Selected Materials on Criminal Law and Procedure

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Recent Cases Affecting Criminal Law and Procedure
(October 17, 2006 – May 15, 2007)

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North Carolina Supreme Court

Criminal Law and Procedure

Using Hands to Beat Robbery Victim Was Not "Dangerous Weapon, Implement or Means" to Support Conviction of Armed Robbery

State v. Hinton, 361 N.C. 207, 639 S.E.2d 437 (26 January 2007), *affirming*, 176 N.C. App. 191, 625 S.E.2d 918 (21 February 2006) (unpublished opinion). The defendant was convicted of armed robbery based on using his fists to beat the robbery victim. The court ruled that the use of hands to beat a robbery victim is not a "dangerous weapon, implement or means" to support a conviction of armed robbery under G.S. 14-87. The court determined that the North Carolina General Assembly intended to require the state to prove that a defendant used an external dangerous weapon or means to convict a defendant of armed robbery. Thus, the use of hands, fists, or feet is insufficient. [Author's note: This ruling does not affect prior rulings that the element of "deadly weapon" in various assault offenses may be satisfied by the use of hands or feet.]

Insufficient Factual Basis to Support Judge's Acceptance of Guilty Plea

State v. Agnew, ___ N.C. ___, ___ S.E.2d ___ (4 May 2007), *reversing*, ___ N.C. App. ___, 630 S.E.2d 743 (20 June 2006) (unpublished opinion). On June 9, 2004, in taking the defendant's guilty plea to trafficking cocaine by possession, the trial judge asked defense counsel if counsel stipulated that there was a factual basis to support the plea and whether the defendant waived the formal presentation of evidence. Defense counsel responded affirmatively. Pursuant to the plea arrangement, the trial judge ordered that the sentencing hearing be continued until scheduled by the state. On March 10, 2005, a different trial judge held the sentencing hearing. The defendant told the judge that he had never seen the evidence in his case, never possessed the drugs, did not understand how he could be charged with trafficking by possession, had been under the influence of marijuana when he pled guilty on June 9, 2004, and had been under the impression that he would receive probation based on his cooperation. Treating the defendant's request as a motion to withdraw the guilty plea, the trial judge denied the motion and asked the prosecutor to tell the judge about the case. The prosecutor summarized the facts, and after further colloquy with the defendant, the judge sentenced the defendant. The court ruled that when the trial judge accepted the defendant's guilty plea on June 9, 2004, the judge did not comply with G.S. 15A-1022(c) because the judge did not determine that there was a factual basis for the plea. The transcript, defense counsel's stipulation, and the indictment taken together did not contain enough information for an independent determination of the defendant's actual guilt in this case. The court noted that the prosecutor's summary of facts on March 10, 2005, could not serve as the factual basis in this case because that summary occurred months after the plea had been accepted.

Trial Court Did Not Have Jurisdiction to Revoke Probation When Hearing Was Conducted After Probationary Period Had Ended, and Judge Failed to Make Required Finding Under G.S. 15A-1344(f)(2)—Ruling of Court of Appeals Is Affirmed

State v. Bryant, 361 N.C. 100, 637 S.E.2d 532 (15 December 2006), *affirming*, 176 N.C. App. 190, 625 S.E.2d 916 (21 February 2006) (unpublished opinion). The court ruled that the trial court did not have jurisdiction to revoke the defendant's probation when the revocation hearing was conducted after the probationary period had ended, and the judge revoking probation failed to make a finding required under G.S. 15A-1344(f)(2) that the state had made a reasonable effort to notify the probationer and to conduct the hearing earlier.

Trial Judge Abused Discretion in Granting Defendant and Counsel Five Minutes to Decide Whether to Present Evidence—Ruling of Court of Appeals Is Reversed

State v. Williams, 361 N.C. 78, 637 S.E.2d 523 (15 December 2006), *reversing*, 175 N.C. App. 640, 625 S.E.2d 147 (7 February 2006). The defendant was convicted of first-degree murder and sentenced to life imprisonment without parole. At the close of the state's case around 4:00 p.m. on the second day of trial, defense counsel asked for an adjournment for the day or at least some time to decide whether to present evidence. The trial judge stated that he would give five minutes. Defense counsel asked for fifteen minutes. The trial judge denied that request. Defense counsel told the judge that he did not know the extent of the state's evidence until it was presented. The judge again said five minutes. The defendant did not present any evidence. The court ruled that the judge abused his discretion in only giving five minutes. The court noted that defense counsel had a list of twenty to thirty witnesses that the state might call, but the state rested on the afternoon of the second day of trial having only called twelve witnesses. Also, the defendant and defense counsel had a great deal to consider given the weaknesses in the testimony of the state's witnesses. The court also noted the gravity of the charge of first-degree murder.

Proper Remedy Under Defendant's Motion for Appropriate Relief When Defendant Was Sentenced to Illegal Concurrent Sentence Pursuant to Plea Agreement Was to Allow Defendant to Withdraw Guilty Plea; Judge Had No Authority to Order Sentence to Run Concurrently

State v. Ellis, 361 N.C. 200, 639 S.E.2d 425 (26 January 2007), *reversing*, 167 N.C. App. 276, 605 S.E.2d 168 (7 December 2004). The defendant pled guilty to armed robbery in 1992 when the law required the sentence to run consecutively to any sentences being served. However, the state and the defendant in the plea agreement agreed that the sentence would run concurrently with the sentences the defendant was then serving. The judge sentenced the defendant for the armed robbery, but did not indicate whether it was to run concurrently or consecutively. The Department of Correction recorded the sentence as consecutive to the sentence he then was serving. The defendant filed a motion for appropriate relief requesting that he be allowed to withdraw his guilty plea. The trial court judge hearing the motion for appropriate relief instead ordered the sentence to run concurrently. The court ruled, relying on State v. Wall, 348 N.C. 671, 502 S.E.2d 585 (1998), that the proper remedy was to allow the defendant to withdraw his guilty plea, and the defendant could proceed to trial or attempt to negotiate another plea agreement. The judge at the MAR hearing had no authority to order the sentence to run concurrently. The defendant was not entitled to specific performance of the plea agreement that would result in an illegal sentence.

(1) Fourteen-Year-Old Juvenile Who Had Consensual Fellatio With Twelve-Year-Old Was Properly Adjudicated Delinquent of Crime Against Nature
(2) Crime Against Nature Offense Was Not Unconstitutionally Applied to Juvenile

In re R.L.C., ___ N.C. ___, ___ S.E.2d ___ (4 May 2007), *affirming*, ___ N.C. App. ___, 635 S.E.2d 1 (5 September 2006). A fourteen-year-old juvenile was adjudicated delinquent of crime against nature for having consensual fellatio with a twelve-year-old. (1) The court ruled the fact that other offenses involving this sex act require certain age differentials as elements did not show a legislative intent that the juvenile could not be adjudicated delinquent of crime against nature with a person who was only two years younger than the juvenile. (2) The court ruled, distinguishing Lawrence v. Texas, that the crime against nature offense was not unconstitutionally applied to the juvenile. The court noted that, unlike *Lawrence v. Texas*, this case involved minors. The court also recognized that preventing sexual conduct between minors furthers a legitimate governmental interest and application of the crime against nature offense is a reasonable means of promoting that interest.

Capital Case Issues

(1) Doctrine of Invited Error Applies When Trial Judge in Capital Sentencing Hearing Erroneously Submits Mitigating Factor G.S. 15A-2000(f)(1) (No Significant Prior Criminal History) at Defendant's Request
(2) Trial Judge's Failure to Submit Aggravating Factor in Capital Sentencing Hearing Is Not Structural Error

State v. Polke, 361 N.C. 65, 638 S.E.2d 189 (15 December 2006). The defendant was convicted of first-degree murder and sentenced to death. (1) The defendant at the capital sentencing hearing requested that the trial judge submit mitigating factor G.S. 15A-2000(f)(1) (no significant prior criminal history), and the judge did so. The defendant on appeal argued that the trial judge erroneously submitted this mitigating factor. The court ruled that the doctrine of invited error applies when a trial judge in a capital sentencing hearing erroneously submits this mitigating factor at the defendant's request, and thus the defendant cannot be prejudiced by an error resulting from his own conduct. [Author's note: The court noted, on the other hand, its recent ruling in State v. Hurst, 360 N.C. 181, 624 S.E.2d 309 (2006), that the doctrine of invited error does not apply when mitigating factor G.S. 15A-2000(f)(1) is withheld at the defendant's request.] (2) The court ruled that a trial judge's failure to submit an aggravating factor in a capital sentencing hearing is not structural error and thus not subject to structured error analysis.

Arrest, Search, and Confession Issues

(1) Court Rules That Officers Did Not Have Exigent Circumstances to Enter House Without Search Warrant to Look for Possible Missing Person
(2) Court Remands to Trial Court for Determination Whether Defendant Had Reasonable Expectation of Privacy in House to Contest Officers' Entry into House
(3) Court Remands to Trial Court for Determination Whether Independent Source Exception to Fourth Amendment's Exclusionary Rule Would Support Finding Probable Cause for Search Warrant With Exclusion of Illegally-Obtained Information That Had Been Included in Search Warrant's Affidavit

State v. McKinney, 361 N.C. 53, 637 S.E.2d 868 (15 December 2006), *affirming in part and reversing in part*, 174 N.C. App. 138, 619 S.E.2d 901 (18 October 2005). The defendant was

convicted of first-degree murder and sentenced to life imprisonment without parole. Amy advised law enforcement that her roommate, Aja, had told her that Aja's friend, the defendant, had killed his roommate. An address of the residence where the defendant and victim apparently lived was supplied to law enforcement. Officers arrived at the residence and were advised there that the defendant was reportedly driving the victim's vehicle, which was not in the driveway. The victim's sister arrived and informed officers that the victim lived there. The victim's brother arrived shortly thereafter. Officers learned that neither the brother nor sister had any contact with the victim in several days, and the victim had not reported for work the prior day, which was very unusual. The officers also learned that the defendant had told Aja that the victim had pulled a knife on the defendant, and the victim "wouldn't be coming back." The victim's brother then entered the house through a window and officers followed him. The officers saw what appeared to be blood spatter in the front bedroom and other indications of blood elsewhere in the house, secured the house, obtained a search warrant, and thereafter discovered the victim's body in a large garbage can in the house. (1) The court ruled that the officers did not have exigent circumstances to enter the house without a search warrant to look for the possible missing victim. (2) The court remanded to the trial court for a determination whether the defendant had a reasonable expectation of privacy in the house to contest the officers' entry into the house (had the defendant permanently abandoned the house?). (3) The court remanded to the trial court for a determination whether the independent source exception to the Fourth Amendment's exclusionary rule [Murray v. United States, 487 U.S. 533 (1988)] would support finding probable cause for the search warrant with the exclusion of illegally-obtained information (the apparent blood spatter and other indications of blood in the house) that had been included in search warrant's affidavit.

Evidence

(1) Medical Expert's Opinion Testimony That Child Had Been Sexually Abused Was Admissible When It Was Based on Physical Evidence
(2) Medical Expert's Opinion Testimony That, Based on Child's Statements to Her, She Would Believe Child and Diagnose Sexual Abuse Even in Absence of Physical Evidence Was Inadmissible, But Error Was Not Plain Error Requiring New Trial—Ruling of Court of Appeals Is Reversed

State v. Hammett, 361 N.C. 92, 637 S.E.2d 518 (15 December 2006), *reversing*, 175 N.C. App. 597, 625 S.E.2d 168 (7 February 2006). The defendant was convicted of multiple charges concerning sexual abuse of his daughter. (1) The court ruled that the medical expert's opinion testimony that the child had been sexually abused was admissible when it was based on physical evidence and the child's statements. The physical findings by the expert included a notch in the six o'clock position of the victim's hymenal ring. (2) The court ruled that the medical expert's opinion testimony that based on the child statements to her, she would believe the child and diagnose sexual abuse even in absence of physical evidence was inadmissible. This testimony improperly vouched for the child's credibility. The court, however, also ruled that this error was not plain error requiring a new trial.

(1) Evidence of Killing Committed Ten Years Before Murder Being Tried Was Not Too Dissimilar or Remote to Be Admitted Under Rule 404(b)
(2) Trial Judge Erred in Allowing Conviction to Be Admitted Under Rule 404(b)

State v. Badgett, ___ N.C. ___, ___ S.E.2d ___ (4 May 2007). The defendant was convicted of a first-degree murder committed in 2002. The trial judge admitted under Rule 404(b) evidence of the facts involving the defendant's killing of another person in 1992 as well as the defendant's

conviction of voluntary manslaughter for that killing. (1) The court ruled that evidence of the killing was not too dissimilar or remote to be admitted. The court reviewed the evidence and concluded that there were remarkable similarities between the two killings, including fatal stab wounds to an unarmed victim's neck with a folding pocketknife that occurred during an argument with the victim in the victim's home. Concerning the temporal requirement, the defendant was in prison for five of the ten years between the two killings (such time is excluded by case law), leaving only five years between them. (2) The court ruled that the trial judge erred in allowing the state to introduced evidence of the defendant's conviction of voluntary manslaughter for the 1992 killing. The court relied on its ruling in State v. Wilkerson, 356 N.C. 418, 571 S.E.2d 583, *reversing per curiam*, 148 N.C. App. 310, 559 S.E.2d 5 (2002) (for reasons stated in dissenting opinion of the Court of Appeals). Evidence of the prior conviction was inadmissible when the state had introduced evidence of the underlying facts and circumstances of the conviction and, in this case, the defendant did not testify so the conviction was not admissible under Rule 609.

Sentencing

(1) Court Discusses Use of Special Verdicts in Criminal Cases
(2) Court Rules Trial Judge's Finding of Aggravating Factor in Violation of *Blakely v. Washington* Was Harmless Error Beyond Reasonable Doubt
(3) Trial Judge's Finding of Aggravating Factor Did Not Violate Constitution of North Carolina

State v. Blackwell, 361 N.C. 41, 638 S.E.2d 452 (15 December 2006). The defendant was convicted of second-degree murder and other offenses when he drove his vehicle while impaired and crashed into another vehicle, killing one of the occupants. In a sentencing hearing held before the ruling in Blakely v. Washington, 542 U.S. 296 (2004), the trial judge found the statutory aggravating factor that the defendant was on pretrial release for another charge and imposed a sentence in the aggravated range for the second-degree murder conviction and two other felony convictions. (1) In responding to one of the defendant's arguments that *Blakely* error was not harmless beyond a reasonable doubt because trial judge allegedly lacked a procedural mechanism by which to submit the aggravating factor to the jury, the court discussed the use of special verdicts in criminal cases. The court stated that North Carolina law permits the submission of aggravating factors to a jury by using a special verdict. [Author's note: The court's discussion was in the context of a sentencing hearing conducted before the *Blakely* ruling and the enactment of the legislation setting out procedures for the jury to find aggravating factors.] (2) The court reviewed the state's evidence at trial, the defendant's failure to object to the prosecutor's statement at sentencing about the defendant being on pretrial release, and the defendant's failure at sentencing to present any arguments or evidence contesting the aggravating factor. It then ruled that the trial judge's finding of aggravating factor in violation of Blakely v. Washington, 542 U.S. 296 (2004), was harmless error beyond reasonable doubt. (3) The court ruled that the trial judge's finding of the aggravating factor did not violate Article I, Section 24 of the Constitution of North Carolina. *See also* State v. Speight, 361 N.C. 106, 637 S.E.2d 539 (15 December 2006) (court set aside North Carolina Court of Appeals ruling that sentence was erroneously imposed under *Blakely* and remanded case to that court for harmless error analysis not inconsistent with ruling in State v. Blackwell, discussed above).

North Carolina Court of Appeals

Criminal Law and Procedure

(1) Sufficient Evidence of Strangulation to Support Conviction of Assault by Strangulation
(2) Sufficient Evidence of Restraint to Support Kidnapping Conviction
(3) Sufficient Evidence to Support Kidnapping Conviction Because Restraint Was Separate and Independent From Assault by Strangulation
(4) Court Upholds Sufficiency of Evidence to Support One Conviction of Intimidating Witness But Finds Insufficient Evidence of Ten Other Convictions of Intimidating Witness

State v. Braxton, ___ N.C. App. ___, ___ S.E.2d ___ (1 May 2007). The defendant was convicted of one count of second-degree kidnapping, two counts of assault by strangulation, two counts of assault on a female, and eleven counts of intimidating a witness. (1) The court upheld the defendant's convictions of assault by strangulation based on the victim's testimony that there were separate incidents in which the defendant grabbed her by the throat, causing her to have difficulty breathing. The court rejected the defendant's argument that the definition of strangulation should be the complete closure of one's airways causing an inability to breathe. The court noted with approval the definition of strangulation in footnote one to the offense in N.C.P.I.—Crim. 208.61 (2005): "strangulation is defined as a form of asphyxia characterized by closure of the blood vessels and/or air passages of the neck as a result of external pressure on the neck brought about by hanging, ligature, or the manual assertion of pressure." (2) The court ruled that there was sufficient evidence of restraint to support the kidnapping conviction because the defendant restrained the victim by pinning her on the bed by pushing his knee into her chest, grabbing her hair, and preventing her from escaping from him. (3) The court ruled that there was sufficient evidence to support the kidnapping conviction because the restraint of the victim was separate and independent from the assault by strangulation: pinning the victim on the bed by pushing his knee into her chest, grabbing her hair, and preventing her from leaving the motel room. (4) The court upheld the sufficiency of evidence to support one conviction of intimidating a witness (G.S. 14-226) but found insufficient evidence to support ten other convictions. The state's eleven indictments alleged the defendant attempted to deter the victim from attending court by means of threats. The court noted that the state did not also allege by "menaces or in any other manner" and thus was confined to the allegation of threats only. The court examined the evidence and found only one communication that constituted a threat. The defendant in the other communications merely told her not to testify, which was insufficient evidence of a threat.

Sufficient Evidence of "Serious Bodily Injury" to Support Conviction of Assault Inflicting Serious Bodily Injury When Victim Lost Natural Tooth

State v. Downs, ___ N.C. App. ___, 635 S.E.2d 518 (17 October 2006). The court ruled there was sufficient evidence of "serious bodily injury," as defined in G.S. 14-32.4(a), to support the defendant's conviction of assault inflicting serious bodily injury when the victim lost his natural tooth as a result of the defendant's assault. The natural tooth was located in the top front row of teeth. The court stated that the defendant suffered "serious permanent disfigurement" (a term included in the statutory definition), despite the planned substitution of a dental implant in place of the natural tooth.

(1) Sufficient Evidence to Support Two Rape Convictions When Defendant Vaginally Penetrated Victim on Couch While Facing Defendant, Withdrew His Penis, Turned Her on Her Side, and Then Vaginally Penetrated Her from Behind
(2) Evidence Supported Conviction of Kidnapping in Addition to Rape Convictions When Defendant's Removal of Victim from Bedroom to Kitchen and Then to Family Room and His Commission of Other Acts Were Not Necessary to Accomplish Rapes and Placed Her in Greater Danger Than That Inherent in the Rapes
(3) When Kidnapping Indictment Alleged "Confined, Restrained, and Removed," Jury Instruction Permitting Conviction on Finding That Defendant "Restrained *or* Removed" Victim Was Not Error
(4) Sufficient Evidence to Support Conviction of Attempted Second-Degree Burglary

State v. Key, ___ N.C. App. ___, 636 S.E.2d 816 (21 November 2006). The defendant was convicted of two counts of first-degree rape, one count of second-degree kidnapping, one count of attempted second-degree burglary, and one count of first-degree burglary. The defendant broke into the victim's home and threatened her with a knife in the bedroom. He forced her at knife point to go into the kitchen where he taped her eyes shut, took the phone off the hook, and told her to go into the family room and remove her clothing. The defendant vaginally penetrated the victim on a couch while she faced the defendant, withdrew his penis, turned her on her side, and then vaginally penetrated her from behind. (1) The court ruled, relying on State v. Lancaster, 137 N.C. App. 37, 527 S.E.2d 61 (2000), that there was sufficient evidence to convict the defendant of two counts of rape. (2) The court ruled, distinguishing State v. Cartwright, ___ N.C. App. ___, 629 S.E.2d 318 (16 May 2006), that the evidence supported the conviction of kidnapping in addition to the rape convictions when the defendant's removal of the victim from the bedroom to the kitchen and then to the family room and his commission of other acts were not necessary to accomplish the rapes and placed her in greater danger than that inherent in the rapes. (3) The court ruled, relying on State v. Lancaster, 137 N.C. App. 37, 527 S.E.2d 61 (2000), that when the kidnapping indictment alleged "confined, restrained, and removed," the jury instruction permitting a conviction on the jury's finding that the defendant "restrained *or* removed" the victim was not error. (4) In a separate incident unrelated to the rapes and kidnapping, the defendant was convicted of attempted second-degree burglary. On February 9, 2001, the defendant acted as an interested buyer of a home being sold by the victim and observed the inside of the home and took photographs. On the evening of February 15, 2001, a neighbor saw a suspicious van slow down and drive by the victim's residence and called 911. The neighbor then saw the defendant park his vehicle in the adjoining neighborhood, enter the rear of the victim's property, and come to the front doorway, where he stood on the door sill for thirty to sixty seconds before walking away from the door. Evidence was also introduced that the defendant searched homes for sale on the Internet, approached the homeowners to learn about them and their property, and later returned at night to make a "credit card entry." The court ruled that this evidence was sufficient to support the defendant's conviction of attempted second-degree burglary.

