Criminal Case Law Update

Covering significant cases for trial judges, decided June 4, 2019 to October 3, 2019. Summaries were prepared by Shea Denning, Phil Dixon, Jonathan Holbrook, Jamie Markham, John Rubin, Jessica Smith, Christopher Tyner, and Jeff Welty.

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Contents

Criminal Procedure

Arraignment

1. **State v. Edgerton**, ___N.C. App. ___, ___ S.E.2d ___ (Aug. 6, 2019).

In a habitual larceny case, the defendant was not prejudiced by the trial court's failure to formally arraign him on the special indictment alleging prior larceny convictions.

In this habitual larceny case where the defendant was sentenced as a habitual felon, the defendant was not prejudiced by the trial court's failure to formally arraign him on the indictment alleging the prior convictions. G.S. 15A-928 mandates that in cases where a previous conviction elevates a later offense to a higher grade a trial judge must arraign a defendant on the special indictment that alleges the prior convictions. Because it is a statutory mandate, a trial judge's failure to so arraign a defendant automatically is preserved for appellate review regardless of whether the defendant objects at trial. Reviewing the record, including the fact of the stipulation to the convictions, the court concluded that the defendant was not prejudiced by the trial court's error.

Bond Forfeiture

2. **State v. Ortiz**, ___ N.C. App. ___, ___ S.E.2d ___ (Aug. 6, 2019).

G.S. 15A-544.5 is the exclusive avenue of relief from a bond forfeiture that has not yet become a final judgment and thus the trial court erred by granting relief in reliance on G.S. 15A-301.

In this bond forfeiture case, the trial court erred by granting the sureties relief from a bond forfeiture before the date of the forfeited bond's final judgment. The court first determined that the Board of Education's appeal of the trial court's grant of relief was timely as it was filed two days after the trial court's entry of final judgment on the sureties' motion to strike the forfeited bond, which, the court concluded, occurred upon the entry of the trial court's written order granting relief rather than upon an earlier oral ruling. Turning to the merits, the court held that because G.S. 15A-544.5 is the exclusive avenue of relief from a bond forfeiture where the forfeiture has not yet become a final judgment, the trial court erred by granting relief under G.S. 15A-301, a statute that grants judicial officials the authority to recall criminal process in certain circumstances. By its terms, G.S. 15A-544.5 clearly and unambiguously instructs that it is the exclusive avenue of relief from a bond forfeiture that has not yet become a final judgment. The trial court's order specifically stated that none of the seven reasons for setting aside a forfeiture enumerated in G.S. 15A-544.5 existed in this case, and it was error to rely on G.S. 15A-301 as an alternative source of authority.

Capacity to Proceed and Related Issues

3. **State v. Williams**, __ N.C. App. __, __ S.E.2d __ (Oct. 1, 2019).

When an incompetent defendant responded to treatment and regained competency, the trial court did not err by declaring him competent based on updated psychological evaluations, a

joint motion from the state and defense, and the defendant's demonstrated ability to understand the proceedings and assist in his own defense; the trial court was not required to conduct another competency hearing sua sponte.

In 2007, the defendant shot and killed one victim, a family friend, and seriously injured a second victim, his mother. After he was arrested and charged with murder and attempted murder, the defendant was evaluated and found to be suffering from paranoid schizophrenia and substance abuse disorder, rendering him unable to assist in his own defense and incompetent to stand trial. The state dismissed the charges with leave to reinstate. The defendant was re-evaluated by two doctors in 2015 and 2016, and both doctors concluded that the defendant had substantially improved in response to medication and treatment and was now competent to proceed. Based on the new evaluations and a joint motion from the defense and the state, the court declared the defendant competent. The state reinstated the criminal charges and the defendant proceeded to trial, where he was convicted of murder and attempted murder. On appeal, the defense argued that the trial court erred by not ordering another competency assessment *sua sponte*, in light of the defendant's history and mental condition. Based on the record as a whole, the Court of Appeals held that the trial court did not err. Although the defendant still appeared to hold a number of delusional beliefs, "irrational beliefs and nonsensible positions" do not, by themselves, raise a bona fide doubt about competency. The trial court heard testimony from two doctors opining that the defendant was competent, and the defendant demonstrated that he was able to confer with his counsel, assist in his defense, engage in colloquies with the court on legal issues, make a knowing and voluntary waiver of his right to remain silent, and testify "lucidly and at length on his own behalf." Therefore, the defense failed to demonstrate that there was substantial evidence he was incompetent during the trial, and the trial court did not err by declining to order another competency hearing *sua sponte*.

4. **State v. Sides**, __ N.C. App. __, __ S.E.2d __ (Oct. 1, 2019).

A defendant who attempted suicide during trial and was held for an involuntary commitment evaluation was voluntarily absent by her own action, waiving her right to be present. The trial could continue in her absence, and the court was not required to order a competency evaluation sua sponte. Trial court also did not err by amending judgments in defendant's absence to correct clerical errors that did not change the sentence.

