that was similar to that at the base of the marijuana plants, whereas dirt in the garden was brown. The State's case relied on the theory of constructive possession. The defendants were found guilty and appealed. The court of appeals found for the defendant, concluding that the evidence was insufficient as to constructive possession. The Supreme Court reversed. It viewed the case as involving a unique application of the constructive possession doctrine. It explained: "The doctrine is typically applied in cases when a defendant does not have actual possession of the contraband, but the contraband is found in a home or in a vehicle associated with the defendant; however, in this case we examine the doctrine as applied to marijuana plants found growing on

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

Possession with Intent

State v. Yisrael, __ N.C. ___, 813 S.E.2d 217 (May 11, 2018)
The Court per curiam affirmed the opinion below, ___ N.C. App. ___, 804 S.E.2d 742 (2017). Over a dissent, the Court of Appeals held that the trial court did not err by denying the defendant's motion to dismiss a charge of possession with intent to sell or deliver marijuana. The defendant argued that the State failed to present sufficient evidence of his intent to sell or deliver the drugs and that the evidence shows the marijuana in his possession was for personal use. The defendant possessed 10.88 grams of marijuana. Although the amount of drugs may not be sufficient, standing alone, to support an inference of intent to sell or deliver, other facts supported this element, including the packaging of the drugs. Additionally, the 20-year-old defendant was carrying a large amount of cash ($1,540) and was on the grounds of a high school. Moreover, a stolen, loaded handgun was found inside the glove compartment of the vehicle.

Defenses

Self-Defense

State v. Bass, ___ N.C. ___, 819 S.E.2d 322 (Oct. 26, 2018)
On appeal from a decision of a divided panel of the Court of Appeals, ___ N.C. App. ___, 802 S.E.2d 477 (2017), the court affirmed, holding that the trial court committed prejudicial error by omitting stand-your-ground language from the self-defense jury instructions. The incident in question occurred outside of the Bay Tree Apartments. The defendant gave notice of his intent to pursue self-defense and throughout the trial presented evidence tending to support this defense. At the charge conference, the defendant requested that the jury charge include language from Pattern Jury Instruction 308.45 providing, in relevant part, that

the defendant has no duty to retreat in a place where the defendant has a lawful right to be and that the defendant would have a lawful right to be at his place of residence. Believing that the no duty to retreat provisions applies only to an individual located in his own home, workplace, or motor vehicle, the trial court declined to give the requested instruction. After deliberations began, the jury asked for clarification on duty to retreat. Outside the presence of the jury, the defendant again requested that the trial court deliver a no duty to retreat instruction, this time pointing to Pattern Jury Instruction 308.10, including its language that the defendant has no duty to retreat when at a place that the defendant has a lawful right to be. The trial court again concluded that because the defendant was not in his residence, workplace, or car, the no duty to retreat instruction did not apply. The Court of Appeals held that the trial court committed reversible error in omitting the no duty to retreat language from its instruction. Reviewing the relevant statutes, the Supreme Court affirmed this holding, concluding that "wherever an individual is lawfully located—whether it is his home, motor vehicle, workplace, or any other place where he has the lawful right to be—the individual may stand his ground and defend himself from attack when he reasonably believes such force is necessary to prevent imminent death or great bodily harm to himself or another."

