UNC
SCHOOL OF GOVERNMENT

2014 Criminal Law Contractors Training

June 27, 2014 / Chapel Hill, NC

ELECTRONIC CONFERENCE MATERIALS*

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UNC SCHOOL OF GOVERNMENT

2014 Criminal Law Contractors Training

June 27, 2014— UNC-Chapel Hill School of Government

Sponsored by the UNC-Chapel Hill School of Government
North Carolina Office of Indigent Defense Services

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(This conference offers 6 hours of CLE credit (5 general credits and 1 ethics)

8:00	**Check- in**	
9:00 – 9:15 **Room 2603**	**Welcome & Announcements** Austine Long, Program Attorney, UNC School of Government, Chapel Hill, NC D. Tucker Charns, Regional Defender, NC Office of Indigent Defense Services, Durham, NC	
9:15 – 10:15 **Room 2603**	**Client Centered Advocacy** [60 min., Ethics] D. Tucker Charns, Regional Defender, NC Office of Indigent Defense Services, Durham, NC	
10:15 – 10:30	**Break** (Light snack provided) Atrium	
10:30 – 11:30 **Room 2603**	**Case Law Update** [60 min.] Alyson Grine, Defender Educator, UNC School of Government, Chapel Hill, NC John Rubin, Prof. of Public Law & Government., UNC School of Government, Chapel Hill, NC	
11:30 – 12:30 **Room 2603**	**Justice Reinvestment Act** [60 min.] James Markham, Asst. Prof. of Public Law & Govt., UNC School of Government, Chapel Hill, NC	
12:30 – 1:30 **Dining Room**	**Lunch** (provided in the building) Address by Tom Maher, Executive Director, NC Office of Indigent Defense Services, NC	
	FELONY TRACK-Room 2603	**MISDEMEANOR TRACK-Room 2601**
1:30 – 2:30	**Developing an Investigation and Discovery Plan** [60 min.] Lisa Anderson Williams, Attorney, Williams & Williams, Durham, NC	**Traffic Stops** [60 min.] Brennan Aberle, Assistant Public Defender, Office of the Public Defender, Greensboro, NC
2:30 – 3:30	**Preserving the Record** [60 min.] Staples Hughes, Appellate Defender NC Office of Indigent Defense Services Durham, NC	**DWI: Elements & Motions Practice** [60 min.] Shea Denning, Professor UNC School of Government, Chapel Hill, NC
3:30 – 3:45	Break	
3:45 – 4:45 **Room 2603**	**Motions Practice** [60 min.] Mike Klinkosum, Attorney, Cheshire, Parker, Schneider, & Bryan, P.L.L.C. Raleigh, NC	

CLE Hours:
General: 5.0, Ethics: 1.0 **Total: 6.0**

CLIENT CENTERED ADVOCACY

CASE LAW UPDATE

Alyson Grine
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Felony and Misdemeanor Case Update

2014 Criminal Law Contractors Training
(Includes selected cases decided between December 3, 2013 and May 27, 2014)

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

Investigation Issues

Seizures

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

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

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

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

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

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

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

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

Grounds for Stop

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

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

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

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

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

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

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

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

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

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

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

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

Checkpoints

DWI checkpoint was not unconstitutional

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

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

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

Searches

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Exigent circumstances supported warrantless blood draw in DWI case

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

Miranda

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

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

Other Search and Investigation Issues

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

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

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

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

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

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

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

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

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

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

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

Licensed security officer was not state agent

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

Pretrial and Trial Procedure

Right to Counsel

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

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

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

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

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

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

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

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

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

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

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

Pleadings

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

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

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

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

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

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

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

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

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

Discovery

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

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

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

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

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

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

Jury Issues: Selection, Instructions, and Deliberations

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Other Procedural Issues

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Evidence

Confrontation Clause

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

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

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

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

Expert Opinion Testimony

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

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

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

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

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

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

Other Evidence Issues

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Crimes

Generally

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Impaired Driving

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

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

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

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

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

Sexual Offenses

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

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

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

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

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

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

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

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

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

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

Sex Offender Registration and Satellite-Based Monitoring

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

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

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

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

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

Enrollment in lifetime SBM was not an unreasonable search and seizure

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

Sentencing and Probation

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Post Conviction

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

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

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

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

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

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

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

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

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

JUSTICE REINVESTMENT ACT

Justice Reinvestment Essentials (S.L. 2011-192, as amended)

Felony maximum sentences increased; all felons get post-release supervision *Offenses committed on or after December 1, 2011*	• Class B1–E felonies: 12-month PRS (maximum is 120% of minimum + 12 months) • Class F–I felonies: 9-month PRS (maximum is 120% of minimum + 9 months) • Sex offenders: PRS *supervised release* period is 5 years. For Class B1–E felonies requiring registration, the maximum sentence is 120% of the minimum + 60 months. S.L. 2011-307 • Drug trafficking offenses on/after Dec. 1, 2012, receive PRS. S.L. 2012-188
New Advanced Supervised Release (ASR) program created *Persons entering a plea or found guilty on or after January 1, 2012* (Note that for Class F–I felonies, only offenses committed on or after December 1, 2011, receive post-release supervision)	If the prosecutor does not object, the sentencing judge may, when imposing an active sentence, order defendants in the following grid cells into to DAC's ASR program: • Class D felonies, prior record levels I–III • Class E felonies, prior record levels I–IV • Class F felonies, prior record levels I–V • All Class G and H felonies Defendants who complete "risk reduction incentives" in prison (or who are unable to do so through no fault of their own) get released onto PRS on their ASR date. The ASR date is the lowest min. sentence in the mitigated range for the defendant's offense and prior record level (or 80% of the imposed minimum if a mitigated-range sentence). G.S. 15A-1340.18.
Intermediate punishment redefined *Offenses committed on or after December 1, 2011*	A sentence that places a defendant on supervised probation and *may* include drug treatment court, special probation, or other conditions of probation, including the "community and intermediate" conditions set out below. G.S. 15A-1340.11(6).
Community punishment redefined *Offenses committed on or after December 1, 2011*	A sentence to supervised or unsupervised probation or a fine that does not include an active punishment, drug treatment court, or special probation. The sentence may include any of the "community and intermediate" conditions described below. G.S. 15A-1340.11(2).
New set of "community and intermediate probation conditions" *Offenses committed on or after December 1, 2011* (unless otherwise indicated) (does not apply to DWI)	The following conditions may be ordered in any case, community or intermediate: • Electronic house arrest • Community service, and pay the fee prescribed by law • Jail confinement for 2–3 days, for no more than 6 days per month, during any 3 separate months of a probation period. If the defendant is on probation for multiple judgments, confinement periods must run concurrently and may total no more than 6 days/month • Substance abuse assessment, monitoring, or treatment • Abstain from alcohol and submit to continuous alcohol monitoring (CAM) if dependency or abuse identified by a substance abuse assessment (offenses on/after 12/1/12) • Participation in an educational or vocational skills development program • Submission to satellite-based monitoring (if a covered sex offender). G.S. 15A-1343(a1)
Intermediate punishments repealed *Offenses committed on or after December 1, 2011*	• Intensive supervision • Residential program • Day reporting center
Delegated authority expanded *Offenses committed on or after December 1, 2011* (does not apply to DWI)	Unless the judge finds that delegation is not appropriate, a probation officer can add the following conditions in response to a probationer's failure to comply with 1 or more conditions imposed by the court *or* if the probationer is high risk (Supervision Level 1 or 2): • Perform up to 20 hours of community service (50 hours in intermediate cases) • Submit to an electronically monitored curfew • Submit to substance abuse assessment, monitoring, or treatment • CAM, if alcohol abstinence is a condition (intermediate only, offenses on/after 12/1/12) • Participate in an educational or vocational skills development program • Electronic house arrest • Report to the probation officer at a frequency determined by the officer • Submit to satellite-based monitoring if a covered sex offender (intermediate only) In response to a defendant's failure to comply with one or more conditions imposed by the court (not based on risk level alone), the probation officer may, if the probationer waives the right to a hearing and a lawyer, require jail confinement for 2–3 days, for no more than 6 days per month, during any 3 separate months. G.S. 15A-1343.2.

(*over*)

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Statutory "absconding" condition *Offenses committed on or after December 1, 2011*	It is a regular condition of probation that a defendant not "abscond, by willfully avoiding supervision or by willfully making the defendant's whereabouts unknown to the supervising probation officer." G.S. 15A-1343(b)(3a).
Revocation authority limited *Probation violations occurring on or after December 1, 2011* (all probation cases, including DWI)	Under G.S. 15A-1344(a) and -1344(d2), the court may revoke probation only for: • Violations of the "commit no criminal offense" condition • Violations of the new statutory "absconding" condition • Defendants who have previously received two CRV periods in the case. Note: The Parole Commission's authority to revoke PRS is similarly limited. G.S. 15A-1368.3.
New Confinement in Response to Violation (CRV) authorized *Probation violations occurring on or after December 1, 2011* (all probation cases, including DWI)	In response to probation violations other than a new criminal offense or absconding, the court *may* impose confinement of *90 days for a felony* or *up to 90 days for a misdemeanor*. • Felonies: If time remaining on the defendant's sentence is 90 days or less, then CRV is for the remainder of the sentence (after 7/16/12, not applicable to misdemeanors) • A defendant may receive only two CRV periods in a particular case • Jail credit for time spent awaiting a violation hearing must be applied to any CRV ordered • CRV periods must run concurrently with one another • CRV confinement is immediate unless otherwise specified by the court • CRV is served where defendant would have served an active sentence. G.S. 15A-1344(d2)
G.S. 90-96 conditional discharge amended, made mandatory *Persons entering a plea or found guilty on or after January 1, 2012*	When any eligible defendant who pleads guilty to or is found guilty of: • Misdemeanor possession of a controlled substance (any schedule or amount); • Possession of drug paraphernalia under G.S. 90-113.22; or • Felony drug possession under G.S. 90-95(a)(3) (any schedule or amount) The court shall, with the consent of the defendant, place the defendant on probation without entering judgment under G.S. 90-96(a). An eligible defendant is any person who has not previously been convicted of any felony, any offense under the Controlled Substances Act, or any state/federal controlled substance/paraphernalia offense. For offenses committed on or after Dec. 1, 2013, G.S. 90-96(a) is not mandatory if the court determines that the offender is inappropriate for a conditional discharge.
Habitual felon a 4-class enhancement *Principal felonies occurring on or after December 1, 2011*	Class I → Class E Class H → Class D All other felonies → Class C G.S. 14-7.6.
Habitual breaking and entering status offense created *Principal felonies occurring on or after December 1, 2011*	Defendant charged with felony "breaking and entering" (listed offenses) who has 1 or more prior B/E convictions (listed offenses) can, in DA's discretion, be charged as habitual B/E status offender and, if convicted, sentenced as a *Class E felon*: – 1st/2nd deg. burglary (G.S. 14-51); breaking out of dwelling house burglary (G.S. 14-53) – Felony breaking/entering bldgs. (G.S. 14-54(a)); B/E place of worship (G.S. 14-54.1) – Any repealed, superseded offense substantially similar to the offenses above – Any offense from another jurisdiction substantially similar to the offenses above • A second B/E offense only qualifies if committed after conviction of the first offense. • The principal offense must occur after the defendant turns 18 • Conviction used to establish habitual status doesn't count toward prior record level • Habitual B/E sentences must run consecutively to any sentence being served G.S. 14-7.25 through -7.31.
Changes to proper place of confinement *Sentences imposed on or after January 1, 2012*	Misdemeanors: • 90 days or less: Local jail except as provided in G.S. 148-32.1(b) • 91–180 days (except for DWI): Statewide Misdemeanant Confinement Program (MCP), through which place of confinement will be determined by the N.C. Sheriffs' Ass'n • Sentence or sentences totaling 181 days or more: To DAC Felons: DAC. G.S. 15A-1352; 148-32.1. Note: Different rules apply for split sentences (G.S. 15A-1351(a)) and DWI (G.S. 20-176(c1)).

rev. 3/13/2014

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The Justice Reinvestment Act

Jamie Markham
UNC School of Government

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Justice Reinvestment Essentials (S.L. 2011-192, as amended)

Felony maximum sentences increased; all felons get post-release supervision *Offenses committed on or after December 1, 2011*	• Class B1–E felonies: 12-month PRS (maximum is 120% of minimum + 12 months) • Class F–I felonies: 9-month PRS (maximum is 120% of minimum + 9 months) • Sex offenders: PRS *supervised release* period is 5 years. For Class B1–E felonies requiring registration, the maximum sentence is 120% of the minimum + 60 months. S.L. 2011-307 • Drug trafficking offenses on/after Dec. 1, 2012 receive PRS. S.L. 2012-188
New Advanced Supervised Release (ASR) program created *Persons entering a plea or found guilty on or after January 1, 2012* (Note that for Class F–I felonies, only offenses committed on or after December 1, 2011, receive post-release supervision)	If the prosecutor does not object, the sentencing judge may, when imposing an active sentence, order defendants in the following grid cells into to DAC's ASR program: • Class D felonies, prior record levels I–III • Class E felonies, prior record levels I–IV • Class F felonies, prior record levels I–V • All Class G and H felonies Defendants who complete "risk reduction incentives" in prison (or who are unable to do so through no fault of their own) get released onto PRS on their ASR date. The ASR date is the lowest min. sentence in the mitigated range for the defendant's offense and prior record level (or 80% of the imposed minimum if a mitigated-range sentence). G.S. 15A-1340.18.
Intermediate punishment redefined *Offenses committed on or after December 1, 2011*	A sentence that places a defendant on supervised probation and *may* include drug treatment court, special probation, or other conditions of probation, including the "community and intermediate" conditions set out below. G.S. 15A-1340.11(6).
Community punishment redefined *Offenses committed on or after December 1, 2011*	A sentence to supervised or unsupervised probation or a fine that does not include an active punishment, drug treatment court, or special probation. The sentence may include any of the "community and intermediate" conditions described below. G.S. 15A-1340.11(2).
New set of "community and intermediate probation conditions" *Offenses committed on or after December 1, 2011* (unless otherwise	The following conditions may be ordered in any case, community or intermediate: • Electronic house arrest • Community service, and pay the fee prescribed by law • Jail confinement for 2–3 days, for no more than 6 days per month, during any 3 separate

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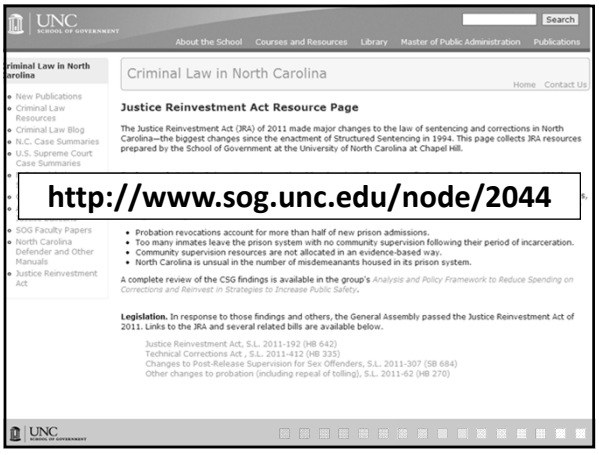

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Justice Reinvestment

- All felons get post-release supervision
- Advanced Supervised Release (ASR) created
- Judges' authority to revoke probation limited
- G.S. 90-96 made (then un-made) mandatory
- Place-of-confinement rules amended

Felony Sentencing

Changes to Felony Sentencing: All felons get post-release supervision

Offenses committed on or after December 1, 2011

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Post-release supervision (PRS) for all felonies

Supervision (like probation) upon release from prison

- Class B1-E: 12 months PRS (was 9 months)
- Class F-I: 9 months PRS (was 0 months)
- **Corresponding increase in maximum sentences**

Class H / Level II

I/A
8 - 10
6 - 8
4 - 6

PRIOR LAW

- 8-10 months

NEW LAW

- 8-19 months

Consecutive Felonies

- DAC will apply a "one-sentence theory" or "single sentence rule" (15A-1354(b))
  - Sum all minimums
  - Sum all maximums, minus 60, 12, or 9 months for second/subsequent PRS terms

Consecutive Felonies

Consecutive Class H felonies: (8-19) (8-19)

8 — 10 (+9) months

8 — 10 (+9)

16 — 20 (+9)

16 — 29 (release 9 months early for PRS)

Advanced Supervised Release (ASR)

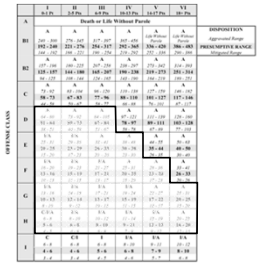
Pleas and findings of guilt on or after January 1, 2012

Advanced Supervised Release (ASR)

- Early release program for certain inmates
- Eligible inmates released on "ASR date" if they complete "risk reduction incentives" in DAC
- Sentencing court and prosecutor are gatekeepers
  - No ASR unless court-ordered at sentencing
  - No ASR if prosecutor objects

ASR Eligibility

- Active sentences
  - Class D, I–III
  - Class E, I–IV
  - Class F, I–V
  - Class G, I–VI
  - Class H, I–VI

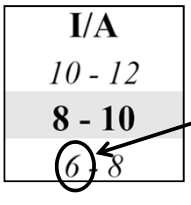


Advanced Supervised Release (ASR)

- ASR date is:
  - Lowest mitigated minimum sentence the defendant could have received
  - If already mitigated, then 80% of imposed minimum

Class H

Prior Record Level III



For any presumptive or aggravated sentence, the ASR date is …

6 months

For a mitigated sentence, the ASR date is 80% of the imposed minimum

Example: 6-17 month sentence
ASR date is …
4.8 months

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Changes to Probation

Judges' Revocation Authority Limited

For probation violations occurring on or after December 1, 2011

Limit on Revocation Authority

For probation violations occurring on or after December 1, 2011…

- Court may only revoke probation for:
  - New criminal offense
  - Absconding
- For other violations, court may order Confinement in Response to Violation ("CRV")

Confinement in Response to Violation (CRV)

- Felony CRV: 90 days exactly
- Misdemeanor CRV: "Up to" 90 days
- After two CRV periods, court may revoke for any violation

Revocation eligibility

- New criminal offense
- Statutory absconding
- Two prior CRVs

New Criminal Offense

- "Commit no criminal offense in any jurisdiction"
- What does it mean to "commit" a criminal offense?
  - Can a pending charge be a probation violation?
  - Or must there be a conviction?

New Criminal Offense

- No violation based on a pending charge…
  - State v. Guffey, 253 N.C. 43 (1960)
- …unless the probation court makes "independent findings" that the alleged criminal activity occurred
  - State v. Monroe, 83 N.C. App. 143 (1986)

Proper Notice of Violation

1. Condition of Probation "Not use, possess or control any illegal drug or controlled substance unless it has been prescribed for the defendant by a licensed physician and is in the original container with the prescription number affixed on it..." in that DEFENDANT ADMITTED TO USING 10 LINES OF COCAINE AT COSA WORKS TREATMENT CENTER ON 2/19/2012.

2. Condition of Probation "... and participate in further evaluation, counseling, treatment or education programs recommended as a result of that evaluation, and comply with all further therapeutic requirements of those programs until discharged" in that ON 11/21/11, JUDGE HILL ORDERED THAT DEFENDANT COMPLETE CRYSTAL LAKES TREATMENT PROGRAM. DEFENDANT HAS FAILED TO COMPLY WITH TREATMENT.

