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

2012 District Court Judges' Summer Conference
(Includes cases decided between October 4, 2011 and June 5, 2012)

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

(1) Reasonable suspicion existed to detain defendant where defendant generally matched description of suspicious person, defendant peered from behind parked van, and defendant fled and attempted to hide upon seeing officer; (2) Officer was justified in removing screwdriver and wrench discovered during pat-down; (3) Statements defendant gave after being forced to the ground and handcuffed should have been suppressed where no Miranda warnings were given

State v. Hemphill, __ N.C. App. __, 723 S.E.2d 142 (Feb. 21, 2012). (1) An officer had a reasonable, articulable suspicion that criminal activity was afoot when he detained the defendant. After 10 pm the officer learned of a report of suspicious activity at Auto America. When the officer arrived at the scene he saw the defendant, who generally matched the description of one of the individuals reported, peering from behind a parked van. When the defendant spotted the officer, he ran, ignoring the officer's instructions to stop. After a 1/8 mile chase, the officer found the defendant trying to hide behind a dumpster. The defendant's flight and the other facts were sufficient to raise a reasonable suspicion that criminal activity was afoot. (2) Upon feeling a screwdriver and wrench on the defendant's person during a pat-down, the officer was justified in removing these items as they constituted both a potential danger to the officer and were further suggestive of criminal activity being afoot. (3) The defendant's response to the officer's questioning while on the ground and being restrained with handcuffs should have been suppressed because the defendant had not been given *Miranda* warnings. The officer's questioning constituted an interrogation and a reasonable person in the defendant's position, having been forced to the ground by an officer with a taser drawn and in the process of being handcuffed, would have felt his freedom of movement had been restrained to a degree associated with formal arrest. Thus, there was a custodial interrogation. The court went on, however, to find that the defendant was not prejudiced by the trial court's failure to suppress the statements. A concurring judge agreed that the defendant was not entitled to a new trial but believed that the defendant was not in custody and thus not subjected to a custodial interrogation.

No reasonable suspicion to stop where officer, who was seeking robbery suspects, saw defendant pull off highway into wooded area and heard yelling and cars doors slamming before defendant accelerated rapidly past officer

State v. Brown, __ N.C. App. __, 720 S.E.2d 446 (Dec. 20, 2011). The trial court erred by denying the defendant's motion to suppress evidence of his alleged impairment where the evidence was the fruit of an illegal stop. An officer who was surveying an area in the hope of locating robbery suspects saw the defendant pull off to the side of a highway in a wooded area. The officer heard yelling and car doors slamming. Shortly thereafter, the defendant accelerated rapidly past the officer, but not to a speed warranting a traffic violation. Thinking that the defendant may have been picking up the robbery suspects, the officer followed the defendant for almost a mile. Although he observed no traffic violations, the officer pulled over the defendant's vehicle. The officer did not have any information regarding the direction in which the suspects fled, nor did he have a description of the getaway vehicle. The officer's reason for pulling over the defendant's vehicle did not amount to the reasonable, articulable suspicion necessary to warrant a *Terry* stop.

Weaving

Reasonable suspicion to stop existed where defendant's weaving in lane was so erratic that other drivers had to take evasive action

State v. Fields, __ N.C. App. __, 723 S.E.2d 777 (Mar. 6, 2012). An officer had reasonable suspicion to stop the defendant's vehicle where the defendant's weaving in his own lane was sufficiently frequent and erratic to prompt evasive maneuvers from other drivers. Distinguishing cases holding that weaving within a lane, standing alone, is insufficient to support a stop, the court noted that here "the trial court did not find only that defendant was weaving in his lane, but rather that defendant's driving was 'like a ball bouncing in a small room'" and that "[t]he driving was so erratic that the officer observed other drivers -- in heavy traffic -- taking evasive maneuvers to avoid defendant's car." The court determined that none of the other cases involved the level of erratic driving and potential danger to other drivers that was involved in this case.

Weaving was insufficient to establish reasonable suspicion for stop

State v. Otto, __ N.C. App. __, 718 S.E.2d 181 (Nov. 15, 2011), *review allowed,* ___ N.C. ___, 719 S.E.2d 30 (Dec. 2, 2011). In an impaired driving case, the court held, over a dissent, that the officer lacked reasonable suspicion for the stop. At 11 pm, the officer noticed the defendant weaving from the center line to the fog line; the defendant's vehicle did not leave the roadway or cross the center line, nor did the defendant commit any additional traffic violations. The officer initiated a stop after following the defendant for approximately 3/4 of a mile. When the officer initially observed the defendant, she was approximately 1/2 mile from the Rock Springs Equestrian Club, a private club, and was coming from the direction of the club. The officer was aware that a banquet was being held at the club that evening; although the officer did not know if alcohol would be served at the club that evening, the officer had heard alcohol was served at other club events. The court held that the trial court's finding that the officer knew that the club served alcohol was not supported by the evidence. The officer never testified to this fact and because the club didn't regularly serve alcohol, there was no basis for the officer to presume that alcohol was served that evening. The court also held that the trial court erred in concluding that the officer had a reasonable, articulable suspicion for stopping the defendant's vehicle, stating: "Without any additional circumstances giving rise to a reasonable suspicion that criminal activity is afoot, stopping a vehicle for weaving is unreasonable."

Other Vehicle Stops

Anonymous tip of drug activity combined with abrupt lane change and other factors provided reasonable suspicion to stop

State v. Watkins, __ N.C. App. __, __ S.E.2d __ (May 1, 2012). Officers had reasonable suspicion to stop the defendant's vehicle. Officers had received an anonymous tip that a vehicle containing "a large amount of pills and drugs" would be traveling from Georgia through Macon County and possibly Graham County; the vehicle was described as a small or mid-sized passenger car, maroon or purple in color, with Georgia license plates. Officers set up surveillance along the most likely route. When a small purple car passed the officers, they pulled out behind it. The car then made an abrupt lane change without signaling and slowed down by approximately 5-10 mph. The officers ran the vehicle's license plate and discovered the vehicle was registered to a person known to have outstanding arrest warrants. Although the officers were pretty sure that the driver was not the wanted person, they were unable to identify

the passenger. They also saw the driver repeatedly looking in his rearview mirror and glancing over his shoulder. They then pulled the vehicle over. The court concluded that the defendant's lane change in combination with the anonymous tip and defendant's other activities were sufficient to give an experienced law enforcement officer reasonable suspicion that some illegal activity was taking place. Those other activities included the defendant's slow speed in the passing lane, frequent glances in his rearview mirrors, repeated glances over his shoulder, and that he was driving a car registered to another person. Moreover, it noted, not only was the defendant not the owner of the vehicle, but the owner was known to have outstanding arrest warrants; it was reasonable to conclude that the unidentified passenger may have been the vehicle's owner.

Invalidity of checkpoint irrelevant to whether officer had reasonable suspicion to stop where defendant tried to evade checkpoint

State v. Collins, __ N.C. App. __, 724 S.E.2d 82 (Mar. 6, 2012). The trial court erred by granting the defendant's motion to suppress on grounds that a checkpoint was unlawful under G.S. 20-16.3A. Because the defendant did not actually stop at the checkpoint, its invalidity was irrelevant to whether an officer had sufficient reasonable suspicion to stop the defendant once he attempted to evade the checkpoint. The court vacated the order granting the motion to suppress and remanded.

(1) Court rejected argument that stop was pretextual where defendant was lawfully stopped for speeding about 10 mph above the speed limit; (2) Length of detention did not exceed scope of stop where officer discovered new facts such as defendant's lack of driver's license; (3) Defendant's consent to search vehicle extended to areas under hood and in air filter compartment

State v. Lopez, __ N.C. App. __, 723 S.E.2d 164 (Feb. 21, 2012). (1) An officer lawfully stopped a vehicle after observing the defendant drive approximately 10 mph above the speed limit. The court rejected the defendant's argument that the traffic stop was a pretext to search for drugs as irrelevant in light of the fact that the defendant was lawfully stopped for speeding. (2) Reasonable suspicion supported the length of the stop. The officer's initial questions regarding the defendant's license, route of travel, and occupation were within the scope of the traffic stop. Any further detention was appropriate in light of the following facts: the defendant did not have a valid driver's license; although the defendant said he had just gotten off work at a construction job, he was well kept with clean hands and clothing; the defendant "became visibly nervous by breathing rapidly[;] . . . his heart appeared to be beating rapidly[,] he exchanged glances with his passenger and both individuals looked at an open plastic bag in the back seat of the vehicle"; an officer observed dryer sheets protruding from an open bag containing a box of clear plastic wrap, which, due to his training and experience, the officer knew were used to package and conceal drugs; and the defendant told the officer that the car he was driving belonged to a friend but that he wasn't sure of the friend's name. (3) The defendant's voluntary consent to search his vehicle extended to the officer's looking under the hood and in the vehicle's air filter compartment.

Court of Appeals affirmed in holding no reasonable suspicion supported stop where numbers on 30-day tag looked low and tag was dirty and worn

State v. Burke, __ N.C. __, 720 S.E.2d 388 (Jan. 27, 2012). In a per curiam opinion, the court affirmed the decision below in *State v. Burke,* __ N.C. App. __, 718 S.E.2d 738 (June 21, 2011) (over a dissent, the court held that the trial judge erred by denying the defendant's motion to suppress when no reasonable suspicion supported a stop of the defendant's vehicle; the officer stopped the vehicle because the numbers on the 30-day tag looked low and that the "low" number led him to "wonder[] about the

possibility of the tag being fictitious"; the court noted that it has previously held that 30-day tags that were unreadable, concealed, obstructed, or illegible, justified stops of the vehicles involved; here, although the officer testified that the 30-day tag was dirty and worn, he was able to read the tag without difficulty; the tag was not faded; the information was clearly visible; and the information was accurate and proper).

Warrantless Searches

Generally

Scope of traffic stop not exceeded where officer extended detention for arrival of canine unit in light of additional factors officer discovered after stop and after giving traffic citation

State v. Fisher, __ N.C. App. __, __ S.E.2d __ (Mar. 20, 2012). The trial court erred by concluding that an officer lacked reasonable suspicion to detain the defendant beyond the scope of a routine traffic stop. The officer lawfully stopped the vehicle for a seatbelt violation but then extended the detention for arrival of a canine unit. The State argued that numerous factors established reasonable suspicion that the defendant was transporting contraband: an overwhelming odor of air freshener in the car; the defendant claimed to have made a five hour round trip to go shopping but had not purchased anything; the defendant was nervous; the defendant had pending drug charges and was known as a distributor of marijuana and cocaine; the defendant was driving in a pack of cars; the car was registered to someone else; the defendant never asked why he had been stopped; the defendant was "eating on the go"; and a handprint indicated that something recently had been placed in the trunk. Although the officer did not know about the pending charges until after the canine unit was called, the court found this to be a relevant factor. It reasoned: "The extended detention of defendant is ongoing from the time of the traffic citation until the canine unit arrives and additional factors that present themselves during that time are relevant to why the detention continued until the canine unit arrived." Even discounting several of these factors that might be indicative of innocent behavior, the court found that other factors--nervousness, the smell of air freshener, inconsistency with regard to travel plans, driving a car not registered to the defendant, and the pending charges--supported a finding that reasonable suspicion existed.

Fourth Amendment violated by installation of GPS tracking device on defendant's vehicle and monitoring vehicle's movements on public streets

United States v. Jones, 565 U.S. __, 132 S. Ct. 945 (Jan. 23, 2012). The government's installation of a GPS tracking device on a vehicle and its use of that device to monitor the vehicle's movements on public streets constitutes a "search" within the meaning of the Fourth Amendment. Suspecting that the defendant was involved in drug trafficking, the government obtained a search warrant for use of a GPS device on the defendant's vehicle; the warrant authorized officers to install the device in the District of Columbia within 10 days. Officers ended up installing the device on the undercarriage of the vehicle while it was parked in a public parking lot in Maryland, 11 days after the warrant was signed. Over the next 28 days, the government used the device to track the vehicle's movements, and once had to replace the device's battery when the vehicle was parked in a different public lot in Maryland. By means of signals from multiple satellites, the device established the vehicle's location within 50 to 100 feet, and communicated that location by cellular phone to a government computer. It relayed more than 2,000 pages of data over the 4-week period. The defendant was charged with several drug offenses. He unsuccessfully sought to suppress the evidence obtained through the GPS device. Before the U.S. Supreme Court the government conceded noncompliance with the warrant and argued only that a

warrant was not required for the GPS device. Concluding that the evidence should have been suppressed, the Court characterized the government's conduct as having "physically occupied private property for the purpose of obtaining information." So characterized, the Court had "no doubt that such a physical intrusion would have been considered a 'search' within the meaning of the Fourth Amendment when it was adopted." The Court declined to address whether the defendant had a reasonable expectation of privacy in the undercarriage of his car and in the car's locations on the public roads, concluding that such an analysis was not required when the intrusion—as here—"encroached on a protected area."

Officers were entitled to qualified immunity where officers entered residence based on objectively reasonable fear that violence was imminent

Ryburn v. Huff, 565 U.S. __, 132 S. Ct. 987 (Jan. 23, 2012). The Court reversed a Ninth Circuit ruling that officers were not entitled to qualified immunity in a § 1983 action that arose after the officers entered a home without a warrant. When officers responded to a call from a high school, the principal informed them that a student, Vincent Huff, was rumored to have written a letter threatening to "shoot up" the school. The officers learned that Vincent had been absent two days, that he was a victim of bullying, and that a classmate believed him to be capable of carrying out the alleged threat. Officers found these facts concerning in light of training suggesting to them that these characteristics are common among perpetrators of school shootings. When the officers went to Vincent's home and knocked at the door, no one answered. They then called the home phone and no one answered. When they called Vincent's mother's cell phone, she reported that she and Vincent were inside. Vincent and Mrs. Huff then came outside to talk with the officers. Mrs. Huff declined an officer's request to continue the discussion inside. When an officer asked Mrs. Huff if there were any guns in the house, she immediately turned around and ran inside. The officers followed and eventually determined the threat to be unfounded. The Huffs filed a § 1983 action. The District Court found for the officers, concluding that they were entitled to qualified immunity because Mrs. Huff's odd behavior, combined with the information the officers gathered at the school, could have led reasonable officers to believe that there could be weapons inside the house, and that family members or the officers themselves were in danger. A divided panel of the Ninth Circuit disagreed with the conclusion that the officers were entitled to qualified immunity. The U.S. Supreme Court reversed, determining that reasonable officers could have come to the conclusion that the Fourth Amendment permitted them to enter the residence if there was an objectively reasonable basis for fearing that violence was imminent. It further determined that a reasonable officer could have come to such a conclusion based on the facts as found by the trial court.

Officers' entry of open field did not constitute search

State v. Ballance, __ N.C. App. __, 720 S.E.2d 856 (Jan. 17, 2012). The trial court did not err by rejecting the defendant's motion to suppress evidence obtained by officers when they entered the property in question. The court concluded that the property constituted an "open field," so that the investigating officers' entry onto the property and the observations made there did not constitute a "search" for Fourth Amendment purposes. The property consisted of 119 acres of wooded land used for hunting and containing no buildings or residences.

Search of the defendant's jacket incident to arrest was lawful when, after defendant was arrested, handcuffed, and placed in patrol car officer retrieved jacket from ground 10 feet away from defendant

State v. Jones, __ N.C. App. __, __ S.E.2d __ (June 5, 2012). A search of the defendant's jacket incident to arrest was lawful. When the officer grabbed the defendant, the defendant ran. While attempting to evade capture, the defendant tried to punch the officer while keeping his right hand inside his jacket. The defendant refused to remove his hand from his jacket pocket despite being ordered to do so and the jacket eventually came off during the struggle. This behavior led the officer to believe that the defendant may be armed. After the defendant was subdued, handcuffed, and placed in a patrol vehicle, the officer walked about ten feet and retrieved the jacket from the ground. He searched the jacket and retrieved a bag containing crack cocaine.

Strip Searches

Roadside strip searches were constitutional and supported by probable cause and exigent circumstances

State v. Fowler, __ N.C. App. __, __ S.E.2d __ (May 1, 2012). Roadside strip searches of the defendant were reasonable and did not violate the constitution. The court first rejected the State's argument that the searches were not strip searches. During both searches the defendant's private areas were observed by an officer and during one search the defendant's pants were removed and an officer searched inside of the defendant's underwear with his hand. Next, the court held that probable cause supported the searches. The officers stopped the defendant's vehicle for speeding after receiving information from another officer and his informant that the defendant would be traveling on a specified road in a silver Kia, carrying 3 grams of crack cocaine. The strip search occurred after a consensual search of the defendant's vehicle produced marijuana but no cocaine. The court found competent evidence to show that the informant, who was known to the officers and who had provided reliable information in the past, provided sufficient reliable information, corroborated by an officer, to establish probable cause to believe that the defendant would be carrying a small amount of cocaine in his vehicle. When the consensual search of defendant's vehicle did not produce the cocaine, the officers had sufficient probable cause, under the totality of the circumstances, to believe that the defendant was hiding the drugs on his person. Third, the court found that exigent circumstances supported the search. Specifically, the officer knew that the defendant had prior experience with jail intake procedures and that he could reasonably expect that the defendant would attempt to get rid of evidence in order to prevent his going to jail. Finally, the court found the search reasonable. The trial court had determined that although the searches were intrusive, the most intrusive one occurred in a dark area away from the traveled roadway, with no one other than the defendant and the officers in the immediate vicinity. Additionally, the trial court found that the officer did not pull down the defendant's underwear or otherwise expose his bare buttocks or genitals and no females were present or within view during the search. The court determined that these findings support the trial court's conclusion that, although the searches were intrusive, they were conducted in a discreet manner away from the view of others and limited in scope to finding a small amount of cocaine based on the corroborated tip of a known, reliable informant.

Reasonable suspicion is not required for close visual inspection, including removing clothing and exposing private areas, of arrestees who will be held in general population of detention facility, regardless of seriousness of offense

Florence v. Board of Chosen Freeholders, 566 U.S. __, 132 S.Ct. 1510 (April 2, 2012). Reasonable suspicion is not required for a close visual inspection of arrestees who will be held in the general population of a detention facility. The petitioner was arrested and taken to the Burlington County

Detention Center. Burlington County jail procedures required every arrestee to shower with a delousing agent. Officers would check arrestees for scars, marks, gang tattoos, and contraband as they disrobed. Petitioner claims he was also instructed to open his mouth, lift his tongue, hold out his arms, turn around, and lift his genitals. The petitioner was later transferred to the Essex County Correctional Facility. At that facility all arriving detainees passed through a metal detector and waited in a group holding cell for a more thorough search. When they left the holding cell, they were instructed to remove their clothing while an officer looked for body markings, wounds, and contraband. Without touching the detainees, an officer looked at their ears, nose, mouth, hair, scalp, fingers, hands, arms, armpits, and other body openings. Petitioner alleges he was required to lift his genitals, turn around, and cough in a squatting position. After a mandatory shower, during which his clothes were inspected, petitioner was admitted to the facility. He was released the next day. Petitioner filed suit under 42 U.S.C. §1983 arguing that persons arrested for a minor offense could not be required to remove their clothing and expose their private areas to close visual inspection as a routine part of the intake process. Rather, he contended, officials could conduct this kind of search only if they had reason to suspect a particular inmate of concealing a weapon, drugs, or other contraband. The district court granted the petitioner's motion for summary judgment. The Third Circuit reversed. The Court affirmed, stating in part:

> The question here is whether undoubted security imperatives involved in jail supervision override the assertion that some detainees must be exempt from the more invasive search procedures at issue absent reasonable suspicion of a concealed weapon or other contraband. The Court has held that deference must be given to the officials in charge of the jail unless there is "substantial evidence" demonstrating their response to the situation is exaggerated. Petitioner has not met this standard, and the record provides full justifications for the procedures used.

Slip op. at 9-10 (citation omitted).

The Court noted that correctional officials have a significant interest in conducting a thorough search as a standard part of the intake process to identify disease, gang affiliation, and locate contraband. The Court rejected the petitioner's assertion that certain detainees, such as those arrested for minor offenses, should be exempt from this process unless they give officers a particular reason to suspect them of hiding contraband. It concluded: "It is reasonable, however, for correctional officials to conclude this standard would be unworkable. The record provides evidence that the seriousness of an offense is a poor predictor of who has contraband and that it would be difficult in practice to determine whether individual detainees fall within the proposed exemption." Slip op. at 14.

Vehicle Searches under *Arizona v. Gant*

Vehicle search incident to arrest for possession of drug paraphernalia was valid under *Gant*; also, officers had probable cause for warrantless search of vehicle

State v. Watkins, __ N.C. App. __, __ S.E.2d __ (May 1, 2012). The search of a vehicle driven by the defendant was valid under *Arizona v. Gant,* 556 U.S. 332 (2009) as incident to the arrest of the defendant's passenger for possession of drug paraphernalia. Officers had a reasonable belief that evidence relevant to the passenger's possession of drug paraphernalia might be found in the vehicle. Additionally, the objective circumstances provided the officers with probable cause for a warrantless search of the vehicle. The drug paraphernalia found on the passenger, an anonymous tip that the vehicle would be transporting drugs, the fact that there were outstanding arrest warrants for the car's

owner, the defendant's nervous behavior while driving and upon exiting the vehicle, and an alert by a drug-sniffing dog provided probable cause for the warrantless search of the vehicle.

(1) Defendant did not withdraw consent to search car by saying "they're tearing up my trunk"; (2) Search was not invalid where officers took off rear quarter panels; (3) Consent search did not violate *Gant*

State v. Schiro, __ N.C. App. __, 723 S.E.2d 134 (Feb. 21, 2012). (1) The defendant did not withdraw his consent to search his car when, while sitting in a nearby patrol car, he said several times: "they're tearing up my trunk." A reasonable person would not have considered these statements to be an unequivocal revocation of consent. (2) A consent search of the defendant's vehicle was not invalid because it involved taking off the rear quarter panels. The trial court found that both rear quarter panels were fitted with a carpet/cardboard type interior trim and that they "were loose." Additionally, the trial court found that the officer "was easily able to pull back the carpet/cardboard type trim . . . covering the right rear quarter panel where he observed what appeared to be a sock with a pistol handle protruding from the sock." (3) Although the search was not valid as one incident to arrest under *Arizona v. Gant*, 556 U.S. 332 (2009), it was a valid consent search.

