Shea Denning
John Rubin
UNC School of Government
Denning: 919.843.5120, denning@sog.unc.edu
Rubin: 919.962.2498, rubin@sog.unc.edu

# Criminal Law Case Update

## 2013 District Court Judges' Summer Conference
## (Includes cases decided between October 2, 2012 and June 4, 2013)

The summaries are drawn from criminal case summaries prepared by Jessica Smith. To view all of the summaries, go to http://www.sog.unc.edu/node/488. To obtain the summaries automatically by email, go to the above site and click on Criminal Law Listserv.

# Investigation Issues

## Grounds for Stop

### Generally

**Juvenile was seized where officer approached and questioned her and told her companions to leave after she yelled an obscenity; ordering juvenile to empty her pockets constituted an unlawful search**

In Re V.C.R., __ N.C. App. __, __ S.E.2d __ (May 7, 2013). (1) An officer had reasonable suspicion that a juvenile was violating G.S. 14-313(c) (unlawful for person under 18 to accept receipt of cigarettes) and thus the officer's initial stop of the juvenile was proper. (2) The officer's actions of approaching the juvenile a second time in response to her loud yelling of an obscenity, telling her companions to leave, and questioning the juvenile constituted a seizure as a reasonable person would not feel free to leave. (3) Referencing the offense of disorderly conduct, the court found this seizure "permissible, given [the juvenile's] loud and profane language." (4) The officer's subsequent conduct of ordering the juvenile to empty her pockets constituted a search. (5) This search was illegal; it was not incident to an arrest nor consensual. The district court thus erred by denying the juvenile's motion to suppress.

**Reversing court of appeals, court upholds stop where one brake light was non-functional, and holds that an officer's reasonable mistake of law provides grounds for a traffic stop**

State v. Heien, __ N.C. __, 737 S.E.2d 351 (Dec. 14, 2012) (http://appellate.nccourts.org/opinions/?c=1&pdf=MjAxMi8zODBQQTExLTEucGRm). The court reversed State v. Heien, __ N.C. App. __, 714 S.E.2d 827 (Aug. 16, 2011), and held that there was reasonable suspicion for a stop that led to the defendant's drug trafficking convictions. An officer stopped a vehicle on the basis of a non-functioning brake light. The evidence indicated that although the left brake light was operating, the right light was not. Interpreting various statutes, the Court of Appeals held that a vehicle is not required to have more than one operating brake light. It went on to conclude that because no violation of law had occurred, the stop was unreasonable. Before the supreme court, the State did not appeal the court of appeals' interpretation of statutory law; the State appealed only the court's determination that the stop was unreasonable. Thus, the issue before the court was whether an officer's mistake of law may nonetheless give rise to reasonable suspicion to conduct a routine traffic stop. On this issue the court held that an officer's objectively reasonable but mistaken belief that a traffic violation has occurred can provide reasonable suspicion a stop. Applying this standard to the facts at hand, the court found the officer's mistake objectively reasonable and that the stop was justified.

**Traffic stop was not unduly prolonged and consent to search was valid where officer did not inform the defendant he was searching for drugs**

State v. Heien, __ N.C. App. __, __ S.E.2d __ (April 2, 2013). (1) Over a dissent the court held that a valid traffic stop was not unduly prolonged and as a result the defendant's consent to search his vehicle was valid. The stop was initiated at 7:55 am and the defendant, a passenger who owned the vehicle, gave consent to search at 8:08 am. During this time, the two officers discussed a malfunctioning vehicle brake light with the driver, discovered that the driver and the defendant claimed to be going to different destinations, and observed the defendant behaving unusually (he was lying down on the backseat under a blanket and remained in that position even when approached by an officer requesting his driver's

license). After each person's name was checked for warrants, their licenses were returned. The officer then requested consent to search the vehicle. The officer's tone and manner were conversational and non-confrontational. No one was restrained, no guns were drawn and neither person was searched before the request to search the vehicle was made. The trial judge properly concluded that the defendant was aware that the purpose of the initial stop had been concluded and that further conversation was consensual. (2) Over a dissent, the court held that the defendant's consent to search the vehicle was valid even though the officer did not inform the defendant that he was searching for narcotics.

**Officer did not have grounds to frisk the defendant who was walking in the middle of the street and paced nervously after being detained**

State v. Phifer, __ N.C. App. __, 741 S.E.2d 446 (April 2, 2013). The trial court improperly denied the defendant's motion to suppress. An officer saw the defendant walking in the middle of the street. The officer stopped the defendant to warn him about impeding the flow of street traffic. After issuing this warning, the officer frisked the defendant because of his "suspicious behavior," specifically that the "appeared to be nervous and kept moving back and forth." The court found that "the nervous pacing of a suspect, temporarily detained by an officer to warn him not to walk in the street, is insufficient to warrant further detention and search."

**(1) A passenger has standing to challenge stop; 2) No reasonable suspicion supported stop where evidence failed to show traffic violation and occupants' behavior was not unusual for people passing law enforcement; 3) Counsel was ineffective by failing to file motion to suppress**

State v. Canty, __ N.C. App. __, 736 S.E.2d 532 (Dec. 18, 2012)
(http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMi04MDQtMS5wZGY=)
(1) A passenger has standing to challenge a stop of a vehicle in which the passenger was riding. (2) No reasonable suspicion supported a traffic stop. The State had argued reasonable suspicion based on the driver's alleged crossing of the fog line, her and her passenger's alleged nervousness and failure to make eye contact with officers as they drove by and alongside the patrol car, and the vehicle's slowed speed. The court found that the evidence failed to show that the vehicle crossed the fog line and that in the absence of a traffic violation, the officers' beliefs about the conduct of the driver and passenger were nothing more than an "unparticularized suspicion or hunch." It noted that nervousness, slowing down, and not making eye contact is not unusual when passing law enforcement. The court also found it "hard to believe" that the officers could tell that the driver and passenger were nervous as they passed the officers on the highway and as the officers momentarily rode alongside the vehicle. The court also found the reduction in speed—from 65 mph to 59 mph—insignificant. (2) Counsel rendered ineffective assistance by failing to file what would have been a meritorious motion to suppress.

**(1) Passenger with no possessory interest does not have standing to challenge search of vehicle; (2) Where officers have grounds to believe traffic infraction occurred, it is irrelevant that the stop was based on pretext; (3) Stop lasting ten minutes was limited in scope and duration**

State v. Franklin, __ N.C. App. __, 736 S.E.2d 218 (Dec. 18, 2012)
(http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMi00MTItMS5wZGY=)
(1) Although a passenger who has no possessory interest in a vehicle has standing to challenge a stop of the vehicle, that passenger does not have standing to challenge a search of the vehicle. (2) Over a dissent, the court held that where officers have probable cause to believe that a traffic infraction (here,

a seatbelt violation) has occurred, it is irrelevant whether their stop of the vehicle on that basis was a pretext. The dissenting judge believed that there was no probable cause that the seatbelt violation had occurred. (3) Over a dissent, the court held that a vehicle stop made on the basis of a seatbelt violation was sufficiently limited in scope and duration. The stop lasted ten minutes and the officer's actions related to the stop. The dissenting judge believed that the stop's duration was unreasonable.

**(1) Officer had reasonable suspicion to stop for speeding where he observed vehicle for three to five seconds; (2) Officer had reasonable suspicion the defendant was the driver although he lost sight of him for approximately thirty seconds**

State v. Royster, __ N.C. App. __, 737 S.E.2d 400 (Dec. 18, 2012) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMi00NTgtMS5wZGY=)
(1) An officer had reasonable suspicion to stop the defendant's vehicle for speeding. The court rejected the defendant's argument that because the officer only observed the vehicle for three to five seconds, the officer did not have a reasonable opportunity to judge the vehicle's speed. The court noted that after his initial observation of the vehicle, the officer made a U-turn and began pursuing it; he testified that during his pursuit, the defendant "maintained his speed." Although the officer did not testify to a specific distance he observed the defendant travel, "some distance was implied" by his testimony regarding his pursuit of the defendant. Also, although it is not necessary for an officer to have specialized training to be able to visually estimate a vehicle's speed, the officer in question had specialized training in visual speed estimation. (2) The court rejected the defendant's argument that an officer lacked reasonable suspicion to stop his vehicle for speeding on grounds that there was insufficient evidence identifying the defendant as the driver. Specifically, the defendant noted that the officer lost sight of the vehicle for a short period of time. The officer only lost sight of the defendant for approximately thirty seconds and when he saw the vehicle again, he recognized both the car and the driver.

## Checkpoint

**Stopping in road and turning away from checkpoint provided reasonable suspicion for stop; constitutionality of checkpoint was immaterial**

State v. Griffin, __ N.C. __, __ S.E.2d __ (April 12, 2013). The defendant's act of stopping his vehicle in the middle of the roadway and turning away from a license checkpoint gave rise to reasonable suspicion for a vehicle stop. The trial court denied the defendant's motion to suppress, finding the stop constitutional. In an unpublished opinion, the court of appeals reversed on grounds that the checkpoint was unconstitutional. That court did not, however, comment on whether reasonable suspicion for the stop existed. The supreme court allowed the State's petition for discretionary review to determine whether there was reasonable suspicion to initiate a stop of defendant's vehicle and reversed. It reasoned:

Defendant approached a checkpoint marked with blue flashing lights. Once the patrol car lights became visible, defendant stopped in the middle of the road, even though he was not at an intersection, and appeared to attempt a three-point turn by beginning to turn left and continuing onto the shoulder. From the checkpoint [the officer] observed defendant's actions and suspected defendant was attempting to evade the checkpoint. . . . It is clear that this Court and the Fourth Circuit have held that even a legal turn, when viewed in the totality of the circumstances, may give rise to reasonable suspicion. Given the place and manner of defendant's turn in conjunction with his proximity to the

checkpoint, we hold there was reasonable suspicion that defendant was violating the law; thus, the stop was constitutional. Therefore, because the [officer] had sufficient grounds to stop defendant's vehicle based on in conjunction with his proximity to the checkpoint, we hold there was reasonable suspicion that defendant was violating the law; thus, the stop was constitutional. Therefore, because the [officer] had sufficient grounds to stop defendant's vehicle based on reasonable suspicion, it is unnecessary for this Court to address the constitutionality of the driver's license checkpoint.

### Weaving

**Weaving within the lane did not provide reasonable suspicion for the stop.**

State v. Kochuk, __ N.C. App. __, 741 S.E.2d 327 (Nov. 6, 2012) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMi01MjUtMS5wZGY=).
Over a dissent, the court affirmed the trial court's order granting the defendant's motion to suppress all evidence obtained as a result of a vehicle stop. Relying on State v. Fields, 195 N.C. App. 740 (2009) (weaving alone is insufficient to support a reasonable suspicion that the defendant was driving while impaired), the trial court had determined that the officer lacked reasonable suspicion for the stop. The officer saw the defendant's vehicle cross over the dotted white line in the middle lane causing both passenger side wheels to enter the right lane for three to four seconds. He also observed the defendant's vehicle drift to the right side of the right lane "where its wheels were riding on top of the white line . . . twice for a period of three to four seconds each time." The court found these movements were "nothing more than weaving" and thus under *Fields*, the stop was improper.

