

**District Court Judges 2010 Fall Conference:
Felony and Misdemeanor Case Update
(includes cases decided through September 21, 2010)**

The following summaries are drawn from criminal case summaries prepared by Bob Farb and 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.

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I. Investigation Issues

A. Police Authority

Delegation of Police Power to Davidson College, a Religious Institution, Violated First Amendment; Defendant Charged with Impaired Driving after Stop by Davidson Police Officer Entitled to Suppression of Evidence

[*State v. Yencer*](#), __ N.C. App. __, __ S.E.2d __ (Aug. 17, 2010). A Davidson College Police Department officer who arrested the defendant for impaired and reckless driving had no authority to do so. Applying precedent, the court held that because Davidson College is a religious institution, delegation of state police power to Davidson’s campus police force pursuant to G.S. 74G was unconstitutional under the Establishment Clause of the First Amendment. Thus, the court reversed the trial court’s denial of defendant’s motion to suppress evidence resulting from her stop and seizure by the Davidson officer. The court “urge[d]” the North Carolina Supreme Court to grant a petition for discretionary review.

B. Reasonable Suspicion for Stop

- (1) Reasonable Suspicion to Stop After Officer Saw Tractor-Trailer Car Carrier Cross Line of Lane and Cross Back Over Fog Line Twice in Two Mile Stretch**
- (2) Sufficient Evidence of Possession Based on Defendant’s Power and Control of Vehicle**
- (3) Sufficient Evidence to Support Conviction for Maintaining a Vehicle**

[*State v. Hudson*](#), __ N.C. App. __, __ S.E.2d __ (Aug. 17, 2010). (1) An officer had reasonable suspicion to stop the defendant’s tractor-trailer car hauler after the officer observed the vehicle twice cross the center dividing lines of northbound lanes of I-95 and weave back over the fog line during a two-mile stretch of travel.

(2) There was sufficient evidence of constructive possession to sustain a conviction for possession with the intent to sell and deliver marijuana. The drugs were found in a vehicle being transported by a car carrier driven by the defendant. The court determined that based on the defendant’s power and control of the vehicle in which the drugs were found, an inference arose that he had knowledge of their presence. The vehicle had been under the defendant’s exclusive control since it was loaded onto his car carrier two days earlier and the defendant had keys to every car on the carrier. Although the defendant’s possession of the vehicle was not exclusive because he did not own it, other evidence created an inference of his knowledge. Specifically, he acted suspiciously when stopped (held his hands up, nervous, sweating), he turned over a suspect bill of lading, and he had fully functional keys for all cars on the carrier except the one at issue for which he gave the officers a “fob” key that prevented its user from opening the trunk housing the marijuana.

(3) The evidence was sufficient to support a conviction for maintaining a vehicle. Drugs were found in a vehicle being transported by a car carrier driven by the defendant. The evidence showed that the defendant kept or maintained the vehicle where the bill of lading showed that the defendant picked it

up and maintained possession as the authorized bailee continuously and without variation for two days. Having stopped to rest overnight at least one time during the time period, the defendant retained control and disposition over the vehicle and resumed his planned route with the car carrier.

Reasonable Suspicion Supported Stop of Vehicle Where Defendant was Driving on a Public Street while Using his Windshield Wipers but without Having his Taillights On

[*State v. Hopper*](#), __ N.C. App. __, __ S.E.2d __ (July 6, 2010). The trial court properly concluded that an officer had reasonable suspicion to believe that the defendant was committing a traffic violation when he saw the defendant driving on a public street while using his windshield wipers in inclement weather but not having his taillights on. The trial court's conclusion that the street at issue was a public one was supported by competent evidence, even though conflicting evidence had been presented. The court noted that its conclusion that the officer correctly believed that the street was a public one distinguished the case from those holding that an officer's mistaken belief that a defendant had committed a traffic violation is constitutionally insufficient to support a traffic stop.

For purposes of the traffic violation at issue, failure to activate taillights under G.S. 20-129, the term highway is defined by G.S. 20-4.01(13), not case law decided before enactment of that provision.

Based on State's Stipulation and Other Facts, Officer Did Not Have Reasonable Suspicion to Continue Detention of Defendant after Initial Stop

[*State v. Huey*](#), ___ N.C. App. ___, 694 S.E. 2d 410 (15 June 2010). An officer was looking for two robbery suspects. The state stipulated at the suppression hearing that he knew they were black males and about eighteen years old, with one suspect wearing a light colored hoodie and the other suspect wearing a darker hoodie. An officer stopped the defendant, who was wearing a light colored hoodie. The defendant presented a North Carolina identification card, which revealed he was fifty-one years old. The officer then ran a warrant check and arrested him on an outstanding arrest warrant. (Although the officer testified at the suppression hearing that he learned that the suspects were about eighteen years old only after he discovered the defendant's outstanding arrest warrant, the court ruled that the trial court was bound by the state's stipulation.) Even if the officer could not have known the defendant's age when he initially saw the defendant with his hoodie on, he should have been able to recognize that the defendant was much older than eighteen years of age when face to face with him. In any event, the court stated that as soon as the defendant provided his identification card with his birth date, the officer knew that the defendant did not match the descriptions of the suspects, and at that point the investigative stop should have ended because reasonable suspicion did not exist.

C. Miranda

- (1) No Plain Error in Admitting Defendant's Confession as There Was Ample Evidence to Support a Conclusion that the Defendant's English Skills Sufficiently Enabled Him to Understand the Miranda Warnings that were Read to Him.**
- (2) Evidence of Defendant's Alleged Involvement in Another Armed Robbery Properly Admitted under Rule 404(b) in Instant Armed Robbery Trial.**
- (3) Evidence Was Sufficient to Support Armed Robbery Conviction.**

[*State v. Mohamed*](#), __ N.C. App. __, __ S.E.2d __ (July 20, 2010).

Defendant took \$20 and a credit card from a man at a Greensboro carwash at gunpoint. Six minutes later, defendant used the credit card to buy cigarettes at a nearby gas station. The gas station attendant, who knew the name on the card was not defendant's name called the police. Defendant was arrested and interrogated at the police station. Defendant emigrated from Sudan and had been in the county less than six months at the time of his arrest. Defendant speaks Arabic and has a limited command of English. At the beginning of the interrogation, defendant requested an interpreter, but none was provided.

(1) The trial court did not commit plain error by failing to exclude the defendant's statements to investigating officers after his arrest. There was ample evidence to support a conclusion that the defendant's English skills sufficiently enabled him to understand the *Miranda* warnings that were read to him. Among other things, the defendant complied with an officer's instructions and wrote his confession in English. Defendant's command of English was sufficient to permit him to knowingly and intelligently waive his *Miranda* rights.

(2) Evidence of the defendant's involvement in another robbery was properly admitted under Rule 404(b). In both instances, the victims were robbed of their credit or debit cards by one or more handgun-wielding individuals with African accents, which were then used by the defendant to purchase gas at the same gas station within a very short period of time. The evidence was admissible to prove a common plan or scheme and identity. The court further held that the trial court did not abuse its discretion by failing to exclude the evidence under Rule 403.

(3) Evidence of robbery with dangerous weapon was sufficient to survive motion to dismiss. Court found substantial evidence that Defendant committed the crime under the doctrine of recent possession, which allows the jury to infer that the possessor of recently stolen property is guilty of taking it.

- (1) Trial court Did Not Err by Denying Defendant's Motion to Suppress under *Miranda*, Since Defendant Reinitiated Conversation with the Officer after Initially Invoking his Miranda Rights.**
- (2) Defendant May Not be Sentenced for Both Robbery and Possession of Stolen Property Taken During the Robbery.**

[*State v. Moses*](#), __ N.C. App. __, __ S.E.2d __ (July 20, 2010).

Defendant appealed convictions for robbery with a dangerous weapon, conspiracy to commit robbery, assault by pointing a gun and possession of stolen goods. The State's evidence established that defendant and an accomplice approached two people in the parking lot of a fast food restaurant shortly

after midnight. Defendant pulled out a gun and demanded money from the victims. One of the victims gave the robbers his mobile telephone and his wallet, which contained immigration papers and cash. The other victim called the mobile phone after the robbery and asked the person who answered for the immigration papers. She arranged, with the knowledge of the Durham police department, to meet in front of a store in Durham to pay money to retrieve the stolen items. Defendant was arrested when he arrived at the appointed time. Defendant was taken to police headquarters and advised of his *Miranda* rights by a police investigator. He indicated he did not wish to speak to the police without his attorney present, and the investigator ceased questioning. Defendant later reinitiated contact with the investigator who again advised defendant of his *Miranda* rights. Defendant waived those rights in writing and confessed to the robbery. Defendant moved to suppress his confession at trial on the basis that he did not initiate conversation with Investigator Anthony after he asserted his *Miranda* right to counsel. The trial court denied defendant's motion.

(1) The trial court did not err by denying the defendant's motion to suppress based on the trial court's unchallenged finding of fact that the defendant reinitiated conversation with the investigator. The trial court also found that defendant was not under the influence of any controlled substances, that defendant was not promised or threatened in any way and that defendant was again fully advised of his *Miranda* rights before he provided a statement.

(2) The appellate court vacated the defendant's judgment for possession of stolen goods, holding that a defendant may not be sentenced for both robbery and possession of stolen property taken during the robbery. The court extended the rule in *State v. Perry*, 305 N.C. 225 (1982), holding that a defendant may not be convicted of larceny and possession of the same property taken during the larceny, on the basis that larceny is a lesser included offense of armed robbery.

Juvenile's Statement Was Product of Interrogation and Her *Miranda* Rights Were Violated; Exclusionary Rule Did Not Apply Because Statement Was Not Coerced.