Sufficient Evidence of Overt Act to Support Conviction of Attempted First-Degree Statutory Sexual Offense

State v. Henderson, ___ N.C. App. ___, 642 S.E.2d 509 (3 April 2007). The defendant was convicted of attempted first-degree statutory sexual offense with his eight-year-old daughter. The court ruled that there was sufficient evidence of an overt act to support the defendant's conviction. The evidence showed that the defendant removed his pants, walked into a room where his daughter was seated, stood in front of her, and asked her to put his penis in her mouth. The defendant had threatened the victim many times in the past, and the victim stated that she was

afraid of the defendant. The court noted that violence is not a necessary component of an overt act.

(1) Sufficient Evidence Existed to Support Element of First-Degree Kidnapping That Defendant Did Not Release Victims in Safe Place
(2) Confinement, Removal, and Restraint of Kidnapping Victims Were Separate and Independent of Commission of Armed Robberies

State v. Anderson, ___ N.C. App. ___, 640 S.E.2d 797 (20 February 2007). The defendant was convicted of six counts of first-degree kidnapping, three counts of armed robbery, one count of first-degree burglary, and one count of a felonious assault. The defendant and an accomplice forced their way into a residence, committed robberies there, and eventually left. Three of the kidnapping victims were children who had been awoken and placed in another bedroom in the residence. Two adult female victims were eventually taken by the defendant by gunpoint to the garage and one of them was then taken to the front of the house, where the defendant left when he realized the adult male victim was calling the police. (See other pertinent facts set out in the opinion). (1) The court ruled, relying on State v. Love, ___ N.C. App. ___, 630 S.E.2d 234 (6 June 2006), that the defendant never released the six kidnapping victims and thus found it unnecessary to decide whether the residence was a safe place. The court upheld all six first-degree kidnapping convictions. (2) The court also rejected the defendant's argument that the confinement, removal, and restraint of the kidnapping victims were not separate and independent of the commission of the armed robberies. The defendant bound the two adult female victims after he had forced one of them to load valuables into trash bags. The defendant subjected the three child victims to danger and abuse that were manifestly unnecessary to the completion of the burglary. Also, the adult female victims and the children were held as hostages, and the adult female victims were used as human shields as well. The adult male victim was forcibly moved at gunpoint to another place in the house after he had been robbed.

(1) Confinement, Removal, and Restraint of Bound Kidnapping Victims Were Separate and Independent of Commission of Armed Robberies
(2) Sufficient Evidence Existed to Support Element of First-Degree Kidnapping That Defendant Did Not Release Victims in Safe Place

State v. Morgan, ___ N.C. App. ___, ___ S.E.2d ___ (15 May 2007). The defendants broke into a motel room carrying a gun, restrained two victims with duct tape, stole property, and left. (1) The court ruled, relying on State v. Beatty, 347 N.C. 555, 495 S.E.2d 367 (1998), that the confinement, removal, and restraint of the kidnapping victims were separate and independent of the commission of armed robberies. The bound victims were placed in greater danger than the restraint and removal inherent in the armed robberies. (2) The court ruled, relying on State v. Love, ___ N.C. App. ___, 630 S.E.2d 234 (6 June 2006), that there was sufficient evidence to support the element of first-degree kidnapping that defendant did not release the victims in a safe place. The defendants did not affirmatively or willfully act to release the victims.

Insufficient Evidence to Support Convictions of Second-Degree Murder

State v. Myers, ___ N.C. App. ___, 639 S.E.2d 1 (2 January 2007). The court ruled that the state's evidence was insufficient to support the defendants' convictions of second-degree murder. (See the discussion of the evidence in the court's opinion.)

Sufficient Evidence to Support Conviction of Armed Robbery When Defendant Brandished Knife and Threatened to Cut Victim, a Store Employee, Who Had Followed Defendant After He Had Stolen Chainsaw and Left Store

State v. Hurley, ___ N.C. App. ___, 637 S.E.2d 919 (19 December 2006). The defendant was convicted of armed robbery. The court ruled that there was sufficient evidence to support the conviction when the defendant brandished a knife and threatened to cut the victim, a store employee, who had followed the defendant after he had stolen a chainsaw and left the store. A continuous transaction occurred from the taking of the chainsaw to the defendant's brandishing the knife.

Sufficient Evidence of Armed Robbery When Defendant Pushed Victim and Took Victim's Wallet That Was Lying on Ground, Victim Chased Defendant, and Defendant Threatened Victim With Knife

State v. Blair, ___ N.C. App. ___, 638 S.E.2d 914 (2 January 2007). The court ruled, relying on State v. Bellamy, 159 N.C. App. 143, 582 S.E.2d 663 (2003), and other cases, that there was sufficient evidence of armed robbery when the defendant pushed the victim and then took the victim's wallet that was lying on the ground, the victim chased the defendant, and the defendant threatened the victim with a knife.

Habitual Misdemeanor Assault Offense Is Not Unconstitutional Under *Apprendi v. New Jersey*, *Blakely v. Washington*, or Double Jeopardy Clause

State v. Massey, ___ N.C. App. ___, 635 S.E.2d 528 (17 October 2006). The court ruled that the habitual misdemeanor assault offense is not unconstitutional under the rulings in Apprendi v. New Jersey, 530 U.S. 466 (2000), or Blakely v. Washington, 542 U.S. 296 (2004), or under the Double Jeopardy Clause.

(1) **Habitual Felon Statute Is Not Unconstitutional Under Double Jeopardy Clause Based on Rulings in *Apprendi v. New Jersey* or *Blakely v. Washington***
(2) **Court Notes That Convictions of Habitual Misdemeanor Assault for Habitual Assault Offenses Committed Before December 1, 2004, May Be Used to Prove Habitual Felon Status**

State v. Artis, ___ N.C. App. ___, 641 S.E.2d 314 (6 February 2007). The defendant was convicted of malicious conduct by prisoner and habitual misdemeanor assault. He then was found to be an habitual felon, based on three prior felony convictions—two for habitual misdemeanor assault and one for felony eluding arrest. (1) The court ruled that the habitual felon statute is not unconstitutional under the Double Jeopardy Clause based on the rulings in Apprendi v. New Jersey, 530 U.S. 466 (2000), or Blakely v. Washington, 542 U.S. 296 (2004). (2) The court discussed the ratification clause of 2004 legislation and noted that convictions of habitual misdemeanor assault for habitual assault offenses committed before December 1, 2004, may be used to prove habitual felon status. The prohibition against using these convictions to prove habitual felon status only applies to offenses of habitual misdemeanor assault committed on or after December 1, 2004.

(1) Habitual DWI Offense Is Not Unconstitutional Under Double Jeopardy Clause Based on Rulings in *Apprendi v. New Jersey* or *Blakely v. Washington*
(2) No Violation of State Constitutional Right to Unanimous Verdict When Habitual DWI Verdict Sheet Did Not Set Out Two Prongs of Offense

State v. Bradley, ___ N.C. App. ___, 640 S.E.2d 432 (6 February 2007). The defendant was convicted of habitual DWI. (1) The court ruled that the habitual DWI offense is not unconstitutional under the Double Jeopardy Clause based on the rulings in Apprendi v. New Jersey, 530 U.S. 466 (2000), or Blakely v. Washington, 542 U.S. 296 (2004). (2) The court ruled, relying on State v. Oliver, 343 N.C. 202, 470 S.E.2d 16 (1996), that there was no violation of the defendant's state constitutional right to a unanimous verdict when the habitual DWI verdict sheet did not set out two prongs of offense (0.08 and impaired prongs). There is only one offense, and it does not violate the unanimity right if some jurors find one prong and other jurors find the other prong.

(1) Sufficient Evidence of Possession of Firearm to Support Conviction of Possession of Firearm by Felon
(2) Sufficient Evidence of Assault When Defendant Reached for Weapon During Struggle with Law Enforcement Officers
(3) Trial Judge Erred in Instructing on Attempted Assault, Which Is Not Recognized Crime

State v. Barksdale, ___ N.C. App. ___, 638 S.E.2d 579 (2 January 2007). The defendant was convicted of attempted assault with a deadly weapon on a law enforcement officer and possession of firearm by a felon. After chasing the defendant, three officers tackled him and then struggled in trying to subdue him on the ground. After an officer had handcuffed the defendant's right wrist, he noticed a chrome-plated handgun in the grass about six inches from the defendant's left hand. Although none of the officers saw the defendant touch the gun, the defendant was reaching for the gun with his outstretched hand. They applied even greater force and finally subdued him. They then retrieved the gun, which was dry and warm even though the ground was wet from rain earlier in the evening and the weather was cool. (1) The court ruled that there was sufficient circumstantial evidence of the defendant's possession of the firearm before he was tackled to support the conviction of possession of a firearm by a felon. (2) Based on the common law definition of assault (the pertinent part of the definition, "the unequivocal appearance of an attempt" with force and violence to do some immediate physical injury), the court ruled that there was sufficient evidence of assault when the defendant reached for the weapon during his struggle with the law enforcement officers. (3) The court ruled, relying on State v. Currence, 14 N.C. App. 263, 188 S.E.2d 10 (1972), that the trial judge erred in instructing on the offense of attempted assault, because attempted assault is not a recognized crime.

Possession of Closed Pocketknife on Educational Property Violates G.S. 14-269.2(d) (Weapon on Educational Property); Operability of Pocketknife Is Irrelevant

In re B.N.S., ___ N.C. App. ___, 641 S.E.2d 411 (6 March 2007). A juvenile had a closed pocket knife in his coat pocket at a high school. The pocketknife's blade was 2.5 inches long. The court ruled that this evidence was sufficient to support the juvenile's adjudication of delinquency for a violation of G.S. 14-269.2(d) (weapon on educational property). The court also stated that the operability of the pocketknife was irrelevant. The court noted that none of the statutory exemptions to this offense in G.S. 14-269.2(g) and (h) applied in this case. [Author's note: As a result of this ruling, disregard a contrary view on this issue set out on page 412 of the Institute of

Government's publication, *North Carolina Crimes: A Guidebook on the Elements of Crime* (5th ed. 2001).]

Defendant Was Properly Convicted of Two Counts of Felony Larceny

State v. West, ___ N.C. App. ___, 638 S.E.2d 508 (19 December 2006). The defendant was convicted of second-degree murder, two counts of felony larceny, and one count of breaking and entering a vehicle. The defendant entered a truck owned by the victim's employer and stole the victim's shotgun that was locked behind the truck's seat. The defendant then stole an automobile owned by the victim. Both vehicles were parked in the same driveway and both takings occurred during the same time period. The court ruled, distinguishing State v. Marr, 342 N.C. 607, 467 S.E.2d 236 (1996), that the defendant was properly convicted of two counts of felony larceny. The defendant's motive for stealing the shotgun was to use it as an outlet for his anger when he shot and killed a stranger. The defendant's motive for stealing the automobile was to use it to travel to his mother's house. These were two separate takings to support the two larceny convictions.

(1) Sufficient Evidence to Support Conviction of Obtaining Property by False Pretenses by Using Stolen Credit Cards at Store
(2) Sufficient Evidence of Breaking or Entering by Unauthorized Entry of Law Office Area Not Open to Public
(3) Sufficient Evidence of Felony Larceny By Acting in Concert With Accomplice
(4) Trial Judge Erred in Finding That Verdicts of Misdemeanor Breaking or Entering and Felony Larceny Were Inconsistent

State v. Perkins, ___ N.C. App. ___, 638 S.E.2d 591 (2 January 2007). The defendant was seen in the morning with another person (Brooks) in a hallway of a law office and beyond the public reception area. Neither had permission to be there, and the defendant gave a false explanation for her presence. That afternoon a person matching Brooks' description was seen coming from a lawyer's office, where it was later discovered that the lawyer's credit and check cards were stolen and used by the defendant and Brooks to buy merchandise at a grocery store. The defendant admitted to an officer that she was given the cards by "Steve" (the first name of Brooks), and the stolen cards were found at the same house where the defendant and Brooks were arrested. The jury returned verdicts finding the defendant guilty of misdemeanor breaking or entering, felony larceny, and obtaining property by false pretenses. The trial judge determined that the verdicts of misdemeanor breaking or entering and felony larceny were legally inconsistent and ordered further deliberations. The jury deliberated and found the defendant guilty of felony breaking or entering and felony larceny. (1) The court ruled that there was sufficient evidence to support the defendant's conviction of obtaining property by false pretenses by using stolen credit cards at the store. The court rejected the defendant's argument that the evidence was insufficient because the state did not present evidence of any verbal misrepresentations by the defendant. The state's evidence at trial included a videotape of the purchases by the defendant and her signed receipts. Verbal misrepresentations need not be proved; conduct alone is sufficient. (2) The court ruled, relying on State v. Brooks, ___ N.C. App. ___, 631 S.E.2d 54 (20 June 2006) (sufficient evidence to support conviction of felonious breaking or entering when defendant entered inner office of law firm to which public access was not allowed and committed theft), that there was sufficient evidence to support the defendant's conviction of misdemeanor breaking or entering. (3) The court ruled there was sufficient evidence of felony larceny by acting in concert with Brooks. (4) The court ruled that the trial judge erred in finding that the verdicts of misdemeanor breaking or entering and felony larceny were inconsistent. The court stated that a jury could reasonably find that the defendant had committed an unauthorized entry in the morning but the state had failed to

prove the defendant's intent to commit a larceny then. The jury also could have determined that the defendant did not act in concert with Brooks' entry in the afternoon but she did act in concert concerning the larceny.

Defendant Was Properly Convicted of Three Counts of Indecent Liberties for Three Sexual Distinct Acts During Same Transaction

State v. James, ___ N.C. App. ___, 643 S.E.2d 34 (17 April 2007). The defendant was convicted of three counts of indecent liberties for three sexual acts that occurred during the same transaction: (1) fondling the victim's breasts; (2) oral sex; and (3) sexual intercourse. Distinguishing State v. Laney, ___ N.C. App. ___, 631 S.E.2d 522 (5 July 2006) (defendant's conduct in touching victim's breast over her shirt, putting his hand under the waistband of her pants, and touching the victim over her pants supported only one conviction of indecent liberties), the court ruled that the three convictions were proper. The court noted that in *Laney* the sole act was touching, while in this case there was a touching and two distinct sexual acts. The court stated that these were three distinctive acts even though they occurred within a short time span.

Defendant's Right to Unanimous Verdict Was Not Violated Although There Was Evidence of More Sexual Acts Than Charges of Statutory Sexual Offense

State v. Wallace, ___ N.C. App. ___, 635 S.E.2d 455 (17 October 2006). The defendant was convicted of three counts of statutory sexual offense. There was evidence of more sexual acts than charged offenses. The court ruled, relying on State v. Markeith Lawrence, 360 N.C. 368, 627 S.E.2d 609 (2006), that the defendant's right to a unanimous verdict was not violated.

Defendant's Right to Unanimous Verdict Was Not Violated When Jury Instruction for Contributing to Delinquency of Minor Did Not Require Jury to Be Unanimous in Finding Which of Three Criminal Acts Juvenile Could Have Been Adjudicated Delinquent

State v. Cousart, ___ N.C. App. ___, 641 S.E.2d 372 (6 March 2007). The defendant was convicted of contributing to the delinquency of a minor. The jury instruction did not require that the jury be unanimous in finding one of the three criminal acts (driving without a license; breaking into a motor vehicle; larceny) the juvenile could have been adjudicated delinquent. The court ruled, relying on State v. Hartness, 326 N.C. 561, 391 S.E.2d 177 (1990), that the defendant's right to a unanimous verdict was not violated. The court stated that the gravamen of the crime is the defendant's conduct, and the jury need only be unanimous that the juvenile committed an act for which he could be adjudicated delinquent, but need not be unanimous on the specific act.

Sufficient Evidence to Prove Defendant Inflicted Injuries to Child in Trial of Felony Child Abuse Inflicting Serious Bodily Injury

State v. Wilson, ___ N.C. App. ___, 640 S.E.2d 403 (6 February 2007). The defendant was convicted of felony child abuse inflicting serious bodily injury involving her twenty-three-month-old child. The court ruled that there was sufficient evidence to prove the defendant inflicted the injuries. The defendant had exclusive custody of the child when the injuries were sustained. The treating doctors and medical experts agreed that the injuries were not accidental, but rather intentionally inflicted. The defendant did not present rebuttal experts. The defendant during her testimony often changed her account of the cause of the injuries and also contradicted herself.

(1) Communicating Threats Charge Was Not Fatally Defective
(2) Sufficient Evidence to Support Adjudication of Communicating Threats
(3) Court Rules on Validity of Various Conditions of Juvenile Probation

In re S.R.S., ___ N.C. App. ___, 636 S.E.2d 277 (7 November 2006). The juvenile was adjudicated delinquent of communicating threats. As the juvenile was being restrained in an elementary school from going into a hallway, he shouted at a teacher in the hallway that he was going to bring a gun to school the next day and kill the teacher's daughter. The teacher's daughter was a student in the school whom the juvenile had previously assaulted. (1) The juvenile petition charging communicating threats alleged that the juvenile threatened to physically injure the person and damage the property of the teacher and was communicated by orally stating to the victim that he was going to bring a gun to school the next day and kill the teacher's daughter. The court noted problems in the pleading that included allegations of damage to property as well as injury to a person and alleging the juvenile's threatening injury to the teacher instead of the teacher's child. However, the court ruled that the charge was not fatally defective because any confusion in the pleading was clarified by the allegation setting forth the precise conduct forming the basis of the charge—the threat to kill the teacher's daughter. The juvenile had sufficient notice of the offense to defend himself. [Author's note: The fact that the pleading alleged both injury to a person and damage to property does not create a fatal defect because the state is only required to prove one of the alleged alternative ways of committing an offense, and the language concerning damage to property is surplusage that does not adversely affect the validity of the charge. See the discussion in paragraph 13 on page five of Robert L. Farb, "Criminal Pleadings, State's Appeal from District Court, and Double Jeopardy Issues," posted on the Institute of Government's website at http://ncinfo.iog.unc.edu/programs/crimlaw/pleadjep.pdf.] (2) The court ruled that the evidence was sufficient to support the adjudication of communicating threats. Based on the juvenile's prior assault of the teacher's daughter, the juvenile's threat in the school's hallway would cause a reasonable person to believe that the threat was likely to be carried out, and that the teacher actually believed the threat was likely to be carried out. (3) The court ruled on the validity of the following conditions of special probation: (i) the juvenile must abide by rules set out by the court counselor and the juvenile's parents, including, but not limited to, curfew rules and rules concerning those with whom he may or may not associate (ruled valid); (ii) the juvenile must cooperate with any out-of-home placement if deemed necessary, or if arranged by the court counselor, including, but not limited to, a wilderness program (ruled invalid, an impermissible delegation to the court counselor of the judge's authority; the court noted that the record did not show any statement by the court counselor indicating that an out-of-home placement was recommended or necessary); and (iii) two conditions, the juvenile must cooperate with any counseling recommended by the court counselor and comply with any assessment recommended by the court counselor (ruled invalid, an impermissible delegation to the court counselor of the judge's authority without a more specific statement by the judge concerning what type of counseling or assessment).