## Warrantless Searches

### Dissipation of Alcohol

**Natural dissipation of alcohol in bloodstream does not categorically constitute exigency such that a blood test is justified without a warrant; issue must be determined case by case**

Missouri v. McNeely, 569 U.S. __ (April 17, 2013). The Court held that in drunk driving investigations, the natural dissipation of alcohol in the bloodstream does not constitute an exigency in every case sufficient to justify conducting a blood test without a warrant. After stopping the defendant's vehicle for speeding and crossing the centerline, the officer noticed several signs that the defendant was intoxicated and the defendant acknowledged that he had consumed "a couple of beers." When the defendant performed poorly on field sobriety tests and declined to use a portable breath-test device, the officer placed him under arrest and began driving to the stationhouse. But when the defendant said he would again refuse to provide a breath sample, the officer took him to a nearby hospital for blood testing where a blood sample was drawn. The officer did not attempt to secure a warrant. Tests results showed the defendant's BAC above the legal limit. The defendant was charged with impaired driving and he moved to suppress the blood test. The trial court granted the defendant's motion, concluding that the exigency exception to the warrant requirement did not apply because, apart from the fact that as in all intoxication cases, the defendant's blood alcohol was being metabolized by his liver, there were no circumstances suggesting the officer faced an emergency in which he could not practicably obtain a warrant. The state supreme court affirmed, reasoning that Schmerber v. California, 384 U. S. 757 (1966), required lower courts to consider the totality of the circumstances when determining whether exigency permits a nonconsensual, warrantless blood draw. The state court concluded that Schmerber "requires

more than the mere dissipation of blood-alcohol evidence to support a warrantless blood draw in an alcohol-related case." The U.S. Supreme Court granted certiorari to resolve a split of authority on the question whether the natural dissipation of alcohol in the bloodstream establishes a per se exigency that suffices on its own to justify an exception to the warrant requirement for nonconsensual blood testing in drunk driving investigations. The Court affirmed. The Court began by noting that under Schmerber and the Court's case law, applying the exigent circumstances exception requires consideration of all of the facts and circumstances of the particular case. It went on to reject the State's request for a per se rule for blood testing in drunk driving cases, declining to "depart from careful caseby-case assessment of exigency." It concluded: "while the natural dissipation of alcohol in the blood may support a finding of exigency in a specific case, as it did in Schmerber, it does not do so categorically. Whether a warrantless blood test of a drunk-driving suspect is reasonable must be determined case by case based on the totality of the circumstances."

## Dog Sniffs

**Dog sniff provided probable cause to search vehicle; court declines to create inflexible evidentiary requirements for dog alerts**

Florida v. Harris, 568 U.S. __ (Feb. 19, 2013)
(http://www.supremecourt.gov/opinions/12pdf/11-817_5if6.pdf).
Concluding that a dog sniff "was up to snuff," the Court reversed the Florida Supreme Court and held that the dog sniff in this case provided probable cause to search a vehicle. The Court rejected the holding of the Florida Supreme Court which would have required the prosecution to present, in every case, an exhaustive set of records, including a log of the dog's performance in the field, to establish the dog's reliability. The Court found this "demand inconsistent with the 'flexible, commonsense standard' of probable cause. It instructed:

In short, a probable-cause hearing focusing on a dog's alert should proceed much like any other. The court should allow the parties to make their best case, consistent with the usual rules of criminal procedure. And the court should then evaluate the proffered evidence to decide what all the circumstances demonstrate. If the State has produced proof from controlled settings that a dog performs reliably in detecting drugs, and the defendant has not contested that showing, then the court should find probable cause. If, in contrast, the defendant has challenged the State's case (by disputing the reliability of the dog overall or of a particular alert), then the court should weigh the competing evidence. In all events, the court should not prescribe, as the Florida Supreme Court did, an inflexible set of evidentiary requirements. The question—similar to every inquiry into probable cause—is whether all the facts surrounding a dog's alert, viewed through the lens of common sense, would make a reasonably prudent person think that a search would reveal contraband or evidence of a crime. A sniff is up to snuff when it meets that test.

Applying that test to the drug dog's sniff in the case at hand, the Court found it satisfied.

**Using a drug-sniffing dog on a homeowner's porch is a "search"**

Florida v. Jardines, 569 U.S. __ (Mar. 26, 2013).
(http://www.supremecourt.gov/opinions/12pdf/11-564_5426.pdf).
Using a drug-sniffing dog on a homeowner's porch to investigate the contents of the home is a "search" within the meaning of the Fourth Amendment. The Court's reasoning was based on the theory that the officers engaged in a physical intrusion of a constitutionally protected area. Applying that principle, the Court held:

The officers were gathering information in an area belonging to [the defendant] and immediately surrounding his house—in the curtilage of the house, which we have held enjoys protection as part of the home itself. And they gathered that information by physically entering and occupying the area to engage in conduct not explicitly or implicitly permitted by the homeowner. Slip Op. at pp. 3-4.

In this way the majority did not decide the case on a reasonable expectation of privacy analysis; the concurring opinion came to the same conclusion on both property and reasonable expectation of privacy grounds.

## Generally

**Defendant's Fourth Amendment rights not violated by taking of DNA cheek swab as part of booking procedure**

Maryland v. King, 569 U.S. __ (June 3, 2013).
(http://www.supremecourt.gov/opinions/12pdf/12-207_d18e.pdf).
The defendant's Fourth Amendment rights were not violated by the taking of a DNA cheek swab as part of booking procedures. When the defendant was arrested in April 2009 for menacing a group of people with a shotgun and charged in state court with assault, he was processed for detention in custody at a central booking facility. Booking personnel used a cheek swab to take the DNA sample from him pursuant to the Maryland DNA Collection Act (Maryland Act). His DNA record was uploaded into the Maryland DNA database and his profile matched a DNA sample from a 2003 unsolved rape case. He was subsequently charged and convicted in the rape case. He challenged the conviction arguing that the Maryland Act violated the Fourth Amendment. The Maryland appellate court agreed. The Supreme Court reversed. The Court began by noting that using a buccal swab on the inner tissues of a person's cheek to obtain a DNA sample was a search. The Court noted that a determination of the reasonableness of the search requires a weighing of "the promotion of legitimate governmental interests" against "the degree to which [the search] intrudes upon an individual's privacy." It found that "[i]n the balance of reasonableness . . . , the Court must give great weight both to the significant government interest at stake in the identification of arrestees and to the unmatched potential of DNA identification to serve that interest." The Court noted in particular the superiority of DNA identification over fingerprint and photographic identification. Addressing privacy issues, the Court found that "the intrusion of a cheek swab to obtain a DNA sample is a minimal one." It noted that a gentle rub along the inside of the cheek does not break the skin and involves virtually no risk, trauma, or pain. And, distinguishing special needs searches, the Court noted: "Once an individual has been arrested on probable cause for a dangerous offense that may require detention before trial . . . his or her expectations of privacy and freedom from police scrutiny are reduced. DNA identification like that at issue here thus does not require consideration of any unique needs that would be required to justify searching the average citizen." The Court further determined that the processing of the defendant's

DNA was not unconstitutional. The information obtained does not reveal genetic traits or private medical information; testing is solely for the purpose of identification. Additionally, the Maryland Act protects against further invasions of privacy, by for example limiting use to identification. It concluded:

> In light of the context of a valid arrest supported by probable cause respondent's expectations of privacy were not offended by the minor intrusion of a brief swab of his cheeks. By contrast, that same context of arrest gives rise to significant state interests in identifying respondent not only so that the proper name can be attached to his charges but also so that the criminal justice system can make informed decisions concerning pretrial custody. Upon these considerations the Court concludes that DNA identification of arrestees is a reasonable search that can be considered part of a routine booking procedure. When officers make an arrest supported by probable cause to hold for a serious offense and they bring the suspect to the station to be detained in custody, taking and analyzing a cheek swab of the arrestee's DNA is, like fingerprinting and photographing, a legitimate police booking procedure that is reasonable under the Fourth Amendment.

**Discovery of marijuana on a passenger provided probable cause to search a vehicle.**

State v. Mitchell, __ N.C. App. __, 735 S.E.2d 438 (Dec. 4, 2012) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMi00OTktMS5wZGY=)
The discovery of marijuana on a passenger provided probable cause to search a vehicle. After stopping the defendant and determining that the defendant had a revoked license, the officer told the defendant that the officer's K-9 dog would walk around the vehicle. At that point, the defendant indicated that his passenger had a marijuana cigarette, which she removed from her pants. The officer then searched the car and found marijuana in the trunk.

**Officers violated defendant's Fourth Amendment rights by entering defendant's backyard, where they found and seized marijuana plants**

State v. Pasour, __ N.C. App. __, 741 S.E.2d 323 (Oct. 16, 2012) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMi0xOTAtMS5wZGY=).
The trial court erred by denying the defendant's motion to suppress property seized in a warrantless search. After receiving a tip that a person living at a specified address was growing marijuana, officers went to the address and knocked on the front and side doors. After getting no answer, two officers went to the back of the residence. In the backyard they found and seized marijuana plants. The officers were within the curtilage when they viewed the plants, no evidence indicated that the plants were visible from the front of the house or from the road, and a "no trespassing" sign was plainly visible on the side of the house.

Even if the officers did not see the sign, it is evidence of the homeowner's intent that the side and back of the home were not open to the public. There no evidence of a path or anything else to suggest a visitor's use of the rear door; instead, all visitor traffic appeared to be kept to the front door and traffic to the rear was discouraged by the posted sign. Further, no evidence indicated that the officers had reason to believe that knocking at the back door would produce a response after knocking multiple times at the front and side doors had not. The court concluded that on these facts, "there was no

justification for the officers to enter Defendant's backyard and so their actions were violative of the Fourth Amendment."

**(1) Seizure of marijuana plants not justified under plain view doctrine where one officer spotted plants in backyard by looking over hood of car parked in driveway and officers walked across defendant's backyard to seize plants; (2) Exigent circumstances did not justify seizure.**

State v. Grice, __ N.C. App. __, 735 S.E.2d 354 (Nov. 20, 2012)
(http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMi01NzctMS5wZGY=).
(1) In a drug case, a seizure of marijuana plants was not justified under the plain view doctrine. Officers went to the defendant's home on a tip that he was growing and selling marijuana and parked behind a white car in the driveway. One of the officers walked up the driveway and knocked on the door; the other stayed in the driveway. While one officer was knocking on the door, the other looked "around the residence . . . from [his] point of view." Looking over the hood of the white car, he saw four plastic buckets about fifteen yards away. Plants were growing in three of the buckets which he immediately identified as marijuana. He pointed out the plants to the other officer, who also believed they were marijuana. The officers then walked to the backyard where the plants were growing beside an outbuilding and seized them. The court rejected the State's argument that the initiation of a valid "knock and talk" inquiry gave police the right to walk across the defendant's backyard to seize the plants, stating: "If we were to adopt such an approach, it would be difficult to articulate a limiting principle such that 'knock and talk' investigations would not become a pretense to seize any property within the home's curtilage, so long as that property otherwise satisfied the remaining prerequisites for seizure under the plain view doctrine." (2) The trial court's finding that exigent circumstances justified seizure of the marijuana plants was not supported by record evidence. One of the officers testified that no one answered the officer's knock at the door and that nothing prevented the officers from securing the premises and obtaining a search warrant. No evidence to the contrary was presented.