Search of defendant's vehicle incident to arrest for carrying a concealed gun was permissible under *Gant*; it was reasonable for officers to believe additional evidence of the offense of arrest could be found in vehicle

State v. Mbacke, __ N.C. __, 721 S.E.2d 218 (Jan. 27, 2012). The court reversed the court of appeals and determined that a search of the defendant's vehicle incident to his arrest for carrying a concealed gun did not violate the Fourth Amendment. The defendant was indicted for, among other things, trafficking in cocaine and carrying a concealed gun. Officers were dispatched to a specific street address in response to a 911 reporting that a black male armed with a black handgun, wearing a yellow shirt, and driving a red Ford Escape was parked in his driveway and that the male had "shot up" his house the previous night. Officers Walley and Horsley arrived at the scene less than six minutes after the 911 call. They observed a black male (later identified as the defendant) wearing a yellow shirt and backing a red or maroon Ford Escape out of the driveway. The officers got out of their vehicles, drew their weapons, and moved toward the defendant while ordering him to stop and put his hands in the air. Officer Woods then arrived and blocked the driveway to prevent escape. The defendant initially rested his hands on his steering wheel, but then lowered them towards his waist. Officers then began shouting at the defendant to keep his hands in sight and to exit his vehicle. The defendant raised his hands and stepped out of his car, kicking or bumping the driver's door shut as he did so. Officers ordered the defendant to lie on the ground and handcuffed him, advising him that he was being detained because they had received a report that a person matching his description was carrying a weapon. After the defendant said that he had a gun in his waistband and officers found the gun, the defendant was arrested for carrying a concealed gun. The officers secured the defendant in the back of a patrol car, returned to his vehicle, and opened the driver's side door. Officer Horsley immediately saw a white brick wrapped in green plastic protruding from beneath the driver's seat. As Officer Horsley was showing this to Officer Walley, the defendant attempted to escape from the patrol car. After re-securing the defendant, the officers searched his vehicle incident to the arrest but found no other contraband. The white brick turned out to be 993.8 grams of cocaine. The court noted that the case required it to apply *Arizona v. Gant,* 556 U.S. 332 (2009) (officers may search a vehicle incident to arrest only if (1) the arrestee is unsecured and within reaching distance of the passenger compartment when the search is conducted; or (2) it is reasonable to believe that evidence relevant to the crime of arrest might be found in the vehicle). It

began its analysis by concluding that as used in the second prong of the *Gant* test, the term "reasonable to believe" establishes a threshold lower than probable cause that "parallels the objective 'reasonable suspicion' standard sufficient to justify a *Terry* stop." Thus, it held that "when investigators have a reasonable and articulable basis to believe that evidence of the offense of arrest might be found in a suspect's vehicle after the occupants have been removed and secured, the investigators are permitted to conduct a search of that vehicle." Applying that standard, the court concluded:

> [D]efendant was arrested for . . . carrying a concealed gun. The arrest was based upon defendant's disclosure that the weapon was under his shirt. Other circumstances . . . such as the report of defendant's actions the night before and defendant's furtive behavior when confronted by officers, support a finding that it was reasonable to believe additional evidence of the offense of arrest could be found in defendant's vehicle. Accordingly, the search was permissible under *Gant* . . . ."

The court ended by noting that it "[was] not holding that an arrest for carrying a concealed weapon is *ipso facto* an occasion that justifies the search of a vehicle." It expressed the belief that "the 'reasonable to believe' standard required by *Gant* will not routinely be based on the nature or type of the offense of arrest and that the circumstances of each case ordinarily will determine the propriety of any vehicular searches conducted incident to an arrest."

Arrest

Where arrest warrants were supported by probable cause, defendants were shielded by public official immunity from false imprisonment claims

Beeson v. Palombo, __ N.C. App. __, __ S.E.2d __ (May 1, 2012). Because probable cause supported the issuance of arrest warrants for assault on a female, the defendants were shielded by public official immunity from the plaintiff's claims based on false imprisonment and other grounds. The defendant officer told the magistrate that the plaintiff, a teacher, had "touched [the] breast area" of two minor female students after at least one of the students had covered herself with her arms and asked the plaintiff not to touch her. This evidence was enough for a reasonable person to conclude that an offense had been committed and that the plaintiff was the perpetrator.

Miranda

Police not prohibited from speaking to defendant when five days earlier defendant, who was not in custody, said he did not want to speak to police without his lawyer; (2) Urging defendant to "cut a deal" did not violate Fifth Amendment; (3) Breach of *Miranda* procedures in first interrogation did not require suppression of warned statement arising from second interrogation where defendant denied involvement during first interrogation

Bobby v. Dixon, 565 U.S. __, 132 S. Ct. 26 (Nov. 7, 2011). The Court, per curiam, held that the Sixth Circuit erroneously concluded that a state supreme court ruling affirming the defendant's murder conviction was contrary to or involved an unreasonable application of clearly established federal law. The defendant and an accomplice murdered the victim, obtained an identification card in the victim's name, and sold the victim's car. An officer first spoke with the defendant during a chance encounter when the defendant was voluntarily at the police station for completely unrelated reasons. The officer gave the defendant *Miranda* warnings and asked to talk to him about the victim's disappearance. The

defendant declined to answer questions without his lawyer and left. Five days later, after receiving information that the defendant had sold the victim's car and forged his name, the defendant was arrested for forgery and was interrogated. Officers decided not to give the defendant *Miranda* warnings for fear that he would again refuse to speak with them. The defendant admitted to obtaining an identification card in the victim's name but claimed ignorance about the victim's disappearance. An officer told the defendant that "now is the time to say" whether he had any involvement in the murder because "if [the accomplice] starts cutting a deal over there, this is kinda like, a bus leaving. The first one that gets on it is the only one that's gonna get on." When the defendant continued to deny knowledge of the victim's disappearance, the interrogation ended. That afternoon the accomplice led the police to the victim's body, saying that the defendant told him where it was. The defendant was brought back for questioning. Before questioning began, the defendant said that he heard they had found a body and asked whether the accomplice was in custody. When the police said that the accomplice was not in custody, the defendant replied, "I talked to my attorney, and I want to tell you what happened." Officers read him *Miranda* rights and obtained a signed waiver of those rights. At this point, the defendant admitted murdering the victim. The defendant's confession to murder was admitted at trial and the defendant was convicted of, among other things, murder and sentenced to death. After the state supreme court affirmed, defendant filed for federal habeas relief. The district court denied relief but the Sixth Circuit reversed.

The Court found that the Sixth Circuit erred in three respects. First, it erred by concluding that federal law clearly established that police could not speak to the defendant when five days earlier he had refused to speak to them without his lawyer. The defendant was not in custody during the chance encounter and no law says that a person can invoke his *Miranda* rights anticipatorily, in a context other than custodial interrogation. Second, the Sixth Circuit erroneously held that police violated the Fifth Amendment by urging the defendant to "cut a deal" before his accomplice did so. No precedent holds that this common police tactic is unconstitutional. Third, the Sixth Circuit erroneously concluded that the state supreme court unreasonably applied *Oregon v. Elstad*, 470 U.S. 298 (1985), when it held that the defendant's second confession was voluntary. As the state supreme court explained, the defendant's statements were voluntary. During the first interrogation, he received several breaks, was given water and offered food, and was not abused or threatened. He freely acknowledged that he forged the victim's name and had no difficulty denying involvement with the victim's disappearance. Prior to his second interrogation, the defendant made an unsolicited declaration that he had spoken with his attorney and wanted to tell the police what happened. Then, before giving his confession, the defendant received *Miranda* warnings and signed a waiver-of-rights form. The state court recognized that the defendant's first interrogation involved an intentional *Miranda* violation but concluded that the breach of *Miranda* procedures involved no actual compulsion and thus there was no reason to suppress the later, warned confession. The Sixth Circuit erred by concluding that *Missouri v. Seibert*, 542 U.S. 600 (2004), mandated a different result. The nature of the interrogation here was different from that in *Seibert*. Here, the Court explained, the defendant denied involvement in the murder and then after *Miranda* warnings were given changed course and confessed (in *Seibert* the defendant confessed both times). Additionally, the Court noted, in contrast to *Seibert*, the two interrogations at issue here did not occur in one continuum.

No error in denying defendant's motion to suppress statements made while search warrant being executed

State v. Garcia, __ N.C. App. __, 715 S.E.2d 915 (Oct. 4, 2011). The trial court did not err by denying the defendant's motion to suppress statements made while a search warrant was being executed. The

defendant and his wife were present when the search warrant was executed. After handcuffing the defendant, an officer escorted him to a bathroom, read him *Miranda* rights, and questioned him about drug activities in the apartment. While this procedure was applied to the defendant's wife, an officer discovered a digital scale and two plastic bags of a white, powdery substance; the defendant then stated that the drugs were his, not his wife's. The court rejected the defendant's argument that he was arrested when he was moved to the bathroom and read his rights, noting that the questioning occurred during the search.

(1) Court rejected defendant's argument that he was coerced to confess because officers threatened to imprison his father if he did not; (2) Evidence supported finding that defendant did not invoke right to remain silent where defendant made continued assertions of his innocence; (3) Defendant's right to counsel not violated where defendant re-initiated conversation with officers after invoking right

State v. Cooper, __ N.C. App. __, 723 S.E.2d 780 (Mar. 6, 2012). (1) The court rejected the defendant's argument that his confession was involuntary because it was obtained through police threats. Although the defendant argued that the police threatened to imprison his father unless he confessed, the trial court's findings of fact were more than sufficient to support its conclusion that the confession was not coerced. The trial court found, in part, that the defendant never was promised or told that his father would benefit from any statements that he made. (2) The court rejected the defendant's argument that his Fifth Amendment right to remain silent was violated where there was ample evidence to support the trial court's finding that the defendant did not invoke that right. The defendant had argued that his refusal to talk to police about the crimes, other than to deny his involvement, was an invocation of the right to remain silent. The court found that the defendant's "continued assertions of his innocence cannot be considered unambiguous invocations of his right to remain silent." (3) The court rejected the defendant's argument that his confession was improperly obtained after he invoked his right to counsel. Although the defendant invoked his right to counsel before making the statements at issue, because he re-initiated the conversation with police, his right to counsel was not violated when detectives took his later statements.

Trial court's conclusion that defendant's statements made in hospital were voluntary was supported by facts although defendant argued medication rendered statements involuntary

State v. Cornelius, __ N.C. App. __, 720 S.E.2d 783 (Mar. 6, 2012). The trial court did not err by denying the defendant's motion to suppress three statements made while he was in the hospital. The defendant had argued that medication he received rendered the statements involuntary. Based on testimony of the detective who did the interview, hospital records, and the recorded statements, the trial court made extensive findings that the defendant was alert and oriented. Those findings supported the trial court's conclusion that the statements were voluntary.

Prisoner was not in custody for *Miranda* purposes where prisoner is removed from general population and questioned about events that occurred outside prison

Howes v. Fields, 565 U.S. __, 132 S. Ct. 1181 (Feb. 21, 2012). The Sixth Circuit erroneously concluded that a prisoner is in custody within the meaning of *Miranda* if the prisoner is taken aside and questioned about events that occurred outside the prison. While incarcerated, Randall Fields was escorted by a corrections officer to a conference room where two sheriff's deputies questioned him about allegations that, before he came to prison, he had engaged in sexual conduct with a 12-year-old boy. In order to get to the conference room, Fields had to go down one floor and pass through a locked door that separated two sections of the facility. Fields arrived at the conference room between 7 and 9 pm and was

questioned for between five and seven hours. At the beginning of the interview, Fields was told that he was free to leave and return to his cell. Later, he was again told that he could leave whenever he wanted. The interviewing deputies were armed, but Fields remained free of handcuffs and other restraints. The door to the conference room was sometimes open and sometimes shut. About halfway through the interview, after Fields had been confronted with the allegations of abuse, he became agitated and began to yell. One of the deputies, using an expletive, told Fields to sit down and said that "if [he] didn't want to cooperate, [he] could leave." Fields eventually confessed to engaging in sex acts with the boy. Fields claimed that he said several times during the interview that he no longer wanted to talk to the deputies, but he did not ask to go back to his cell before the interview ended. When he was eventually ready to leave, he had to wait an additional 20 minutes or so because an officer had to be called to escort him back to his cell, and he did not return to his cell until well after when he generally went to bed. At no time was Fields given *Miranda* warnings or advised that he did not have to speak with the deputies. Fields was charged with criminal sexual conduct. Fields unsuccessfully moved to suppress his confession and the jury convicted him of criminal sexual conduct. After an unsuccessful direct appeal, Fields filed for federal habeas relief. The federal district court granted relief and the Sixth Circuit affirmed, holding that the interview was a custodial interrogation because isolation from the general prison population combined with questioning about conduct occurring outside the prison makes any such interrogation custodial per se. Reversing, the Court stated: "it is abundantly clear that our precedents do not clearly establish the categorical rule on which the Court of Appeals relied, i.e., that the questioning of a prisoner is always custodial when the prisoner is removed from the general prison population and questioned about events that occurred outside the prison." "On the contrary," the Court stated, "we have repeatedly declined to adopt any categorical rule with respect to whether the questioning of a prison inmate is custodial." The Court went on to hold that based on the facts presented, Fields was not in custody for purpose of *Miranda.*

Error, but not plain error, to allow use of defendant's pre- and post-arrest silence as substantive evidence of guilt

State v. Harrison, __ N.C. App. __, 721 S.E.2d 371 (Feb. 7, 2012). The trial court erred by allowing the State to use the defendant's pre- and post-arrest silence as substantive evidence of guilt. When explaining the circumstances of the defendant's initial interview, an officer testifying for the State stated: "He provided me – he denied any involvement, wished to give me no statement, written or verbal." Also, when the State asked the officer whether the defendant had made any statements after arrest, the officer responded, "After he was mirandized [sic], he waived his rights and provided no further verbal or written statements." The court noted that a defendant's pre- arrest silence and post-arrest, pre-Miranda warnings silence may not be used as substantive evidence of guilt, but may be used to impeach the defendant by suggesting that his or her prior silence is inconsistent with present statements at trial. A defendant's post-arrest, post-Miranda warnings silence, however, may not be used for any purpose. Here, the defendant testified after the officer, so the State could not use the officer's statement for impeachment. Also, the officer's testimony was admitted as substantive evidence during the State's case in chief. However, the errors did not rise to the level of plain error.

Identifications

(1) Trial court did not commit plain error in determining photo lineup was not impermissibly suggestive; (2) Trial court did not commit plain error by not excluding evidence of pretrial identification after finding a violation of Eyewitness Identification Reform Act occurred

State v. Stowes, __ N.C. App. __, __ S.E.2d __ (May 1, 2012). (1) In a store robbery case, the court found no plain error in the trial court's determination that a photo lineup was not impermissibly suggestive. The defendant argued that the photo lineup was impermissibly suggestive because one of the officers administering the procedure was involved in the investigation, and that officer may have made unintentional movements or body language which could have influenced the eyewitness. The court noted that the eyewitness (a store employee) was 75% certain of his identification; the investigating officer's presence was the only irregularity in the procedure; the eyewitness did not describe any suggestive actions on the part of the investigating officer; and there was no testimony from the officers to indicate such. Also, the lineup was conducted within days of the crime. The perpetrator was in the store for 45-50 minutes and spoke with the employee several times. (2) The trial court did not commit plain error by granting the defendant relief under the Eyewitness Identification Reform Act (EIRA) but not excluding evidence of a pretrial identification. The trial court found that an EIRA violation occurred because one of the officers administering the procedure was involved in the investigation. The court concluded: "We are not persuaded that the trial court committed plain error by granting Defendant all other available remedies under EIRA, rather than excluding the evidence."

Pretrial show-up was not impermissibly suggestive on facts

State v. Watkins, __ N.C. App. __, 720 S.E.2d 844 (Jan. 17, 2012). A pretrial show-up was not impermissibly suggestive. The robbery victim had ample opportunity to view the defendant at the time of the crime and there was no suggestion that the description of the perpetrator given by the victim to the police officer was inaccurate. During the show-up, the victim stood in close proximity to the defendant, and the defendant was illuminated by spotlights and a flashlight. The victim stated that he was "sure" that the defendant was the perpetrator, both at the scene and in court. Also, the time interval between the crime and the show-up was relatively short.

Due Process Clause does not require screening for reliability where an eyewitness identification is made under suggestive circumstances not arranged by law enforcement

Perry v. New Hampshire, 565 U.S. __, 132 S. Ct. 716 (Jan. 11, 2012). The Due Process Clause does not require a preliminary judicial inquiry into the reliability of an eyewitness identification when the identification was not procured under unnecessarily suggestive circumstances arranged by law enforcement. New Hampshire police received a call reporting that an African-American male was trying to break into cars parked in the lot of the caller's apartment building. When an officer responding to the call asked eyewitness Nubia Blandon to describe the man, Blandon, who was standing in her apartment building just outside the open door to her apartment, pointed to her kitchen window and said the man she saw breaking into the car was standing in the parking lot, next to a police officer. Petitioner Perry, who was that person, was arrested. About a month later, when the police showed Blandon a photographic array that included a picture of Perry and asked her to point out the man who had broken into the car, she was unable to identify Perry. At trial Perry unsuccessfully moved to suppress Blandon's identification on the ground that admitting it would violate due process. The Court began by noting that an identification infected by improper police influence is not automatically excluded. Instead, the Court explained, the trial judge must screen the evidence for reliability pretrial. If there is a very substantial likelihood of irreparable misidentification, the judge must disallow presentation of the evidence at trial. But, it continued, if the indicia of reliability are strong enough to outweigh the corrupting effect of the police-arranged suggestive circumstances, the identification evidence ordinarily will be admitted, and the jury will ultimately determine its worth. In this case, Perry asked the Court to extend pretrial screening for reliability to cases in which the suggestive circumstances were not arranged by law

enforcement officers because of the grave risk that mistaken identification will yield a miscarriage of justice. The Court declined to do so, holding: "When no improper law enforcement activity is involved . . . it suffices to test reliability through the rights and opportunities generally designed for that purpose, notably, the presence of counsel at postindictment lineups, vigorous cross-examination, protective rules of evidence, and jury instructions on both the fallibility of eyewitness identification and the requirement that guilt be proved beyond a reasonable doubt." Justice Thomas filed a concurring opinion. Justice Sotomayor dissented.

School principal was not acting as agent of State when he showed student and her sister photographs from Sex Offender Registry

State v. Jones, __ N.C. App. __, 715 S.E.2d 896 (Oct. 4, 2011). The trial court's admission of photo identification evidence did not violate the defendant's right to due process. The day after a break-in at her house, one of the victims, a high school student, became upset in school. Her mother was called to school and brought along the student's sister, who was also present when the crime occurred. After the student told the Principal about the incident, the Principal took the student, her sister and her mother into his office and showed the sisters photographs from the N.C. Sex Offender Registry website to identify the perpetrator. Both youths identified the perpetrator from one of the pictures. The mother then contacted the police and the defendant was eventually arrested. At trial, both youths identified the defendant as the perpetrator in court. The court rejected the defendant's argument that the Principal acted as an agent of the State when he showed the youths the photos, finding that his actions "were more akin to that of a parent, friend, or other concerned citizen offering to help the victim of a crime." Because the Principal was not a state actor when he presented the photographs, the defendant's due 12 process rights were not implicated in the identification. Even if the Principal was a state actor and the procedure used was unnecessarily suggestive, the procedure did not give rise to a substantial likelihood of irreparable misidentification given the circumstances of the identification. Finally, because the photo identification evidence was properly admitted, the trial court also properly admitted the in-court identifications of defendant.

Establishment Clause

Delegation of state police power to campus police at Davidson College under Campus Police Act does not offend Establishment Clause

State v. Yencer, 365 N.C. 292, 718 S.E.2d 615 (Nov. 10, 2011). The supreme court held that the Campus Police Act, as applied to the defendant, does not violate the Establishment Clause of the First Amendment to the U.S. Constitution. The facts underlying the case involved a Davidson College Police Department officer's arrest of the defendant for impaired and reckless driving. The court of appeals held, in *State v. Yencer*, __ N.C. App. __, 696 S.E.2d 875 (Aug. 17, 2010), that because Davidson College is a religious institution, delegation of state police power to Davidson's campus police force was unconstitutional under the Establishment Clause. Applying the three-pronged test of *Lemon v. Kurtzman*, 403 U.S. 602 (1971), the supreme court reversed, holding that as applied to the defendant's case, the Campus Police Act does not offend the Establishment Clause.

Pretrial and Trial Procedure

Pretrial Release

No error in denying surety's motion to set aside bond forfeiture

State v. Fred Adams, __ N.C. App. __, __ S.E.2d __ (May 1, 2012). The trial court did not err by denying the surety's motion to set aside a bond forfeiture when the trial court's ruling was properly based on G.S. 15A-544.5(f) (no forfeiture may be set aside when the surety had actual notice before executing a bond that the defendant had already failed to appear on two or more prior occasions in the case for which the bond was executed).

(1) Trial court did not err by denying surety's motion to set aside bond forfeiture where defendant was not surrendered until 9:40 pm on day time limit expired; (2) Trial court did not abuse discretion by failing to fully remit forfeited amount

State v. Williams, __ N.C. App. __, __ S.E.2d __ (Feb. 7, 2012). (1) The trial court did not err by denying the surety's motion to set aside a bond forfeiture when the defendant was not surrendered until 9:40 pm on the day the 150-day time limit in G.S. 15A-544.5 expired and the surety's motion to set aside was not filed until the next day. The court rejected the surety's argument that the 150-day period should not expire when the courthouse closes, but should be extended until 11:59 pm. (2) The trial court did not abuse its discretion by failing to fully remit the forfeited amount pursuant to G.S. 15A-544.8(b)(2). The surety had argued that because the trial court found extraordinary circumstances warranting partial remission, remission should be in full unless the trial court makes specific findings supporting partial remission, but cited no authority for this proposition.

District court judge was not required to follow administrative order establishing pretrial release policy where superior court judge issued order without consulting with district court judges in district

State v. Harrison, __ N.C. App. __, 719 S.E.2d 204 (Dec. 6, 2011). A district court judge did not err by failing to follow an administrative order issued by the senior resident superior court judge when that order was not issued in conformity with G.S. 15A-535(a) (issuance of policies on pretrial release). The administrative order provided, in part, that "the obligations of a bondsman or other surety pursuant to any appearance bond for pretrial release are, and shall be, terminated immediately upon the entry of the State and a Defendant into a formal Deferred Prosecution Agreement." The district court judge was not required to follow the administrative order because the superior court judge issued it without consulting with the chief district court judge or other district court judges within the district.

Right to Counsel

(1) Court took waiver of counsel in compliance with statute; (2) No absolute impasse occurred where counsel refused to file motions counsel believed to be frivolous

State v. Jones, __ N.C. App. __, __ S.E.2d __ (May 1, 2012). (1) Based on the trial court's extensive colloquy with the defendant, the trial court properly took a waiver of counsel in compliance with G.S. 15A-1242. (2) An absolute impasse did not occur when trial counsel refused to abide by the defendant's wishes to pursue claims of prosecutorial and other misconduct that counsel believed to be frivolous. Under the absolute impasse doctrine counsel need only abide by a defendant's lawful instructions with respect to trial strategy. Here, the impasses were not over tactical decisions, but rather over whether

the defendant could compel counsel to file frivolous motions and assert theories that lacked any basis in fact. The court concluded: "Because nothing in our case law requires counsel to present theories unsupported in fact or law, the trial court did not err in failing to instruct counsel to defer to Defendant's wishes."