(1) Indictment for Eluding Arrest (G.S. 20-141.5) Need Not Allege Duty Officer Was Lawfully Performing When Defendant Committed Offense
(2) Guilty Verdicts Need Not Be Set Aside on Ground That They Were Inconsistent With Not Guilty Verdicts in Same Trial

State v. Teel, ___ N.C. App. ___, 637 S.E.2d 288 (5 December 2006). The defendant was indicted for felony eluding arrest (G.S. 20-141.5) based on the factors of reckless driving and speeding in excess of fifteen miles per hour over the speed limit; reckless driving (G.S. 20-140(b)); and resisting a public officer (G.S. 14-223). He was convicted of misdemeanor eluding arrest and reckless driving and found not guilty of resisting a public officer. (1) The court ruled,

distinguishing State v. Kirby, 15 N.C. App. 480, 190 S.E.2d 320 (1972) (charge of resisting public officer must describe duty the officer was discharging or attempting to discharge), that an indictment for eluding arrest (G.S. 20-141.5) need not allege the duty the officer was lawfully performing when the defendant committed the offense. (2) The court ruled that the defendant did not cite any authority for his assignment of error concerning his motion for appropriate relief to set aside the guilty verdicts because they were inconsistent with the not guilty verdicts (a verdict of misdemeanor eluding arrest instead of felony eluding arrest and not guilty of resisting arrest), and thus the assignment of error was considered abandoned. The defendant's argument rested on: (1) the inconsistency between the guilty verdict of reckless driving and the jury's failure to find the defendant guilty of felony eluding arrest, with one of the elements being reckless driving; and (2) the inconsistency between the guilty verdict of misdemeanor eluding arrest, which was based on the defendant's failure to stop, and the not guilty verdict of resisting a public officer, which also was based on failure to stop. The court also noted that the defendant's assignment of error was without merit even if the court would reach the merits. It stated, relying on State v. Rosser, 54 N.C. App. 660, 284 S.E.2d 130 (1981), United States v. Powell, 469 U.S. 57 (1984), and other cases, that a jury is not required to be consistent, and that incongruity alone will not invalidate a verdict.

In First-Degree Murder Trial in Which State Sought Conviction Based Solely on Felony Murder Theory, Trial Judge Erred in Not Submitting Second-Degree Murder to Jury When There Was Conflicting Evidence Concerning Commission of Underlying Felony of Armed Robbery

State v. Gwynn, ___ N.C. App. ___, 641 S.E.2d 719 (20 March 2007). The court ruled, based on the principles set out in State v. Millsaps, 356 N.C. 556, 572 S.E.2d 767 (2002) (when to submit lesser-included offenses of first-degree felony murder), that in a first-degree murder trial in which the state sought a conviction based solely on the felony murder theory, the trial judge erred in not submitting second-degree murder to the jury when there was conflicting evidence concerning the commission of the underlying felony of armed robbery.

Insufficient Evidence to Support Conviction of Conspiracy to Traffic in Cocaine

State v. Euceda-Valle, ___ N.C. App. ___, 641 S.E.2d 858 (20 March 2007). The defendant was convicted of trafficking by possessing over 400 grams of cocaine and conspiracy to traffic in cocaine by transporting over 400 grams of cocaine. The defendant was stopped for a traffic offense, and cocaine was found in the vehicle's trunk. There also was a passenger in the vehicle. The court ruled there was insufficient evidence to support the trafficking conspiracy conviction. There was no evidence of: (1) conversations between the defendant and passenger; (2) unusual movements or actions by either of them; (3) large amounts of cash on the passenger; (4) possession of weapons; or (5) anything else suggesting an agreement.

Trial Judge Erred in Assault Trial in Failing to Instruct Jury on Defendant's Lack of Duty to Retreat on His Own Premises

State v. Beal, ___ N.C. App. ___, 638 S.E.2d 541 (2 January 2007). The defendant was convicted of a felonious assault. The defendant and the alleged victim lived in the same mobile home, which was owned by the alleged victim. The defendant paid rent to live there. The assault occurred in the mobile home and its curtilage. The court ruled, relying on State v. Browning, 28 N.C. App. 376, 221 S.E.2d 375 (1976) and other cases, that the trial judge erred in failing to instruct the jury on the defendant's lack of duty to retreat on his own premises.

Work-Release Escape Indictment's Improper Statutory Citation to Non-Work-Release Escape Under G.S. 148-45(b) Was Irrelevant When Indictment's Allegations Correctly Charged Offense Under G.S. 148-45(g)

State v. Lockhart, ___ N.C. App. ___, 639 S.E.2d 5 (2 January 2007). The defendant was convicted under G.S. 148-45(g) of escape by failing to return to the prison unit while on work release. The indictment alleged the statutory citation as G.S. 148-45(b), escape from a prison unit. The court ruled, relying on State v. Allen, 112 N.C. App. 419, 435 S.E.2d 802 (1993), and other cases, that the defendant was properly charged. An indictment's incorrect statutory citation is immaterial when the charging language properly alleges the correct offense.

Trial Court Erred by Imposing Sanction Prohibiting Testimony by Defense Mental Health Experts Based on Purported Defense Discovery Violations

State v. Gillespie, ___ N.C. App. ___, 638 S.E.2d 481 (19 December 2006). **(Author's note: The North Carolina Supreme Court has granted the state's petition to review this ruling.)** The defendant was convicted of first-degree murder and sentenced to life imprisonment without parole. The court ruled, relying on the factors set out in Taylor v. Illinois, 484 U.S. 400 (1988), that the trial court erred by imposing the sanction prohibiting testimony on insanity and diminished capacity at the defendant's trial by two defense mental health experts based on purported defense discovery violations. The court concluded that the record was devoid of any indication that any purported defense discovery violations were willful or done to gain a tactical advantage, and any prejudice to the state in contesting the testimony of the defense experts was outweighed by the prejudice to the defendant in presenting evidence on insanity and diminished capacity. The court reversed the defendant's conviction and ordered a new trial. (See the court's detailed analysis of the facts and issues involved with its ruling.)

Trial Judge Did Not Err in Imposing Sanction of Prohibiting Testimony by Defense Expert on Reliability of Confidential Informants When Defendant Failed to Give Proper Notice to State Under G.S. 15A-905(c)(2)

State v. Leyva, ___ N.C. App. ___, 640 S.E.2d 394 (6 February 2007). The defendant was convicted of cocaine trafficking offenses. The court ruled that the trial judge did not err in imposing the sanction of prohibiting testimony by a defense expert on the reliability of confidential informants when the defendant failed to give proper notice to the state under G.S. 15A-905(c)(2) (give notice to state of expert witnesses defendant reasonably expects to call as witness at trial). The defendant did not give notice to the state until it had presented the testimony of several officers about confidential informants. The trial judge ruled that the defendant could have anticipated the issue concerning confidential informants because the defendant was aware of the state's use of a confidential informant, and the defendant's proposed expert testimony was not required by the interests of justice.

(1) Trial Judge Did Not Abuse Discretion in Denying Defendant's Motion for Bill of Particulars to Provide Exact Dates and Times of Child Sexual Abuse Charges
(2) Trial Judge Did Not Err in Allowing State to Amend Dates Specified in Indictments Charging Statutory Rape and Sexual Offense

State v. Whitman, ___ N.C. App. ___, 635 S.E.2d 906 (17 October 2006). The defendant was convicted of statutory rape, statutory sexual offense, indecent liberties, and incest. (1) The court ruled that the trial judge did not abuse his discretion in denying the defendant's motion for a bill of particulars providing the exact dates and times of the charges. The court noted that the

defendant was provided with open-file discovery. In addition, there was no factual information introduced at trial that had not been provided in discovery and necessary to prepare the defendant's defense. Neither the victim's testimony nor other evidence introduced at trial was more specific concerning dates, times, and places than the information made available in discovery. (2) The court ruled that the trial judge did not err in allowing the state to amend the dates specified in the indictments charging statutory rape and sexual offense (from "January 1998 through June 1998" to "July 1998 through December 1998"). The amendment did not substantially alter the offense because the victim would have been 15 under both the original and amended dates. Also, the amendment did not impair the defendant's ability to prepare an alibi defense because an incest indictment tried with these charges covered the entire 1998 calendar year, and the defendant would have to address all of 1998. See also State v. Wallace, ___ N.C. App. ___, 635 S.E.2d 455 (17 October 2006) (no error in amending date of statutory sexual offense indictment from "November 2001" to "June through August 2001"; defendant did not present an alibi defense that was adversely affected by the change in dates).

Defendant Was Not Entitled to Defense of Duress in Second-Degree Vehicular Murder Trial

State v. Brown,___ N.C. App. ___, ___ S.E.2d ___ (6 March 2007). The defendant was convicted of second-degree murder and other offenses (willful speed competition, reckless driving, and driving left of center) as a result of a collision of his vehicle (vehicle A) with another vehicle (vehicle B) as they sped together on a highway, and vehicle B crashed into the decedent's vehicle (vehicle C), which was traveling in the opposite direction from vehicles A and B. The court ruled that the defendant was not entitled to a jury instruction on the defense of duress. The defendant did not have a well-grounded apprehension of death or serious bodily harm. Also, he had a reasonable opportunity to avoid his conduct without undue exposure to death or serious bodily harm: he had ample opportunity to either maintain a safe speed or to pull over off the highway. (See the court's discussion of the facts in its opinion.)

Trial Judge Erred in Denying Defense Counsel's Motion to Withdraw Based on Counsel's Representation of Both Defendant and Potential Defense Witness

State v. Ballard, ___ N.C. App. ___, 638 S.E.2d 474 (19 December 2006). The defendant was convicted of two counts of first-degree murder and other offenses. At the close of the state's case, the prosecutor told the trial judge and defense counsel that he had learned that James Turner, who was represented on federal criminal charges by the same defense counsel, had revealed potentially exculpatory information during an interview with officers on other matters. Defense counsel spoke to Turner and stated that Turner had credible, material, and exculpatory information, but Turner's testimony could implicate Turner in unrelated criminal charges. Thus, defense counsel could not call Turner as a witness for the defendant, creating a clear conflict of interest. Defense counsel sought to withdraw and moved for a mistrial, which was denied. The defendant wanted to keep defense counsel as his lawyer and have Turner testify. The court ruled that the trial judge erred in denying defense counsel's motion to withdraw. The court rejected the state's argument that the defendant had waived the conflict of interest issue, noting that the trial judge failed to properly question and advise the defendant on this matter.

Trial Judge Erred in Not Conducting a Hearing Concerning Defense Counsel's Potential Conflict of Interest When the Potential Conflict Had Been Brought to Judge's Attention

State v. Mims, ___ N.C. App. ___, 637 S.E.2d 244 (5 December 2006). In a pretrial hearing on a motion to dismiss drug charges, evidence showed that law enforcement officers arrested Chavis, who was in a residence when the officers found illegal drugs there. The owner of the residence,

who was neither Chavis nor the defendant, was not there. The defendant arrived at the residence a few minutes later and told law enforcement officers that the drugs found in the house were hers. Her defense to be offered at trial was that she did so to protect Chavis, the father of her child, but the drugs did not belong to her or Chavis. Both Chavis and the defendant were charged with possessing the drugs, and they were represented by different lawyers in the same law firm. The prosecutor mentioned to the judge that there may be a conflict of interest with the same law firm representing both the defendant and Chavis, but the judge stated that it was an ethical issue and not a concern of the state. The defendant was tried alone, and Chavis did not testify for her at the defendant's trial. The court ruled, relying on State v. James, 111 N.C. App. 785, 433 S.E.2d 755 (1993), and State v. Hardison, 126 N.C. App. 52, 483 S.E.2d 459 (1997), that the trial judge erred by failing to conduct a hearing concerning defense counsel's potential conflict of interest that had been brought to the judge's attention by the prosecutor. The court remanded the matter to the trial court for a hearing on this issue.

No Prejudicial Error Resulted When Trial Judge Failed to Impanel Jury Until After State's Opening Statement

State v. Pointer, ___ N.C. App. ___, 638 S.E.2d 909 (2 January 2007). The court ruled, distinguishing State v. Stephens, 51 N.C. App. 244, 275 S.E.2d 564 (1981), that no prejudicial error resulted when the trial judge failed to impanel the jury until after the state's opening statement.

No Error In Allowing State to Amend Indictment to Change Name of Victim

State v. Hewson, ___ N.C. App. ___, 642 S.E.2d 459 (20 March 2007). The court ruled, relying on State v. Bailey, 97 N.C. App. 472, 313 S.E.2d 556 (1990) (amendment permitted to change name from "Pettress Cebron" to "Cebron Pettress"), and other cases, and distinguishing State v. Abrahams, 338 N.C. 315, 451 S.E.2d 131 (1994) (error to allow amendment to change name from "Carlose Antoine Latter" to "Joice Hardin"), and other cases, that the trial judge did not err in allowing the state to amend the indictment to change the victim's name from "Gail Hewson Tice" to "Gail Tice Hewson."

Poker Is a Game of Chance Under G.S. 14-292

Joker Club v. Hardin, ___ N.C. App. ___, ___ S.E.2d ___ (1 May 2007). The court ruled that poker is a game of chance, not a game of skill, and thus in violation of G.S. 14-292 when anything of value is bet.

Judge's Failure to Personally Address Juvenile on Two of Six Matters Set Out in G.S. 7B-2407(a) in Accepting His Admission to Act of Delinquency Required That Adjudication of Delinquency Be Set Aside

In re A.W., ___ N.C. App. ___, 641 S.E.2d 354 (6 March 2007). The court ruled, relying on In re T.E.F., 359 N.C. 570, 614 S.E.2d 296 (2005), that the trial judge erred in accepting the juvenile's admission to an act of delinquency by failing to fully comply with G.S. 7B-2407(a). The court failed to orally address the juvenile concerning two of the six matters set out in the statute. The court stated that even though the juvenile apparently completed a transcript of admission form that covered these two matters, the failure to address the juvenile orally required that the adjudication of delinquency be set aside.

G.S. 7B-2407 (When Admission by Juvenile May Be Accepted) Does Not Apply When Judge Accepts Admissions by Juvenile Or by Juvenile Through Attorney That Juvenile Violated Conditions of Court Supervision (Probation)

In re D.J.M., ___ N.C. App. ___, 638 S.E.2d 610 (2 January 2007). The court ruled that G.S. 7B-2407 (when admission by juvenile may be accepted) does not apply when judge accepts admissions by juvenile or by juvenile through attorney that juvenile violated conditions of court supervision (probation). G.S. 7B-2407 does not apply to G.S. 7B-2510(e). The court ruled that the trial judge did not err by failing to make the specific inquires set out in G.S. 7B-2407 in accepting the juvenile's admissions to the probation violations.

Juvenile Trial Court Lacked Subject Matter Jurisdiction to Enter Adjudication and Disposition Orders Because Juvenile Petition Was Untimely Filed

In re M.C., ___ N.C. App. ___, ___ S.E.2d ___ (1 May 2007). The court noted that under G.S. 7B-1703(b), a juvenile petition must be filed within 15 days after the complaint is received by the juvenile court counselor, and an extension of an additional 15 days may be granted at the chief court counselor's discretion. Thus, the juvenile petition must be filed within a maximum of 30 days after the complaint is received by the juvenile court counselor. In this case, the court stated that the only indication when the juvenile court counselor received the complaint was the date (November 1, 2005) that the petition was verified by a detective. The juvenile petition was filed with the trial court on December 2, 2005, which was more than 30 days from November 1, 2005. The court ruled that the trial court was without jurisdiction to hear the matter. Although the juvenile did not raise the issue before the trial court, it may be raised for the first time on appeal. The court vacated the trial court's adjudication and disposition orders and ordered that the case be dismissed.

Evidence

(1) State Did Not Violate Defendant's Due Process Rights By Failing to Conduct Test Comparing State Witness's DNA With DNA From Hair Found on Cap at Crime Scene
(2) Discovery Statute Did Not Require State to Obtain DNA from State's Witness and Compare It with DNA From Hair on Cap
(3) Judge Lacked Authority to Issue Defense-Requested Nontestimonial Identification Order to Require State to Obtain DNA Sample from State's Witness for Testing
(4) Judge Did Not Err in Prohibiting Cross-Examination of State's Witness Whether He Was Willing to Submit DNA Sample
(5) Judge Did Not Err in Prohibiting Proposed Testimony of Defense Investigator Under Residual Hearsay Exception

State v. Ryals, ___ N.C. App. ___, 635 S.E.2d 470 (17 October 2006). The defendant was convicted of second-degree murder. State's witness Lee testified that she saw the defendant beat the victim with his fists and kick and stomp him. State's witness Winstead also testified about the defendant's beating of the victim. A police department crime technician recovered a black knit cap and other items from the crime scene. Negroid hair was found on the cap , but a state's witness testified it was not suitable for further analysis. A defense expert witness compared a DNA sample from the hair on the cap with the defendant's DNA sample and concluded that it could not have originated from the defendant. Before trial, a judge denied the defendant's motion for a nontestimonial identification order to collect a DNA sample from Winstead to compare it with DNA from the hair on the cap; the defendant contended that Winstead had a motive to commit the murder, was present at the scene, and could have committed the murder. (1) The court

ruled, relying on State v. McNeil, 155 N.C. App. 540, 574 S.E.2d 145 (2002), and State v. Campbell, 133 N.C. App. 531, 515 S.E.2d 732 (1999), that the state did not violate the defendant's due process rights under Brady v. Maryland, 373 U.S. 83 (1963), when it failed to collect DNA from Winstead and conduct a test comparing his DNA with the DNA from the hair on the cap. (2) The court ruled that the discovery provisions in G.S. 15A-903(e) did not require the state to obtain a DNA sample from Winstead for comparison with DNA from the hair on the cap. (3) The court ruled, relying on State v. Tucker, 329 N.C. 709, 407 S.E.2d 805 (1991), that the trial judge lacked the authority to issue a defense-requested nontestimonial identification order to require the state to obtain a DNA sample from state's witness Winstead to conduct comparison testing with DNA from the hair on the cap. (4) The court ruled that the trial judge did not err in prohibiting cross-examination of state's witness Winstead whether he was willing to submit a DNA sample for comparison testing with the DNA from the hair on the cap. The court noted that even if the answer of the state's witness was no, the proposed testimony was not relevant because there was conflicting evidence whether the perpetrator of the murder was wearing a hat. (5) The defendant proffered testimony under the residual hearsay exception, Rule 804(b)(5), by the defense investigator of a statement made by an unavailable witness that the defendant was at a party at the time of the murder. The court ruled that the trial judge did not err in prohibiting this proposed testimony because the statement (i) the statement lacked circumstantial guarantees of trustworthiness (a large amount of alcohol was consumed at the party and defendant chose not call other people present at the party), and (ii) the statement was not more probative than any other evidence that the defendant could secure through reasonable efforts (others had attended the party and were available as witnesses).

(1) No Violation of Sixth Amendment Confrontation Rights Under *Crawford v. Washington* in Admitting Videotaped Interviews of Child Sexual Abuse Victims Because They Took Stand at Trial and Were Available for Cross-Examination
(2) Videotaped Interviews Between Child Sexual Abuse Victims and Pediatric Nurses Were Admissible Under Rule 803(4) (Statement Made for Medical Diagnosis or Treatment) and *State v. Hinnant*
(3) Child Sexual Assault Victim's Statement to Mother Within 24 Hours of Assault Was Admissible Under Rule 803(2) (Excited Utterance)

State v. Burgess, ___ N.C. App. ___, 639 S.E.2d 68 (2 January 2007). The defendant was convicted of six counts of first-degree sexual offense involving three children under thirteen years old. (1) The court ruled that there was no violation of the defendant's Sixth Amendment confrontation rights under Crawford v. Washington, 541 U.S. 36 (2004), in admitting videotaped interviews of child sexual abuse victims because they took the stand at trial and were available for cross-examination (the defendant did not cross-examine them). (2) The court ruled, relying on State v. Lewis, 172 N.C. App. 97, 616 S.E.2d 1 (2005), and State v. Isenberg, 148 N.C. App. 29, 557 S.E.2d 568 (2001), that videotaped interviews between child sexual abuse victims and pediatric nurses were admissible under Rule 803(4) (statement made for medical diagnosis or treatment) because they satisfied the standard set out in State v. Hinnant, 351 N.C. 277, 523 S.E.2d 663 (2000). The children made the statements with the understanding that they would lead to medical diagnosis or treatment. The pediatric nurses at the children's medical center had interviewed the children before they were examined by a doctor, and the children were told they were there for a check up with a doctor. (3) The court ruled, relying on State v. Smith, 315 N.C. 76, 337 S.E.2d 833 (1985), and State v. Thomas, 119 N.C. App. 708, 460 S.E.2d 349 (1995), that a child sexual assault victim's statement to her mother within 24 hours of assault was admissible under Rule 803(2) (excited utterance).