## Search Warrants

**Officers not justified in detaining occupants beyond immediate premises covered by search warrant**

Bailey v. United States, 568 U.S. __ (Feb. 19, 2013)
(http://www.supremecourt.gov/opinions/12pdf/11-770_j4ek.pdf).
Michigan v. Summers, 452 U.S. 692 (1981) (officers executing a search warrant may detain occupants on the premises while the search is conducted), does not justify the detention of occupants beyond the immediate vicinity of the premises covered by a search warrant. In this case, the defendant left the premises before the search began and officers waited to detain him until he had driven about one mile away. The Court reasoned that none of the rationales supporting the Summers decision—officer safety, facilitating the completion of the search, and preventing flight—apply with the same or similar force to the detention of recent occupants beyond the immediate vicinity of the premises. It further concluded that "[a]ny of the individual interests is also insufficient, on its own, to justify an expansion of the rule in Summers to permit the detention of a former occupant, wherever he may be found away from the scene of the search." It stated: "The categorical authority to detain incident to the execution of a search warrant must be limited to the immediate vicinity of the premises to be searched." The Court continued, noting that Summers also relied on the limited intrusion on personal liberty involved with detaining occupants incident to the execution of a search warrant. It concluded that where officers arrest an individual away from his or her home, there is an additional level of intrusiveness. The Court declined to

precisely define the term "immediate vicinity," leaving it to the lower courts to make this determination based on "the lawful limits of the premises, whether the occupant was within the line of sight of his dwelling, the ease of reentry from the occupant's location, and other relevant factors."

# Pretrial and Trial Procedure

## Initial Appearance

**(1) No unnecessary delay in initial appearance where defendant was interviewed for nearly an hour after his arrest and before being taken before a magistrate; (2) A causal relationship must exist between an alleged substantial violation of Chapter 15A and the acquisition of evidence in order to suppress the evidence under G.S. 15A-974(2)**

State v. Caudill, __ N.C. App. __, __ S.E.2d __ (May 7, 2013).
(http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMy8xMi0xMDY0LTEucGRm ).
(1) The trial court did not err by denying the defendant's motion to suppress statements to officers on grounds that they were obtained in violation of G.S. 15A-501(2) (arrested person must be taken before a judicial official without unnecessary delay). After a consensual search of his residence produced controlled substances, the defendant and three colleagues were arrested for drug possession. The defendant, who previously had waived his Miranda rights, was checked into the County jail at 11:12 am. After again being informed of his rights, the defendant was interviewed from 1:59 pm to 2:53 pm and made incriminating statements about a murder. After the interview the defendant was taken before a magistrate and charged with drug offenses and murder. The defendant argued that the delay between his arrival at the jail and his initial appearance required suppression of his statements regarding the murder. The court noted that under G.S. 15A-974(2), evidence obtained as a result of a substantial violation of Chapter 15A must be suppressed upon timely motion; the statutory term "result" indicates that a causal relationship between a violation of the statute and the acquisition of the evidence to be suppressed must exist. The court concluded that the delay in this case was not unnecessary and there was no causal relationship between the delay and defendant's incriminating statements made during his interview. The court rejected the defendant's constitutional arguments asserted on similar grounds.

## Closing the Courtroom

**Trial court did not violate the defendant's constitutional right to a public trial by closing the courtroom during a sexual abuse victim's testimony**

State v. Comeaux, __ N.C. App. __, 741 S.E.2d 346 (Dec. 31, 2012)
(http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMS0xMjg5LTEucGRm).
The trial court did not violate the defendant's constitutional right to a public trial under Waller v. Georgia by closing the courtroom during a sexual abuse victim's testimony where the State advanced an overriding interest that was likely to be prejudiced; the closure of the courtroom was no broader than necessary to protect the overriding interest; the trial court considered reasonable alternatives to closing the courtroom; and the trial court made findings adequate to support the closure.

## Double Jeopardy

**Trial court's entry of directed verdict of acquittal based on a mistake of law is an acquittal for double jeopardy purposes**

Evans v. Michigan, 568 U.S. __ (Feb. 20, 2013) (http://www.supremecourt.gov/opinions/12pdf/11-1327_7648.pdf). When the trial court enters a directed verdict of acquittal based on a mistake of law the erroneous acquittal constitutes an acquittal for double jeopardy purposes barring further prosecution. After the State rested in an arson prosecution, the trial court entered a directed verdict of acquittal on grounds that the State had provided insufficient evidence of a particular element of the offense. However, the trial court erred; the unproven "element" was not actually a required element at all. The Court noted that it had previously held in Arizona v. Rumsey, 467 U. S. 203, 211 (1984), that a judicial acquittal premised upon a "misconstruction" of a criminal statute is an "acquittal on the merits . . . [that] bars retrial." It found "no meaningful constitutional distinction between a trial court's 'misconstruction' of a statute and its erroneous addition of a statutory element." It thus held that the midtrial acquittal in the case at hand was an acquittal for double jeopardy purposes.

## Motions

### Motion to Continue

**Trial court did not err by denying defendant's motion to continue trial so that he could locate two alibi witnesses**

State v. Burton, __ N.C. App. __, 735 S.E.2d 400 (Dec. 4, 2012) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMi0zNTQtMS5wZGY=)
The trial court did not err by denying the defendant's motion to continue trial so that he could locate two alibi witnesses. Both alibi witnesses were served months prior and the trial had already been continued for this purpose.

### Motions to Suppress

**Trial court did not shift burden of proof to the defendant at suppression hearing**

State v. Williams, __ N.C. App. __, 738 S.E.2d 211 (Feb. 19, 2013) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMy8xMi05NDctMS5wZGY=)
The trial court did not impermissibly place the burden of proof on the defendant at a suppression hearing. Initially the burden is on the defendant to show that the motion to suppress is timely and in proper form. The burden then is on the State to demonstrate the admissibility of the challenged evidence. The party who bears the burden of proof typically presents evidence first. Here, the fact that the defendant presented evidence first at the suppression hearing does not by itself establish that the burden of proof was shifted to the defendant.

**(1)Trial court had jurisdiction to enter written order denying motion to suppress that did not differ materially from oral order; (2) trial court had jurisdiction to enter written order denying motion to suppress after defendant had given notice of appeal**

State v. Franklin, __ N.C. App. __, 736 S.E.2d 218 (Dec. 18, 2012)
(http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMi00MTItMS5wZGY=).
(1) The court rejected the defendant's argument that the trial court lacked jurisdiction to enter its written order on his motion to suppress because the order differed materially from the court's oral ruling. The appellate court found no material difference between the two orders. (2) The trial court had jurisdiction to enter a written order denying the defendant's motion to suppress when the written order was entered after the defendant had given notice of appeal but had the effect of merely reducing the court's oral ruling to writing.

**State's notice of appeal of a trial court ruling on a suppression motion was timely as window for filing written notice of appeal opens on date of rendition and closes 14 days after entry of judgment or order.**

State v. Oates, __ N.C. __, 732 S.E.2d 571 (Oct. 5, 2012)
(http://appellate.nccourts.org/opinions/?c=1&pdf=MjAxMi8zOTdQQTExLTEucGRm).

The court reversed State v. Oates, __ N.C. App. __, 715 S.E.2d 616 (Sept. 6, 2011), and held that the State's notice of appeal of a trial court ruling on a suppression motion was timely. The State's notice of appeal was filed seven days after the trial judge in open court orally granted the defendant's pretrial motion to suppress but three months before the trial judge issued his corresponding written order of suppression. The court held that the window for filing a written notice of appeal in a criminal case opens on the date of rendition of the judgment or order and closes fourteen days after entry of the judgment or order. The court clarified that rendering a judgment or an order means to pronounce, state, declare, or announce the judgment or order and is "the judicial act of the court in pronouncing the sentence of the law upon the facts in controversy." Entering a judgment or an order is "a ministerial act which consists in spreading it upon the record." It continued: For the purposes of entering notice of appeal in a criminal case . . . a judgment or an order is rendered when the judge decides the issue before him or her and advises the necessary individuals of the decision; a judgment or an order is entered under that Rule when the clerk of court records or files the judge's decision regarding the judgment or order.

## Motions to Dismiss

**(1) Trial court erred by dismissing murder case as sanction for discovery violations; (2) Trial court erred by suppressing evidence as sanction for failing to document and disclose communications between police department and related agencies; (3) Trial court erred by finding that destruction of bones resulted in flagrant violation of *Brady***

State v. Dorman, __ N.C. App. __, 737 S.E.2d 452 (Feb. 19, 2013)
(http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMy8xMi05Ny0xLnBkZg==).
The trial court erred by dismissing murder charges against the defendant under G.S. 15A-954(a)(4) (flagrant violation of constitutional rights causing irreparable prejudice). The court first held that the trial court erred in finding that destruction of the purported bones of victim resulted in a flagrant violation of constitutional right to due process under *Brady*. An autopsy by the Medical Examiner's Office identified the victim and found that cause of death was blunt head trauma consistent with a

shotgun wound. After the autopsy was complete, the Medical Examiner's officer released most of the victim's skeletal remains to the family and they were cremated. A partial fragment of the victim's skull was retained by that office As to the *Brady* issue, the court concluded that even if, as the trial court found, there was evidence of bad faith on the part of the district attorney's office, the Durham Police Department, North Carolina Victim Compensation Services, and the Medical Examiner's Office and any bad faith on the part of those agencies can be attributable to the prosecution, bad faith standing alone is insufficient to support a dismissal under G.S. 15A-954(a)(4). Even if a flagrant violation of rights has occurred, there also must be irreparable prejudice to the defendant such there is no remedy other than dismissal. In this respect, the court held:

> [T]he trial court was premature in concluding that the alleged violations "caused such irreparable harm to [Defendant's] case as to require a dismissal with prejudice[,]" because Defendant cannot meet his burden of demonstrating his defense has been irreparably harmed. As explained above, the unavailability of the bones for independent testing makes it impossible to determine to what extent those bones would have been helpful to Defendant's case. Under the circumstances of this case as it has progressed thus far, Defendant cannot meet his burden of demonstrating his defense has been actually, as opposed to potentially, prejudiced. Furthermore, the court continued, the motion to dismiss and the trial court's order was premature given that no trial has occurred. It explained: The defense has yet to engage any expert, and has failed to attempt to conduct any tests, whether for DNA or to attempt to replicate the photographic identification of the decedent using the radiographs of her teeth. It may well be that upon the hiring of an expert and analyzing the partial skull remains which still are being held by the [Medical Examiner's Office], Defendant's expert may concur in the [autopsy results] that the jaw bone is indeed that of [the victim]. Until it can be established that the partial remains are untestable or that the identification of the deceased is somehow flawed or incapable of repetition, we fail to see how the defense has been irreparably prejudiced.