After the third day of her embezzlement trial, the defendant took 60 Xanax pills in apparent intentional overdose and suicide attempt. The defendant was taken for an involuntary commitment evaluation and the trial was postponed until the following week. When the trial resumed, the defendant was still in the hospital for evaluation and treatment. Over the defendant's objection, the trial judge ruled that pursuant to *State v. Minyard*, 231 N.C. App. 605 (2014), the defendant was voluntarily absent by her own actions and the trial would continue. The defense made a pro forma motion to dismiss at the close of the state's evidence, but not on the grounds of either her absence or her competency. The defendant was convicted of three counts of embezzlement and sentenced a few days later when she returned to court. The judgments were later amended, again in the defendant's absence, to correct a clerical error regarding the offense dates.

On appeal, the defense argued that the trial court erred by failing to order a competency hearing *sua sponte* after the defendant's apparent suicide attempt. The Court of Appeals disagreed and held that it was not error to continue the trial in the defendant's absence or decline to order a competency hearing. Under *Minyard*, the defendant was voluntarily absent and thus waived her right to be present for trial; the fact that it may have been an attempted suicide does not change that analysis. The court is only required to examine competency *sua sponte* if there is substantial evidence before it that defendant may be incompetent. Based on a review of the record as a whole, the appellate court was not persuaded that the defendant's suicide attempt was a result of mental illness rather than a voluntary act intended to avoid facing prison. The Court of Appeals further held that it was not error to amend the judgments in defendant's absence. The changes only corrected clerical errors and did not change the sentences actually imposed, so the defendant did not have to be present.

5. **State v. Hollars**, ___ N.C. App. ___, ___ S.E.2d ___ (Aug. 6, 2019), *temp. stay allowed*, ___ N.C. ___, 831 S.E.2d 92 (Aug. 21, 2019).

The trial court erred by failing to conduct a competency hearing sua sponte where substantial evidence raised a bona fide doubt as to the defendant's competency.

In this indecent liberties and sex offense case, the court held, over a dissent, that the trial court erred by failing to hold a competency hearing sua sponte immediately prior to or during the defendant's trial. Where there is substantial evidence before the trial court that raises a bona fide doubt as to a defendant's competency, the trial court has a constitutional duty to conduct a competency hearing. Under the court's precedent, evidence of a defendant's irrational behavior, his demeanor at trial, and any prior medical opinion on competence to stand trial are all relevant to a bona fide doubt inquiry. The defendant's numerable prior forensic evaluations indicated that he suffered from a range of diagnosed mental health disorders, and other medical evidence suggested that the defendant's mental stability could drastically deteriorate over a brief period of time. There was a five-month gap between the defendant's competency hearing and his trial. At trial, the defendant's counsel raised the issue of the defendant's competency with the trial court after becoming concerned due to his behavior, but the trial court did not thereafter engage in an extended colloquy with the defendant to explore this concern. Under the totality of the circumstances, this evidence gave rise to a bona fide doubt regarding the defendant's competency. A dissenting judge would have held that there was no bona fide doubt as to the defendant's competency, noting, among other things, that there was no evidence in the record of irrational behavior or change in demeanor by the defendant during trial and faulting the majority for resting its reasoning "almost entirely on [the defendant's] prior competency evaluations."

Counsel Issues

6. **State v. Ryan**, __ N.C. __, __ S.E.2d __ (Sept. 27, 2019).

Defendant received ineffective assistance of counsel when his attorney failed to adequately dispute the state's DNA evidence or call witnesses who could have supported his alibi and impeached other witnesses. In a 3-3 per curiam decision, the trial court's order granting

defendant's MAR and vacating his convictions for murder and armed robbery on the basis of ineffective assistance of counsel was not disturbed.

After a hung jury and mistrial in 2009, the defendant was convicted of first-degree murder and robbery with a dangerous weapon in 2010 and sentenced to death. Defendant appealed, but the case was remanded to the trial court to resolve the defendant's post-conviction motions, including a motion for appropriate relief ("MAR") alleging ineffective assistance of counsel. After conducting a hearing on the MAR, the trial court found that the defendant received ineffective assistance of counsel and ordered the convictions vacated. In its written order, the trial court found that the state's DNA expert "failed to follow scientific protocol and included scientifically invalid interpretations of DNA samples," and defendant's counsel was deficient for failing to obtain an expert to assist him in cross-examining the state's expert and presenting a contrary interpretation. Additionally, the trial court found that defendant's counsel was deficient for failing to call three witnesses who could have testified in support of defendant's alibi or impeached other witnesses. The defense witnesses also could have testified that they were "threatened…with criminal charges if they testified in criminal court in accordance with their out of court statements," a fact that "should have been brought to the attention of the trial court and the jury." The state appealed the order granting the MAR, and argued that the trial court: (i) made findings in its order that were not supported by the evidence developed at the hearing; (ii) overstated the significance of the flawed DNA evidence in light of other evidence of the defendant's guilt; and (iii) misapplied the standard for evaluating ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668 (1984), which requires showing that counsel's performance "fell below an objective standard of reasonableness" as well as "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."

In a per curiam decision, three justices voted to affirm the order granting the MAR and three justices voted to reverse it. (Justice Ervin did not participate in the decision.) As a result, the superior court's order granting the MAR and vacating the defendant's conviction is undisturbed, but stands without precedential value.

7. **State v. Goodwin**, ___ N.C. App. ___, ___ S.E.2d ___ (Sept. 17, 2019).

Trial judge's denial of defendant's request to replace appointed counsel with retained counsel was structural error where trial judge analyzed the issue as a matter of effective assistance rather than the defendant's right to the counsel of his choice.