(1) Statements Made by Shooting Victim During 911 Call Were Nontestimonial under *Davis v. Washington*, 126 S. Ct. 2266 (2006), and *Crawford v. Washington*, 541 U.S. 36 (2004)

(2) Report Detailing Timeline of 911 Call and Responses Made by Law Enforcement Was Nontestimonial Under *Crawford v. Washington*, 541 U.S. 36 (2004), and Admissible as Business Record Under Hearsay Rule 803(6)

(3) Information Form Used by Neighborhood Security Guards Was Nontestimonial Under *Crawford v. Washington*, 541 U.S. 36 (2004), and Admissible as Business Record Under Hearsay Rule 803(6)

State v. Hewson, ___ N.C. App. ___, 642 S.E.2d 459 (20 March 2007). The defendant was convicted of the first-degree murder of his wife whom he shot while she was inside her home. (1) The wife called 911 to report that she had been shot by her husband. She died shortly after making the 911 call. The court ruled that her statements were nontestimonial under Davis v. Washington, 126 S. Ct. 2266 (2006), and Crawford v. Washington, 541 U.S. 36 (2004). The court stated that the 911 call described current circumstances requiring police assistance. (2) The court ruled, relying on State v. Forte, 360 N.C. 427, 629 S.E.2d 137 (2006), the an event report detailing the timeline of the 911 call and the responses made by law enforcement was nontestimonial under Crawford v. Washington, 541 U.S. 36 (2004), and was admissible as a business record under Rule 803(6). (3) The court ruled that a pass-on information form used by neighborhood security guards was nontestimonial under Crawford v. Washington, 541 U.S. 36 (2004), and was admissible as a business record under Rule 803(6). An entry by a security guard on the form included information that the victim's husband had been threatening her and to make sure that he does not use the pass system to get into the neighborhood.

Trial Judge in Child Abuse Homicide Trial Did Not Err in Allowing State's Expert To Testify on Rebuttal Concerning Normal Caretaking Reaction and Profile of Caretaking Behavior After Injury to Child

State v. Faulkner, ___ N.C. App. ___, 638 S.E.2d 18 (19 December 2006). The defendant was convicted of second-degree murder involving the child abuse homicide of a child who was twenty-two months old, and whose mother lived with the defendant. The defendant was alone with the child while the mother went shopping for about twenty to thirty minutes. When she arrived home and picked up the child, his eyes rolled into the back of his head, and his arms and legs were stiff. She called 911. An emergency responder testified that the defendant, when asked what had happened, appeared nervous, with color drained from his face, and did not respond. Cause of death was brain swelling caused by blunt force trauma to the head. A defense expert testified and suggested that there was an over diagnosis and perhaps rush to judgment of child abuse because of a belief that child abuse is underreported and everyone is "discombabobulated" by the death of a child. The state on rebuttal called a medical expert, a developmental and forensic pediatrician, who outlined three parameters to determine whether a child's injuries were accidentally or intentionally inflicted: (1) the consistency of history given by the caretaker; (2) the extent to which the caretaker's explanation is consistent with the extent of injuries; and (3) the caretaker's behavior. When a child has been accidentally injured, a caretaker who witnesses the accident seeks help right away. When a child is injured intentionally, it is very common that the assailant will leave and not seek care. Often the caretaker is not concerned about what has happened with the child, but with how it impacts on the caretaker. The court ruled, assuming without deciding such testimony would not be admissible on the state's direct case, that the defendant's evidence opened the door to its admissibility on rebuttal. Thus, the trial judge did not abuse his discretion in admitting the testimony.

Evidence of Defendant's Prior Assaults and Robbery of Victim B Committed Within a Few Months Before Commission of Murder of Victim A Was Admissible in Murder Trial under Rule 404(b) to Show Defendant's Intent to Shoot Friends of Victim B and Victim B

State v. Christian, ___ N.C. App. ___, 638 S.E.2d 470 (19 December 2006). The defendant was convicted of first-degree murder of victim A when he shot into a car and killed an occupant. The court ruled that evidence of the defendant's assaults and robbery of victim B committed within a few months before the murder of victim A was admissible under Rule 404(b) to show the defendant's intent to shoot friends of victim B who were in the car with the murder victim and victim B himself, who the defendant may have believed was in the car.

Evidence of Recent Armed Robberies and Convictions of Those Armed Robberies Was Admissible Under Rule 404(b) in Armed Robbery Trial [But See Author's Note}

State v. Morgan, ___ N.C. App. ___, ___ S.E.2d ___ (15 May 2007). The defendants were convicted of two counts of armed robbery and other offenses. The court ruled that evidence of recent armed robberies as well as the convictions of those armed robberies was admissible under Rule 404(b) to show the defendants' identity, motive, intent, common plan, knowledge, and opportunity. [Author's note: The ruling relating to the admissibility of the convictions appears to be in conflict with State v. Badgett, ___ N.C. ___, ___ S.E.2d ___ (4 May 2007) (evidence of the prior conviction was inadmissible under Rule 404(b) when the state had introduced evidence of the underlying facts and circumstances of the conviction and, in this case, the defendant did not testify so the conviction was not admissible under Rule 609).]

State Was Properly Permitted to Cross-Examine Defense Character Witness Concerning Knowledge of Defendant's Gang Membership When Character Witness Had Testified About Defendant's Reputation as a Good Marine

State v. Perez, ___ N.C. App. ___, 641 S.E.2d 844 (20 March 2007). The defendant was convicted of second-degree murder. He offered evidence of self-defense. He also offered testimony through a character witness about his good character and reputation as a good Marine. The state on cross-examination was allowed to question the character witness about his knowledge of the defendant's gang associations and whether his gang membership was consistent with his reputation as a good Marine. The court rejected the defendant's argument that the ruling in Dawson v. Delaware, 503 U.S. 159 (1996) (irrelevant evidence of defendant's gang membership was inadmissible), barred this testimony

Testimony About Defendant's Violent Past Was Admissible to Explain Chain of Events Leading to Ensuing Fight and Was Not Prohibited Character Evidence Under Rule 404

State v. Beal, ___ N.C. App. ___, 638 S.E.2d 541 (2 January 2007). The defendant was convicted of a felonious assault. The defendant and the alleged victim lived in the same mobile home, which was owned by the alleged victim. The defendant paid rent to live there. The assault occurred in the mobile home and its curtilage. The alleged victim testified that he and the defendant began to argue and he asked the defendant to leave. In response to a question why he had asked him to leave, the alleged victim testified that when the defendant drinks, he gets violent. Relying on State v. Agee, 326 N.C. 542, 391 S.E.2d 171 (1990), the court ruled the evidence was admissible to explain the chain of events that led to the fight and was not improper character evidence under Rule 404.

Statements of Nontestifying Declarants Were Not Testimonial Under *Crawford v. Washington* Because They Were Not Offered to Prove Truth of Matters Asserted

State v. Leyva, ___ N.C. App. ___, 640 S.E.2d 394 (6 February 2007). The court ruled that statements of nontestifying declarants were not testimonial under Crawford v. Washington, 541 U.S. 36 (2004), because they were not offered to prove the truth of the matters asserted. They instead were offered to explain the officers' presence at certain places.

(1) Rules of Evidence Do Not Apply to Sentencing Hearings
(2) Ruling in Crawford v. Washington, 541 U.S. 36 (2004), Does Not Apply to Non-Capital Sentencing Hearing

State v. Sings, ___ N.C. App. ___, 641 S.E.2d 370 (6 March 2007). (1) The court ruled, citing Rule 1101(b)(3) and G.S. 15A-1334(b), that the rules of evidence do not apply at a sentencing hearing. (2) The court ruled, relying on the rationale of State v. Phillips, 325 N.C. 222, 381 S.E.2d 325 (1989), and distinguishing State v. Bell, 359 N.C. 1, 603 S.E.2d 2004), that the ruling in Crawford v. Washington, 541 U.S. 36 (2004), does not apply to a non-capital sentencing hearing.

Trial Judge Did Not Err in Allowing Opinion Testimony by State's Accident Reconstruction Expert

State v. Brown,___ N.C. App. ___, ___ S.E.2d ___ (6 March 2007). The defendant was convicted of second-degree murder and other offenses (willful speed competition, reckless driving, and driving left of center) as a result of a collision of his vehicle (vehicle A) with another vehicle (vehicle B) as they sped together on a highway, and vehicle B crashed into the decedent's vehicle (vehicle C), which was traveling in the opposite direction from vehicles A and B. The court ruled that the trial judge did not err in allowing the state's accident reconstruction expert to offer his opinion that the driver of vehicle B was trying to get out of the way of oncoming traffic, based on statements made by the driver of vehicle B and the physical evidence. The court stated that the expert employed methods found to be reliable, such as a review of both the physical evidence and witness statements.

Arrest, Search, and Confession Issues

(1) Officer Conducted Valid Traffic Stop of Vehicle
(2) Officer Conducted Valid Search of Vehicle for Weapons
(3) Officer Conducted Valid Consent Search of Passenger's Purse
(4) Officer Had Probable Cause to Search Vehicle for Illegal Drugs, Including Locked Briefcase Found Inside Vehicle

State v. Parker, ___ N.C. App. ___, ___ S.E.2d ___ (1 May 2007). The defendant was convicted of various drug and drug-related offenses. A narcotics detective was conducting surveillance of the defendant in response to a citizen's complaint that the defendant was trafficking methamphetamine. He stopped a vehicle that the defendant was driving because it was going approximately 60 m.p.h. in a 45 m.p.h. zone and then passed another vehicle at approximately 80 m.p.h. in a 55 m.p.h. zone. The defendant stepped out of his vehicle and approached the detective's vehicle. The detective ordered the defendant to return to his vehicle, but he refused to do so. The detective then secured the defendant in the backseat of the defendant's vehicle. Two passengers (A and B) were also seated in the vehicle. The defendant told the detective there was a gun in the vehicle. The detective opened the door to the front passenger seat where A was sitting

and saw a 12-gauge shotgun located between the seat and door. He assisted A out of the vehicle and, while doing so, saw a piece of newspaper fall to the ground and made a mental note of it. The detective removed B from the vehicle as well. The detective then conducted a "weapons frisk" of the vehicle for his own safety to make sure that were no other weapons there. He examined the newspaper and saw that it was covering a drawstring bag. Inside the bag he found a substance he believed to be methamphetamine and a smoking device. He found a pistol under the front passenger seat. Thereafter, A consented to a search of her purse, which the detective had seen in the vehicle. The detective discovered in the purse a straw containing white powder residue that he believed to be drug paraphernalia used to ingest an illegal controlled substance. The detective then searched the vehicle's interior and found a locked briefcase in the hatchback portion. The defendant claimed ownership of the briefcase and gave the combination to the detective. When the combination did not unlock it, the detective's partner pried it open with a screwdriver. Inside was a plastic cylinder containing a bag of a substance the detective believed to be methamphetamine. The detective arrested the defendant for various drug offenses but did not charge him with any traffic violations. (1) The court ruled that the narcotics detective had probable cause to stop the defendant's vehicle for the speeding violations. The court noted prior case law [Whren v. United States, 517 U.S. 806 (1996); State v. McClendon, 350 N.C. 630 (1999)] that an officer's subjective motivation is irrelevant when a stop is supported by probable cause. Also, the fact that an officer conducting a traffic stop did not later issue a traffic citation is irrelevant to the validity of the stop [State v. Baublitz, 172 N.C. App. 801, 616 S.E.2d 615 (2005)]. (2) The court ruled that the officer conducted a valid "vehicle frisk" for weapons inside the defendant's vehicle under Michigan v. Long, 463 U.S. 1032 (1983). The detective had a reasonable belief that the defendant was dangerous and had immediate access to a weapon in the car. And the search of the drawstring bag was a valid part of the weapons search. (3) The court ruled that although the detective's request for consent to search A's purse was unrelated to the traffic infraction for which the detective initially stopped the defendant, the request was supported by reasonable suspicion that the purse would contain contraband or evidence of a drug crime. [Author's note: When an officer has lawfully detained a person, an officer's questioning of that person (including a request for consent), even if the questioning is unrelated to the purpose of the detention, is not a seizure under the Fourth Amendment (as long as the questioning does not unnecessarily prolong the detention) and therefore does not need any justification (for example, reasonable suspicion). See Muehler v. Mena, 544 U.S. 93 (2005); United States v. Mendez, 476 F.3d 1077 (9th Cir. 2007); United States v. Alcarez-Arellano, 441 F.3d 1252 (10th Cir. 2006); United States v. Slater, 411 F.3d 1003 (8th Cir. 2005). In this case, the detective clearly had reasonable suspicion to detain the vehicle's occupants based on the discovery of the contents of the drawstring bag and thus did not need any justification under the Fourth Amendment for asking for consent to search A's purse, even though that request was not related to the purpose of the traffic stop.] (4) The court ruled that the detective had probable cause to search the vehicle for illegal drugs, including the locked briefcase found inside the vehicle. The court relied on California v. Acevedo, 500 U.S. 565 (1991), and State v. Holmes, 109 N.C. App. 615 (1993).

Detective's Seizure of Cigarette Butt Thrown by Defendant on His Patio Floor During Interview With Two Detectives Violated Defendant's Fourth Amendment Rights

State v. Reed, ___ N.C. App. ___, 641 S.E.2d 320 (6 March 2007). Two detectives investigating a burglary, sexual offense, and robbery, arrived at the defendant's apartment to talk with him. The defendant led the detectives to a small patio at the back of his apartment. After the defendant finished a cigarette, he flicked the butt at a pile of trash located in the corner of the concrete patio. The butt struck the pile of trash and rolled between the defendant and one of the detectives, who kicked the butt off of the patio into the grassy common area. The conversation ended and the detective, who had kept his eye on the still-burning cigarette butt, retrieved the butt after the other

detective and the defendant turned to go back inside the apartment.. A DNA test of the cigarette butt resulted in evidence introduced against the defendant at trial. The court ruled, relying on State v. Rhodes, 151 N.C. App. 208, 565 S.E.2d 266 (2002) (officer's warrantless search of trash can located immediately by steps to side-entry door of defendant's house violated Fourth Amendment), and other cases, and distinguishing State v. Hauser, 342 N.C. 382, 464 S.E.2d 443 (1995), ruled that the seizure of the cigarette butt violated the defendant's Fourth Amendment rights. The court rejected the state's argument that the defendant discarded the cigarette butt and thus lost his reasonable expectation of privacy. The cigarette butt was not abandoned within the curtilage of the defendant's home. [Author's note: The issue whether the detective had probable cause to seize the cigarette butt was not involved in this case.]

After Writing and Delivering Warning Ticket to Defendant, Officer Had Reasonable Suspicion to Detain Defendant Further So Drug Dog Could Conduct Sniff of Exterior of Vehicle

State v. Euceda-Valle, ___ N.C. App. ___, 641 S.E.2d 858 (20 March 2007). An officer stopped the defendant's vehicle for speeding and issued him a warning ticket. There was a passenger in the vehicle. After writing and delivering the warning ticket to the defendant, the officer ordered the defendant to remain so a drug dog could conduct a sniff of the exterior of the vehicle. The court ruled, relying on State v. McClendon, 350 N.C. 630, 517 S.E.2d 128 (1999), and State v. Hernandez, 170 N.C. App. 299, 612 S.E.2d 420 (2005), that the officer had reasonable suspicion to detain the defendant. The defendant was extremely nervous and refused to make eye contact with the officer. There was the smell of air freshener coming from the vehicle, which was not registered to the occupants. There was a disagreement between the defendant and the passenger about their itinerary.

Defendant Was Not in Custody to Require *Miranda* Warnings During Questioning

State v. Smith, ___ N.C. App. ___, 636 S.E.2d 267 (7 November 2006) . The court ruled that the defendant was not in custody under *Miranda* when he was questioned in the sheriff's department. An officer went to the defendant's house and asked him to come to the department for questioning. The defendant came in a separate vehicle. He waited there about an hour while his wife was questioned and could have left at any time. He was told he was not in custody and was offered something to drink. As the questioning began, the defendant did indicate that he wanted to speak to an attorney, but he did not stop making statements. He stood up, became very upset, and made some incriminating statements.

Defendant's Statement in Response to Officer's Question Was Admissible Under Public Safety Exception to *Miranda*

State v. Hewson, ___ N.C. App. ___, 642 S.E.2d 459 (20 March 2007). Officers responded to a home in response to a 911 call by the victim of a shooting while she was inside her home, reporting that she had been shot by her husband. They saw the defendant outside the house and ordered him to lie face down on the ground. After handcuffing him, an officer asked him, without giving *Miranda* warnings, "Is there anyone else in the house, where is she?" The court ruled the defendant's statement in response to the officer's question was admissible under public safety exception to *Miranda* under New York v. Quarles, 467 U.S. 649 (1984). [See a discussion of the public safety exception on page 200 of Robert L. Farb, *Arrest, Search, and Investigation in North Carolina* (3d ed. 2003).

(1) Defendant Did Not Make Clear Request for Counsel During Custodial Interrogation to Require Officer to Stop Interrogation
(2) Confession Was Not Involuntary Based on Officer's Statements to Defendant

State v. Shelly, ___ N.C. App. ___, 638 S.E.2d 516 (2 January 2007). The defendant was convicted of first-degree murder. (1) During custodial interrogation the defendant asked general questions about when he would get a lawyer and the officer truthfully told him that unless he had a personal lawyer that one would be appointed when he went to court. (See additional facts discussed in the court's opinion.) The court noted the informative nature of the conversation: the defendant asked questions and received answers from the officer in an effort to understand his rights and the interview process before choosing to invoke or forego his right to counsel. The court ruled, distinguishing State v. Torres, 330 N.C. 517, 412 S.E.2d 20 (1992), and State v. Steptoe, 296 N.C. 711, 252 S.E.2d 707 (1979), that the defendant did not make a clear request for counsel to require the officer to stop the interrogation. (2) The court ruled that the defendant's confession was not involuntary based on the officer's statements to the defendant. The officer said that a person who cooperates and shows remorse and is honest and has no criminal background has the best chance of obtaining leniency because he cooperated. The court upheld the trial judge's findings that no improper promises were made to the defendant. The officer did not promise the defendant any different or preferential treatment as a result of the defendant's cooperation. The officer did not create a hope of leniency that induced the defendant to confess to the murder.

Prosecutor's Cross-Examination of Defendant Did Not Impermissibly Comment on Defendant's Assertion of His Right to Remain Silent After Receiving *Miranda* Warnings

State v. Ezzell, ___ N.C. App. ___, 642 S.E.2d 274 (3 April 2007). The defendant was arrested for murder at the crime scene and spoke to an officer after waiving his *Miranda* rights. He made several statements concerning the events surrounding the murder. After arriving at the sheriff's office, the defendant asserted his right to remain silent after being given *Miranda* warnings. The prosecutor cross-examined the defendant at trial about what the defendant did and did not tell the officer at the crime scene. The court noted the it would have been natural and expected for the defendant to have mentioned certain details to the officer then. The court ruled that the prosecutor's cross-examination did not impermissibly comment on the defendant's assertion of his right to remain silent at the sheriff's office. (See the prosecutor's questions set out in the court' opinion.)

Sentencing

"Law of the Case" Doctrine Did Not Bar State at Resentencing Hearing From Presenting New Evidence and Arguing for Higher Prior Record Level

State v. Dorton, ___ N.C. App. ___, 641 S.E.2d 357 (6 March 2007). The defendant was convicted of second-degree sexual offense and was sentenced to an aggravated sentence in Prior Record Level I. The defendant appealed and the North Carolina Court of Appeals ordered a new sentencing hearing based on Blakely v. Washington, 542 U.S. 296 (2004). The state did not appeal any issue relating to the defendant's sentence. The trial judge on remand sentenced the defendant to a presumptive sentence in Prior Record Level I. Two days later during the same superior court term, the state presented evidence of a prior conviction that it had just discovered. The trial judge accepted the state's evidence and modified the sentence to a presumptive sentence in Prior Record Level II. The court ruled that the "law of the case" doctrine did not bar state at resentencing from presenting new evidence and arguing for a higher prior record level even

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though it had not previously raised the issue of an incorrect prior record level by appeal to the court of appeals from the original sentence. The court stated that the doctrine is limited to issues actually presented and necessary for the determination of the case.