In Re L.I., ___ N.C. App. ___, ___ S.E.2d ___ (July 6, 2010). A juvenile's statement, made while in custody, was the product of interrogation and not a voluntary, spontaneous statement. The trial court thus erred by denying the juvenile's motion to suppress the statement, since the officer had not advised the juvenile of her rights under *Miranda* and G.S. 7B-2101(a). The juvenile was a passenger in a vehicle stopped by an officer. When the officer ordered the juvenile out of the vehicle, he asked, "[Where is] the marijuana I know you have[?]" After handcuffing and placing juvenile in the back of the patrol car, the officer told her that he was going to "take her downtown" and that "if [she] t[ook] drugs into the jail it[] [would be] an additional charge." The juvenile later told the officer that she had marijuana and that it was in her coat pocket. The court went on to hold that the trial judge did not err by admitting the seized marijuana. Rejecting the juvenile's argument that the contraband must be excluded as fruit of the poisonous tree, the court concluded that because there was no coercion, the exclusionary rule does not preclude the admission of physical evidence obtained as a result of a *Miranda* violation. Although the juvenile was in custody at the time of her statement and her *Miranda* rights were violated, the court found no coercion, noting that there was no evidence that the juvenile was deceived, held incommunicado, threatened or intimidated, promised anything, or interrogated for an unreasonable period of time; nor was there evidence that the juvenile was under the influence of drugs or alcohol or that her mental condition was such that she was vulnerable to manipulation.

D. Warrantless Searches

Officer Conducting Frisk of Drug Suspect Lawfully Seized Digital Scale from His Pocket Because Its Identity Was Immediately Apparent Without Manipulating It

[*State v. Morton*](#), ___ N.C. App. ___, 694 S.E. 2d 432 (15 June 2010). The court ruled, relying on *Minnesota v. Dickerson*, 508 U.S. 366 (1993), that an officer conducting a frisk of a drug suspect lawfully seized a digital scale from his pocket because its identity was immediately apparent without manipulating it. (Author's note: "immediately apparent" means the same as probable cause). The officer testified that scales are often used to weigh controlled substances before distribution.

Warrantless Search of Defendant's Car was Valid on Grounds of Consent even though Officer who Procured Consent by Speaking in Spanish was not Fluent in Spanish

[*State v. Meding*](#), ___ N.C. App. ___, ___ S.E.2d ___ (July 20, 2010). A warrantless search of the defendant's car was valid on grounds of consent. The court rejected the defendant's argument that his consent was invalid because the officer who procured it was not fluent in Spanish. The court noted that the defendant was non-responsive to initial questions posed in English, but that he responded when spoken to in Spanish. The officer asked simple questions about weapons or drugs and when he gestured to the car and asked to "look," the defendant nodded in the affirmative. Although not fluent in Spanish, the officer had Spanish instruction in high school and college and the two conversed entirely in Spanish for periods of up to 30 minutes. The officer asked open ended-questions, which the defendant answered appropriately. The defendant never indicated that he did not understand a question. The court also rejected the defendant's argument that his consent was invalid because the officer wore a sidearm while seeking the consent, concluding that the mere presence of a holstered sidearm does not render consent involuntary.

The defendant's waiver of *Miranda* rights was valid where *Miranda* warnings were given by an officer who was not fluent in Spanish. The officer communicated effectively with the defendant in Spanish, notwithstanding the lack of fluency. The defendant gave clear, logical, and appropriate responses to questions. Also, when the officer informed the defendant of his *Miranda* rights, he did not translate English to Spanish but rather read aloud the Spanish version of the waiver of rights form. Even if the defendant did not understand the officer, the defendant read each right, written in Spanish, initialed next to each right, and signed the form indicating that he understood his rights. The court noted that officers are not required to orally apprise a defendant of *Miranda* rights to effectuate a valid waiver.

Exigent Circumstances Existed for an Officer to Make a Warrantless Entry into the Defendant's Home

[*State v. Cline*](#), ___ N.C. App. ___, ___ S.E.2d ___ (July 20, 2010). Exigent circumstances existed for an officer to make a warrantless entry into the defendant's home to ascertain whether someone inside was in need of immediate assistance or under threat of serious injury. The officer was summoned after motorists discovered a young, naked, unattended toddler on the side of a major highway. The officer was able to determine that the child was the defendant's son with reasonable certainty and that the defendant resided at the premises in question. When the officer knocked and banged on front door, he received no response. The officer found the back door ajar. It would have taken the officer approximately two hours to get a search warrant for the premises.

Reasonable Suspicion to Justify Frisk Where Defendant Volunteered He Had Gun

[*State v. King*](#), __ N.C. App. __, __ S.E.2d __ (Aug. 17, 2010). An officer had reasonable suspicion to believe that the defendant was armed and dangerous justifying a pat-down frisk. Around midnight, the officer stopped the defendant's vehicle after determining that the tag was registered to a different car; prior to the stop, the defendant and his passenger had looked oddly at the officer. After the stop, the defendant held his hands out of the window, volunteered that he had a gun, which was loaded, and when exiting the vehicle, removed his coat, even though it was cold outside. At this point, the pat down occurred. The court rejected the defendant's argument that his efforts to show that he did not pose a threat obviated the need for the pat down. It also rejected the defendant's argument that the discovery of the gun could not support a reasonable suspicion that he still might be armed and dangerous; instead, the court concluded that the confirmed presence of a weapon is a compelling factor justifying a frisk, even where that weapon is secured and out of the defendant's reach. Additionally, the officer was entitled to formulate "common-sense conclusions," based upon an observed pattern that one weapon often signals the presence of other weapons, in believing that the defendant, who had already called the officer's attention to one readily visible weapon, might be armed.

II. Pretrial and Trial Procedure

A. Right To Counsel

Forfeiture of Right to Counsel at Trial Did Not Carry Over to Resentencing, Held after Successful Appeal for Which Defendant Was Represented by Counsel

[*State v. Boyd*](#), __ N.C. App. __, __ S.E.2d __ (July 20, 2010). Defendant's forfeiture of his right to counsel did not carry over to his resentencing, held after a successful appeal. To determine the life of a forfeiture of counsel the court adopted the standard for life of a waiver of counsel (a waiver is good and sufficient until the proceedings are terminated or the defendant makes it known that he or she desires to withdraw the waiver). Applying this standard, the court found that "a break in the period of forfeiture occurred" when the defendant accepted the appointment of counsel (the Appellate Defender) for the appeal of his initial conviction. The court noted in dicta that the defendant's statement at resentencing that he did not want to be represented and his refusal to sign a written waiver did not constitute a new forfeiture. Because the initial forfeiture did not carry through to the resentencing and because the trial judge did not procure a waiver of counsel under G.S. 15A-1242 at the resentencing, the defendant's right to counsel was violated.

No Abuse of Discretion in Denying Defendant's Request for Substitute Counsel where Defendant's Constitutional Rights Not Violated

[*State v. Covington*](#), __ N.C. App. __, __ S.E.2d __ (July 6, 2010). The trial court did not abuse its discretion by denying the defendant's request for substitute counsel where there was no evidence that the defendant's constitutional right to counsel was violated. The defendant waived the right to appointed counsel and retained an attorney. The day after the jury was impaneled for trial the defendant requested substitute counsel, asserting that counsel had not communicated enough with him, that the defendant was unaware the case would be tried that day, and that he had concerns about counsel's

strategy, particularly counsel's advice that the defendant not testify. None of these concerns constituted a violation of the defendant's constitutional right to counsel.

Error to Rule that Defendant Forfeited Right to Counsel

[*State v. Wray*](#), __ N.C. App. __, __ S.E.2d __ (Aug. 17, 2010). The trial court erred by ruling that the defendant forfeited his right to counsel. The defendant's first lawyer was allowed to withdraw because of a breakdown in the attorney-client relationship. His second lawyer withdrew on grounds of conflict of interest. The defendant's third lawyer was allowed to withdraw after the defendant complained that counsel had not promptly visited him and had "talked hateful" to his wife and after counsel reported that the defendant accused him of conspiring with the prosecutor and contradicted everything the lawyer said. The trial court appointed Mr. Ditz and warned the defendant that failure to cooperate with Ditz would result in a forfeiture of the right to counsel. After the defendant indicated that he did not want to be represented by Ditz, the trial court explained that the defendant either could accept representation by Ditz or proceed pro se. The defendant rejected these choices and asked for new counsel. When Ditz subsequently moved to withdraw, the trial court allowed the motion and found that the defendant had forfeited his right to counsel. On appeal, the court recognized "a presumption against the casual forfeiture" of constitutional rights and noted that forfeiture should be restricted to cases of "severe misconduct." The court held that the record did not support the trial court's finding of forfeiture because: (1) it suggested that while the defendant was competent to be tried, under *Indiana v. Edwards*, 554 U.S. 164 (2008), he may have lacked the capacity to represent himself; (2) Ditz had represented the defendant in prior cases without problem; (3) the record did not establish serious misconduct required to support a forfeiture (the court noted that there was no evidence that the defendant used profanity in court, threatened counsel or court personnel, was abusive, or was otherwise inappropriate); (4) evidence of the defendant's misbehavior created doubt as to his competence; and (5) the defendant was given no opportunity to be heard or participate in the forfeiture hearing.

B. Motions Practice

(1) Defendant's Motion to Suppress without Merit Where Not Made Before Trial as Required by G.S. 15A-975

(2) Defendant Opened Door to Cross-Examination of Defense Expert Regarding Prior Offense

(3) Sufficient Evidence that Offense occurred During Nighttime to Support Conviction of First-Degree Burglary

[*State v. Reavis*](#), __ N.C. App. __, __ S.E.2d __ (Sept. 21, 2010). (1) Defendant was convicted of first degree sex offense, first degree burglary, malicious maiming, attempted first degree rape, and common law robbery arising from an assault of a 95-year-old woman in her home. Defendant's motion to suppress his statement made during a police interview was untimely. The motion was not made until trial and there was no argument that the State failed to disclose evidence of the interview or statement in a timely manner.

(2) Defendant opened the door to the State's cross-examination of a defense expert regarding prior offenses. On direct examination, the defendant's psychiatric expert reviewed the defendant's history of mental illness, including mention of his time in prison in 1996 for robbery. Defense counsel presented evidence as to defendant's time in prison, the year of the crime, the type of crime, defendant's time on

probation, and a probation violation which returned him to prison. On cross-examination, the State questioned the expert about the defendant's time in prison, the defendant's previous "pleas which ultimately sent [defendant] to prison[,]” and the exact dates and times of the incidents, one of which led to the defendant's incarceration. The defendant raised no objection until the State presented police reports from the defendant's prior robbery conviction. Because the expert had testified about the robbery, the State could inquire into his knowledge of the events which led to the conviction.