The defendant was charged with drug offenses. A lawyer was appointed to represent him. Immediately before trial, the defendant stated that he wanted to hire a lawyer instead and could afford to do so. A superior court judge determined that appointed counsel was providing effective assistance and denied the defendant's request to retain counsel. The court of appeals found this to be structural error, as the issue was not whether the defendant was receiving effective assistance or was at an absolute impasse with his attorney, but whether he should be allowed the attorney of his choice. The court stated that "when a trial court is faced with a Defendant's request to substitute his court appointed counsel for the private counsel of his choosing, it may only deny that request if granting it would cause significant prejudice or a

disruption in the orderly process of justice." The court noted that a last-minute request to change lawyers may cause such prejudice or disruption, but the trial judge did not make any such finding in this case as a result of analyzing the issue under the incorrect standard.

8. **State v. Mahatha**, ___ N.C. App. ___, ___ S.E.2d ___ (Sept. 3, 2019).

Waiver of counsel was not knowing, voluntary, and understanding where trial judge erroneously advised the defendant about the maximum punishments for the charges.

The defendant was charged with driving while license revoked, not an impaired revocation; assault on a female; possession of a firearm by a person previously convicted of a felony; attempted robbery with a dangerous weapon; and habitual felon status. The State proceeded to trial on the charges of speeding to elude arrest and attaining habitual felon status, dismissing the other charges. The defendant was found guilty of both, and the trial judge sentenced the defendant to 97 to 129 months' imprisonment.

The defendant argued that that the trial judge failed to comply with the statutory mandate of G.S. 15A-1242 before allowing the defendant to represent himself. The Court of Appeals agreed, finding that the trial judge failed to inform the defendant of the nature of the charges and proceedings and the range of permissible punishments. The trial court erroneously informed the defendant that: obtaining the status of habitual felon is a Class D felony when being a habitual felon is a status, not a crime; erroneously indicated that the defendant faced a maximum possible sentence of 47 months for possession of a firearm by a person previously convicted of a felony when he faced a maximum of 231 months if determined to be a habitual felon; failed to inform the defendant of the maximum prison term of 231 months for the attempted robbery with a dangerous weapon if he were determined to be a habitual felon; erroneously referred to the speeding to elude arrest as fleeing to elude arrest and failed to inform the defendant that the habitualized maximum was 204 months; and asked the defendant whether he understood that he could face 231 months when he could actually have faced 666 months and 170 days. The Court of Appeals concluded that the defendant's waiver of counsel was not knowing, intelligent, or voluntary and vacated his convictions and remanded for a new trial.

9. **State v. Edgerton**, ___ N.C. App. ___, ___ S.E.2d ___ (Aug. 6, 2019).

Defendant did not establish that his trial counsel lacked authority to stipulate to the prior convictions used to elevate his charge to habitual larceny.

In this habitual larceny case where the defendant was sentenced as a habitual felon, the defendant did not establish that his trial counsel did not have authority to stipulate to the prior convictions used to elevate his charge to habitual larceny. Noting that in other contexts it had expressly rejected attempts to analogize counsel's stipulation of a prior conviction to counsel's entry of a guilty plea or admission of a defendant's guilt to a jury, the latter being decisions which must be made exclusively by the defendant, the court likewise rejected the defendant's analogy in this case. Citing a prior decision, the court explained that a defendant's attorney may stipulate to an element of a charged crime and that an attorney is presumed to have the authority to act on behalf of his or her client during trial, including while stipulating to elements. The record in this

case did not show that the defendant's attorney acted without his authority with regard to the stipulation.

Dismissal of Charges

10. **State. v. Courtney**, ___ N.C. ___, 831 S.E.2d 260 (Aug. 16, 2019).

Jeopardy continues after a mistrial, and the State's entry of a voluntary dismissal under G.S. 15A-931 after jeopardy has attached terminates jeopardy in the defendant's favor, regardless of the reason the State gives for entering the dismissal.

On discretionary review of a unanimous decision of the Court of Appeals, ___ N.C. App. ___ (2018), the court affirmed the Court of Appeals' decision vacating the defendant's conviction on double jeopardy grounds. In this murder case, the defendant's first trial ended in a mistrial due to a deadlocked jury. After two status hearings, the State entered a dismissal on form AOC-CR-307, checking the "dismissal" box and writing "hung jury, state has elected not to re-try case" on the form. Several years later, the discovery of additional evidence led to the defendant being re-indicted. The defendant's motion to dismiss on double jeopardy grounds was denied and the defendant was convicted of second-degree murder.

On appeal, the Supreme Court applied a two-pronged analysis to evaluate the defendant's double jeopardy claim: (1) did jeopardy attach, and (2) if so, did the proceeding end in such a manner that the Double Jeopardy Clause bars his retrial. As to the first prong, the court said jeopardy clearly attached when the first jury was empaneled and sworn. Further, under *Richardson v. United States*, 468 U.S. 317 (1984), jeopardy continued following the mistrial. The court rejected the State's argument that mistrial created a legal fiction under which jeopardy is deemed never to have attached at the first trial, and that there was thus no jeopardy to terminate at the time the State dismissed the initial charge. To the contrary, the court read *Richardson* as contemplating a "continuing jeopardy doctrine," where jeopardy continued from its initial attachment in the first trial through the end of the case. As to the second prong of the analysis, the court concluded that the State's dismissal of the charge under G.S. 15A-931 was binding on the State and tantamount to an acquittal, and that it was thus a jeopardy-terminating event for double jeopardy purposes. As a result, the defendant's second trial was barred by double jeopardy, and the Supreme Court affirmed the Court of Appeals' decision vacating it.