Reversible error to require defendant to proceed pro se where defendant had waived only the right to assigned counsel

State v. Ramirez, __ N.C. App. __, 724 S.E.2d 172 (April 17, 2012). The trial court committed reversible error by requiring the defendant to proceed pro se in a probation revocation hearing when the defendant had waived only the right to assigned counsel, not the right to all assistance of counsel.

Counsel was ineffective by allowing plea offers to expire without advising defendant of them; case remanded for determination on prejudice

Missouri v. Frye, 566 U.S. __, 132 S. Ct. 1399 (Mar. 21, 2012). The Court held that a defense lawyer rendered ineffective assistance by allowing a plea offer by the prosecution to expire without advising the defendant of the offer or allowing him to consider it. The defendant was charged with felony driving with a revoked license, an offense carrying a maximum term of imprisonment of four years. On November 15, the prosecutor sent a letter to defense counsel offering a choice of two plea bargains. First, the prosecutor offered to recommend a 3-year sentence for a guilty plea to the felony charge, without a recommendation regarding probation but with a recommendation for 10 days in jail as so called "shock" time. Second, to reduce the charge to a misdemeanor and, if the defendant pleaded guilty, the prosecutor offered to recommend a 90-day sentence. The misdemeanor charge would have carried a maximum term of imprisonment of one year. The letter stated that both offers would expire on December 28. The defendant's attorney did not tell the defendant of the offers and they expired. Before this charge was resolved, the defendant was again arrested for driving with a revoked license. The defendant subsequently pled guilty to the initial charge. There was no plea agreement. The trial court accepted the guilty plea and sentenced the defendant to three years in prison. The defendant challenged his conviction, arguing that counsel's failure to inform him of the plea offer constituted ineffective assistance of counsel. The Court began its analysis by concluding that the constitutional right to counsel extends to the negotiation and consideration of plea offers that lapse or are rejected. It stated: "In today's criminal justice system . . . the negotiation of a plea bargain . . . is almost always the critical point for a defendant." Having determined that there is a right to effective assistance with respect to plea offers, the Court turned to the question of whether defense counsel has the duty to communicate the terms of a formal offer to accept a plea on terms and conditions that may result in a lesser sentence, a conviction on lesser charges, or both. On this issue it held:

> [A]s a general rule, defense counsel has the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused. Any exceptions to that rule need not be explored here, for the offer was a formal one with a fixed expiration date. When defense counsel allowed the offer to expire without advising the defendant or allowing him to consider it, defense counsel did not render the effective assistance the Constitution requires.

The Court then turned to the issue of prejudice and laid out the following standards: To show prejudice from ineffective assistance of counsel where a plea offer has lapsed or been rejected because of counsel's deficient performance, defendants must demonstrate a reasonable probability they would

have accepted the earlier plea offer had they been afforded effective assistance of counsel. Defendants must also demonstrate a reasonable probability the plea would have been entered without the prosecution canceling it or the trial court refusing to accept it, if they had the authority to exercise that discretion under state law. To establish prejudice in this instance, it is necessary to show a reasonable probability that the end result of the criminal process would have been more favorable by reason of a plea to a lesser charge or a sentence of less prison time. Applying these standards to the case before it, the Court concluded that because defense counsel made no meaningful attempt to inform the defendant of the written plea offer, counsel's representation fell below an objective standard of reasonableness. As to prejudice, the Court found that the state court applied the wrong standard. Specifically, it did not require the defendant to show that the first plea offer, if accepted, would have been adhered to by the prosecution and accepted by the trial court, particularly given the defendant's subsequent arrest for the same offense. The Court remanded on this issue.

Counsel was ineffective by advising defendant to reject plea offer and defendant was prejudiced; proper remedy was to order State to reoffer plea agreement

Lafler v. Cooper, 566 U.S. __, 132 S. Ct. 1376 (Mar. 21, 2012). The Court held that defense counsel rendered ineffective assistance by advising a defendant to reject a plea offer and it specified the appropriate remedy for the constitutional violation. The defendant was charged with assault with intent to murder, possession of a firearm by a felon, possession of a firearm in the commission of a felony, misdemeanor possession of marijuana, and being a habitual offender. The prosecution twice offered to dismiss two of the charges and to recommend a sentence of 51-85 months for the other two, in exchange for a guilty plea. The defendant rejected both offers, allegedly after his attorney convinced him that the prosecution would be unable to establish intent to murder. On the first day of trial the prosecution offered a significantly less favorable plea deal, which the defendant rejected. The defendant was convicted on all counts and received a mandatory minimum sentence of 185-360 months' imprisonment. He then challenged the conviction, arguing that his attorney's advice to reject the plea constituted ineffective assistance. On appeal the parties agreed that counsel rendered deficient performance when he advised the defendant to reject the plea offer. Thus, the only issue before the Court was how to apply *Strickland*'s prejudice prong. The court held that when ineffective assistance results in a rejection of the plea offer and the defendant is convicted at the later trial a defendant must show that but for the ineffective advice of counsel there is a reasonable probability that the plea offer would have been presented to the court (i.e., that the defendant would have accepted the plea and the prosecution would not have withdrawn it in light of intervening circumstances), that the court would have accepted its terms, and that the conviction or sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence that in fact were imposed. The Court then addressed the issue of the appropriate remedy, noting that the injury suffered by defendants who decline a plea offer as a result of ineffectiveness and then receive a greater sentence at a trial can come in at least one of two forms. Sometimes, the Court explained, the sole advantage a defendant would have received under the plea is a lesser sentence. In this situation, the trial court may conduct an evidentiary hearing to determine whether the defendant has shown a reasonable probability that but for counsel's errors he or she would have accepted the plea. "If the showing is made," the Court elaborated, "the court may exercise discretion in determining whether the defendant should receive the term of imprisonment the government offered in the plea, the sentence he received at trial, or something in between." In some situations, however, the Court noted "resentencing alone will not be full redress for the constitutional injury," such as when an offer was for a guilty plea to a less serious crime than the one the defendant ends up getting convicted for at trial, or if a mandatory sentence limits a judge's sentencing discretion. In these situations, the Court explained, "the proper exercise of

discretion to remedy the constitutional injury may be to require the prosecution to reoffer the plea proposal. Once this has occurred, the judge can then exercise discretion in deciding whether to vacate the conviction from trial and accept the plea or leave the conviction undisturbed." The Court noted that when implementing a remedy in both situations, the trial court must weigh various factors. Although it determined that the "boundaries of proper discretion need not be defined here" the Court noted two relevant considerations: First, a court may take account of a defendant's earlier expressed willingness, or unwillingness, to accept responsibility for his or her actions. Second, it is not necessary here to decide as a constitutional rule that a judge is required to prescind (that is to say disregard) any information concerning the crime that was discovered after the plea offer was made. The time continuum makes it difficult to restore the defendant and the prosecution to the precise positions they occupied prior to the rejection of the plea offer, but that baseline can be consulted in finding a remedy that does not require the prosecution to incur the expense of conducting a new trial. Applying the relevant test to the case at hand, the Court found that the defendant met *Strickland*'s two-part test for ineffective assistance. The fact of deficient performance had been conceded and the defendant showed that but for counsel's deficient performance there is a reasonable probability that both he and the trial court would have accepted the guilty plea. Additionally, as a result of not accepting the plea and being convicted at trial, respondent received a minimum sentence 3½ times greater than he would have received under the plea. The Court found that the correct remedy is to order the State to reoffer the plea agreement. It continued: "Presuming [the defendant] accepts the offer, the state trial court can then exercise its discretion in determining whether to vacate the convictions and resentence respondent pursuant to the plea agreement, to vacate only some of the convictions and resentence respondent accordingly, or to leave the convictions and sentence from trial undisturbed."

Trial court erred by allowing defendant to waive counsel without conducting colloquy required by G.S. 15A-1242

State v. Anderson, __ N.C. __, 722 S.E.2d 509 (Mar. 9, 2012). In a per curiam opinion, the court affirmed *State v. Anderson*, __ N.C. App. __, 721 S.E.2d 233 (Aug. 16, 2011) (holding that the trial court erred by allowing the defendant to waive counsel after accepting a waiver of counsel form but without complying with G.S. 15A-1242; among other things, the trial court failed to clarify the specific charges or inform the defendant of the potential punishments or that he could request court-appointed counsel).

Trial court did not err by removing the defendant's retained counsel where counsel was likely to be a necessary witness at trial

State v. Rogers, __ N.C. App. __, __ S.E.2d __ (Mar. 6, 2012). The trial court did not err by removing the defendant's retained counsel, Wayne Eads, based on the possibility that Eads might be called to testify as a witness at trial. The defendant was charged with attempted murder and felony assault. The defendant was having an affair with the victim's wife and the victim's wife had discussed with the defendant the possibility of leaving her husband. Prior to the incident at issue, the victim's wife also communicated with Eads, who was the defendant's best friend and attorney, about her relationship with the defendant and the consequences of a divorce. The trial court's action was proper given "a serious potential for conflict" based on Eads' relationship with the defendant and communication with the victim's wife. The court stated:

> Eads was aware of personal and sensitive information, including the nature of their affair, which was a major factor leading to the shooting. Had Eads remained as defendant's counsel, he might have been called to testify, at which time he might have

> been asked to disclose confidential information regarding the relationship between defendant and [the victim's wife], which information may have divulged defendant's motive for shooting [the victim], which in turn could compromise his duty of loyalty to his client.

The court went on to conclude that competent evidence supported the trial court's conclusion that Eads was likely to be a necessary witness at trial and that none of the exceptions to Rule 3.7 of the N.C. Revised Rules of Professional Conduct applied.

No *Harbison* error where defense counsel raised admission with trial court and defendant consented to strategy

State v. Holder, __ N.C. App. __, 721 S.E.2d 365 (Feb. 7, 2012). The court rejected the defendant's *Harbison* claim (it is ineffective assistance of counsel for a defense lawyer to concede guilt without the defendant's consent) where defense counsel raised the admission with the trial court before it was made and the defendant consented to counsel's strategy.

***Harbison* claim dismissed without prejudice where defense counsel conceded defendant's guilt but record was incomplete as to consent by defendant**

State v. King, __ N.C. App. __, 721 S.E.2d 336 (Feb. 7, 2012). The court dismissed the defendant's *Harbison* claim without prejudice to it being raised in a motion for appropriate relief. During closing argument, defense counsel stressed that the defendant was a drug user, not a drug dealer. With regard to a charge of possession of drug paraphernalia, counsel stated "finding him guilty of the drug paraphernalia I would agree is about as open and shut as we can get in this case, but finding him guilty of the selling, you don't have the seller." The court noted that this statement conceded guilt. However, because of the incomplete record as to consent by the defendant, the court dismissed without prejudice.

State v. Spencer, __ N.C. App. __, 720 S.E.2d 901 (Jan. 17, 2012). Although concluding that counsel admitted the defendant's guilt to the jury, the court dismissed the defendant's *Harbison* claim without prejudice to his right to file a motion for appropriate relief on that basis in the trial court. Counsel conceded guilt to resisting a public officer and eluding arrest when he stated, among other things, that the defendant "chose to get behind the wheel after drinking, and he chose to run from the police[,]" and "[the officer] was already out of the way and he just kept on going, kept running from the police." However, the record did not indicate whether the defendant had consented to these admissions.

State v. Johnson, __ N.C. App. __, 720 S.E.2d 441 (Dec. 20, 2011). The court dismissed the defendant's *Harbison* claim without prejudice in order for it to be raised by way of a motion for appropriate relief in the trial division. As to a charge of resisting an officer, defense counsel had argued to the jury that "[T]he elements are there. They were officers of the law. They were discharging a duty of their office. We are not contending they were doing anything unlawful at the time and he didn't obey. He delayed them. He obstructed them, he resisted them[.]" The court concluded that such statements cannot be construed in any other light than admitting the defendant's guilt. However, the court determined, based on the record on appeal, it was unclear whether the defendant consented to this admission of guilt.

(1) Trial court did not abuse its discretion by denying defendant's motion to replace his court-appointed lawyer; (2) Having elected representation by counsel, defendant cannot also file motions on his own behalf

State v. Glenn, __ N.C. App. __, __ S.E.2d __ (June 5, 2012). (1) The trial court did not abuse its discretion by denying the defendant's motion to replace his court-appointed lawyer. Substitute counsel is required and must be appointed when a defendant shows good cause, such as a conflict of interest or a complete breakdown in communications. However, general dissatisfaction or disagreement over trial tactics is not a sufficient basis to appoint new counsel. In this case, the defendant's objections fell into the latter category. The court also rejected the defendant's argument that the trial court failed to inquire adequately when the defendant raised the substitute counsel issue. (2) The court declined to consider the defendant's pro se MAR on grounds that he was represented by appellate counsel. It noted that having elected for representation by appointed counsel, the defendant cannot also file motions on his own behalf or attempt to represent himself; a defendant has no right to appear both by himself and by counsel.

Pleadings

Indictment charging defendant with being a sex offender unlawfully on the premises of a place intended primarily for the use, care, or supervision of minors was defective where it failed to allege defendant had been convicted of an offense enumerated in G.S. Ch. 14 Article 7A or an offense involving a victim under 16 at the time of the offense

State v. Harris, __ N.C. App. __, 724 S.E. 2d 633 (April 3, 2012). An indictment charging the defendant with being a sex offender unlawfully on the premises of a place intended primarily for the use, care, or supervision of minors in violation of G.S. 14-208.18 was defective. According to the court the "essential elements" of the charged offense are that the defendant (1) knowingly is on the premises of any place intended primarily for the use, care, or supervision of minors (2) at a time when he or she was required by North Carolina law to register as a sex offender based upon a conviction for an offense enumerated in G.S. Ch. 14 Article 7A or an offense involving a victim who was under the age of 16. The court rejected the defendant's argument that the indictment, which alleged that the defendant "did unlawfully, willfully and feloniously on the premises of Winget Park Elementary School," was defective because it omitted any affirmative assertion that he actually went on the school's premises. The court reasoned that although the indictment contained a grammatical error, it clearly charged the defendant with unlawfully being on the premises of the school. Next, the court rejected the defendant's argument that the indictment was defective because it failed to allege that he knowingly went on the school's premises. The court reasoned that the indictment's allegation that the defendant acted "willfully" sufficed to allege the requisite "knowing" conduct. However, the court found merit in the defendant's argument that the indictment was defective because it failed to allege that he had been convicted of an offense enumerated in G.S. Ch. 14 Article 7A or an offense involving a victim who was under 16 years of age at the time of the offense.

State v. Herman, __ N.C. App. __, __ S.E.2d __ (June 5, 2012). Following *State v. Harris,* __ N.C. App. __, __ S.E. 2d __ (April 3, 2012) (an indictment charging the defendant with being a sex offender unlawfully on the premises of a place intended primarily for the use, care, or supervision of minors in violation of G.S. 14-208.18 was defective because it failed to allege that he had been convicted of an offense enumerated in G.S. Ch. 14 Article 7A or an offense involving a victim who was under 16 years of age at the time of the offense), the court held that the indictment at issue was defective.

Indictment charging larceny from a merchant by removal of antitheft device was defective; description of property taken as "merchandise" was too general, and language alleged an attempted larceny rather than a completed offense

State v. Justice, __ N.C. App. __, 723 S.E. 2d 798 (April 3, 2012). An indictment charging the defendant with larceny from a merchant by removal of antitheft device in violation of G.S. 14-72.11 was defective in two respects. The elements of this offense include a larceny (taking the property of another, carrying it away, without the consent of the possessor, and with the intent to permanently deprive) and removal of an antishoplifting or inventory control device. In this case, the defendant was alleged to have taken clothing from a department store. The court determined that the indictment's description of the property taken as "merchandise" was "too general to identify the property allegedly taken." Additionally, the indictment alleged that the defendant "did remove a component of an anti-theft or inventory control device . . . . in an effort to steal" property. This language, the court determined, alleged only an attempted larceny not the completed offense.

Summons charging defendant with impaired driving was not defective where it failed to allege exact hour and minute of offense

State v. Friend, __ N.C. App. __, 724 S.E.2d 85 (Mar. 6, 2012). A criminal summons charging the defendant with impaired driving was not defective on grounds that it failed to allege the exact hour and minute that the offense occurred.

Indictment for resisting officer sufficiently stated manner in which defendant resisted

State v. Hemphill, __ N.C. App. __, 723 S.E.2d 142 (Feb. 21, 2012). An indictment for resisting an officer was not defective. The indictment alleged that the defendant resisted "by not obeying [the officer's] command [to stop]." The court rejected the defendant's argument that the indictment failed to state with sufficient particularity the manner in which the defendant resisted.

No fatal variance where indictment alleged deadly weapon to be a handgun while trial evidence showed it was an AK-47 rifle

State v. Lee, __ N.C. App. __, 720 S.E.2d 884 (Jan. 17, 2012), *review allowed*, __ N.C. __, 724 S.E.2d 518 (Apr. 12, 2012). There was no fatal variance between an indictment charging assault with a deadly weapon with intent to kill inflicting serious injury and the evidence at trial. The indictment alleged the deadly weapon to be a handgun while the trial evidence showed it was an AK-47 rifle. The court reasoned: "both a handgun and an AK-47 rifle are a type of gun, are obviously dangerous weapons, and carry the same legal significance." Moreover, the defendant failed to demonstrate that the variance caused prejudice.

Misdemeanor statements of charges alleging violations of G.S. 113-291.1 (manner of taking wild animals and wild birds) were not fatally defective where they tracked statutory language

State v. Ballance, __ N.C. App. __, 720 S.E.2d 856 (Jan. 17, 2012). For reasons discussed in the opinion, the court held that misdemeanor statements of charges alleging violations of G.S. 113-291.1 (manner of taking wild animals and wild birds) were not fatally defective where the charging instruments tracked the statutory language. The court rejected the argument that G.S. 113-291.1(b)(2) creates a separate offense for each and every type of bait listed.

(1) Trial court erred by allowing State to amend bill of indictment by striking word "Incorporated" in a larceny by employee case; (2) Jurisdictional issues may be raised at any time

State v. Abbott, __ N.C. App. __, 720 S.E.2d 437 (Dec. 20, 2011). (1) In a larceny by employee case, the trial court erred by allowing the State to amend the bill of indictment. The indictment stated that the defendant was an employee of "Cape Fear Carved Signs, Incorporated." The State moved to amend by striking the word "Incorporated," explaining that the business was a sole proprietorship of Mr. Neil Schulman. The amendment was a substantial alteration in the charge. (2) The court rejected the State's argument that the defendant waived his ability to contest the indictment by failing to move to dismiss it at trial, reiterating that jurisdictional issues may be raised at any time.

"Willfully" on DWI citation was surplusage

State v. Clowers, __ N.C. App. __, 720 S.E.2d 430 (Dec. 20, 2011). In an impaired driving case, citation language alleging that the defendant acted "willfully" was surplusage.

(1) Second indictment did not supersede first indictment where defendant was never arraigned on it; (2) Right to be free from double jeopardy violated where defendant was convicted of stalking, and then charged again and convicted of stalking, and the time periods for both indictments overlapped

State v. Fox, __ N.C. App. __, 716 S.E.2d 261 (Oct. 4, 2011). Because the defendant was never arraigned on a second indictment (that did not indicate that it was a superseding indictment), the second indictment did not supersede the first indictment. Additionally, the court found that the defendant's right to be protected from double jeopardy was violated when, after being convicted of felony stalking, he was again charged and convicted of that crime. Because the time periods of the "course of conduct" for both indictments overlapped, the same acts could result in a conviction under either indictment. Also, in the second trial the State introduced evidence that would have established stalking during the overlapping time period.

(1) Defendant waived issue of fatal variance in drug case by failing to raise it at trial; (2) No fatal variance between indictment alleging possession of .1 grams of cocaine and evidence of possession of 0.03 grams of cocaine.

State v. Glenn*,* __ N.C. App. __, __ S.E.2d __ (June 5, 2012). In a felony possession of cocaine case, the defendant waived the issue of fatal variance by failing to raise it at trial. The court however went on summarily reject the defendant's argument on the merits. The defendant had argued that there was a fatal variance between the indictment, which alleged possession of .1 grams of cocaine and the evidence, which showed possession of 0.03 grams of cocaine.

Discovery

Conviction reversed for *Brady* violation where State failed to disclose statements by sole eyewitness; statements were material impeachment evidence and State's other evidence was not strong enough to sustain confidence in verdict

Smith v. Cain, 565 U.S. __, 132 S. Ct. 627 (Jan. 10, 2011). The Court reversed petitioner Smith's conviction on grounds of a *Brady* violation. At Smith's trial, a single witness, Larry Boatner, linked Smith to the crime. Boatner testified that Smith and two other gunmen entered a home, demanded money

and drugs, and then began shooting, killing five people. At trial, Boatner identified Smith as the first gunman through the door and claimed that he had been face to face with Smith during the initial moments of the robbery. No other witnesses and no physical evidence implicated Smith. Smith was convicted of five counts of murder. After an unsuccessful direct review, Smith sought post-conviction relief in the state courts. In connection with this effort he obtained notes of the lead police investigator. These notes contained statements by Boatner that conflicted with his testimony identifying Smith as a perpetrator. Specifically, they state that Boatner "could not . . . supply a description of the perpetrators other then [sic] they were black males." The investigator also made a handwritten account of a conversation he had with Boatner five days after the crime, in which Boatner said he "could not ID anyone because [he] couldn't see faces" and "would not know them if [he] saw them." The investigator's typewritten report of that conversation states that Boatner told the officer he "could not identify any of the perpetrators of the murder." Smith argued that the prosecution's failure to disclose the notes violated *Brady.* The State did not dispute that Boatner's statements were favorable to Smith and that they were not disclosed. The sole question for the Court thus was whether the statements were material. The Court noted that evidence impeaching an eyewitness may not be material if the State's other evidence is strong enough to sustain confidence in the verdict. However, it concluded the State's evidence was not sufficiently strong in this case. Boatner's testimony was the only evidence linking Smith to the crime. Also, Boatner's undisclosed statements directly contradicted his testimony. Boatner's undisclosed statements, the Court concluded, were plainly material. The Court went on to reject various reasons advanced by the State and the dissent regarding why the jury might have discounted Boatner's undisclosed statements. Justice Thomas dissented.