(3) Although the victim's testimony tended to show that the crime did not occur at nighttime, there was sufficient evidence of this element where the victim called 911 at 5:42 am; she told police the attack occurred between 5:00 and 5:30 am; a crime scene technician testified that "it was still pretty dark" when she arrived, and she used a flashlight to take photographs; and the defendant stipulated to a record from the U.S. Naval Observatory showing that on the relevant date the sun did not rise until 6:44 am.

C. Other Procedural Issues

Trial Court Did Not Err in Denying Defendant's Motion to Require State to Disclose Confidential Informant's Identity

[*State v. Dark*](#), ___ N.C. App. ___, 694 S.E. 2d 502 (15 June 2010). The defendant was convicted of cocaine offenses involving a sale to an undercover officer set up with the assistance of a confidential informant. The defendant told the informant to come to a specific parking place at an apartment complex. The undercover officer drove there with the informant. The officer paid the defendant for crack cocaine and marijuana. The officer later identified the defendant in a photo lineup. The defendant did not offer evidence at trial. The court ruled that the trial court did not err in denying the defendant's motion to require the state to disclose the confidential informant's identity. Although the informant's presence and role in arranging the purchase was a factor favoring disclosure, the court agreed with the trial court's finding that the defendant did not show how the informant's identity could provide useful information for the defendant to clarify any contradiction between the state's evidence and the defendant's denial that he committed the offenses. Moreover, the informant's testimony was not admitted at trial. The testimony of the undercover officer and another officer established the defendant's guilt.

Trial Court Did Not Abuse its Discretion in Denying Continuance Because of Alleged Discovery Violation

[*State v. Ellis*](#), ___ N.C. App. ___, ___ S.E.2d ___ (July 20, 2010). The trial court did not abuse its discretion by denying the defendant's motion to continue because of the State's alleged discovery violation. Although the State provided the defendant with a copy of the robbery victim's pre-trial written statement and a composite sketch of the perpetrator based on the victim's description, the defendant argued that the State violated its continuing duty to disclose by failing to inform the defense of the victim's statement, made on the morning of trial, that she recognized the defendant as the robber when he entered in the courtroom. After the victim identified the defendant as the perpetrator, the defense moved to continue to obtain an eyewitness identification expert. Finding no abuse of discretion, the court relied, in part, on the timing of the events and that the defendant could have anticipated that the victim would be able to identify the defendant.

- (1) No Fatal Variance between a Forgery Indictment and Evidence Presented at Trial**
- (2) No Error in Joining Charges of Impersonating a Law Enforcement Officer and Felony Forgery that occurred in March 2006 with Charges of Impersonating a Law Enforcement Officer that Occurred in April 2006.**
- (3) Evidence Showing that Defendant Signed a Law Enforcement Officer's Name on Five North Carolina Uniform Citations Provided Sufficient Evidence of Forgery under G.S. 14-119.**
- (4) Trial Court Erred in its Jury Instructions for the Crime of Impersonating an Officer under G.S. 14-277(b), but Error was Harmless.**

State v. Guarascio, __ N.C. App. __, __ S.E.2d __ (July 20, 2010). (1) There was no fatal variance between a forgery indictment and the evidence presented at trial. The indictment charged the defendant with forgery of "an order drawn on a government unit, STATE OF NORTH CAROLINA, which is described as follows: NORTH CAROLINA UNIFORM CITATION." The evidence showed that the defendant, who was not a law enforcement officer, issued citations to several individuals. The court rejected the defendant's arguments that the citations were not "orders" and were not "drawn on a government unit" because he worked for a private police entity.

(2) The trial court did not err by joining charges of impersonating a law enforcement officer and felony forgery that occurred in March 2006 with charges of impersonating a law enforcement officer that occurred in April 2006. The offenses occurred approximately one month apart. Additionally, on both occasions the defendant acted as a law enforcement officer (interrogating individuals and writing citations for underage drinking), notified the minors' family members that they were in his custody for underage drinking, and identified himself as a law enforcement officer to family members. His actions evidence a scheme or plan to act under the guise of apparent authority as a law enforcement officer to interrogate, belittle, and intimidate minors.

(3) There was sufficient evidence of forgery under G.S. 14-119 when the evidence showed that the defendant signed a law enforcement officer's name on five North Carolina Uniform Citations.

(4) The trial court erred in its jury instructions for the crime of impersonating an officer under G.S. 14-277(b). The court noted that while G.S. 14-277(a) makes it a crime for an individual to make a false representation to another person that he is a sworn law enforcement officer, G.S. 14-277(b) makes it a crime for an individual, while falsely representing to another that he is a sworn law enforcement officer, to carry out any act in accordance with the authority granted to a law enforcement officer. Accordingly, the court concluded, a charge under G.S. 14-277(b) includes all of the elements of a charge under G.S. 14-277(a). The court further concluded that while NCPJI – Crim. 230.70 correctly charges an offense under G.S. 14-277(a), NCPJI – Criminal 230.75 "inadequately guides the trial court regarding the elements of [an offense under G.S. 14-277(b)] . . . by omitting from the instruction the ways enumerated in [G.S. 14-277(a)] and N.C.P.I. – Crim. 230-70 by which an individual may falsely represent to another that he is a sworn law enforcement officer." The trial court's instructions based on this pattern instruction were error, however the error was harmless.

Trial Court Did not Abuse its Discretion by Joining Charges of Felony Assault with a Deadly Weapon and Possession of Stolen Firearms.

State v. Peterson, __ N.C. App. __, __ S.E.2d __ (July 20, 2010). The trial court did not abuse its discretion by joining charges of felony assault with a deadly weapon and possession of stolen firearms. There was a sufficient transactional connection (a firearm that was the basis of the firearm charge was

used in the assault) and joinder did not prejudicially hinder the defendant's ability to receive a fair trial. Evidence of events leading up to the assault in question was relevant to complete the story of the crime.

- (1) Defense Counsel's Admission to the Jury of Defendant's Guilt without Obtaining Defendant's Express Consent was Per Se Ineffective Assistance of Counsel**
- (2) Trial Judge Committed Prejudicial Error with Respect to Instruction on Intent for Charges of Assault with a Deadly Weapon where Vehicle was Deadly Weapon**
- (3) Error, but not Plain Error, for Officers to Testify to their Lay Opinion that Defendant was At Fault**

[*State v. Maready*](#), __ N.C. App. __, __ S.E.2d __ (July 6, 2010). (1) Because defense counsel admitted the defendant's guilt to assault with a deadly weapon and involuntary manslaughter to the jury without obtaining the defendant's express consent, counsel was per se ineffective under *State v. Harbison*, 315 N.C. 175 (1985). A majority of the panel distinguished the United States Supreme Court's holding in *Florida v. Nixon*, 543 U.S. 175 (2004) (under federal law, when the defendant alleges ineffective assistance due to an admission of guilt, the claim should be analyzed under the *Strickland* attorney error standard), on grounds that *Nixon* was a capital case and the case before the court was non-capital. The majority further concluded that post-*Nixon* decisions by the North Carolina Supreme Court and the court of appeals required it to apply the *Harbison* rule.

(2) The trial judge committed prejudicial error with respect to its instruction on the intent element for the charges of assault with a deadly weapon, in a case in which a vehicle was the deadly weapon. In order for a jury to convict of assault with a deadly weapon, it must find that it was the defendant's actual intent to strike the victim with his vehicle, or that the defendant acted with culpable negligence from which intent may be implied. Because the trial court's instruction erroneously could have allowed the jury to convict without a finding of either actual intent or culpable negligence, reversible error occurred.

(3) It was error to allow officers, who were not proffered as experts in accident reconstruction and who did not witness the car accident in question, to testify to their opinions that the defendant was at fault based on their examination of the accident scene. The court stated: "Accident reconstruction opinion testimony may only be admitted by experts, who have proven to the trial court's satisfaction that they have a superior ability to form conclusions based upon the evidence gathered from the scene of the accident than does the jury." However, the court went on to find that the error did not rise to the level of plain error.

Trial Court Did not Abuse its Discretion by Denying the Defendant's Mistrial Motion Based on the Prosecutor's Closing Statement.

[*State v. Mills*](#), __ N.C. App. __, __ S.E.2d __ (July 20, 2010). The trial court did not abuse its discretion by denying the defendant's mistrial motion based on the prosecutor's closing statement. During closing arguments in this murder case, defense counsel stated that "a murder occurred" at the scene in question. In his own closing, the prosecutor stated that he agreed with this statement by defense counsel. Although finding no abuse of discretion, the court "remind[ed] the prosecutor that the State's interest in a criminal prosecution is not that it shall win a case, but that justice shall be done."

No Error in Failing to Conduct Evidentiary Hearing Regarding Defense Counsel's Prior Representation of Person in Crime Scene Videotape

[*State v. Choudhry*](#), __ N.C. App. __, __ S.E.2d __ (Aug. 17, 2010). Over a dissent, the court held that the trial court did not err by failing to conduct an evidentiary hearing concerning defense counsel's possible conflict of interest due to prior representation, in unrelated matters, of a person who appeared in a crime scene videotape. When the prosecutor brought the matter to the trial court's attention, the trial court conducted a hearing and fully advised the defendant of the facts underlying the potential conflict and gave him the opportunity to express his views. In light of this, the court held that the defendant waived any possible conflict of interest. The dissenting judge believed that the trial court's inquiry did not fully inform the defendant of the potential conflict of interest and that the defendant's waiver was not knowing, intelligent, and voluntary.

III. Evidence

A. Confrontation Clause

Lab Reports Improperly Admitted Where Notice and Demand Not Sent to Defendant, Who Was Pro Se

[*State v. Blackwell*](#), __ N.C. App. __, __ S.E.2d __ (Sept. 21, 2010). The court ordered a new trial in a drug case in which the trial court admitted laboratory reports regarding the identity, nature, and quantity of the controlled substances where the State had not complied with the notice and demand provisions in G.S. 90-95(g) and (g1). Instead of sending notice directly to the defendant, who was *pro se*, the State sent notice to a lawyer who was not representing the defendant at the time.