Justice Newby authored a dissent, joined by Justice Ervin, which would have concluded under State v. Tyson, 138 N.C. 627, 629 (1905), that the mistrial returned the case to pretrial status where the State could dismiss the charge without prejudice. The majority's rule, the dissent argued, "places the State in the impossible position of choosing to proceed to a new trial with what one jury deemed insufficient evidence or lose any opportunity to hold the defendant accountable for the crime."

Double Jeopardy

11. **Gamble v. United States**, 587 U.S. ___, 139 S. Ct. 1960 (June 17, 2019).

Refusing to overturn the dual-sovereignty doctrine, the Court held that the defendant's federal prosecution for felon in possession did not violate double jeopardy despite the fact that he had been previously convicted for the same instance of possession under state law.

Citing the text of the Double Jeopardy Clause of the Fifth Amendment, historical evidence, and "170 years of precedent," the Court refused to overturn the "dual-sovereignty" doctrine and held that the defendant's federal prosecution for unlawful possession of a handgun was not barred by principles of double jeopardy despite the fact that the defendant had been previously convicted for the same instance of possession under state law.

The defendant pleaded guilty in Alabama state court to possession of a firearm by a person convicted of a crime of violence and thereafter was indicted by the United States for the analogous federal offense based on the same instance of possession. He moved to dismiss on the ground that the federal indictment was for "the same offence" as the one at issue in his state conviction and thus exposed him to double jeopardy. The district court denied the motion and the Eleventh Circuit affirmed, each citing the dual-sovereignty doctrine – the long-standing principle that two offenses are not the "same offence" for double jeopardy purposes if prosecuted by different sovereigns. Reviewing the text of the Double Jeopardy Clause, historical evidence, and its precedent, the Court affirmed the lower courts and declined to depart from the doctrine.

Dissenting from the majority opinion, Justice Ginsburg characterized the dual-sovereignty doctrine as "misguided" and, for reasons explained in her dissenting opinion, would have overruled it. Dissenting separately, Justice Gorsuch also would have overruled the doctrine, saying that it "was wrong when it was invented, and remains wrong today."

12. **State v. Smith**, ___ N.C. App. ___, ___ S.E.2d ___ (Sept. 3, 2019).

Consecutive sentences for assault with a deadly weapon inflicting serious injury and assault by a prisoner with a deadly weapon inflicting bodily injury did not violate double jeopardy.

The defendant was convicted of and received consecutive sentences for assault with a deadly weapon inflicting serious injury (ADWISI) and assault by a prisoner with a deadly weapon inflicting bodily injury based on the same act of stabbing another prisoner. The Court of Appeals rejected the defendant's argument that consecutive sentences for the two offenses violated the Double Jeopardy Clause of the Fifth Amendment. The Court reasoned that the ADWISI charge requires that the injury be serious while the assault by prisoner charge requires bodily injury only, which may or may not be serious. The Court reasoned further that the assault by a prisoner charge requires bodily injury while the ADWISI charge may be shown by a physical or mental injury. The Court concluded for these reasons that "serious injury" and "bodily injury" are not synonymous and the defendant's double jeopardy argument therefore fails.

13. **Seay v. Cannon**, 927 F.3d 776 (4th Cir., June 21, 2019).

No manifest necessity existed for mistrial; double jeopardy prohibits retrial of murder case.

In this South Carolina habeas case, the petitioner was allegedly among a group of men that kidnapped and murdered a police informant. Startasia Grant was a key government witness in the case, and she testified at the trial of one of the co-defendants (resulting in his conviction). Her testimony was necessary to place the petitioner-defendant with the co-defendants at the time of the crime. She was charged with obstruction of justice at the time of her testimony in the first trial, but that charge was dismissed following her testimony. Over two years later, a subpoena was issued for her to testify in the petitioner's murder trial. The subpoena commanded Grant to appear July 25, 2016 and each day thereafter for the term of court. It further stated that the prosecutor "may be able to give . . . a more specific date and time to appear" but nothing indicated that the witness was told not to appear. Grant did not appear the first day of trial. The trial was continued to the next day for unrelated reasons, and Grant again did not appear. The government began the trial and a jury was empaneled. Efforts to contact Grant during trial were unsuccessful. On July 27, the government alerted the court to Grant's absence and a bench warrant for her arrest was issued. Court adjourned to the next day, but again Grant did not appear and law enforcement could not locate her. The government moved for a mistrial, claiming surprise and expressing fear for Grant's safety. The petitioner objected, but the trial court granted the mistrial, finding that the government was surprised by Grant's absence. Following reindictment, the state court denied the petitioner's double jeopardy motion, as did the federal district court. The Fourth Circuit reversed.
In the court's words:

> The Double Jeopardy Clause . . . prohibits states from subjecting a person to trial twice for the same crime. 'In a jury trial, jeopardy attaches when the jury is empaneled,' after which 'the defendant has a constitutional right, subject to limited exceptions, to have his case decided by that particular jury.' *Id*. at 7 (internal citation omitted).