Proper Notice of Violation

- State v. Tindall
  - At the hearing, the judge deemed drug use a new criminal offense and revoked
  - Court of Appeals: Revocation was improper; defendant did not receive notice of a revocation-eligible violation

Revocation eligibility

- New criminal offense
- **Statutory absconding**
- Two prior CRVs

Limit on Revocation Authority

For probation violations occurring on or after December 1, 2011…

- Court may revoke probation only for:
  - Violation of "new criminal offense" condition;
  - Absconding under G.S. 15A-1343(b)(3a); or
  - A person who has already received two CRVs

Applies only to defendants on probation for offenses that occurred on or after December 1, 2011

Absconding

- State v. Nolen
  - Defendant on probation for offense committed in April 2010
  - Allegedly "absconded" in June 2012

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Condition of Probation "Remain within the jurisdiction of the Court unless granted written permission to leave by the Court or the probation officer" in that
ON 06/15/12 A HOME CONTACT WAS ATTEMPTED BY SC PROBATION OFFICER AT LAST KNOWN ADDRESS OF 350 OAK ST ARCADIA SC 29320 THE OFFICER WAS ADVISED, DEFENDANT MOVED BACK TO GASTONIA SIX MONTHS AGO. DEFENDANT HAS MADE HER WHEREABOUTS UNKNOWN TO PROBATION, THEREFORE ABSCONDING SUPERVISION.

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Absconding

- State v. Nolen
  - On probation for offense committed in April 2010
  - Allegedly "absconded" in June 2012
  - Revoked
- Court of Appeals reversed
  - Defendant not subject to absconding condition
  - At best, a remain-within-the-jurisdiction violation

Who can be revoked for absconding?

1. Defendants on probation for offenses committed on/after 12/1/11.
2. Defendants who actually fled before 12/1/11.

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Electing to Serve after JRA

- No express statutory provision…since 1997
- Options:
  - Admit to new crime or absconding?
  - Reframe "technicals" as crimes?
  - CRV-then-terminate?
- Remember: Mandatory PRS after prison

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CRV Appeals

- State v. Romero
  - Superior court ordered 90-day CRV for technical violations in a felony case. Defendant appealed.
- Court of Appeals:
  - There's no statutory right to appeal a CRV.[1] Dismissed.

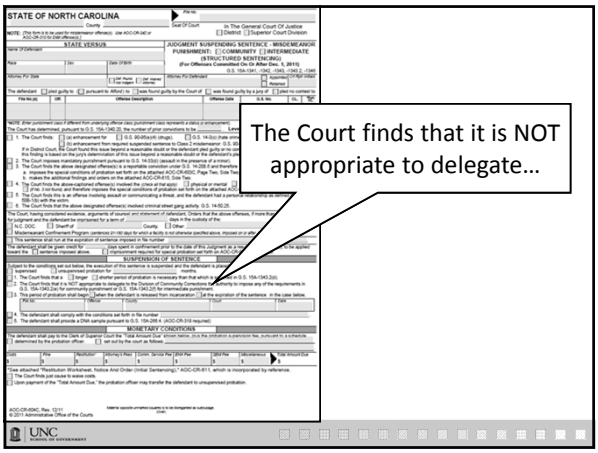
1. "We decline to express any opinion on the issue of whether [a terminal CRV] would constitute a *de facto* revocation . . . ."

Delegated Authority Expanded

For offenses committed on or after December 1, 2011

Delegated Authority

- Allows probation officer to add certain conditions
- Applies unless judge says otherwise



JRA Delegated Authority

- With violation or "high risk," officer can add:
  - Community service, 20/50 hours (comm./intermed.)
  - Increased reporting to officer
  - Substance abuse assessment, monitoring, or treatment
  - Continuous alcohol monitoring (offenses on/after 12/1/12)
  - Electronic house arrest
  - Curfew with electronic monitoring
  - Educational/vocational skills development
  - SBM for covered sex offenders (intermediate only)

JRA Delegated Authority

- In response to violation (not based on risk alone), officer can order "Quick dip"
  - 2-3 days, up to 6 days per month, in no more than three separate months
  - Must follow detailed procedure (waiver of rights)

Conditional discharge under G.S. 90-96

Pleas entered or findings of guilt on or after January 1, 2012

90-96, generally

- Deferral for first-time drug offenders
  - Probation without entry of judgment
  - Discharge and dismissal if successful
  - Upon violation, court may enter judgment and sentence
  - If under 22, opportunity to expunge

90-96(a): Eligibility

- Defendant eligibility:
  - No prior felonies of any kind; no prior drug convictions
  - No prior discharge and dismissal
- Offense eligibility:
  - All simple possession offenses (felony and misdemeanor)
  - Possession of drug paraphernalia
- Mandatory for offenses committed before 12/1/13

Place of Confinement

Sentences imposed on or after January 1, 2012

Place of Confinement

Pre-January 1, 2012

Felons: DOC, except by commitment or board request

Misdemeanants:

1-90 days: Local jail, unless overcrowded

91+ days: Jail or DOC, in judge's discretion

Post-January 1, 2012

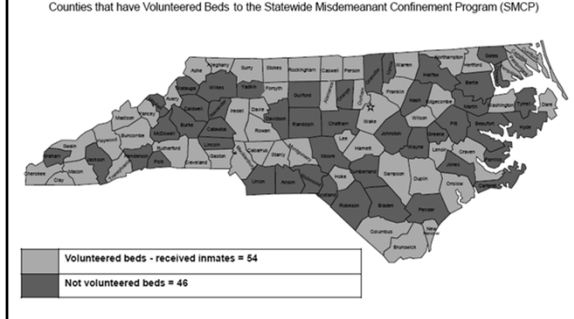
Felons: DAC

Misdemeanants:

1-90 days: Local jail, unless overcrowded

91-180 days: Statewide Misd. Confinement Pgm.

181+ days: DAC



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DEVELOPING INVESTIGATION AND DISCOVERY PLAN

Developing a Discovery Strategy

LISA ANDERSON WILLIAMS
CRIMINAL LAW CONTRACTORS TRAINING
JUNE, 2014

Do Your Homework

1. Learn the reputation and propensity of the investigating agency
2. Learn the reputation and propensity of the individual Assistant District Attorney assigned to the case.
3. Learn the reputation and propensity of your client.
4. Learn the facts of your case.
5. Learn the applicable law which governs the material facts.

Issues with the Investigators

Factors to consider:

- How long has the officer been in law enforcement?
- What types of cases have they normally been assigned to and is your case the type he has less of more experience with?
- Have they worked in other jurisdictions and are there issues with credibility or professionalism in your or any jurisdiction?

Tips to Investigate the Investigation

- Search the name in Google and other search engines.
- Search the name in legal data bases and appellate orders.
- Inquire from veterans on both sides of the aisle whether there are issues of concern with the officer or agency.

Tips to Investigate, cont.

- If you discover issues, take reasonable and prudent actions. However, do not ever make a knowingly false accusation of misconduct. If you discover an accusation that you made is false withdraw it publicly and in writing and acknowledge the same with the Court and the State. False or poorly investigated allegations will harm your professional reputation and your client's case.
- If there is a problem with the investigation, determine if the issue is an isolated incident or a pattern of misconduct and take the action that is consistent with whatever direction the client has given you regarding a desired resolution.

Motions that can assist in the creation of a successful discovery strategy:

Motion to Preserve files.
Motion for compliance with N.C.G.S.-15 A 501.
Motion for discovery pursuant to N.C.G.S. 15 A 903.
Motion to Compel Investigators to Disclose their entire file as defined by N.C.G.S 15 A 903 to the DA's office in a timely manner and request a time line be set for delivery of the information to the State and disclosure to the defense upon receipt.
Motion to Reveal Deals and Concessions.
Motion to reveal the presence of any cooperation agreements with other jurisdictions or agencies.
Motion to Inspect the Officer's files and evidence collected.
Motion for Production of Exculpatory Information.
Motion to Reveal Identification Procedures.
Motion for Expert Assistance to the Defendant.

Narrow Your Focus to Issues that are Material

- Identify the issues that you intend to litigate. Make narrow focused discovery request, in writing, for information that is in the files of the State which is relevant and probative to resolving those claims. Make your claims as early and be as specific as you can about what you are requesting.
- Discovery request that support your defense, or the investigation of your defense, can stem from not only information in the State's files in your case in chief, but also any agent of the State as defined by 15 A 903 which has relevant and probative information to your defense.

Methods for Obtaining Information to Support Your Defense:

- Discovery request made pursuant to N.C.G.S 15 A 902 and 903.
- Motions to Compel the production of Discovery and Inspection of State's files and tangible items.
- Motion for Production and Inspection of Confidential Records via an *In Camera* Review by the Court.
- Defendant's Right to Compulsory Process
- Public Records request served on any State agency, as defined and allowed by statutes.
- Identification and location of independent witnesses who have relevant and probative information to the defendant's theory of the case.

Hallmark of a Well Investigated Case

- There are material differences between the State's theory of the case and the Defense's theory of the case that can be demonstrated via affidavit or sworn statement by the time of trial.
- All information that is material on any witness's reputation for truthfulness and bias has been explored and evaluated whether it helps or hurts the defense case.
- Compliance with all obligation on the defense pursuant to N.C.G.S 15 A 905.
- All discovery request have been filed in the court file and written orders have been signed or presented to the Court for review.

Hallmark, cont.

- Any discovery request that was denied pretrial should be renewed at the time of trial, as discovery is a trial right in this State.
- Any important significant motion that is denied by the Court should be preserved for an appellate review and a request to make an offer of proof if appropriate should be considered.
- The defense has the right to issue its own subpoenas for testimony and documents, which can only be quashed by order of the Court, any discovery request which are not compiled with should be considered for procurement in means independent of disclosures by the State.

Closing Remarks

- Candor to the Court or a lack of candor to the Court has consequences that will impact you and your client for the rest of your lives.
- Accept contrary rulings by the Court with respect and deference but preserve the review for the record.
- Prior to making an accusation of an ethical or professional lapse by the State or its Agents make a thorough and fair investigation. Review the information with objective eyes and have supporting documents to substantiate the allegations. If you have only a suspicion and lack proof, never assume nor present your beliefs to be a fact.

Closing Remarks, cont.

- You will earn your reputation with peers and judge's alike. Others will be familiar with it every time you litigate a discovery issue, motion, or meet with a judge in chambers. Treat your credibility like the most valuable asset you have in every case and all the time.
- Acknowledge any error or misrepresentation that you make as soon as you discover it. Inform and apologize to the affected party and resolve not to repeat the mistake. Mistakes make us human, you will make them. How you respond to the error, is much more revealing.
- Have the courage of your convictions. If you find yourself involved in a discovery issue of magnitude, do the right thing. Make the best decision you can given your options and then move on the next client who deserves the best advocacy you can provide them and the benefit of all of your cumulative experiences.

STATE OF NORTH CAROLINA	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION
COUNTY OF DURHAM	FILE NO. 13 CRS

STATE OF NORTH CAROLINA)) v.))))))	**MOTION FOR DISCLOSURE OF EVIDENCE OF ALLEGED PRIOR BAD ACTS OR CRIMES OF THE DEFENDANT WHICH THE STATE CONTENDS ARE ADMISSIBLE UNDER EVIDENCE RULES 404(b) or 608, OR OTHER RULES OF EVIDENCE**

NOW COMES the defendant, by and through counsel, and respectfully requests the following:

1. That the court order the State to disclose its intention to elicit testimony or evidence of bad acts or crimes of Defendant which are not charged in a pending bill of indictment and which the state contends are admissible under N.C. Rules of Evidence 404(b) or 608(b), or other rule of evidence, statute, or legal authority.

2. That the court order the State to disclose the evidence of purported prior bad acts or crimes of Defendant upon which it intends to rely.

Such disclosure is required by the Sixth, Eighth and Fourteenth Amendments to the United States Constitution, and Article I, §§ 19, 23 and 27 of the North Carolina Constitution.

In support of his request, Defendant shows the following to the court:

The State must disclose all information concerning prior bad conduct of Defendant under N.C. Gen. Stat. § 15A-903(a). That act gives Defendant access to the "complete files of all law enforcement and prosecutorial agencies involved in the investigation of the crimes committed or the prosecution of the defendant." This

provision clearly contemplates all information connected to any evidence the State intends to offer under North Carolina Rules of Evidence 404(b) or 608.

If the State were permitted to introduce evidence of alleged prior bad acts of which neither Defendant nor his counsel had notice, Defendant would not be able to properly defend against such allegations. A defendant's right under the state and federal constitutions to confront the accusers and witnesses against him, "includes the right to prepare and present a defense." *State v. Canady*, 355 N.C. 242, 253 (2002). (constitutional error for trial court to permit State's ballistics expert to testify about results of their test when defendant never had opportunity to examine the test shells used by the State's expert to reach his conclusion).This right guarantees that a defendant be given the opportunity to rigorously investigate and challenge the evidence before that evidence is introduced at trial. *Id*. Defendant will not be able to rigorously challenge the evidence against him unless he is given adequate notice of every alleged prior bad act the State intends to offer against him.

AThe prohibition of evidence of other crimes is said to have constitutional implication as due process requires that a person be convicted, if at all, of a particular crime charged and not for other crimes or simply because of who he is.≅ *State v. McKoy*, 78 N.C. App. 531, 538, 337 S.E. 2d 666, *rev=d on other grounds*, 317 N.C. 519, 347 S.E. 2d 374 (1986). Thus, admission of evidence of other crimes or wrongs potentially violates the defendant's presumption of innocence of the crime charged. *See United States v. Foskey*, 636 F.2d 517 (D.C. Cir. 1980) (cited in *McKoy*, 78 N.C. App. at 538).

The Supreme Court of North Carolina has squarely held that before a trial court may admit evidence of other crimes or bad acts of the defendant under Rule 404(b) or

608(b), it must first determine whether or not the evidence is relevant under the Rule. If it determines that the evidence is relevant, the trial court is obligated, Aprior to admitting extrinsic conduct evidence, to engage in a balancing, under Rule 403, of the probative value of the evidence against its prejudicial effect. The better practice is for the proponent of the evidence, out of the presence of the jury, to inform the court of the rule under which he is proceeding and to obtain a ruling on its admissibility prior to offering it.≅ *State v. Morgan*, 315 N.C. 626, 639, 340 S.E.2d 84 (1986).

The orders the Defendant seeks by this motion will advance the mandate and policy rationale of *Morgan* and will promote the orderly administration of justice by permitting the Defendant and the state, prior to trial, to conduct research and to prepare motions advocating against and for the admission of the evidence in question. AOrdinarily it is disclosure rather than suppression, that provides the proper administration of justice.≅ *United States v. Baum*, 482 F.2d 1325, 1331 (2nd Cir. 1973) (conviction reversed for surprise admission of other crimes evidence). AIn many jurisdictions, 404(b) questions are the most frequently litigated issues in criminal appeals . . . The erroneous admission of uncharged misconduct too often provides a fertile ground for reversal in criminal cases.≅ *United States v. King*, 121 F.R.D. 277, 281 (E.D.N.C. 1988). *See State v. Al Bayyinah*, 356 N.C. 150 (2002). (Reversing death row inmate's convictions because evidence improperly admitted under 404(b)) "The dangerous tendency of Rule 404(b) evidence to mislead and raise a legally spurious presumption of guilt requires that its admissibility should be subject to strict scrutiny by the courts." *Al Bayyinah*, at 154.

The Defendant cannot be prepared to respond meaningfully to evidence of uncharged crimes and bad acts when he has no notice of them. Disclosure in advance of trial will eliminate unfair surprise and therefore avoid the necessity for the defense to seek recesses or other delays during trial to investigate undisclosed accusations of misconduct. In sum, it is both fundamentally unfair and a violation of the right to make a defense to the crime charged not to give a defendant prior notice of all crimes which the prosecution will attempt to use to convict him.

This the _____day of _____, _____.

_____

Lisa Anderson Williams
Williams & Williams Attorneys
5318 High Gate Centre, Suite 135
Durham, NC 27713

CERTIFICATE OF SERVICE

I certify that I served a copy of the foregoing **Motion to Compel Investigating Officers to Turn Over All Information Related to the Investigation of this Case to the Prosecutors** by leaving a copy at his office:

Name : _____
Assistant District Attorney

This the _____ day of _____, _____

_____
Lisa Anderson Williams

STATE OF NORTH CAROLINA

COUNTY OF DURHAM

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
FILE NO. CRS

STATE OF NORTH CAROLINA)
)
v.)
)
)
_____)

MOTION FOR PRODUCTION OF EXCULPATORY INFORMATION

The Defendant, by and through counsel, moves this court pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963); *United States v. Agurs*, 427 U.S. 97 (1976); and *Kyles v. Whitley*, 514 U.S. 419 (1995); and under the Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I §§ 19, 23 and 27 of the North Carolina Constitution to order the prosecution to turn over to defense counsel any materials in the possession of the prosecution and law enforcement agencies which are favorable to the defendant, including, but not limited to the following:

1. Any statement of any witness or from any source, exculpating the defendant or otherwise indicating a lessened role of the defendant in this case by any government agency.

2. Any exculpatory statements made by, or attributed to, the defendant.

3. Any statements of any witnesses or from any sources indicating that the defendant did not act with premeditation or deliberation or which indicate that the defendant did not act with the specific intent to kill.

4. Any reports or evidence of threats, deals, arrangements, promises or inducements made to any prosecution witness in this case.

5. The criminal records of all prosecution witnesses including prior convictions and cases pending at the present time or at the time of defendant arrest.

6. Any evidence of law enforcement officers making monetary payments to, or promises of monetary payments to, any material witness or informant in this case.

7. Any alias or other names used by any prosecution witness.

8. Any evidence of any mental or emotional illness, or drug or alcohol use by, any of the prosecution witnesses at the time of this offense or any time thereafter.

9. Any evidence of any out of court statements by any prosecution witness which differs from the witness= testimony which is expected to be given at the upcoming trial.

10. The names and addresses of any individuals who were considered at any time during the case as possible suspects and the evidence that led to this conclusion.

11. Any evidence that another person other than the accused was in possession of the alleged murder weapon.

12. Any evidence that another person other than the accused attempted to dispose of the alleged murder weapon after the time of this alleged offense.

13. A list of any evidence that has been destroyed by law enforcement authorities in this case and the policy that allowed such destruction.

14. Any evidence or information that indicates that evidence was obtained in violation of the North Carolina or the Federal Constitution.

Defendant respectfully requests that the prosecutor be ordered to inquire of all investigation officers concerning the existence of this evidence and if such or other exculpatory evidence exists, to produce it to defense counsel. Exculpatory evidence,

whether in the hands of the police or prosecution, should be provided. *Kyles*, 514 U.S. at 437 (1995) (AThe individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government=s behalf in the case, including the police.≅)

Defendant further requests that the State be ordered to provide this information in a manner that allows Defendant an opportunity to effectively develop and investigate any exculpatory evidence prior to trial. "The State has not satisfied its duty to disclose unless the information was provided in a manner allowing defendant to make effective use of the evidence." *State v. Canady*, 355 N.C. 242, 252 (2002) (finding the State failed to meet its obligations under *Brady* when it disclosed that someone had given information that a person other than Defendant was responsible for the murder for which Defendant was being tried, but would not disclose the name of the person who had given law enforcement that information).

Further, a defendant has a right to exculpatory "information *in a timely manner* so he [can] effectively use it." *Id*. at 253 (emphasis added). Defendant requests that this Court order that the State provide all such materials within the possession of the State immediately and all such materials no later than two months prior to the start of trial.

This the _____ day of _____, _____

_____

Lisa Anderson Williams, Esq.
Attorney for Ryan _____
5318 High Gate Centre., Ste. 135
Durham, North Carolina 27713
Tel. (919) 667-2390
Fax: (919) 667-2380

CERTIFICATE OF SERVICE

I certify that I served a copy of the foregoing **Motion for Production of Exculpatory Information** by and delivery to the Office of the District Attorney Durham, NC:

This the 30th day of _____, _____.