- (1) Defendant's Confrontation Clause Rights were Violated when the Trial Court Allowed a Substitute Analyst to Testify that Substance was Cocaine, Based on Testing Done and Reports Prepared by Non-Testifying Analysts**
- (2) Evidence Sufficient to Establish Offense of Keeping and Maintaining a Vehicle for Keeping and Selling Cocaine where Defendant Possessed Cocaine in Vehicle over a Duration of Time**
- (3) Two-year Delay in Sentencing Reasonable where Defendant Never Requested Sentencing**

[*State v. Craven*](#), __ N.C. App. __, __ S.E.2d __ (July 20, 2010). (1) Following *State v. Brewington*, __ N.C. App. __ (May 18, 2010) (trial court committed reversible error by allowing a substitute analyst to testify to an opinion that a substance was cocaine), the court held that the defendant's confrontation clause rights were violated when the trial court allowed a substitute analyst to testify that a substance was cocaine, based on testing done and reports prepared by non-testifying analysts. Even though the State had offered lay testimony by a cocaine user that the substance was cocaine, the court concluded that the error was not harmless beyond a reasonable doubt, reasoning that a lay opinion would not have the same effect on the jury as an expert opinion.

(2) The trial court did not err by denying the defendant's motion to dismiss felony charge of keeping and maintaining a vehicle for keeping and selling cocaine where the evidence was sufficient to establish that

the defendant had possession of cocaine in his mother's vehicle over a duration of time and/or on more than one occasion.

(3) The court had jurisdiction to enter judgment on a PJC. The defendant was indicted on August 7, 2006, and entered a guilty plea on January 22, 2007, when a PJC was entered, from term to term. Judgment was entered on March 13, 2009. Because the defendant never requested sentencing, he consented to continuation of sentencing and the two-year delay was not unreasonable.

B. Opinion Testimony

Trial Court Abused Discretion by Allowing State's Expert to Identify Pills as Controlled Substances Solely by Visual Examination Without Chemical Analysis of Any of the Pills—Ruling of Court of Appeals Is Affirmed

[*State v. Ward*](#), 364 N.C. 133, 694 S.E.2d 738 (17 June 2010), *affirming*, ___ N.C. App. ___, 681 S.E. 2d 354 (18 August 2009). The defendant was convicted of several controlled substance offenses involving different substances. The state's drug expert testified that he conducted chemical analyses of some of the substances—for example, cocaine and pills determined to be amphetamines. However, other pills allegedly containing other substances were identified solely by a visual examination of their appearance and pharmaceutical markings and a comparison of the information derived from that process to information contained in Micromedix literature used by doctors in hospitals and pharmacies to identify prescription medicines. The court ruled that the trial court abused its discretion in allowing the state's expert to identify these pills as controlled substances solely by visual examination without a chemical analysis of any of the pills. The expert's visual identification of the purported controlled substances was not sufficiently reliable under Rule 702.

The court made the following statements about its ruling. Unless the state establishes that another method of identification is sufficient to establish the identity of a controlled substance beyond a reasonable doubt, some form of scientifically valid chemical analysis is required. The ruling in this case is limited to Rule 702 and does not affect visual identification techniques used by law enforcement for other purposes, such as conducting criminal investigations. Moreover, common sense limits the scope of chemical analysis that must be performed. In this case, the state submitted sixteen batches of items consisting of over four hundred tablets to the SBI laboratory.

A chemical analysis of each individual tablet is not necessary. The SBI maintains standard operating procedures for chemically analyzing batches of evidence, and the propriety of those procedures were not at issue. A chemical analysis is required, but its scope may be dictated by whatever sample is sufficient to make a reliable determination of the chemical composition of the batch of evidence under consideration.

Officer's Opinion Testimony that Substances Were Marijuana Was Admissible

[*State v. Ferguson*](#), ___ N.C. App. ___, 694 S.E. 2d 470 (June 15, 2010). The defendant was convicted of two marijuana offenses. The court ruled, relying on *State v. Fletcher*, 92 N.C. App. 50 (1988) (officers with appropriate background properly offered opinion testimony that substance was marijuana), the

trial court did not err in allowing a law enforcement officer to testify that in his opinion the substances seized from a motor vehicle and the defendant's pocketbook were marijuana. The court stated that the decision in *State v. Llamas-Hernandez*, 363 N.C. 8 (2009) (reversing court of appeals ruling based on dissenting opinion, which stated that officer's opinion testimony that white powder was cocaine was inadmissible), did not cast doubt on the continuing validity of the *Fletcher* ruling.

C. Other Evidence Issues

No Plain Error in Admitting Photographs of the Victim's Body and Evidence of Defendant's Prior Bad Acts

State v. Blymyer, ___ N.C. App. ___, ___ S.E.2d ___ (July 6, 2010). The trial court did not commit plain error under Rules 401 or 403 by admitting photographs of the murder victim's body. The trial court admitted 28 photographs and diagrams of the interior of the home where the victim was found, 12 of which depicted the victim's body. The trial court also admitted 11 autopsy photographs. An officer used the first set of photos to illustrate the position and condition of the victim's body and injuries sustained. A forensic pathology expert testified to his observations while performing the autopsy and the photographs illustrated the condition of the body as it was received and during the course of the autopsy. The photographs had probative value and that value, in conjunction with testimony by the officer and the expert was not substantially outweighed by their prejudicial effect.

In a murder and armed robbery case, the trial court did not commit plain error by admitting 404(b) evidence that the defendant broke into and stole from two houses near the time of the victim's death. The evidence was relevant to illustrate the defendant's motive for stealing from the victim—to support an addiction to prescription pain killers.

State Properly Impeached Defendant with Prior Statements Rendered Inconsistent by Omission

State v. Smith, ___ N.C. App. ___, ___ S.E.2d ___ (Aug. 17, 2010). In this murder case, the defendant claimed that the child victim drowned in a bathtub while the defendant met with a drug dealer. Although the defendant gave statements prior to trial, he never mentioned that meeting. At trial, the State attempted to impeach him with this fact. The court noted that to qualify as inconsistent, the prior statement must have eliminated "a material circumstance presently testified to which would have been natural to mention in the prior statement." The court noted that the defendant voluntarily gave the police varying explanations for why the child stopped breathing (he threw up and then stopped breathing after falling asleep; he drowned in the tub). An alleged meeting while the child was in the tub would have been natural to include in these prior statements. Thus, the court concluded, his prior inconsistent statements were properly used for impeachment.

Information in a Police Department Database Linking Defendant's Name to Her Photograph Admissible under Rule 803(8) Public Records Hearsay Exception.

State v. McLean, ___ N.C. App. ___, ___ S.E.2d ___ (July 6, 2010). Information in a police department database linking the defendant's name to her photograph fell within the Rule 803(8) public records hearsay exception. After an undercover officer engaged in a drug buy from the defendant, he selected the defendant's photograph from an array presented to him by a fellow officer. The fellow officer then

cross-referenced the photograph in the database and determined that the person identified was the defendant. This evidence was admitted at trial. The court noted that although the Rule 803(8) exception excludes matters observed by officers and other law enforcement personnel regarding a crime scene or apprehension of the accused, it allows for admission of public records of purely ministerial observations, such as fingerprinting and photographing a suspect, and cataloguing a judgment and sentence. The court concluded that the photographs in the police department's database were taken and compiled as a routine procedure following an arrest and were not indicative of anything more than that the person photographed has been arrested. It concluded: "photographing an arrested suspect is a routine and unambiguous record that Rule 803(8) was designed to cover. Absent evidence to the contrary, there is no reason to suspect the reliability of these records, as they are not subject to the same potential subjectivity that may imbue the observations of a police officer in the course of an investigation."

(1) Blue Book and NADA Pricing Guide Fall within Rule 803(17) Hearsay Exception

(2) Permissible for Vehicle Owner to Testify Regarding Value of Stolen Vehicle

(3) Restitution Award Must be Supported by Evidence Adduced at Trial or Sentencing

[*State v. Dallas*](#), __ N.C. App. __, __ S.E.2d __ (July 6, 2010). (1) In a larceny of motor vehicle case, the court held that the Kelley Blue Book and the NADA pricing guide fall within the Rule 803(17) hearsay exception for "[m]arket quotations, tabulations, lists, directories, or other published compilations, generally used and relied upon by the public or by persons in particular occupations." Those items were used to establish the value of the motor vehicles stolen.

(2) In a larceny of motor vehicle case, the court rejected the defendant's argument that testimony by the vehicle owners regarding the value of the stolen vehicles invaded the province of the jury as fact-finder, stating: "the owner of property is competent to testify as to the value of his own property even though his knowledge on the subject would not qualify him as a witness were he not the owner."

(3) In a larceny of motor vehicle case, the restitution award was not supported by competent evidence. Restitution must be supported by evidence adduced at trial or at sentencing; the unsworn statement of the prosecutor is insufficient to support restitution. In this case, the trial court ordered the defendant to pay \$8,277.00 in restitution based on an unverified worksheet submitted by the State. However, the evidence at trial showed that the value of the stolen items was \$1,200.00 - \$1,400.00.

Error, But Not Plain Error, For State to Introduce Evidence of Defendant's Silence Before Being Given Miranda Warnings

[*State v. Mendoza*](#), __ N.C. App. __, __ S.E.2d __ (Aug. 17, 2010). Trial court erred by allowing the State to introduce evidence, during its case in chief, of the defendant's pre-arrest and post-arrest, pre-*Miranda* warnings silence. The only permissible purpose for such evidence is impeachment; since the defendant had not yet testified when the State presented the evidence, the testimony could not have been used for that purpose. Also, the State's use of the defendant's post-arrest, post-*Miranda* warnings silence was forbidden for any purpose. However, the court concluded that there was no plain error given the substantial evidence pointing to guilt.

No Abuse of Discretion in Excluding Evidence Proffered by the Defendant of a Co-Defendant's Hearsay Statement

[*State v. Choudhry*](#), __ N.C. App. __, __ S.E.2d __ (Aug. 17, 2010) Trial court did not abuse its discretion by sustaining the State's objection to a defense proffer of a co-defendant's hearsay statement indicating that he and the defendant acted in self-defense. The statement was not admissible under Rule 804(b)(3) (statement against interest exception). To be admissible under that rule, (1) the statement must be against the declarant's interest, and (2) corroborating circumstances must indicate its trustworthiness. As to the second prong, there must be an independent, non-hearsay indication of trustworthiness. There was no issue about whether the statement satisfied the first prong. However, as to the second, there was no corroborating evidence. Furthermore, the co-defendant had a motive to lie: he was friends with the defendant, married to the defendant's sister, and had an incentive to exculpate himself. Nor was the statement admissible under the Rule 804(b)(5) catchall exception. Applying the traditional six-part residual exception analysis, the court concluded that, for the reasons noted above, the statement lacked circumstantial guarantees of trustworthiness.