When Calculating Points for Prior Convictions to Establish Prior Record Level, Convictions Obtained During a Single Trial Cannot Be Used in Establishing Prior Record Level for One of the Convictions

State v. West, ___ N.C. App. ___, 638 S.E.2d 508 (19 December 2006). The defendant at a single trial was convicted of second-degree murder, two counts of felony larceny, and one count of breaking and entering a vehicle. Before recessing for lunch, the trial judge sentenced the defendant for the convictions of the two larcenies and breaking and entering a vehicle. After lunch, the judge sentenced the defendant for second-degree murder and calculated the defendant's prior record level for the second-degree murder by assigning two points for one of the felony larceny convictions. The court ruled that the judge erred in doing so in contravention of legislative intent in calculating a prior record level for convictions obtained at a single trial.

Aggravating Factor G.S. 15A-1340.16(d)(8) (Knowingly Creating Great Risk of Death to More Than One Person By Weapon Normally Hazardous to Lives of More Than One Person) Was Properly Found for Second-Degree Murder and Felonious Assault Convictions Involving Vehicle Crash

State v. Borges, ___ N.C. App. ___, ___ S.E.2d ___ (15 May 2007). The defendant was convicted of second-degree murder and four counts of assault with a deadly weapon inflicting serious injury involving a vehicle crash in which the defendant was impaired. The jury found the aggravating factor G.S. 15A-1340.16(d)(8) (knowingly creating great risk of death to more than one person by weapon normally hazardous to lives of more than one person) for these convictions. The court ruled that the finding of the aggravating factor did not violate G.S. 15A-1340.16(d) (evidence necessary to prove element of offense may not be used to prove aggravating factor). The state was required to prove additional facts by additional evidence to prove the aggravating factor.

***Blakely v. Washington* Error in Judge's Finding of Aggravating Factors in DWI Sentencing Hearing Was Harmless Beyond Reasonable Doubt**

State v. McQueen, ___ N.C. App. ___, 639 S.E.2d 131 (16 January 2007). The court ruled, relying on Washington v. Recuenco, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006), and State v. Blackwell, 361 N.C. 41, 638 S.E.2d 452 (15 December 2006), that Blakely v. Washington, 542 U.S. 296 (2004), error in the judge's finding of two aggravating factors in a DWI sentencing hearing was harmless beyond a reasonable doubt. The court ruled that there was overwhelming evidence to support the two aggravating factors (accident caused personal injury and property damage in excess of $500.00).

Trial Judge Had Authority to Submit Aggravating Factors to Jury as Required by *Blakely v. Washington* Even Though There Was No Statutory Authority to Do So

State v. Johnson, ___ N.C. App. ___, 639 S.E.2d 78 (2 January 2007). The court ruled, relying on State v. Blackwell, 361 N.C. 41, 638 S.E.2d 452 (15 December 2006), that the trial judge had the authority to submit aggravating factors to the jury as required by Blakely v. Washington, 542 U.S. 296 (2004), even though there was no statutory authority to do so. (Author's note: The trial

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Court Rules That Crawford v. Washington, 541 U.S. 36 (2004) Is Not Retroactive

Whorton v. Bockting, 127 S. Ct. 1173, 167 L. Ed. 2d 1 (28 February 2007). In Crawford v. Washington, 541 U.S. 36 (2004), the United States Supreme Court ruled that "testimonial statements" by witnesses who do not appear at trial may not be admitted unless the witness is unavailable to testify and there has been a prior opportunity for cross-examination. The Court ruled in this case that the *Crawford* ruling was not retroactive and thus did not apply to cases that had become final on direct review before the date of the *Crawford* ruling, March 8, 2004.

Officer's Ramming Plaintiff's Vehicle From Behind to Stop Plaintiff's Public-Endangering Flight Did Not Violate Fourth Amendment

Scott v. Harris, 127 S. Ct. 1769, ___ L. Ed. 2d ___ (30 April 2007). The plaintiff sued an officer and others for allegedly violating his Fourth Amendment rights in a high-speed chase that resulted in injury to the plaintiff. The Court ruled, based on the facts in this case, that the officer did not violate the Fourth Amendment by attempting to stop the plaintiff's vehicle from continuing his public-endangering flight by ramming his vehicle from behind.

California "Catchall" Jury Instruction on Mitigating Evidence in Capital Sentencing Hearing Did Not Violate Defendant's Eighth Amendment Right to Present All Mitigating Evidence

Ayers v. Belmontes, 127 S. Ct. 469, 166 L. Ed. 2d 334 (13 November 2006). In capital sentencing hearing in a California state court, the trial judge (after instructing the jury on specific aggravating and mitigating factors) instructed the jury to consider "[a]ny other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime." The defendant had presented evidence that he would lead a constructive life if incarcerated rather than executed—namely, his religious commitment. The Court ruled that the jury instruction did violate the defendant's Eighth Amendment right to present all mitigating evidence.

In Federal Habeas Corpus Action, Court Rules State Appellate Court Ruling That Trial Spectators' Wearing Buttons Displaying Murder Victim's Image Did Not Violate Defendant's Constitutional Rights Was Neither Contrary to Nor an Unreasonable Application of Clearly Established Federal Law, as Determined by United States Supreme Court

Carey v. Musladin, 127 S. Ct. 649, 166 L. Ed. 2d 482 (11 December 2006). The defendant was convicted of murder in a state court jury trial during which family members of the murder victim sat in the front row and wore buttons displaying the victim's image. The defendant's conviction was affirmed by a state appellate court, which ruled that the spectators' conduct did not violate the defendant's Sixth or Fourteenth Amendment rights. The defendant later filed a federal habeas corpus action alleging that his constitutional rights were violated by the spectators' conduct during his trial. The Court ruled that the state appellate court's ruling was neither contrary to nor

an unreasonable application of clearly established federal law, as determined by the Court. The Court stated that the effect on a defendant's fair trial rights of the spectator conduct, which was not instigated by the state, was an open question in the Court's jurisprudence. [Author's note: This ruling did not determine that the defendant's constitutional rights were not violated. Instead, the ruling determined that the defendant's conviction would not be reversed in a federal court habeas corpus action under the standard of federal habeas corpus review set out in federal law.]

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Habitual Offender Laws

Habitual Felon Law; G.S. 14-7.1 through 14-7.6

Generally. Being an habitual felon is not a crime but is a status achieved when a person has been convicted of three felony offenses as set out in G.S. 14-7.1: the second felony must have been committed after the conviction of the first felony and the third felony must have been committed after the conviction of the second felony. When a defendant is convicted of a felony after having achieved habitual felon status, the punishment for that offense is elevated to a Class C felony. State v. Penland, 89 N.C. App. 350 (1986); State v. Thomas, 82 N.C. App. 682 (1986). For example, if a defendant is convicted of felonious breaking or entering, a Class H felony, and then found to be a habitual felon, the judgment for the conviction of felonious breaking or entering is for a Class C felony. No sentence is imposed for the finding of habitual felon. State v. Wilson, 139 N.C. App. 544 (2000).

Disqualifying convictions. Felonies that do not qualify to support habitual felon status: (1) convictions or pleas of guilty entered before July 6, 1967; (2) a conviction for which the defendant received a pardon; (3) federal intoxicating liquor offenses; and (4) a conviction of habitual misdemeanor assault for an offense committed on or after December 1, 2004. Multiple felonies committed before a defendant attained the age of 18 may not constitute more than one felony.

G.S. 14-33.2, as revised in 2004, provides in effect that a conviction of habitual misdemeanor assault for an offense committed on or after December 1, 2004, may not be used to prove a felony conviction to establish habitual felon status. For the text of the ratification clause concerning this effective date, see Sec. 10.2, S.L. 2004-186, and for a relevant interpretation of the ratification clause in the context of another statute, see State v. Leeper, 356 N.C. 55, 61-62 (2002). The 2004 legislative amendment effectively overrules State v. Smith, 139 N.C. App. 209 (2000), on this issue. See State v. Artis, ___ N.C. App. ___, 641 S.E.2d 314 (6 February 2007) (court discussed ratification clause of 2004 legislation and noted that convictions of habitual misdemeanor assault for offenses committed before December 1, 2004, may be used to prove habitual felon status; prohibition against using these convictions to prove habitual felon status only applies to offenses of habitual misdemeanor assault committed on or after December 1, 2004).

Use of habitual felon status for certain offenses. There is no statutory prohibition against using felony offenses such as habitual impaired driving, habitual misdemeanor assault, and the felony of operating a motor vehicle to elude arrest under G.S. 20-141.5 as the substantive felony which is elevated to a Class C felony by this law. State v. Baldwin, 117 N.C. App. 713 (1995) (habitual impaired driving); State v. Smith, 139 N.C. App. 209 (2000) (habitual misdemeanor assault); State v. Scott, 167 N.C. App. 783 (2005) (felony eluding arrest); State v. Artis, ___ N.C. App. ___, 641 S.E.2d 314 (6 February 2007) (habitual misdemeanor assault).

No bar to use habitual DWI conviction to prove habitual felon status. There is no statutory prohibition against using prior convictions of habitual impaired driving to establish habitual felon status, State v. Baldwin, 117 N.C. App. 713 (1995), even when the habitual impaired driving convictions were also used to prove the substantive felony of habitual impaired driving. State v. Misenheimer, 123 N.C. App. 156 (1996).

No double jeopardy bars. There is no double jeopardy violation in using the same convictions previously used at a prior trial in establishing habitual felon status to establish habitual felon status at a later trial. State v. Creason, 123 N.C. App. 495 (1996). There is no double jeopardy violation when the state uses a felony conviction to prove possession of firearm by a convicted felon and uses that same felony conviction to prove habitual felon status. State v. Glasco, 160 N.C. App. 150 (2003); State v. Crump, ___ N.C. App. ___, 632 S.E.2d 233 (1 August 2006).

Collateral estoppel bar when acquittal based on same felony convictions. A not guilty verdict in a violent habitual felon hearing bars the state, on collateral estoppel grounds, from trying a defendant in later violent habitual felon hearing based on the same two prior convictions used in the prior violent habitual felon hearing. State v. Safrit, 145 N.C. App. 541 (2001). The *Safrit* ruling clearly would also apply a habitual felon hearing.

District attorney's policies. A district attorney's policy of prosecuting all defendants who qualify as habitual felons is not unconstitutional. State v. Parks, 146 N.C. App. 568 (2001).

I. Indictment [see the indictment form at the end of this paper]

A. G.S. 14-7.3 requires that an indictment charging habitual felon must be separate from the indictment charging the substantive felony. State v. Patton, 342 N.C. 633 (1996) (dicta). *But see* State v. Young, 120 N.C. App. 456 (1995) (court ruled, in case decided before *Patton*, that indictment alleging felony offense in first count and habitual felon in second count was not error; even if it was error, defendant was not prejudiced since he was properly notified of the charges and the habitual felon charge was not mentioned to the jury during the trial of the felony offense).

B. An habitual felon indictment need not refer to the substantive felony offense(s) being tried. State v. Cheek, 339 N.C. 725 (1995). Any error in referring to the substantive felony is surplusage and does not invalidate the indictment if it does not prejudice the defendant. State v. Bowens, 140 N.C. App. 217 (2000).

C. An indictment for substantive felony offense(s) need not refer to the habitual felon indictment. State v. Todd, 313 N.C. 110 (1985).

D. One habitual felon indictment is sufficient for all felony offenses being tried. That is, a separate habitual felon indictment is not required for each substantive felony indictment. State v. Patton, 342 N.C. 633 (1996). However, if a defendant pleads guilty to criminal offenses and admits to habitual felon status and sentencing is continued until a later date, a felony charge brought thereafter must be accompanied by a new habitual felon indictment. State v. Bradley, 175 N.C. App. 234 (2005).

E. The "date of offense" block in a habitual felon indictment is not legally significant because habitual felon is a status, not a crime. That block could be completed with (1) the date when the grand jury considers issuing the habitual felon indictment; or (2) the date of the third conviction that effectively qualified the defendant as a habitual felon.

F. For each of the three preceding felony convictions, an habitual felon indictment must allege the date of the commission of the offense and the date of the conviction, including the court and state where the defendant was convicted. The second felony must have been committed after the conviction of the first felony. The third felony must have been committed after the conviction of the second felony.

The date of a prior conviction under the habitual felon law is the date of the jury's return of the guilty verdict, not the date when the sentenced was imposed. State v. McGee, 175 N.C. App. 586 (2006).

G. Alleged indictment defects

State v. Gant, 153 N.C. App. 136 (2002). (1) The defendant was indicted for several felonies and for being an habitual felon. He was convicted of some of the felonies. An error was discovered in the habitual felon indictment in alleging the date of one of the prior felony convictions. The judge granted the state's motion for a continuance so the state could obtain a superseding habitual felon indictment to correct the error. The court ruled, citing State v. Oakes, 113 N.C. App. 332 (1994), that the trial judge did not err in granting the continuance. The court noted that the defect was only technical. [Author's note: A superseding indictment was probably unnecessary. The indictment likely could have been amended to correct the technical error. See, for example, State v. Hargett, 148 N.C. App. 688 (2002).]

State v. Briggs, 137 N.C. App. 125 (2000) (indictment alleging prior felony as "the felony of breaking and entering . . . in violation of . . . N.C. G.S. 14-54" sufficiently alleged a prior felony conviction even though misdemeanor breaking or entering is included in that statute).

State v. Smith, 112 N.C. App. 512 (1993) [no fatal indictment defects when (i) date of guilty plea was not provided but date of sentencing was provided; and (ii) date of arrest was provided but date of offense may have been different from date of arrest].

State v. Williams, 99 N.C. App. 333 (1990) (no fatal defect in indictment when felony convictions were listed as in violation of enumerated "North Carolina General Statute" without naming "State of North Carolina"; this was a sufficient allegation of name of state against whom felonies were committed to comply with G.S. 14-7.3).

State v. Spruill, 89 N.C. App. 580 (1988) (alleging erroneous date of offense was not a fatal variance since time was not of the essence, and defendant's stipulation before trial as to correct date showed that he was not surprised by the variance).

State v. Bowens, 140 N.C. App. 217 (2000). The defendant was convicted of maintaining a dwelling to keep or sell controlled substances and possession of marijuana with intent to sell and deliver, and then was adjudicated a habitual felon and sentenced accordingly. The habitual felon indictment alleged the three felony convictions properly but also alleged that the principal felony as felonious possession of marijuana, which was dismissed at trial. Because there is no requirement that the habitual felon indictment refer to the principal felony or felonies [State v. Patton, 342 N.C. 633 (1996)], the court ruled that the allegation of the principal felony was surplusage, it was not prejudicial to the defendant (he had proper notice that he was charged with being a habitual felon), and therefore the habitual felon indictment was valid. On the issue of surplusage in indictments, the court cited State v. Westbrooks, 345 N.C. 43 (1996) and State v. Sisk, 123 N.C. App. 361 (1996).

H. Amendment of indictment

An habitual felon indictment may be amended to change the date of the commission of a felony alleged in the indictment, State v. Locklear, 117 N.C. App. 255 (1994), to amend conviction dates, State v. Hargett, 148 N.C. App. 688 (2002), and to allege that all but one of the felony convictions were committed after the defendant became eighteen, State v. Hicks, 125 N.C. App. 158 (1997).

State v. Lewis, 162 N.C. App. 277 (2004). The court ruled that the state was properly permitted to amend a habitual felon indictment. The state corrected the second conviction alleged in the indictment, which had mistakenly noted the date and county of the defendant's probation revocation instead of the date and county of the defendant's prior conviction of felonious breaking and entering.

See *State v. Cogdell*, 165 N.C. App. 368 (2004), discussed below, which specifies when the state may obtain a superseding habitual felon indictment.

II. Procedure

A. The defendant is first tried for the substantive felony offense(s) for which the defendant has been indicted. The jury may not be informed of the pending habitual felon indictment. If the defendant is convicted of a felony or felonies, then the same jury (unless there is some reason not to use the same jury) will decide at a hearing whether or not the defendant is an habitual felon. State v. Todd, 313 N.C. 110 (1985) (jury need not be re-impaneled for hearing). Of course, the defendant may plead guilty to the habitual felon indictment, and a hearing on this issue would be unnecessary.

See generally State v. Winstead, 78 N.C. App. 180 (1985) (provision in G.S. 14-7.3 prohibiting trial of habitual felon indictment within 20 days of return of that indictment by grand jury did not apply when state obtained a new indictment for the substantive felony offense).

B. Proof of prior convictions may be shown by evidence of: (1) the original record; (2) a certified copy of the original record [note the certified records are self-authenticating: Rules 901(b), 902(4), 1005 and 28 U.S.C. § 1738, a federal statute that provides a method of authenticating certified copies of court records from other states]; or (3) a stipulation between the state and the defendant.

State v. Wolfe, 157 N.C. App. 22 (2003). The defendant's name was Eldridge Frank Wolfe. The state introduced certified copies of two judgments entered on felony convictions of a person named "Eldridge Frank Wolfe." The court ruled that this established prima facie evidence of the prior felony convictions under G.S. 14-7.10. The court noted that any discrepancies in other details in the judgments (for example, one of the judgments noted that the person's race as black, while the defendant is white) are for the jury to consider in weighing the evidence.

State v. Gilmore, 142 N.C. App. 465 (2001). The defendant was convicted of felonious breaking or entering of a store and felonious larceny. He then was adjudicated a habitual felon. The defendant stipulated to the three prior convictions alleged in the habitual felon indictment and to his habitual felon status. However, the issue was not submitted to the jury, and the defendant did not plead guilty to being a habitual felon. The court ruled that

the defendant was improperly adjudicated a habitual felon. There was no court inquiry establishing a record of a guilty plea.

State v. Wall, 141 N.C. App. 529 (2000). The court ruled that a fax of a certified copy of a conviction was sufficient to prove a conviction in a habitual felon hearing. The court stated, relying on the reasoning in State v. Jordan, 120 N.C. App. 364 (1995) [faxed copy of prior conviction admissible under former G.S. 15A-1340.4(e) in Fair Sentencing Act hearing] that the methods of proving a conviction in G.S. 14-7.4 are permissive, not mandatory. The court noted that the judge carefully examined the fax, which showed that it represented a document that was stamped with a seal showing it to be a true copy of the original that was signed by the clerk of superior court. The judge found that the fax was a reasonable copy of the seal. The defendant did not contend that the fax was inaccurate or incomplete, but only that its admission did not comply with G.S. 14-7.4.

See also the prima facie evidence rule in G.S. 14-7.4, State v. Hodge, 112 N.C. App. 462 (1993) (name "Michael Hodge" in court conviction record was sufficiently similar to "William Michael Hodge"), and State v. Petty, 100 N.C. App. 465 (1990) (similar ruling).

State v. Carpenter, 155 N.C. App. 35 (2002). The defendant was convicted of habitual misdemeanor assault and then adjudicated a habitual felon. The court ruled, relying on State v. Lindsey, 118 N.C. App. 549 (1995), that the state failed to prove that two New Jersey convictions were felony convictions for the habitual felon law. The New Jersey judgments did not state that the defendant was convicted of a felony or sentenced as a felon. An official did not certify that the two offenses were felonies in New Jersey. The court rejected the state's argument that the defendant could have received sentences exceeding one year for each of the convictions, offenses punishable by more than one year in prison constitute common law felonies under New Jersey law, and thus this was sufficient evidence to prove that they were felony convictions.

C. A no contest plea entered in a North Carolina state court on or after July 1, 1975 is a conviction. See State v. Jackson, 128 N.C. App. 626 (1998).

D. If a trial judge or appellate court rules that an habitual felon indictment is technically defective and dismisses the habitual felon indictment, the state may seek a new habitual felon indictment and sentencing as an habitual felon. State v. Oakes, 113 N.C. App. 332 (1994); State v. Hawkins, 110 N.C. App. 837 (1993), *reversed on other grounds*, State v. Cheek, 339 N.C. 725 (1995); State v. Mewborn, 131 N.C. App. 495 (1998) (violent habitual felon indictment).