State v. Lee , 370 N.C. 671 (Apr. 6, 2018)
On discretionary review of a unanimous decision of the Court of Appeals, ___ N.C. App. ___, 789 S.E.2d 679 (2016), the court reversed because of errors in the jury instructions on self-defense. At trial, the parties agreed to the delivery of N.C.P.I.–Crim. 206.10, the pattern instruction on first-degree murder and self-defense. That instruction provides, in relevant part: "Furthermore, the defendant has no duty to retreat in a place where the defendant has a lawful right to be." Additionally, N.C.P.I.–Crim. 308.10, which is incorporated by reference in footnote 7 of N.C.P.I.–Crim. 206.10 and entitled "Self-Defense, Retreat," states that "[i]f the defendant was not the aggressor and the defendant was . . . [at a place the defendant had a lawful right to be], the defendant could stand the defendant's ground and repel force with force." Although the trial court agreed to instruct the jury on self-defense according to N.C.P.I.–Crim. 206.10, it ultimately omitted the "no duty to retreat" language of N.C.P.I.–Crim. 206.10 from its actual instructions without prior notice to the parties and did not give any part of the "stand-your-ground" instruction. Defense counsel did not object to the instruction as given. The jury convicted defendant of second-degree murder and the defendant appealed. The Court of Appeals affirmed the conviction, reasoning that the law limits a defendant's right to stand his ground to any place he or she has the lawful right to be, which did not include the public street where the incident occurred. The Supreme Court allowed defendant's petition for discretionary review and reversed.

The court held that by omitting the relevant stand-your-ground provision, the trial court's jury instructions were an inaccurate and misleading statement of the law. The court concluded, in part, that "[c]ontrary to the opinion below, the phrase "any place he or she has the lawful right to be" is not limited to one's home, motor vehicle, or workplace, but includes any place the citizenry has a general right to be under the circumstances." Here, the defendant offered ample evidence that he acted in self-defense while standing in a public street, where he had a right to be when he shot the victim. Because the defendant showed a reasonable possibility that, had the trial court given the required stand-your-ground instruction, a different result would have been reached at trial, the court reversed the Court of Appeals, finding that the defendant was entitled to a new trial.

State v. Cook , 370 N.C. 506 (Mar. 2, 2018)
The court per curiam affirmed a divided panel of the Court of Appeals, ___ N.C. App. ___, 802 S.E.2d 575 (2017). In this assault on a law enforcement officer case, the court of appeals held, over a dissent, that the trial court did not err by denying the defendant's request for a self-defense instruction. While executing a warrant for the defendant's arrest at his home, an officer announced his presence at a bedroom door and stated that he was going to kick in the door. The officer's foot went through the door on the first kick. The defendant fired two gunshots from inside the bedroom through the still-unopened door and the drywall adjacent to the door, narrowly missing the officer. The charges at issue resulted. The defendant testified that he was asleep when the officer arrived at his bedroom door; that when his

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

Statute of Limitations

State v. Curtis, ___ N.C. ___, 817 S.E.2d 187 (Aug. 17, 2018)
On discretionary review of a unanimous, unpublished decision below, the court reversed, ruling on the "*Turner* issue" presented in this case and holding that the misdemeanor DWI prosecution was not barred by the two-year statute of limitations in G.S. 15-1. On 1 August 2012, the defendant was cited for DWI. A magistrate's order was issued on 9 August 2012. On 21 April 2015, the defendant objected to trial on the citation and moved for a statement of charges and to dismiss. The defendant argued that because she was filing a pretrial objection to trial on a citation, the State typically would be required to file a statement of charges. However, she further argued that because G.S. 15-1 establishes a two-year statute of limitations for misdemeanors, the charges must be dismissed. In a Preliminary Indication, the District Court found a statute of limitations bar and dismissed the charges. The State appealed to Superior Court, arguing that the magistrate's order tolled the statute of limitations. The Superior Court affirmed the District Court's Preliminary Indication and the State appealed to the Court of Appeals. That court found the procedural and legal issues identical to those in State v. Turner, ___ N.C. App. ___, 793 S.E.2d 287 (2016), adopted the reasoning of that decision, and held that the District Court did not err by granting the motion to dismiss. The State again sought review, arguing that any criminal pleading that establishes jurisdiction in the district court tolls the two-year statute of limitations. The Supreme Court agreed. The Supreme Court found the citation was a constitutionally and statutorily proper criminal pleading that conveyed jurisdiction to the District Court to try the defendant for the charged misdemeanor. The court went on to hold that the citation tolled the statute of limitations. The court found itself unable to "conclude that the General Assembly intended the illogical result that an otherwise valid criminal pleading that vests jurisdiction in the trial court would not also toll the statute of limitations."