A mistrial is one such limited exception, but a mistrial must be supported by a manifest necessity where the defendant objects to it. When a mistrial is declared because of weaknesses in the government case, such as missing witnesses, the government bears a "heavy" burden to justify the mistrial, subject to the "strictest scrutiny" on review. *Id*. at 8. The U.S. Supreme Court had previously held that if a prosecutor begins trial uncertain of whether her witnesses are available, she "t[akes] a chance" that evidence at trial will be insufficient to convict and that jeopardy will attach. *Id*. at. 9 (citing *Downum v. U.S.,* 372 U.S. 734 (1963)). The government here did just that and could not claim unfair surprise at Grant's absence—it knew for at least two days before a jury was empaneled that Grant had not complied with the subpoena and was clearly concerned about her absence during that time. The government chose to begin trial under those circumstances, instead of seeking a continuance. The finding of unfair surprise was therefore unsupported by the record.

The government also pointed to the lack of alternatives available to the trial court under the circumstances. A vital part of the manifest necessity question is availability of alternatives to the

declaration of a mistrial. "If the trial court's assessment of reasonable alternatives does not appear on the record, a finding of manifest necessity will not be upheld under the lens of strictest scrutiny." *Id*. at 14. Here, the record did not reflect any consideration of alternatives, such as further continuing the trial, or allowing testimony from other witnesses to proceed while the search for Grant continued. The court concluded:

> Finally, we emphasize that this case sharply illustrates the consequences of the government's too ready reliance on the short-term solution of a mistrial to solve a common trial predicament. The clear loser in this scenario is the public, which had a strong interest in having [the petitioner] tried under the murder indictment. However, as a result of the government's ill-advised request for a mistrial, approved by the state trial court without consideration of existing alternatives, [the petitioner] is entitled to the habeas corpus relief that will afford him his constitutional rights under the Double jeopardy Clause. *Id.* at 15-16.

The conviction was therefore vacated and the case remanded with instruction for the petition to be granted. A dissenting judge would have found the mistrial supported by a manifest necessity and that no double jeopardy violation occurred.

DWI Procedure

14. **Mitchell v. Wisconsin** , 588 U.S. ___, 139 S. Ct. 2525 (June 27, 2019).

(1) Court vacates judgment of Wisconsin Supreme Court affirming petitioner's impaired driving conviction and remands for application of new exigency test; (2) Plurality concludes that when the State has probable cause to believe that an unconscious driver has committed the offense of driving while impaired, exigent circumstances "almost always" permit the State to carry out a blood test without a warrant; (3) Opinion concurring in the judgment only would hold that the dissipation of alcohol creates an exigency justifying a warrantless search any time the State has probable cause for impaired driving.

The petitioner appealed from his impaired driving conviction on the basis that the State violated the Fourth Amendment by withdrawing his blood while he was unconscious without a warrant following his arrest for impaired driving. A Wisconsin state statute permits such blood draws. The Wisconsin Supreme Court affirmed the petitioner's convictions, though no single opinion from that court commanded a majority, and the Supreme Court granted certiorari to decide "[w]hether a statute authorizing a blood draw from an unconscious motorist provides an exception to the Fourth Amendment warrant requirement."

Justice Alito, joined by Chief Justice Roberts, Justice Breyer and Justice Kavanaugh announced the judgment of the court and wrote the plurality opinion. The plurality noted at the outset that the Court's opinions approving the general concept of implied consent laws did not rest on the idea that such laws create actual consent to the searches they authorize, but instead approved defining elements of such statutory schemes after evaluating constitutional claims in light of laws developed over the years to combat drunk driving. The plurality noted that the Court had previously determined that an officer may withdraw blood from an impaired driving suspect

without a warrant if the facts of a particular case establish exigent circumstances. *Missouri* v.*McNeely*, 569 U.S. 141 (2013); *Schmerber* v. *California*, 384 U. S. 757, 765 (1966). While the natural dissipation of alcohol is insufficient by itself to create per se exigency in impaired driving cases, exigent circumstances may exist when that natural metabolic process is combined with other pressing police duties (such as the need to address issues resulting from a car accident) such that the further delay necessitated by a warrant application risks the destruction of evidence. The plurality reasoned that in impaired driving cases involving unconscious drivers, the need for a blood test is compelling and the officer's duty to attend to more pressing needs involving health or safety (such as the need to transport an unconscious suspect to a hospital for treatment) may leave the officer no time to obtain a warrant. Thus, the plurality determined that when an officer has probable cause to believe a person has committed an impaired driving offense and the person's unconsciousness or stupor requires him to be taken to the hospital before a breath test may be performed, the State may almost always order a warrantless blood test to measure the driver's blood alcohol concentration without offending the Fourth Amendment. The plurality did not rule out that in an unusual case, a defendant could show that his or her blood would not have been withdrawn had the State not sought blood alcohol concentration information and that a warrant application would not have interfered with other pressing needs or duties. The plurality remanded the case because the petitioner had no opportunity to make such a showing.

Justice Thomas concurred in the judgment only, writing separately to advocate for overruling *Missouri* v. *McNeely*, 569 U.S. 141 (2013), in favor of a rule that the dissipation of alcohol creates an exigency in every impaired driving case that excuses the need for a warrant.