State v. Cogdell, 165 N.C. App. 368 (2004). On January 14, 2002, the defendant was indicted for several felony offenses. On January 22, 2002, the defendant was indicted as an habitual felon. The defendant was arraigned on these indictments on May 29, 2002. A superseding habitual felon indictment was issued on September 3, 2002, which changed the allegations involving the three felony convictions set out in the original habitual felon indictment. The defendant was arraigned on this indictment on September 6, 2002. The defendant's trial began on December 9, 2002. Distinguishing State v. Little, 126 N.C. App. 262 (1997), the court ruled that the trial judge did not err in not dismissing the superseding indictment. In *Little*, the state obtained an habitual felon indictment before the defendant pled to the substantive felonies. However, after obtaining convictions on those substantive felonies, the state obtained a superseding habitual felon indictment,

deleting one of the felonies alleged in a prior habitual felon indictment and replacing it with another. The court in *Little* ruled that it was error to adjudicate and sentence the defendant on the superseding habitual felon indictment because the defendant was entitled to rely, when he entered his plea on the substantive felonies, on the allegations in the habitual felon indictment in evaluating the state's likelihood of success on the habitual felon indictment. The court distinguished *Little* on the following grounds: (1) unlike the present case, the superseding habitual felon indictment in *Little* occurred *after* (court's emphasis) the defendant was convicted of the substantive felonies; (2) there was no indication in *Little* that the pleas to the substantive felonies actually occurred at an arraignment—the court stated that the critical event that forecloses substantive changes in an habitual felon indictment is the plea entered before the actual trial, not at an earlier arraignment; (3) the court stated that the most important distinction between this case and *Little* involves notice; although the superseding habitual felon indictment in this case was brought after the defendant's first arraignment, it was brought three months before the defendant's trial and thus the defendant received sufficient notice that he was being prosecuted as a habitual felon for the three felony convictions alleged in the superseding indictment.

E. The state must obtain an habitual felon indictment before the trial of the substantive felony. That is, the state may not wait until the defendant is convicted and sentenced for the substantive felony and then obtain an habitual felon indictment. State v. Allen, 292 N.C. 431 (1977). However, it was not a violation of the *Allen* ruling when the defendant was indicted for felony larceny of a motor vehicle and habitual felon and then later indicted for felonious possession of stolen goods (the stolen vehicle), and then tried for felonious possession of stolen goods and habitual felon. State v. Murray, 154 N.C. App. 631 (2002).

F. A habitual felon indictment returned two weeks before the substantive felony indictment was valid. State v. Blakney, 156 N.C. App. 671 (2003).

G. A defendant may plead no contest to a habitual felon indictment, even though G.S. 14-7.6 only mentions "conviction or plea of guilty." State v. Jones, 151 N.C. App. 317 (2002)

H. When a defendant pleas guilty or no contest to habitual felon, the trial judge must comply with the procedures in G.S. 15A-1022(a) (judge's duties in taking guilty plea from defendant). The trial judge may not simply accept a defendant's stipulation to habitual felon status. State v. Artis, 174 N.C. App. 668 (2005); State v. Gilmore, 142 N.C. App. 465 (2001).

I. The procedures in G.S. 15A-928 do not apply to a habitual felon proceeding. State v. Marshburn, 173 N.C. App. 749 (2005).

J. A defendant in a habitual felon hearing could not collaterally attack a prior felony conviction on the ground that a district court did not have jurisdiction to accept a defendant's guilty plea to a felony. State v. Flemming, 171 N.C. App. 413 (2005).

K. Jury instruction is contained in N.C.P.I.—Crim. 203.10.

III. Sentencing

A. If a defendant is determined to be an habitual felon, the punishment classification for the substantive felony conviction(s) is Class C (unless the felony was a Class A, B1, or B2, in which case the sentencing is under these higher classifications). See generally State v. Thomas, 82 N.C. App. 682 (1986); State v. Aldridge, 76 N.C. App. 638 (1985). The judgment for the substantive felony conviction(s) must contain the sentence for a Class C felony. No sentence is imposed for the finding of habitual felon status. State v. Wilson, 139 N.C. App. 544 (2000); State v. Taylor, 156 N.C. App. 172 (2003).

B. For sentencing of felonies committed on or after October 1, 1994, the felony is treated a Class C felony under the Structured Sentencing Act (SSA). First, determine the defendant's prior record level, except G.S. 14-7.6 prohibits the assignment of points for convictions "used to establish a person's status as an habitual felon." State v. Miller, 168 N.C. App. 572 (2005) (state improperly relied on two convictions used to prove habitual felon status to also prove the defendant's prior record level). It is proper, in calculating prior record level, to use a felony conviction that was not submitted to the jury in establishing habitual felon status even if it occurred during the same week as the other felony conviction used to establish habitual felon status. State v. Truesdale, 123 N.C. App. 639 (1996); State v. McCrae, 124 N.C. App. 664 (1996). After determining the defendant's prior record level, then the judge imposes a sentence from the presumptive, aggravated, or mitigated range just as the judge would do so for any other Class C felony under SSA.

In determining a prior record level under SSA, a prior conviction of felonious breaking or entering is considered a Class H felony for determining points, even though the defendant was sentenced as Class C felon for being a habitual felon. State v. Vaughn, 130 N.C. App. 456 (1998), *affirmed*, 350 N.C. 88 (1999).

The dispositional deviation for extraordinary mitigation under G.S. 15A-1340.13(g) and (h) may apply to prior record levels I and II under Class C.

C. For sentencing of felonies committed before October 1, 1994, the felony is treated as a Class C felony under Fair Sentencing Act (FSA). The defendant's prior convictions that are used to prove the defendant's habitual felon status may also constitute aggravating factors. State v. Roper, 328 N.C. 337 (1991).

D. Sentences imposed under the habitual felon law must run consecutively to any sentence being served at the time the defendant is sentenced. See G.S. 14-7.6.

E. See *State v. Bethea*, 122 N.C. App. 623 (1996). The defendant pled guilty to two felony charges (felonious breaking and entering and felonious larceny) and to being an habitual felon. The prior convictions that established habitual felon status were (1) felonious breaking and entering and felonious larceny; (2) larceny of a firearm; and (3) possession of cocaine. In determining the defendant's prior record level, the trial judge assigned one point under G.S. 15A-1340.14(b)(6) because all the elements of the current offense were included in a prior offense [see (1) above] and one point under G.S. 15A-1340.14(b)(7) because the defendant committed the offenses for which he had pled guilty while he was on probation for a prior offense [see (3) above]. The defendant, citing G.S. 14-7.6 (which prohibits—in determining prior record level for sentencing as an habitual felon—convictions used to establish habitual felon status), argued that the trial judge erred in

assigning one point each as described above. The court ruled that the trial judge did not err. The court reasoned that both G.S. 15A-1340.14(b)(6) and (b)(7) address the gravity and circumstances surrounding the offense for which the defendant is now being sentenced, rather than the mere existence of the prior offense.

F. A defendant's guilty plea to habitual felon indictment alleging five felony convictions bars the state from using all five felony convictions in calculating a defendant's prior record level. State v. Lee, 150 N.C. App. 701 (2002). [Author's note: If the defendant had pleaded not guilty, a hearing held, and the trial judge had instructed the jury on only three of the five felony convictions, then it would appear that the remaining two felony convictions could be used to establish the defendant's prior record level.]

G. There is no due process violation when a prosecutor decides which prior convictions to use to establish habitual felon status and which prior convictions to use to establish a defendant's prior record level. State v. Cates, 154 N.C. App. 737 (2002).

H. The habitual felon law used in conjunction with structured sentencing does not violate double jeopardy. State v. Brown, 146 N.C. App. 299 (2001).

IV. Constitutional Issues

The habitual felon statute is not unconstitutional under the double jeopardy clause based on the rulings in Apprendi v. New Jersey, 530 U.S. 466 (2000), or Blakely v. Washington, 542 U.S. 296 (2004).

Violent Habitual Felon Law; G.S. 14-7.7 through 14-7.12

Being a violent habitual felon is not a crime but is a status achieved when a person has been convicted of two violent felony offenses as set out in G.S. 14-7.7. The second violent felony offense must have been committed after the conviction of the first violent felony. When a defendant is convicted of a violent felony after having achieved violent habitual felon status, the punishment for that offense is life imprisonment without parole.

Felonies that do not qualify to support violent habitual felon status: (1) a conviction or plea of guilty entered and a judgment entered thereon before July 6, 1967; and (2) a conviction for which the defendant received a pardon.

A "violent felony" is defined in G.S. 14-7.7(b) as:

(1) All Class A through E felonies.

(2) Any repealed or superseded offense substantially equivalent to the offenses listed in (1) above.

(3) Any offense committed in another jurisdiction substantially equivalent to the offenses set forth in (1) or (2) above.

The classification of an offense as a violent felony (for both the offense being tried and for the determination of the convictions used in establishing violent habitual felon status) would be the classification of the offense under the Structured Sentencing Act at the time that offense was committed for which the defendant is being sentenced. See State v. Stevenson, 136 N.C. App. 235 (1999); State v.

Mason, 126 N.C. App. 318 (1997). Thus, an offense classified under the Fair Sentencing Act as a Class D felony but classified as a Class G felony under the Structured Sentencing Act would be considered a Class G felony under the violent habitual felon law (for example, second-degree burglary and second-degree arson). Or a Class F felony under the Fair Sentencing Act that is classified as a Class D felony under the Structured Sentencing Act would be considered a Class D felony under the violent habitual felon law (for example, voluntary manslaughter).

Note that some Class A through E felonies (drug trafficking offenses, first-degree burglary, etc.) do not have violence as an element, but they are included in the definition of violent felony.

A not guilty verdict in a violent habitual felon hearing bars the state, on collateral estoppel grounds, from trying a defendant in later violent habitual felon hearing based on the same two prior convictions used in the prior violent habitual felon hearing. State v. Safrit, 145 N.C. App. 541 (2001).

I. Indictment [see the indictment form at the end of this paper] [See also the discussion under Habitual Felons above. Case law discussed in that topic would equally apply to this topic. For a case upholding a violent habitual felon indictment, see State v. Mason, 126 N.C. App. 318 (1997).]

II. Procedure [See the discussion under Habitual Felons above. Case law discussed in that topic would equally apply to this topic.]

Jury instruction: N.C.P.I. Crim.—203.13

III. Sentencing

A. If a defendant is determined to be a violent habitual felon, the punishment for the felony conviction(s) is life imprisonment without parole.

B. Sentences imposed under the violent habitual felon law must run consecutively to any sentence being served at the time the defendant is sentenced. See G.S. 14-7.12.

C. The reclassification of felony offenses after they were committed so they become violent felonies under the violent habitual offender statute does not violate ex post facto provisions. State v. Mason, 126 N.C. App. 318 (1997); State v. Wolfe, 157 N.C. App. 22 (2003).

Habitual Impaired Driving Law; G.S. 20-138.5

A person commits this offense:

(1) by committing the offense of impaired driving under G.S. 20-138.1

(2) having been convicted of three or more "offenses involving impaired driving" [defined in G.S. 20-4.01(24a) to include impaired driving, commercial impaired driving, felony death by vehicle, first- and second-degree murder and involuntary manslaughter based on impaired driving, similar offenses in other jurisdictions, etc.], and

(3) these prior convictions all occurred within ten years of the date of the present offense. [For offenses committed before December 1, 2006, the prior convictions all must have occurred within seven years.]

I. Indictment [see the indictment form at end of this paper]

A. The indictment must conform to the provisions of G.S. 15A-928. For example, the allegation of the three or more prior convictions must be contained in a separate count of the indictment charging this offense or in a separate indictment.

State v. Lobohe, 143 N.C. App. 555 (2001). The court ruled that an indictment properly alleged habitual DWI (G.S. 20-138.1) as required by G.S. 15A-928. The first count alleged impaired driving (using the term "feloniously"). The second count alleged three prior DWI convictions, giving the dates of the convictions and the courts in which the defendant had been convicted.

B. The three or more prior convictions within ten years do not have to occur in any particular order. For example, they all could occur on the same date. State v. Allen, 164 N.C. App. 665 (2004) (two DWI convictions consolidated for judgment count as two convictions in prosecution of habitual DWI); State v. Baldwin, 117 N.C. App. 713 (1995).

C. Amendment of habitual DWI indictment

State v. Winslow, 360 N.C. 161 (2005). The court, per curiam and without an opinion, reversed the decision of the North Carolina Court of Appeals, 169 N.C. App. 137 (2005), for the reasons stated in the dissenting opinion. The defendant was arrested and charged with habitual impaired driving (DWI) on April 9, 2000. He later was indicted, with the oldest prior conviction mistakenly alleged as April 1, 1993, which is not within seven years of the current offense. At the close of the state's evidence, the defendant moved to dismiss the indictment for not alleging habitual DWI. The trial judge allowed the state to amend the indictment to allege the correct conviction date of the oldest conviction as August 11, 1993. The dissenting opinion stated that the amendment was a substantial alteration of the charge and not allowed under G.S. 15A-923(e), because the amendment elevated the offense from a misdemeanor to a felony. The dissenting opinion stated that the case should be remanded for resentencing on misdemeanor DWI.

II. Procedure

A. The procedure for trying this offense must conform to the provisions of G.S. 15A-928. For example, the case must be tried before the jury as a simple impaired driving offense (without mention of the prior impaired driving convictions, unless they are admissible under a rule of evidence such as Rule 609) unless the defendant denies the existence of one or more of the prior impaired driving convictions alleged in the indictment. If the defendant denies the existence of these convictions, then the state must prove all the prior convictions before the jury trying the impaired driving offense.

See generally *State v. Jernigan*, 118 N.C. App. 240 (1995) (trial judge in habitual impaired driving trial erred in failing to formally arraign defendant on prior convictions, but error was not prejudicial in this case, when the defendant had previously stipulated to the convictions before trial); *State v. Hudgins*, 167 N.C. App. 705 (2005) (trial judge

erred under G.S. 15A-928 in allowing state in habitual DWI trial to introduce evidence of prior DWI convictions before arraigning defendant to determine whether he would admit to the convictions).

State v. Ellis, 130 N.C. App. 596 (1998). The court ruled that a certified AOC computer printout of one of the defendant's prior DWI convictions was admissible to prove a prior DWI conviction in a habitual impaired driving prosecution. The court, while noting the provisions of G.S. 8-35.2, rested its ruling on G.S. 15A-1340.14(f) (but note that this statute permits the use of AOC records to prove convictions under the Structured Sentencing Act, while this case involved proof of a conviction at trial.)

B. This offense is a substantive felony offense within the original jurisdiction of superior court. State v. Priddy, 115 N.C. App. 547 (1994); State v. Bowden, ___ N.C. App. ___, 630 S.E.2d 208 (6 June 2006) (court reaffirmed that habitual DWI is a substantive felony offense, not a status offense, and thus the superior court had original jurisdiction to try the transactionally-related misdemeanors under G.S. 7A-271(a)(3); court noted that in the post-*Priddy* case of State v. Vardiman, 146 N.C. App. 381 (2001), habitual DWI was described as a recidivist offense; court, relying on In re Appeal from Civil Penalty, 324 N.C. 373 (1989), stated that one panel of the Court of Appeals cannot overrule another panel, and that in any event *Vardiman* in fact reaffirmed *Priddy*'s ruling that habitual DWI is a substantive felony; court also noted that the mere fact that a statute is directed at recidivism does not prevent the statute from establishing a substantive offense).

C. Jury instruction: N.C.P.I. Crim.—270.25A.

III. Constitutional Issues

A. If a defendant is convicted of a misdemeanor (for example, misdemeanor assault) in district court and appeals for trial de novo in superior court, the state's later indictment of the defendant for felonious assault arising out of the same incident creates a presumption of vindictiveness under the Due Process Clause. Blackledge v. Perry, 417 U.S. 21 (1974). See also Thigpen v. Roberts, 468 U.S. 27 (1984) (prosecution of manslaughter barred under Blackledge after conviction of misdemeanor traffic offenses in lower court and appeal for trial de novo in higher court; court stated in footnote 6 that state may attempt to rebut presumption of vindictiveness); State v. Mayes, 31 N.C. App. 694 (1976) (prosecution of felonious assault barred under Blackledge after conviction of misdemeanor assault in district court and appeal for trial de novo in superior court). These rulings would likely apply to a defendant who is convicted of impaired driving in district court, appeals to superior court for trial de novo, and the state then indicts the defendant for habitual impaired driving; State v. Bissette, 142 N.C. App. 669 (2001).

B. If a defendant is convicted of impaired driving in district court and does not appeal for trial de novo, and then the state charges the defendant with habitual impaired driving, the habitual impaired driving prosecution may be barred by the Double Jeopardy Clause because the state may not prosecute a defendant for a greater offense after a prosecution for a lesser-included offense. Brown v. Ohio, 432 U.S. 161 (1977).

C. Habitual DWI is a substantive and punishment enhancement offense that does not violate double jeopardy. The defendant is subjected to enhanced punishment for the current impairing violation and is not being punished a second time for the three prior DWI convictions. Also, it is not a double jeopardy violation to use the same prior DWI

convictions to prove more than one habitual DWI offense. State v. Vardiman, 146 N.C. App. 381 (2001), *appeal dismissed*, 355 N.C. 222 (2002). The court in State v. Bradley, ___ N.C. App. ___, 640 S.E.2d 432 (6 February 2007), ruled that the habitual DWI offense is not unconstitutional under the Double Jeopardy Clause based on the rulings in Apprendi v. New Jersey, 530 U.S. 466 (2000), or Blakely v. Washington, 542 U.S. 296 (2004).

IV. Sentencing

A. For offenses committed on or after December 1, 1997, the punishment is a Class F felony and is subject to the sentencing provisions of the Structured Sentencing, but a defendant must be sentenced to a minimum active term of not less than 12 months of imprisonment, which shall not be suspended. A sentence must run consecutively to any sentences being served at the time of sentencing. G.S. 20-138.5(b). The North Carolina Court of Appeals ruled in State v. Gentry, 135 N.C. App. 107 (1999) that impaired driving convictions used to prove habitual impaired driving may not be used to calculate the defendant's prior record level.

For offenses committed on or after October 1, 1994 and before December 1, 1997, the punishment for this offense is a Class G felony and is subject to the sentencing provisions of the Structured Sentencing Act.

B. A defendant convicted of this offense must have his or her driver's license permanently revoked. G.S. 20-138.5(d).

C. The motor vehicle driven at the time of this offense is subject to forfeiture under certain conditions. See G.S. 20-138.5(e).

Habitual Misdemeanor Assault Law; G.S. 14-33.2

[Note: The elements below reflect the changes made to G.S. 14-33.2, effective for offenses committed on or after December 1, 2004.]

A person commits this offense:

(1) (a) by violating any of the offenses in G.S. 14-33 and causes physical injury; *or*

(b) by violating G.S. 14-34; *and*

(2) has been convicted of two or more prior felony or misdemeanor assaults.

A prior assault conviction does not qualify under element (2) above if it occurred more than 15 years before the date of the offense set out in element (1) above.

[Note: When two prior assault convictions occurred on the same date, there is no statutory bar to count them as two convictions under element (2) above. *See* State v. Forrest, 168 N.C. App. 614 (2005) (no statutory requirement that prior convictions occur on separate dates).]

I. Indictment [see the indictment form at end of this paper]

A. The indictment must conform to the provisions of G.S. 15A-928. For example, the allegation of the prior convictions must be contained in a separate count of the indictment charging this offense or in a separate indictment.

State v. Williams, 153 N.C. App. 192 (2002). The state indicted the defendant for assault on a female. He was convicted. Then the state proved at a separate sentencing hearing that the defendant had five qualifying convictions to purportedly establish habitual misdemeanor assault under G.S. 14-33.2. The court ruled that the court lacked jurisdiction to sentence the defendant for habitual misdemeanor assault when the indictment only charged assault on a female, a misdemeanor. An indictment charging the felony of habitual misdemeanor assault is required. [Author's note: G.S. 15A-928 requires the state, in charging the felony of habitual misdemeanor assault, to indict the defendant for the misdemeanor assault and to allege in either a separate count of the same indictment or in a separate indictment the five prior qualifying convictions that constitutes habitual misdemeanor assault.]

B. The two prior convictions do not have to occur in any particular order. For example, they could have occurred on the same date. *See* State v. Forrest, 168 N.C. App. 614 (2005) (no statutory requirement that prior convictions occur on separate dates).

II. Procedure

A. The procedure for trying this offense must conform to the provisions of G.S. 15A-928. For example, the case is tried before the jury as a simple assault on a female offense (without mention of the prior convictions, unless they are admissible under a rule of evidence such as Rule 609) unless the defendant denies the existence of one or more of the prior convictions alleged in the indictment. If the defendant denies the existence of these convictions, then the state must prove all the prior convictions before the jury.