_____
Lisa Anderson Williams, Esq.
Attorney for _____
Tel. (919) 667-2390
Fax: (919) 667-2380

A PRACTICAL GUIDE TO BRADY MOTIONS:

Getting What You Want
Getting What You Need

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SOME BASIC INFORMATION ABOUT BRADY CLAIMS

I.THE PROBLEM OF "OPEN FILE" DISCOVERY

It has become custom in many courts and with many prosecutors that discovery in criminal cases operates on a streamlined "open file" process. Under the open file system, defense counsel is permitted to look at the State's file on the case, and the prosecution's discovery obligations are then satisfied.

This sounds good in theory – after all, why bother with time-consuming motions and arguments when the State is willing to let you look at everything they have?

In practice, though, every defense lawyer knows that "open file" discovery doesn't work anything like it is supposed to. The files we are shown often do not contain some police reports, witness statements, and other crucial documents. Materials that contradict the State's case or support a defense are frequently missing. Evidence that corroborates the defendant's story is mysteriously absent. Items that would impeach the police are nowhere to be found.

Not only is the discovery often empty of anything that would help the defense – prejudicial and damaging evidence that we could prepare to refute (if only we knew about it) is also frequently absent. Sometimes it seems that no trial is complete without the prosecutor producing a "surprise" witness, statement, or piece of evidence that never made it into their "open file" discovery.

The practice of "open file" discovery has become the customary way of doing things in many places not because it is good, or even legal, but because "that's the way it's always been done." Many judges and prosecutors even assume that because it has been around so long, it must be legally required. This is, of course, completely wrong. In fact, the U.S. Supreme Court, in Strickler v. Greene, 527 U.S. 263, 283, 119 S.Ct. 1936, 1949 (1999), explicitly held that a prosecutor's open file discovery policy in no way substitutes for or diminishes the State's obligation to turn over all exculpatory evidence pursuant to Brady.

Regardless of what customs, practices and traditions may have grown up around discovery, the fact remains that the U.S. Constitution, the North Carolina Constitution, and the rulings of the North Carolina Supreme Court all supercede local "open file" customs. And fortunately for the defense bar, all of those legal resources require that we get a lot more discovery than most "open file" policies provide. If we are to get meaningful discovery, we must use those resources to compel the courts and prosecutors to follow the law, and release the information our clients need to get a fair trial.

II.THE DIFFERENCE BETWEEN DISCOVERY AND BRADY

It is important to distinguish between the kind of discovery we are entitled to under state and local statutes, rules and customs, and the U.S. Constitutional requirement that the State turn over to the defense all exculpatory evidence (Brady material).

Every state is free under the Constitution to establish whatever discovery rules it wants. Some states provide virtually no discovery at all. For example, New York does not even require the State to give defense counsel a witness list. This does not violate the Constitution. Other states require total discovery. For example, Florida gives the defense an absolute right to take a sworn deposition of all prosecution witnesses (including police officers and crime victims) prior to trial. This too is constitutional. The discovery rules of most states, including North Carolina fall somewhere in between these extremes. And in general, the Constitution doesn't care how a state deals with discovery.

The Constitution is concerned with only one aspect of discovery – prior to trial, the prosecution must turn over to the defense all exculpatory evidence in its actual or constructive possession. Failure to do so is a violation of Due Process Clauses of the Fifth and Fourteenth Amendments. This rule applies regardless of how a state has chosen to structure its discovery process. The main U.S. Supreme Court cases that establish this right are:

Brady v. Maryland, 373 U.S. 83 (1963)
Kyles v. Whitley, 514 U.S. 419 (1995)
Strickler v. Greene, 527 U.S. 263 (1999)

The generic term applied to the exculpatory evidence the State must turn over is "Brady material."

III.WHAT IS BRADY MATERIAL?

Brady says that the prosecution must disclose any information or material that is:

- A. Material (and)
- B. Relevant to guilt *or* punishment. (and)
- C. Favorable to the accused. (and)
- D. Within the actual or constructive knowledge or possession of anyone acting on behalf of the State.

It is helpful to examine each of these factors individually, to get a clear idea of exactly what kind of material the State is required to turn over:

A.WHAT DO WE MEAN BY MATERIAL?

Materiality is the most confusing aspect of the Brady standard. Many courts define materiality in terms of the standard the defense must meet to get a conviction reversed when a Brady violation is discovered after trial, and the issue is raised on appeal or at post-conviction proceedings. In this context, materiality is usually defined as whether there was a reasonable probability that the result of the trial would have been different if the exculpatory material had been turned over before trial.

Other courts have recognized, though, that this standard is not really appropriate as a guide for whether information must be turned over before trial. Those courts have usually adhered to the language of Brady, Bagley and Kyles, all of which speak of the obligation to turn over anything that is relevant to guilt or punishment and is exculpatory or favorable to the defense.

B.WHAT IS "RELEVANT TO GUILT *OR* PUNISHMENT?"

This simply establishes that Brady material consists of anything that is helpful to the defense at either the guilt *or* sentencing phase of a case. For example, assume that a robbery victim identified the defendant as one of two people who robbed him, but also told police that the defendant prevented the other robber from injuring him. This would be Brady material because it is relevant to mitigating punishment – even though it actually helps establish the defendant's guilt.

C.WHAT IS "FAVORABLE TO THE ACCUSED?"

It is essential to realize that as used in Brady, the terms "favorable to the accused" and "exculpatory" are not limited to evidence that goes towards proving that the defendant is innocent of the charges. Brady material is defined much more broadly, and the prosecution has the obligation to turn over many things that don't directly go towards a claim of innocence.

For the purposes of Brady analysis, material that is favorable to the defense is anything that meets the following criteria:

- It is exculpatory – meaning that it tends to show that the defendant is innocent of the charges. . . . or
- It may mitigate sentence. . . . or
- It can be used to impeach a state witness, or otherwise cast doubt on the prosecution case. Impeachment evidence must be turned over even if has nothing to do with the defendant's innocence.

Again, it is a good idea to look at each of these criteria individually:

C-1. WHAT DO WE MEAN BY " IS EXCULPATORY?"

The most important thing to understand about the term "is exculpatory," is that it is not limited to things that prove the defendant did not commit the crime. Rather, it includes any information or material that might lead the jury to conclude that the defendant should be found not guilty of any of the crimes charged.

One constructive way of analyzing whether something "is exculpatory" is to look at the different general categories (or genres) of defenses in criminal cases, and ask ourselves whether the evidence we want to discover helps establish any of those categories. These genres (within which almost all defenses fit) are as follows:

1. The criminal act never occurred. (Frame-up, for example)
2. The criminal act occurred, but the defendant was not the one who did it. (Alibi, for example)
3. The criminal act occurred, the defendant committed it, but it wasn't legally a crime. (Self-defense, for example)
4. The criminal act occurred, the defendant committed it, but it wasn't the crime charged. (Lesser included offense, for example)
5. The criminal act occurred, the defendant committed it, but he was not legally responsible. (Insanity, for example)

Any material that might help to establish any of these categories is Brady material, and must be disclosed. Moreover, it doesn't matter whether the defendant has committed to raising a defense with that information. As long as the material would help to establish a defense, it must be turned over, and it is for the defense lawyer to determine whether and how he or she wishes to use it.

Along the same lines, any material that is inconsistent with the prosecutor's theory of the case is Brady material, regardless of whether and how defense counsel is going to use that material.

Due process also requires disclosure of any evidence that provides grounds for the defense to attack the reliability, thoroughness, and good faith of the police investigation, to impeach the credibility of the state's witnesses, or to bolster the defense case against prosecutorial attacks. Kyles v. Whitley, 514 U.S. 419, 442 n.134, 445-451 (1995).

To sum up:

- Any material that helps the defense attack the reliability, thoroughness, or good faith of the police investigation is discoverable under Brady. This is a terrific tool for prying loose police reports that show inconsistent behavior or statements by police, incompetence or failure to follow guidelines or protocols for investigation, and general sloppiness in investigating the crime or in failing to follow leads or investigate anything that wouldn't help convict your client. It is also very useful

for obtaining information about informants, deals and other crimes that may have given witnesses a motive to lie in your case, or given the police a motive to frame your client.

- Even if something would not be admissible at trial, if it fits within the definition of Brady material, it must be disclosed. The key to Brady is that the defense must be given all favorable information – it is then up to defense counsel to figure out a way, if possible, to use it. Contrary to what many prosecutors believe, the fact that a document or piece of information may be inadmissible does not relieve them of their obligation to disclose it under Brady.

- Even if the prosecutor thinks that the Brady material is unreliable or unbelievable, he or she must disclose it. It is for defense counsel, not the prosecutor to decide whether the Brady material is reliable enough to be used. For example: the excuse that "the other guy who confessed was crazy and unbelievable" does not relieve the prosecution from the due process obligation to inform the defense about the "other guy and his confession."

C-2. WHAT DO WE MEAN BY "MITIGATE SENTENCE?"

Information or material that mitigates sentence is:

- Anything that supports any argument you are permitted to make at sentence in support of a less-than-maximum sentence.

- Anything the courts in your jurisdiction have held to be a mitigating factor at sentencing.

A good technique for supporting a demand for Brady material that mitigates sentence is to cite caselaw that either:

- Has explicitly held that such material is relevant to sentence. . . . or
- In which a court has considered such material in its sentencing determination, even if the case itself was not explicitly about that material.

C-3. WHAT DO WE MEAN BY "IMPEACH A STATE'S WITNESS?"

Anything that is inconsistent with the testimony of a State's witness. This might include prior statements of that witness, or any other information from any other source that is inconsistent with the witness's testimony.

Anything that is inconsistent with other prior statements of a State's witness.

Any statements omitting something the witness later told the prosecutor, or

testified to. This covers the very common situation where a State's witness at trial "remembers" for the first time that the defendant confessed to him. When the witness has such a miraculous recovered memory, any prior statements the witness made that did not include the alleged confession become Brady material, and must be turned over immediately.

D.WHAT IS "WITHIN THE KNOWLEDGE OR POSSESSION OF ANYONE ACTING ON BEHALF OF THE STATE?"

The important thing to recognize about this requirement for Brady material is that it is not limited to things that are within the actual knowledge or possession of the individual prosecutor on the case. All of the following are included:

- Anything actually known to or in the possession of anyone in the prosecutor's office.
- Anything actually known to or in the possession of the police, even if the prosecutor doesn't know about it.
- Anything actually known to or in the possession of anyone else acting on behalf of the State, even if the prosecutor doesn't know about it.

The prosecutor is therefore prohibited from hiding behind the excuse that "I didn't know about that." If the material was within the knowledge or possession of anyone working on behalf of the prosecution, the State is considered to have constructive knowledge or possession of that material, and must obtain and turn it over to the defense pursuant to Brady..

Even better, in Kyles v. Whitley, the U.S. Supreme Court explicitly said that the individual prosecutor has an affirmative duty to learn of any favorable evidence known to the other people and agencies acting on the government's behalf on the case, including the police.

II. . USING YOUNGBLOOD v. WEST VIRGINIA, U.S. , 126 S.Ct. 2188 (2006)

A.WHAT IS YOUNGBLOOD?

Youngblood is the latest pronouncement of the U.S. Supreme Court on Brady/Kyles issues. In addition to reaffirming the rulings in Brady and Kyles, it explicitly orders the West Virginia courts to stop avoiding some of the most important provisions of Brady and Kyles. Thus it can be cited for the proposition that state court efforts to dilute the due process protections concerning disclosure of exculpatory evidence by casting them in terms of state evidentiary law will not be tolerated.

Youngblood involved a defendant accused of abducting three teenaged girls and sexually assaulting one of them. His defense was consent. After he was convicted and sentenced to 26-60 years in prison, a defense investigator discovered that the "victims" had written a letter bragging

about how they framed Youngblood and how the entire incident was consensual. A police officer who saw the letter before trial refused to take custody of it, and told the person who had the letter to destroy it. The defense was never told about the letter until after Youngblood was convicted. Consequently, the jury never found out about the letter, and neither the "victims" nor the police officer were cross-examined about it at trial.

The defense filed a state habeas petition, but the trial judge denied the petition, holding that the letter wasn't Brady material because it only went to impeachment, not innocence. The trial court also held that it was not Brady material because the police officer never gave the letter to the prosecutor, so the prosecution was not in possession of the material.

When the denial of Youngblood's habeas was appealed, the West Virginia Supreme Court of Appeals, by a 3-2 vote, affirmed. The majority did not address the specific Brady/Kyles claims, but merely held that the trial court did not abuse its discretion. Dissenting, two justices said that there was a clear Brady violation.

B.THE HOLDING OF YOUNGBLOOD

The U.S. Supreme Court reversed. It made following explicit findings, and ordered the West Virginia courts to follow them:

1. Impeachment material falls under Brady/Kyles and must be disclosed, even if it does not directly go to innocence.

2. If the police know about exculpatory information (including impeachment material) it is considered to be within the possession of the prosecution and must be disclosed pursuant to Brady/Kyles, even if the police never told the prosecutor about it.

3. The prosecutor has an affirmative duty to seek out and learn of any exculpatory material in the possession of anyone else acting on the government's behalf in the case, including the police.

III.WHAT MUST WE DO TO GET BRADY MATERIAL?

A.HOW TO DEMAND BRADY MATERIAL

It is very tempting to store a form Brady motion on your computer, and file it in every case, just changing the defendant's name and case number. Unfortunately, the more general our demand is, the easier it is for the prosecution to weasel out of its obligations. By specifically tailoring our demand to the factual needs of our case, we make it difficult for the State or the Court to claim that they didn't know something existed or was relevant.

This does not mean that we can't use the computer, or we can't use similar language in our Brady motions. It does mean, however, that our Brady motions must contain sufficient facts

about the individual case to make our demand specific. At the very least, this means that we should include facts in our demand that refer to:

- ./ The prosecution witnesses we want information about. For example:
  - ./ "Any and all information bearing on the truthfulness, bad character or bad reputation of State's witness John Smith, including but not limited to: complete adult criminal record; complete juvenile record; any contempt citations issued against the witness; any past instances of dishonesty, fraud, lying or violence on the part of the witness that is known to the State or its agents; any history of mental illness . . ."
- ./ The specific documents (or at least the kind of documents) we want to get. For example:
  - ./ "The name, address and telephone number of any witness who at any time identified someone other than the defendant as the person who committed the robbery charged in this case; any and all reports that mention in any way that a witness, whether named or unnamed, identified someone other than the defendant as the person who committed the robbery charged in this case; the name, address and telephone number of any witness who at any time stated that the defendant was not the person who committed the robbery charged in this case; any and all reports that mention in any way that a witness, whether named or unnamed, stated that the defendant was not the person who committed the robbery charged in this case."
- ./ The specific evidence we think may be out there that fits within Brady. For example:
  - ./ "Any medical or scientific records (including but not limited to the results of any tests and the complete raw data upon which those test results were based) that indicate that the defendant was not the person who committed the crimes charged. This request is intended to encompass, but not be limited to all blood testing, DNA testing, serology testing, fingerprint testing, hair sample testing
- ./ When enumerating the things you are asking for in your motion, use the phrase "including, but not limited to" as a way of preventing the court or the prosecutor from claiming that you unnecessarily limited the scope of your request.

In order to make specific demands for Brady material, we have to do several things before writing the motion:

- ./ Know your theory of defense. It is impossible to think of things that may be exculpatory if we haven't figured out what our defense is.

- ./ Investigate. Often it will be impossible to complete an investigation before motion papers are due. When that happens, do the best you can to base the specifics of your Brady motion on what you know about the facts of your case. Then supplement your requests for Brady material as you learn more about the case.

- ./ Follow up on what you learn. When you get some Brady material, investigate it, and then make demands for additional material on anything your follow-up investigation turns up.

B.WHEN TO DEMAND BRADY MATERIAL

The Brady process is not just for pre-trial. The prosecution has an ongoing constitutional responsibility to turn over all exculpatory material, whenever they find it. Imbler v. Pachtman, 424 U.S. 409, 427,n.25, 96 S.Ct. 984 (1976), held that "after a conviction the prosecutor also is bound by the ethics of his office to inform the appropriate authority of after-acquired or other information that casts doubt upon the correctness of the conviction."

This means that demanding Brady material is something we should be doing throughout the case. For example:

- ♦ In pre-trial motions

- ♦ Just before trial begins – to make sure that nothing has come up that the prosecutor has neglected to mention

- ♦ After the prosecutor's opening – to make sure there is nothing that may be in conflict with what the prosecutor has just told the jury.

- ♦ After the direct examination of every State's witness – to make sure the prosecutor doesn't possess something that contradicts the testimony the witness just gave.

- ♦ After the prosecutor's closing – for the same reason you ask for it after his or her opening.

- ♦ Before sentencing – to make sure the State is not withholding anything that would mitigate sentence.

In your pre-trial motions and prior to sentencing, it is important to make the motion in writing and to get the State's response and the court's decision (if any) in writing.

When you make Brady applications during trial, be sure to **make them on the record**,

and to get the State's response and the court's ruling **on the record**. This is absolutely essential if we are to have a remedy when we discover months later that the State lied about something.

C.BRADY DURING POST-CONVICTION

When Brady material turns up after a defendant has been convicted and sentenced, a state post-conviction or habeas corpus petition is usually the appropriate way to raise the issue. This is standard practice. But what can be done when the Brady material is discovered after the defendant has not only been convicted, but lost his or her appeal, and lost a post-conviction case? In such cases, there are usually serious procedural problems with filing a second, or successor habeas. In particular, the defendant must show cause why he did not raise the claim in his first petition, and actual prejudice from the violation.

In Strickler v. Greene, 527 U.S. 263, 119 S.Ct. 1936, 1949 (1999), the U.S. Supreme Court held that when a defendant files a successor habeas under Brady, if he proves that the State withheld evidence, that will constitute cause for not presenting the claim earlier.

It is essential that we take advantage of this law by:

- ./ Remaining vigilant for concealed Brady material even after conviction.
- ./ Raising the claim even after a first habeas has failed.

IV.REFUTING THE PROSECUTOR'S ARGUMENTS – USING KYLES v. WHITLEY, 514 U.S. 419, 115 S.Ct. 1555 (1995)

The most significant Brady case of the past 30 years has been Kyles v. Whitley, 514 U.S. 419 (1995). The importance of Kyles lies in the fact that the U.S. Supreme Court took the opportunity to explicitly refute virtually every excuse prosecutors have traditionally used to avoid turning over Brady material at trial, and to avoid reversals on appeal and habeas corpus when they are caught in a Brady violation. It is therefore essential that we become familiar with Kyles, and use it at every opportunity to refute the State's arguments.

The following is a list of many rulings from Kyles that are helpful in refuting common incorrect arguments made by the prosecution – at trial, appeal, and post-conviction:

Materiality: The State Argues that the Withheld Material Would Not Have Resulted in an Acquittal

Kyles: "The question is not whether the defendant would more likely than not have received a

different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence. A 'reasonable probability' of a different result is accordingly shown when the Governments evidentiary suppression 'undermines confidence in the outcome of the trial.'"

Materiality: The State Argues that Even Without the Withheld Material, the Evidence was Sufficient to Convict

Kyles: "A defendant need not demonstrate that after discounting the inculpatory evidence in light of the undisclosed evidence, there would not have been enough left to convict. The possibility of an acquittal on a criminal charge does not imply an insufficient evidentiary basis to convict. . . . None of the Brady cases has ever suggested that sufficiency of evidence (or insufficiency) is the touchstone."

Materiality: The Prosecutor Argues on a Brady Appeal of Post-Conviction that "The Withheld Evidence Wasn't Important"

Kyles: The U.S. Supreme Court suggests that defense counsel look to (and cite) the prosecutor's closing argument at trial to show that the State argued that the subject matter of the withheld evidence was very important. In Kyles, for example, the prosecution withheld evidence that cast doubt on the credibility and observational powers of a witness. On appeal, the State argued that this wasn't material under Brady, because the witness was not important. During closing argument at trial, though, the prosecutor had vehemently argued that those same witnesses were very important and highly credible. The Supreme Court viewed this as a strong indication that the withheld information about the witness' credibility was material.