Post-Conviction Proceedings
DNA Testing & Related Matters

State v. Sayre, ___ N.C. ___, 818 S.E.2d 101 (per curiam) (Sept. 21, 2018)
On appeal from the unpublished decision of a divided panel of the Court of Appeals, ___ N.C. App. ___, 803 S.E.2d 699 (2017), the court affirmed per curiam. In the opinion below, the Court of Appeals affirmed the trial court's order denying the defendant's pro se motion to locate and preserve evidence and motion for post-conviction DNA testing. The defendant pleaded guilty to multiple counts of indecent liberties, 2 counts of second-degree sexual offense and 2 counts of felony child abuse. He did not appeal. Nearly 2 years later he filed a pro se motion to locate and preserve evidence and motion for post-conviction DNA testing. The motion listed 12 pieces of physical evidence that the defendant alleged needed to be tested and preserved because they would prove that he was not the perpetrator. The trial court denied the defendant's motion concluding that he had not made a showing that DNA testing may be material to his claim of wrongful conviction. As a result, the trial court declined to either appoint counsel

or conduct an evidentiary hearing on the motion. The defendant appealed. The Court of Appeals concluded that the defendant's burden of showing materiality under the post-conviction DNA statute requires more than a conclusory statement that the ability to conduct the testing is material to the defense. Rather, the defendant must provide specific reasons why the requested test would be significantly more accurate or probative of the identity of the perpetrator or accomplice or that there is a reasonable probability of contradicting previous test results. Here, the defendant's bare assertion that the DNA testing would prove he is not the perpetrator is not sufficiently specific to establish that the requested DNA testing would be material to his defense. Accordingly, the trial court did not err by summarily denying his request for post-conviction DNA testing and court-appointed counsel to prosecute the motion.

State v. Lane, 370 N.C. 508 (Mar. 2, 2018)
In this capital case, the court held that the defendant failed to prove materiality in connection with his request for post-conviction DNA testing of hair samples. The hair samples were found in a trash bag in which the victim's body had been placed. Before the trial court the defendant argued that the requested testing was material for two reasons. First, the evidence at trial showed two separate crimes, a rape and murder; acknowledging that DNA evidence implicated him in the rape, the defendant asserted that the hairs could relate to another perpetrator, and potentially the only perpetrator of the murder. Second, the defendant argued that the State's closing argument relied in part on the forensic analysis of hairs recovered from the defendant's residence that were found to be microscopically consistent with the victim's hair; the defendant asserted that if those hairs were material to the State, the hairs found in the bag were material to the defense. The trial court denied the testing motion, finding that the defendant failed to establish materiality. The trial court considered, among other things, the evidence presented at trial and prior post-conviction DNA testing that was done on vaginal and rectal swabs from the victim's body that ultimately implicated the defendant. The court began by adopting the following standard of review of the denial of the motion for post-conviction DNA testing: findings of fact are binding if supported by competent evidence and may not be disturbed absent an abuse of discretion; conclusions of law are reviewed de novo. The court further determined that the post-conviction DNA statute adopted the *Brady* materiality standard. It went on to conclude that taken together, the overwhelming evidence of guilt at trial, the dearth of trial evidence pointing to a second perpetrator, and "the inability of forensic testing to determine whether the hair samples at issue are relevant to establish a third party was involved", created an "insurmountable hurdle" to the defendant's materiality argument with respect to either the conviction or sentence. Finally, the court denied the defendant's request that the court exercise its constitutional supervisory or inherent authority to order testing.