Justice Sotomayer, joined by Justices Ginsburg and Kagan, dissented, reasoning that the Court already had established that there is no categorical exigency exception for blood draws in impaired driving cases, although exigent circumstances might justify a warrantless blood draw on the facts of a particular case. The dissent noted that in light of that precedent, Wisconsin's primary argument was always that the petitioner consented to the blood draw through the State's implied-consent law. Certiorari review was granted on the issue of whether this law provided an exception to the warrant requirement. The dissent criticized the plurality for resting its analysis on the issue of exigency, an issue it said Wisconsin had affirmatively waived.

Justice Gorsuch dissented by separate opinion, arguing that the Court had declined to answer the question presented, instead upholding Wisconsin's implied consent law on an entirely different ground, namely the exigent circumstances doctrine.

15. **Couick v. Jessup**, ___ N.C. App. ___, ___ S.E.2d ___ (Aug. 6, 2019).

Because the Affidavit submitted to DMV did not show that petitioner had willfully refused chemical analysis under G.S. 20-16.2, it was not a "properly executed affidavit" which conferred jurisdiction upon DMV to revoke petitioner's license.

In this license revocation case arising from a DWI charge, the court concluded that the DMV did not have jurisdiction to revoke the petitioner's drivers license because the affidavit submitted to the DMV showed that the arresting officer designated a blood test but that the petitioner refused

a breath test. Quoting extensively from Lee v. Gore, 365 N.C. 227 (2011) and emphasizing the DMV's "limited authority" to suspend a driver's license, the court explained that because the Affidavit and Revocation Report of Law Enforcement Officer form (DHHS 3907) filed in this case "states that [the officer] designated one type of test and the petitioner refused another type of test," it did not evidence a willful refusal under G.S. 20-16.2 – a necessary condition precedent under these circumstances to the DMV's exercise of jurisdiction to revoke the petitioner's license.

False Evidence

16. **State v. Kimble**, __ N.C. App. __, __ S.E.2d __ (Oct. 1, 2019).

The state did not violate the defendant's due process rights by knowingly presenting false testimony; the defense did not show that the state knew the witness would testify differently from her prior statements, or that the testimony was material.

The defendant was convicted of murder for shooting and killing the victim in the parking lot of a dance club. Before trial, a witness to the shooting met with prosecutors to review her 35-page statement to the police and prepare her trial testimony. During that interview, the witness stated that she did not see the shooting but she saw the defendant holding a gun and running towards the victim. The state provided notes from that interview to the defense. At trial, however, the witness testified that she saw the defendant stand over the victim and shoot him. The defense asked the court to instruct the state to enter into a stipulation or make a statement to the jury explaining that the witness had not previously claimed she saw the shooting. The state responded that it had no knowledge the witness would testify inconsistently with her prior statement, it had complied with the discovery rules by turning over the prior statement and interview notes, and any discrepancies should be addressed on cross-examination. The trial court did not order the state to enter a stipulation or address the jury, and instead offered the defense an opportunity to conduct additional cross-examination, which the defense declined. The Court of Appeals affirmed the trial court's ruling and rejected the defendant's argument that the state knowingly presented false testimony in violation of defendant's due process rights. Even if the witness's trial testimony was false, the defendant failed to show that: (1) the testimony was material; and (2) the state knowingly and intentionally used that false testimony to convict the defendant. First, the defendant did not show that the testimony was material because other witness testimony and circumstantial evidence established that the defendant shot the victim. Second, the defendant did not show that state deliberately used false testimony because the state was not aware that the witness would testify inconsistently with her prior statement and pretrial interview. Any discrepancies between the witness's prior statements and her trial testimony were matters of credibility, and they were properly addressed through impeachment on cross-examination.

Habitual Felon

17. **State v. Edgerton**, ___ N.C. App. ___, ___ S.E.2d ___ (Aug. 6, 2019).

Use of an ACIS printout to prove one of the defendant's prior convictions during the habitual felon phase of trial was competent evidence that did not violate the best evidence rule.

In this habitual larceny case where the defendant was sentenced as a habitual felon, the use of an ACIS printout to prove one of the defendant's prior convictions during the habitual felon phase of trial was competent evidence that did not violate the best evidence rule. Citing State v. Waycaster, ___ N.C. App. ___, 818 S.E.2d 189 (2018), the court explained that G.S. 14-7.4 permits an original or certified copy of the court record of a prior conviction to be admitted into evidence to prove the prior conviction but does not mandate that manner of proof. The same case held that a certified copy of an ACIS printout is sufficient evidence of a prior conviction under the habitual felon statute.

Indictment & Pleading Issues

18. **State v. Bryant**, __ N.C. App. __, ___ S.E.2d ___ (Oct. 1, 2019).

Prosecutor's amendment of a citation impermissibly changed the nature of the offense, so the district court lacked jurisdiction to enter a judgment; the superior court erred by denying defendant's petition for writ of certiorari to review the district court's denial of her MAR.