Motions Practice

(1) Defendant not denied right to speedy trial where defendant never made a speedy trial motion in district court; delay is measured from date of appeal from district court to superior court trial date; (2) State's dismissal of impaired driving charge following the district court's denial of its motion to continue did not violate separation of powers; (3) No violation of due process occurred when State refiled charges

State v. Friend, __ N.C. App. __, 724 S.E.2d 85 (Mar. 6, 2012). (1) The defendant was not denied his speedy trial rights. The date of the offense and the initial charge was 7 March 2006. The defendant was tried upon a re-filed charge in district court on 13 April 2009. The defendant never made a speedy trial motion in district court; his only speedy trial request was made in superior court on 4 February 2010. Because the defendant already had a trial in district court, the time of the delay runs from his appeal from district court on 13 April 2009 until his superior court trial on 15 February 2010, a period of less than one year. Assuming arguendo that the delay exceeded one year, the claim still failed. (2) The State's dismissal of an impaired driving charge following the district court's denial of its motion to continue did not violate separation of powers. The defendant had argued that the district attorney is an executive branch official who was obligated to proceed with the trial when the trial court denied the State's motion to continue. He further argued that to allow the State to voluntarily dismiss the charge allowed the executive branch to subvert the court's authority. (3) No violation of due process occurred when the State refiled charges against the defendant after having taken a dismissal of them in response to the trial court's denial of its motion to continue.

At retrial, court erred in applying the law of the case and denying defendant's motion to suppress

State v. Lewis, __ N.C. __, 724 S.E.2d 492 (April 13, 2012). Affirming the court of appeals, the court held

that on a retrial the trial court erred by applying the law of the case and denying the defendant's motion to suppress. At the defendant's first trial, he unsuccessfully moved to suppress the victim's identification as unduly suggestive. That issue was affirmed on appeal. At the retrial, the defense filed new motions to suppress on the same grounds. However, at the pretrial hearings on these motions, the defense introduced new evidence relevant to the reliability of the identification. The State successfully argued that the law of the case governed and that the defendant's motions must be denied. After the defendant was again convicted, he appealed and the court of appeals reversed on this issue. Affirming that ruling the court noted that "the law of the case doctrine does not apply when the evidence presented at a subsequent proceeding is different from that presented on a former appeal." It then went on to affirm the court of appeals' holding that the retrial court erred in applying the doctrine of the law of the case to defendant's motion to suppress at the retrial.

Trial court did not err by denying the defendant's motion based on speedy trial violation where time between arrest and trial was about twenty-two months but delay was not clearly attributable to State

State v. Lee, __ N.C. App. __, 720 S.E.2d 884 (Jan. 17, 2012), *review allowed*, __ N.C. __, 724 S.E.2d 518 (Apr. 12, 2012). The trial court did not err by denying the defendant's motion to dismiss the charges on grounds of a speedy trial violation. The time between arrest and trial was approximately twenty-two months. Although the defendant asserted that the State was responsible for the delay by not calendaring his competency hearing until nearly ten months after he completed a competency evaluation, the court could not determine what caused this scheduling delay. It noted that during this time the defendant filed numerous complaints with the State Bar concerning defense counsel and repeatedly asked the trial court to remove his counsel. Also, during this time one of the victims was out of the country receiving medical treatment for his injuries and was unavailable. Although troubled by the delay, the court concluded that given the defendant's actions regarding appointed counsel and the availability of the victim, "we cannot say the delay was due to any willfulness or negligence on the part of the State, especially in light of the fact that defendant has made no showing of such on appeal." The court went on to note that although the defendant repeatedly attempted to assert his speedy trial right, he failed to show actual and substantial prejudice resulting from the delay.

Pleas

Defendant's plea invalid where trial judge misinformed him of maximum sentence

State v. Reynolds, __ N.C. App. __, 721 S.E.2d 333 (Feb. 7, 2012). The defendant's plea was not constitutionally valid where the trial judge misinformed the defendant of the maximum sentence he would receive. The trial court told the defendant that the maximum possible sentence would be 168 months' imprisonment when the maximum sentence (and the maximum ultimately imposed) was 171 months. The court rejected the State's argument that the defendant was not prejudiced by this error.

Trial court erred by setting aside plea where State failed to return seized funds in keeping with plea agreement; Court of Appeals reinstated plea and ordered State to return funds

State v. King, __ N.C. App. __, 721 S.E.2d 327 (Feb. 7, 2012). The trial court erred by setting aside the plea agreement in response to the defendant's motion seeking return of seized property. The defendant pled guilty pursuant to a plea agreement that called for, in part, the return of over $6,000 in seized funds. The defendant complied with her obligations under the agreement, but the State did not return the funds, on grounds that they had been forfeited to federal and State authorities. When the defendant filed a motion for return of the property, the trial court found that the State had breached

the agreement but that specific performance was impossible; instead, the trial judge struck the plea. The court began by agreeing that the State breached the plea agreement. It went on to conclude that because the State was in a better position to know whether the money had been forfeited, it bore the risk as to the mistake of fact. It explained:

> [When] the district attorney entered into the plea agreement, he was capable of confirming the status of the funds prior to agreeing to return them to defendant. The money was seized from defendant and sent to the DEA the same month. The parties did not enter into the plea agreement until approximately nine months after the forfeiture . . . . The State could have easily confirmed the availability of the funds prior to the execution of the agreement but failed to do so. Therefore, the State must bear the risk of that mistake and the Court erred by rescinding the plea agreement based on a mistake of fact.

In this case, it concluded, rescission could not repair the harm to the defendant because the defendant had already completed approximately nine months of probation and had complied with all the terms of the plea agreement, including payment of fines and costs. The court reasoned that while the particular funds seized were no longer available, "money is fungible" and "there is no requirement that *the exact funds seized* must be returned to defendant and the State cannot avoid its obligation on this basis." The court reversed the trial court's order, reinstated the plea, and ordered the State to return the funds.

State bound by plea agreement and bore risk of mistake where defendant fully complied with agreement

State v. Rico, __ N.C. App. __, 720 S.E.2d 801 (Jan. 17, 2012), *review allowed,* ___ N.C. ___, 721 S.E.2d 229 (Feb. 3, 2012). Over a dissent, the court held that where there was a mistake in the plea agreement and where the defendant fully complied with the agreement, the risk of any mistake in a plea agreement must be borne by the State. According to the court, both parties mistakenly believed that the aggravating factor of use of a firearm could enhance a sentence for voluntary manslaughter by use of that same firearm. Both the original and amended judgments against the defendant imposed an aggravated sentence based upon the aggravating factor of use of a firearm. The court determined that the State remains bound by the plea agreement and that the defendant must be resentenced on his guilty plea to voluntary manslaughter. The dissenting judge argued that the proper remedy was to set aside the plea arrangement and remand for disposition of the original charge (murder).

Closing Arguments

Reversible effort to deny defendant right to final argument; defendant did not introduce evidence by reading portions of victim's earlier statement or by questioning victim regarding his testimony on direct examination

State v. Hogan, __ N.C. App. __, 720 S.E.2d 854 (Jan. 17, 2012). The trial court committed reversible error by denying the defendant the right to the final argument based on its ruling that he had "introduced" evidence within the meaning of Rule 10 of the General Rules of Practice for the Superior and District Courts during his cross-examination of the victim. During that cross defense counsel read aloud several portions of the victim's earlier statement to an officer, in what appears to have been an attempt to point out inconsistencies between the victim's trial testimony and his prior statement; defense counsel also asked the victim questions, including whether he had told the officer everything

that happened when he provided his statement. The statements read and referenced by defense counsel directly related to the victim's testimony on direct examination. Furthermore, defense counsel never formally introduced the statement into evidence. Thus, the defendant never "introduced" evidence within the meaning of Rule 10.

Reversible error to deny defendant right to final argument; defendant did not introduce evidence by cross-examining officer on issue in officer's report that had not yet come up at trial

State v. Matthews, __ N.C. App. __, 720 S.E.2d 829 (Jan. 17, 2012). Because the defendant did not present any evidence at trial, the trial court committed reversible error by denying the defendant final closing argument. Defense counsel cross-examined an officer who responded to a call about the break-in and identified defense Exhibit 2, a report made by that officer following his investigation. During cross defense counsel elicited the officer's confirmation that, after viewing video surveillance footage, a man named Basil King was identified as a possible suspect. The trial court denied the defendant's motion to make the final closing argument because it believed this cross-examination constituted the introduction of evidence pursuant to Rule 10 of the General Rules of Practice for the Superior and District Courts. Although the defendant introduced for the first time evidence in the officer's report that Basil King was a suspect, the defendant did not introduce the officer's actual report into evidence, nor did he have the officer read the report to the jury. Furthermore, this evidence was relevant to the investigation and was contained in the officer's own report. It was the State, the court noted, that first introduced testimony by the officer and other witnesses concerning the investigation and the evidence leading the police to identify the defendant as a suspect. It concluded: "We cannot say that the identification of other suspects by the police constituted new evidence that was not relevant to any issue in the case." (quotation omitted). Therefore, this testimony cannot be considered the introduction of evidence pursuant to Rule 10.

Other Procedural Issues

Trial judge did not err by unsealing search warrants where State failed to make a timely motion to extend period for which documents were sealed

In Re Baker, __ N.C. App. __, __ S.E.2d __ (April 17, 2012). Where search warrants were unsealed in accordance with procedures set forth in a Senior Resident Superior Court Judge's administrative order and where the State failed to make a timely motion to extend the period for which the documents were sealed, the trial judge did not err by unsealing the documents. At least 13 search warrants were issued in an investigation. As each was issued, the State moved to have the warrant and return sealed. Various judges granted these motions, ordering the warrants and returns sealed "until further order of the Court." However, an administrative order in place at the time provided that an order directing that a warrant or other document be sealed "shall expire in 30 days unless a different expiration date is specified in the order." Subsequently, media organizations made a public records request for search warrants more than thirty days old and the State filed motions to extend the orders sealing the documents. A trial judge ordered that search warrants sealed for more than thirty days at the time of the request be unsealed. The State appealed. The court began by rejecting the State's argument that the trial court erred by failing to give effect to the language in the original orders that the records remain sealed "until further order of the Court." The court noted the validity of the administrative order and the fact that the trial judge acted in compliance with it. The court also rejected the State's argument that the trial judge erred by having the previously sealed documents delivered without any motion, hearing, or notice to the State and without findings of fact. The court noted that the administrative order

afforded an opportunity and corresponding procedure for the trial court to balance the right of access to records against the governmental interests sought to be protected by the prior orders. Specifically, the State could make a motion to extend the orders. Here, however, the State failed to make a timely motion to extend the orders. Therefore, the court concluded, the administrative order did not require the trial court to balance the right to access against the governmental interests in protecting against premature release. The court further found that the State had sufficient notice given that all relevant officials were aware of the administrative order.

State's announcement that it "would be unable to proceed with the case in chief" following granting of defendant's motions to suppress did not constitute dismissal of charges, and trial court lacked authority to dismiss on own motion

State v. Joe, __ N.C. __, 723 S.E.2d 339 (April 13, 2012). Disagreeing with the court of appeals' holding in *State v. Joe*, ___ N.C. App. ___, ___, 711 S.E.2d 842, 848 (2011), that the prosecutor's statements amounted to a dismissal in open court, the court also held that the trial court had no authority to enter an order dismissing the case on its own motion. The defendant was charged with resisting a public officer, felony possession of cocaine with intent to sell or deliver, and attaining habitual felon status. The defendant filed a motion to dismiss the resisting charge and a motion to suppress all evidence seized during the search incident to arrest. The trial court granted both motions. The State then announced that it "would be unable to proceed with the case in chief" on the remaining charges and the other charges were dismissed. The State appealed and the court of appeals affirmed, reasoning that the prosecutor's statements constituted a dismissal in open court under G.S. 15A-931. The court disagreed with this conclusion and further held that the trial court had no authority to enter an order dismissing the case on its own motion. It remanded to the court of appeals for consideration of the State's argument regarding the motion to suppress.

Charge was not properly before superior court on appeal for trial de novo where State took a voluntary dismissal in district court that was not pursuant to a plea agreement

State v. Reeves, __ N.C. App. __, 721 S.E.2d 317 (Feb. 7, 2012). Where the defendant was charged with impaired driving and reckless driving and the State took a voluntary dismissal of the reckless driving charge in district court, that charge was not properly before the superior court on appeal for trial de novo and judgment on that offense must be vacated. The court noted that the dismissal was not pursuant to a plea agreement.

Defendant has no absolute right to waive right to be present at trial

State v. Shaw, __ N.C. App. __, 721 S.E.2d 363 (Feb. 7, 2012). The court rejected the defendant's argument that he had an absolute right to waive the right to be present at trial. The court noted that no such right exists.

Shackling defendant during trial was abuse of discretion

State v. Lee, __ N.C. App. __, 720 S.E.2d 884 (Jan. 17, 2012), *review allowed*, __ N.C. __, 724 S.E.2d 518 (Apr. 12, 2012). Although the trial court abused its discretion by requiring the defendant to remain shackled during his trial, the error was harmless in light of the trial court's curative instruction and the overwhelming evidence of guilt. The court "strongly caution[ed] trial courts to adhere to the proper procedures regarding shackling of a defendant."

While better practice is to sequester witnesses on request of either party, no abuse of discretion in child sexual assault case to deny defendant's motion

State v. Sprouse, __ N.C. App. __, 719 S.E.2d 234 (Dec. 6, 2011). Based on the facts presented in this child sexual assault case, the trial court did not abuse its discretion by denying the defendant's request to sequester witnesses. The court noted however that "the better practice should be to sequester witnesses on request of either party unless some reason exists not to." (quotation omitted).

Evidence

Confrontation Clause

Declarant's statement was "clearly" testimonial where officer questioned her after sexual assault; primary purpose of her statement was to provide information necessary for defendant's prosecution rather than to address ongoing emergency

State v. Glenn, __ N.C. App. __, __ S.E.2d __ (April 17, 2012). A non-testifying victim's statement to a law enforcement officer was testimonial. In the defendant's trial for kidnapping and other charges, the State introduced statements from a different victim ("the declarant") who was deceased at the time of trial. The facts surrounding the declarant's statements were as follows: An officer responding to a 911 call concerning a possible sexual assault at a Waffle House restaurant found the declarant crying and visibly upset. The declarant reported that while she was at a bus stop, a driver asked her for directions. When she leaned in to give directions, the driver grabbed her shirt and told her to get in the vehicle. The driver, who had a knife, drove to a parking lot where he raped and then released her. The declarant then got dressed and walked to the Waffle House. The trial court determined that because the purpose of the interrogation was to resolve an ongoing emergency, the declarant's statements were nontestimonial. Distinguishing the U.S. Supreme Court's decision in *Michigan v. Bryant,* the court of appeals disagreed. The court noted that when the officer arrived "there was no ongoing assault, the declarant had no signs of trauma, no suspect was present, and the officer did not search the area for the perpetrator or secure the scene. The officer asked the declarant if she wanted medical attention (she refused) and what happened. Thus, the court concluded, the officer "assessed the situation, determined there was no immediate threat and then gathered the information." Furthermore, the declarant told the officer that the perpetrator voluntarily released her. The court concluded that even if the officer believed there was an ongoing emergency when he first arrived, he determined that no ongoing emergency existed when he took the statement. The court also determined that there was no ongoing threat to the victim, law enforcement, or the public. It noted that the defendant voluntarily released the declarant and drove away and there was no indication that he would return to harm her further. As for danger to the officer, the court found no evidence that the defendant was ever in the Waffle House parking lot or close enough to harm the officer with his weapon, which was a knife, not a gun. The court also concluded that "the evidence suggested defendant's motive was sexual and did not rise to the level of endangering the public at large." Regarding the overall circumstances of the encounter, the court noted that because there was only one officer, "the circumstances of the questioning were more like an interview," in which the officer asked what happened and the declarant narrated the events. It continued, noting that since the declarant "had no obvious injuries, and initially refused medical attention, the primary purpose of her statement could not have been to obtain medical attention." Furthermore, she "seemed to have no difficulty in recalling the events, and gave [the officer] a detailed description of the events, implying that her primary purpose was to provide information necessary for defendant's prosecution." In fact, the

court noted, she told the officer that she wanted to prosecute the suspect. The court concluded that the statement was "clearly" testimonial:

> [T]here was no impending danger, because the driver released [the declarant] and [the declarant] was waiting at a restaurant in a presumably safe environment. In addition, [the officer] questioned her with the requisite degree of formality because the questioning was part of an investigation, outside the defendant's presence. [The officer] wanted to determine "what happened" rather than "what is happening." Furthermore, [the declarant's] statement deliberately recounted how potentially criminal events from the past had progressed and the interrogation occurred after the described events ended. Finally, [the declarant] gave the officer a physical description of the driver, how he was dressed, his approximate age, and the type of vehicle he was driving. For a criminal case, this information would be "potentially relevant to later criminal prosecution." (citations omitted).

Trial court properly applied forfeiture by wrongdoing exception to *Crawford* rule where facts showed that defendant intended to and did intimidate a witness into not testifying

State v. Weathers, __ N.C. App. __, 724 S.E.2d 114 (Mar. 20, 2012). The trial court properly applied the forfeiture by wrongdoing exception to the *Crawford* rule. At the defendant's trial for first-degree murder and kidnapping, an eyewitness named Wilson was excused from testifying further after becoming distraught on the stand. The trial court determined that Wilson's testimony would remain on the record under the forfeiture by wrongdoing exception and denied the defendant's motion for a mistrial. At a hearing on the issue Wilson disclosed that, as they were being transported to the courthouse for trial, the defendant threatened to kill Wilson and his family. A detention officer testified that she heard the threat. Also, in a taped interview with detectives and prosecutors, Wilson repeatedly expressed concern for his life and the lives of his family members. Finally, the defendant made several phone calls showing an intent to intimidate Wilson. In one call to his grandmother, the defendant repeatedly referred to Wilson as "nigger" and said he would "straighten this nigger out". During the phone calls, the defendant joked about the "slick moves" he used to prevent Wilson from testifying. In other calls, the defendant instructed acquaintances to come to court to intimidate Wilson while he was testifying. One of those acquaintances said he would be in court on the morning of 2 March 2011. On that date, Wilson, who already had been hesitant and fearful on the stand, became even more emotional and "broke down" upon seeing a young man dressed in street clothes indicative of gang attire enter the courtroom. These facts were sufficient to establish that the defendant intended to and did intimidate Wilson. The court rejected the defendant's argument that application of the doctrine was improper because Wilson never testified that he chose to remain silent out of fear of the defendant. The court stated: "It would be nonsensical to require that a witness testify against a defendant in order to establish that the defendant has intimidated the witness into not testifying. Put simply, if a witness is afraid to testify against a defendant in regard to the crime charged, we believe that witness will surely be afraid to finger the defendant for having threatened the witness, itself a criminal offense."

Right to confront not violated where trial court did not permit defendant to cross-examine accomplices about conversations about charge concessions they had with their attorneys

State v. Lowery, __ N.C. App. __, 723 S.E.2d 358 (Feb. 21, 2012). The court rejected the defendant's argument that his constitutional right to confront witnesses against him was violated when the trial court refused to permit defense counsel to cross examine the defendant's accomplices about

conversations they had with their attorneys regarding charge concessions the State would make to them if they testified against the defendant. The court held that the accomplices' private conversations with their attorneys were protected by the attorney-client privilege and that the privilege was not waived when the accomplices took the stand to testify against the defendant.

Plain error to allow State to admit SBI report identifying substance as oxycodone when neither the preparer of the report nor a substitute analyst testified at trial, regardless of fact that defendant identified pills as hydrocodone to an investigating officer

State v. Burrow, __ N.C. App. __, 721 S.E.2d 356 (Feb. 7, 2012). Over a dissent, the court held that the trial court committed plain error in a drug trafficking case by allowing the State to admit a SBI forensic report identifying the substance at issue as oxycodone when neither the preparer of the report nor a substitute analyst testified at trial. Although the defendant identified the pills as hydrocodone to an investigating officer, "such 'identifying' statements by the defendant . . . are insufficient to show what a substance is; the State must present evidence of the chemical makeup of the substance at issue." The court distinguished *State v. Nabors*, __ N.C. __, 718 S.E.2d 623 (2011) (testimony of the defendant's lay witness that the substance at issue was "cocaine" was sufficient to identify the controlled substance as cocaine), on grounds that in this case, the defendant incorrectly identified the pills as hydrocodone (they were oxycodone). The court also rejected the notion that an officer's testimony that the pills were oxycodone was sufficient. Noting that it might be permissible for an officer to give a lay opinion "as to a substance with a 'distinctive color, texture, and appearance[,]' it is not appropriate for an officer to render an opinion regarding a non-descript substance." The dissenting judge agreed that error occurred but disagreed that the error rose to the level of plain error.

State court was not unreasonable in determining that State established victim's unavailability and conducted the requisite good-faith search for the victim

Hardy v. Cross, 565 U.S. __, 132 S. Ct. 490 (Dec. 12, 2011). Reversing the Seventh Circuit, the Court held that the state court was not unreasonable in determining that the prosecution established the victim's unavailability for purposes of the confrontation clause. In the defendant's state court trial for kidnaping and sexual assault, the victim testified. After a mistrial, a retrial was scheduled for March 29, 2000. On March 20, the prosecutor informed the trial judge that the victim could not be located. On March 28, the State moved to have the victim declared unavailable and to introduce her prior testimony at the retrial. The State represented that it had remained in constant contact with the victim and her mother and that every indication had been that the victim, though very frightened, would testify. On March 3, however, the victim's mother and brother told the State's investigator that they did not know where the victim was; the mother also reported that the victim was "very fearful and very concerned" about testifying. About a week later, the investigator interviewed the victim's father, who had no idea where she was. On March 10, the victim's mother told the State that the victim had run away the day before. Thereafter, the prosecutor's office and police attempted to find the victim. Their efforts included: constant visits her home at all hours; visits to her father's home; conversations with her family members; checks at, among other places, the Medical Examiner's office, local hospitals, the Department of Corrections, the victim's school, the Secretary of State's Office, the Department of Public Aid, and with the family of an old boyfriend of the victim. On a lead that the victim might be with an ex-boyfriend 40 miles away, a police detective visited the address but the victim had not been there. The State's efforts to find the victim continued until March 28, the day of the hearing on the State's motion. That morning, the victim's mother informed the detective that the victim had called approximately two weeks earlier saying that she did not want to testify and would not return. The victim's mother said that

she still did not know where the victim was or how to contact her. The trial court granted the State's motion and admitted the victim's earlier testimony. The defendant was found guilty of sexual assault. On appeal, the state appellate court agreed that the victim was unavailable and that the trial court had properly admitted her prior testimony. The defendant then filed a petition for a writ of habeas corpus arguing that the state court had unreasonably applied clearly established Supreme Court precedents holding that the confrontation clause precludes the admission of the prior testimony of an allegedly unavailable witness unless the prosecution made a good-faith effort to obtain the declarant's presence at trial. The federal district court denied the petition; the Seventh Circuit reversed.
The Court began its analysis by noting that under *Barber v. Page*, 390 U. S. 719 (1968), "a witness is not 'unavailable' for purposes of the . . . confrontation requirement unless the prosecutorial authorities have made a good-faith effort to obtain his presence at trial." Here, the state court holding that the prosecution conducted the requisite good-faith search for the victim was not an unreasonable application of its precedents. The Seventh Circuit found that the State's efforts were inadequate for three main reasons. First, it faulted the State for failing to contact the victim's current boyfriend or any of her other friends in the area. But, the Court noted, there was no evidence suggesting that these individuals had information about her whereabouts. Second, the Seventh Circuit criticized the State for not making inquiries at the cosmetology school where the victim had been enrolled. However, because the victim had not attended the school for some time, there is no reason to believe that anyone there had better information about her location than did her family. Finally, the Seventh Circuit found that the State's efforts were insufficient because it failed to serve her with a subpoena after she expressed fear about testifying at the retrial. The Court noted: "We have never held that the prosecution must have issued a subpoena if it wishes to prove that a witness who goes into hiding is unavailable for Confrontation Clause purposes, and the issuance of a subpoena may do little good if a sexual assault witness is so fearful of an assailant that she is willing to risk his acquittal by failing to testify at trial." It concluded: "when a witness disappears before trial, it is always possible to think of additional steps that the prosecution might have taken to secure the witness' presence, but the Sixth Amendment does not require the prosecution to exhaust every avenue of inquiry, no matter how unpromising."