State v. Burch, 160 N.C. App. 394 (2003). The court ruled that the state failed to prove the felony of habitual misdemeanor assault when the defendant neither stipulated to his prior convictions nor was arraigned under G.S. 15A-928(c) and admitted to them, and the state did not prove the convictions before the jury.

B. This offense is a felony within the original jurisdiction of superior court. State v. Smith, 139 N.C. App. 209 (2000).

C. Jury instruction: N.C.P.I Crim.—208.45.

III. Constitutional Issues

A. If a defendant is convicted of a misdemeanor (for example, misdemeanor assault) in district court and appeals for trial de novo in superior court, the state's later indictment of the defendant for felonious assault arising out of the same incident creates a presumption of vindictiveness under the Due Process Clause. Blackledge v. Perry, 417 U.S. 21 (1974). See also Thigpen v. Roberts, 468 U.S. 27 (1984) (prosecution of manslaughter barred under Blackledge after conviction of misdemeanor traffic offenses in lower court and appeal for trial de novo in higher court; court stated in footnote 6 that state may attempt to rebut presumption of vindictiveness); State v. Mayes, 31 N.C. App.

694 (1976) (prosecution of felonious assault barred under Blackledge after conviction of misdemeanor assault in district court and appeal for trial de novo in superior court). These rulings would likely apply to a defendant who is convicted of assault on a female in district court, appeals to superior court for trial de novo, and the state then indicts the defendant for habitual misdemeanor assault.

B. If a defendant is convicted of assault on a female in district court and does not appeal for trial de novo, and then the state charges the defendant with habitual misdemeanor assault, the habitual misdemeanor assault prosecution may be barred by the Double Jeopardy Clause because the state may not prosecute a defendant for a greater offense after a prosecution for a lesser-included offense. Brown v. Ohio, 432 U.S. 161 (1977). For an analysis of what constitutes offenses subject to the Double Jeopardy Clause, see United States v. Dixon, 509 U.S. 688 (1993).

C. The habitual misdemeanor assault law does not violate double jeopardy. State v. Carpenter, 155 N.C. App. 35 (2002). There is no ex post facto violation in using offenses to prove habitual misdemeanor assault that occurred before the enactment of the statute creating the habitual misdemeanor assault offense. State v. Smith, 139 N.C. App. 209 (2000). The habitual misdemeanor assault offense is not unconstitutional under the rulings in Apprendi v. New Jersey, 530 U.S. 466 (2000), or Blakely v. Washington, 542 U.S. 296 (2004), or under the Double Jeopardy Clause. State v. Massey, ___ N.C. App. ___, 635 S.E.2d 528 (17 October 2006).

IV. Sentencing

A. This offense is a Class H felony. It became effective for offenses committed on or after December 1, 1995. Sentencing for this offense is subject to the provisions of the Structured Sentencing Act, which requires the determination of the defendant's prior record level and the imposition of a sentence in the presumptive, aggravated, or mitigated range. The North Carolina Court of Appeals ruled in State v. Gentry, 135 N.C. App. 107 (1999) that impaired driving convictions used to prove habitual impaired driving may not be used to calculate the defendant's prior record level. The *Gentry* ruling would apply to habitual misdemeanor assault as well.

B. G.S. 14-33.2, as revised in 2004 effective for offenses of habitual misdemeanor assault committed on or after December 1, 2004, provides in effect that a conviction of habitual misdemeanor assault may not be used to prove one of the three felonies to establish habitual felon status. The statutory revision effectively overrules State v. Smith, 139 N.C. App. 209 (2000), on this issue.

General Constitutional Issues

I. Challenging Prior Convictions

A. Collateral attack of a prior conviction is limited to a claim based on an alleged violation of right-to-counsel.

Custis v. United States, 511 U.S. 485 (1994). The Court ruled that although a defendant has a federal constitutional right to collaterally attack a prior conviction because it was obtained in violation of an indigent's constitutional right to counsel, a defendant has no

federal constitutional right to collaterally attack a prior conviction on other grounds, such as (1) the guilty plea was obtained without proper advice about waiver of rights as required by Boykin v. Alabama, 395 U.S. 238 (1969), or (2) the defendant's lawyer provided ineffective assistance of counsel under the Sixth Amendment. The Court ruled that a trial judge at a federal sentencing hearing had properly barred the defendant from attacking—under the grounds specified in (1) and (2) above—prior state convictions offered by the government to enhance a federal sentence.

The Court stated that the defendant could attack his state convictions in state court or through federal habeas review. If the defendant was successful, the defendant then could apply for reopening of any federal sentence enhanced by the state convictions (although the Court stated that it expressed no opinion on the appropriate disposition of such an application).

[Author's note: The North Carolina Court of Appeals in State v. Stafford, 114 N.C. App. 101 (1994) ruled that a defendant may not collaterally attack prior DWI convictions on *Boykin* grounds when the convictions are offered to prove the offense of habitual impaired driving. The *Stafford* ruling is consistent with the *Custis* ruling, and it would also bar a defendant from collaterally attacking a prior conviction on *Boykin* grounds when the state seeks to use the conviction at sentencing or to impeach the defendant with that conviction. See State v. Muscia, 115 N.C. App. 498 (1994) (court ruled, relying on *Stafford*, that the defendant was properly denied collateral attack of a prior DWI conviction used in sentencing for a DWI offense). A defendant's remedy would be to directly attack the prior conviction (if it occurred in a North Carolina state court) by a motion for appropriate relief under G.S. 15A-1415 in the court where the conviction occurred.

For right-to-counsel violations, G.S. 15A-980 allows a defendant to collaterally attack a prior conviction that the state seeks to use for impeachment or sentencing purposes. Thus, North Carolina statutory law is consistent with federal constitutional law as described in *Custis*.

The North Carolina Court of Appeals has ruled that a defendant has the burden of proof when seeking to set aside a conviction on *Boykin* grounds. State v. Hester, 111 N.C. App. 110 (1993); State v. Bass, 133 N.C. App. 646 (1999) (defendant failed to meet burden of proof). And, G.S. 15A-980 specifically provides that a defendant has the burden of proof when seeking to set aside a conviction on right-to-counsel grounds.

Note that part of the court's opinion in State v. Creason, 123 N.C. App. 495 (1996) is inconsistent with the discussion above. To the extent it is inconsistent, it is of questionable validity.

A defendant may not collaterally attack a prior conviction based on allegation of ineffective assistance of counsel. State v. Hensley, 156 N.C. App. 634 (2003).]

State v. Fulp, 355 N.C. 171 (2002). The court ruled that the trial judge properly ruled that a prior conviction used in a habitual felon hearing was not obtained in violation of the defendant's right to counsel. The defendant did not meet his burden of proving by a preponderance of evidence that he had not waived his right to counsel—G.S. 15A-980(c). The court noted, citing State v. Heatwole, 344 N.C. 1 (1996), that a waiver of the right to counsel need not be in writing. G.S. 7A-457(a) ("may, in writing, waive") is directory, not mandatory. The court also stated that although a trial judge must consider the factors in G.S. 7A-457(a) in deciding whether a waiver of counsel is valid, the judge is not required to find and state that it considered those factors.

B. An uncounseled misdemeanor conviction, when only a fine is imposed, is valid for later use as a prior conviction. However, an uncounseled misdemeanor conviction is not valid

for such use if a suspended sentence or active sentence was imposed. *See* Alabama v. Shelton, 535 U.S. 654 (2002). The ruling in Nichols v. United States, 511 U.S. 738 (1994) (because an uncounseled misdemeanor conviction is constitutionally valid if a defendant does not receive an active sentence for that conviction, that conviction may constitutionally be used in a later proceeding, including a sentencing hearing), must be reconsidered in light of *Alabama v. Shelton.*

II. Constitutionality of Habitual Felon Law

North Carolina appellate courts have upheld the constitutionality of the habitual felon law. State v. Todd, 313 N.C. 110 (1985); State v. Smith, 112 N.C. App. 512 (1993).

III. Miscellaneous Issues

A. Manson is convicted of armed robbery (the offense was committed on October 15, 1994) and is found to be a violent habitual offender. He is sentenced to life imprisonment without parole. Manson argues it is a violation of the *ex post facto* clause to find him to be a violent habitual offender because the convictions establishing that status occurred before the October 1, 1994, effective date of the violent habitual offender law under which he was sentenced. Is it a violation of the *ex post facto* clause?

No. Courts have ruled that a sentence imposed as an habitual offender is an increased punishment for the current offense, not an additional punishment for the prior convictions. Gryger v. Burke, 334 U.S. 728 (1948); McDonald v. Massachusetts, 180 U.S. 311 (1901). See also State v. Todd, 313 N.C. 110 (1985); State v. Cobb, 18 N.C. App. 221 (1973), *reversed on other grounds*, 284 N.C. 573 (1974); State v. Smith, 139 N.C. App. 209 (2000).

B. Weldon is convicted of felonious breaking and entering for a crime committed on October 2, 1994. He has a 1989 conviction for assault with a deadly weapon with intent to kill inflicting serious injury, which was a Class F felony then and which is a Class C felony under SSA. As a result of SSA sentencing law [see G.S. 15A-1340.14(c)], the trial judge assesses 6 points (for a Class C felony) for the 1989 conviction. Weldon argues the legislature's classification of the 1989 conviction as a Class C felony for determining prior record level is a violation of the *ex post facto* clause. Is it a violation of the *ex post facto* clause?

No. State v. Mason, 126 N.C. App. 318 (1997). See also Covington v. Sullivan, 823 F.2d 37 (2d Cir. 1987) (no violation of *ex post facto* clause when defendant's predicate crime was reclassified as a violent felony after his first conviction but before the offense for which he was convicted and sentenced as a second violent felony offender); United States ex rel. Boney v. Godinez, 837 F. Supp. 268 (N.D. Ill. 1993).

C. It is a matter of legislative intent whether cumulative punishments for multiple offenses are permitted at a single trial.

Missouri v. Hunter, 459 U.S. 359 (1983). The defendant was convicted first-degree robbery and armed criminal action at a single trial in Missouri state court. The defendant was sentenced for each of these offenses. The elements of armed criminal action are the commission of a felony with a dangerous or deadly weapon, and all these elements are included in the offense of first-degree robbery. The Court ruled that when a legislature

specifically authorizes cumulative punishment under two statutes, regardless whether these two statutes proscribe the "same" conduct under the *Blockburger* test [Blockburger v. United States, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 2d 306 (1932)], there is no violation of the Double Jeopardy Clause of the Fifth Amendment.

HABITUAL FELON INDICTMENT **G.S. 14-7.1**
page one of two pages

[This form is to be used in preparing an indictment that alleges that the defendant is an habitual offender. Being an habitual offender is not a crime; it is a status. G.S. 14-7.6 provides that a defendant is to be sentenced as a Class C felon when convicted of a felony committed while the defendant is an habitual offender. **Do not use this form to charge a defendant with violent habitual offender status under G.S. 14-7.7. There is another indictment form available to charge that status.**]

The jurors for the State upon their oath present that (*name defendant*) is an habitual felon in that on or about (*give date the defendant committed felony*) (*name defendant*) did commit the felony of (*name felony and give statutory citation*) and that on or about (*give date the defendant was convicted of felony*) (*name defendant*) was convicted of the felony of (*name felony for which defendant was convicted and the court and state in which the defendant was convicted*); and that on or about (*give date the defendant committed felony*) (*name defendant*) did commit the felony of (*name felony and give statutory citation*) and that on or about (*give date the defendant was convicted of felony*) (*name defendant*) was convicted of the felony of (*name felony for which defendant was convicted and the court and state in which the defendant was convicted*); and that on or about (*give date the defendant committed felony*) (*name defendant*) did commit the felony of (*name felony and give statutory citation*) and that on or about (*give date the defendant was convicted of felony*) (*name defendant*) was convicted of the felony of (*name felony for which defendant was convicted and the court and state in which the defendant was convicted*).

Note:

To be an habitual felon, the defendant must have pled guilty or no contest to or have been convicted of *three* felonies *before* the commission of the felony with which the defendant is charged. Each of the three prior felonies must have been *committed* after the plea of guilty or no contest to or conviction of the one before it.

The North Carolina Supreme Court in State v. Patton, 342 N.C. App. 633 (1996) ruled that a separate habitual felon indictment is not required for each substantive felony indictment. One habitual felon indictment is sufficient.

Note (continued):

The North Carolina Supreme Court in State v. Cheek, 339 N.C. 725 (1995) ruled that a habitual felon indictment need not allege the predicate felony being tried.

Sample Indictment

The jurors for the State upon their oath present that James Peter Kenly is an habitual felon in that on or about June 1, 1982, James Peter Kenly did commit the felony of armed robbery in violation of G.S. 14-87 and that on or about January 12, 1983, James Peter Kenly was convicted of the felony of armed robbery in the Superior Court of Wilson County, North Carolina; and that on or about April 30, 1990, James Peter Kenly did commit the felony of felonious breaking and entering in violation of G.S. 14-54 and that on or about November 10, 1990, James Peter Kenly was convicted of felonious breaking and entering in the Superior Court of Cumberland County, North Carolina; and that on or about August 30, 1995, James Peter Kenly did commit the felony of felonious larceny in violation of G.S. 14-72 and that on or about December 12, 1995, James Peter Kenly was convicted of the felony of felonious larceny in the Superior Court of Sampson County, North Carolina.

Punishment:

If the defendant is convicted of a felony, and if the jury then finds (or the defendant pleads guilty to) in a separate proceeding that the defendant is an habitual felon, that conviction is punished as a Class C felony. If there is more than one felony conviction, each conviction is punished as a Class C felony. See State v. Thomas, 82 N.C. App. 682 (1986).

VIOLENT HABITUAL FELON INDICTMENT **G.S. 14-7.7**
page one of two pages

[This form is to be used in preparing an indictment that alleges that the defendant is a violent habitual offender. Being an habitual offender is not a crime; it is a status. G.S. 14-7.12 provides that a defendant is to be sentenced to life imprisonment without parole when convicted of a violent felony committed while the defendant is a violent habitual offender. **Do not use this form to charge a defendant with habitual offender status under G.S. 14-7.1. There is another indictment form available to charge that status.**]

The jurors for the State upon their oath present that (*name defendant*) is a violent habitual felon in that on or about (*give date the defendant committed felony*) (*name defendant*) did commit the violent felony of (*name felony and give statutory citation*) and that on or about (*give date the defendant was convicted of felony*) (*name defendant*) was convicted of the violent felony of (*name felony for which defendant was convicted and the court and state in which the defendant was convicted*); and that on or about (*give date the defendant committed felony*) (*name defendant*) did commit the violent felony of (*name felony and give statutory citation*) and that on or about (*give date the defendant was convicted of felony*) (*name defendant*) was convicted of the violent felony of (*name felony for which defendant was convicted and the court and state in which the defendant was convicted*).

Note

To be a violent habitual felon, the defendant must have pled guilty or no contest to or have been convicted of *two* violent felonies *before* the commission of the felony with which the defendant is charged. Each of the two prior violent felonies must have been *committed* after the plea of guilty or no contest to or conviction of the one before it.

For a definition of "violent felony" for violent felonies committed on or after May 1, 1994 until September 30, 1994, see the version of G.S. 14-7.7 applicable to those offenses. For a definition of "violent felony" for violent felonies committed on or after October 1, 1994, see the version of G.S. 14-7.7 applicable to those offenses.

The North Carolina Supreme Court in State v. Patton, 342 N.C. App. 633 (1996) ruled that a separate habitual felon indictment is not required for each substantive felony indictment. One habitual felon indictment is sufficient. This ruling would likely be applied to a violent habitual felon indictment.

Note (continued):

The North Carolina Supreme Court in State v. Cheek, 339 N.C. 725 (1995) ruled that an habitual felon indictment need not allege the predicate felony being tried. That ruling would likely be applied to a violent habitual felon indictment.

Sample Indictment

The jurors for the State upon their oath present that David Louis Smith is a violent habitual felon in that on or about July 5, 1982, David Louis Smith did commit the violent felony of armed robbery in violation of G.S. 14-87 and that on or about January 12, 1983, David Louis Smith was convicted of the violent felony of armed robbery in the Superior Court of Wilson County, North Carolina; and that on or about April 30, 1990, David Louis Smith did commit the violent felony of second-degree rape in violation of G.S. 14-27.3 and that on or about November 10, 1992, David Louis Smith was convicted of second-degree rape in the Superior Court of Cumberland County, North Carolina.

Punishment

If the defendant is convicted of a violent felony, and if the jury then finds (or the defendant pleads guilty to) in a separate proceeding that the defendant is a violent habitual felon, the punishment for that violent felony is life imprisonment without parole. If there is more than one violent felony conviction, each conviction is punished with life imprisonment without parole. See *State v. Thomas*, 82 N.C. App. 682 (1986) (this ruling, applicable to the habitual felon law, would appear to be equally applicable to the violent habitual felon law).

HABITUAL IMPAIRED DRIVING **G.S. 20-138.5**
page one of three pages

[Note: Use this form only for offenses committed on or after December 1, 2006.]

Charging Language for Arrest Warrant or Magistrate's Order only:

. . . unlawfully, willfully, and feloniously did drive a vehicle[1] on (*name or describe highway or public vehicular area*), a (*choose one*: highway;[2] public vehicular area[3]), while subject to an impairing substance[4] and, within ten years of the date of this offense, has been convicted of three or more offenses involving impaired driving.[5] The defendant has been previously convicted[6] on (1) (*name date of conviction, offense, and court in which conviction occurred*); (2) (*name date of conviction, offense, and court in which conviction occurred*); and (3) (*name date of conviction, offense, and court in which conviction occurred*).[7]

Charging Language for an Indictment or Information (see Note below):

First count in the indictment or information:

. . . unlawfully, willfully, and feloniously did drive a vehicle[1] on (*name or describe highway or public vehicular area*), a (*choose one*: highway;[2] public vehicular area[3]), while subject to an impairing substance.[4]

Second count in the indictment or information:

. . . ~~**unlawfully, willfully, and feloniously did**~~ within ten years of the date of this offense, has been convicted of three or more offenses involving impaired driving.[5] The defendant has been previously convicted on (1) (*name date of conviction, offense, and court in which conviction occurred*); (2) (*name date of conviction, offense, and court in which conviction occurred*); and (3) (*name date of conviction, offense, and court in which conviction occurred*).[7]

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1. "Vehicle" is defined in G.S. 20-4.01(49).

2. "Highway" is defined in G.S. 20-4.01(13).

3. "Public vehicular area" is defined in G.S. 20-4.01(32).

4. "Impairing substance" is defined in G.S. 20-4.01(14a).

5. "Offense involving impaired driving" is defined in G.S. 20-4.01(24a).

6. "Conviction" is defined in G.S. 20-4.01(4a). It includes, for example, out-of-state convictions. A conviction must have occurred within ten years of the date of the impaired driving offense.

7. More than three prior convictions may be alleged. It may be useful to do because if the state is unable to prove a particular prior conviction at trial, it may still be able to prove three other prior convictions alleged in the criminal pleading.

Note:

The misdemeanor offense of impaired driving, G.S. 20-138.1, is a lesser-included offense of habitual impaired driving. Therefore, it is not necessary to charge the misdemeanor offense when charging habitual impaired driving.

In alleging and proving prior convictions in superior court, a prosecutor must comply with G.S. 15A-928, which requires that an indictment or information for this kind of offense must allege prior convictions in either (1) a separate count of the indictment or information charging the substantive offense, or (2) in a separate indictment or information. Also, the title of the indictment or information must not include a reference to the prior convictions; therefore, the title probably should delete the reference to "habitual" in the name of the offense. The defendant on trial for this offense in superior court must be arraigned before the close of the state's evidence in the absence of the jury. If the defendant admits the prior convictions, proof of the convictions and jury instructions about this element are not permitted. If the defendant denies the prior convictions or a particular conviction, then the state has the burden of proving the conviction(s) before the jury.

Sample Charge (Arrest Warrant or Magistrate's Order only):

. . . **unlawfully, willfully, and feloniously did** drive a vehicle on U.S. 70, Raleigh, N.C., a highway, while subject to an impairing substance and, within ten years of the date of this offense, has been convicted of three or more offenses involving impaired driving. The defendant has been previously convicted on (1) April 1, 2000, of impaired driving in Durham County District Court; (2) March 6, 2001, of felony death by vehicle in Wake County Superior Court; and (3) January 4, 2003, of impaired driving in Durham County District Court.