The court also disagreed with the trial court's conclusion that dismissal was the only appropriate remedy, noting the trial judge's wide discretion in determining how to most fairly address any flagrant violation of rights. Second, the court held that the trial court erred by determining that the State's failure to disclose "the role its agents took in assisting, facilitating, and paying for the permanent destruction" of the remains and the failure by a doctor at the Medical Examiner's Officer to produce the email records subject to subpoena flagrantly violated the defendant's constitutional rights. Because the defendant was provided with that information prior to trial, no *Brady* violation occurred. Third, the trial court erred by concluding that three instances in which the State "fail[ed] to correct misrepresentations of material fact . . . flagrantly violated [the defendant's] constitutional rights[.]" Although the trial court cited Napue v. Illinois, 360 U.S. 264 (1959), in support of its ruling, the court found that case inapplicable given that no trial and no conviction had been obtained. Fourth, with respect to the trial court's conclusion that a flagrant violation of Eighth Amendment rights, the court rejected this basis for dismissal, stating: "Upon review of the trial court's order, we cannot determine the precise factual or legal basis for the trial court's specific conclusion that an Eighth Amendment violation occurred . . . ."

**Trial court erred in dismissing DWI for violation of G.S. 20-139.1(d1); suppression motion would have been proper vehicle to raise issue**

State v. Wilson, __ N.C. App. __, 736 S.E.2d 614 (Jan. 15, 2013) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMy8xMi02NDEtMS5wZGY=). The trial court erred by dismissing a misdemeanor DWI charge under G.S. 15A-954. The trial court erroneously dismissed the charges under G.S. 15A-954(a)(1) (statute alleged to have been violated is unconstitutional on its face or as applied to the defendant) without making a finding that the DWI statute, G.S. 20-138.1, was unconstitutional as applied to the defendant. The fact that G.S. 20-139.1(d1) was violated was not a basis for dismissal under G.S. 15A-954. Nor did G.S. 15A-954(a)(4) (flagrant violation of constitutional rights causing irreparable prejudice) support dismissal of the charges where there was no finding that the defendant suffered irreparable prejudice. The court noted that the proper vehicle for the defendant to have asserted his arguments was a motion to suppress; since the State had stipulated that it would not seek to introduce the challenged blood evidence at trial, the trial court was required to summarily grant the defendant's suppression motion.

### Motions to Dismiss--Corpus Delicti Rule

**(1) Adjudication for no operator's license was not prohibited by corpus delicti rule; (2) Evidence of reckless driving was insufficient where juvenile collided with utility pole; (3) Evidence of unauthorized use was insufficient where no evidence showed the juvenile did not have his mother's consent to drive her vehicle**

In re A.N.C., __ N.C. App. __, __ S.E.2d __ (Feb. 5, 2013) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMy8xMi00ODItMS5wZGY=). The evidence was sufficient to sustain a juvenile's adjudication as delinquent for driving with no operator's license under the corpus delicti rule. The thirteen-year-old juvenile admitted that he drove the vehicle. Ample evidence, apart from this confession existed, including that the juvenile and his associates were the only people at the scene and that the vehicle was registered to the juvenile's mother.

## Mistrial

**Neither collateral estoppel nor the rule prohibiting one superior court judge from overruling another applies to legal rulings in a retrial following a mistrial**

State v. Macon, __ N.C. App. __, __ S.E.2d __ (May 7, 2013). The trial court did not err when during a retrial in a DWI case it instructed the jury that it could consider the defendant's refusal to take a breath test as evidence of her guilt even though during the first trial a different trial judge had ruled that the instruction was not supported by the evidence. Citing State v. Harris, 198 N.C. App. 371 (2009), the court held that neither collateral estoppel nor the rule prohibiting one superior court judge from overruling another applies to legal rulings in a retrial following a mistrial. It concluded that on retrial de novo, the second judge was not bound by rulings made during the first trial. Moreover, it concluded, collateral estoppel applies only to an issue of ultimate fact determined by a final judgment. Here, the first judge's ruling involved a question of law, not fact, and there was no final judgment because of the mistrial.

**Trial court did not err by denying defendant's mistrial motion after officer mentioned defendant was a convicted sex offender**

State v. Smith, __ N.C. App. __, 736 S.E.2d 847 (Feb. 5, 2013)
(http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMy8xMi04MDktMS5wZGY=)
In a resist, delay and obstruct case arising out of an incident of indecent exposure, the trial court did not abuse its discretion by denying the defendant's mistrial motion when an officer testifying for the State indicated that the defendant said he was a convicted sex offender. The trial court sustained the defendant's objection, granted the defendant's motion to strike, and gave the jury a curative instruction.

## Right to Counsel

**The defendant did not initiate communication with police so as to waive his right to counsel; if he did, waiver was not knowing and intelligent in light of his age and inexperience and the circumstances of the interrogation**

State v. Quick, __ N.C. App. __, 739 S.E.2d 608 (April 16, 2013).
http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMy8xMi0xMTExLTEucGRm
The court rejected the State's argument that the defendant initiated contact with the police following his initial request for counsel and thus waived his right to counsel. After the defendant asserted his right to counsel, the police returned him to the interrogation room and again asked if he wanted counsel, to which he said yes. Then, on the way from the interrogation room back to the jail, a detective told the defendant that an attorney would not able to help him and that he would be served with warrants regardless of whether an attorney was there. The police knew or should have known that telling the defendant that an attorney could not help him with the warrants would be reasonably likely to elicit an incriminating response. It was only after this statement by police that the defendant agreed to talk. Therefore, the court concluded, the defendant did not initiate the communication. The court went on to conclude that even if the defendant had initiated communication with police, his waiver was not knowing and intelligent. The trial court had found that the prosecution failed to meet its burden of showing that the defendant made a knowing and intelligent waiver, relying on the facts that the defendant was 18 years old and had limited experience with the criminal justice system, there was a period of time between 12:39 p.m. and 12:54 p.m. where there is no evidence as to what occurred, and there was no audio or video recording. The court found that the defendant's age and inexperience, when combined with the circumstances of his interrogation, support the trial court's conclusion that the State failed to prove the defendant's waiver was knowing and intelligent.

**Trial court erred by failing to inquire into nature and extent of potential conflict where defense counsel previously represented a witness for the State and the defendant objected to continued representation**

State v. Gray, __ N.C. App. __, 736 S.E.2d 837 (Feb. 5, 2013), *temp. stay allowed*, __N.C. __, 737 S.E.2d 383 (Feb. 26, 2013).
(http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMy8xMi0xNTMtMS5wZGY=).
The defendant was entitled to a new trial where the trial court proceeded to trial over the defendant's objection to continued representation by appointed counsel who had previously represented one of the State's witnesses. At a pretrial hearing the State informed the trial court that defense counsel had

previously represented Mr. Slade, who the State intended to call as a trial witness. The defendant told the trial court that he was concerned about a conflict of interest and asked for another lawyer. Slade subsequently waived any conflict and the State Bar advised the trial court that since Slade had consented "the lawyer's ability to represent the current client is not affected" and that the current client's consent was not required. The trial court conducted no further inquiry. The court held that the trial court erred by failing to make any inquiry into the nature and extent of the potential conflict and whether the defendant wished to waive the conflict. It concluded: [W]e believe that Defendant . . . was effectively forced to go to trial while still represented by his trial counsel, who had previously represented one of the State's witnesses and who acknowledged being in the possession of confidential information which might be useful for purposes of cross-examining that witness, despite having clearly objected to continued representation by that attorney. As a result, given that prejudice is presumed under such circumstances, Defendant is entitled to a new trial.

**Trial court did not err by failing to inform defendant of his right to hire private counsel before accepting defendant's waiver of counsel.**

State v. Reid, __ N.C. App. __, 735 S.E.2d 389 (Dec. 4, 2012)
(http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMi0zNDAtMS5wZGY=)
The trial court did not err when taking the defendant's waiver of counsel. The trial court complied with the statute and asked the standard waiver questions in the judges' bench book. The court rejected the defendant's argument that the waiver was invalid because the trial judge did not inform him of his right to hire a private lawyer.

**1) No violation of defendant's Sixth Amendment right to counsel when trial court required defendant to proceed pro se after determining that defendant forfeited right to counsel; (2)Trial court did not err by finding forfeiture based on serious misconduct, which included defendant threatening his attorneys; (3) Defendant waived Miranda rights; (4) Defendant did not invoke right to counsel during questioning; (5) Defendant's confession was voluntary**

State v. Cureton, __ N.C. App. __, 734 S.E.2d 572 (Nov. 6, 2012)
(http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMi0xNDctMS5wZGY=).
(1) No violation of the defendant's Sixth Amendment right to counsel occurred when the trial court found that the defendant forfeited his right to counsel because of serious misconduct and required him to proceed pro se. The court rejected the defendant's argument that Indiana v. Edwards prohibits a finding of forfeiture by a "gray area" defendant who has engaged in serious misconduct. (2) The trial court did not err by finding that the defendant forfeited his right to counsel because of serious misconduct. The court rejected the defendant's argument that the misconduct must occur in open court. The defendant was appointed three separate lawyers and each moved to withdraw because of his behavior. His misconduct went beyond being uncooperative and noncompliant and included physically and verbally threatening his attorneys. He consistently shouted at his attorneys, insulted and abused them, and spat on and threatened to kill one of them. The court also rejected the defendant's argument that State v. Wray, 206 N.C. App. 354 (2010), required reversal of the forfeiture ruling. (3) After being read his Miranda rights, the defendant knowingly and intelligently waived his right to counsel. The court rejected the defendant's argument that the fact that he never signed the waiver of rights form established that that no waiver occurred. The court also rejected the defendant's argument that he was incapable of knowingly and intelligently waiving his rights because his borderline mental capacity prevented him from fully understanding those rights. In this regard, the court relied in part on a later psychological evaluation diagnosing the defendant as malingering and finding him competent to stand

trial. (4) After waiving his right to counsel the defendant did not unambiguously ask to speak a lawyer. The court rejected the defendant's argument that he made a clear request for counsel. It concluded: "Defendant never expressed a clear desire to speak with an attorney. Rather, he appears to have been seeking clarification regarding whether he had a right to speak with an attorney before answering any of the detective's questions." The court added: "There is a distinct difference between inquiring whether one has the right to counsel and actually requesting counsel. Once defendant was informed that it was his decision whether to invoke the right to counsel, he opted not to exercise that right." (5) The defendant's confession was voluntary. The court rejected the defendant's argument that he "was cajoled and harassed by the officers into making statements that were not voluntary," that the detectives "put words in his mouth on occasion," and "bamboozled [him] into speaking against his interest."