Cross-examination of a declarant at a probable cause hearing satisfied *Crawford*'s requirement of a prior opportunity for cross-examination

State v. Ross, __ N.C. App. __, 720 S.E.2d 403 (Oct. 18, 2011). (1) Defense counsel's cross-examination of a declarant at a probable cause hearing satisfied *Crawford*'s requirement of a prior opportunity for cross-examination. (2) Because evidence admitted for purposes of corroboration is not admitted for the truth of the matter asserted, *Crawford* does not apply to such evidence.

Defendant's confrontation rights and statutory rights under G.S. 15A-1225.1 were not violated when trial court permitted child victim to testify by one-way closed circuit television system

State v. Jackson, __ N.C. App. __, 717 S.E.2d 35 (Oct. 4, 2011). (1) 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. The court held that *Maryland v. Craig* survived *Crawford* and that the procedure satisfied *Craig*'s procedural requirements. (2) The court also held that the child's remote testimony complied with the statutory requirements of G.S. 15A-1225.1.

SBI forensic report identifying cocaine properly admitted when State gave notice under G.S. 90-95(g) and defendant lodged no objection

State v. Jones, __ N.C. App. __, __ S.E.2d __ (June 5, 2012). A SBI forensic report identifying a substance as cocaine was properly admitted when the State gave notice under the G.S. 90-95(g) notice and demand statute and the defendant lodged no objection to admission of the report without the testimony of the preparer.

Opinion Testimony

Generally

Trial court did not abuse discretion in allowing testimony by State's experts in firearm toolmark identification; forensic toolmark identification is sufficiently reliable and State presented evidence of both experts' qualifications and experience

State v. Britt, __ N.C. App. __, 718 S.E.2d 725 (Dec. 6, 2011). The trial court did not abuse its discretion by reversing its ruling on the defendant's motion in limine and allowing the State's expert witnesses' firearm identification testimony. The trial court initially had ruled that it would limit any testimony by the experts to statements that the bullets were "consistent," rather than that they had been fired from the same weapon. However, after defense counsel stated in his opening statement that defense experts would testify as to their "opinion that you cannot make a match, that there [are] simply not enough points of comparison on the two bullets," the trial court reversed its earlier ruling and permitted the State's experts to testify to their opinions that both bullets were fired from the same gun. (1) Citing case law, the court held that forensic toolmark identification is sufficiently reliable. (2) The court rejected the defendant's argument that the State's experts were not qualified to testify based on a lack of evidence verifying one of the expert's training and a shared lack of credentials. The State presented evidence of both experts' qualifications and experience. Although the State did not present verification of one of the expert's training and neither expert was a member of a professional organization, both experts explained how firearm toolmark identification works and how they conducted their investigations such that they were better qualified than the jury to form an opinion in the instant case.

(1) No plain error in admitting officer's lay opinion testimony identifying defendant as person depicted in a videotape where officer was in a better position than jury to identify defendant; (2) State laid proper foundation for videotape

State v. Collins, __ N.C. App. __, 716 S.E.2d 255 (Oct. 4, 2011). (1) The trial court did not commit plain error by admitting an officer's lay opinion testimony identifying the defendant as the person depicted in a videotape. The defendant argued that the officer was in no better position than the jury to identify the defendant in the videotape. However, the officer had contact with the defendant prior to the incident in question; because he was familiar with the defendant, the officer was in a better position than the jury to identify defendant in the videotape. (2) The trial court did not err by admitting a videotape of a controlled buy as substantive evidence where the State laid a proper foundation for the videotape. The court rejected the defendant's argument that the State was required to proffer a witness to testify that the tape accurately depicted the events in question.

Drug Identification

No error in allowing two officers to testify that substance was marijuana where neither was tendered as expert

State v. Cox, __ N.C. App. __, 721 S.E.2d 346 (Feb. 7, 2012). In a drug case, no error occurred when two officers testified, based on their observation, training, and experience, that green vegetable matter was marijuana. The defendant argued that this was improper because neither was tendered as an expert and neither had conducted a chemical analysis. The court noted that it has previously held that a police officer experienced in the identification of marijuana may testify to his or her visual identification of evidence as marijuana.

Supreme Court declined to address whether trial court erred in admitting lay testimony that substance was crack cocaine, holding testimony by defendant's witness identifying substance as crack cocaine was sufficient to withstand motion to dismiss

State v. Nabors, 365 N.C. 306, 718 S.E.2d 623 (Dec. 9, 2011). The court reversed a decision by the court of appeals in *State v. Nabors*, __ N.C. App. __, 700 S.E.2d 153 (Oct. 19, 2010) (the trial court erred by denying the defendant's motion to dismiss drug charges when the evidence that the substance at issue was crack cocaine consisted of lay opinion testimony from the charging police officer and an undercover informant based on visual observation; the court held that *State v. Ward*, 364 N.C. 133 (2010), calls into question "the continuing viability" of *State v. Freeman,* 185 N.C. App. 408 (2007) (officer can give a lay opinion that substance was crack cocaine), and requires that in order to prove that a substance is a controlled substance, the State must present expert witness testimony based on a scientifically valid chemical analysis and not mere visual inspection). The supreme court declined to address whether the trial court erred in admitting lay testimony that the substance at issue was crack cocaine, instead concluding that the testimony by the defendant's witness identifying the substance as cocaine was sufficient to withstand the motion to dismiss.

Nartest not sufficiently reliable method of identification of controlled substances

State v. Jones, __ N.C. App. __, 718 S.E.2d 415 (Nov. 1, 2011). (1) In a drug case, the court followed *State v. Meadows*, 201 N.C. App. 707 (2010), and held that the trial court erred by allowing an officer to testify as an expert concerning the use and reliability of a NarTest machine. (2) The trial court erred by admitting testimony by an expert in forensic chemistry regarding the reliability of a NarTest machine. Although the witness's professional background and comparison testing provided some indicia of reliability, other factors required the court to conclude that the expert's proffered method of proof was not sufficiently reliable. Among other things, the court noted that no case has recognized the NarTest as an accepted method of analysis or identification of controlled substances and that the expert had not conducted any independent research on the machine outside of his duties as a NarTest employee. (3) Because a lab that tested a controlled substance was neither licensed nor accredited, expert testimony regarding testing done at that lab on the substances at issue was inadmissible. (4) The trial court improperly allowed an officer to testify that a substance was cocaine based on a visual examination. (5) However, that same officer was properly allowed to testify that a substance was marijuana based on visual identification. (6) In a footnote, the court indicated that the defendant's statement that he bought what he believed to be cocaine was insufficient to identify the substance at issue.

No error where trial court allowed State's expert to testify about results of chemical analysis of substance where lab was not accredited

State v. McDonald, __ N.C. App. __, 716 S.E.2d 250 (Oct. 4, 2011). (1) In a drug case, no plain error 23 occurred when the trial court allowed the State's expert forensic chemist to testify as to the results of his chemical analysis of the substance in question. Through the expert's testimony as to his professional

background and use of established forensic techniques, the State met its burden of establishing "indices of reliability," as contemplated in *Howerton*. The court noted that although the laboratory was not accredited the defendant provided no legal authority establishing that accreditation is required when the forensic chemist who conducted the analysis at issue testifies at trial. (2) The court rejected the defendant's argument that the expert's lab report was inadmissible under G.S. 8-58.20(b) because the lab was not accredited. That statutory provision is relevant only when the State seeks to have the report admitted without the testimony of the preparer.

Other Evidence Issues

Hearsay

No error where trial court excluded victim's statement to social worker during "play therapy" session

State v. Carter, __ N.C. App. __, 718 S.E.2d 687 (Nov. 1, 2011). (1) In a child sexual assault case, the trial court did not err by declining to admit defense-proffered evidence offered under the hearsay exception for statements made for purposes of medical diagnosis and treatment. The evidence was the victim's statement to a social worker made during "play therapy" sessions. Nothing indicated that the victim understood that the sessions were for the purpose of providing medical diagnosis or treatment. They began more than two weeks after an initial examination and were conducted at a battered women's shelter in a "very colorful" room filled with "board games, art supplies, Play-Doh, dolls, blocks, cars, [and] all [other types] of things for . . . children to engage in" rather than in a medical environment. Although the social worker emphasized that the victim should tell the truth, there was no evidence that she told her that the sessions served a medical purpose or that the victim understood that her statements might be used for such a purpose. (2) The trial court did not err by declining to admit the same statement as an excited utterance. Because the record contained no description of the victim's behavior or mental state, the court could not discern whether she was excited, startled, or under the stress of excitement when the statement was made. (3) The trial court did not err by excluding defense evidence consisting of testimony by a social worker that during therapy sessions the victim was "overly dramatic," "manipulative," and exhibited "attention seeking behavior." The testimony did not relate to an expert opinion which the witness was qualified to deliver and was inadmissible commentary on the victim's credibility.

Rule 404(b)

In a child sex case, no error to admit 404(b) evidence of sexual conduct with young girl that took place within same time frame as charged conduct to show plan and intent

State v. Houseright, __ N.C. App. __, __ S.E.2d __ (May 15, 2012). In a child sex case involving a female victim, the trial court did not err by admitting 404(b) evidence in the form of testimony from another female child (E.S.) who recounted the defendant's sexual activity with her. The evidence was relevant to show plan and intent. Because the defendant's conduct with E.S. took place within the same time period as the charged offenses and with a young girl of similar age, it tends to make more probable the existence of a plan or intent to engage in sexual activity with young girls. Additionally, the defendant's plan to engage in sexual activity with young girls was relevant to the charges being tried. Finally, there was no abuse of discretion under the Rule 403 balancing test. On the issue of similarity, the court focused on the fact both E.S. and the victim were the same age and that the defendant was an adult; there was no discussion of the similarity of the actual acts.

(1) 404(b) evidence regarding shoplifting properly admitted as part of chain of circumstances leading to second-degree murder charge stemming from car accident after police chase; (2) Evidence that defendant previously received citations for driving without a license was relevant to malice; admission of "bare fact" of citations did not violate *Wilkerson*; (3) Evidence that defendant tried to escape after collision was relevant to malice; (4) No plain error when officers testified that defendant committed felony speeding to elude arrest and other crimes

State v. Rollins, __ N.C. App. __, __ S.E.2d __ (May 15, 2012). (1) In a second-degree murder case stemming from a vehicle accident during a high speed chase following a shoplifting incident, details of the shoplifting incident were properly admitted under Rule 404(b). Evidence is admissible under Rule 404(b) when it is part of the chain of circumstances leading to the event at issue or when necessary to provide a complete picture for the jury. Here, the shoplifting incident explained the manner of the defendant's flight. (2) The trial court did not err by admitting evidence that the defendant received two citations for driving without a license, including one only three days before the crash at issue. The fact that the defendant drove after having been repeatedly informed that driving without a license was unlawful was relevant to malice. The court rejected the defendant's argument that admission of the "bare fact" of the citations violated the *Wilkerson* rule (bare fact of a conviction may not be admitted under Rule 404(b)). The court noted that *Wilkerson* recognized that conviction for a traffic-related offense may "show the malice necessary to support a second-degree murder conviction," because it was "the *underlying evidence* that showed the necessary malice, not the fact that a trial court convicted the defendant." Thus, the court concluded, *Wilkerson* does not apply. (3) The trial court did not err by admitting an officer's testimony of the defendant's conduct after the crash. The evidence suggested that the defendant was continuing to try to escape regardless of the collision and in callous disregard for the condition of his passengers and as such supports a finding of malice. (4) No plain error occurred when officers testified that the defendant committed the offense of felony speeding to elude arrest and other crimes. The officer's testimony was a shorthand statement of facts necessary to explain why the police chase ensued. Specifically, the officers testified that they were not allowed to give chase unless they observed felonious conduct. Following *State v. Anthony*, 354 N.C. 372, 408 (2001), the court held that the officers were not interpreting the law for the jury, but rather were testifying regarding their observations in order to explain why they pursued the defendant in a high-speed chase.

Prior bad acts properly admitted to show common plan or scheme, identity, and motive although no forensic evidence or eyewitness placed defendant at the scene of one of the prior bad acts, a home invasion

State v. Donald Adams, __ N.C. App. __, __ S.E.2d __ (May 1, 2012). In the defendant's trial for breaking and entering into his ex-wife's Raleigh residence and for burning her personal property, the trial court did not abuse its discretion by admitting 404(b) evidence of an argument the defendant had with the victim and of a prior break-in at the victim's Atlanta apartment for which the defendant was not investigated, charged, or convicted. The victim testified that in June 2008, while at her apartment in Raleigh, the defendant became angry and threw furniture and books, shoved a television, and broke a lamp. A few months later, the victim's Atlanta apartment was burglarized and ransacked. Her couch was shredded, a lamp was broken, the floor was covered in an oily substance, her personal belongings were strewn about, and her laptop and car title were stolen. Police could not locate any fingerprints or DNA evidence tying the defendant to the crime; no eyewitnesses placed the defendant at the scene. In January 2009, the crime at issue occurred when the victim's apartment in Raleigh was burglarized and ransacked. Her clothes and other personal belongings were strewn about and covered in liquid, her furniture was cut, her electronics destroyed, the floor was covered in liquid, her pictures were slashed,

and a fire was lit in the fireplace, in which pictures of the defendant and the victim, books, shoes, picture frames, and photo albums had been burned. The only stolen item was a set of jewelry given to her by the defendant. As with the earlier break-in, the police could not locate any forensic evidence or eyewitnesses tying the defendant to the crime. The court found it clear from the record that the evidence established "a significant connection between defendant and the three incidents." The court went on to find that the prior bad acts were properly admitted to show common plan or scheme, identity, and motive.

Trial court did not err in admitting evidence that defendant possessed pornographic materials relating to incest where defendant was charged with sexually assaulting his minor child

State v. Brown, __ N.C. __, 722 S.E.2d 508 (Mar. 9, 2012). In a per curiam opinion, the court affirmed the decision below in *State v. Brown,* __ N.C. App. __, 710 S.E.2d 265 (May 3, 2011) (in a case in which the defendant was charged with sexually assaulting his minor child, the court rejected the defendant's argument that the trial court erred by admitting evidence that he possessed pornographic materials ("Family Letters," a publication purporting to contain letters regarding individuals' sexual exploits with family members); the defendant argued that the evidence was inadmissible under Rule 404(b) absent a showing that he used the materials during the crimes or showed them to the victim at or near the time of the crimes; the court concluded that the evidence was properly admitted to show motive and intent; as to motive, it stated: "evidence of a defendant's incestuous pornography collection sheds light on that defendant's desire to engage in an incestuous relationship, and that desire serves as evidence of that defendant's motive to commit the underlying act – engaging in sexual intercourse with the victim/defendant's child – constituting the offense charged"; as to intent, it concluded that the defendant's desire to engage in incestuous sexual relations may reasonably be inferred from his possession of the incestuous pornography, a fact relevant to the attempted rape charge; the court also found the evidence relevant to show a purpose of arousing or gratifying sexual desire in connection with an indecent liberties charge; finally, the court concluded that the evidence passed the Rule 403 balancing test, noting that it was admitted with a limiting instruction).

Generally

Evidence of victims' military disciplinary infractions not relevant and properly excluded

State v. Laurean, __ N.C. App. __, __ S.E.2d __ (May 1, 2012). In a murder case, the trial court did not err by excluding defense evidence of the victims' military disciplinary infractions. Both the defendant and the victim were in the military. After several military infractions, the victim was referred to the defendant for counseling. The victim later alleged that the defendant raped her. She was subsequently killed. At trial, the defendant sought to question military personnel about the victim's disciplinary infractions which led to the request that he counsel her. The defendant argued that this evidence established the victim's motive for making a false rape allegation against him. The trial court excluded this evidence. The court of appeals concluded that the question of whether the victim's accusation of rape was grounded in fact or falsehood was not before the jury. Moreover, her specific instances of conduct unrelated to the defendant shed no light upon the crimes charged. Therefore, it concluded, the specific instances of conduct resulting in minor disciplinary infractions were not relevant and were properly excluded.

Defense witness placed defendant's character at issue by testifying that defendant was not a violent person

State v. Williams, __ N.C. App. __, __ S.E.2d __ (April 17, 2012). In a murder case where a defense witness testified that the defendant was not a violent person, thereby placing a pertinent character trait at issue, no plain error occurred when the State cross-examined the witness about whether she knew of the defendant's prior convictions or his pistol whipping of a person.

Error to admit evidence about sexual encounter with defendant that occurred nine years earlier and was factually different from case at bar

State v. Glenn, __ N.C. App. __, __ S.E.2d __ (April 17, 2012). In a kidnapping, assault and indecent exposure case, the trial court erred by admitting testimony from a witness about a sexual encounter with the defendant to show identity, modus operandi, intent, plan, scheme, system, or design. The encounter occurred nine years earlier. The witness testified that the partially clothed defendant approached her on foot while she was walking. He exposed his penis to her and grabbed at her breasts and buttocks. Although he followed her up a driveway, he did not try to restrain her. In the case at hand, however, the victim got in a man's vehicle and discovered that he was partially clothed. The man called her a bitch and grabbed her hair and shirt as she attempted to exit the vehicle, but there was no evidence of a sexual touching. The court concluded: "Given the differences in the two instances, as well as the remoteness in time of the incident . . . admission of the evidence was error.

Evidence that defendant assaulted a male visiting victim's home and called victim a whore and slut bore on victim's state of mind in not immediately reporting rape

State v. Foust, __ N.C. App. __, 724 S.E.2d 154 (April 17, 2012). In a rape case, the trial court did not err by admitting evidence that the defendant assaulted a male visiting the victim's home and called the victim a whore and slut upon arriving at her house and finding a male visitor. Rejecting the defendant's argument that these incidents bore no similarity to the rape at issue, the court noted that the victim was present for both incidents and that her state of mind was relevant to why she did not immediately report the rape.

No error to admit evidence of second fraudulent check, virtually identical to first one

State v. Conley, __ N.C. App. __, 724 S.E.2d 163 (April 17, 2012). In a case involving convictions for uttering a forged instrument and attempting to obtain property by false pretenses in connection with a fraudulent check, the trial court did not err by admitting evidence of a second fraudulent check. The second check was virtually identical to the first one, except that it was drawn on a different bank. The fact that the defendant possessed the second check undermined the defendant's explanation for how he came into possession of the first check and proved intent to commit the charged crimes. Also, the evidence passed the Rule 403 balancing test.

(1) Trial court did not err in allowing State to present evidence of a knife that was admitted into evidence during defendant's first trial but was not available for retrial; (2) Trial court abused its discretion by excluding, at retrial, evidence of improper communication between lead investigator and a juror at defendant's first trial

State v. Lewis, __ N.C. __, 724 S.E.2d 492 (April 13, 2012). (1) Reversing the court of appeals, the court held that the trial court did not violate the defendant's due process rights by allowing the State to present evidence of a knife allegedly used during the crime at the defendant's retrial. The knife had been seized from the defendant's residence and was admitted into evidence during the defendant's first trial. However, the knife was not available at the retrial because it had been destroyed after the

defendant's first conviction was affirmed. Before the retrial the defense unsuccessfully moved to limit evidence regarding the knife. The court noted that under *California v. Trombetta*, 467 U.S. 479 (1984), "[t]he duty imposed by the Constitution on the State to preserve evidence is limited to evidence that might be expected to play a significant role in the suspect's defense." It continued: "[t]o meet this standard of constitutional materiality, evidence must both possess an exculpatory value that was apparent before the evidence was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means." Applying this test, the court concluded that the evidence did not meet the constitutional materiality threshold required by *Trombetta.* According to the defendant, the knife was the only physical evidence linking him to the crime and if it had been available at the retrial, he would have been able to compare the recovered knife with the victim's description to show that the victim's identification of the knife as the one used by the attacker was not credible. The court concluded however that although the knife was unavailable, defense counsel was able to challenge the victim's identification of the knife by using cross-examination to point out that its handle had been inside the assailant's hand. While cross-examining the lead detective defense counsel also established that the victim's nightgown had been left bloody by the assault but that the recovered knife was tested for blood and DNA and found to be "clean." Thus, the court concluded, despite the knife's unavailability, defense counsel was able to elicit impeaching testimony from the State's witnesses concerning the knife. It held: "In the absence of an allegation that the evidence was destroyed in bad faith, we conclude that the State's failure to preserve the knife for defendant's retrial did not violate defendant's right to due process." (2) The court of appeals properly found that the trial court abused its discretion by excluding, at a retrial, evidence of remarks that the lead investigator, Detective Roberts, made to a juror at the defendant's first trial. After the defendant's conviction, he filed a motion for appropriate relief (MAR) alleging that his trial had been tainted because of improper communication between Roberts and a juror, Deputy Hughes. At a hearing on the MAR, the defendant presented evidence that when his case was called for trial Hughes was in the pool of prospective jurors. While in custody awaiting trial, Hughes had twice transported the defendant to Central Prison in Raleigh. On one of those trips, the defendant told Hughes that he had failed a polygraph examination. Also, Hughes had assisted Roberts in preparing a photographic lineup for the investigation. While undergoing voir dire, Hughes acknowledged that he knew the defendant and had discussed the case with him. While he had misgivings about being a juror, Hughes said that he believed he could be impartial. Because the defendant insisted that Hughes remain on the jury, his lawyer did not exercise a peremptory challenge to remove Hughes from the panel. The evidence at the MAR hearing further showed that during a break in the trial proceedings, Roberts made the following statement to Hughes: "if we have . . . a deputy sheriff for a juror, he would do the right thing. You know he flunked a polygraph test, right?" Hughes did not report this communication to the trial court. Although the trial court denied the MAR, the court of appeals reversed, ordering a new trial. Prior to the retrial, the State filed a motion in limine seeking to suppress all evidence raised in the MAR hearing. Defense counsel opposed the motion, arguing that Roberts' earlier misconduct was directly relevant to his credibility. The trial court allowed the State's motion. The defendant was again convicted and appealed. The court of appeals held that the trial court abused its discretion by granting the State's motion. The supreme court affirmed, holding that the trial court should have allowed defense counsel to cross-examine Roberts regarding his statements to Hughes to show Roberts' bias against the defendant and pursuant to Rule 608(b) to probe Roberts' character for untruthfulness. The court went on to reject the State's argument that the evidence was properly excluded under Rule 403, noting that defense counsel understood that the line of questioning would inform the jurors that the defendant had been convicted in a prior trial but believed the risk was worth taking. The court held that the trial court's error prejudiced the defense given Roberts' significant role in the case.