Harmless Error: The State Argues that Even Though there was a Brady Violation, it was Harmless Error

Kyles: Once a reviewing court has found constitutional [Brady] error, there is no need for further harmless-error review . . . . [a Brady error] could not be treated as harmless."

The Prosecutor Says, "I Didn't Know About that Information – the Police Never Told Me

Kyles: "The individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police."

The Prosecutor Says, "None of the Items We Failed to Disclose Would Have Changed the Jury's Mind."

Kyles: Brady does not require "a series of independent materiality decisions" for each individual piece of information withheld. Rather, it requires, "a cumulative evaluation" to determine whether the cumulative effect of all the pieces of information the State failed to disclose rises to the level of Brady materiality.

Finally, Kyles determined that the following kind of information is all Brady material that must be disclosed:

> Inconsistent descriptions by different witnesses of the criminal.
> Inconsistent descriptions by different witnesses of the crime.
> The fact that some of the witness's descriptions of the criminal matched the police informant
> That there were pending charges against the police informant
> That there was an ongoing investigation of the police informant concerning other crimes.
> That the police informant made inconsistent statements to the police about the crime and about his accusation of the defendant
> That the police had other leads and information that they failed to follow up on or investigate, that could have pointed the finger at someone other than the defendant.
> That before accusing the defendant, one of the witnesses previously said that she had not actually seen the crime
> That a witness's description of the crime and/or the criminal became more "accurate" and more certain after the witness met with police and/or prosecutors, or after the witness testified at a first hearing or trial.
> That a witness's prior statements omit significant details or facts that the witness "remembered" at trial.
> That a witness's trial testimony omitted significant details or facts that the witness mentioned in prior statements.
> That a witness or informant made statements that incriminated himself in the crime charged against the defendant.

Please read Kyles before making your next Brady demand.

TRAFFIC STOPS

Reasonable Suspicion: Traffic Stops

An independent analysis inspired by UNC School of Government Professor Jeff Welty's Paper on Traffic Stops

A. Brennan Aberle
Asst. Public Defender
18th Judicial District
Guilford County

"Get in the Way"
-U.S. Representative John Lewis

- http://publicdefenders.us/?q=node/208

4th Amendment

- The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.
- *Action based merely on whatever may pique the curiosity of a particular officer is the antithesis of the objective standards requisite to reasonable conduct…*

  -*Delaware v. Prouse* (1979), 440 U.S. 648, 654-655, (Brennan, J., dissenting).
- *These, I protest, are not mere second-class rights, but belong in the catalog of indispensable freedoms. Among deprivations of rights, none is so effective in cowing a population, crushing the spirit of the individual, and putting terror in every heart. Uncontrolled search and seizure is one of the first and most effective weapons in the arsenal of every arbitrary government. And one need only briefly to have dwelt and worked among a people possessed of many admirable qualities but deprived of these rights to know that the human personality deteriorates and dignity and self-reliance disappear where homes, persons and possessions are subject at any hour to unheralded search and seizure by the police. But the right to be secure against searches and seizures is one of the most difficult to protect. Since the officers are themselves the chief invaders, there is no enforcement outside of court.*

  -*Brinegar v. United States*, 388 U.S. 160 (1949) (J. Jackson, dissenting)

Reasonable Suspicion

- "Our Supreme Court has held that an investigatory stop must be justified by a "'reasonable, articulable suspicion that criminal activity is afoot.'" *Styles*, 362 N.C. at 414, 665 S.E.2d at 439 (quoting *Illinois v. Wardlow*, 528 U.S. 119, 123, 120 S. Ct. 673, 145 L. Ed. 2d 570, 576 (2000)). Reasonable suspicion is a "less demanding standard than probable cause and requires a showing considerably less than preponderance of the evidence[.]" *Wardlow*, 528 U.S. at 123, 145 L. Ed. 2d at 576. "The stop must be based on specific and articulable facts, as well as the rational inferences from those facts, as viewed through the eyes of a reasonable, cautious officer, guided by his experience and training." *Watkins*, 337 N.C. at 441-42, 446 S.E.2d at 70 (citing *Terry*, 392 U.S. at 21-22, 20 L. Ed. 2d at 906)."

-*State v. Fields*, 195 N.C. App. 740, 743 (2009)

Reasonable Suspicion: Common Justifications for Traffic Stops

- Weaving
- Sitting at Stoplight
- Speeding
- Tag Issues
- Driving Slowly
- Unsafe Movement/Lack of Turn Signal
- Driver's Identity
- Late Hour/High Crime Area

These common categories were recently highlighted in Professor Welty's February 2014 update on Traffic Stops.

Reasonable Suspicion: Weaving

Weaving Cases: Pre-textual Stops and Stops based on RAS

- Weaving Cases involve two moving parts:
  - Is there a Chapter 20 violation to justify the stop?
    - Typically involving "weaving across lanes" cases
  - Is there Reasonable Suspicion without a Chapter 20 violation
    - Typically involving "weaving within lane" cases.

Weaving Defined?

- What does weaving "across lanes" mean, and what is the applicable chapter 20 violation?
  - Does it include touching a fog line?
  - Does it include quickly putting the tires over the line only once?
  - What does the language of the typical Chapter 20 violations mean?
    - Does it require perfect, stay-in-between the lines driving?
    - Does case law shed any light on their meaning?

Because I believe that there are more questions than answers, we should not be conceding more 4th Amendment ground than we already have.

- **N.C.G.S. 20-146(a)- Driving on Right Half of Highway**
  - "Upon all highways of sufficient width a vehicle shall be driven upon the right half of the highway except as follows:"
    - Overtaking or passing a vehicle
    - When an obstruction exists making it necessary
    - Upon a highway divided into three marked lanes for traffic under the rules applicable
    - Upon a highway designated for one-way traffic
- **N.C.G.S. 20-146(d)(1)- Failure to Maintain Lane Control**
  - "A vehicle shall be driven *as nearly as practicable* entirely within a single lane and shall not be moved from such lane until the driver has first ascertained that such movement can be made with safety."
- **N.C.G.S. 20-146(d)(3)- Obeying Traffic Signals**
  - "Official traffic-control devices may be erected directing specific traffic to use a designated lane or designating those lanes to be used by traffic moving in a particular direction regardless of the center of the street and drivers of vehicles shall obey the direction of every such device."

Weaving Across Lanes

- *State v. Osterhoudt*, __ N. C. App. __, 731 S.E.2d 454 (2012)
- *State v. Simmons*, 205 N.C. App. 509 (2010)
- *State v. Kochuck*, 366 N.C. 549 (2013)
- *State v. Derbyshire*, __ N.C. App. __, 745 S.E.2d 886 (2013)

Weaving Within Lane

- *State v. Fields*, 195 N.C. App. 740 (2009)
- *State v. Peele*, 196 N.C. App. 668 (2009)
- *State v. Otto,* 366 N.C. 134 (2012)

State v. Osterhoudt, __ N. C. App. __, 731 S.E.2d 454 (2012)

Weaving Across Lanes

- "The evidence tended to establish the following: … N.C. Trooper Monroe was traveling east on Fifth Street and observed defendant make a "wide right turn" onto Fifth Street whereby half of defendant's car went over the double yellow line into the turning lane for traffic coming in the opposite direction."
- Trooper Monroe's testimony that he initiated the stop of defendant after observing defendant drive over the double yellow line is sufficient to establish a violation of: (1) N.C. Gen. Stat. § 20-146(d)(3-4) since we concluded that crossing the double yellow line constitutes a failure to obey traffic-control devices; (2) N.C. Gen. Stat. § 20-146(d)(1) because by crossing the double yellow line, defendant failed to stay in his lane;"
- Outcome? Reasonable Articulable Suspicion

State v. Osterhoudt, __ N. C. App. __, 731 S.E.2d 454 (2012)

Weaving Across Lanes

- Consider what does "as nearly as practicable" mean in this circumstance?
  - Driving practicably shouldn't involve halfway over the lane line, but it might include a slight lane cross. A careful reading of the Court's holding suggests that this case, alone, does not stand for the proposition that touching the lane line or even slightly crossing it is a Chapter 20 violation.
- Is there a difference between slightly crossing white dotted lines (which you may cross from time to time legally) and yellow double lines, which are "traffic signals" you are never permitted to cross?
  - Legislative intent? N.C.G.S. 20-146(d)(1) vs. N.C.G.S. 20-146(d)(3)
  - Can you break one law and not the other?

State v. Simmons, 205 N.C. App. 509 (2010)

Weaving Across Lanes

- "N.C. 11, a four-lane highway with two lanes of travel in each direction, separated by a median"
- "Trooper Potter testified that he observed Defendant's truck travel left in the left lane and he crossed the center line. He traveled back right again to the middle of the left lane. Then he traveled back left again and, and -- to the line, which is the -- it's a yellow line in that location. And he traveled back over the line. Then he traveled back all the way across the dotted line. He did not signal the vehicle. He then traveled right, crossing the white line, which line on that side is white, and then he traveled back to the center of the right lane."
- "Trooper Potter was then asked to step down from the witness stand to illustrate his testimony on the chalkboard. Trooper Potter further testified: I observed [Defendant] run over the line . . . . There's a line and then a small portion of the shoulder there, but he crossed the line. . . . Like I said, he crossed it twice, then moved back into the middle, went for awhile [sic], and then he went all the way across. Did not signal. Then he went over on that side and ran off the road on that side. Then he went back to the middle of that line."

State v. Simmons, 205 N.C. App. 509 (2010)

Weaving Across Lanes

- Outcome? Reasonable Articulable Suspicion
- Court's Reasoning:
  - "the evidence before this Court indicates that Defendant was not only weaving within his lane, but was also weaving across and outside the lanes of travel, and at one point actually ran off the road. We conclude that this evidence is sufficient to support a reasonable suspicion that Defendant was driving while impaired."

Because the driving in this case was so bad, it continues to leave open the question of what does it mean to maintain lane control "as nearly as practicable". Again, nothing in this case suggests that crossing a lane line slightly or touching the line is a Chapter 20 violation.

State v. Kochuck, 366 N.C. 549 (2013)

Weaving Across Lanes

- NC Supreme Court Case reversing *State v. Kochuk*, 741 S.E.2d 327 (2012) for the reasons cited in its dissent.
- "Based on the totality of the circumstances as articulated by the majority opinion in *Otto* and our case law in *Hudson*, I would hold that there was reasonable suspicion to stop Defendant. Defendant in this case momentarily crossed the right dotted line once while in the middle lane. He then made a legal lane change to the right lane and later drove on the fog line twice. Defendant, thus, was weaving within his own lane. The trial court also found that Trooper Ellerbe stopped Defendant at 1:10 a.m. These two facts coupled together, under the totality of the circumstances analysis as outlined in *Otto*, constitute reasonable suspicion for the stop." – *State v. Kochuk*, 741 S.E.2d 327 (2012) (J. Beasley Dissenting).

State v. Kochuck, 366 N.C. 549 (2013)
Weaving Across Lanes

- Outcome? Reasonable Articulable Suspicion
- Two interesting things about this case:
  - This is considered a "weaving across lanes" case, but it is analyzed under the "weaving plus more" doctrine which we will see momentarily in the "weaving within lane" cases. Therefore, there is an argument that this case is not about a Chapter 20 violation at all, and rather about pure Reasonable Suspicion stops.
  - There is also some defense friendly language in here. Consider that Judge Beasley noted that even though the Defendant "momentarily crossed the right dotted line" and later "drove on the fog line twice," the Defendant, thus was "weaving within his own lane."
    - If we accept that riding the fog line and momentarily crossing the fog line is "weaving within the lane" then have we answered the question that this behavior does not constitute failure to maintain lane control. If it did, Judge Beasley wouldn't have had to couple it with the additional fact that it was 1:10 in the morning, because it would have been a Chapter 20 violation by itself.

State v. Derbyshire, __ N.C. App. __, 745 S.E.2d 886 (2013)
Weaving Across Lanes

- "Sgt. Turner's testimony is unclear and could reasonably be interpreted to suggest that Defendant's tires crossed the dividing line either as a part of his weaving or after the weaving. In its sixth finding of fact, however, the trial court resolved the apparent ambiguity by finding that Sgt. Turner 'observed []Defendant's vehicle weave in and out of his traffic lane, with the right tires crossing the dividing lane line.' Thus, despite the seeming ambiguity in Sgt. Turner's testimony, the trial court found that the crossing occurred in concert with — not in addition to — Defendant's solitary 'weave,' and we are bound by that determination."
- "Therefore, our decision is limited to whether Sgt. Turner could have developed a reasonable suspicion that Defendant was in the process of committing a crime when he weaved only once, causing the right side of his tires to cross the dividing line in his direction of travel. Because one instance of weaving is neither (1) erratic and dangerous nor (2) constant and continuous under *Fields* 2012 and *Otto*, respectively, we conclude that this case is governed by our prior decisions in *Fields* 2009 and *Peele*. Therefore, we hold that Sgt. Turner lacked a reasonable and articulable suspicion of the commission of a crime."

State v. Derbyshire, __ N.C. App. __, 745 S.E.2d 886 (2013)
Weaving Across Lanes

- Outcome? No Reasonable Articulable Suspicion
  - This case could also be interpreted to suggest that a single crossing of the line might be practicable driving and thus not a Chapter 20 violation. Again, the court could have concluded that the stop was supported by a broken traffic law, but it didn't.
- But….
  - Temporary Stay Granted, which means the case isn't binding. Temporary Stay granted by 747 S.E.2d 524 (Aug. 27, 2013).

State v. Fields, 195 N.C. App. 740 (2009)
Weaving Within Lane

- At approximately 4:00 p.m…., Detective Little of the Columbus County Sheriff's Office Drug Enforcement Unit was patrolling Highway 74 when he observed defendant's car. Detective Little followed defendant's car for approximately one and a half miles. On three separate occasions, Detective Little saw defendant's car swerve to the white line on the right side of the traffic lane.

State v. Fields, 195 N.C. App. 740 (2009)
Weaving Within Lane

- Outcome? No Reasonable Articulable Suspicion
- Reasoning?
  - "The requisite degree of suspicion must be high enough "to assure that an individual's reasonable expectation of privacy is not subject to arbitrary invasions solely at the unfettered discretion of officers in the field." *State v. Murray*, 192 N.C. App. 684, 687, 666 S.E.2d 205, 208 (2008). A police officer must develop more than an "unparticularized suspicion or hunch" before he or she is justified in conducting an investigatory stop. See *id.* (holding that the police officer lacked reasonable suspicion when he stopped a vehicle to find out why it was traveling in an area with a history of break-ins)."
  - Weaving within a lane can contribute to a reasonable suspicion of driving while impaired when coupled with additional specific articulable facts, which also indicate that the defendant was driving while impaired.
    - See, e.g., *State v. Aubin*, 100 N.C. App. 628, 397 S.E.2d 653 (1990) (weaving within lane, plus driving only forty-five miles per hour on the interstate), appeal dismissed, disc. review denied, 328 N.C. 334, 402 S.E.2d 433, cert. denied, 502 U.S. 842, 112 S. Ct. 134, 116 L. Ed. 2d 101 (1991);
    - *State v. Jones*, 96 N.C. App. 389, 386 S.E.2d 217 (1989) (weaving towards both sides of the lane, plus driving twenty miles per hour below the speed limit), appeal dismissed, disc. review denied, 326 N.C. 366, 389 S.E.2d 809 (1990);
    - *State v. Adkerson*, 90 N.C. App. 333, 368 S.E.2d 434 (1988) (weaving within lane five to six times, plus driving off the road);
    - *State v. Thompson*, 154 N.C. App. 194, 571 S.E.2d 673 (2002) (weaving within lane, plus exceeding the speed limit).

State v. Fields, 195 N.C. App. 740 (2009)
Weaving Within Lane

- When determining if reasonable suspicion exists under the totality of circumstances, a police officer may also evaluate factors such as traveling at an unusual hour or driving in an area with drinking establishments. In *State v. Jacobs*, 162 N.C. App. 251, 255, 590 S.E.2d 437, 441 (2004), the defendant was weaving within his lane and touching the designated lane markers on each side of the road. We concluded that the defendant's weaving combined with the fact that he was driving at 1:43 a.m. in an area near bars was sufficient to establish a reasonable suspicion of driving while impaired. *Id.* Similarly, we found that the facts in *State v. Watson*, 122 N.C. App. 596, 599-600, 472 S.E.2d 28, 30 (1996), established a reasonable suspicion, due to the fact that the defendant was weaving within his lane and driving on the dividing line of the highway at 2:30 a.m. on a road near a nightclub.
- In order to preserve an individual's Fourth Amendment rights, it is of the utmost importance that we recognize that the presence of any one of these factors is not, by itself, proof of any illegal conduct and is often quite consistent with innocent travel.

State v. Peele, 196 N.C. App. 668 (2009)
Weaving Within Lane

- At approximately 7:50 p.m. on 7 April 2007, Sergeant James Sullivan of the Williamston Police Department responded to a dispatch regarding "a possible careless and reckless, D.W.I., headed towards the Holiday Inn intersection." The vehicle was described as a burgundy Chevrolet pickup truck. Sergeant Sullivan arrived at the intersection "within a second" and observed a burgundy Chevrolet pickup truck. After following the truck for about a tenth of a mile and seeing the truck weave within his lane once, Sergeant Sullivan pulled defendant over for questioning.
- Sergeant Sullivan testified that he "followed [defendant] a short distance and observed [him] weave into the center, bump the dotted line, and then fade to the other side and bump the fog line, and then pretty much go back into the middle of the lane." He did not testify to any other instance of weaving. This evidence only supports a finding that Sergeant Sullivan observed defendant weave once within his lane of travel. Accordingly, we must determine whether the dispatch when combined with the single instance of weaving is sufficient to warrant a determination that Sergeant Sullivan had reasonable suspicion to stop defendant.

  We first note that Sergeant Sullivan's observation of a single instance of weaving within his lane was not sufficient to establish reasonable suspicion to stop defendant.

State v. Peele, 196 N.C. App. 668 (2009)
Weaving Within Lane

- Outcome? No Reasonable Articulable Suspicion
  - Even with anonymous tip
- This case also suggests that "bump[ing]" the fog line is weaving within the lane, so use that language to your advantage.

State v. Otto, 336 N.C. 134 (2012)
Weaving Within Lane

- Around 11:00 p.m., as the trooper sat on a cross street, he observed a burgundy Ford Explorer drive past him on NC 43 heading south. At that point, he was about a half mile from Rock Springs Equestrian Center ("Rock Springs"), and the vehicle was coming from its direction. But, because NC 43 is a busy road into and out of Greenville, Trooper Smith did not know specifically where the vehicle was coming from. He did know that Rock Springs was hosting a Ducks Unlimited Banquet that night, and he had heard from others that Rock Springs sometimes served alcohol.

  Trooper Smith happened to turn onto NC 43 behind the Ford, and he did not notice anything out of the ordinary when he pulled onto the road behind it. But while driving about a hundred feet behind the Ford, he "immediately started noticing [it] was weaving" within its own lane. The vehicle never left its lane, but was "constantly weaving from the center line to the fog line." The Ford appeared to be traveling at the posted speed limit of fifty-five miles per hour. Trooper Smith watched it weave in its own lane for about three-quarters of a mile, and then he activated his lights and stopped defendant, the driver.