## Evidence

### Confrontation Clause

**Former testimony of witness from a plea hearing was properly admitted under Rule 804(b)(1) and did not violate the defendant's confrontation rights; (2) No violation of confrontation rights where statements of non-testifying witnesses were not introduced for their truth**

State v. Rollins, __ N.C. App. __, 738 S.E.2d 440 (Mar. 19, 2013).
http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMy8xMi01NTItMS5wZGY=
(1) No violation of the defendant's confrontation rights occurred when the trial court admitted an unavailable witness's testimony at a proceeding in connection with the defendant's Alford plea under the Rule 804(b)(1) hearsay exception for former testimony. The witness was unavailable and the defendant had a prior opportunity to cross examine her at the plea hearing. (2) No violation of the defendant's confrontation rights occurred when an officer testified to statements made to him by others where the statements were not introduced for their truth but rather to show the course of the investigation, specifically why officers searched a location for evidence.

**No error in allowing ill witness to testify remotely by two-way, live broadcast**

State v. Seelig, __ N.C. App. __, 738 S.E.2d 427 (Mar. 19, 2013).
http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMy8xMi00NDItMS5wZGY=
In a case in which the defendant was charged with obtaining property by false pretenses for selling products alleged to be gluten free but which in fact contained gluten, the trial court did not err by allowing an ill witness to testify by way of a two-way, live, closed-circuit web broadcast. The witness testified regarding the results of laboratory tests he performed on samples of the defendant's products. The trial court conducted a hearing and found that the witness had a history of panic attacks, had suffered a severe panic attack on the day he was scheduled to fly from Nebraska to North Carolina for trial, was hospitalized as a result, and was unable to travel to North Carolina because of his medical condition. Applying the test of Maryland v. Craig, the court found these findings sufficient to establish that allowing the witness to testify remotely was necessary to meet an important state interest of protecting the witness's ill health. Turning to *Craig*'s second requirement, the court found that reliability of the witness's testimony was otherwise assured, noting, among other things that the witness testified under oath and was subjected to cross examination.

**No error in allowing child victim to testify remotely via closed circuit television**

State v. Lanford, __ N.C. App. __, __ S.E.2d __ (Jan. 15, 2013)
(http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMy8xMi02MjMtMS5wZGY=).
The trial court did not err by allowing a child victim to testify out of the defendant's presence by way of a closed circuit television. Following State v. Jackson, __ N.C. App. __, 717 S.E.2d 35 (Oct. 4, 2011) (in a child sexual assault case, the defendant's confrontation rights were not violated when the trial court permitted the child victim to testify by way of a one-way closed circuit television system; Maryland v. Craig survived *Crawford* and the procedure satisfied *Craig*'s procedural requirements), the court held that no violation of the defendant's confrontation rights occurred. The court also held that the trial court's findings of fact about the trauma that the child would suffer and the impairment to his ability to communicate if required to face the defendant in open court were supported by the evidence.

## Judicial Notice

**(1) District court judge committed prejudicial error by taking judicial notice in DVPO hearing of assault conviction disposed of by PJC; (2) Wife's testimony in DVPO hearing about doctor's diagnosis was inadmissible hearsay.**

Little v. Little, __ N.C. App. __, 739 S.E.2d 876 (April 16, 2013).
http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMy8xMi00MTQtMi5wZGY=
(1) In a domestic violence protective order hearing a district court judge committed prejudicial error by taking judicial notice of the fact that the defendant's criminal file showed a conviction for assault on a female where in fact a PJC was entered on that charge. (2) A wife's testimony in a domestic violence protective order hearing that a doctor told her that her neck suffered a cervical strain was inadmissible hearsay. Because the trial court relied on the inadmissible hearsay the error was not harmless.

## Opinion Testimony

### Child Abuse

**Improper testimony by pediatrician in a child sexual abuse case required new trial.**

State v. Ryan, __ N.C. App. __, 734 S.E.2d 598 (Nov. 6, 2012)
(http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMi0yMjgtMS5wZGY=).
Improper testimony by an expert pediatrician in a child sexual abuse case required a new trial. After the alleged abuse, the child was seen by Dr. Gutman, a pediatrician, who reviewed her history and performed a physical exam. Gutman observed a deep notch in the child's hymen, which was highly suggestive of vaginal penetration. Gutman found the child's anus to be normal but testified that physical findings of anal abuse are uncommon. Gutman also tested the child for sexually transmitted diseases. The tests were negative, except that the child was diagnosed with bacterial vaginosis. Gutman testified that the presence of bacterial vaginosis can be indicative of a vaginal injury, although it is the most common genital infection in women and can have many causes. The child's mother had indicated the child had symptoms of vaginosis as early as 2006, which predated the alleged abuse. Gutman testified to her opinion that the child had been sexually abused, that she had no indication the child's story was fictitious or that the child had been coached, and that defendant was the perpetrator. (1) Gutman was properly allowed to testify that the child had been sexually abused given the physical evidence of the

unusual hymenal notch and bacterial vaginosis. The court noted that Gutman did not state which acts of alleged sexual abuse had occurred. It continued, noting that if Gutman had testified that the child had been the victim of both vaginal and anal sexual abuse, that would have been error given the lack of physical evidence of anal penetration. (2) Gutman's testimony that she was not concerned that the child was "giving a fictitious story" was essentially an opinion that the child was not lying about the sexual abuse and thus was improper. The court rejected the State's argument that the defendant opened the door to this testimony. (3) Citing State v. Baymon, 336 N.C. 748 (1994), the court held that Gutman's testimony that the child had not been coached was admissible. (4) It was error to allow Gutman to testify that "there was no evidence that there was a different perpetrator" other than defendant where Gutman based her conclusion on her interview with the child and it did not relate to a diagnosis derived from Gutman's examination of the child.

## Drug Identification

**State not required to test substance where officer testified without objection that based on his training substance was marijuana**

State v. Johnson, __ N.C. App. __, 737 S.E.2d 442 (Feb. 5, 2013) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMy8xMi04MjctMS5wZGY=).
In a misdemeanor possession of marijuana case, the State was not required to test the substance alleged to be marijuana where the arresting officer testified without objection that based on his training the substance was marijuana. The officer's testimony was substantial evidence that the substance was marijuana and therefore the trial court did not err by denying the defendant's motion to dismiss.

**Officer properly allowed to identify marijuana based on look and smell**

State v. Mitchell, __ N.C. App. __, 735 S.E.2d 438 (Dec. 4, 2012) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMi00OTktMS5wZGY=)
In a drug case, an officer properly was allowed to identify the substance at issue as marijuana based on his "visual and olfactory assessment" and a chemical analysis of marijuana was not required.

## Generally

**Trial court did not err by allowing the officer to give lay opinion regarding the weight of the alleged deadly weapon, a kitchen chair**

State v. James, __ N.C. App. __, 735 S.E.2d 627 (Dec. 4, 2012) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMi01NDAtMS5wZGY=)
In an assault with a deadly weapon on a law enforcement officer case, the trial court did not err by allowing the officer to give lay opinion regarding the weight of a kitchen chair (the alleged deadly weapon) that the defendant threw at him. The officer's observation of the chair and of the defendant use of it was sufficient to support his opinion as to its weight. Also, this testimony was helpful to the jury. Given the manner of its use, there was sufficient evidence that a kitchen table chair was a deadly weapon.

## Other Evidence Issues

### Authentication of Electronic Evidence

**Trial court did not abuse its discretion by determining that a text message sent from the defendant's phone was properly authenticated**

State v. Wilkerson, __ N.C. App. __, 733 S.E.2d 181 (Oct. 16, 2012) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMi0xNzUtMS5wZGY=).
In a felony larceny after a breaking or entering case, the trial court did not abuse its discretion by determining that a text message sent from the defendant's phone was properly authenticated where substantial circumstantial evidence tended to show that the defendant sent the text message. The defendant's car was seen driving up and down the victim's street on the day of the crime in a manner such that an eyewitness found the car suspicious and called the police; the eyewitness provided a license plate number and a description of the car that matched the defendant's car, and she testified that the driver appeared to be using a cell phone; the morning after the crime, the car was found parked at the defendant's home with some of the stolen property in the trunk; the phone was found on the defendant's person the following morning; around the time of the crime, multiple calls were made from and received by the defendant's phone; the text message itself referenced a stolen item; and by referencing cell towers used to transmit the calls, expert witnesses established the time of the calls placed, the process employed, and a path of transit tracking the phone from the area of the defendant's home to the area of the victim's home and back.

### Cross Examination and Impeachment

**(1) Trial court did not err by allowing the State to ask social worker about DSS report alleging that victim was neglected, sexually abused and dependent where the defendant opened the door to this testimony; (2) Trial court did not impermissibly allow the State to use extrinsic evidence to impeach the defendant on a collateral matter**

State v. Black, __ N.C. App. __, 735 S.E.2d 195 (Oct. 16, 2012) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMS0xMzQyLTEucGRm).
(1) In this child sexual abuse case, the trial court did not err by allowing the State to ask a DSS social worker about a 2009 DSS petition alleging that the victim was neglected, sexually abused and dependent where the defendant opened the door to this testimony. Before the witness testified, the defendant had cross-examined two child witnesses about their testimony at the 2009 DSS hearing, pointing out inconsistencies. This cross examination opened the door for the State to ask the DSS social worker about the 2009 hearing. (2) The trial court did not impermissibly allow the State to use extrinsic evidence to impeach the defendant on a collateral matter. On cross-examination, the defendant denied that she had told anyone that the victim began masturbating at an early age, given the victim a vibrator, or taught the victim how to masturbate. In rebuttal, the State called a social worker to testify that the defendant told her that the victim started masturbating at age seven or eight and that she gave the victim a vibrator. The defendant's prior statements were not used solely to impeach but as substantive evidence in the form of admissions.

**(1) Trial court did not err by allowing examining physician to testify to child's credibility where the defendant elicited this evidence during his own cross-examination; (2) Trial court did not err by admitting defendant's statement that he was investigated in Michigan for similar sexual misconduct.**

State v. Graham, __ N.C. App. __, 733 S.E.2d 100 (Oct. 16, 2012)
(http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMi0yNTgtMS5wZGY=).
(1) In this child sexual abuse case, the trial court did not err by allowing an emergency room doctor who examined one of the children to testify to the child's credibility where the defendant elicited this evidence during his own cross-examination. (2) The trial court did not err by allowing into evidence the defendant's statement that he was investigated in Michigan for similar sexual misconduct decades prior to the current incident. On direct examination the defendant stated that he had "never been in trouble before" and that he had no interaction with the police in connection with a criminal case. These statements opened the door for the State to inquire as to the Michigan investigation.

### Rape Shield

**Trial court did not err by finding defense counsel in contempt of court for willful violation of rape shield statute.**

State v. Okwara, __ N.C. App. __, 733 S.E.2d 576 (Oct. 16, 2012)
(http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMi0zMzAtMS5wZGY=).
(1) In the context of an appeal from a contempt proceeding, the court held that by asking the victim at trial about a possible prior instance of rape between the victim and a cousin without first addressing the relevance and admissibility of the question during an in camera hearing, defense counsel violated the Rape Shield Statute. (2) For reasons discussed in the opinion, the court affirmed the trial judge's order finding defense counsel in contempt of court for willfully disobeying a court order regarding permissible inquiry under the Rape Shield statute.