Trial court did not err by excluding defendant's statement to a doctor where defendant's primary objective was to present diagnosis as a defense

State v. Lowery, __ N.C. App. __, 723 S.E.2d 358 (Feb. 21, 2012). The trial court did not err by excluding the defendant's statement to a doctor, offered under Rule 803(4) (hearsay exception for medical diagnosis and treatment). The defendant told the doctor that he only confessed to the murder because an officer told him he would receive the death penalty if he did not do so. Relying on appellate counsel's admission that the defendant saw the doctor with the hope that any mental illness he may have had could be diagnosed and used as a defense at trial, the court concluded, "[e]ven though defendant may have wanted continued treatment if he did, in fact, have a mental illness, his primary objective was to present the diagnosis as a defense." The court also noted that the defendant did not make any argument as to how his statement was relevant to medical diagnosis or treatment.

(1) Trial court erred by admitting evidence concerning history and activities of Bloods gang; (2) No error to allow evidence about hierarchy of gang structure where defendant's position in the gang was relevant to charges; (3) Photographs of defendant's tattoos and testimony about Bloods symbols were relevant; (4) Evidence of telephone call between defendant and his wife had little purpose other than to show violent propensities

State v. Privette, __ N.C. App. __, 721 S.E.2d 299 (Feb. 7, 2012). (1) The trial court erred by admitting evidence concerning the history of the Bloods gang and the activities of various Bloods subsets. The court noted that "[e]vidence of gang membership is generally inadmissible unless it is relevant to the issue of guilt." Here, the court was unable to determine how the evidence was relevant and concluded that its effect "was to depict a 'violent' gang subculture of which [the defendant] was a part and to impermissibly portray [the defendant] as having acted in accordance with gang-related proclivities." (2) The trial court did not err by allowing evidence about the hierarchy of gang structure when evidence regarding the defendant's position in the gang was relevant to the extortion-related charges. The evidence helped explain why the defendant thought that he could induce a third party to confess to a robbery; placed into context his statements that the third party would be murdered if he did not turn himself in; and helped explain the third party's decision to confess. (3) The trial court did not err by admitting photographs of the defendant's tattoos and related testimony describing the relationship between some of these tattoos and Bloods symbols where that evidence also explained the defendant's position in gang hierarchy (see discussion above). (4) Evidence of a telephone call between the defendant and his wife in which he described violent acts he would perform on her if she were a man was not relevant and had little purpose other than to show the defendant's violent propensities.

Error to allow impeachment with prior conviction over ten years old

State v. Ellerbee, __ N.C. App. __, 721 S.E.2d 296 (Feb. 7, 2012). The trial court erred by allowing the State to impeach a defense witness with a prior conviction that occurred outside of the ten-year "look-back" for Rule 609 when the trial court made no findings as to admissibility. However, no prejudice resulted.

State's witness properly allowed to use a prior statement to refresh recollection

State v. Harrison, __ N.C. App. __, 721 S.E.2d 371 (Feb. 7, 2012). The trial court properly allowed the State's witness to use a prior statement to refresh her recollection. The prior statement was made to an officer and recounted an interaction between her and the defendant. The witness had an independent recollection of her conversation with the defendant and of making her statement to the officer. She

affirmed that her recollection had been refreshed, testified from memory, and her testimony included details not in the statement. Her testimony showed that she was not using her prior statement as a crutch for something beyond her recall. In its decision the court reviewed and distinguished the law regarding the past recollection recorded and present recollection refreshed.

Footage from a surveillance video was properly authenticated

State v. Cook, __ N.C. App. __, 721 S.E.2d 741 (Jan. 17, 2012). Footage from a surveillance video was properly authenticated despite facilities manager's statement that he didn't know "anything about how [the camera] works." The facilities manager also testified that the camera was "a live streaming recording device that sends the imagine [*sic*] back to a server that records." He further testified that he viewed the surveillance video as the technician made a copy of the footage immediately following the incident, and that the footage presented in court was the same as that which he viewed when the copy was being made from the surveillance system's server a few days after the theft.

No error in denying defendant's motion to exclude DNA evidence, which was premised on the State's failure to preserve cigarette cartons from which blood samples were taken

State v. Matthews, __ N.C. App. __, 720 S.E.2d 829 (Jan. 17, 2012). The trial court did not err by denying the defendant's motion to exclude DNA evidence. The alleged crime occurred at a convenience store. An officer collected blood samples from the scene, including blood from cigarette cartons. The defendant argued that the cigarette cartons from which samples were taken should have been preserved. The court noted that the defendant did not argue any bad faith on the part of law enforcement officers, nor did he identify any irregularities in the collection or analysis of the samples that would call into question the results of the analysis. Therefore, the court concluded, the defendant failed to demonstrate any exculpatory value attached to the cigarette cartons from which the blood samples were collected. Also, evidence of a break-in by the defendant, occurring after the break-in in question, was properly admitted under Rule 404(b). DNA evidence sufficiently linked the defendant to the break-in and the evidence was probative of intent, identity, modus operandi, and common scheme or plan.

Cell phone records properly authenticated by custodian of records for Sprint/Nextel although he did not personally provide the records to police

State v. Crawley, __ N.C. App. __, 719 S.E.2d 632 (Dec. 20, 2011). Cell phone records introduced by the State were properly authenticated. At trial the State called Ryan Harger, a custodian of records for Sprint/Nextel, a telecommunications company that transmitted the electronically recorded cell phone records to the police department. The defendant argued that the cell phone records were not properly authenticated because Harger did not himself provide the records to the police and that he could not know for certain if a particular document was, in fact, from Sprint/Nextel. The court noted that Harger, a custodian of records for Sprint/Nextel for 10 years, testified that: he is familiar with Sprint/Nextel records; he has testified in other cases; Sprint/Nextel transmitted records to the police and that he believed that was done by e-mail; the records were kept in the normal course of business; the documents he saw were the same as those normally sent to law enforcement; and the relevant exhibit included a response letter from Sprint, a screen print of Sprint's database, a directory of cell sites, and call detail records. Although Harger did not send the documents to the police, he testified that he believed them to be accurate and that he was familiar with each type of document. This was sufficient to show that the records were, as the State claimed, records from Sprint/Nextel, and any question as to the accuracy or reliability of such records is a jury question. The court went on to conclude that even if Harger's testimony did not authenticate the records, any error was not prejudicial, because an officer

sufficiently authenticated another exhibit, a map created by the officer based on the same phone records. The officer testified that he received the records from Sprint/Nextel pursuant to a court order and that they were the same records that Harger testified to. He then testified as to how he mapped out cell phone records to produce the exhibit.

Prejudicial error where trial court denied admission of defendant's exhibit showing victim's prior convictions

State v. Lynch, __ N.C. App. __, 720 S.E.2d 452 (Dec. 20, 2011). Over a dissent, the court held that the trial court committed prejudicial error by denying defense counsel's request to allow into evidence an exhibit showing the victim's prior convictions for twelve felonies and two misdemeanors, offered under Rule 609. The court noted that Rule 609 is mandatory, leaving no room for discretion by the trial judge.

Letter defendant wrote detailing financial hardships and defendant's submission of false information in a loan application were relevant to show that defendant had a financial motive to kill his wife

State v. Britt, __ N.C. App. __, 718 S.E.2d 725 (Dec. 6, 2011). In a case in which the defendant was charged with murdering his wife, the trial court did not abuse its discretion by admitting a letter the defendant wrote years before his wife's death to an acquaintance detailing his financial hardships. Statements in the letter supported the State's theory that the defendant had a financial motive to kill his wife. Further, the trial court did not abuse its discretion by admitting 404(b) evidence pertaining to the defendant's submission of false information in a loan application. Evidence of the defendant's financial hardship was relevant to show a financial motive for the killing.

(1) Trial court did not err by admitting testimony from the surviving victim that touched on the deceased victim's state of mind; (2) Defendant did not open the door so as to permit evidence of substance of anonymous 911 call

State v. Sharpless*,* __ N.C. App. __, __ S.E.2d __ (June 5, 2012). (1) In a murder and assault case involving a home invasion and two victims, the trial court did not err by admitting testimony from the surviving victim that touched on the deceased victim's state of mind when he initially opened the door to the intruder. The surviving victim "merely gave his understanding and interpretation of what went on at the door based on his sitting in the next room and being able to hear the whole situation." As such, the surviving victim properly testified regarding his own beliefs of the sequence of events that took place at the door.; (2) The State argued that it permissibly elicited otherwise inadmissible hearsay testimony from a 911 operator regarding an anonymous phone call to refute and rebut the defendant's allegedly misleading impression that he could not have been involved in the murder, robbery and assault with which he was charged. The court held that while the defendant may have opened the door to the admission of further evidence regarding his potential involvement in the robbery, the defendant did not open the door to the admission of the substance of the anonymous tip, which included allegations that defendant was part of a trio involved in a particular narcotics robbery, where no other evidence substantiated these claims. The court held that admission of the substance of the call prejudiced the defendant by creating "an image for the jury of defendant as a person involved in a narcotics robbery gone awry." The court reversed on this issue and remanded for a new trial.

Crimes

Acting in Concert

Defendant's presence in victim's yard and flight from officers insufficient evidence of acting in concert with unknown man who committed larceny from home

State v. Bowden, __ N.C. App. __, 717 S.E.2d 230 (Oct. 4, 2011). The trial court did not err by dismissing charges of felony breaking or entering and felony larceny. The State presented evidence that an unknown man, who appeared to be concealing his identity, was seen walking around the victim's yard carrying property later determined to have been taken from the victim's home. The man fled when he saw officers and was never apprehended or identified. The defendant was also seen in the yard, but was never seen entering or leaving the home or carrying any stolen property. Although the defendant also fled from officers, no evidence linked him to the unknown man. The defendant's presence in the yard and his flight was insufficient evidence of acting in concert.

Generally

(1) Sufficient evidence that the defendant was an agent of the company in embezzling case; (2) Sufficient evidence that defendant had constructive possession of corporation's money

State v. Smalley, __ N.C. App. __, __ S.E.2d __ (April 17, 2012). (1) In an embezzlement case in which the defendant was alleged to have improperly written company checks to herself, there was sufficient evidence that the defendant was an agent of the company and not an independent contractor. Two essential elements of an agency relationship are the authority of the agent to act on behalf of the principal and the principal's control over the agent. Here, the defendant had authority to act on behalf of the corporation because she had full access to the company's checking accounts, could write checks on her own, and delegated the company's funds. Evidence of the company's control over the defendant included that she was expected to meet several responsibilities and that a member of the company communicated with her several times a week. (2) There was sufficient evidence that the defendant had constructive possession of the corporation's money when she was given complete access to the corporation's accounts and was able to write checks on behalf of the corporation and to delegate where the corporation's money went.

Sufficient evidence to establish that check was fraudulent

State v. Conley, __ N.C. App. __, 724 S.E.2d 163 (April 17, 2012). The evidence was sufficient to sustain the defendant's convictions for uttering a forged instrument and attempting to obtain property by false pretenses. Both offenses involved a fraudulent check. The court rejected the defendant's argument that there was insufficient evidence to establish that the check was falsely made. An employee of the company that allegedly issued the check testified that she had in her possession a genuine check bearing the relevant check number at the time the defendant presented another check bearing the same number. The employee testified the defendant's check bore a font that was "way off" and "really different" from the font used by the company in printing checks. She identified the company name on the defendant's check but stated "it's not our check."

Sufficient evidence existed that defendant was perpetrator of charged offenses

State v. Barnhart, __ N.C. App. __, __ S.E.2d __ (April 17, 2012). There was sufficient evidence that the defendant was the perpetrator of the charged offenses so that the trial court did not err by denying the defendant's motion to dismiss. The crimes occurred at approximately 1:00 am at the victim's home. The intruder took a fifty-dollar bill, a change purse, a cell phone, and jewelry. The victim's description of the perpetrator was not inconsistent with the defendant's appearance. An eyewitness observed the defendant enter a laundromat near the victim's home at approximately 2:00 am the same morning. The stolen change purse, cell phone, and jewelry were found in the laundromat. No one other than the defendant entered the laundromat from midnight that evening until when the police arrived. The defendant admitted using used a fifty-dollar bill to purchase items that morning and gave conflicting stories about how he obtained the bill.

No double jeopardy violation where defendant was convicted of attempted first-degree murder and assault with a deadly weapon with intent to kill inflicting serious bodily injury based on same events

State v. Rogers, __ N.C. App. __, __ S.E.2d __ (Mar. 6, 2012). No double jeopardy violation occurred when the defendant was convicted of attempted first-degree murder and assault with a deadly weapon with intent to kill inflicting serious bodily injury based on the same events. Each offense includes an element not included in the other.

(1) Insufficient evidence that defendant constructively possessed marijuana and cocaine where drugs were found at trash receptacles in Wendy's parking lot; (2) Trial court erred by denying the defendant's motion to dismiss speeding to elude charge where officer lost sight of vehicle and was unable to identify driver

State v. Lindsey, __ N.C. App. __, __ S.E.2d __ (Mar. 6, 2012). (1) There was insufficient evidence of constructive possession. After the defendant fled from his van, which he had crashed in a Wendy's parking lot, an officer recovered a hat and a cell phone in the van's vicinity. No weapons or contraband were found on the defendant or along his flight path. A search of the driver's side seat of the van revealed a "blunt wrapper" and a wallet with $800. Officers discovered a bag containing cocaine and a bag containing marijuana near trash receptacles in the Wendy's parking lot. The officers had no idea how long the bags had been there, and though the Wendy's was closed at the time, the lot was open and had been accessible by the public before the area was secured. Finding the evidence insufficient, the court noted that the defendant was not at his residence or in a place where he exercised any control; although an officer observed the defendant flee, he did not see the defendant take any actions consistent with disposing of the marijuana and cocaine in two separate locations in the parking lot; there was no physical evidence linking the defendant to the drugs recovered; and no drugs were found on or in the defendant's van. A dissenting judge would have found the evidence sufficient to establish constructive possession of the marijuana. (2) In a felony speeding to elude case the court held, over a dissent, that the trial court erred by denying the defendant's motion to dismiss where an officer, who lost sight of the vehicle was unable to identify the driver. The court emphasized that it was not "suggest[ing] a bright-line rule that the officer from whom a suspect flees must always make visual contact with the suspect." "Clearly," it stated if "a vehicle is continuously tracked by one or more officers from the point of fleeing to the point of apprehension, and only one individual is in the vehicle, sufficient evidence would exist that the suspect apprehended was the same person who initially fled." The court found that on the facts presented, the "complete absence of any identification of the driver" was determinative: no officer or other witness saw the driver of the van before or during the pursuit and the original officer lost sight of the van for some time.

G.S. 14-306.4 (electronic machines and devices for sweepstakes prohibited) invalidated as an unconstitutionally overbroad regulation of free speech

Hest Technologies, Inc. v. North Carolina, __ N.C. App. __, __ S.E.2d __ (Mar. 6, 2012). Over a dissent, the court held that G.S. 14-306.4 (electronic machines and devices for sweepstakes prohibited) is an unconstitutionally overbroad regulation of free speech. The court found that the statute regulated constitutionally protected speech. It held that the statutory ban on all "visual information . . . that takes the form of actual . . . or simulated game play" "necessarily encompasses all forms of video games, from the simplest simulation to a much more complex game requiring substantial amounts of interactive gameplay by the player, and thus, operates as a categorical ban on all video games for the purposes of communicating a sweepstakes result." As a result, the statute is constitutionally overbroad. The court invalidated the portion of G.S. 14-306.4 criminalizing the dissemination of a sweepstakes result through the use of an entertaining display. In this respect, the court's ruling was broader than the trial court's holding, which invalidated only a single statutory example of the term entertaining display.

Sandhill Amusements v. North Carolina, __ N.C. App. __, 724 S.E.2d 614 (Mar. 6, 2012). Over a dissent and relying on *Hest Technologies,* above, the court reversed a trial court ruling holding G.S. 14-306.4 to be constitutional.

No violation of G.S. 14-344 (sale of admission tickets in excess of printed price)

Hill v. StubHub, __ N.C. App. __, __ S.E.2d __ (Mar. 6, 2012). Fees that the defendant StubHub charged for its services did not violate G.S. 14-344 (sale of admission tickets in excess of printed price). [Author's note: As the court noted, after the present case was initiated, the General Assembly amended G.S. 14-344 and enacted G.S. 14-344.1 to exempt internet ticket sales accompanied by a ticket assurance guarantee from the strictures otherwise established by that statutory provision.]

Trafficking by possession

State v. Lopez, __ N.C. App. __, 723 S.E.2d 164 (Feb. 21, 2012). In a trafficking by possession case there was sufficient evidence of knowing possession where the defendant was driving the vehicle that contained the cocaine.

Court declined to address issue regarding born alive rule

State v. Chapman, __ N.C. App. __, 724 S.E.2d 540 (Feb. 7, 2012). Because of a procedural error by the State, the court declined to address an issue regarding the born alive rule presented in the State's appeal of a trial court's order dismissing capital murder charges. The defendant shot a woman who was pregnant with twins. Although the bullet did not strike the fetuses, the injury caused a spontaneous abortion. While both twins had heartbeats, experts said that they were previable.

(1) Insufficient evidence to establish that defendant constructively possessed stolen property; (2) Trial judge properly instructed on extortion; North Carolina does not recognize a "claim of right" defense

State v. Privette, __ N.C. App. __, 721 S.E.2d 299 (Feb. 7, 2012). (1) In a possession of stolen property case, the evidence was insufficient to establish that the defendant constructively possessed the jewelry at issue. The necessary "other incriminating circumstances" for constructive possession could not be inferred from the fact that the defendant was a high-ranking member of a gang to which the others involved in a robbery and subsequent transfer of the stolen goods belonged; the defendant

accompanied a person in possession of stolen property to an enterprise at which a legitimate transaction occurred; and the defendant and his wife made ambiguous references to "more scrap gold" and "rings" unaccompanied by any indication that these items were stolen. At most the State established that the defendant had been in an area where he could have committed the crimes. (2) The trial judge properly instructed the jury on extortion using the pattern jury instruction. The court rejected the notion that North Carolina recognizes a "claim of right" defense to extortion. Instead, it construed the statute to require proof that the defendant intentionally utilized unjust or unlawful means in attempting to obtain the property or other acquittance, advantage, or immunity; the statute does not require proof that the defendant sought to achieve an end to which he had no entitlement.

(1) Evidence was sufficient to sustain a conviction under G.S. 14-454.1(a)(2) where defendant submitted false information into the State Title and Registration System (STARS); (2) Indictment charging a violation of G.S. 14-454.1(b) was defective where it stated a purpose covered by G.S. 14-454.1(a)(2)

State v. Barr, __ N.C. App. __, 721 S.E.2d 395 (Feb. 7, 2012). (1) The evidence was sufficient to sustain a conviction under G.S. 14-454.1(a)(2) (unlawful to "willfully . . . access or cause to be accessed any government computer for the purpose of . . . [o]btaining property or services by means of false or fraudulent pretenses, representations, or promises"). The State alleged that the defendant, who worked for a private license plate agency, submitted false information into the State Title and Registration System (STARS) so that a car dealer whose dealer number was invalid could transfer title. The defendant admitted that she personally accessed STARS to make three transfers for the dealer, that she told a co-worker to run a fourth transaction in a similar fashion, and that she received payment for doing so. The court also found the evidence sufficient to support a conclusion that the defendant acted willfully. (2) In a case in which the defendant was charged with violations of G.S. 14-454.1(a)(2) and G.S. 14-454.1(b) (unlawful to "willfully and without authorization . . . accesses or causes to be accessed any government computer for any purpose other than those set forth in subsection (a)") as to the same transaction, the indictment charging a violation of G.S. 14-454.1(b) was defective when it stated a purpose covered by G.S. 14-454.1(a)(2). The court concluded that the plain language of G.S. 14-454.1(b) requires that the purpose for accessing the computer must be one "other than those set forth" in subsection (a).

Sufficient to show constructive possession where defendant facilitated drug transaction by providing transportation and arranging the location

State v. Adams, __ N.C. App. __, 721 S.E.2d 391 (Feb. 7, 2012). In a trafficking by possession case, the evidence was sufficient to show constructive possession. After receiving a phone call from an individual named Shaw requesting cocaine, the defendant contacted a third person, Armstrong, to obtain the drugs. The defendant picked up Armstrong in a truck and drove to a location that the defendant had arranged with Shaw for the purchase. The defendant knew that Armstrong had the cocaine. Officers found cocaine on scales in the center of the truck. The defendant's facilitation of the transaction by providing the vehicle, transportation, and arranging the location constituted sufficient incriminating circumstances to support a finding of constructive possession.

Consent domestic violence protective order was void ab initio for lack of any finding of fact that respondent committed act of domestic violence

Kenton v. Kenton, ___ N.C. App. ___, ___ S.E.2d ___ (Feb. 7, 2012). In a civil case for renewal of a domestic violence protective order (DVPO), the court ruled that the original DVPO, entered by consent, was void ab initio, because it lacked any finding that the respondent had committed an act of domestic

violence, a prerequisite to entry of a DVPO. The court therefore vacated the trial court's order renewing the DVPO. For a discussion of the potential impact of this ruling in criminal cases, see Jeff Welty, *Consent DVPOs without Findings of Fact Are Void ab Initio,* UNC Sch. of Gov't Blog, North Carolina Criminal Law (Feb. 21, 2012), http://sogweb.sog.unc.edu/blogs/ncclaw/?p=3321, and Jessica Smith, *Is Kenton Retroactive?,* UNC Sch. of Gov't Blog, North Carolina Criminal Law (Apr. 23, 2012), http://sogweb.sog.unc.edu/blogs/ncclaw/?p=3530.