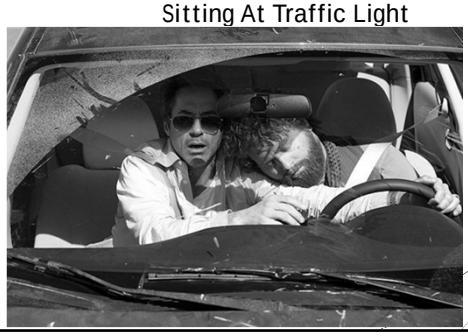
State v. Otto, 336 N.C. 134 (2012)
Weaving Within Lane

- Outcome? Reasonable Article Suspicion
- The totality of the circumstances here leads us to conclude that there was reasonable suspicion for the traffic stop. Unlike the Court of Appeals cases in which weaving within a lane was found to be insufficient to support reasonable suspicion, the weaving here was constant and continual. In *Fields* the defendant weaved only three times over the course of a mile and a half. 195 N.C. App. at 741, 673 S.E.2d at 766. Similarly, in *State v. Peele*, there was only one instance of weaving. 196 N.C. App. 668, 671, 675 S.E.2d 682, 685, disc. rev. denied, 363 N.C. 587, 683 S.E.2d 383 (2009). In contrast, defendant here was weaving "constantly and continuously" over the course of three-quarters of a mile. In addition, defendant was stopped around 11:00 p.m. on a Friday night. These factors are sufficient to create reasonable suspicion.

Weaving Summary

- Weaving Across Lanes
  - DO NOT CONCEDE THAT BUMPING, TOUCHING, OR SLIGHTLY CROSSING THE LINE IS WEAVING ACROSS LANES. THERE IS NO CASELAW THAT SUGGESTS THAT IT IS. IN FACT, THERE IS CASELAW THAT SUGGESTS THE OPPOSITE!
  - Furthermore, don't consider touching the lane or slightly crossing the lane to be a Chapter 20 Violation, it might not be, even if it is charged that way.
    - Practicable driving? Obstruction?
  - *Derbyshire* suggests that one instance of crossing the lane might be okay.
- Weaving Within Lane
  - If it isn't severe (see *Otto*) there must be additional factors.
    - Print maps to show other innocent travel destinations in the area other than bars.
    - Be conscious of the time of driving

Reasonable Suspicion: Sitting At Traffic Light



Length of Delay Continuum

- 30 seconds at stop light, 12:15AM, plus area known for bars? Reasonable Suspicion
  - *State v. Barnard,* 362 N.C. 244 (2008)
- 8-10 seconds, area known for bars, 4:30AM? No Reasonable Suspicion
  - *State v. Roberson*, 163 N.C. App.129 (2004)

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

- "Around 12:15 a.m. on 2 December 2004, Officer Brett Maltby was on patrol in a high crime area of downtown Asheville where a number of bars are located. Officer Maltby's marked patrol car was stopped behind defendant's vehicle at a red traffic light. When the light turned green, defendant remained stopped for approximately thirty seconds before making a legal left turn. Officer Maltby initiated a stop of the vehicle."
- Outcome? Reasonable Articulable Suspicion
- "Because defendant's thirty-second delay at a green traffic light under these circumstances gave rise to a reasonable, articulable suspicion that defendant may have been driving while impaired, the stop of defendant's vehicle was constitutional and the evidence obtained as a result of the stop was properly admitted. It is irrelevant that part of Officer Maltby's motivation for stopping defendant may have been a perceived, though apparently non-existent, statutory violation of impeding traffic."

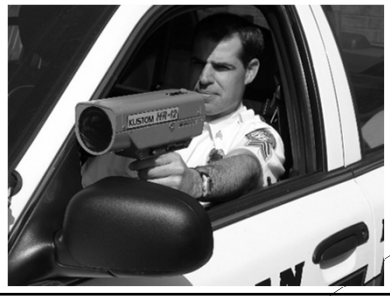
State v. Roberson, 163 N.C. App.129 (2004)

- Deputy Eaton . . . is experienced in the field of DWI detection, having received training in that area and also having been involved in more than 100 DWI arrests himself.
- At approximately 4:30 a.m. on October 19, 2001, Deputy Eaton was traveling southbound on High Point Road in Greensboro, North Carolina when he approached the intersection of Holden Road, whereupon he stopped for a red traffic light. Defendant's vehicle was also stopped at this light; however, it was on the opposite side of the intersection traveling northbound on High Point Road. There were no other vehicles in the area.
- After traveling approximately one city block, defendant's vehicle had still not moved. Deputy Eaton executed a U-turn and began to approach defendant's vehicle from the rear. As he approached defendant's vehicle, she lawfully proceeded through the intersection.
- Deputy Eaton then activated his blue light and effected a traffic stop of defendant's vehicle. Defendant was subsequently arrested and charged with the offense of driving while impaired.
- Deputy Eaton estimated the total time that defendant's vehicle had delayed before proceeding through the intersection at Holden Road upon the signal changing to green at ten seconds; however, he acknowledged that in previous testimony he had estimated the time at eight to ten seconds.
- On October 19, 2001, the furniture market was in session in High Point. Deputy Eaton testified that High Point Road was a major thoroughfare connecting Greensboro to High Point, and there were many bars and restaurants located in the immediate area where he stopped defendant. Deputy Eaton also expressed his belief that the bars and restaurants were required to stop serving alcohol at 2:00 a.m.

State v. Roberson, 163 N.C. App.129 (2004)

- Outcome? No Reasonable Suspicion.
- "A motorist waiting at a traffic light can have her attention diverted for any number of reasons. Moreover, as there was no other vehicle behind defendant to redirect her attention to the green light through a quick honk of the horn, a time lapse of eight to ten seconds does not appear so unusual as to give rise to suspicion justifying a stop…The fact that Officer Eaton's observation of defendant gave rise to no more than an "'unparticularized suspicion or hunch,'" *Steen*, 352 N.C. at 239, 536 S.E.2d at 8 (citation omitted), cannot be rehabilitated by adding to the mix of considerations the general statistics advocated by the State on time, location, and special events from which a law enforcement officer would draw his inferences based on his training and experience, inferences must still be evaluated against the backdrop of everyday driving experience . . . [and the time of day of the stop] does not enhance the suspicious nature of the observation [of the delay]"). Defendant was stopped at 4:30 a.m. in an area that hosted several bars and restaurants; however, by law, those establishments were prohibited from serving alcohol after 2:00 a.m."

Reasonable Suspicion: Speeding



Reasonable Suspicion: Speeding

- These cases are about whether there is reasonable suspicion that a Chapter 20 Violation (speeding) has occurred.
- The less over the speed limit that an officer alleges a defendant is traveling, the more reliability is required to determine probable cause.

State v. Barnhill, 166 N.C. App. 228 (2008)

- At approximately 1:50 a.m., Officer Malone noticed a white Chevrolet truck heading eastbound on Fourth Street towards him. In Officer's Malone's opinion the vehicle was exceeding a safe speed, as he estimated the vehicle to be traveling 40 m.p.h. in a 25 m.p.h. zone. He testified he was basing this estimation on the fact he observed the truck for approximately five to ten seconds, and in that time the truck traveled approximately 750 feet, or a block and a half. Officer Malone also based his opinion that defendant was speeding on the fact that when he first saw the truck he could hear the vehicle's engine racing and the sound was "pretty loud" as defendant accelerated. Officer Malone further testified that the intersection through which defendant proceeded was slightly elevated in the middle and when defendant came through the intersection it appeared the truck was bouncing because it had gone through at a high rate of speed. On cross-examination, Officer Malone admitted he had never received any training in visually estimating the speed of moving vehicles, he was not certified to operate any type of speed detection device, and he did not know in measurable terms the actual distance the vehicle traveled, but estimated the distance. Additionally, the trial court found that Officer Malone did not testify that he witnessed defendant engage in any other criminal, traffic, or equipment violations.

State v. Barnhill, 166 N.C. App. 228 (2008)

- The standard the trial court applied, the reasonable suspicion standard, does not apply here, as the basis for the stop was speeding, a readily observed traffic violation.
- Thus, we apply the probable cause standard to the facts of this case to determine if Officer Malone had sufficient justification to stop defendant's vehicle. "Probable cause is 'a suspicion produced by such facts as indicate a fair probability that the person seized has engaged in or is engaged in criminal activity.'" Wilson, 155 N.C. App. at 94, 574 S.E.2d at 97-98 (citations omitted). Officer Malone testified at the suppression hearing that he believed defendant to be speeding based on his personal observation of the speed of the vehicle, the racing of the engine, and the bouncing of the car through the intersection.
- Here, Officer Malone's competency to estimate the speed of the truck is being called into question because of his lack of specialized training to visually estimate speed. We find it relevant that if an ordinary citizen can estimate the speed of a vehicle, so can Officer Malone.

U.S. v. Sowards, 690 F.3d 583 (4th Cir. 2012)

- Deputy James Elliott stopped Sowards for speeding along North Carolina's I-77 after visually estimating that Sowards's vehicle was traveling 75 mph in a 70-mph zone. Although Deputy Elliott's patrol car was equipped with radar, he had intentionally positioned his patrol car at an angle that rendered an accurate radar reading impossible.
- At the suppression hearing, Deputy Elliott testified that he was certified in the use of radar equipment in North Carolina. As a condition of obtaining radar certification, Deputy Elliott was required to visually estimate the speed of twelve separate vehicles and then have his visual speed estimates verified with radar. To pass the road test, Deputy Elliott's visual speed estimates could not vary from the radar by greater than a total of 42-mph for all twelve vehicles combined. Deputy Elliott testified, however, that, for any one vehicle, his visual speed estimate could have been off by as much as 12 mph, so long as he did not exceed the 42 mph total for all twelve vehicles combined.
- [On Cross-Examination Deputy Elliot also showed some difficulty estimating distance, and admitted he did nothing else to corroborate his visual estimate.]

U.S. v. Sowards, 690 F.3d 583 (4th Cir. 2012)

- However, the Fourth Amendment does not allow, and the case law does not support, blanket approval for the proposition that an officer's visual speed estimate, in and of itself, will always suffice as a basis for probable cause to initiate a traffic stop. Instead, for the purposes of the Fourth Amendment, the question remains one of reasonableness. Critically, and as further explained below, the reasonableness of an officer's visual speed estimate depends, in the first instance, on whether a vehicle's speed is estimated to be in significant excess or slight excess of the legal speed limit. If slight, then additional indicia of reliability are necessary to support the reasonableness of the officer's visual estimate.
- However, where an officer estimates that a vehicle is traveling in only slight excess of the legal speed limit, and particularly where the alleged violation is at a speed differential difficult for the naked eye to discern, an officer's visual speed estimate requires additional indicia of reliability to support probable cause.
- [There are some collected cases in *Sowards* where the where visual estimate of the speed is 10mph above the posted limit and there is no probable cause found.]

Speeding Practice Tips

- Do not immediately concede a speeding stop, assess your facts and compare them to *Barnhill* and *Sowards*.
- Distinguish your case by holding *Barnhill* to the high standard that it is by citing its specifics. Remember, *in Barnhill* there was a speed of 15 mph above the speed limit alleged, a roaring engine, and visual bouncing over the elevated intersection.
- Even though an officer can testify as a lay witness for visually estimating speed, impeaching an officer on their training can give their testimony less weight. Use the cross-examination in the *Sowards* opinion for guidance.

Reasonable Suspicion: Tag Issues

Do you have a Reasonable Expectation of Privacy in Your License Plate? **No ☹**

- Because license plates, vin numbers, and registration stickers are in open view, courts have pretty uniformly rejected this argument.
- *State v. Chambers*, 2010 WL 1287068 (N.C. Ct. App. April 6, 2010) (unpublished)
  - "Defendant's license tag was displayed , as required by NC law, on the back of his vehicle for all of society to view. Therefore, Defendant did not have a subjective or objective reasonable expectation of privacy in his license tag. As such, the officer's actions did not constitute a search under the Fourth Amendment."
- *Jones v. Town of Woodworth*, __So.3d__, 2013 WL6834783 (La. Ct. App. 3rd Cir. Dec. 26 2013)
- *State v. Setinich*,822 N.W.2d 9 (Minn. Ct. App. 2012)
- *State v. Davis*, 239 P.3d 1002 (or. Ct. app. 2010), etc. etc.
- *But See Driver's Identity*

Reasonable Suspicion: Driver's Identity

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

"On 15 May 2004, Officer Jarrett Doty of the Granite Quarry Police Department was on patrol in an unmarked vehicle. At approximately 9:32 p.m., Officer Doty pulled his automobile "in behind a Pontiac vehicle[.]" It was dark and Officer Doty could not determine the sex, race, or ethnicity of the driver of the Pontiac, or how many individuals were riding inside. Officer Doty traveled behind the Pontiac for approximately "[a] mile[,] . . . [m]aybe two miles" and did not observe the driver of the vehicle commit any traffic violations or weave in the lane of travel. Nevertheless, Officer Doty "ran the registration plate that was attached to the rear of the vehicle" through a computer in his patrol car. Officer Doty discovered that the vehicle was registered to Defendant. He then "ran [Defendant's] license number from the registration information" and determined that Defendant's license had been suspended. Once he had this information, but still not knowing whether Defendant was driving the vehicle, Officer Doty activated the blue lights on his patrol car and stopped the Pontiac. When he approached the Pontiac, Officer Doty found that Defendant was operating the vehicle. As a result of the stop, Defendant was cited for driving while impaired and driving with a revoked license.

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

- "We are persuaded by the rationale of the majority of jurisdictions and thus adopt the holding of the majority of jurisdictions that when a police officer becomes aware that a vehicle being operated is registered to an owner with a suspended or revoked driver's license, and there is no evidence appearing to the officer that the owner is not the individual driving the automobile, reasonable suspicion exists to warrant an investigatory stop."
- This reasoning affirmed by *State v. Johnson*, 204 N.C. App. 259 (2010)
  - What facts can you use to distinguish from your case and argue that Officer should have been on notice that driver was not registered owner?
    - Darkness?
    - Age?
    - Gender?
    - Race?

Driver's Identity Practice Tips

- This defense really requires affirmatively arguing that the officer was on notice that driver was not registered owner.
  - Check for video that clearly shows the driver is not the owner
  - Ask questions of officers about their ability to see the driver without tipping your hand about what the issue is
- Also try to fight back against the normalization of jurisprudence that we can reasonably assume that the driver of the car is the owner for the purposes of a seizure. If someone owns a car and had their license suspended, is it not just as reasonable to assume that someone else is driving their car for them? Would you just sell your car if your license is temporarily suspended, or let a family member or friend borrow it?

Reasonable Suspicion: Driving Slowly

Driving Slowly Overview

- Much like weaving, cases involving slow drivers involve a combination of Chapter 20 statute stops and non-Chapter 20 analyses. Typically, if there is no Chapter 20 violation, there may be other factors that are required to justify the stop.
- It should be noted from the outset here, that similarly, there are no bright-line rules and it is very important that you pay close attention to the language of slow-driving cases in order to distinguish or support your own cases. I have found that in a suppression motion, it can be helpful to provide a chart to the court that details the holdings in various cases. It will make you look more authoritative in your argument, as well as make your clients happy.

Sample Chart: Driving Slowly

	Facts	Outcome
State v. Bonds, 139 N.C. App. 627 (2000)	(1) defendant had a blank look (2) 10 miles per hour below the speed limit. (3) defendant's window was completely down in 28 degree weather.	Reasonable Suspicion Found. Officer testified in experience windows down was to "refresh" impaired driver.
State v. Aubin, 100 N.C. App. 628 (1990)	(1) 20 miles an hour below the posted speed on Interstate (2) Weaving within lane	Reasonable Suspicion Found. Public interest in removing impaired drivers from the highways
My Case	(1) 10 Miles under in residential area (2) Frequent stops because defendant looking for friend's house	Should be differentiated because there is less danger of slow speed in Res. area than on Interstate

- N.C.G.S. 20-141(a)
  - No person shall drive a vehicle on a highway or in a public vehicular area at a speed greater than is reasonable and prudent under the conditions then existing.
- N.C.G.S. 20-141(h)
  - NO person shall operate a motor vehicle on the highway at such a slow speed as to impede the normal and reasonable movement of traffic except when reduced speed is necessary for safe operation or in compliance with the law...
- N.C.G.S. 20-141(c)
  - Except while towing another vehicle, or when an advisory safe-speed sign indicates a slower speed, or as otherwise provided by law, it shall be unlawful to operate a passenger motor vehicle upon the interstate and primary highway system at less than the following speeds:
    - Forty miles per hour in a speed zone of 55 miles per hour
    - Forty-five miles per hour in a speed zone of 60 miles per hour or greater

- *State v. Bonds*, 139 N.C. App. 627 (2000)
  - **RAS found when defendant had a blank look on his face, ten miles per hour below the speed limit, driver-side window was completely down in twenty-eight degree weather. Court noted that recent NHTSA publication "The Visual Detection of DWI Motorists," states that driving ten miles per hour or more under the speed limit, plus staring straight ahead with fixed eyes, indicates a fifty percent chance of being legally intoxicated.**
- *State v. Aubin*, 100 N.C. App. 628 (1990)
  - **RAS found when defendant was going 20 miles an hour below the posted speed on I-95 and weaving within its lane**
- *State v. Jones*, 96 N.C. App. 389 (1989)
  - **RAS found when defendant driving 20 miles per hour below the speed limit on I-95 and weaving within his lane.**
- *State v. Styles*, 362 N.C. 412 (2008)
  - **This is a case about a "failure to use turn signal" stop, however, the court, when speaking about the reasonable suspicion standard notes, "…law enforcement may observe certain facts that would, in the totality of the circumstances, lead a reasonable officer to believe a driver is impaired, such as weaving within the lane of travel or driving significantly slower than the speed limit."**
    - **One reading of this could suggest that driving significantly under the speed limit might, by itself, support a stop, but as we have seen with weaving within the lane, the speed might night to be grossly under the limit to justify the stop without additional factors.**

- *State v. Brown*, 2010 WL 3860440, 207 N.C. App. 377, N.C. Ct. App. Oct. 5, 2010) (unpublished)
  - **RAS found when "ten miles under the posted speed limit, as well as weaving inside her lane of traffic. While neither of these factors, alone, is enough to create reasonable suspicion, this Court has held that weaving combined with driving excessively under the speed limit may give rise to reasonable suspicion for an officer to initiate a traffic stop to investigate whether a defendant is driving while impaired."**
    - This case is helpful because it suggests that driving slow, alone, may not be enough for RAS.
- *State v. Canty*, __ N. C. App. __, 736 S.E.2d 532 (2012)
  - **No Reasonable Suspicion. "Nervousness, slowing down, and not making eye contact is nothing unusual when passing law enforcement stationed on the side of the highway. We find it hard to believe that these officers could tell Ms. Canty and Defendant were "nervous" as they passed by the officers on the highway and as the officers momentarily rode alongside them. A vehicle's slowed speed has been a factor in initiating a traffic stop, but the weight of this factor is minimal since the officers' reports state that the vehicle was going 65 mph and slowed to 59 mph, which is hardly significant in comparison to *Jones* where we held that driving twenty mph below the speed limit in addition to weaving amounted to reasonable suspicion."**
- *State v. Bacher,* 867 N.E.2d 864, 867 (Ohio Ct. App. 1 Dist. 2007)
  - Because the case law is unsettled in NC about slow driving alone, Professor Welty provides this case as a helpful one for collecting nation-wide cases that suggest slow-driving alone may not be enough.

Reasonable Suspicion: Unsafe Movement/Lack of Turn Signal

N.C.G.S. 20-154(a)
Signals on Starting, Stopping, or Turning

- "The driver of any vehicle upon a highway or public vehicular area before starting, stopping or turning from a direct line shall first see that such movement can be made in safety… and whenever the operation of any other vehicle may be affected by such movement, shall give a signal as required in this section…"

State v. Ivey, 360 N.C. 562 (2006) overruled, in part, on other grounds

- Officer Rush observed defendant driving a white Chevrolet Tahoe sport utility vehicle with "tinted windows and expensive, fancy chrome wheels" on Monument Street in Charlotte, North Carolina. There is no indication that any other automobile or pedestrian traffic which might have been in the area would have been affected by defendant's operation of the vehicle. Officer Rush, some distance directly behind the automobile, saw defendant come to a complete stop at a T-intersection and then make a right turn without signaling. A concrete median at the T-intersection blocked a left turn, so that, as Officer Rush confirmed at the suppression hearing, defendant had no choice but to turn right. After observing defendant's turn, Officer Rush initiated a traffic stop of the sport utility vehicle and issued a uniform citation to defendant for unsafe movement under N.C.G.S. § 20-154(a) for failure to signal.