## Crimes

### Drug Offenses

**Defendant's testimony that he possessed "dope" and "drugs" provided sufficient evidence that he possessed a controlled substance.**

State v. Poole, __ N.C. App. __, 733 S.E.2d 564 (Oct. 16, 2012)
(http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMS0yMS0yLnBkZg==).
In a case involving a charge of possessing a controlled substance on the premises of a local confinement facility, the defendant's own testimony that he had a "piece of dope . . . in the jail" was sufficient evidence that he possessed a controlled substance on the premises.

## DVPO, Violation of

**(1) Trial court erred in failing to give jury special verdict to resolve whether violation extended beyond date of stalking statute in effect at time; (2) Insufficient evidence that the defendant knowingly violated DVPO by failing to stay away from victim's place of work**

State v. Williams, __ N.C. App. __, 741 S.E.2d 9 (April 2, 2013).
http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMy8xMi0xMDM0LTEucGRm
(1) The trial court committed plain error by instructing the jury on the crime of stalking under the new stalking statute, G.S. 14-277.3A, when the charged course of conduct occurred both before and after enactment of the new statute. The new version of the stalking statute lessened the burden on the State. The court noted that where, as here, a defendant is indicted for a continuing conduct offense that began prior to a statutory modification that disadvantages the defendant and the indictment tracks the new statute's disadvantageous language, the question of whether the violation extended beyond the effective date of the statute is one that must be resolved by the jury through a special verdict. Here, the trial court's failure to give such a special verdict was plain error. (2) The evidence was insufficient to establish that the defendant knowingly violated a DVPO. The DVPO required the defendant to "stay away from" victim Smith's place of work, without identifying her workplace. The victim worked at various salons, including one at North Hills. The defendant was charged with violating the DVPO when he was seen in the North Hills Mall parking lot on a day that the victim was working at the North Hills salon. The court concluded that it need not determine the precise contours of what it means to "stay away" because it is clear that there was insufficient evidence that the defendant failed to "stay away" from the victim's place of work, and no evidence that defendant knowingly did so. It reasoned:

> The indictment alleges defendant was "outside" Ms. Smith's workplace, and although technically the area "outside" of Ms. Smith's workplace could include any place in the world outside the walls of the salon, obviously such an interpretation is absurd. Certainly the order must mean that defendant could not be so close to Ms. Smith's workplace that he would be able to observe her, speak to her, or intimidate her in any way, but we cannot define the exact parameters of the term "stay away." It is clear only that defendant was not seen in an area that could reasonably be described as "outside" of Ms. Smith's salon, nor was there evidence that he was in a location that would permit him to harass, communicate with, follow, or even observe Ms. Smith at her salon, which might reasonably constitute a failure to "stay away" from her place of work. There was also no evidence that he was in proximity to Ms. Smith's vehicle or that he was in a location which might be along the path she would take from the salon to her vehicle. Additionally, there was no evidence that defendant was aware that Ms. Smith worked at the North Hills salon, or that he otherwise knew that he was supposed to stay away from North Hills. The order did not identify North Hills as one of the locations that defendant was supposed to stay away from. The order specified no distance that defendant was supposed to keep between himself and Ms.

Smith or her workplace. Defendant was seen walking in the parking structure of a public mall at some unknown distance from the salon where Ms. Smith was working on the night in question.

## Fraud and Identity Theft

**In false pretense case, State failed to offer sufficient evidence of a false representation with intent to deceive where the evidence showed the defendant made a promise he was unable to keep**

State v. Braswell, __ N.C. App. __, 738 S.E.2d 229 (Mar. 5, 2013).
(http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMy8xMi04NzYtMS5wZGY= ).
The trial court erred by denying the defendant's motion to dismiss false pretenses charges. The State failed to offer sufficient evidence to establish that the defendant made a false representation with the intent to deceive when he told the victims that he intended to invest the money that they loaned him in legitimate financial institutions and would repay it with interest at the specified time. The evidence, taken in the light most favorable to the State, simply tends to show that the defendant, after seriously overestimating his own investing skills, made a promise that he was unable to keep.

**(1) Sufficient evidence established the offense of conversion of property by a bailee; (2) There is no prohibition on using unenforceable contracts to support a conversion charge.**

State v. Minton, __ N.C. App. __, 734 S.E.2d 608 (Nov. 6, 2012)
(http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMi0yNDMtMS5wZGY=).
There was sufficient evidence to establish the offense of conversion of property by a bailee in violation of G.S. 14-168.1. The court rejected the defendant's argument that because "[e]vidence of nonfulfillment of a contract obligation" is not enough to establish intent for obtaining property by false pretenses under G.S. 14-100(b), this evidence should not be sufficient to establish the intent to defraud for conversion. The court also rejected the defendant's argument that there was insufficient evidence of an intent to defraud where the underlying contract between himself and the victim was unenforceable; the court found no prohibition on using unenforceable contracts to support a conversion charge.

**Sufficient evidence established that the defendant "used" or "possessed" another person's social security number to avoid legal consequences when defendant, after being detained and questioned, gave an officer a false name and other false identifying information, but did not himself provide the false social security number**

State v. Sexton, __ N.C. App. __, 734 S.E.2d 295 (Nov. 6, 2012)
(http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMi00NDUtMS5wZGY=).
In an identity theft case, the evidence was sufficient to establish that the defendant "used" or "possessed" another person's social security number to avoid legal consequences. After being detained and questioned for shoplifting, the defendant falsely gave the officer his name as Roy Lamar Ward and provided the officer with the name of an employer, date of birth, and possible address. The officer then obtained Ward's social security number, wrote it on the citation, and issued the citation to the defendant. The defendant neither signed the citation nor confirmed the listed social security number.

**Sufficient evidence established that the defendant used the victims' credit card numbers with the intent to fraudulently represent himself as the cardholders**

State v. Jones, __ N.C. App. __, 734 S.E.2d 617 (Nov. 20, 2012), *discretionary review allowed*, __ N.C. __, 736 S.E.2d 186 (Jan. 24, 2013).
(http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMi0yODItMS5wZGY=).
(1) In an identity theft case, the State presented sufficient evidence that the defendant used the victims' credit card numbers with the intent to fraudulently represent himself as the cardholders. The evidence showed that the defendant possessed the credit card information of several other people without authorization, was the owner of a vehicle which had received a paint job, new tires, and other products and services paid for through unauthorized charges to some of the cards, possessed a cell phone from a store where unauthorized charges were made to some of the credit cards, and had a utility account for which one of the credit cards was used to make a payment. The court held: "[W]hen one presents a credit card or credit card number as payment, he is representing himself to be the cardholder or an authorized user thereof. Accordingly, where one is not the cardholder or an authorized user, this representation is fraudulent. No verbal statement of one's identity is required, nor can the mere stating of a name different from that of the cardholder negate the inference of misrepresentation."

## Impaired Driving

**Trial court erred by determining that breath tests were not sequential and granting motion to suppress test results**

State v. Cathcart, __ N.C. App. __, __ S.E.2d __ (May 21, 2013)
(http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMy8xMi0xNDc4LTEucGRm).
The trial court erred by granting the defendant's motion to suppress breath test results from an Intoximeter EC/IR II. The trooper administered the first breath test, which returned a result of .10. When the trooper asked for a second sample, the defendant did not blow hard enough and the machine produced an "insufficient sample" result. The machine then timed out and printed out the first test result ticket. The trooper reset the machine and asked the defendant for another breath sample; the trooper did not wait before starting the second test. The next sample produced a result of .09. The sample was printed on a second result ticket. The trial court granted the defendant's motion to suppress, concluding that the trooper did not follow the procedures outlined in N.C. Admin. Code tit. 10A, r. 41B.0322 (2009) and because he did not acquire two sequential breath samples on the same test record ticket. Following *State v. White*, 84 N.C. App. 111 (1987), the court held that the trial court erred by concluding that the breath samples were not sequential. With respect to the administrative code, the court held that it was not necessary for the trooper to repeat the observation period.

**Officers had probable cause of impaired driving for the defendant who was lying on ground behind car**

State v. Williams, __ N.C. App. __, __ S.E.2d __ (Feb. 19, 2013)
(http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMy8xMi05NDctMS5wZGY=)
Officers had probable cause to arrest the defendant for impaired driving. An officer saw the defendant lying behind a car on the ground near the trunk. His shirt was pulled over his head, his head was in the shirt's sleeve hole, and he appeared unconscious. When the officer tried to arouse the defendant, he woke up and started chanting. His speech was slurred, he had a strong odor of alcohol, he fell back when he stood, he was unsteady on his feet and his eyes were bloodshot. The keys were in the ignition and the car was not running. Another officer searched the area and found no sign of anyone else.

**Prosecution for DWI violated double jeopardy where the defendant had been subjected to one-year disqualification of commercial driver's license**

State v. McKenzie, __ N.C. App. __, 736 S.E.2d 591 (Jan. 15, 2013), *writ allowed*, __ N.C. __, 736 S.E.2d 184 (Jan. 23, 2013) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMy8xMi00MzYtMS5wZGY=). (1) Over a dissent the court held that prosecuting the defendant for DWI violated double jeopardy where the defendant previously was subjected to a one-year disqualification of his commercial driver's license under G.S. 20-17.4. (2) Over a dissent the court held that the issue whether the defendant's one-year disqualification violated his due process rights was moot. However, it added: "[W]e believe [G.S.] 20-17.4 raises due process concerns because it does not afford defendants any opportunity for a hearing. Nonetheless, in the absence of a justiciable claim, it is the role of the state legislature, not this Court, to remedy constitutionally suspect statutes." The dissenting judge did not believe that the trial court had jurisdiction to consider the due process issue.

**Trial court erred by denying the defendant's motion to suppress intoxilyzer results where defendant was denied statutory right to have a witness view test**

State v. Buckheit, __ N.C. App. __, 735 S.E.2d 345 (Nov. 6, 2012) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMi00NjUtMS5wZGY=).
The trial court erred by denying the defendant's motion to suppress intoxilyzer results. After arrest, the defendant was informed of his rights under G.S. 20-16.2(a) and elected to have a witness present. The defendant contacted his witness by phone and asked her to witness the intoxilyzer test. Shortly thereafter his witness arrived in the lobby of the County Public Safety Center; when she informed the front desk officer why she was there, she was told to wait in the lobby. The witness asked the front desk officer multiple times if she needed to do anything further. When the intoxilyzer test was administered, the witness was waiting in the lobby. Finding the case indistinguishable from State v. Hatley, 190 N.C. App. 639 (2008), the court held that after her timely arrival, the defendant's witness made reasonable efforts to gain access to the defendant but was prevented from doing so and that therefore the intoxilyzer results should have been suppressed.

## Larceny

**Owner's testimony that stolen vehicle was worth more than $1,000 was sufficient evidence of value**

State v. Redman, __ N.C. App. __, 736 S.E.2d 545 (Dec. 18, 2012) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMi0xNDItMS5wZGY=).
In a felony larceny case, there was sufficient evidence that a stolen vehicle was worth more than $1,000. The value of a stolen item is measured by fair market value and a witness need not be an expert to give an opinion as to value. A witness who has knowledge of value gained from experience, information and observation may give his or her opinion of the value of the stolen item. Here, the vehicle owner's testimony regarding its value constituted sufficient evidence on this element.