Sample Charge (Indictment or Information only):

(First count of indictment or information)

. . . **unlawfully, willfully, and feloniously did** drive a vehicle on, U.S. 70 in Raleigh, N.C., a highway, while subject to an impairing substance.

(Second count of indictment or information)

. . . ~~**unlawfully, willfully, and feloniously did**~~ within ten years of the date of this offense, has been convicted of three or more offenses involving impaired driving. The defendant has been previously convicted on (1) April 1, 2000, of impaired driving in Durham County District Court; (2) March 6, 2001, of felony death by vehicle in Wake County Superior Court; and (3) January 4, 2003, of impaired driving in Durham County District Court.

Punishment:

Class F felony.

HABITUAL IMPAIRED DRIVING **G.S. 20-138.5**
page one of three pages

[Note: Use this form only for offenses committed before December 1, 2006.]

Charging Language for Arrest Warrant or Magistrate's Order only:

. . . **unlawfully, willfully, and feloniously did** drive a vehicle[1] on (*name or describe highway or public vehicular area*), a (*choose one*: highway;[2] public vehicular area[3]), while subject to an impairing substance[4] and, within seven years of the date of this offense, has been convicted of three or more offenses involving impaired driving.[5] The defendant has been previously convicted[6] on (1) (*name date of conviction, offense, and court in which conviction occurred*); (2) (*name date of conviction, offense, and court in which conviction occurred*); and (3) (*name date of conviction, offense, and court in which conviction occurred*).[7]

Charging Language for an Indictment or Information (see Note below):

First count in the indictment or information:

. . . **unlawfully, willfully, and feloniously did** drive a vehicle[1] on (*name or describe highway or public vehicular area*), a (*choose one*: highway;[2] public vehicular area[3]), while subject to an impairing substance.[4]

Second count in the indictment or information:

. . . ~~**unlawfully, willfully, and feloniously did**~~ within seven years of the date of this offense, has been convicted of three or more offenses involving impaired driving.[5] The defendant has been previously convicted on (1) (*name date of conviction, offense, and court in which conviction occurred*); (2) (*name date of conviction, offense, and court in which conviction occurred*); and (3) (*name date of conviction, offense, and court in which conviction occurred*).[7]

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1. "Vehicle" is defined in G.S. 20-4.01(49).

2. "Highway" is defined in G.S. 20-4.01(13).

3. "Public vehicular area" is defined in G.S. 20-4.01(32).

4. "Impairing substance" is defined in G.S. 20-4.01(14a).

5. "Offense involving impaired driving" is defined in G.S. 20-4.01(24a).

6. "Conviction" is defined in G.S. 20-4.01(4a). It includes, for example, out-of-state convictions. A conviction must have occurred within seven years of the date of the impaired driving offense.

7. More than three prior convictions may be alleged. It may be useful to do because if the state is unable to prove a particular prior conviction at trial, it may still be able to prove three other prior convictions alleged in the criminal pleading.

Note:

The misdemeanor offense of impaired driving, G.S. 20-138.1, is a lesser-included offense of habitual impaired driving. Therefore, it is not necessary to charge the misdemeanor offense when charging habitual impaired driving.

In alleging and proving prior convictions in superior court, a prosecutor must comply with G.S. 15A-928, which requires that an indictment or information for this kind of offense must allege prior convictions in either (1) a separate count of the indictment or information charging the substantive offense, or (2) in a separate indictment or information. Also, the title of the indictment or information must not include a reference to the prior convictions; therefore, the title probably should delete the reference to "habitual" in the name of the offense. The defendant on trial for this offense in superior court must be arraigned before the close of the state's evidence in the absence of the jury. If the defendant admits the prior convictions, proof of the convictions and jury instructions about this element are not permitted. If the defendant denies the prior convictions or a particular conviction, then the state has the burden of proving the conviction(s) before the jury.

Sample Charge (Arrest Warrant or Magistrate's Order only):

. . . **unlawfully, willfully, and feloniously did** drive a vehicle on U.S. 70, Raleigh, N.C., a highway, while subject to an impairing substance and, within seven years of the date of this offense, has been convicted of three or more offenses involving impaired driving. The defendant has been previously convicted on (1) April 1, 2001, of impaired driving in Durham County District Court; (2) March 6, 2002, of felony death by vehicle in Wake County Superior Court; and (3) January 4, 2003, of impaired driving in Durham County District Court.

Sample Charge (Indictment or Information only):

(First count of indictment or information)

. . . **unlawfully, willfully, and feloniously did** drive a vehicle on, U.S. 70 in Raleigh, N.C., a highway, while subject to an impairing substance.

(Second count of indictment or information)

. . . ~~**unlawfully, willfully, and feloniously did**~~ within seven years of the date of this offense, has been convicted of three or more offenses involving impaired driving. The defendant has been previously convicted on (1) April 1, 2001, of impaired driving in Durham County District Court; (2) March 6, 2002, of felony death by vehicle in Wake County Superior Court; and (3) January 4, 2003, of impaired driving in Durham County District Court.

Punishment:

Class F felony.

HABITUAL MISDEMEANOR ASSAULT **G.S. 14-33.2**
page one of three pages

I. Charging Language for an Arrest Warrant or Magistrate's Order only:

. . . unlawfully, willfully, and feloniously did (*insert proper charging language of a violation of G.S. 14-33 or G.S. 14-34).*[1] This assault caused physical injury to the victim, [*describe injury*].[2]

The defendant has been previously convicted of two or more felony or misdemeanor assault offenses. The defendant has been previously convicted of the [*choose one*: misdemeanor; felony] assault of (*name offense*) on (*give date*) in (*name court*). The defendant has been previously convicted of the [*choose one*: misdemeanor; felony] assault of (*name offense*) on (*give date*) in (*name court*).[3] The earlier of these convictions occurred no more than 15 years prior to the date of current violation.

II. Charging Language for an Indictment or Information (see Note below):

(First count of the indictment or information)

. . . unlawfully, willfully, and feloniously did (*insert proper charging language of a violation of G.S. 14-33 or G.S. 14-34).*[1] This assault caused physical injury to the victim, [*describe injury*].[2]

(Second count of the indictment or information)

The defendant has been previously convicted of two or more felony or misdemeanor assault offenses. The defendant has been previously convicted of the [*choose one*: misdemeanor; felony] assault of (*name offense*) on (*give date*) in (*name court*). The defendant has been previously convicted of the [*choose one*: misdemeanor; felony] assault of (*name offense*) on (*give*

date) in (*name court*).[3] The earlier of these convictions occurred no more than 15 years prior to the date of current violation.

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1. Violations of G.S. 14-33 include: simple assault; simple affray; assault on a sports official; assault inflicting serious injury; assault with a deadly weapon; assault on a female by a male at least 18 years old; assault on a child under 12; assault on a government officer or employee; assault on school personnel; assault on public transit operator; and assault in the presence of a minor. A violation of G.S. 14-34 is assault by pointing a gun.

2. The allegation that the assault caused physical injury is not required if charging a violation of G.S. 14-34 (assault by pointing a gun).

3. More than two misdemeanor or felony assault convictions may be alleged even though only two convictions must be proved at trial.

Note:

This charging form reflects legislative changes that were effective for habitual misdemeanor assault offenses committed on or after December 1, 2004.

A conviction of habitual misdemeanor assault may not be used for any other habitual offense statute, such as habitual felon under Article 2 of General Statutes Chapter 14.

In alleging and proving prior convictions in superior court, a prosecutor must comply with G.S. 15A-928, which requires that an indictment or information for this kind of offense must allege prior convictions in either (1) a separate count of the indictment or information charging the substantive offense, or (2) in a separate indictment or information. Also, the title of the indictment or information must not include a reference to the prior convictions—it is unclear whether the reference to "habitual" in the name of the offense needs to be deleted. The defendant on trial for this offense in superior court must be arraigned before the close of the state's evidence in the absence of the jury. If the defendant admits the prior convictions, proof of the convictions and jury instructions about this element are not permitted. If the defendant denies the prior convictions or a particular conviction, then the state has the burden of proving the conviction(s) before the jury.

Sample Charge (Arrest Warrant or Magistrate's Order only):

. . . unlawfully, willfully, and feloniously did assault and strike Susan Riggins, a female person, by throwing an empty whiskey bottle and hitting her on the left shoulder. The defendant is a male person and was at least 18 years of age when the assault and striking occurred. This assault caused physical injury to the victim, bruises on her left shoulder. The defendant has been previously convicted of two or more felony or misdemeanor assault offenses. The defendant has been previously convicted of misdemeanor assault of assault on a female on October 14, 2003, in Wake County District Court. The defendant has been previously convicted of misdemeanor assault of assault on a female on December 13, 2004, in Wake County District Court. The earlier of these convictions occurred no more than 15 years prior to the date of current violation.

Sample Charge (Indictment or Information only):

(First count of indictment or information)

. . . unlawfully, willfully, and feloniously did assault and strike Susan Riggins, a female person, by throwing an empty whiskey bottle and hitting her on the left shoulder. The defendant is a male person and was at least 18 years of age when the assault and striking occurred. This assault caused physical injury to the victim, bruises on her left shoulder.

(Second count of indictment or information)

The defendant has been previously convicted of two or more felony or misdemeanor assault offenses. The defendant has been previously convicted of misdemeanor assault of assault on a female on October 14, 2003, in Wake County District Court. The defendant has been previously convicted of misdemeanor assault of assault on a female on December 13, 2004, in Wake County District Court. The earlier of these convictions occurred no more than 15 years prior to the date of current violation.

Punishment:

Class H felony.

Possession of Firearm by Felon

I. Statute: G.S. 14-415.1

II. Elements (as of 2006)

For a detailed discussion of this offense, see the current edition (and supplement, if available) of *North Carolina Crimes: A Guidebook on the Elements of Crime*, published by the Institute of Government.

A person guilty of this offense

1. has been previously convicted of:

   (a) a felony in North Carolina, *or*

   (b) a violation of the criminal law of another state or the United States for an offense substantially similar to one in subdivision (a) of G.S. 14-415.1 and carrying a maximum punishment of more than one year imprisonment, *and*

2. purchases, owns, possesses, or has in his or her custody, care, or control

3. any firearm or any weapon of mass destruction.

III. Punishment (as of 2006)

Class G felony.

IV. Lesser-Included Offenses

None.

V. Indictment Issues

A. Special statutory pleading requirements

1. Under G.S. 14-415.1(c), an indictment charging this offense may not charge any other offense. This subsection also requires specific information to be alleged concerning the prior felony conviction that prohibited the defendant from possessing a firearm. For charging language, see the current edition (and supplement, if available) of *Arrest Warrant and Indictment Forms*, published by the Institute of Government.

   Sample cases:

   State v. Inman, 174 N.C. App. 567 (2005) (indictment was not fatally defective when it failed to allege date of felony conviction).

State v. Boston, 165 N.C. App. 214 (2004) (indictment was not fatally defective when it failed to allege punishment imposed for felony conviction).

State v. Bishop, 119 N.C. App. 695 (1995) (indictment was not fatally defective when it failed to allege Florida felony conviction was "substantially similar" to North Carolina offense).

B. Fatal variance; retrial after dismissal for fatal variance

Sample cases:

State v. Langley, 173 N.C. App. 194 (2005) (there was fatal variance when indictment alleged handgun as weapon when evidence showed that weapon was sawed-off shotgun).

State v. Mason, 174 N.C. App. 206 (2005) (double jeopardy did not bar retrial after North Carolina Court of Appeals had reversed original conviction based on fatal variance; indictment had alleged felony conviction as possession with intent to sell and deliver a counterfeit controlled substance and evidence at trial had showed conviction as sale and delivery of counterfeit controlled substance).

VI. Trial Issues

A. Joinder of offenses for trial

Sample cases:

State v. Cromartie, 177 N.C. App. 73 (2006) (no error when judge granted state's motion to join for trial charges of possession of firearm by felon and felonious assault arising from same transaction).

State v. Floyd, 148 N.C. App. 290 (2002) (no error in joining for trial multiple offenses, which included possession of firearm by felon).

State v. Hardy, 67 N.C. App. 122 (1984) (no error in joining for trial possession of firearm by felon and multiple charges, including breaking or entering and larceny, when there was transactional connection of all offenses; statutory requirement of separate indictment for possession of firearm by felon does not bar joinder of offenses).

B. Proving possession of firearm

Sample cases:

Sufficient Evidence

State v. Barksdale, ___ N.C. App. ___, 638 S.E.2d 579 (2 January 2007) (sufficient evidence of possession of firearm when defendant struggled with law

enforcement officers on the ground and reached for handgun that was six inches from his left hand).

State v. Leach, 166 N.C. App. 711 (2004) [sufficient evidence of possession of firearm when during officers' chase of defendant's van (defendant was sole occupant) an officer saw an object coming out of the van and sparks flew when object hit ground, and firearm was recovered within minutes from nearby roadside].

State v. Clark, 159 N.C. App. 520 (2003) (sufficient evidence of possession of firearm when officer saw handle of .38 derringer protruding under driver's seat and defendant was driver).

State v. Glasco, 160 N.C. App. 150 (2003) (sufficient evidence of possession of firearm when AK-47 was found hidden beside backyard shed where defendant had been seen).

State v. Boyd, 154 N.C. App. 302 (2002) (sufficient evidence of possession of firearm when handgun was found under passenger seat and defendant had been sitting there).

State v. Walker, 154 N.C. App. 645 (2002) (sufficient evidence of possession of firearm based on firearm possessed by accomplice during break-in and armed robbery; defendant constructively possessed firearm by acting in concert with accomplice).

Insufficient Evidence

State v. Alston, 131 N.C. App. 514 (1998) (insufficient evidence of possession of firearm when defendant was front seat passenger in car driven by wife, .22 caliber pistol was on transmission console located between driver's and passenger's seat, and pistol was purchased by and registered to wife).

C. What constitutes felony conviction

1. No contest plea constitutes a conviction. *State v. Watts*, 72 N.C. App. 661 (1985).

2. Guilty plea to felony and entry of PJC constitutes a conviction. *Friend v. State*, 169 N.C. App. 99 (2005).

D. Defendant's offer to stipulate to felony conviction

North Carolina appellate courts have not definitively ruled whether a defendant's offer to stipulate to the felony conviction bars the state from offering evidence to prove the felony conviction before the jury. See the sample case discussed below.

Sample case:

State v. Jackson, 139 N.C. App. 721 (2000), *reversed on other grounds*, 353 N.C. 495 (2001) [court found no plain error when trial judge rejected defendant's

tendered stipulation of felony conviction that constituted element of possession of firearm by felon; court did not decide whether the ruling in Old Chief v. United States, 519 U.S. 172 (1997) (trial judge abused discretion in federal firearm prosecution in not accepting defendant's tendered stipulation to prior conviction, based on facts in that case) applied to a prosecution under G.S. 14-415.1].

E. Judge, not jury, determines whether out-of-state felony conviction was "substantially similar" to North Carolina offense

State v. Bishop, 119 N.C. App. 695 (1995). The *Bishop* ruling does not appear to be adversely affected by *Blakely v. Washington*, 542 U.S. 296 (2004). See *State v. Hadden*, 175 N.C. App. 492 (2006) [court ruled, distinguishing *Shepard v. United States*, 544 U.S. 13 (2005), that the defendant did not have right to jury trial under *Blakely v. Washington*, 542 U.S. 296 (2004), concerning the findings of prior convictions in determining the defendant's prior record level or that the defendant's out-of-state convictions were substantially similar to offenses under North Carolina law].

F. Defenses or Scope of Offense

1. Inoperability of firearm is not a defense

State v. McCree, 160 N.C. App. 200 (2003); *State v. Jackson*, 353 N.C. 495 (2001).

2. Necessity or duress defense

North Carolina appellate courts have not definitively ruled whether a defendant may present a necessity or duress defense (see cases from other jurisdictions discussed in the sample cases below). The cases have assumed without deciding that such a defense exists and then ruled that the evidence was insufficient to support a defense.

Sample cases:

State v. Craig, 167 N.C. App. 793 (2005) (defendant was not entitled to the jury instruction on duress; the court noted that the uncontroverted evidence showed that the defendant continued to possess the firearm when he was no longer under any imminent threat of harm).

State v. Boston, 165 N.C. App. 214 (2004) (no evidence to support conclusion that defendant was under an imminent threat of death or injury when he made decision to carry gun).

State v. Napier, 149 N.C. App. 462 (2002) (court, without deciding whether necessity defense exists for possession of firearm by felon, ruled that defendant offered insufficient evidence of defense; he did not show that he was under a present or imminent threat of death or serious bodily injury to justify his going to another's property with his firearm).

3. Defendant may possess antique firearm

   See the last sentence in G.S. 14-415.1(a).

4. G.S. 14-415.1 no longer permits a felon to possess a firearm in his or her home or place of business, which was permitted under prior versions of the statute.

V. Constitutional Issues

A. Double jeopardy

State v. Crump, ___ N.C. App. ___, 632 S.E.2d 233 (1 August 2006) (no double jeopardy violation when state obtained conviction of possessing firearm by felon for possessing firearm in 2003 and conviction of habitual felon status, and 1998 conviction of possessing firearm by felon was used as underlying felony to prove 2003 offense, and 1998 offense also was one of three felony convictions used to prove habitual felon status).

State v. Crump, ___ N.C. App. ___, 632 S.E.2d 233 (1 August 2006) (no double jeopardy violation when state obtained conviction for possessing firearm by felon for possessing firearm in 2003, and 1991 cocaine conviction was used as underlying felony for 1998 offense, which then was used to prove 2003 offense).

State v. Mason, 174 N.C. App. 206 (2005) (double jeopardy did not bar retrial after defendant was granted new trial by appellate court on ground that there was fatal variance between indictment's allegations and evidence offered at trial).

State v. Glasco, 160 N.C. App. 150 (2003) (no double jeopardy violation when state used felony conviction to support conviction of possession of firearm by felon and used that same felony conviction to support finding of habitual felon status).

B. Ex post facto

State v. Johnson, 169 N.C. App. 301 (2005) (defendant's conviction of possessing firearm by felon did not violate Ex Post Facto Clause and other constitutional provisions when he was convicted of a felony in 1983, his right to possess a firearm was restored before a 1995 amendment to G.S. 14-415.1 again barred him from possessing a handgun, and he possessed a handgun in 2001).

United States v. Farrow, 364 F.3d 551 (4th Cir. 2004) (amendment of North Carolina's Felony Firearms Act, replacing five-year handgun disability following general restoration of civil rights with permanent ban, did not render Act punitive rather than regulatory, and thus no ex post facto violation had occurred).

VI. Sentencing

North Carolina appellate courts have not directly addressed in a published opinion whether the felony conviction used to prove the defendant's disability to possess a firearm may be used as points in the calculation of the defendant's prior record level.

The court in *State v. Moore*, 172 N.C. App. 593, 616 S.E.2d 691 (16 August 2005), an unpublished opinion, noted as without merit the defendant's argument that double jeopardy barred the use of the felony conviction in such a manner. See Rule 30(e)(3) of the Rules of Appellate Procedure concerning when and how unpublished opinions may be used by a party. However, on the non-constitutional issue concerning the use of the conviction, see cases that may be relevant: *State v. Gentry*, 135 N.C. App. 107 (1999) (impaired driving convictions used to prove offense of habitual impaired driving may not be used to calculate defendant's prior record level), and *State v. Harrison*, 165 N.C. App. 332 (2004) (2004) (felony conviction triggering requirement that defendant register as sex offender was properly used to determine defendant's prior record level).

VII. Related offenses

G.S. 14-415.3 (prohibiting possession of firearm or weapon of mass destruction by defendant acquitted of certain crimes by reason of insanity or determined to be incapable to proceed).

G.S. 50B-3.1 (prohibiting under certain circumstances possession and purchase of firearm when defendant is subject to domestic violence protective order). See also G.S. 14-269.8 (same offense as in G.S. 50B-3.1).

VIII. Federal criminal law prohibiting possession of firearms

See the discussion in the current edition (and supplement, if available) of *North Carolina Crimes: A Guidebook on the Elements of Crime*, published by the Institute of Government.

See a related case: *State v. Oaks*, 163 N.C. App. 719 (2004) [court affirmed trial judge's order requiring destruction of defendant's firearms under G.S. 15-11.1(b1), based on finding that defendant was unlawful user of marijuana and thus prohibited by federal law from possessing firearms].