(1) No Abuse of Discretion in Murder Case to Allow State to Cross-Examine Defense Expert about a 2005 Murder

(2) No Error to Allow State to Impeach Defendant with Evidence Regarding Exercise of Right to Counsel

(3) Prosecutor Did Not Impermissibly Assert that Defendant Was Lying

(4) Prosecutor's Cross-Examination Mentioning Punishment Not Plain Error

(5) Sufficient Evidence of Premeditation and Deliberation to Support First Degree Murder Conviction

(6) Sufficient Evidence to Support Armed Robbery Convictions

[*State v. Ferguson*](#), __ N.C. App. __, __ S.E.2d __ (Sept. 21, 2010). (1) Under the rationale of *State v. Wallace*, 351 N.C. 481 (2000), the trial court did not abuse its discretion in a murder case by allowing the State to cross-examine the defendant's expert psychiatrist concerning a 2005 murder. At a pretrial hearing, the trial court held that the evidence was inadmissible. At trial, the defendant called the expert, Dr. Corbin, who opined that the victim's conduct triggered a traumatic reaction in defendant and that it was improbable that defendant intentionally planned the murder. On cross, the State examined Corbin concerning the 2005 homicide and why that murder was committed without the traumatic reaction that Corbin stated was caused by the victim's conduct. The court noted that as in *Wallace*, the issue was presented during the guilt-innocence phase; also, the prosecutor's questions pertained to the bases of the expert's opinion and were not solely designed to put the 2005 murder before the jury, the trial court's initial exclusion of the murder charges showed its awareness of the potential danger of undue prejudice, and in accordance with *Wallace*, the trial court gave a detailed limiting instruction to the jury. (2) The court rejected the defendant's argument that the trial court erred by allowing the prosecutor to impeach the defendant with evidence regarding his exercise of his right to counsel. The State cross-examined the defendant concerning whether he had talked to his attorneys, how many times he talked with them, whether they discussed his trial testimony, whether they discussed the strengths and weaknesses of his case, whether defendant changed his story after learning the difference in punishment for voluntary manslaughter and murder, and whether he understood the felony murder rule. The focus of the testimony was to show that the defendant changed his story to avoid the most serious consequences of his actions. Defense counsel made a general objection to the first question but did not lodge further objections. The court held that in the absence of a specific objection raising attorney-client privilege or a constitutional issue, the trial court did not abuse its discretion in overruling

defendant's objection. (3) Distinguishing *State v. Locklear*, 294 N.C. 210 (1978) (improper for a lawyer to assert that witness is lying), the court held that the prosecutor did not call the defendant a liar or state that he was lying. The defendant admitted lying during direct examination. On cross, the prosecutor asked the defendant how many people he had lied to. (4) Although the court found that the prosecutor's cross-examination mentioning potential sentencing ranges was "fraught with . . . dangers of misleading the jury," it did not rise to the level of plain error. (5) There was sufficient evidence to submit first-degree murder to the jury on the theory of premeditation and deliberation where the defendant made contradictory statements to the police following the killing, the defendant and the victim had a dispute over money related to prior drug dealings, and the defendant inflicted 79 stab wounds on the victim, attempted to conceal evidence, and stole the victim's motor vehicle. (6) The evidence was sufficient to establish armed robbery where the defendant's taking of the victim's vehicle following the murder was part of one continuous transaction. The evidence was sufficient to establish that the defendant intended to permanently deprive the victim of his property where the evidence showed that the defendant left the victim dead or dying in his apartment, stole his motor vehicle, and abandoned it at a car wash.

IV. Crimes

A. Generally

Sufficient Evidence of Malice to Support Second-Degree Murder Conviction Arising from Vehicle Accident

[*State v. Mack*](#), __ N.C. App. __, __ S.E.2d __ (Aug. 17, 2010). There was sufficient evidence of malice in a second-degree murder case involving a vehicle accident. The defendant, whose license was revoked, drove extremely dangerously in order to evade arrest for breaking and entering and larceny. When an officer attempted to stop the defendant, he fled, driving more than 90 miles per hour, running a red light, and traveling the wrong way on a highway — all with the vehicle's trunk open and with a passenger pinned by a large television and unable to exit the vehicle.

Sufficient Evidence of Stalking Based on Evidence that Defendant Sent Five Faxes to Victim and the First Four Did Not Contain a Direct Threat

[*State v. Wooten*](#), __ N.C. App. __, __ S.E.2d __ (Aug. 17, 2010). The evidence was sufficient to sustain a stalking conviction where it showed that the defendant sent five facsimile messages to the victim's workplace but the first four did not contain a direct threat. In this regard, the court noted, the case "diverges from those instances in which our courts historically have applied the stalking statute." Among other things, the faxes called the victim, Danny Keel, "Mr. Keel-a-Nigger," referenced the defendant having purchased a shotgun, and mentioned his daughter, who was living away from home, by first name.

Insufficient Evidence that Defendant Actually or Constructively Possessed Stolen Vehicle Found Parked on the Street in Front of Defendant's Residence

[*State v. Marshall*](#), __ N.C. App. __, __ S.E.2d __ (Aug. 17, 2010). In a possession of stolen property case, the trial court committed reversible error by instructing the jury on constructive possession. The property, a vehicle stolen from a gas station, was found parked on the street outside of the defendant's

residence. The defendant claimed that unknown to him, someone else drove the vehicle there. The State argued that evidence of a surveillance tape showing the defendant at the station when the vehicle was taken, the defendant's opportunity to observe the running, unoccupied vehicle, the fact that the vehicle was not stolen until defendant left the station, and the later discovery of the vehicle near the defendant's residence was sufficient to establish constructive possession. The court concluded that although this evidence showed opportunity, it did not show that the defendant was aware of the vehicle's location outside his residence, was at home when it arrived, that he regularly used that location for his personal use, or that the public street was any more likely to be under his control than the control of other residents. The court concluded that the vehicle's location on a public street not under the defendant's exclusive control and the additional circumstances recounted by the State did not support an inference that defendant had "the intent and capability to maintain control and dominion over" the vehicle. Based on the same analysis, the court also agreed with the defendant's argument that the trial court erred by denying his motions to dismiss as there was insufficient evidence that he actually or constructively possessed the stolen vehicle and by accepting the jury verdict as to possession of stolen goods because it was fatally inconsistent with its verdict of not guilty of larceny of the same vehicle.

Defendant May Be Convicted of Felonious Possession of Stolen Goods Although Jury Found Defendant Not Guilty of Breaking or Entering and Larceny of Same Goods—Ruling of Court of Appeals Is Reversed

[State v. Tanner](#), 364 N.C. 229, 695 S.E.2d 97 (17 June 2010), *reversing*, 193 N.C. App. 150 (7 October 2008). The defendant was indicted for felonious breaking or entering, felonious larceny, and felonious possession of stolen goods. The jury convicted the defendant of felonious possession of stolen goods but acquitted him of felonious breaking or entering and felonious larceny. The court noted its ruling in *State v. Perry*, 305 N.C. 225 (1982), that a defendant may not be convicted of felonious larceny if he was acquitted of breaking or entering on which the charge of felonious larceny was based. However, while a conviction of felonious larceny based on the theory of the larceny being committed pursuant to a breaking or entering requires that the defendant also be the perpetrator of (or have aided or abetted) a breaking or entering, this is not so with felonious possession of stolen goods, which only requires proof that the defendant knew or had reasonable grounds to believe that goods were stolen pursuant to a breaking or entering.

A jury's finding that a defendant did not take part in a breaking or entering but did possess stolen goods is not fatally contradictory as in *Perry*. The jury in this case could have found that the defendant knew the goods had been stolen pursuant to a breaking or entering based on the defendant's statements to an officer that the man who provided the stolen property to the defendant had made a "score" from the place that had been broken into. Thus, the court ruled that the defendant was properly convicted of felonious possession of stolen goods. In addition to reversing the court of appeals opinion in this case, the court also overruled contrary rulings in *State v. Marsh*, 187 N.C. App. 235 (2007), *State v. Goblet*, 173 N.C. App. 112 (2005), and other cases.

Substantial Evidence of Felony Failure to Appear When Defendant, Who Signed Appearance Bond, Failed to Appear on Second Day of Trial

[State v. Goble](#), ___ N.C. App. ___, ___ S.E.2d ___ (July 6, 2010). The trial court did not err by denying the defendant's motion to dismiss a charge of felony failure to appear. To survive a motion to dismiss a charge of felonious failure to appear, the State must present substantial evidence that (1) the defendant was released on bail pursuant to G.S. Article 26 in connection with a felony charge or, pursuant to G.S.

15A-536, after conviction in the superior court; (2) the defendant was required to appear before a court or judicial official; (3) the defendant did not appear as required; and (4) the defendant's failure to appear was willful. In this case, the defendant signed an Appearance Bond for Pretrial Release which included the condition that the defendant appear in the action whenever required. The defendant subsequently failed to appear on the second day of trial. The court further held that the defendant, who failed to appear on felony charges, was not entitled to an instruction on misdemeanor failure to appear even though the felony charges resulted in misdemeanor convictions.

Trial Court Erred by Denying the Defendant's Motion to Dismiss a Charge Alleging that He Murdered His Wife.