State v. Ivey, 360 N.C. 562 (2006) overruled, in part, on other grounds

- The record does not indicate that any other vehicle or any pedestrian was, or might have been, affected by the turn. Therefore, the only question is whether Officer Rush's vehicle may have been affected by the turn. Officer Rush was traveling at some distance behind the sport utility vehicle and observed defendant come to a complete stop at the stop sign. Defendant then turned right, the only legal movement he could make at the intersection. Regardless of whether defendant used a turn signal, Officer Rush's vehicle would not have been affected. Officer Rush's only option was to stop at the intersection. Accordingly, Officer Rush's vehicle could not have been affected by defendant's maneuver.

State v. Watkins, __N.C. App._, 725 S.E. 2d 400 (2012)

- "As the vehicle passed, the officers pulled out approximately three or four car lengths behind it to confirm that it was bearing Georgia license plates. As the officers' vehicle entered the highway, the Chevrolet made an abrupt lane change into the left lane without signaling and slowed down by approximately five to 10 miles per hour. The driver then maintained a speed below the speed limit and remained in the passing lane. Detective Spencer recognized this behavior by the driver as an attempt to avoid being stopped."
- "Here, the State's evidence established the officers were following three to four car lengths behind defendant's vehicle when he changed lanes. While Officer Brooks testified that shortly after the stop there was "heavy traffic" on the road with "a lot of vehicles going by," there are insufficient facts in the record to determine whether the lane change may have affected another vehicle."
- [This court did find reasonable suspicion based on other facts].

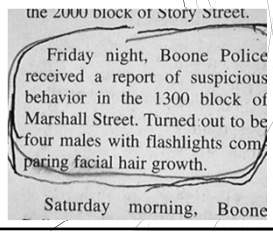
State v. Styles, 362 N.C. 412 (2008)

- "The trial court found that at the time defendant's vehicle changed lanes without a signal, it was "being operated by the defendant immediately in front of" Officer Jones' patrol vehicle...This finding of fact indicates that defendant's failure to signal violated N.C.G.S. § 20-154(a), because it is clear that changing lanes immediately in front of another vehicle may affect the operation of the trailing vehicle. Officer Jones' observation of defendant's traffic violation gave him the required reasonable suspicion to stop defendant's vehicle."

Practice Tips: Unsafe Movement

- These stops are very fact specific and fertile grounds for cross examination.
- It appears that turning without a signal is probably okay when a vehicle has no choice but to turn in one direction, such as in a turning only lane.
- It also appears that failing to use turn signals when it doesn't affect the operation of another vehicle is not a violation of the statute.
  - 3-4 car lengths or more probably doesn't affect the operation of another motor vehicle
  - Changing lanes without signaling when you are "immediately in front of" another vehicle probably does affects the operation of that motor vehicle.

Reasonable Suspicion: Late Hour/High Crime Area



the 2000 block of Story Street.

Friday night, Boone Police received a report of suspicious behavior in the 1300 block of Marshall Street. Turned out to be four males with flashlights comparing facial hair growth.

Saturday morning, Boone

Reasonable Suspicion: Late Hour/High Crime Area

- Presence in a high crime area, "standing alone, is not a basis for concluding that [a suspect is] engaged in criminal conduct."
  - *Brown v. Texas,* 443 U.S. 47 (1979)

State v. Murray, 192 N.C. App. 684 (2008)

- At approximately 3:41 a.m.... [LEO] was performing a property check in the area of the Motorsports Industrial Park. This activity entailed patrolling the main road and checking the buildings and parking lots in the area as part of a "problem oriented policing project"... following reports of break-ins of vehicles and businesses in the Park. Officer came around a curve on the main road, "passed a vehicle coming out of the area," which he thought was "kind of weird," as he "hadn't seen the vehicle in any of [his] earlier property checks around the businesses." He decided to turn around and pull behind the vehicle to "run its license plate and just see if maybe it was a local vehicle. Officer conceded that the vehicle was not violating any traffic laws, was not trespassing, speeding, or making any erratic movements, and was on a public street. Moreover, his check of the license plate showed that the vehicle was not stolen and was in fact a rental vehicle from nearby Charlotte. Nevertheless, at that point, Officer "decided to go ahead and do an investigatory traffic stop on [the vehicle] to find out what they were doing in that location.

State v. Murray, 192 N.C. App. 684 (2008)

- …By his own admission, at the time Officer Arthur stopped the vehicle, he had "no reason to believe" that its occupants were engaged in any unlawful activity…Officer Arthur never articulated any specific facts about the vehicle itself to justify the stop; instead, all of the facts relied on by the trial court in its conclusions of law were general to the area, namely, the "break-ins of property at Motorsports Industrial Park . . . the businesses were closed at this hour . . . no residences were located there . . . this was in the early hours of the morning," and would justify the stop of any vehicle there.
- Officer Arthur's stop of the vehicle was based only on his "unparticularized suspicion or hunch" and does not meet the minimal level of objective justification necessary for an investigatory traffic stop….To hold otherwise would make any individual in the Motorsports Industrial Park "subject to arbitrary invasions solely at the unfettered discretion of officers in the field." *Brown*, 443 U.S. at 51, 61 L. Ed. 2d at 362.

Factors Considered for Reasonable Suspicion

- Factors relevant in determining whether a police officer had reasonable suspicion include: (1) nervousness of an individual (State v. McClendon, 350 N.C. 630, 639, 517 S.E.2d 128, 134 (1999)); (2) presence in a high crime area (Illinois v. Wardlow, 528 U.S. 119, 124, 120 S. Ct. 673, 145 L. Ed. 2d 570, 576 (2000)); and (3) unprovoked flight (Id. at 125, 145 L. Ed. 2d at 577). "None of these factors, standing alone, are sufficient to justify a finding of reasonable suspicion, but must be considered in context." *State v. Roberts*, 142 N.C. App. 424, 429, 542 S.E.2d 703, 707 (2001). Additionally, refusal to cooperate, "'without more, does not furnish the minimal level of objective justification needed for a detention or seizure.'" *Id.* at 429, n.1, 542 S.E.2d at 707, n.1 (citations omitted). Also, "[t]he facts known to the officers at the time of the stop [or seizure] 'must be viewed through the eyes of a reasonable and cautious police officer on the scene, guided by experience and training.'" *State v. McDaniels*, 103 N.C. App. 175, 180, 405 S.E.2d 358, 361 (1991) (quoting *State v. Harrell*, 67 N.C. App. 57, 61, 312 S.E.2d 230, 234 (1984)). In short, an officer's belief that criminal activity may be afoot must be based on objective, articulable facts. See, e.g., *Brown v. Texas*, 443 U.S. 47, 51, 99 S. Ct. 2637, 61 L. Ed. 2d 357, 362 (1979).
  - *In re I.R.T*, 184 NC. App. 579 (2007)

Reasonable Suspicion: Tips

State v. Johnson, 204 N.C. App. 259 (2010)

- **Anonymous Tips**
- Where the justification for a warrantless stop is information provided by an anonymous informant, a reviewing court must assess whether the tip at issue possessed sufficient indicia of reliability to support the police intrusion on a detainee's constitutional rights. *Illinois v. Gates*, 462 U.S. 213, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983). Courts have repeatedly recognized, as a general rule, the inherent unreliability of anonymous tips standing on their own. *Alabama v. White*, 496 U.S. at 329, 110 L. Ed. 2d at 308 ("[A]n anonymous tip alone seldom demonstrates the informant's basis of knowledge or veracity[.]"). While an anonymous tip can provide an officer with reasonable suspicion to conduct a traffic stop, it must itself possess sufficient indicia of reliability, or it must be corroborated by the officer's investigation or observations.
- Similarly, *in State v. Peele*, 196 N.C. App. 668, 675 S.E.2d 682, disc. review denied, 363 N.C. 587, 683 S.E.2d 383 (2009)...the officer received a dispatch call indicating that a burgundy Chevrolet pickup truck was headed toward the Holiday Inn intersection and was "a possible careless and reckless, D.W.I." The officer arrived at the intersection within a second and saw a truck that matched the description dispatch had provided. The officer followed the truck for approximately one-tenth of a mile and observed it weave once within its lane of travel. *Id*. at 669-70, 675 S.E.2d at 684. This Court held that, while the caller accurately described the car's physical characteristics, the caller gave police no way to test his or her credibility.

State v. Johnson, 204 N.C. App. 259 (2010)

- **Anonymous Tips**
- Read together, *White, Hughes, and Peele* make clear that where an anonymous tip forms the basis for a traffic stop, the tip itself must exhibit sufficient indices of reliability, or it must be "buttressed by sufficient police corroboration." *Hughes*, 353 N.C. at 207, 539 S.E.2d at 630. The type of detail provided in the tip and corroborated by the officers is critical in determining whether the tip can supply the reasonable suspicion necessary for the stop. Where the detail contained in the tip merely concerns identifying characteristics, an officer's confirmation of these details will not legitimize the tip.
- Regarding this point, the Court in Hughes stated that an accurate description of a subject's readily observable location and appearance is of course reliable in this limited sense: It will help the police correctly identify the person whom the tipster means to accuse. Such a tip, however, does not show that the tipster has knowledge of concealed criminal activity. The reasonable suspicion here at issue requires that a tip be reliable in its assertion of illegality, not just in its tendency to identify a determinate person. *Hughes*, 353 N.C. at 209, 539 S.E.2d at 632 (quoting *Florida v. J.L.*, 529 U.S. 266, 272, 120 S. Ct. 1375, 146 L. Ed. 2d 254, 261 (2000)).

Case Update: *Navarette v. California* Slip Op. 12-9490 (April 22, 2014)

- A California Highway Patrol officer stopped the pickup truck occupied by petitioners because it matched the description of a vehicle that a[n anonymous] 911 caller had recently reported as having run her off the road.
- Outcome? Reasonable Suspicion of DWI even after Officer followed truck for 5 minutes and observed no traffic violations.
- Why is it reliable under a Totality of Circumstances Test?
  - The 911 call in this case bore adequate indicia of reliability for the officer to credit the caller's account. By reporting that she had been run off the road by a specific vehicle, the caller necessarily claimed an eyewitness basis of knowledge. The apparently short time between the reported incident and the 911 call suggests that the caller had little time to fabricate the report. And a reasonable officer could conclude that a false tipster would think twice before using the911 system, which has several technological and regulatory features that safeguard against making false reports with immunity.

State v. Maready, 362 N.C. 614 (2008)

- **Non-Anonymous Tips**
- Similarly, we give significant weight to the fact that the minivan driver approached the deputies in person and gave them information at a time and place near to the scene of the alleged traffic violations. She would have had little time to fabricate her allegations against defendant. Moreover, in providing the tip through a face-to-face encounter with the sheriff's deputies, the minivan driver was not a completely anonymous informant. It is inconsequential to our analysis that the officers did not actually pause to record her license plate number or other identifying information. Not knowing whether the officers had already noted her tag number or if they would detain her for further questioning, and aware they could quickly assess the truth of her statements by stopping the silver Honda, the minivan driver willingly placed her anonymity at risk. This circumstance weighs in favor of deeming her tip reliable.

PRESERVING THE RECORD

PRESERVING ERROR IN CRIMINALS TRIAL: A CHECKLIST

IDS Contract Counsel Training, June 27, 2014

Staples Hughes, Appellate Defender

THE BIG PICTURE

Preserving The Record For Appeal Is Part Of Your Job As Trial Counsel. It Is Part Of The Duty Of Loyalty And Competence You Owe Your Client. You Have To Take Affirmative Steps To Preserve The Record.

1. If you hear a colleague say any of the following things, he or she is completely wrong:

A. "They can save that for appeal." ***Nothing is saved unless you save it.***

B. "They can raise that in an MAR." ***If you know about "that," and it's on the record, and you don't do something at trial about it, it can't be raised in an MAR. Or an appeal. Or anything. It's gone.***

C. "They can raise that in federal court." ***If you didn't preserve it in state court, there's nothing to raise in federal court.***

☐ (Check off each box as you review this list before trial. It might help you remember.)

2. In sum: **NOTHING IS PRESERVED FOR APPELLATE OR POST-CONVICTION OR FEDERAL REVIEW UNLESS YOU PRESERVE IT AT Trial.** Nothing. So be paranoid. Be obsessive.

☐

3. **No, the appellate courts are NOT going to cut your client a break because it's a serious case.** It is emotionally and politically difficult for appellate court judges to grant relief. If you don't preserve the issues, appellate courts can and do get off the hook by defaulting issues.

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4. Yes, yes, you will tell the truth in post-conviction if you fouled the preservation up, **but it is extremely difficult to win an IAC claim in post-conviction. Preserve the issue for direct appeal.**

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5. **There is no conflict between trial strategy and preserving the record.**

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6. **IN SUM: GREAT TRIAL LAWYERS PRESERVE THE RECORD.**

☐

FUNDAMENTAL PRINCIPLES FOR PRESERVING EVIDENTIARY AND EVIDENCE-BASED ISSUES

I. You have to object or make a request. Sounds basic, but every opinion day in the North Carolina Court of Appeals, defendants lose because there was no objection or request.

A. An objection or request must be timely (but better late than never).

B. It must be specific. Just "Objection" won't do. Just "Because it's admissible, your Honor" won't do.

C. The objection or request must include constitutional grounds. **Never make an objection or request that does not state a constitutional ground.**

D. An objection must be reasserted consistently. You cannot give up on the objection, even if you have to make over and over and over -- when the same evidence comes in from one or multiple witnesses, you have to object again, or your client cannot raise the issue on appeal.

E. If the answer to an objectionable question is inadmissible for additional reasons, you have to object on the additional grounds.

F. If you lose a pre-trial motion to suppress or a pre-trial motion in limine, you must renew before the objection in front of the jury when the state tries to get the evidence in or the client can't raise the issue on appeal.

G. Forget Evidence Rule 103(a) [last paragraph]. State v. Tutt, 171 N.C. App. 518, 615 S.E.2d 688 (2005) (rule violates the N.C. Constitution). Accord, State v. Oglesby, 361 N.C. 550, 648 S.E.2d 819 (2007).

II. Why stating specific grounds REALLY MATTERS.

A. A general objection to the state's evidence, if overruled, is no good on appeal unless the evidence wasn't admissible for any reason, even a non-substantive reason like corroboration.

B. Likewise, you have to articulate specific reasons for admissibility of defense evidence, or that ground can't be argued on appeal.

C. If you don't assert a federal constitutional ground in an objection or your pitch for admissibility, appellate counsel can't argue it.

III. If the state's objection is sustained, you have to make an offer of proof to show what the evidence would have been. This sounds elementary, but counsel often forget to make offers of proof in the heat of battle.

A. Don't think the context will show what the witness would have said. It won't be obvious to the appellate court.

B. Don't rely on your own summary of what the evidence would have been unless you have to, that is, unless the judge makes you summarize it for the record, or unless there is some other good reason to summarize (e.g. the witness was taken to the hospital with a suspected heart attack when the judge wouldn't let him testify).

C. Best: get the witness to testify out of the jury's presence.

D. If the judge tells you to make your offer of proof later (e.g. "when we recess for lunch"), the burden's on YOU to bring it to the judge's attention again. No offer means no proof means no issue.

E. State that the evidence is admissible under a specific evidence rule or state law doctrine, and that exclusion violates the defendant's right to present a defense under the Fifth, Sixth, and Fourteenth Amendments. If you do not state the constitutional basis for admissibility, appellate counsel cannot argue that basis on appeal.

IV. <u>You Have To Get A Ruling on Your Objection.</u> If you don't insist on a ruling, your client will have no issue on appeal. Keep a list going of the things you have to do to preserve your objections, e.g. if the judge says you can put something on the record at a later time, make a note.

V. <u>CONSTITUTIONALIZE!</u>

A. Substantive issues and the prejudice standard are at stake.

B. Non-constitutional: the defendant has to show a reasonable possibility of a different result.

C. Constitutional: the state has to show harmlessness beyond a reasonable doubt.

D. If you don't raise it, the defendant can't argue it on appeal.

E. AGAIN, NEVER MAKE AN OBJECTION THAT DOES NOT STATE A CONSTITUTIONAL GROUND.

VI. Limiting Instructions Are Potentially Crucial.

A. Yes, of course the limiting instruction probably doesn't mean much to the jury. That's not the point. A limiting instruction restricts the legal relevance and use of evidence.

B. If you don't request a limiting instruction, the evidence can be used for any purpose. Without a limiting instruction, corroborative statements can be used for substantive purposes.

C. Remember to move pre-trial to excise non-corroborative or other objectionable parts of a "corroborative" statement. And renew denied objections before the jury.

D. The limiting instruction could be the difference between winning and losing a sufficiency or closing argument issue on appeal.

VII. Motions to Strike are Potentially Crucial.

A. If the prosecutor's question was OK, but the answer was objectionable, you must move to strike, stating specific grounds ("Move to strike the answer, hearsay, confrontation.") or the defendant cannot raise the issue on appeal (assuming the judge denies the motion to strike).

B. Be alert for the question that itself was objectionable. Object as soon as it is clear that the question itself is objectionable, and then move to strike the answer ("Move to strike, same grounds," or if the answer is inadmissible for additional reasons, "Move to strike, same grounds and inadmissible opinion, due process.").

C. Similarly, if the judge sustains your objection to a bad question, but the witness answers anyway, you must move to strike, or we cannot raise the issue on appeal.

D. You have to decide whether a cautionary instruction does more harm than good. If you don't ask, there's no issue on appeal.

VIII. Even if your objection was sustained and your motion to strike was granted, if what the jury heard was sufficiently catastrophic, ask that the jury be excused and <u>move for a mistrial</u>, asserting that the damage cannot be undone and is a violation of constitutional rights.

IX. And certainly, when your objection is overruled, and what the jury heard was sufficiently catastrophic, also move for a mistrial.

X. <u>MOVE TO DISMISS</u> AT THE END OF <u>ALL THE EVIDENCE</u> AS TO EVERY COUNT IN EVERY CASE, whether that's at the end of state's evidence or the defense evidence (or rebuttal, surrebuttal, etc.). You never know when you might have not perceived a problem with the state's proof. When all the evidence is in, move to dismiss. Every time. Here's as certain a way as possible to preserve insufficiency of the evidence and variance between the charge and the evidence (variance is NOT preserved by a motion to dismiss for insufficiency):

"Your Honor, the defense moves to dismiss each charge on the ground that the evidence is insufficient as a matter of law on every element of each charge to support submission of the charge to the jury, AND that submission to the jury would therefore violate the Fourteenth Amendment. Further, the defense moves to dismiss each charge on the ground that, as to each charge, there is a variance between the crime alleged in the indictment and any crime for which the state's evidence may have been sufficient to warrant submission to the jury, AND that submission to the jury would therefore violate the Fifth, Sixth, and Fourteenth Amendments."

[Then lay out specific insufficiency arguments, as well as specific variance arguments, if you have any]

[If you made specific insufficiency or variance argument, then REPEAT "But I want to reiterate, your Honor, the defense …"]

If the judge wants to debate some particular obviously-proven element of an offense, just say, "Your Honor, I am making this motion to preserve the issues of insufficiency and variance for appellate review and do not wish to be heard further." If the judge persists, just keep repeating the preceding sentence in a civil but bored manner.