Car was deadly weapon given manner of use

State v. Spencer, __ N.C. App. __, 720 S.E.2d 901 (Jan. 17, 2012). Based on the manner of its use, a car was a deadly weapon as a matter of law. The court based its conclusion on the vehicle's high rate of speed and the fact that the officer had to engage in affirmative action to avoid harm.

(1) Sufficient evidence existed that defendant took victim's car although victim was still in vehicle; (2) No entering occurred for burglary where defendant used shotgun to break window

State v. Watkins, __ N.C. App. __, 720 S.E.2d 844 (Jan. 17, 2012). (1)The evidence was sufficient to establish that the defendant took the victim's car when the defendant forced the victim at gunpoint to take the defendant as a passenger in the vehicle. The fact that the victim was "still physically present in the car cannot negate the reasonable inference that defendant's actions were sufficient to bring the car under his sole control." (2) An entering did not occur for purposes of burglary when the defendant used a shotgun to break a window, causing the end of the shotgun to enter the premises. The court reiterated that to constitute an entry some part of the defendant's body must enter the premises or the defendant must insert into the premises some tool that is intended to be used to commit the felony or larceny therein (such as a hook to grab an item).

Wildlife offense

State v. Ballance, __ N.C. App. __, 720 S.E.2d 856 (Jan. 17, 2012). The evidence was sufficient to establish the offense of taking bear with bait.

Insufficient evidence of breaking or entering a motor vehicle absent items of value

State v. McDowell, __ N.C. App. __, 720 S.E.2d 423 (Dec. 20, 2011). Citing *State v. Jackson*, 162 N.C. App. 695 (2004), in this breaking or entering a motor vehicle case, the court held that the evidence was insufficient where it failed to show that that the vehicle contained any items of value apart from objects installed in the vehicle.

Sufficient evidence existed that defendant constructively possessed cocaine

State v. Johnson, __ N.C. App. __, 720 S.E.2d 441 (Dec. 20, 2011). In a trafficking case, the evidence was sufficient to show that the defendant constructively possessed cocaine found in a vehicle in which the defendant was a passenger. Another occupant in the vehicle testified that the cocaine belonged to the defendant, the cocaine was found in the vehicle "where [the defendant]'s feet would have been[,]" and, cocaine also was found on the defendant's person.

Reversing Court of Appeals for reasons stated in dissent, Court finds insufficient evidence existed of constructive possession of marijuana where defendant was present in room where contraband was in plain view

State v. Slaughter, 365 N.C. 321 (Dec. 9, 2011). For the reasons stated in the dissenting opinion below, the court reversed a decision by the court of appeals in *State v. Slaughter,* __ N.C. App. __, 710 S.E.2d 377 (May 17, 2011). The court of appeals had held, over a dissent, that there was sufficient evidence of constructive possession of marijuana. The dissenting judge had noted that the evidence showed only that the defendant and two others were detained by a tactical team and placed on the floor of a 10-by-15 foot bedroom in the back of the mobile home, which had a pervasive odor of marijuana; inside the bedroom, police found, in plain view, numerous bags containing marijuana, approximately $38,000 in cash, several firearms, a grinder, and a digital scale; stacks of $20 and $100 bills, plastic sandwich baggies, and marijuana residue were found in the bathroom adjoining the bedroom. The dissenter noted that there was no evidence of the defendant's proximity to the contraband prior to being placed on the floor, after being placed on the floor, or relative to the other two individuals detained in the room. Having concluded that the evidence was insufficient as to proximity, the dissenting judge argued that mere presence in a room where contraband is located does not itself support an inference of constructive possession. The dissenting judge further concluded that the fact that the contraband was in plain view did not "take this case out of the realm of conjecture." He asserted: "The contraband being in plain view suggests that defendant knew of its presence, but there is no evidence — and the majority points to none — indicating that defendant had the intent and capability to maintain control and dominion over it."

Insufficient evidence existed of uttering a forged check and obtaining property by false pretenses where State presented no evidence that check was not from the issuer

State v. Brown, __ N.C. App. __, 720 S.E.2d 414 (Dec. 6, 2011). The evidence was insufficient to support a charge of uttering a forged check. For forgery, the "false writing must purport to be the writing of a party other than the one who makes it and it must indicate an attempted deception of similarity." Here, the State presented no evidence that the check was not in fact a check from the issuer. For the same reason the court held that the evidence was insufficient to support a conviction for obtaining property by false pretenses.

Habitual Felon

Conviction for habitual misdemeanor assault can be used as a predicate felony for habitual felon status.

State v. Holloway, __ N.C. App. __, 720 S.E.2d 412 (Oct. 18, 2011).

Homicide

Defendant's flight from first officer sufficient to show malice in death of second officer who died in car accident while responding to call from first officer

State v. Pierce, __ N.C. App. __, 718 S.E.2d 648 (Oct. 18, 2011). (1) In a case in which a second officer got into a vehicular accident and died while responding to a first officer's communication about the defendant's flight from a lawful stop, the evidence was sufficient to establish malice for purposes of second-degree murder. The defendant's intentional flight from the first officer–including driving 65 mph in a residential area with a speed limit of 25 mph and throwing bags of marijuana out of the vehicle–reflected knowledge that injury or death would likely result and manifested depravity of mind and disregard of human life. (2) The defendant's flight from the first officer was the proximate cause of the

second officer's death. The evidence was sufficient to allow a reasonable jury to conclude that the second officer's death would not have occurred had the defendant not fled and that the second officer's death was reasonably foreseeable. The court rejected the defendant's argument that the second officer's contributory negligence broke the causal chain.

Impaired Driving

Sufficient evidence existed other than defendant's extrajudicial confession that defendant was driving the vehicle

State v. Foye, __ N.C. App. __, __ S.E.2d __ (April 17, 2012). In an impaired driving and driving while license revoked case there was sufficient evidence other than the defendant's extrajudicial confession to establish that the defendant was driving the vehicle. Among other things, the vehicle was registered to the defendant and the defendant was found walking on a road near the scene, he had injuries suggesting that he was driving, and he admitting being impaired.

(1) Sufficient evidence existed other than defendant's extrajudicial confession that defendant was driving the vehicle; (2) New sentencing hearing ordered where State failed to provide defendant with notice of intent to use an aggravating factor

State v. Reeves, __ N.C. App. __, 721 S.E.2d 317 (Feb. 7, 2012). In an impaired driving case, there was sufficient evidence apart from the defendant's extrajudicial confession to establish that he was driving the vehicle. When an officer arrived at the scene, the defendant was the only person in the vehicle and he was sitting in the driver's seat. (2) The court vacated the defendant's sentence on an impaired driving conviction and remanded for a new sentencing hearing where the State failed to provide the defendant with notice of its intent to use an aggravating factor under G.S. 20-179(d).

(1) Sufficient evidence existed that defendant was operating the vehicle; (2) Sufficient evidence existed that defendant was given Intoxilyzer test

State v. Clowers, __ N.C. App. __, 720 S.E.2d 430 (Dec. 20, 2011). (1) There was sufficient evidence that the defendant was operating the vehicle in question. At trial a witness testified about her observations of the car, which continued from her first sighting of it until the car stopped in the median and the police arrived. She did not observe the driver or anyone else exit the car and the car did not move. The witness talked to an officer who arrived at the scene and then left. An officer testified that when she arrived at the scene eight minutes after the call went out, another officer was already talking to the driver who was still seated in the car. (2) The evidence was sufficient to show that the Intoxilyzer test was administered on the defendant at the time in question. Jacob Sanok, a senior identification technician with the local bureau of identification testified that he read the defendant his rights for a person requested to submit to a chemical analysis to determine alcohol concentration; the defendant indicated that he understood those rights; Sanok administered the Intoxilyzer tests to the defendant; and Sanok gave the defendant a copy of the Intoxilyzer test. The State introduced the rights form signed by the defendant; Sanok's "Affidavit and Revocation Report of Chemical Analyst[,]" showing that Sanok performed the Intoxilyzer test on the defendant; and the printout from the Intoxilyzer test showing that the defendant, who was listed by name, had a reported alcohol concentration of ".25g/210L[.]" Even though Sanok did not directly identify the defendant as the person to whom he administered the Intoxilyzer test, an officer identified the defendant in the courtroom as the person who was arrested and transported to the jail to submit to the Intoxilyzer test.

Larceny, Possession of Stolen Goods, and Obtaining Property by False Pretenses

Insufficient evidence that defendant knew four-wheeler was stolen

State v. Cannon, __ N.C. App. __, 721 S.E.2d 691 (Nov. 1, 2011). In a possession of stolen goods case, the court held that the evidence was insufficient to establish that the defendant knew that the item at issue, a four-wheeler, was stolen. Distinguishing *State v. Lofton*, 66 N.C. App. 79 (1984), the court noted, among other things, that the cosmetic changes to the four-wheeler were minimal, the defendant openly drove the four-wheeler, and the defendant did not flee from police. Additionally, there was no evidence regarding how the defendant got possession of the four-wheeler.

Unauthorized use of a motor vehicle is not a lesser included offense of possession of stolen goods

State v. Nickerson, 365 N.C. 279, 715 S.E.2d 845 (Oct 7, 2011). Reversing *State v. Nickerson*, __ N.C. App. __, 701 S.E.2d 685 (2010), the court held that unauthorized use of a motor vehicle is not a lesser included offense of possession of stolen goods. The court applied the definitional test and concluded that unauthorized use of a motor vehicle contains at least one element not present in the crime of possession of stolen goods and that therefore the former offense is not a lesser included offense of the latter offense.

Robbery

No error in denying defendant's motion to dismiss armed robbery charge absent evidence gun was inoperable or unloaded

State v. Williamson, __ N.C. App. __, __ S.E.2d __ (May 15, 2012). In an armed robbery case, the trial court did not err by failing to instruct the jury on common law robbery and by denying the defendant's motion to dismiss armed robbery charges. Because there was no evidence that the gun was inoperable or unloaded, there was no evidence to rebut the presumption that the firearm was functioning properly.

Sufficient evidence that stun gun was dangerous weapon for purposes of armed robbery

State v. Rivera, __ N.C. App. __, 716 S.E.2d 859 (Nov. 1, 2011). (1) The State presented sufficient evidence to establish that a stun gun was a dangerous weapon for purposes of armed robbery. The court concluded, in part, that although the victim did not die or come close to death, she was seriously injured. Given that serious injury "a permissive inference existed sufficient to support a jury determination that the stun gun was a dangerous weapon." (2) The State presented sufficient evidence that the stun gun was used in a way that endangered or threatened the victim's life. The court noted that the victim was tased, suffered significant pain, fell, injured her rotator cuff, endured two surgeries and extensive physical therapy, and two years later still experienced pain and a limited range of motion in her arm.

Sufficient evidence that victim's life was endangered or threatened by use or threatened use of a dangerous weapon although victim never indicated he felt afraid or threatened

State v. Hill, *365* N.C. 273, 715 S.E.2d 841 (Oct. 7, 2011). Affirming the court of appeals, the court held the State presented substantial evidence that the victim's money was taken through the use or threatened use of a dangerous weapon. The court noted that the investigating officer had testified that

the victim reported being robbed by a man with a knife. The court also held that the evidence was sufficient to establish that the victim's life was endangered or threatened by the assailant's possession, use, or threatened use of a dangerous weapon, relying on the testimony noted above and the victim's injuries. The court rejected the defendant's argument that the evidence failed to support this element because the victim never indicated that he was afraid or felt threatened, concluding that the question is whether a person's life was in fact endangered or threatened by the weapon, not whether the victim was scared or in fear of his or her life.

Sexual Offenses

(1) Expert testimony was not required for State to establish victim had mental disability for purposes of second-degree sexual offense; (2) State presented sufficient evidence of crime against nature

State v. Hunt, __ N.C. __, 722 S.E.2d 484 (Mar. 9, 2012). (1) Reversing a decision of the court of appeals in *State v. Hunt,* __ N.C. App. __, 710 S.E.2d 339 (May 3, 2011), the court held that expert testimony was not required for the State to establish that the victim had a mental disability for purposes of second-degree sexual offense. In the opinion below, the court of appeals reversed the defendant's conviction on grounds that there was insufficient evidence as to the victim's mental disability, reasoning: "where the victim's IQ falls within the range considered to be 'mental retardation[,]' but who is highly functional in her daily activities and communication, the State must present expert testimony as to the extent of the victim's mental disability as defined by [G.S.] 14-27.5." The supreme court, however, found the evidence sufficient. First, it noted, there was evidence that the victim was mentally disabled. The victim had an IQ of 61, was enrolled in special education classes, a teacher assessed her to be in the middle level of intellectually disabled students, and she required assistance to function in society. Second, the victim's condition rendered her substantially incapable of resisting defendant's advances. The victim didn't know the real reason why the defendant asked her to come into another room, his initial acts of touching scared her because she didn't know what he was going to do, she was shocked when he exposed himself, she was frightened when he forced her to perform fellatio and when she raised her head to stop, he forced it back down to his penis. Finally, there was evidence that the defendant knew or reasonably should have known about the victim's disability. Specifically, his wife testified that she had discussed the victim's condition with the defendant. The court emphasized that "expert testimony is not necessarily required to establish the extent of a victim's mental capacity to consent to sexual acts when a defendant is charged with second-degree sexual offense pursuant to section 14-27.5." (2) Reversing the court of appeals, the court held that the State presented sufficient evidence of crime against nature. The defendant conceded knowing that the victim was 17 years old. For the reasons discussed above, the court concluded that there was sufficient evidence that the victim's conditions rendered her substantially incapable of resisting the defendant's advances. All of this evidence indicates that the sexual acts were not consensual. In addition, the court noted, the record suggests that the acts were coercive, specifically pointing to the defendant's conduct of forcing the victim's head to his penis. The court emphasized that "expert testimony is not necessarily required to establish the extent of a victim's mental capacity to consent to sexual acts when a defendant is charged with . . . crime against nature."

(1) Error to allow DSS social worker to testify regarding substantiation of sex abuse of the victim by the defendant; (2) Sufficient evidence existed of penetration during anal intercourse

State v. Sprouse, __ N.C. App. __, 719 S.E.2d 234 (Dec. 6, 2011). (1) In a child sexual assault case, the trial court erred by allowing a DSS social worker to testify that there had been a substantiation of sex abuse of the victim by the defendant. Citing its opinion in *State v. Giddens,* 199 N.C. App. 115 (2009),

aff'd, 363 N.C. 826 (2010), the court agreed that this constituted an impermissible opinion vouching for the victim's credibility. However, the court found that unlike *Giddens,* the error did not rise to the level of plain error. (2) There was sufficient evidence of penetration during anal intercourse to sustain convictions for statutory sex offense and sexual activity by a substitute parent. The victim testified that the defendant "inserted his penis . . . into [her] butt," that the incident was painful, and that she wiped blood from the area immediately after the incident.

(1) Where evidence showed two acts of fellatio, trial court erred in giving instructions regarding four charges of first-degree sexual offense; (2) Trial court did not err with respect to instructions on two counts of sexual offense because jury could properly have found either anal intercourse or fellatio; (3) Sufficient evidence of fellatio existed to support sex offense charges

State v. Sweat, __ N.C. App. __, 718 S.E.2d 655 (Oct. 18, 2011), *review allowed*, 365 N.C. 371 (Dec. 8, 2011). In a case in which there was a dissenting opinion, the court held that (1) the trial court erred by instructing the jury that to find the defendant guilty of four charges of first-degree statutory sexual offense they could find that he engaged in "either anal intercourse and/or fellatio" with the victim when the evidence showed only two acts of fellatio and (2) the trial court did not err with respect to instructions on two counts because the jury could properly have found either anal intercourse or fellatio and was not required to agree as to which one occurred. (3) Over a dissent, the court held that there was sufficient evidence of fellatio under the corpus delecti rule to support sex offense charges involving this act.

Sufficient evidence that defendant engaged in conduct for the purpose of arousing or gratifying sexual desire

State v. Sims, __ N.C. App. __, 720 S.E.2d 398 (Oct. 4, 2011). In an indecent liberties case, the evidence was sufficient to establish that the defendant engaged in conduct for the purpose of arousing or gratifying sexual desire. While at a store, the defendant crouched down to look at the victim's legs, "fell into" the victim, wrapping his hands around her, and kneeled down, 6-8 inches away from her legs. Other evidence showed that he had asked another person if he could hug her legs and that he admitted to being obsessed with women's legs.

(1) No plain error where trial court referred to child as "victim" in instructions; (2) Plain error in failing to instruct on attempted sexual offense where evidence of penetration conflicting; (3) Sufficient evidence of anal penetration

State v. Carter, __ N.C. App. __, 718 S.E.2d 687 (Nov. 1, 2011). (1) In a child sexual assault case, the trial court did not commit plain error by impermissibly expressing an opinion when it described the child as the "victim" in its jury instructions. (2) The trial court committed plain error by failing to instruct on attempted sexual offense where the evidence of penetration was conflicting. (3) There was sufficient evidence of anal penetration to support a sexual offense charge. Although the evidence was conflicting, the child victim stated that the defendant's penis penetrated her anus. Additionally, a sexual assault nurse examiner testified that the victim's anal fissure could have resulted from trauma to the anal area.

Digital penetration constituted sexual act that supported charge of child abuse

State v. Stokes, __ N.C. App. __, 718 S.E.2d 174 (Nov. 1, 2011). Digital penetration of the victim's vagina can constitute a sexual act sufficient to support a charge of child abuse under G.S. 14-318.4(a2) (sexual act).

No evidence of threat of force or special relationship to prove constructive force for second-degree sexual offense

In Re T.W., __ N.C. App. __, __ S.E.2d __ (June 5, 2012). Because there was no evidence of threat of force or special relationship there was insufficient evidence of constructive force to support second-degree sexual offense charges. The State had argued that constructive force was shown by (a) the fact that the juvenile threatened the minor victims with exposing their innermost secrets and their participation with him in sexual activities, and (2) the power differential between the juvenile and the victims. Rejecting this argument, the court concluded: for "the concept of constructive force to apply, the threats resulting in fear, fright, or coercion must be threats of physical harm." Acknowledging that constructive force also can be inferred from a special relationship, such as parent and child, the court concluded that the relationships in the case at hand did not rise to that level. In this case the juvenile was a similar age to the victims and their relationship was one of leader and follower in school.

Weapons Offenses

Insufficient evidence of constructive possession of firearm existed where only evidence was defendant's extrajudicial confession

State v. Cox, __ N.C. App. __, 721 S.E.2d 346 (Feb. 7, 2012). There was insufficient evidence of constructive possession to support a conviction of felon in possession of a firearm. Although the defendant confessed that the gun was his, the case raised a corpus delicti issue. Under that rule, the State may not rely solely on the extrajudicial confession of a defendant to obtain a conviction; rather, it must produce substantial independent corroborative evidence that supports the facts underlying the confession. Here, the only evidence that the defendant possessed the gun was the extrajudicial confession. [Author's note: for a discussion of the corpus delicti rule, see the chapter on the issue in the N.C. Superior Court Judges' Benchbook here: http://www.sog.unc.edu/node/2131].

Felon in possession of a firearm statute was unconstitutional as applied to plaintiff; Court considered number, age, and severity of offenses for which plaintiff was convicted

Baysden v. North Carolina, __ N.C. App. __, 718 S.E.2d 699 (Nov. 15, 2011). Over a dissent, the court 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 law-abiding 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 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.

Defendant may not be convicted of separate counts of possession of stolen firearm for each firearm possessed

State v. Surrett, __ N.C. App. __, 719 S.E.2d 120 (Nov. 15, 2011). The trial court erred in convicting the defendant of two counts of possession of a stolen firearm under G.S. 14-71.1. The court of appeals stated: "While defendant did possess the two separate stolen firearms, we hold that defendant may not be convicted on separate counts for each firearm possessed."

Insufficient evidence that defendant possessed a firearm found along the route of car chase; sufficient evidence that defendant possessed shotgun found in his home closet

State v. Pierce, __ N.C. App. __, 718 S.E.2d 648 (Oct. 18, 2011). (1) For purposes of a felon in possession charge, the evidence was insufficient to establish that the defendant possessed a firearm found along the route of his flight by vehicle from an officer. The defendant fled from an officer attempting to make a lawful stop. The officer did not see a firearm thrown from the defendant's vehicle; the firearm was found along the defendant's flight route several hours after the chase; the firearm was traced to a dealer in Winston-Salem, where the other two occupants of the defendant's vehicle lived; and during the investigation a detective came to believe that one of the vehicle's other occupants owned the firearm. (2) The evidence was sufficient to show that the defendant possessed a shotgun found at his residence. The shotgun was found in the defendant's closet along with a lockbox containing ammunition that could be used in the shotgun, paychecks with the defendant's name on them, and the defendant's parole papers. Also, the defendant's wife said that the defendant was holding the shotgun for his 42 brother.

Defenses

Burden is on the defendant to prove affirmative defense of automatism

State v. Rogers, __ N.C. App. __, __ S.E.2d __ (Mar. 6, 2012). The trial court did not commit plain error by instructing the jury that the defendant had the burden of persuasion to prove the defense of automatism. Automatism is an affirmative defense, and the burden is on the defendant to prove its existence to the jury.

Trial court did not err by refusing to instruct on entrapment; defendant's actions illustrated "ready compliance, acquiescence in, [and] willingness to cooperate in the criminal plan"

State v. Adams, __ N.C. App. __, 721 S.E.391 (Feb. 7, 2012). In a drug trafficking case, the trial court did not err by denying the defendant's request for a jury instruction on entrapment. After an individual

named Shaw repeatedly called the defendant asking for cocaine, the defendant told Shaw he would "call a guy." The defendant called a third person named Armstrong to try to obtain the cocaine. When Armstrong did not answer his phone, the defendant drove to his house. The next day, the defendant picked up Armstrong and drove him to a location previously arranged to meet Shaw. The court found that these actions illustrate the defendant's "ready compliance, acquiescence in, [and] willingness to cooperate in the criminal plan" and thus his predisposition. Additionally, the court noted, the defendant admitted that he had been involved as a middle man on a prior deal; this admission further demonstrates predisposition.

Trial court did not err by refusing to instruct on entrapment by estoppel where defendant's colleague, who was not a government official, told her to enter transaction

State v. Barr, __ N.C. App. __, 721 S.E.2d 395 (Feb. 7, 2012). The trial court did not err by denying the defendant's request for an instruction on the defense of entrapment by estoppel. The defendant was charged with violating G.S. 14-454.1(a)(2) (unlawful to "willfully . . . access or cause to be accessed any government computer for the purpose of . . . [o]btaining property or services by means of false or fraudulent pretenses, representations, or promises"). The State alleged that the defendant, who worked for a private license plate agency, submitted false information into the State Title and Registration System (STARS) so that a car dealer whose dealer number was invalid could transfer title. The defendant asserted that she was told by a colleague named Granados, who was a licensed title clerk, how to enter the transaction. The court concluded that Granados was not a governmental official; Granados was an employee of the license plate agency, not the State of North Carolina, and the agency was a private contractor. It stated that a government license does not transform private licensees into governmental officials.