## Motor Vehicle Offenses (Other than DWI)

**(1) Adjudication for no operator's license was not prohibited by corpus delecti rule; (2) Evidence of reckless driving was insufficient where juvenile collided with utility pole; (3) Evidence of unauthorized use was insufficient where no evidence showed the juvenile did not have his mother's consent to drive her vehicle**

In re A.N.C., __ N.C. App. __, __ S.E.2d __ (Feb. 5, 2013) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMy8xMi00ODItMS5wZGY=) (1) The evidence was insufficient to adjudicate the thirteen-year-old juvenile delinquent for unauthorized use of a motor vehicle. Although the evidence showed that the juvenile was operating a motor vehicle registered to his mother, there was no evidence that he was using the vehicle without his mother's consent. (2) The evidence was insufficient to adjudicate the thirteen-year-old juvenile delinquent for reckless driving under G.S. 20-140(b). The evidence showed that the juvenile was driving a vehicle registered to his mother at the time of the wreck and that the vehicle that he was driving collided with a utility pole. However there was no evidence showing that the collision resulted from careless or reckless driving. The court concluded that the "mere fact that an unlicensed driver ran off the road and collided with a utility pole does not suffice to establish a violation of [G.S.] 20-140(b)."

## Resist, Delay, Obstruct

**(1) Trial court did not err by instructing jury that arrest for indecent exposure would be lawful arrest; (2) Evidence was sufficient to establish that defendant willfully resisted arrest.**

State v. Smith, __ N.C. App. __, 736 S.E.2d 847 (Feb. 5, 2013) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMy8xMi04MDktMS5wZGY=). (1) In a resisting, delaying, obstructing case, the trial court did not err by instructing the jury that an arrest for indecent exposure would be a lawful arrest where the defendant never claimed at trial that he was acting in response to an unlawful arrest, nor did the evidence support a reasonable inference that he did so. Although the defendant argued on appeal that the arrest was not in compliance with G.S. 15A-401, the evidence indicated otherwise. (2) The court rejected the defendant's argument that the evidence was insufficient to establish that he willfully resisted arrest. Responding to a call about indecent exposure, the officer found the defendant in his car with his shorts at his thighs and his genitals exposed. When the defendant exited his vehicle his shorts fell to the ground. The defendant refused to give the officer his arm or put his arm behind his back. According to the defendant he was merely trying to pull up his pants.

## Sex Offenders

**(1) Trial court erred by requiring the defendant to enroll in SBM where he did not fall into any of the categories in G.S. 14-208.40; (2) Trial court's order was a nullity where it was never filed with clerk**

State v. Hadden, __ N.C. App. __, __ S.E.2d __ (April 2, 2013) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMy8xMi05MjItMS5wZGY=). (1) The trial court erred by requiring the defendant to enroll in SBM. After finding that the defendant did not fall into any of the categories requiring SBM under G.S. 14-208.40, the trial court nonetheless ordered SBM

enrollment for 30 years, on grounds that his probation was revoked and he failed to complete sex offender treatment. The court remanded for reconsideration. (2) The trial court's order requiring the defendant to enroll in SBM, although signed and dated by the trial court, was never filed with the clerk of court and therefore was a nullity.

**PJC is not a "reportable conviction" for purposes of sex offender registration statute**

Walters v. Cooper, __ N.C. App. __, 739 S.E.2d 185 (Mar. 19, 2013), *writ of supersedeas allowed,* __ N.C. __, 739 S.E.2d 838 (Apr. 03, 2013) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMy8xMi0xMjIxLTEucGRm).
Over a dissent, the court held that a PJC entered upon a conviction for sexual battery does not constitute a "final conviction" and therefore cannot be a "reportable conviction" for purposes of the sex offender registration statute.

**(1) Trial court erred by finding the defendant required the highest level of supervision and monitoring where STATIC-99 classified him as a low risk for reoffending and trial court's additional findings were unsupported; (2) Trial court erred in concluding that indecent liberties was an offense against a minor**

State v. Thomas, __ N.C. App. __, __ S.E.2d __ (Feb. 19, 2013) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMy8xMi02NjctMS5wZGY=). (1) The trial court erred by concluding that the defendant required the highest level of supervision and monitoring and ordering the defendant to enroll in SBM for ten years when the STATIC-99 risk assessment classified him as a low risk for reoffending and the trial court's additional findings were not supported by the evidence. The trial court had made additional findings that the victim suffered significant emotional trauma, that the defendant took advantage of a position of trust, and that the defendant had a prior record for a sex offense. The trial court stated that these factors "create some concern for the court on the likelihood of recidivism." The finding that the victim suffered from trauma was based solely on unsworn statements by the victim's mother and thus were insufficient to support this finding. The defendant's prior record and likelihood of recidivism was already accounted for in the STATIC-99 and thus did not constitute additional evidence outside of the STATIC-99. However, because the State had presented evidence which could support a determination of a higher level of risk, the court remanded for a new SBM hearing. (2) The trial court erred by concluding that indecent liberties was an offense against a minor as defined by G.S. 14-208.6(1m). However, that offense may constitute a sexually violent offense and could thus support a SBM order.

**(1) G.S. 14-208.18(a)(1)-(3) creates three separate and distinct criminal offenses; (2) The defendant did not have standing to assert that G.S. 14-208.18(a)(3) was facially invalid but had standing to raise an as applied challenge; (3) G.S. 14-208.18(a)(3) was unconstitutionally vague as applied to the defendant; (4) Trial court lacked jurisdiction to rule that G.S. 14-208.18(a)(2) was unconstitutional where the defendant was charged with a violation of G.S. 14-208.18(a)(3).**

State v. Daniels, __ N.C. App. __, 741 S.E.2d 354 (Dec. 31, 2012) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMi00MTctMS5wZGY=)
(1) G.S. 14-208.18(a)(1)-(3) creates three separate and distinct criminal offenses. (2) Although the defendant did not have standing to assert that G.S. 14-208.18(a)(3) was facially invalid, he had standing to raise an as applied challenge. (3) G.S. 14-208.18(a)(3), which prohibits a sex offender from being "at any place" where minors gather for regularly scheduled programs, was unconstitutionally vague as applied to the defendant. The defendant's two charges arose from his presence at two public parks. The

State alleged that on one occasion he was "out kind of close to the parking lot area or that little dirt road area[,]" between the ballpark and the road and on the second was at an "adult softball field" adjacent to a "tee ball" field. The court found that on these facts, the portion of G.S. 14-208.18(a)(3), prohibiting presence "at any place," was unconstitutionally vague as applied to the defendant because it fails to give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, and it fails to provide explicit standards for those who apply the law. (4) The trial court lacked jurisdiction to rule that G.S. 14-208.18(a)(2) was unconstitutional where the defendant only was charged with a violation of G.S. 14-208.18(a)(3) and those provisions were severable.

## Sexual Assaults

**Sufficient evidence of force and penetration**

State v. Norman, __ N.C. App. __, __ S.E.2d __ (May 7, 2013) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMy8xMi01OTktMS5wZGY=). (1) In a second-degree rape and sexual offense case, the evidence sufficiently established use of force. The victim repeatedly declined the defendant's advances and told him to stop and that she didn't want to engage in sexual acts. The defendant pushed her to the ground. When he was on top of her she tried to push him away. (2) Because evidence of vaginal penetration was clear and positive, the trial court did not err by failing to instruct the jury on attempted rape.

**Insufficient evidence of sexual purpose to support adjudication for sexual battery**

In re K.C., __ N.C. App. __, __ S.E.2d __ (April 16, 2013). (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMy8xMi0xMTU3LTEucGRm).
There was insufficient evidence to support a delinquency adjudication for sexual battery. Although there was sufficient evidence of sexual contact, there was insufficient evidence of a sexual purpose. When dealing with children, sexual purpose cannot be inferred from the act itself and that there must be "evidence of the child's maturity, intent, experience, or other factor indicating his purpose in acting." It continued, "factors like age disparity, control by the juvenile, the location and secretive nature of the juvenile's actions, and the attitude of the juvenile should be taken into account." Evaluating the circumstances, the court found the evidence insufficient.

## Speeding to Elude

**(1) Defendant's desire to be arrested by a female officer not relevant in determining whether she intended to elude police; (2) Even if trial court's instructions as to intent were erroneous, they were not plain error.**

State v. Cameron, __ N.C. App. __, 732 S.E.2d 386 (Oct. 2, 2012) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMi0zOTUtMS5wZGY=).
(1) In a speeding to elude case, the court rejected the defendant's argument that she did not intend to elude an officer because she preferred to be arrested by a female officer rather than the male officer who stopped her. The defendant's preference in this regard was irrelevant to whether she intended to elude the officer. (2) Even if the trial court erred in its jury instruction with regard to the required state of mind, no plain error occurred in light of the overwhelming evidence of guilt.

## Weapons Offenses

**Felon in possession statute does not apply to person who has received pardon of forgiveness for felony**

Booth v. North Carolina, __ N.C. App. __, __ S.E.2d __ (June 4, 2013) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMy8xMy0yLTEucGRm).
G.S. 14-415.1(a), proscribing the offense of felon in possession of a firearm, does not apply to the plaintiff, who had received a Pardon of Forgiveness from the NC Governor for his prior NC felony. The court relied on G.S. 14-415.1(d), which provides in part that the section does not apply to a person who "pursuant to the law of the jurisdiction in which the conviction occurred, has been pardoned."

**Court of Appeal's opinion in *Baysden v. North Carolina* (holding felon in possession of firearm statute unconstitutional as applied to plaintiff) left undisturbed**

Baysden v. State, __ N.C. __, 736 S.E.2d 173 (Jan. 25, 2013) (http://appellate.nccourts.org/opinions/?c=1&pdf=MjAxMy81MjJBMTEtMS5wZGY=).
With one justice taking no part in consideration of the case, an equally divided court left undisturbed the following opinion below, which stands without precedential value:

Baysden v. North Carolina, __ N.C. App. __, 718 S.E.2d 699 (Nov. 15, 2011). Over a dissent, the court of appeals applied the analysis of Britt and Whitaker and held that the felon in possession of a firearm statute was unconstitutional as applied to the plaintiff. The plaintiff was convicted of two felony offenses, neither of which involved violent conduct, between three and four decades ago. Since that time he has been a lawabiding citizen. After his firearms rights were restored, the plaintiff used firearms in a safe and lawful manner. When he again became subject to the firearms prohibition because of a 2004 amendment, he took action to ensure that he did not unlawfully possess any firearms and has "assiduously and proactively" complied with the statute since that time. Additionally, the plaintiff was before the court not on a criminal charge for weapons possession but rather on his declaratory judgment action. The court of appeals concluded: "[W]e are unable to see any material distinction between the facts at issue in . . . Britt and the facts at issue here." The court rejected the argument that the plaintiff's claim should fail because 2010 amendments to the statute expressly exclude him from the class of individuals eligible to seek restoration of firearms rights; the court found this fact irrelevant to the Britt/Whitaker analysis. The court also rejected the notion that the determination as to whether the plaintiff's prior convictions were nonviolent should be made with reference to statutory definitions of nonviolent felonies, concluding that such statutory definitions did not apply in its constitutional analysis. Finally, the court rejected the argument that the plaintiff's challenge must fail because unlike the plaintiff in Britt, the plaintiff here had two prior felony convictions. The court refused to adopt a bright line rule, instead concluding that the relevant factor is the number, age, and severity of the offenses for which the litigant has been convicted; while the number of convictions is relevant, it is not dispositive.