If you move to dismiss at the end of the state's evidence, ask yourself if the prosecutor can fix his or her **problem.**

PRESERVING OTHER ISSUES BEFORE (AND MAYBE DURING) CLOSING ARGUMENT

I. Jury Instructions

A. Requests for instructions must be in writing. Write out what you want the judge to say. If it's in writing, it's preserved if the judge refuses to give it. As always, assert constitutional grounds (right to due process, to make a defense, to confront the evidence under the Fifth, Sixth, and Fourteenth Amendments).

B. If it's a pattern instruction, submit the request in writing, quoting the text of the pattern instruction.

C. Oral requests are void. Oral requests are void. Oral requests are void. If denied, they don't preserve anything. If the judge strays from the oral request, the defendant has no issue on appeal.

D. If you know something objectionable is coming, make your objection in writing. If not, an oral objection during the charge conference is sufficient to preserve the issue.

E. Insist that the judge commit in writing to the precise words he or she is going to use so you can have an adequate opportunity to lodge specific objections.

II. When something "non-verbal" and prejudicial happens in the courtroom, put it on the record, and move for whatever corrective action is appropriate.

A. What needs to be stated for the record, or filed with the clerk, or put into evidence outside the presence of the jury so that someone reading the transcript and looking at the court file will understand?

B. Could be displays of emotion by spectators.

C. Could be actions of the prosecutor (e.g. yelling on cross, pointing at a particular juror in argument, intimidation of a witness when standing at the witness stand).

D. Could be the shackling of the client, particularly if the judge refuses a hearing on necessity.

E. Etc. etc. etc. etc. etc.

III. State on the record with the jury absent what happened at significant bench conferences.

IV. If something bad happens outside the courtroom (prejudicial contact with jurors, for instance), insist on an evidentiary hearing. If the judge denies an evidentiary hearing, put on the record your summary of the facts you know. Consider moving for a mistrial if whatever happened cannot be cured by a less drastic remedy.

V. Get audiovisual presentations (e.g. Powerpoint) in the record (copies of the slides and the name of the software). Get a picture of other visual aids used by the prosecution in the record (e.g. a diagram a witness makes on a whiteboard). Have copies of audio and video recordings filed with the clerk of court. If possible, make indices of the portions played before the jury if the whole recording isn't played.

VI. Jury Selection: Trial Strategy Comes First

A. Fight tooth and nail for the questions you want to ask.
B. Constitutionalize the adverse rulings.
C. Under current law, restrictions on questioning are not preserved unless you exhaust peremptory challenges.
D. Don't worry about the current law – don't exhaust peremptory challenges to preserve the issue if you will lose good jurors or open yourself up to bad prospective jurors.
E. Don't exhaust peremptories to preserve denied cause challenge if you will lose a good juror or open yourself up to bad prospective jurors.
F. Preserving the denied cause challenge:
    1. You **must** peremptorily excuse the juror **unless** you are already out of peremptory challenges.
    2. If you are out of peremptory challenges when you make the cause challenge, state on the record that **you would excuse the juror if you had any peremptory challenges left**.
    3. When you exhaust peremptories, **you must** renew the previous cause challenge and have it denied.

VII. BATSON

A. The race or ethnicity and the gender of every prospective juror must be in the record.

B. Questionnaires can be the vehicle, but you must make them a part of the record.

C. Object if the judge does not find a prima facie case.

D. If the judge finds a prima facie case or asks the prosecutor for an explanation or the prosecutor volunteers an explanation, ask for an opportunity to rebut.

E. Renew previous Batson objections when making subsequent Batson objections.

F. Renew all Batson objections at the end of jury selection.

G. Have a copy of State v. Barden, 362 N.C. 277, 279-80, 658 S.E.2d 654 (2008), the core of which is as follows:

"On remand, a judge presiding over a criminal session shall consider the voir dire responses of prospective juror Baggett and those of Teresa Birch, a white woman seated on defendant's jury, in light of *Miller-El v. Dretke*, 545 U.S. 231, 125 S. Ct. 2317, 162 L. Ed. 2d 196 (2005), *Rice v. Collins*, 546 U.S. 333, 163 L. Ed. 2d 824, 126 S. Ct. 969 (2006), *Snyder v. Louisiana*, 552 U.S. ___, 128 S. Ct. 1203, L. Ed. 2d (2008), cases decided after defendant's prior *Batson* hearing. The State shall have an opportunity to offer race-neutral reasons for striking juror Baggett while seating juror Birch. The court should determine whether these explanations are race-neutral under the framework set forth in these United States Supreme Court decisions, which were not available to it at the time of the 2003 hearing. If the court upholds the strikes after this new hearing under *Batson* in light of *Snyder*, *Rice*, and *Miller-El*, the defendant's sentence will stand. If not, he is entitled to a new trial."

H. The big point is that the Supreme Court of North Carolina has now approved comparative analysis of the prosecutor's exercise of a peremptory against a black juror when a very similar white juror was not struck.

VIII. Get times in the record, e.g.:

A. How long did jurors deliberate, accounting for recesses, reinstruction, lunch, etc.?
B. How long did jurors take looking at prejudicial photographs?
C. Even how long did a witness sit in silence after you posed the crucial question?

☐

IX. Make sure the judge has jury notes placed in the court file.

☐

X. Use jury selection to let jurors know the lawyers may be objecting during the trial.

A. They have all watched TV.
B. If you are doing your job, most of them will like you.
C. They can stand some drama, just be civil and professional when making objections.

☐

XI. ***GET COMPLETE RECORDATION*** – have opening statements and closing arguments recorded in every trial, capital or non-capital, misdemeanor or felony. Get jury selection recorded in non-capital trials. G.S. §15A-1241 gives you the **right** to complete recordation upon request. Why should you get complete recordation?

A. Error may occur in unrecorded portions of the trial and your efforts to preserve it may be lost. It is difficult for trial counsel to accurately reconstruct what happened just minutes before if it was not recorded. It is extremely difficult for appellate counsel to reconstruct what happened. An unfair judge may try to factfind the issue away. It is better for the truth of what happened to be contemporaneously recorded.
B. Recordation may be a deterrent to improper conduct.
C. In particular, improper argument by prosecutors is lost if it is not recorded.
D. Knowing that the prosecutor emphasized inadmissible evidence in closing argument may be crucial on appeal to demonstrate prejudice. If the prosecutor did not emphasize inadmissible evidence, we can live with the truth.

E. Having all portions of the trial recorded clarifies for the appellate court what the theories of the prosecution and the defense were and short-circuits speculation by both sides on appeal.

XII. Here is the relevant part of the statute:

§ 15A-1241. Record of proceedings.

(a) The trial judge must require that the reporter make a true, complete, and accurate record of all statements from the bench and all other proceedings except:

(1) Selection of the jury in noncapital cases;

(2) Opening statements and final arguments of counsel to the jury; and

(3) Arguments of counsel on questions of law.

(b) **Upon motion of any party** or on the judge's own motion, proceedings excepted under subdivisions (1) and (2) of subsection (a) **must be recorded.** The motion for recordation of jury arguments must be made before the commencement of any argument and if one argument is recorded all must be. Upon suggestion of improper argument, when no recordation has been requested or ordered, the judge in his discretion may require the remainder to be recorded.

(emphasis added)

XIII. OBJECT TO IMPROPER JURY ARGUMENT!

A. Appellate counsel regularly read objectionable closing argument of prosecutors where there is no objection by defense counsel. Object to bad argument. Object Object Object.

B. **"Although he did not object at the time, defendant now argues that the argument by the prosecutor was grossly improper. Where a defendant fails to object, an appellate court reviews the prosecutor's arguments to determine whether the argument was so grossly improper that the trial court committed reversible error in failing to intervene ex mero**

motu to correct the error. Only an extreme impropriety on the part of the prosecutor will compel this Court to hold that the trial judge abused his discretion in not recognizing and correcting ex mero motu an argument that defense counsel apparently did not believe was prejudicial when originally spoken."

C. [from a recent decision, which sounds like many other decisions]

D. To sum up, no objection = *ex mero motu* standard of review = defendant loses.

E. Pre-argument motions to prohibit bad argument are fine for whatever deterrence value they may have, but they do not preserve objections to bad argument. You have to object when the bad argument is made to the jury.

F. Specifically, if the prosecutor has a reputation for improper argument, file a motion before argument asking for a ruling prohibiting what he does, tailored to the specific facts of the case (e.g. name-calling, using evidence outside the purpose for which it is admitted). Whether or not the judge denies your motion in whole or in part, YOU MUST OBJECT DURING THE ARGUMENT TO THOSE PARTS THAT ARE OBJECTIONABLE. Otherwise the appellate court will hold, and at gut level feel, that you have waived the argument.

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XIV. LISTEN DURING THE PROSECUTOR'S CLOSING. Another point that sounds obvious, but you may be emotionally and physically drained at the end of the trial and it may be hard to stay focused on what the prosecutor is doing. ***TAKE NOTES DURING CLOSING ARGUMENT TO KEEP YOU FOCUSED.***

Further, if the prosecutor is doing something objectionable, for instance getting up in the defendant's face during closing argument, you must object and ***state for the record*** what happened. Remember constitutional grounds – bad prosecutorial argument is always a due process violation and may violate the constitution in other ways.

☐

XV. What are you listening for? What follows are general categories of objectionable argument.

A. Something that wasn't in evidence. DA just makes it up or talks about evidence that was excluded outside the presence of the jury.

B. Jail conditions: televisions, weight rooms, three hots and a cot at taxpayer expense. This argument is likely not supported by evidence and deprives the defense of the opportunity to confront such argument with evidence of the reality of life in prison. If the argument is not sustained, ask off the record for a recess and to reopen the evidence and for a continuance to prepare evidence of an accurate picture of life in prison.

C. Arguing evidence that was struck or to which an objection was sustained.

D. Any comment on the defendant's "failure" to testify, particularly cast as a right that the defendant has that the jury should not hold against him.

E. Any comment based on assertion of a privilege or constitutional right.

1. e.g. marital privilege ("Where's his wife if he didn't do it? Why didn't she testify?");
2. e.g. right to silence ("Don't you know if he wasn't there, he would have told the police about this silly alibi.");
3. e.g., again, the testimonial privilege ("Now, the defendant has the right not to testify.").

F. The DA's personal opinion ("I think he was lying." "I don't believe a word of what he said."). In particular, watch out for, "This is the worst case that has ever come before a jury in this county." (Again, ask to reopen the evidence.).

G. Name calling and mud-slinging. ("Animal." "Liar." "Not a human being." "Child of Satan." "S.O.B.") Etc. etc. etc.

H. References and comparisons to historic monsters ("He's the same as Hitler."), or monstrous historical events ("Oklahoma City," "Columbine.").

I. Evidence argued for a purpose outside the basis for its admission into evidence. The classic is arguing a conviction admitted for impeachment as character evidence ("Anyone convicted of breaking into another person's house is the same kind of person that would kill them once there are in there.").

J. "The community demands that you convict this defendant," and similar arguments that society demands a conviction because of a generalized problem (gang violence, domestic violence, impaired driving).

K. Unsupported assertions of characteristics of a class of cases ("In the penalty phase of a capital case, they always put on the mama to tell us what a bad, bad man daddy was.").

L. Guilt based on previous proceedings (arrest, probable cause hearing, grand jury proceedings, prosecutor's decision to try the case).

M. The guilt or guilty plea of a co-defendant as evidence of guilt of the defendant on trial.

N. Arguing <u>the facts</u> of appellate decisions (usually OK to argue and quote relevant statutes and case law).

O. Intimations that appellate review will fix any mistakes the jury makes.

P. Intimations that the judge wouldn't have let evidence in unless it was trustworthy.

Q. Addressing jurors personally ("Ms. Adams, can you put him where he belongs? Mr. Smith can put him where he belongs?" etc. etc.

R. "It could have been you, Mr. Adams," or "It could have been any one of you," i.e. putting jurors in the place of the victim.

S. Personal attacks on defense counsel's integrity or veracity.

T. Argument based on ethnicity ("Welcome to America, Mr. Hernandez.") or economic status ("You are paying for his public defender, folks.") or any other general characterization based on some group classification.

U. In particular, watch out for argument about experts being paid for with the jurors' and other citizens' taxes.

GENERALLY, IF IT SEEMS UNFAIR OR WRONG OR VERY FAR OUT THERE, IT PROBABLY IS.

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XVI. *Do not object unless you think the argument is improper.* You cede the high ground and violate several ethical directives if you object to closing argument in bad faith. Be attentive; don't be stupid, unprofessional, and unethical.

☐

XVII. If the prosecutor in apparent bad faith makes a general objection to your proper argument, immediately move for the prosecutor to state the grounds. If you argue in good faith and the prosecutor argues in bad faith, the truth will be exposed before the jury if the judge is doing his or her job. If the judge is unfair, that unfairness will be exposed to the reviewing court.

XVIII. *If you think objecting to closing argument will alienate the jury, drop that thought.* Most jurors are probably going to like you. They all watch TV and enjoy some drama in the courtroom. They will just think you are being a lawyer. If your objection is sustained, the prosecutor may suffer in their eyes. If the judge overrules your objection in a nasty way and you have maintained the high ground, the jury may count that in favor of your client. If you object and the client is convicted, you have preserved the error for appeal.

A. Make your objections to improper argument specific, e.g.:

1. "Objection, not in evidence, due process and confrontation."
2. "Objection, personal opinion, due process, confrontation."
3. "Objection to comment on silence, Fifth, Sixth, and Fourteenth Amendments, due process."

B. If the judge orders you not to make specific objections to bad argument before the jury, fine, keep a list going, and after argument is over and before the jury is instructed, ask for a hearing to flesh out the basis for your objections, qualifying your objections by saying you may have missed grounds given the court's prohibition against specific contemporaneous objections.

C. In this hearing, remember to constitutionalize your objections. State specifically that you contend that the improper argument violated your client's right to a fair trial and to due process of law under the fifth, sixth and fourteenth amendments.

D. Move for a mistrial as appropriate, <u>but only if you want one</u>.

SOME SUGGESTIONS FOR PRESERVING SPECIFIC GROUNDS, AND, IN PARTICULAR, CONSTITUTIONAL GROUNDS

These suggestions are strategies to try to make preservation as efficient as possible. Some judges will make things difficult. The important thing is that you do everything you can toward the goal of full preservation.

I. **The first time you encounter a particular category of objectionable evidence** that has not been the subject of a motion to suppress or motion in limine, consider asking to be heard outside the jury "on a matter of law." If the judge rules against you after you have fully argued the grounds, then after that state the grounds in summary fashion, e.g.: "Objection: relevance, due process, hearsay, confrontation."

II. **What if the judge yells at you for making specific objections before the jury, for example: You -- "Objection, relevance, due process, hearsay, confrontation." Judge – "*DON'T DO THAT COUNSELOR!"***

A. Keeping it up and letting him or her yell at you again and perhaps find you in contempt is an option, but probably not a good option. Requesting out of the presence of the jury that the judge declare that he or she will find you in contempt if you keep it up is a good option. The judge will either say you will be in contempt, and then you are good shape, or will back off.

B. Consider broaching the issue pre-trial, and explaining the necessity to make specific objections.

C. **The judge cannot relieve you of the necessity to make specific objections.**

D. If the judge prohibits you from making specific objections in the presence of the jury, you still need to keep a list and try to make them outside the presence of the jury. Do this at the earliest opportunity after the ruling in question, stating all grounds. Again, no objections without a paired constitutional basis. And, again, qualify that the judge's prohibition against specific contemporaneous objections may have caused you to miss a ground, because you had to keep listening.

III. **What if the judge says, "Fine, make your specific objections."**

A. Make them.

B. Again, always associate non-constitutional bases with constitutional bases. The most common associations are laid out on the last pages of this manuscript.

C. What about something that comes in as the result of the denial of a motion to suppress or motion in limine? Simply say, "Renew the motion on previously stated grounds," assuming that the pretrial motion stated all grounds. State applicable additional grounds not specified in a motion in limine. AND, renew the objection to each question that elicits testimony that was the subject of a pre-trial motion.

IV. **What about line objections?**

A. <u>WATCH OUT. POTENTIAL TRAP.</u>

B. <u>There is case law that throws doubt on the validity of line objections in criminal cases.</u>

C. Even assuming that line objections are valid, you must state specific grounds up front, just as with any objection.

D. Even assuming that line objections are valid, and that you state specific grounds up front, any objectionable testimony outside the line objection (that is, that is objectionable for a different or additional reason than initially stated) must be the subject of an additional objection.

E. For instance, if the line objection is hearsay/confrontation, and something that is completely irrelevant and prejudicial comes in during what otherwise is within the parameters of the line, you have not preserved the relevancy bases for objecting, and we lose that ground on appeal.

F. A line objection made at the time of the denial of a pre-trial motion IS CLEARLY NO GOOD. You must make the objection at trial.

G. **<u>All things considered, don't rely on line objections.</u>**

COMMON RELATED GROUNDS FOR TRIAL OBJECTIONS

I. If something is **unfair**, it violates **due process of law**. **Anything admitted in violation of a North Carolina Rule of Evidence, or statute, or case law is unfair.**

What you say when you object: "Objection, (state Rule of Evidence or doctrine it embodies) and due process**.**"

II. Include in all **hearsay** objections a **confrontation** objection.

What you say when you object: "Objection, hearsay, confrontation."

III. Any impairment of your **right to put on evidence or argue admitted evidence for a permissible purpose**:

What you say to preserve the issue: "Your Honor this evidence is admissible (or this argument is permissible) under (state Evidence Rule or doctrine it embodies) and its exclusion violates the 5th, 6th and 14th Amendment right to make a defense."

IV. Anything that impairs **fair jury selection** or the **impartiality or bias of jurors** (including taints outside the courtroom from exposure to media, to other information outside the evidence, or to prejudicial opinions of other persons)**:**

What you say when you object: "Objection, 6th and 14th Amendments" or "Right to impartial Jury" or "Right to fair jury Selection."

Again, Never* Make *An Objection That Does Not Also State A Constitutional Ground.

For a couple of different takes on trial preservation of issues for appeal, go to the North Carolina Office of Indigent Defense Services website via the following link, and look under the "Preservation" heading**.**

http://www.ncids.org/Defender%20Training/Training%20Index.htm

MAKE SURE YOU HAVE GIVEN NOTICE OF APPEAL

(YOU MAY NOT HAVE)

Andrew DeSimone, Assistant Appellate Defender

1. Taking an Appeal to the Appellate Division; Easier Said Than Done

A. Following a Jury Trial

i. Oral Notice of Appeal

North Carolina Rule of Appellate Procedure 4(a)(1) states that a party may take an appeal by "giving oral notice of appeal at trial[.]" To do this properly, you must wait until after the trial court has rendered the judgment; notice of appeal before then is premature. Also, **DO NOT** think you are safe just because the judge knows you want to appeal and says something like, "enter notice of appeal" or "your appeal is noted." You, as defense counsel, should affirmatively state, "We enter notice of appeal." You also cannot enter oral notice of appeal after a trial has ended. For example, you **CANNOT** come back on the record the next day to enter oral notice of appeal. *State v. Alexander*, 2014 N.C. App. LEXIS 190 (N.C. Ct. App. Feb. 14, 2014) (unpublished) ("Although defendant attempted to give oral notice of appeal in open court the day after his trial ended, that notice was not effective and defendant has failed to timely appeal the judgment.")

ii. Written Notice of Appeal

Even if you did not give oral notice of appeal at the end of trial, you can file and serve a written notice of appeal in accordance with N.C. R. App. P. 4(a)(2). However, you must follow the requirements of this rule to a T. I have included a sample notice of appeal in the appendix. (App 11) In order to give proper written notice of appeal, you must:

a. Specify the party taking the appeal
b. Designate the judgment or order from which appeal is taken
c. Designate the court to which appeal is taken (the North Carolina Court of Appeals unless it is a death case)
d. Include a case caption with the appropriate County and case file numbers.
e. Sign the notice of appeal
f. File the notice of appeal with the clerk of superior court within 14 days after entry of the judgment or order

g. Serve the notice of appeal in accordance with Rule 26.