Defendant was charged by citation with misdemeanor larceny under G.S. 14-72. The prosecutor amended the citation by striking through the charging language and handwriting the word "shoplifting" on the citation, along with the prosecutor's initials and the date. The defendant entered a guilty plea to a lesser charge of shoplifting under G.S. 14-72.1, but later filed an MAR in district court arguing that the amendment was improper and the court lacked subject matter jurisdiction to enter judgment. The district court denied the MAR, and the superior court denied defendant's petition for writ of certiorari to review the denial. The Court of Appeals granted the defendant's petition for writ of certiorari, and held that the lower courts erred and the MAR should have been granted. The purported amendment to the citation impermissibly changed the nature of the offense because larceny and shoplifting are separate crimes with different elements. "Thus, the amendment was not legally permissible and deprived the district court of jurisdiction to enter judgment against Defendant." The Court of Appeals reversed the superior court's denial of the petition for writ of certiorari and vacated the shoplifting judgment.

19. **State v. Edgerton** , ___ N.C. App. ___, ___ S.E.2d ___ (Aug. 6, 2019).

A habitual larceny indictment was not facially invalid for failure to allege that the defendant was represented by or waived counsel in connection with prior larceny convictions.

In this habitual larceny case where the defendant was sentenced as a habitual felon, the court held that the habitual larceny indictment was not facially invalid for failure to allege all essential elements of the offense. The defendant argued that the habitual larceny indictment was facially invalid because it did not specifically allege that he was represented by counsel or had waived counsel in the proceedings underlying each of his prior larceny convictions. G.S. 14-72(b)(6) provides that a conviction for a larceny offense may not be used as a prior conviction for purposes of elevating misdemeanor larceny to felony habitual larceny unless the defendant was represented by counsel or waived counsel. Reviewing the structure of G.S. 14-72(b)(6), the

North Carolina Supreme Court's definition of the elements of the offense in a prior case, and the availability to defendants of information regarding their counsel when they obtained prior convictions, the court held that representation by or waiver of counsel in connection with prior larceny convictions is not an essential element of felony habitual larceny and thus need not be alleged in an indictment for that offense. Because representation by or waiver of counsel is not an essential element of the offense, the court also rejected the defendant's related sufficiency of the evidence argument.

20. **State v. Futrelle**, ___ N.C. App. ___, 831 S.E.2d 99 (July 2, 2019).

Waiver of indictment that did not include defense attorney's signature was invalid, depriving the trial court of jurisdiction.

The defendant pled guilty to controlled substance offenses pursuant to a bill of information and waiver of indictment. In an MAR, the defendant argued that the pleadings were defective and the trial court lacked jurisdiction because the waiver of indictment was not signed by his attorney. The trial court denied the MAR, finding that the pleadings substantially complied with the statute, but the appellate court reversed and remanded with instructions to grant the MAR and vacate the judgment. The requirements listed in G.S. 15A-642 for a waiver of indictment, including the signature of the defendant's attorney, are mandatory. Therefore, the waiver in this case was "invalid without Defendant's attorney's signature, depriving the trial court of jurisdiction to accept Defendant's guilty plea and enter judgment."

21. **State v. Jones**, ___ N.C. App. ___, 829 S.E.2d 507 (June 4, 2019).

Failure to allege an injury did not render an indictment defective when the defendant was charged with discharging a weapon into occupied property.

An indictment charging the defendant with discharging a weapon into an occupied dwelling was not fatally defective. The defendant argued that the indictment was defective because it charged him with discharging a weapon into occupied property causing serious bodily injury, but failed to allege that any injury resulted from the act. The court noted that the defendant's argument was based on the indictment's reference to G.S. 14-34.1(c) as the statute violated. However, a statutory reference in an indictment is surplusage and can be disregarded. Moreover, the body of the indictment charges the defendant with the version of the offense for which he was convicted, which does not require serious injury.

Jury Trial, Waiver

22. **State v. Rutledge**, ___ N.C. App. ___, ___ S.E.2d ___ (Aug. 20, 2019).

Trial court did not commit prejudicial error by allowing defendant to waive his right to a jury trial on the day of trial and by immediately proceeding to a bench trial.

At the start of his trial on drug charges, the defendant, through counsel, requested to waive his right to trial by jury in favor of a bench trial. The trial judge advised the defendant of the charges

and the maximum punishment and asked several questions about the defendant's request for a bench trial. Specifically, the trial judge asked the defendant whether he wished to waive a jury trial and have a bench trial, whether he understood the difference between a jury trial and bench trial, and whether he had discussed his rights and the ramifications of the waiver with his attorney. The court then granted the defendant's motion for a bench trial. The court and the defendant signed AOC-CR-405, the Waiver of Jury trial form.
The defendant then was arraigned, tried, and convicted. He appealed, arguing that the trial court violated G.S. 15A-1201, which sets out the procedure for waiver of a jury trial, in granting his request for a bench trial. Specifically, the defendant argued that the trial court (1) failed to require the defendant to comply with the notice provisions in G.S. 15A-1201(c); (2) failed to solicit information required to determine that the waiver was knowing and voluntary; and (3) failed to afford the defendant 10 business days in which to revoke the waiver.

(1) The court determined that the defendant's failure to request a separate arraignment before trial invited noncompliance with G.S. 15A-1201(c). Given that, the waiver of jury trial on the date of arraignment and trial, pursuant to notice provided on that date, with the consent of the trial court and the State was proper.