**Court reversed trial court's ruling that felon in possession of firearm statute violated plaintiff's substantive and procedural due process right**

Johnston v. State, __ N.C. App. __, 735 S.E.2d 859 (Dec. 18, 2012) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMi00NS0xLnBkZg==).
Over a dissent the court reversed the trial court's ruling that G.S. 14-415.1 (proscribing the offense of felon in possession of a firearm) violated the plaintiff's substantive due process under the U.S. and N.C. constitutions and remanded to the trial court for additional proceedings. The court also reversed the trial court's ruling that the statute was facially invalid on procedural due process grounds, under both the U.S. and N.C. constitutions. The dissenting judge would have held that the plaintiff's substantive due process claim under the N.C. constitution was without merit.

**(1) Right to carry a concealed handgun not protected by Second Amendment; (2) Sheriff properly denied petitioner's application to renew concealed handgun permit**

Kelly v. Riley, __ N.C. App. __, 733 S.E.2d 194 (Nov. 6, 2012) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMi0yNzMtMS5wZGY=).
(1) G.S. 14-415.12 (criteria to qualify for a concealed handgun permit) was not unconstitutional as applied to the petitioner. Relying on case law from the federal circuit courts, the court adopted a two-part analysis to address Second Amendment challenges. First, the court asks whether the challenged law applies to conduct protected by the Second Amendment. If not, the law is valid and the inquiry is complete. If the law applies to protected conduct, it then must be evaluated under the appropriate form of "means-end scrutiny." Applying this analysis, the court held that the petitioner's right to carry a concealed handgun did not fall within the scope of the Second Amendment. Having determined that G.S. 14-415.12 does not impose a burden on conduct protected by the Second Amendment, the court found no need to engage in the second step of the analysis. (2) The sheriff properly denied the petitioner's application to renew his concealed handgun permit where the petitioner did not meet the requirements of G.S. 14-415.12. The court rejected the petitioner's argument that G.S. 14-415.18 (revocation or suspension of permit) applied.

## Sentencing and Probation

### Court Costs

**(1) Trial court erred by failing to exercise discretion when ordering defendant to pay court costs; (2) Court costs must be limited to amount authorized by G.S. 7A-304**

State v. Patterson, __ N.C. App. __, 735 S.E.2d 602 (Oct. 16, 2012) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMi0zNTYtMS5wZGY=)
(1) The trial court erred by failing to exercise discretion when ordering the defendant to pay court costs. Ordering payment of costs, the court stated: "I have no discretion but to charge court costs and I'll impose that as a civil judgment." Amended G.S. 7A-304(a) does not mandate imposition of court costs; rather, it includes a limited exception under which the trial court may waive court costs upon a finding of just cause. The trial court's statement suggests that it was unaware of the possibility of a just cause waiver. (2) Court costs must be limited to the amounts authorized by G.S. 7A-304.

## Gain Time

**Reversing court of appeals for reasons stated in dissent (petitioners were not entitled to have their earned time credits applied against their sentences for purposes of calculating their unconditional release date)**

Lovette v. North Carolina Department of Correction, __ N.C. __, 737 S.E. 2d 737 (Mar. 8, 2013). http://appellate.nccourts.org/opinions/?c=1&pdf=MjAxMy8zNTlBMTItMS5wZGY=
In a per curiam decision, the court reversed the court of appeals for the reasons stated in the dissenting opinion. In the opinion below, Lovette v. North Carolina Department of Correction, __ N.C. App. __, 731 S.E.2d 206 (2012), the court of appeals, over a dissent, affirmed a trial court order holding that the petitioners had fully served their life sentences after credits had been applied to their unconditional release dates. Both petitioners were sentenced to life imprisonment under former G.S. 14-2, which provided that a life sentence should be considered as imprisonment for eighty years. They filed habeas petitions alleging that based on credits for "gain time," "good time," and "meritorious service" and days actually served, they had served their entire sentences and were entitled to be discharged from incarceration. The trial court distinguished Jones v. Keller, 364 N.C. 249 (2010) (in light of the compelling State interest in maintaining public safety, regulations do not require that the DOC apply time credits for purposes of unconditional release to those who committed first-degree murder during the 8 Apr. 1974 through 30 June 1978 time frame and were sentenced to life imprisonment), on grounds that the petitioners in the case at hand were not convicted of first-degree murder (one was convicted of second-degree murder; the other was convicted for second-degree burglary). The trial court went on to grant the petitioners relief. The State appealed. The court of appeals held that the trial court did not err by distinguishing the case from Jones. The court also rejected the State's argument that the trial court's order changed the petitioners' sentences and violated separation of powers. Judge Ervin dissented, concluding that the trial court's order should be reversed. According to Judge Ervin, the Jones applied and required the conclusion that the petitioners were not entitled to have their earned time credits applied against their sentences for purposes of calculating their unconditional release date.

## Jail Credit

**Trial court erred by denying credit for time the defendant was incarcerated pending a revocation hearing on his first violation of post-release supervision.**

State v. Corkum, __ N.C. App. __, 735 S.E.2d 420 (Dec. 4, 2012)
(http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMi01MjYtMS5wZGY=)
The trial court erred by denying credit for the time the defendant was incarcerated pending a revocation hearing on his first violation of post-release supervision. Under 15-196.1, the trial court was required to credit the defendant with eight days he spent in custody awaiting a revocation hearing for his first violation of post-release supervision when the defendant's sentence later was activated upon the revocation of his post-release supervision following his second violation.

## Juvenile Homicide

**The defendant was entitled to a new sentencing hearing in accordance with statute enacted to bring sentencing laws into compliance with *Miller v. Alabama***

State v. Lovette, __ N.C. App. __, __ S.E.2d __ (Feb. 5, 2013)
(http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMy8xMi03OTQtMS5wZGY=)
In an appeal from a conviction obtained in the Eve Carson murder case, the court held that the defendant was entitled to a new sentencing hearing in accordance with G.S. 15A-1476 (recodified as G.S. 15A-1340.19A), the statute enacted by the North Carolina General Assembly to bring the State's sentencing law into compliance with Miller v. Alabama, __ U.S. __, 183 L. Ed. 2d 407 (2012) (Eighth Amendment prohibits a sentencing scheme that requires life in prison without the possibility of parole for juvenile homicide offenders). The State conceded that the statute applied to the defendant, who was seventeen years old at the time of the murder and whose case was pending on direct appeal when the Act became law.

## Probation Violations

**Trial court lacked jurisdiction to revoke probation where basis of violation was not alleged in violation report and probationer otherwise lacked notice**

State v. Tindall, __ N.C. App. __, __ S.E.2d __ (May 7, 2013). The trial court lacked jurisdiction to revoke the defendant's probation on the basis of a violation that was not alleged in the violation report and of which she was not given notice. The violation reports alleged that the defendant violated two conditions of her probation: to "[n]ot use, possess or control any illegal drug" and to "participate in further evaluation, counseling, treatment or education programs recommended . . . and comply with all further therapeutic requirements." The specific facts upon which the State relied were that "defendant admitted to using 10 lines of cocaine" and that the defendant failed to comply with treatment as ordered. However, the trial court found that the defendant's probation was revoked for "violation of the condition(s) that he/she not commit any criminal offense . . . or abscond from supervision."

**(1) Challenging validity of original judgment in an appeal of probation revocation is an impermissible collateral attack; (2) No error in activating the defendant's sentence on basis that he absconded where the defendant's probation required that he remain in the jurisdiction and report as directed to probation officer**

State v. Hunnicutt, __ N.C. App. __, __ S.E.2d __ (April 2, 2013). (1) A defendant may not challenge the validity of an indictment in an appeal challenging revocation of probation. In such circumstances, challenging the validity of the original judgment is an impermissible collateral attack. (2) The trial court did not err by activating the defendant's sentence on the basis that the defendant absconded by willfully avoiding supervision. The defendant's probation required that he remain in the jurisdiction and report as directed to the probation officer. The violation report alleged violations of both of these conditions. Despite the trial court's use of the term "abscond," it was clear that the trial court revoked the defendant's probation because he violated the two listed conditions. (3) The court remanded for correction of a clerical error on the judgment that incorrectly indicated that the defendant absconded pursuant to G.S. 15A-1343(b)(3e). (4) The trial court did not abuse its discretion in finding a violation and revoking his probation where the evidence supported its determination.

**Error to revoke the defendant's probation for failure to pay monies and complete community service absent evidence of a payment schedule or community service schedule**

State v. Boone, __ N.C. App. __, 741 S.E.2d 371 (Feb. 5, 2013)
(http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMy8xMi02NzUtMS5wZGY=)
The trial court erred by revoking the defendant's probation. The defendant pleaded guilty and was sentenced to 120 days confinement suspended for one year of supervised probation. The trial court ordered the defendant to perform 48 hours of community service, although no date for completion of the community service was noted on the judgment, and to pay $1,385 in costs, fines, and fees, as well as the probation supervision fee. The schedule required for the defendant's payments and community service was to be established by the probation officer. The probation officer filed a violation report alleging that the defendant had willfully violated his probation by failing to complete any of his community service, being $700 in arrears of his original balance, and being in arrears of his supervision fee. The defendant was found to have willfully violated and was revoked. The court concluded that absent any evidence of a required payment schedule or schedule for community service, the evidence was insufficient to support a finding of willful violation.

**No abuse of discretion in revoking probation under JRA where the defendant was convicted of another crime while on probation**

State v. Jones, __ N.C. App. __, 736 S.E.2d 634 (Jan. 15, 2013)
(http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMy8xMi05OTItMS5wZGY=)
The trial court did not abuse its discretion by revoking the defendant's probation under the Justice Reinvestment Act when the defendant was convicted of another criminal offense while on probation.

## Post-Conviction

***Padilla* is not retroactive**

Chaidez v. United States, 568 U.S. __ (Feb. 20, 2013)
(http://www.supremecourt.gov/opinions/12pdf/11-820_j426.pdf).
Padilla v. Kentucky, 559 U. S. ___ (2010) (criminal defense attorneys must inform non-citizen clients of the risks of deportation arising from guilty pleas), does not apply retroactively to cases that became final before Padilla was decided. Applying the *Teague* retroactivity analysis, the Court held that Padilla announced a new rule. The defendant did not assert that Padilla fell within either of the Teague test's exceptions to the antiretroactivity rule. [Note: The N.C. Court of Appeals already has held that Padilla is not retroactive. State v. Alshaif, __ N.C. App. __, 724 S.E.2d 597 (Feb. 21, 2012)]