Trial court did not err by declining to instruct on automatism or unconsciousness where no evidence existed that defendant's consumption of alcohol or his medication was involuntary

State v. Clowers, __ N.C. App. __, 720 S.E.2d 430 (Dec. 20, 2011). In an impaired driving case, the trial court did not err by declining to instruct on automatism or unconsciousness. The defendant asserted that even though unconsciousness through voluntary consumption of alcohol or drugs does not support an instruction as to automatism or unconsciousness, his unconsciousness could have been the result of the effects of voluntary consumption of alcohol combined with the effects of Alprazolam, a drug that he had been prescribed to control his panic attacks. The court concluded that there was no evidence that the defendant's consumption of alcohol or his medication was involuntary.

(1) No error to refuse to instruct on voluntary intoxication when defendant did not produce evidence of effect of crack cocaine on his mental state; (2) No error in instructing jury that it could find defendant guilty of second-degree burglary under a theory of accessory before the fact, aiding and abetting, or acting in concert; (3) A defendant cannot be both a principal and an accessory to the same crime

State v. Surrett, __ N.C. App. __, 719 S.E.2d 120 (Nov. 15, 2011). (1) Although the State presented evidence that the defendant smoked crack, there was no evidence regarding the crack cocaine's effect on the defendant's mental state and thus the trial court did not commit plain error in failing to instruct the jury on the defense of voluntary intoxication. (2) The trial court did not err by instructing the jury that it could find the defendant guilty of second-degree burglary under a theory of accessory before the fact, aiding and abetting, or acting in concert. The separate theories were not separate offenses, but

rather merely different methods by which the jury could find the defendant guilty. By enacting G.S. 14-5.2 the General Assembly did not abolish the theory of accessory before the fact; the statute merely abolished the distinction between an accessory before the fact and a principal, meaning that a person who is found guilty as an accessory before the fact should be convicted as a principal to the crime. (3) The trial court erred in failing to arrest judgment on the defendant's conviction for accessory after the fact to second-degree burglary. A defendant cannot be both a principal and an accessory to the same crime.

No error in convicting defendant of aiding and abetting his son who committed sexual offenses even if son was under duress from defendant

State v. Stokes, __ N.C. App. __, 718 S.E.2d 174 (Nov. 1, 2011). The court rejected the defendant's argument that he could not be convicted of aiding and abetting a sexual offense and child abuse by sexual act on grounds that the person who committed the acts—his son—was under duress from the defendant. Even if the son was under duress, his acts were still criminal**.**

Sex Offender Registration and Satellite-Based Monitoring

(1) Legislative changes regarding period of registration and automatic termination made after defendant was required to register applied to defendant; (2) Trial court erred in finding defendant's removal from registry would not comply with Adam Walsh Act

In re Hamilton, __ N.C. App. __, __ S.E.2d __ (May 1, 2012). (1) Amendments to the sex offender registration scheme's period of registration and automatic termination provision made after the defendant was required to register applied to the defendant. When the defendant was required to register in 2001, he was subject to a ten-year registration requirement which automatically terminated if he did not re-offend. In 2006 the registration statutes were amended to provide that registration could continue beyond ten years, even when the registrant had not reoffended. Also, the automatic termination language was deleted and a new provision was added providing that persons wishing to terminate registration must petition the superior court for relief. The court held that both legislative changes applied to the defendant. (2) The trial court erred by finding that the defendant's removal from the registry would not comply with the federal Adam Walsh Act.

State could not appeal order terminating defendant's sex offender registration after State consented to it

In re Hutchinson, __ N.C. App. __, 723 S.E.2d 131 (Feb. 7, 2012). The State could not appeal an order terminating the defendant's sex offender registration requirement when it had consented to the trial court's action. The court rejected the State's argument that the trial court lacked jurisdiction to terminate the defendant because he had not been registered for 10 years.

DOC's failure to file a complaint or issue a summons to defendant as required by Rules of Civil Procedure did not deprive trial court of jurisdiction to conduct SBM hearing

State v. Self, __ N.C. App. __, 720 S.E.2d 776 (Dec. 20, 2011). The court rejected the defendant's argument that the trial court lacked jurisdiction to conduct an SBM determination hearing because the DOC did not file a complaint or issue a summons to the defendant as required by the Rules of Civil Procedure. The court concluded that G.S. 14-208.40B(b), "which governs the notification procedure for

an offender when there was no previous SBM determination at sentencing, does not require NCDOC to either file a complaint or issue a summons in order to provide a defendant with adequate notice of an SBM determination hearing." Moreover, it concluded, the defendant does not argue that the DOC's letter failed to comply with the notification provisions of G.S. 14-208.40B(b).

(1) Taking indecent liberties with a child is not an aggravated offense for purposes of lifetime SBM; (2) Statutory rape of a victim who is 13, 14, or 15 is an aggravated offense for purposes of lifetime SBM; (3) Neither statutory sex offense under G.S. 14-27.7A(a) nor sexual activity by a substitute parent under G.S. 14-27.7(a) are aggravated offenses for purposes of SBM

State v. Sprouse, __ N.C. App. __, 719 S.E.2d 234 (Dec. 6, 2011). (1) Following prior case law, the court held that taking indecent liberties with a child is not an aggravated offense for purposes of lifetime SBM. (2) Relying on *State v. Clark*, __ N.C. App. __ (April 19, 2011) (first-degree statutory rape involving a victim under 13 is an aggravated offense for purposes of SBM), the court held that statutory rape of a victim who is 13, 14, or 15 is an aggravated offense for purposes of lifetime SBM. (3) Neither statutory sex offense under G.S. 14-27.7A(a) nor sexual activity by a substitute parent under G.S. 14-27.7(a) are aggravated offenses for purposes of SBM.

Trial court erred by terminating the petitioner's sex offender registration where defendant was notified by Kentucky that he was no longer required to register there but had not been registered in North Carolina for at least ten years

In re Borden, __ N.C. App. __, 718 S.E.2d 683 (Nov. 1, 2011). The trial court erred by terminating the petitioner's sex offender registration. G.S. 14-208.12A provides that 10 years "from the date of initial county registration," a person may petition to terminate registration. In this case the convictions triggering registration occurred in 1995 in Kentucky. In 2010, after having been registered in North Carolina for approximately 1½ years, the petitioner received notice from Kentucky that he was no longer required to register there. He then filed a petition in North Carolina to have his registration terminated. The court concluded that the term "initial county registration" means the date of initial county registration in North Carolina, not the initial county registration in any jurisdiction. Since the petitioner had not been registered in North Carolina for at least ten years, the trial court did not have authority under G.S. 14-208.12A to terminate his registration.

First-degree sexual offense is not an aggravated offense requiring lifetime enrollment in SBM

State v. Carter, __ N.C. App. __, 718 S.E.2d 687 (Nov. 1, 2011). The trial court erroneously required the defendant to enroll in lifetime SBM on the basis that first-degree sexual offense was an aggravated offense. The court reiterated that first-degree sexual offense is not an aggravated offense. The court remanded for a risk assessment and a new SBM hearing.

Trial court erred by ordering lifetime SBM where the court found that defendant did not require the highest possible level of supervision and monitoring

State v. Stokes, __ N.C. App. __, 718 S.E.2d 174 (Nov. 1, 2011). The trial court erred by ordering lifetime SBM. The trial court concluded that the defendant was not a sexually violent predator or a recidivist and that although the offenses involved the physical, mental, or sexual abuse of a minor, he did not require the highest possible level of supervision and monitoring. The trial court's finding that the defendant did

not require the highest possible level of supervision and monitoring did not support its order requiring lifetime SBM.

Court had jurisdiction to impose SBM although no civil summons was issued

State v. Sims, __ N.C. App. __, 720 S.E.2d 398 (Oct. 4, 2011). (1) The court rejected the defendant's argument that since no civil summons was issued, the trial court had no jurisdiction to impose SBM; the trial court had jurisdiction under G.S. 14-208.40A to order SBM. (2) The trial judge erroneously concluded that the defendant had a reportable conviction on grounds that indecent liberties is an offense against a minor. However, since that offense is a sexually violent offense, no error occurred.

Sufficient evidence that defendant changed his address

State v. Fox, __ N.C. App. __, 716 S.E.2d 261 (Oct. 4, 2011). In a case involving a sex offender's failure to give notice of an address change, the court held that the evidence was sufficient to establish that the defendant changed his address. Among other things, a neighbor at the new address testified that the defendant stayed in an upstairs apartment every day and evening. Although the defendant claimed that he had not moved from his father's address, his father told an officer that the defendant did not live there any longer.

Trial court did not err by entering civil no contact order against the defendant

State v. Hunt, __ N.C. App. __, __ S.E.2d __ (June 5, 2012). The trial court did not err by entering a civil no contact order against the defendant pursuant to G.S. 15A-1340.50 (permanent no contact order prohibiting future contact by convicted sex offender with crime victim). The court held that because the statute imposes a civil remedy, it does not impose an impermissible criminal punishment under article XI, sec. I of the N.C. Constitution. The court also rejected the defendant's due process argument asserting that the State did not give him sufficient notice of its intent to seek the order. It held that the defendant was not entitled to prior notice by the State that it would seek the no contact order at sentencing. The court held that because the order was civil in nature, it presented no double jeopardy issues. Finally, the court held that the trial judge followed proper procedure in entering the order.

DOC gave sufficient notice of SBM hearing

State v. Manning, __ N.C. App. __, __ S.E.2d __ (June 5, 2012). (1) The DOC gave sufficient notice of a SBM hearing when its letter informed the defendant of both the hearing date and applicable statutory category. (2) The court rejected the defendant's argument that SBM infringed on his constitutional right to travel.

Sentencing and Probation

Generally

Defendant could not challenge trial court's jurisdiction to enter original judgment on appeal from judgment revoking probation

State v. Long, __ N.C. App. __, __ S.E.2d __ (April 17, 2012). On appeal from judgment revoking probation, the defendant could not challenge the trial court's jurisdiction to enter the original judgment as this constituted an impermissible collateral attack on the original judgment.

For purposes of structured sentencing, the term "month" is defined as a calendar month

McDonald v. N.C. Department of Correction, __ N.C. App. __, __ S.E.2d __ (Mar. 20, 2012). G.S. 12-3(12) (defining "imprisonment for one month" as imprisonment for 30 days) is inapplicable to sentences imposed under structured sentencing. For purposes of structured sentencing, the term "month" is defined by G.S. 12-3(3) to mean a calendar month.

No error to consider seriousness of offense

State v. Oakes, __ N.C. App. __, 724 S.E.2d 132 (Mar. 20, 2012). The trial court did not err by considering the seriousness of the offense when exercising its discretion to choose a minimum term within the presumptive range.

Abuse of discretion to summarily deny motion for suppression of prior conviction

State v. Blocker, __ N.C. App. __, __ S.E.2d __ (Mar. 6, 2012). The trial court abused its discretion by summarily denying the defendant's motion under G.S. 15A-980 for suppression, in connection with sentencing, of a prior conviction which the defendant alleged was obtained in violation of her right to counsel. The trial court dismissed the motion as an impermissible collateral attack on a prior conviction that only could be raised by motion for appropriate relief. Relying on a prior unpublished opinion, the court held that although the defendant "could not seek to overturn her prior conviction" on this basis, G.S. 15A-980 gave her "the right to move to suppress that conviction's use in this case."

Eighth Amendment not violated where defendant, who was 16 years old at time of arrest, was convicted of first degree murder and sentenced to life in prison without possibility of parole

State v. Lowery, __ N.C. App. __, 723 S.E.2d 358 (Feb. 21, 2012). No violation of the Eighth Amendment's prohibition against cruel and unusual punishment occurred when the defendant, who was 16 years old at the time of his arrest, was convicted of first degree murder and sentenced to life in prison without the possibility of parole . The court rejected the defendant's argument that *Graham v. Florida*, 130 S. Ct. 2011 (2010) (the Eighth Amendment does not permit a juvenile offender to be sentenced to life in prison without the possibility of parole for a non-homicide crime), warranted a different result; the court distinguished *Graham* on grounds that the case at hand involved a murder conviction.

(1) Sentence invalid where trial judge failed to find that aggravating factor existed and aggravated sentence appropriate; (2) Restitution award not supported by competent evidence; (3) Use of deadly weapon could not be used as aggravating factor where necessary to prove element of offense; (4) Failure to find that aggravating factor exists and aggravated sentence is appropriate is not clerical error

State v. Rico, __ N.C. App. __, 720 S.E.2d 801 (Jan. 17, 2012), *review allowed*, __ N.C. __, 721 S.E.2d 229 (Feb. 3, 2012). (1) Even though the defendant pleaded guilty to a crime and admitted an aggravating factor pursuant to a plea agreement, the trial judge still was required to find that an aggravating factor existed and that an aggravated sentence was appropriate. Failure to do so rendered the sentence

invalid. (2) The court vacated a restitution award that was not supported by competent evidence. (3) Where, as here, the use of a deadly weapon was necessary to prove the unlawful killing element of the pleaded-to offense of voluntary manslaughter, use of a deadly weapon could not also be used as an aggravating factor. (4) Where the trial judge erroneously sentenced the defendant to an aggravated term without finding that an aggravating factor existed and that an aggravated sentence was appropriate, a second judge erroneously treated this as a clerical error that could be corrected simply by amending the judgment.

Defendant's sentence impermissibly based on exercise of right to trial

State v. Jones, __ N.C. App. __, 718 S.E.2d 415 (Nov. 1, 2011). The defendant's sentence was impermissibly based on his exercise of his constitutional rights. At the sentencing hearing, the trial court noted more than once that the defendant "was given an opportunity to plead guilty[,]" and that his failure to plead was one of the "factors that the Court considers when the Court fashions judgment." The trial court also admonished the defendant and defense counsel for "unnecessarily" protracting the trial for 6 days when it should have only taken 2 days.

Whether a federal conviction is substantially similar to a NC felony is a question of law to which defendant may not stipulate

State v. Watlington, __ N.C. App. __, 716 S.E.2d 671 (Oct. 18, 2011). The trial court erred in calculating the defendant's prior record level with respect to whether a federal conviction was substantially similar to a NC felony. The determination of substantial similarity is a question of law which cannot be determined by stipulation to the worksheet.

No *Blakely* error for assignment of prior record level point based on defendant's admission

State v. Miles, __ N.C. App. __, __ S.E.2d __ (June 5, 2012). Where the defendant admitted that he was serving a prison sentence when the crime was committed, no *Blakely* violation occurred when the trial judge assigned a prior record level point on this basis without submitting the issue to the jury.

Restitution

Restitution award for value of automobile supported by competent evidence

State v. Watkins, __ N.C. App. __, 720 S.E.2d 844 (Jan. 17, 2012). The evidence supports the trial court's restitution award for the value of a Honda Accord automobile. The prosecutor introduced documentation that the car was titled in the name of Moses Blunt and that the robbery victim paid $3,790 to Blunt to purchase the car. The prosecutor submitted both the title registration of the car, as well as a copy of the purchase receipt. Additionally, the victim testified at trial that he had paid $3,790 for the car but due to insurance issues, the car was still titled in his roommate's name. Although the victim did not identify his roommate, the prosecutor's introduction of the actual title registration supports the fact that Blunt was the title owner and that the car was worth $3,790 at the time of the transaction, which occurred shortly before the robbery.

Restitution is not authorized for analysis performed by an unlicensed private lab such as NarTest

State v. Jones, __ N.C. App. __, 718 S.E.2d 415 (Nov. 1, 2011). In a drug case, the trial court erred by ordering the defendant to pay $1,200.00 as restitution for fees from a private lab (NarTest) that tested the controlled substances at issue. Under G.S. 7A-304(a)(7), the trial court "shall" order restitution in the amount of $600.00 for analysis of a controlled substance by the SBI. G.S. 7A-304(a)(8) allows the same restitution if a "crime laboratory facility operated by a local government" performs such an analysis as long as the "work performed at the local government's laboratory is the equivalent of the same kind of work performed by the [SBI]." The statute does not authorize restitution for analysis performed by an unlicensed private lab such as NarTest.

No evidence to support restitution worksheet

State v. Sullivan, __ N.C. App. __, 717 S.E.2d 581 (Nov. 1, 2011). The trial court erred by ordering restitution when the defendant did not stipulate to the amounts requested and no evidence was presented to support the restitution worksheet.

Evidence that repairs would cost "[t]hirty-something thousand dollars" was not too vague to support any restitution award, but did not adequately support restitution amount awarded

State v. Moore, 365 N.C. 283, 715 S.E.2d 847 (Oct. 7, 2011). The court reversed *State v. Moore*, __ N.C. App. __, 705 S.E.2d 797 (2011) (holding that the evidence was insufficient to support an award of restitution of $39,332.49), and held that while there was some evidence to support the restitution award, the evidence did not adequately support the particular amount awarded. The case involved a conviction for obtaining property by false pretenses; specifically, the defendant rented premises owned by the victim to others without the victim's permission. The defendant collected rent on the property and the "tenants" caused damage to it. At trial, a witness testified that a repair person estimated that repairs would cost "[t]hirty-something thousand dollars." There was also testimony that the defendant received $1,500 in rent. Although the court rejected the State's argument that testimony about costs of "thirty-something thousand dollars" is sufficient to support an award "anywhere between $30,000.01 and $39,999.99," it concluded that the testimony was not too vague to support any award. The court remanded to the trial court to calculate the correct amount of restitution.

Post-Conviction

(1) Trial court erred by summarily denying defendant's MAR asserting that trial counsel was ineffective in failing to file an affidavit in support of defendant's motion to suppress; (2) Defendant was not procedurally barred from raising ineffectiveness claim in MAR where he failed to raise it on direct appeal; (3) MAR adequately forecast evidence of prejudice

State v. Jackson, __ N.C. App. __, __ S.E.2d __ (April 17, 2012). (1) The trial court erred by summarily denying the defendant's motion for appropriate relief (MAR) and accompanying discovery motion. In the original proceeding, the trial court denied the defendant's motion to suppress in part because it was not filed with the required affidavit. After he was convicted, the defendant filed a MAR asserting that trial counsel was ineffective in failing to file the required affidavit. The trial court denied the MAR and the court of appeals granted certiorari. (2) The court rejected the State's argument that because the defendant failed to raise the ineffectiveness claim on direct appeal, he was procedurally defaulted from raising it in the MAR. The court reasoned that the record did not provide appellate counsel with

sufficient information to establish the prejudice prong of the ineffectiveness test. Specifically, proof of this prong would have required appellate counsel to show that the defendant had standing to challenge the search at issue. (3) The court held that the trial court erred by summarily denying the MAR. Because the State did not contest that trial counsel's failure to attach the requisite affidavit constituted deficient representation, the focus of the court's inquiry was on whether the defendant's MAR forecast adequate evidence of prejudice. On this issue, it concluded that the MAR adequately forecast evidence on each issue relevant to the prejudice analysis: that the defendant had standing to challenge the search and that the affidavit supporting the warrant contained false statements.

Trial court did not abuse discretion by granting defendant's MAR on basis of newly discovered evidence where, after defendant's conviction for drug charges, defendant's father admitted that drugs were his

State v. Rhodes, __ N.C. App. __, 724 S.E. 2d 148 (April 3, 2012). The trial court did not abuse its discretion by granting the defendant's motion for appropriate relief (MAR) on the basis of newly discovered evidence. The defendant was convicted on drug charges for drugs found in his parents' house. At trial the defendant asserted that he did not live in his parents' house. When the defendant's father was asked if the drugs were his he replied, "I plead the Fifth." He was then excused as a witness. After the defendant's conviction, however, the defendant's father admitted to a probation officer that the drugs were his. The defendant then filed a MAR on the basis of this newly discovered evidence and the trial court granted a new trial. In order to succeed on a claim of newly discovered evidence, the defendant must show that (1) a witness will give newly discovered evidence; (2) the evidence is probably true; (3) the evidence is material, competent and relevant; (4) due diligence was used and proper means were employed to procure the testimony at trial; (5) the evidence is not merely cumulative or corroborative; (6) the evidence does not merely tend to contradict, impeach, or discredit the testimony of a former witness; and (7) the evidence is of such a nature that a different result will probably be reached at a new trial. The court rejected the State's argument that the evidence could have been elicited through due diligence at trial. It noted that the witness did not admit exclusive ownership of the drugs until after trial. Moreover, the defense exercised due diligence by calling the defendant's father as witness and asking him whether the drugs were his. However, the witness exercised his right against self-incrimination, prompting the trial court to excuse him as a witness. The defense also tried to elicit this information from the defendant's mother but she was unwilling to implicate her husband. The court also rejected the State's challenge to the trial court's conclusion that the witness's confession was "probably true," noting that it is for the trial court to determine credibility and that the witness had a history of violating drug laws. Finally, the court rejected the State's assertion that the witness's confession would not exculpate the defendant in a new trial.

***Padilla* did not apply retroactively to defendant's MAR**

State v. Alshaif, __ N.C. App. __, 724 S.E.2d 597 (Feb. 21, 2012). The court held that *Padilla v. Kentucky*, __ U.S. __, 130 S. Ct. 1473 (2010), dealing with ineffective assistance of counsel in connection with advice regarding the immigration consequences of a plea, did not apply retroactively to the defendant's motion for appropriate relief. Applying *Teague* retroactivity analysis, the court held that *Padilla* announced a new procedural rule but that the rule was not a watershed one.

Defendant was not entitled to evidentiary hearing on MAR that was without merit

State v. Sullivan, __ N.C. App. __, 717 S.E.2d 581 (Nov. 1, 2011). The trial court did not abuse its discretion by denying the defendant's motion for appropriate relief (MAR) made under G.S. 15A-1414 without first holding an evidentiary hearing. Given that the defendant's MAR claims pertained only to mitigating sentencing factors and the defendant had been sentenced in the presumptive range, the trial judge could properly conclude that the MAR was without merit and that the defendant was not entitled to an evidentiary hearing.

Interpreting Services

US DOJ finds that AOC's interpreting policies fail to provide limited English proficient (LEP) individuals with meaningful access to state court proceedings

Letter re Investigation of the North Carolina Administrative Office of the Courts Complaint No. 171-54M-8 from Thomas E. Perez, Assistant Attorney General, to Judge John W. Smith, AOC Director (Mar. 8, 2012) (http://www.justice.gov/crt/about/cor/TitleVI/030812_DOJ_Letter_to_NC_AOC.pdf). See letter for detailed findings.