[*State v. Pastuer*](#), __ N.C. App. __, __ S.E.2d __ (July 20, 2010). The trial court erred by denying the defendant's motion to dismiss a charge alleging that he murdered his wife. The State's case was based entirely on circumstantial evidence. Distinguishing *State v. Lowry*, __ N.C. App. __, 679 S.E.2d 865 (2009) (evidence showing both motive and opportunity was sufficient to survive a motion to dismiss), and another case, the court held that although the State may have introduced sufficient evidence of motive, evidence of the defendant's opportunity and ability to commit the crime was insufficient to show that he was the perpetrator. No evidence put the defendant at the scene. Although a trail of footprints bearing the victim's blood was found at her home and her blood was found on the bottom of one of the defendant's shoes, the State failed to present substantial evidence that the victim's DNA could only have gotten on the defendant's shoe at the time of the murder. Evidence that the defendant was seen walking down a highway sometime around the victim's disappearance and that her body was later found in the vicinity did not supply substantial evidence that he was the perpetrator.

Sufficient Evidence to Sustain Conviction Under Prior Version of Stalking Statute and Conviction of Harrassing Phone Calls

[*State v. Van Pelt*](#), __ N.C. App. __, __ S.E. 2d __ (Sept. 7, 2010). In a prosecution under the prior version of the stalking statute, there was sufficient evidence to sustain a conviction. The court rejected the defendant's argument that the evidence showed communications to persons other than the alleged victim on all but one occasion, concluding that all of the communications were directed to the victim. The defendant harassed the victim by written communications, pager, and phone with no legitimate purpose. The communications were directed to the victim, including those to his office staff, made with the request that they be conveyed to the victim. The harassment placed the victim in fear as evidenced by his testimony, his actions in having his staff make sure the office doors were locked and ensuring the outside lights were working along with encouraging them to walk in "twos" to their cars, his wife's testimony of his demeanor during and after his phone call with the defendant, his late night phone call to a police officer, his action in taking out a restraining order, and his visit to his children's school to speak with teachers and counselors and to have them removed from the school's website. The victim's fears were reasonable given the defendant's odd behavior exhibiting a pattern of escalation.

The evidence was sufficient to establish that the defendant violated G.S. 14-196(a)(3) by making harassing phone calls. The defendant repeatedly called the victim at work to annoy and harass him. It was not necessary for the State to show that defendant actually spoke with the victim.

(1) Sufficient Evidence to Support Conviction for Exploitation of an Elder Adult
(2) No Error in Finding 99 Year Old Victim Competent as a Witness

[*State v. Forte*](#), __ N.C. App. __, __ S.E. 2d __ (Sept. 7, 2010). The defendant was charged with offenses under the current (G.S. 14-112.2) and prior (G.S. 14-32.3) statutes proscribing the crime of exploitation of an elder adult. (1) There was sufficient evidence that the victim was an elder adult. The victim was either 99 or 109 years old and had not driven a vehicle for years. Individuals helped him by paying his bills, driving him, bringing him meals and groceries, maintaining his vehicles, cashing his checks, helping him with personal hygiene, and making medical appointments for him. (2) There was sufficient evidence that the defendant was the victim's caretaker. The defendant assisted the victim by, among other things, performing odd jobs, running errands, serving as a driver, taking him shopping, purchasing items, doing projects on the victim's property, writing checks, visiting with him, taking him to file his will, making doctor appointments, and cutting his toenails. Additionally, the two had a close relationship, the defendant was frequently at the victim's residence, and was intricately involved in the victim's financial affairs. The court rejected the defendant's argument that these activities were not sufficient to transform the "friendly relationship" into that of caretaker and charge.

The trial court did not abuse its discretion by finding an elderly victim to be competent. The witness correctly testified to his full name and birth date and where he lived. He was able to correctly identify family members, the defendant, and his own signature. He understood that he was at the courthouse, that a trial was occurring, and his duty to tell the truth. His testimony also demonstrated his ability to tell the truth from a lie. Noting that some of his answers were ambiguous and vague and that he was unable to answer some questions, the court concluded that it would not be unusual for an elderly person to have some difficulty in responding coherently to all of the voir dire questions.

Error to Impose Punishment for Felony Death by Vehicle and Felony Serious Injury by Vehicle When the Defendant Also Was Sentenced for Second-Degree Murder and Assault with a Deadly Weapon Inflicting Serious Injury Based on the Same Conduct

[*State v. Davis*](#), __ N.C. __, __ S.E.2d __ (Aug. 27, 2010). Trial court erred by imposing punishment for felony death by vehicle and felony serious injury by vehicle when the defendant also was sentenced for second-degree murder and assault with a deadly weapon inflicting serious injury based on the same conduct. G.S. 20-141.4(a) prescribes the crimes of felony and misdemeanor death by vehicle, felony serious injury by vehicle, aggravated felony serious injury by vehicle, aggravated felony death by vehicle, and repeat felony death by vehicle. G.S. 20-141.4(b), which sets out the punishments for these offenses, begins with the language: "Unless the conduct is covered under some other provision of law providing greater punishment, the following classifications apply to the offenses set forth in this section[.]" Second-degree murder and assault with a deadly weapon inflicting serious injury provide greater punishment than felony death by vehicle and felony serious injury by vehicle. The statute thus prohibited the trial court from imposing punishment for felony death by vehicle and felony serious injury by vehicle in this case.

By failing to raise a constitutional double jeopardy argument at trial, the defendant failed to preserve the argument for appellate review. However, notwithstanding his failure to raise at trial a claim that under G.S. 20-141.4(b) the trial court lacked authority to impose punishment for certain motor vehicle crimes, the issue was preserved for appeal. When a trial court acts contrary to a statutory mandate and a defendant suffers prejudice, the right to appeal is preserved, notwithstanding a failure to object at trial.

Sufficient Evidence of Juvenile’s Possession of Weapons on School Grounds Where Evidence Showed Juvenile Possessed Steel Link that Could be Used as Metallic Knuckles.

[*In Re J.C.*](#), __ N.C. App. __, __ S.E. 2d __ (July 6, 2010). A juvenile petition sufficiently alleged that the juvenile was delinquent for possession of a weapon on school grounds in violation of G.S. 14-269.2(d). The petition alleged that the juvenile possessed an “other weapon,” specified as a “steel link from chain.” The evidence showed that the juvenile possessed a 3/8-inch thick steel bar forming a C-shaped “link” about 3 inches long and 1½ inches wide. The link closed with a ½-inch thick bolt and the object weighed at least 1 pound. The juvenile could slide his fingers through the link so that 3-4 inches of the bar could be held securely across his knuckles and used as a weapon. Finding the petition sufficient the court stated: “the item . . . is sufficiently equivalent to what the General Assembly intended to be recognized as ‘metallic knuckles’ under [the statute].”

B. Child Sex Abuse

Trial Court Did Not Abuse Discretion by Overruling Defense Objection to Testimony by State’s Expert in Child Sexual Abuse Case

[*State v. Livengood*](#), __ N.C. App. __, __ S.E. 2d __ (Sept. 7, 2010). In a child sexual abuse case, the trial court did not abuse its discretion by overruling a defense objection to a response by the State’s expert. On direct examination, the expert testified that the child’s physical examination revealed no signs of trauma to the hymen. On cross-examination, she opined, without objection, that her physical findings could be consistent with rape or with no rape. On recross-examination, defense counsel asked: “And the medical aspects of this case physically are that there are no showings of any rape; correct?” The witness responded: “There’s no physical findings which do not rule out her disclosure, sir.” The trial judge overruled a defense objection to this response. The court rejected the defendant’s argument that the expert’s answer impermissibly commented on the victim’s credibility, concluding that the expert’s response was consistent with her prior testimony that her physical findings were consistent with rape or no rape.

- (1) No Error in Child Sexual Abuse Case to Allow Testimony from Individuals That Defendant Sexually Abused them Decades Earlier**
- (2) Trial Court Erred in Denying Defendant’s Motion to Strike Expert’s Testimony that Victim Was “Believable,” But Error Was Harmless**
- (3) No Error To Exclude Spectators From Courtroom During Victim’s Testimony**

[*State v. Register*](#), __ N.C. App. __, __ S.E. 2d __ (Sept. 7, 2010). (1) In a child sexual abuse case involving a female victim, the trial court did not err by allowing testimony from four individuals (three females and one male) that the defendant sexually abused them when they were children. The events occurred 14, 21, and 27 years prior to the abuse at issue. Citing *State v. Jacob*, 113 N.C. App. 605 (1994), and *State v. Frazier*, 121 N.C. App. 1 (1995), the court rejected the defendant’s argument that the evidence lacked sufficient temporal proximity to the events in question. The challenged testimony, showing common plan, established a strikingly similar pattern of sexually abusive behavior by the defendant over a period of 31 years in that: the defendant was married to each of the witnesses' mothers or aunt; the victims were prepubescent; the incidents occurred when the defendant's wife was at work and he was watching

the children; and the abuse involved fondling, fellatio, or cunnilingus, mostly taking place in the defendant's wife's bed. Although there was a significant gap in time between the last abuse and the events in question, that gap was the result of defendant's not having access to children related to his wife and thus did not preclude admission under Rule 404(b). Finally, the court held that trial judge did not abuse his discretion by admitting this evidence under Rule 403.

(2) The trial court erred by denying the defendant's motion to strike a response by the State's expert witness in a child sexual abuse case. During cross-examination, defense counsel asked whether the victim told the expert that she had been penetrated. The expert responded: "She described the rubbing; and, I would say that, as far as vaginal penetration, since the oral penetration — well, I'm not discussing that. I mean, I felt that that was very graphic and believable." The testimony was not responsive to the question and was opinion testimony on the victim's credibility. The court rejected the State's argument that the statement was offered as a basis of the expert's opinion. However, the court found that the error was harmless.

(3) In a child sexual abuse case, the trial court did not err by excluding spectators from the courtroom during the victim's testimony. The court excluded all spectators except the victim's mother and stepfather, investigators for each side, and a high school class. Because the defendant did not argue that he was denied a public trial, the requirements of *Waller v. Georgia*, 467 U.S. 39 (1984), do not apply. The defendant waived any constitutional issues by failing to raise them at trial. The trial court's action was permissible under G.S. 15-166 (in sexual assault cases the trial judge may, during the victim's testimony, exclude from the courtroom everyone except the officers of the court, the defendant, and those engaged in the trial of the case). Furthermore, the court noted, G.S. 15A-1034(a) gives the trial court authority to restrict access to the courtroom to ensure orderliness in the proceedings. The State was concerned about the child victim being confronted with "a hostile environment with [defendant's] family sitting behind him;" the trial court was concerned about the potential for outbursts or inappropriate reactions by supporters of both the defendant and the victim. Although it was unusual to allow the high school class to stay, this decision was not unreasonable given that the issue was reactions by family members.