Motions for Appropriate Relief

State v. Hyman, ___ N.C. ___, 817 S.E.2d 157 (Aug. 17, 2018)
(1) On review of a divided panel of the Court of Appeals, ___ N.C. App. ___, 797 S.E.2d 308 (2017), in this murder case, the court affirmed the holding of the Court of Appeals that the defendant's ineffective assistance of counsel (IAC) claim was not procedurally barred under G.S. 15A-1419(a)(3) (a claim asserted in a MAR must be denied if, upon a previous appeal, the defendant was in a position to adequately raise the ground or issue underlying the present motion but did not do so). To be subject to the G.S. 15A-1419(a)(3) procedural default bar, the direct appeal record must contain sufficient information to permit the reviewing court to make all the factual and legal determinations necessary to allow a proper resolution of the claim. Here, the defendant was not in a position to adequately raise the IAC claim on direct appeal. A *Strickland* IAC claim requires a defendant to show both deficient performance and prejudice. The nature of the defendant's claim would have required him to establish that his attorney was in a position to provide favorable testimony on his behalf, that her failure to withdraw from representing the defendant in order to testify on his behalf constituted deficient performance, and if she had acted as he asserts she should have, there is a reasonable probability that he would not have been found guilty of

murder. Here, the defendant would have been unable to make a viable showing based on the evidentiary record developed at trial.

(2) Reversing the Court of Appeals, the court found that the record contains adequate evidentiary support for the trial court's findings that the factual basis for the defendant's IAC claim did not exist. The defendant's IAC claim alleged that his lawyer should have withdrawn from representing him at trial and testified on his behalf with respect to a conversation that she had with a witness. The trial court found as a fact that the defendant presented no credible evidence during the MAR hearing that the alleged conversation between defense counsel and the witness ever took place. After reviewing the evidence presented before the trial court, the court found that the record contains sufficient evidence to support the trial court's finding of fact that the alleged conversation never occurred.

§ 1983 Liability--Excessive Force Claims

Kisela v. Hughes, 584 U.S. ___, 138 S. Ct. 1148 (Apr. 2, 2018)
In a per curiam opinion the Court held that a Tucson, Arizona police officer was entitled to qualified immunity with respect to his non-fatal shooting of Amy Hughes. Kisela and officer Garcia responded to a police radio report that a woman was hacking a tree with a kitchen knife. Minutes later, they were flagged down by the person who called 911; that person gave a description of the woman with the knife and said she was behaving erratically. About this time another officer arrived at the scene. Garcia saw a woman, later identified as Sharon Chadwick, standing near a car. A chain link fence was between Chadwick and the officers. The officers saw Hughes, who matched the description that had been provided, exit a house carrying a large knife. Hughes walked toward Chadwick and stopped no more than six feet from her. All three officers drew their guns. At least twice they told Hughes to drop the knife. She did not do so. Kisela shot Hughes four times. All three of the officers later said that at the time they believed Hughes to be a threat to Chadwick. The Court of Appeals held that the record, viewed in the light most favorable to Hughes, was sufficient to demonstrate that Kisela violated the Fourth Amendment. That court also held that the violation was clearly established because, in its view, the constitutional violation was obvious and because of Circuit precedent that the court perceived to be analogous. The Supreme Court granted review and reversed. The Court determined that it need not decide whether Kisela violated the Fourth Amendment when he used deadly force against Hughes, because even assuming a Fourth Amendment violation occurred—a proposition the Court found "not at all evident"—Kisela was at least entitled to qualified immunity. Qualified immunity attaches when an official's conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. The Court stated:

> Kisela says he shot Hughes because, although the officers themselves were in no apparent danger, he believed she was a threat to Chadwick. Kisela had mere seconds to assess the potential danger to Chadwick. He was confronted with a woman who had just been seen hacking a tree with a large kitchen knife and whose behavior was erratic enough to cause a concerned bystander to call 911 and then flag down Kisela and Garcia. Kisela was separated from Hughes and Chadwick by a chain-link fence; Hughes had moved to within a few feet of Chadwick; and she failed to acknowledge at least two commands to drop the knife. Those commands were loud enough that Chadwick, who was standing next to Hughes, heard them. This is far from an obvious case in which any competent officer would have known that shooting Hughes to protect Chadwick would violate the Fourth Amendment.

Justices Sotomayor and Ginsburg dissented.