B. In a Case Involving Satellite-Based Monitoring (SBM)

Oral notice of appeal properly given after judgment has been rendered at the end of trial **DOES NOT COVER A SATELLITE-BASED MONITORING (SBM) ORDER**. Because our appellate courts have held that SBM proceedings are civil, even if conducted during sentencing, written notice of appeal is required. *State v. Brooks*, 204 N.C. App. 193, 194-95, 693 S.E.2d 204, 206 (2010). Therefore, **IN ADDITION** to your oral notice of appeal at trial, you **MUST** file a written notice of appeal of the SBM order. I have also included a sample written notice of appeal from an SBM order in the appendix. (App 12) If you are giving written notice of appeal from the judgment, you can include the SBM order as well as the judgment in one notice of appeal. (App 11)

C. A Suppression Order Following a Guilty Plea

To successfully appeal an order denying a motion to suppress following a guilty plea, you **MUST** do two things: (1) give the prosecutor and the court **NOTICE** of the defendant's intention to appeal the suppression order before plea negotiations are final, and (2) enter notice of appeal from the **JUDGMENT** rendered after the guilty plea, **NOT** from the denial of the motion to suppress.

i. Notice of Intent to Appeal a Suppression Order

Our appellate courts have held that "when a defendant intends to appeal from a suppression motion denial pursuant to G.S. 15A-979(b), he must give notice of his intention to the prosecutor and the court before plea negotiations are finalized or he will waive the appeal of right provisions of the statute." *State v. Reynolds*, 298 N.C. 380, 397, 259 S.E.2d 843, 853 (1979). To be absolutely safe, you should (1) inform the prosecutor of the intent to appeal the suppression order prior to the guilty plea hearing, (2) put it on the record during the guilty plea hearing that you intend to appeal the suppression order, and (3) include your intent to appeal the suppression order in the written transcript of plea. Compliance with this requirement is vital. In fact, failure to give notice of intent to appeal the suppression order before the plea cannot be remedied by appellate counsel filing a petition for writ of certiorari; the client is just out of luck. I have attached a sample written transcript of plea with a proper statement reserving the right to appeal the denial of a motion to suppress. (App 13)

ii. Notice of Appeal from the Judgment

Make sure that after pleading guilty, you give notice of appeal from the **JUDGMENT**, not from the denial of your motion to suppress. Even if you properly gave notice of intent to appeal the suppression order, failure to give notice of appeal from the trial court's judgment after the guilty plea will result in dismissal of the appeal. *See, e.g., State v. Miller*, 205 N.C. App. 724, 725, 696 S.E.2d 542, 543 (2010). Although this may seem silly, it is absolutely required to vest the appellate court with jurisdiction. In reality, all this means is that after the trial court has rendered the judgment following the guilty plea, you should say, "We enter notice of appeal."

DWI: ELEMENTS & MOTIONS PRACTICE

MOTIONS PRACTICE

Motions Practice

2014 Criminal Law Contractors Training
UNC - Chapel Hill School of Government
&
NC Office of Indigent Defense Services
June 27, 2014

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District Court Motions Practice

- Governed primarily by one statute: N.C.Gen. Stat. 15A-953.
- Motions in District Court should ordinarily be made at arraignment (usually at the outset of trial) or during the course of trial as appropriate.
- A written motion may be made prior to trial.
- With the consent of other parties and the district court judge, a motion may be heard before trial.

District Court Motions Practice

- Implied consent offenses have different rules:
  - Usually, defense must move to suppress evidence or dismiss charges prior to trial, even when the case is in district court (N.C. Gen. Stat. 20-38.6).
  - Court may summarily deny a motion to suppress made during trial where a defendant knows all facts material to the motion before trial, and fails to make the motion before trial (N.C. Gen. Stat. 20-38.6(d)).
  - If the defense discovers facts during trial that warrant a motion to suppress, then he/she may make the motion during trial.
  - Even though 20-38.6 does not require that motions be made in writing, the good practice is to file them in writing under the general rules of motions practice (N.C. Gen. Stat. 15A-951).

Motions Practice in Superior Court

- N.C. Gen. Stat. 15A-951 governs. Motions must:
  - Be made in writing (unless made during a hearing or trial);
  - State the grounds of the motion;
  - Set forth the relief or order sought;
  - Be served on the attorney of record for the opposing party;
  - Filed with the court; and
  - Have a certificate of service showing the date and method of service on the opposing party or the date or acceptance of service.

Superior Court Motions - Timing

- N.C. Gen. Stat. 15A-952 – Require the following motions to be made at or before the time of arraignment if a written request is filed for arraignment and if arraignment is held prior to the session of court for which the trial is calendared:
  - Motions to Continue;
  - Motions for change of venue under N.C. Gen. Stat. 15A-957;
  - Motions for special venire under N.C. Gen. Stat. 9-12 or 15A-958;
  - Motions to dismiss under N.C. Gen. Stat. 15A-955;
  - Motions to dismiss for improper venue;
  - AND…..

Superior Court Motions - Timing

- Motions addressed to the pleadings:
  - Motions to dismiss for failure to plead under N.C. Gen. Stat. 15A-924(e);
  - Motions to strike under N.C. Gen. Stat. 15A-924(f);
  - Motions for Bill of Particulars under N.C. Gen. Stat. 15A-924(b) or 15A-925;
  - Motions for severance of offenses, to the extent required under N.C. Gen. Stat. 15A-927;
  - Motions for joinder of related offenses under N.C. Gen. Stat. 15A-926(c).

Superior Court Motions - Timing

- **If a written request for arraignment is not filed, then**

  Motions to Continue;
  Motions for Special Venire;
  Motions to Dismiss under 15A-955; and
  Motions to Dismiss for Improper Venue

  must be filed no later than 21 days from the date of the return of the bill of indictment as a true bill (N.C. Gen. Stat. 15A-952(c).

Superior Court Motions - Timing

- **Failure to file the listed motions under the time requirements constitutes a waiver of the motion. The Court can grant relief from the waiver *except for the failure to move to dismiss for improper venue*.**
- **PRACTICE RULE – *ALWAYS FILE A REQUEST FOR ARRAIGNMENT!!!! ALWAYS!!!!* DO NOT RELY ON THE COURT GRANTING RELIEF FROM HAVING WAIVED THE MOTIONS!**

Superior Court Motions - Timing

- **When a motion is made before trial, the court in its discretion, may hear the motion before trial, on the date set for arraignment, on the date set for trial before a jury is impaneled, or during trial (N.C. Gen. Stat. 15A-952(f).**

Motions to Dismiss

- Governed by N.C. Gen. Stat. 15A-954(a)(1 – 10).
- Applicable to all criminal proceedings and can be made at any time:
  - Statute alleged to have been violated is unconstitutional;
  - Statute of limitations has run;
  - Denial of Speedy Trial under U.S and N.C. Constitutions;
  - Flagrant violation of constitutional rights;
  - Double Jeopardy;
  - Defendant previously charged with same offense in another NC jurisdiction and charge still pending;
  - Issue of law or fact essential to successful prosecution has been previously adjudicated in favor of the defendant in a prior action between the parties;
  - Court has no jurisdiction over the offense charged;
  - Defendant has been granted immunity by law from prosecution;
  - Pleading fails to charge an offense as provided in N.C. Gen. Stat. 15A-924(e).

Motions to Suppress Evidence

- Governed by Article 53 of the N.C. General Statutes (N.C. Gen. Stat. 15A-971 through 15A-980).
- N.C. Gen. Stat. 15A-973 addresses motions to suppress in district court:
  - Ordinarily made during the course of the trial;
  - May be made prior to trial;
  - Heard prior to trial only with the consent of the judge and the prosecutor.
  - *HOWEVER, BE MINDFUL OF DIFFERENT TIMING REQUIREMENTS FOR IMPLIED CONSENT OFFENSES! (N.C. Gen. Stat. 20-38.6)*

Motions to Suppress Evidence in Superior Court - Timing

- N.C. Gen. Stat. 15A-975 –
  - Must file a motion to suppress prior to trial.
  - Only two times a motion to suppress may be made in Superior Court during trial:
    - If the defense did not have a reasonable opportunity to make the motion before trial; OR
    - (N.C. Gen. Stat. 15A-975(b)) If a motion to suppress is allowed during trial and
      - The State failed to notify the defense sooner than 20 working days before trial of its intention to use evidence in question, and the evidence is
        - Evidence of a statement made by the defendant;
        - Evidence obtained by virtue of a search without a search warrant; or
        - Evidence obtained as a result of a search with a search warrant when the defendant was not present at the time of the execution of the search warrant.

Motions to Suppress Evidence in Superior Court - Timing

If the State gives notice, not later than 10 working days before trial, of its intention to use evidence, and if the evidence is of the kind listed in 15A-975(b), the defense may move to suppress the evidence only if the motion is made not later than 10 working days following receipt of the notice from the State.

Motions to Suppress Evidence in Superior Court - Timing

- **PRACTICE TIP – Prosecutors often provide letters/forms with discovery that contain the notice required by 15A-975(b). The notice will sometimes be buried in the text of the letter/form. When you receive letters/forms with discovery you must read them carefully and look for the notice, since that is what starts the clock ticking.**
- **PRACTICE TIP – In order to preserve the right to file a motion to suppress and to stop the notice clock, file a Motion to Extend Time to File Pre-trial Motions.**

Motions to Suppress Evidence in Superior Court - Requirements

- **N.C. Gen. Stat. 15A-977 – A motion to suppress filed before trial in superior court must:**
  - **Be in writing;**
  - **Be served on the State (a copy);**
  - **State the grounds upon which it is made;**
  - **Be accompanied by an affidavit containing the facts supporting the motion and the affidavit must be based on personal knowledge, or upon information and belief, if the source of the information and the basis of the belief are stated.**

Motions to Suppress Evidence in Superior Court - Hearing

- If the motion is not determined summarily, the judge must make a determination on the motion after a hearing and finding of facts.
- Testimony at the hearing must be under oath.
  - Great discovery opportunity;
  - You should have filed a motion for complete recordation;
  - If hearing is held well in advance of trial, consider requesting a copy of the transcript for trial;
  - Ask in your motion to suppress that the evidentiary hearing be held in advance of the trial.

Motions Related to the Trial

- Motion for Complete Recordation of All Proceedings (N.C. Gen. Stat. 15A-1241) - file it or suffer the wrath of Staples Hughes!
- Motion for Sequestration of Witnesses (N.C. Gen. Stat. 15A-2225).
- Motion for Court to Have Potential Jurors Note Their Race on the Record (essential for Batson purposes).

Motions Practice in Superior Court

- Always assert both the U.S. and N.C. Constitutions in your motions to preserve constitutional issues on appeal.
- For motions where evidentiary hearings are available, always request them in the prayer for relief.
- When in doubt check out the NC Public Defender Manuals (UNC-SOG); IDS motions bank (www.ncids.org).

STATE OF NORTH CAROLINA	**IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION**	
COUNTY OF WAKE	[redacted]	
STATE OF NORTH CAROLINA,	)	
	)	
vs.	)	**MOTION FOR SEQUESTRATION OF STATE'S WITNESSES**
[redacted]	)	
	)	
Defendant.	)	

NOW COMES the Defendant, [redacted] by and through the undersigned counsel, Maitri "Mike" Klinkosum, Attorney at Law, and hereby moves this Honorable Court, pursuant to N.C.Gen.Stat. § 15A-1225, the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, and Article 1 §§ 19 and 23 of the North Carolina Constitution, for an Order from this Court ordering the sequestration of all witnesses, other than the Defendant, outside of the courtroom until called to testify and instructing all witnesses not to discuss their testimony with other witnesses throughout the entirety of the trial. In support of the foregoing Motion, the Defendant would show unto the Court as follows:

1. The Defendant is an indigent charged in with one count each of Conspiracy to Traffic in Cocaine and Trafficking in Cocaine by possession.

2. Over periods of time, memories of eye-witnesses, as well as other witnesses, fade, and thereby increase the possibility that a witness, either consciously or unconsciously, may tailor testimony to fit the majority view or rely less on his or her own recollection and more on an unobserved or unremembered fact offered by another witness.

3. The Court can further ensure untainted testimony and the preservation of the Defendant's rights to Due Process and Equal Protection by sequestering witnesses outside the courtroom during the trial of these matters until their testimony is needed.

WHEREFORE, the Defendant respectfully prays unto this Honorable Court for an Order sequestering all witnesses, other than the Defendant, outside of the courtroom until called to testify and instructing all witnesses not to discuss their testimony with other witnesses throughout the entirety of the trial.

This the 12th day of July, 2013.

By:_____

Maitri "Mike" Klinkosum
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STATE OF NORTH CAROLINA	**IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION**
COUNTY OF WAKE	[redacted]
STATE OF NORTH CAROLINA	)
	) **MOTION FOR COMPLETE**
vs.	) **RECORDATION OF**
	) **ALL PROCEEDINGS**
[redacted]	)
	)
Defendant.	)

NOW COMES the Defendant, [redacted], by and through the undersigned counsel, Maitri "Mike" Klinkosum, Attorney at Law, and hereby moves this Honorable Court, pursuant to N.C.Gen.Stat. § 15A-1241(b), the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, and Article 1 §§ 19, 23, and 24 of the North Carolina Constitution, for an Order directing that all proceedings and any hearings and trials of the above-referenced matters be recorded, including, but not limited to, jury selection, opening statements, and closing arguments of counsel. In support of the foregoing Motion, the Defendant would show unto the Court as follows:

1. The Defendant is an indigent charged with one count each of Conspiracy to Traffic in Cocaine and Trafficking in Cocaine by Possession.

2. Because all aspects of a criminal trial encompass the constitutional rights of defendants, the interests of justice and the rights of the Defendant to due process, both substantive and procedural, would be best safeguarded by an Order directing that all parts of any hearings or trials in these matters be recorded.

WHEREFORE, the Defendant respectfully prays unto this Honorable Court to enter an Order pursuant to N.C.Gen.Stat. § 15A-1241(b) directing that all proceedings held in these matters be recorded.

This the 12th day of July, 2013.

By:_____

Maitri "Mike" Klinkosum
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STATE OF NORTH CAROLINA	**IN THE GENERAL COURT OF JUSTICE**
	SUPERIOR COURT DIVISION
COUNTY OF WAKE	[redacted]
STATE OF NORTH CAROLINA,	**)**
	)
vs.	**) MOTION FOR COURT TO NOTE**
	) RACE OF ALL POTENTIAL JURORS
[redacted],	**) EXAMINED FOR SELECTION**
	)
Defendant.	**)**

NOW COMES the Defendant, [redacted], by and through the undersigned counsel, Maitri "Mike" Klinkosum, Attorney at Law, and hereby moves this Honorable Court, pursuant to the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, Article 1 §§ 19 and 23 of the North Carolina Constitution, ***Batson v. Kentucky***, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), and ***Powers v. Ohio***, 499 U.S. 400, 111 S.Ct. 1364, 113 L.Ed.2d. 411 (1991), to adopt a procedure in the trial of these matters which ensures that the race of every potential juror be examined to perfect any future appellate record. In support of the foregoing Motion, the Defendant would show unto the Court as follows:

1. The Defendant is an indigent charged with one count each of Conspiracy to Traffic in Cocaine and Trafficking in Cocaine by Possession.

2. These matters are scheduled for trial beginning on July 22, 2013.

3. In order to have the record accurately reflect the proceedings in the trial of this matter, and in order to perfect any future appellate record in this case, it is absolutely essential that the race of every potential juror be noted for the record. A record of the race of every juror is necessary to preserve the defendant's rights under the Fifth, Sixth, Eighth and Fourteenth Amendments of the United States Constitution, Article I, §§ 19, 24 and 27 of the North Carolina Constitution, ***Batson v. Kentucky***, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986) and ***Powers v. Ohio***, 499 U.S. 400, 111 S.Ct. 1364, 113 L.Ed.2d. 411 (1991).

4. The North Carolina Supreme Court has held that a record must be made of the race of all potential jurors in order for appellate courts to properly review any ***Batson*** claims. *See* ***State v. Mitchell***, 321 N.C. 650 (1988) and ***State v. Brogden***, 329 N.C. 534 (1991).

5. Statements from defense counsel as to the race of the jurors is not sufficient and the North Carolina Supreme Court has expressly disapproved of the practice of having the court reporter attempt to record the race of every juror. ***Brogden***. The most reliable source concerning the race of any juror is the juror himself/herself.

6. In order to properly record the race of potential jurors, the Defendant would propose the following statement and inquiry to prospective jurors:

   Ladies and Gentlemen, as part of the Court's preliminary questions to you, in addition to asking to state your name and where you reside, the Court will ask you to provide us with the race and/or ethnic background with which you identify yourself. We do this for statistical purposes and, because the record of the jury selection proceedings is in written form only, without having you identify your race and/or ethnic background there will no record of that to which we can refer later if need be.

WHEREFORE, the Defendant respectfully prays unto this Honorable Court for the following relief:

1. That every potential juror be asked to identify his/her race/ethnic background. In order to provide an accurate record, this procedure must include every juror, including those excused for hardship by the court, for cause at the request of either party, by use of peremptory by either party and those jurors who actually are selected to serve;

2. The defendant requests that jurors race be asked his or her race as part the court's preliminary inquiry of the potential jurors at the beginning of jury selection; and

3. For such other and further relief to which the Defendant may be entitled and which the Court may deem just and proper.

This the 12th day of July, 2013.

By:_____

Maitri "Mike" Klinkosum
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Certificate of Service

This shall certify that a copy of the foregoing ***Motion for Court to Note Race of All Potential Jurors Examined for Selection*** was this day served upon the District Attorney by the following method:

_____ depositing a copy hereof in a postpaid wrapper in a post office or official depository under the exclusive care, custody, and control of the United States Postal Service, properly addressed to Office of the District Attorney at the following address:

__X__ by personally serving the Office of the District Attorney via hand delivery (***Assistant District Attorney*** [redacted]);

_____ by transmitting a copy via facsimile transmittal to the Office of the District Attorney; and/or

_____ by depositing a copy in the box for the Office of the District Attorney maintained by the Clerk of Superior Court.

This the 12th day of July, 2013.

By:_____

Maitri "Mike" Klinkosum
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Certificate of Service

This shall certify that a copy of the foregoing ***Motion For Complete Recordation of All Proceedings*** was this day served upon the District Attorney by the following method:

_____ depositing a copy hereof in a postpaid wrapper in a post office or official depository under the exclusive care, custody, and control of the United States Postal Service, properly addressed to Office of the District Attorney;

__X__ by personally serving the Office of the District Attorney via hand delivery (***Assistant District Attorney*** [redacted]);

_____ by transmitting a copy via facsimile transmittal to the Office of the District Attorney; and/or

_____ by depositing a copy in the box for the Office of the District Attorney maintained by the Clerk of Superior Court.

This the 12th day of July, 2013.

By:_____
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Certificate of Service

This shall certify that a copy of the foregoing ***Motion for Sequestration of State's Witnesses*** was this day served upon the District Attorney by the following method:

_____ depositing a copy hereof in a postpaid wrapper in a post office or official depository under the exclusive care, custody, and control of the United States Postal Service, properly addressed to Office of the District Attorney;

__X__ by personally serving the Office of the District Attorney via hand delivery (***ADA*** [redacted];

_____ by transmitting a copy via facsimile transmittal to the Office of the District Attorney; and/or

_____ by depositing a copy in the box for the Office of the District Attorney maintained by the Clerk of Superior Court.

This the 12th day of July, 2013.

By:_____

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