(1) Insufficient Evidence To Sustain Conviction for First-Degree Sexual Exploitation of a Minor
(2) No Error to Allow Lay Opinion Testimony Regarding Photographs of Child

[*State v. Ligon*](#), __ N.C. App. __, __ S.E.2d __ (Aug. 17, 2010). The evidence was insufficient to sustain a conviction for first-degree sexual exploitation of a minor. The State's evidence consisted of photographs of the five-year-old child victim but did not depict any sexual activity. The court rejected the State's arguments that a picture depicting the child pulling up the leg of her shorts while her fingers were in her pubic area depicted masturbation; the court concluded that the photograph merely showed her hand in proximity to her crotch. It also rejected the State's argument that this picture, along with other evidence supported an inference that the defendant coerced or encouraged the child to touch herself for the purpose of producing a photograph depicting masturbation, concluding that no statutorily prohibited sexual activity took place. Finally, it rejected the State's argument that a photograph of the defendant pulling aside the child's shorts depicted prohibited touching constituting sexual activity on grounds that the picture depicted the defendant touching the child's shorts, not her body.

Trial court did not err by allowing lay opinion testimony regarding photographs of a five-year-old child that formed the basis for the charges. None of the witnesses perceived the behavior depicted; instead

they formed opinions based on their perceptions of the photographs. In one set of statements to which the defendant failed to object at trial, the witnesses stated that the photographs were “disturbing,” “graphic,” “of a sexual nature involving children,” “objectionable,” “concerning” to the witness, and that the defendant pulled away the minor’s pant leg to get a “shot into the vaginal area.” As to these statements, any error did not rise to the level of plain error. However the defendant did object to a statement in the Police Incident report stating that the photo “has the juvenile’s female private’s [sic] showing.” As to this statement, the court held that the trial court did not abuse its discretion by admitting this testimony as a shorthand statement of fact.

Insufficient Evidence of Crime Against Nature; Remanded for Hearing to Reconstruct Critical Testimony Not Captured in Transcript

[*In Re R.N.*](#), __ N.C. App. __, __ S.E.2d __ (Aug. 17, 2010). The trial court erred by denying the juvenile’s motion to dismiss a charge of crime against nature; as to a second charge alleging the same offense, defects in the transcript made appellate review impossible. The first count alleged that the juvenile licked the victim’s genital area. The evidence established that the juvenile licked her private, put his mouth on her private area, and “touch[ed] . . . on her private parts.” Citing, *State v. Whittemore*, 255 N.C. 583 (1961), the court held that the evidence was insufficient to establish penetration. As to the second count, alleging that the juvenile put his penis in the victim’s mouth, the evidence showed that the juvenile forced the victim’s head down to his private and that she saw his private area. Under *Whittemore*, this was insufficient evidence of penetration. However, when a social worker was asked whether there was penetration, she responded: “[the victim] told me there was (*Indistinct Muttering*) penetration.” The court concluded that because it could not determine from this testimony whether penetration occurred, it could not meaningfully review the sufficiency of the evidence. The court vacated the adjudication and remanded for a hearing to reconstruct the social worker’s testimony.

C. Drug Offenses

(1) Sufficient Evidence of Conspiracy to Sell a Counterfeit Controlled Substance Where Defendant Intentionally Represented Substance as Crack and Brokered the Deal

(2) Audio Recording of Phone Call from Jail Properly Authenticated as Made by Defendant

[*State v. Mobley*](#), __ N.C. App. __, __ S.E.2d __ (Aug. 3, 2010). (1) There was sufficient evidence to support the defendant’s conviction of conspiracy to sell a counterfeit controlled substance. The court concluded that G.S. 90-87(6) (definition of counterfeit controlled substance) requires only that the substance be intentionally represented as a controlled substance, not that a defendant have specific knowledge that it is counterfeit. There was sufficient evidence that the defendant intentionally represented the substance as a controlled substance in this case: when an undercover officer asked for a “40” (\$40 worth of crack cocaine), an accomplice produced a hard, white substance packaged in two small corner baggies, which the officers believed to be crack cocaine. There also was substantial evidence that the defendant conspired with the accomplice: the defendant initiated contact with the officers, directed them where to park, spoke briefly with the accomplice who emerged from a building with the substance, and the defendant brokered the deal.

(2) The trial court did not abuse its discretion by concluding that an audio recording of a booking-area phone call was properly authenticated under Rule 901 as having been made by the defendant. The

State's authentication evidence showed: (1) the call was made to the same phone number as later calls made using the defendant's jail positive identification number; (2) the voice of the caller was similar to later calls placed from the jail using the defendant's jail positive identification number; (3) a witness familiar with the defendant's voice identified the defendant as the caller; (4) the caller identified himself as "Little Renny" and the defendant's name is Renny Mobley; and (5) the caller discussed circumstances similar to those involved with the defendant's arrest.

State's Evidence Insufficient to Show Defendant's Constructive Possession of Drugs Found in the Bathroom Light Fixture of a Motel Room Rented by Another Person

[*State v. Biber*](#), __ N.C. App. __, __ S.E. 2d __ (Sept. 7, 2010)). Over a dissent, the court held that there was insufficient evidence that the defendant had constructive possession of the substance at issue, found in a motel room's bathroom light fixture while the defendant and two others were present. Ms. Hensley, who had rented the room with an unidentified friend, twice complained that people were using drugs in her room and that she did not want them there. The court found no competent evidence that the defendant intended and had the capability to maintain control and dominion over the room or the substance itself. In this regard it noted that because Ms. Hensley did not want the defendant in the room, his control over it was minimal. It also noted that there was no way to determine how long the defendant had been in the room before the officers arrived. Also, there was insufficient evidence of the defendant's proximity to the substance given that no evidence showed that he ever entered the bathroom. Rather, the evidence showed that when the officers entered the room, one of the other people present ran into the bathroom, refused to come out, and engaged in activity consistent with the destruction or concealing of contraband. [Note: Although the case was before the court on an appeal from an adverse ruling on a suppression motion, the court reached the issue of sufficiency of the evidence].

D. Impaired Driving

- (1) Reasonable Suspicion Supported Traffic Stop Where Defendant Weaved Across and Outside Lanes of Travel.**
- (2) No Error in Denying Defendant's Motion to Suppress Breath Test Results on Grounds that Preventative Maintenance Had Not Been Performed at Some Earlier Time Since Maintenance Had Been Performed 23 Days Before Defendant's Test.**
- (3) No Abuse of Discretion in Allowing State's Challenge for Cause of a Juror while Denying Defendant's Challenge for Cause of Another Juror**
- (4) Abuse of Discretion to Allow Prosecutor in Closing Argument and Over Defendant's Objection to Compare Defendant's Case to a Previous Impaired Driving Case Litigated by the Prosecutor, which Resulted in a Guilty Verdict.**

[*State v. Simmons*](#), __ N.C. App. __, __ S.E.2d __ (July 20, 2010). Defendant was convicted at a jury trial of driving while impaired and possession of an open container of alcohol in the passenger area of a motor vehicle. A highway patrol trooper stopped defendant's vehicle after seeing it weave across and outside the lanes of travel, at one point running off the road. Defendant moved pretrial to suppress breath test results and to suppress evidence obtained as a result of the stop of his vehicle. Defendant's motions were denied.

(1) Distinguishing *State v. Fields* __ N.C. App. __, (Mar. 17, 2009) (no reasonable suspicion for a stop where an officer saw the vehicle swerve to the white line three times), the appellate court held that reasonable suspicion existed to support the stop. The defendant was not only weaving within his lane, but also was weaving across and outside the lanes of travel, and at one point ran off the road.

(2) The trial court did not err by denying the defendant's motion to suppress the results of the chemical analysis performed on the defendant's breath with the Intoxilyzer 5000 on grounds that preventative maintenance was not performed on the machine at least every 4 months as required by the Department of Health and Human Services. Preventive maintenance was performed on July 14, 2006 and December 5, 2006. The court concluded that although the defendant's argument might have had merit if the chemical analysis had occurred after November 14, 2006 (4 months after the July maintenance) and before December 5, 2006, it failed because the defendant's analysis was performed only 23 days after the December maintenance.

(3) Trial court did not abuse its discretion in denying defendant's challenge for cause of a juror while granting the state's challenge for cause of another juror. The juror challenged by the State had a pending impaired driving case in the county and admitted to consuming alcohol at least three times a week, and stated that despite his pending charge, he could be fair and impartial. The juror challenged by the defendant was employed with a local university police department as a traffic officer. This juror had issued many traffic citations, worked closely with the District Attorney's office to prosecute those and other traffic cases, including impaired driving cases, and had never testified for the defense. He indicated that he could be fair and impartial. Distinguishing *State v. Lee*, 292 N.C. 617 (1977), the court noted that the juror challenged by the defense did not have a personal relationship with any officer involved in the case and never indicated he might not be able to be fair and impartial. The court rejected the notion that a juror must be excused solely on the grounds of a close relationship with law enforcement.

(4) Reversed for a new trial on the basis that the trial court abused its discretion when it allowed the prosecutor, in closing argument and over the defendant's objection, to compare the defendant's impaired driving case to a previous impaired driving case litigated by the prosecutor. The prosecutor discussed the facts of the case, indicated that the jury had returned a guilty verdict, and quoted from the appellate decision finding no reversible error.

V. Sentencing

Trial Court Improperly Considered at Sentencing Defendant's Exercise of Right to Jury Trial

State v. Pinkerton, __ N.C. App. __, __ S.E.2d __ (July 20, 2010). Over a dissent, the court held that when sentencing the defendant in a child sexual assault case, the trial court impermissibly considered the defendant's exercise of his right to trial by jury. After the jury returned a guilty verdict and the defendant was afforded the right to allocution, the trial court stated that "if you truly cared—if you had one ounce of care in your heart about that child—you wouldn't have put that child through this." Instead, according to the trial court, defendant "would have pled guilty, and you didn't." The court stated: "I'm not punishing you for not pleading guilty . . . I would have rewarded you for pleading guilty."

No Authority under Structured Sentencing Act to Allow Defendant to Serve Active Sentence on Nonconsecutive Days

[State v. Miller](#), __ N.C. App. __, __ S.E.2d __ (July 6, 2010). Under the Structured Sentencing Act a trial judge does not have authority to allow a defendant to serve an active sentence on nonconsecutive days, such as on weekends only.

No Abuse of Discretion in Failing to Find Mitigating Factors at Sentencing

[State v. Davis](#), __ N.C. App. __, __ S.E.2d __ (Aug. 17, 2010) . The trial court did not abuse its discretion by failing to find mitigating factors. As to acceptance of responsibility, the court found that although the defendant apologized for her actions, her statement did not lead to the “sole inference that [s]he accepted [and that] [s]he was answerable for the result of [her] criminal conduct.” Although defense counsel argued other mitigating factors, no supporting evidence was presented to establish them. Finally, although the defendant alleged that a drug addiction compelled her to commit the offenses, the court noted that drug addiction is not *per se* a statutorily enumerated mitigating factor and, in any event, the defendant did not present any evidence on this issue at sentencing.

Restitution Worksheet, Unsupported by Testimony or Documentation, Cannot Support Restitution Order

[State v. Davis](#), __ N.C. App. __, __ S.E.2d __ (Aug. 17, 2010). The evidence was insufficient to support a restitution award. The State conceded that it did not introduce evidence to support the restitution request. However, it argued that the defendant stipulated to the amount of restitution when she stipulated to the factual basis for the plea and that the specific amounts of restitution owed were incorporated into the stipulated factual basis by reference to the restitution worksheets submitted to the court. The court rejected these arguments, concluding that a restitution worksheet, unsupported by testimony or documentation, cannot support a restitution order and that the defendant did not stipulate to the amounts awarded.

VI. Defenses

No Error in Failing to Give Self-Defense Instruction in Murder Case Where No Evidence that Defendant Reasonably Believed He Needed to Use Deadly Force

[State v. Pittman](#), __ N.C. App. __, __ S.E.2d __ (Sept. 21, 2010). In a murder case, the trial court did not err by declining to instruct on self-defense where there was no evidence that would support a finding that the defendant reasonably believed that he needed to use deadly force against the victim to prevent death or serious bodily injury. Although the victim had threatened the defendant repeatedly, there was no evidence that he threatened to kill the defendant or attempted to harm him. There was no evidence that anyone had ever seen the victim with a weapon or attack another person. There was no indication that the victim had a reputation for violence; in fact, although the victim was angry with the defendant for a while, their conflict had never escalated beyond threats. There was no evidence that the victim threatened to hurt or attack the defendant on the day in question or that the encounter between them was more heated than earlier disputes. Instead, the evidence established that the defendant approached the victim with a gun, fired multiple shots at the victim, and continued firing as the victim attempted to retreat. The victim’s prior threats against the defendant, without more, did not establish a

reasonable need for deadly force. The defendant's description of the victim's conduct immediately prior to the shooting did not, whether considered in isolation or in the context of the victim's prior threats, suffice to support a self-defense instruction. The fact that the victim may have been "edging up" on the defendant while reaching behind his back did not support a finding that the defendant reasonably believed that he needed to use lethal force given that the defendant did not claim to have seen the victim with a weapon on that or any occasion, the victim had not threatened him immediately prior to the shooting, and the defendant had no other objective basis, aside from prior threats, for believing that the victim was about to attack him and create a risk of death or great bodily injury.

VII. License Revocation

DMV Had No Authority to Revoke License Where Face of Affidavit Did Not Indicate that Person Willfully Refused Chemical Analysis

[Lee v. Gore](#), __ N.C. App. __, __ S.E.2d __ (Aug. 17, 2010). After a rehearing, the court issued a new opinion, over a dissent, superseding and replacing its prior opinion. See [Lee v. Gore](#), __ N.C. App. __, __ S.E.2d __ (Jan. 19, 2010). The court rejected the DMV's implicit argument that a suspension of driving privileges can occur based on a refusal to submit to chemical analysis in the absence of willfulness. As in its prior decision, the court held that form DHHS 3908 is not a substitute for a properly executed affidavit required by G.S. 20-16.2(c1). The court noted that form DHHS 3908 or other relevant documents may be attached to a properly executed affidavit but held "that the affidavit, in whatever form submitted, must indicate that a person's refusal to submit to chemical analysis was willful." Because the officer here testified that he did not check the box indicating that there was a willful refusal before executing the affidavit, the requirements of G.S. 20-16.2(c1) were not satisfied. Construing G.S. 20-16.2, the court held that before the DMV can revoke a person's driving privileges, it must receive a properly executed affidavit that meets all of the requirements in G.S. 20-16.2(c1). Given this, the DMV had no authority to revoke the Petitioner's license and there was no authority for a DMV review hearing or appellate review in the superior court. The court remanded for reinstatement of the Petitioner's driving privileges.

VIII. Sex Offender Registration and Monitoring

(1) G.S. 14-208.40B Applies to SBM Proceedings Initiated After December 1, 2007

(2) SBM Statute Does Not Violate Ex Post Facto Provisions of Constitution

(3) No Error in Requiring Defendant to Enroll in SBM on the Ground that Offense Involved Physical, Mental, or Sexual Abuse of a Minor

(4) Trial Court Erred in Requiring Lifetime Monitoring

(5) Inadequate Notice Provided to Defendant of Basis for DOC's Preliminary Determination that SBM Should Be Required

[State v. Cowan](#), __ N.C. App. __, __ S.E.2d __ (Sept. 21, 2010). (1) G.S. 14-208.40B (procedure for determining SBM eligibility when eligibility was not determined when judgment was imposed) applies to SBM proceedings initiated after December 1, 2007, even if those proceedings involve offenders who had been sentenced or had committed the offenses that resulted in SBM eligibility before that date. The defendant received a probationary sentence for solicitation of indecent liberties on August 30, 2007 and

thus was subject to SBM requirements, which apply to any offender sentenced to intermediate punishment on or after August 16, 2006. He challenged the trial court's later order requiring him to enroll in SBM, arguing that G.S. 14-208.40B did not apply to offenses committed prior to December 1, 2007, the statute's effective date. (2) Following prior case law, the court held that the SBM statute did not violate the constitutional prohibition against ex post facto laws. (3) Assuming without deciding that an elements-based approach should be used when determining eligibility for SBM under G.S. 14-208.40(a)(2), the trial court did not err by requiring the defendant to enroll in SBM on the grounds that the offense involved the physical, mental, or sexual abuse of a minor. Interpreting the word "involve," the court concluded that eligibility for SBM under G.S. 14-208.40(a)(2) includes both completed acts and acts that create a substantial risk that such abuse will occur. The court determined that an attempt to take an indecent liberty has "within or as part of itself" the physical, mental, or sexual abuse of a minor. It concluded that although solicitation of an indecent liberty need not involve the commission of the completed crime, an effort to "counsel, entice, or induce" another to commit that crime also creates a substantial risk that the "physical, mental, or sexual abuse of a minor" will occur, so that such a solicitation has the sexual abuse of a minor "as a "necessary accompaniment." (4) The trial court erred in requiring lifetime SBM under G.S. 14-208.40(a)(2); that provision subjects a person to SBM for a term of years. (5) The defendant did not receive adequate notice of the basis for the Department of Correction's preliminary determination that he should be required to enroll in SBM under the version of G.S. 14-208.40B(b) applicable to the defendant's case. Specifically the notice failed to specify the category set out in G.S. 14-208.40(a) into which the Department had determined that the defendant fell or to briefly state the factual basis for its conclusion.

Conviction for Abduction of a Child under G.S. 14-41 Triggers Sex Offender Registration Requirements if the Offense is Committed Against a Minor and the Person Committing the Offense is Not the Minor's Parent

[*State v. Stanley*](#), __ N.C. App. __, __ S.E.2d __ (July 20, 2010). A conviction for abduction of a child under G.S. 14-41 triggers registration requirements if the offense is committed against a minor and the person committing the offense is not the minor's parent. The court held that as used in G.S. 14-208.6(1i), the term parent includes only a biological or adoptive parent, not one who "acts as a parent" or is a stepparent.

Probation Violation Not a Crime and Cannot Constitute a New Reportable Conviction Triggering SBM

[*State v. Clayton*](#), __ N.C. App. __, __ S.E.2d __ (Aug. 3, 2010). Because the trial court previously held a hearing pursuant to G.S. 14-208.40B (SBM determination after sentencing) and determined that the defendant was not required to enroll in SBM, the trial court lacked jurisdiction to later hold a second SBM hearing on the same reportable conviction. In this case, the defendant was summoned for the second SBM hearing after a probation violation. The trial court required the defendant to enroll in SBM based on the fact that his probation violation was sexual in nature. The court reasoned that a probation violation is not a crime and cannot constitute a new reportable conviction.

(1) Remanded for Entry of Lifetime SBM Based on Second-Degree Rape of Mentally Disabled Victim (2) Trial Court Erred in Determining that Defendant Required the Highest Level of Supervision

[*State v. Oxendine*](#), __ N.C. App. __, __ S.E.2d __ (Aug. 3, 2010). (1) Following *State v. McCravey*, __ N.C. App. __, __ S.E.2d __ (May 4, 2010) (applying the "elements test," second-degree rape committed by force and against the victim's will is an aggravated offense triggering lifetime SBM), the court granted

the State's petition for writ of certiorari and remanded for entry of an order requiring lifetime SBM enrollment on the basis of the defendant's second-degree rape conviction, which involved a mentally disabled victim. A concurring opinion agreed that the second-degree rape conviction was an aggravated offense, but not as a direct result of *McCravey*.

(2) Following *State v. Kilby*, __ N.C. App. __, 679 S.E.2d 430 (2009) (findings of fact were insufficient to support the trial court's conclusion that the defendant required the highest possible level of supervision and monitoring based on a "moderate" risk assessment from DOC), and *State v. Causby*, __ N.C. App. __, 683 S.E.2d 262 (2009) (applying *Kilby*), the court held that the trial court erroneously determined that the defendant required the highest level of supervision and monitoring. The Static 99 concluded that the defendant posed a low risk of re-offending and no other evidence supported the trial court's determination.