(2) The court held that the colloquy between the trial court and the defendant, which mirrored the acknowledgements on the Waiver of Jury Trial form, established that the defendant fully understood and appreciated the consequences of the decision to waive the right to trial by jury, thus satisfying the requirements of G.S. 15A-1201(d)(1).

(3) G.S. 15A-1201(e) provides that once waiver of jury trial has been made and consented to by the trial judge, the defendant may revoke the waiver one time within 10 business days of the notice. The court held that this provision does not mandate a ten-day cooling off period for a waiver made on the eve of trial. Instead, it provides a period during which a waiver made in advance of trial may be revoked.

(4) The court held that even if it presumed that the trial court erred in granting the waiver, the defendant could not show that he was prejudiced by the violation.

Jury Selection

23. **Flowers v. Mississippi**, 588 U.S. ___, 139 S. Ct. 2228 (June 21, 2019).

In the context of a Batson challenge, the trial court committed clear error in concluding that the State's peremptory strike of a black prospective juror was not motivated in substantial part by discriminatory intent.

In this murder case resulting in a death sentence, the Court held that the trial court committed clear error in concluding that the State's peremptory strike of a black prospective juror was not motivated in substantial part by discriminatory intent. The defendant Flowers, who is black, allegedly murdered four people at a furniture store in Winona, Mississippi, three of whom were white. Flowers was tried six separate times for the murders; the same lead prosecutor conducted each of the trials. A conviction in the first trial was reversed by the Mississippi Supreme Court

on grounds of prosecutorial misconduct, with the court not reaching a *Batson* challenge raised in that proceeding. A conviction in the second trial was reversed by the Mississippi Supreme Court on grounds of prosecutorial misconduct. A conviction in the third trial was reversed by the Mississippi Supreme Court on grounds that the State violated *Batson*. The fourth and fifth trials ended in hung jury mistrials. A *Batson* challenge arising in the sixth trial is the basis of the instant case.

Under principles of equal protection, *Batson v. Kentucky*, 476 U.S. 79 (1986), prohibits the use of peremptory strikes in a racially discriminatory manner. A *Batson* challenge is a three-step process. First, the party asserting the challenge must make a prima facie case of discrimination in the use of a peremptory strike. If a prima facie case is established, the burden shifts to the party subject to the challenge to provide a race-neutral reason for the strike. In the third step, the trial judge assesses whether purposeful discrimination has been proved, examining as part of this assessment whether the proffered race-neutral reasons for the strike in fact are pretext for discrimination.

In assessing the *Batson* issue in the instant case, the Court said that four categories of evidence loomed large:

(1) the history from Flowers' six trials, (2) the prosecutor's striking of five of six black prospective jurors at the sixth trial, (3) the prosecutor's dramatically disparate questioning of black and white prospective jurors at the sixth trial, and (4) the prosecutor's proffered reasons for striking one black juror (Carolyn Wright) while allowing other similarly situated white jurors to serve on the jury at the sixth trial.

The Court addressed each of these categories in turn. With regard to the history from Flowers' trials, the court first noted that under *Batson* a challenger need not demonstrate a history of discriminatory strikes in past cases – purposeful discrimination may be proved solely on evidence concerning the exercise of peremptory challenges at the particular trial at issue. However, *Batson* does not preclude use of such historical evidence, and the "history of the prosecutor's peremptory strikes in Flowers' first four trials strongly supports the conclusion that his use of peremptory strikes in Flowers' sixth trial was motivated in substantial part by discriminatory intent. Over the course of the first four trials, the State "used its available peremptory strikes to attempt to strike every single black prospective juror that it could have struck." The Court further noted that a *Batson* challenge in the second trial was sustained by the trial court and that the Mississippi Supreme Court reversed the conviction obtained in the third trial because of a *Batson* violation.

Turning to the events of the sixth trial, the Court noted that the State struck five of six black prospective jurors and that this, in light of the history of the case, suggested that the State was motivated in substantial part by discriminatory intent. The Court also noted the State's "dramatically disparate questioning of black and white prospective jurors." The five black prospective jurors who were struck were asked a total of 145 questions by the State. In contrast, the State asked the 11 seated white jurors a total of 12 questions. With regard to this disparate questioning, the Court found that the record refuted the State's argument that differences in questioning was explained by differences in the jurors' characteristics. Finally, with regard to a

particular black prospective juror, Carolyn Wright, the Court found that the State's peremptory strike was motivated in substantial part by discriminatory intent. The State said that it struck Wright in part because she knew several defense witnesses and worked at a Wal-Mart where Flowers' father also worked. The Court noted that Winona is a small town and that several prospective jurors knew many individuals involved in the case. It further noted that the State did not engage in a meaningful voir dire examination on this purported basis for striking Wright with similarly situated white potential jurors. The State also misstated the record while attempting to provide a race-neutral explanation of its strike of Wright to the trial court. The Court explained that "[w]hen a prosecutor misstates the record in explaining a strike, that misstatement can be another clue showing discriminatory intent." The court concluded its analysis of the State's strike of Wright by explaining that its precedents require that the strike be examined "in the context of all the facts and circumstances," and that in this light "we conclude that the trial court clearly erred in ruling that the State's peremptory strike of Wright was not motivated in substantial part by discriminatory intent."

Justice Thomas, joined in part by Justice Gorsuch, dissented. In Thomas's view, "[e]ach of the five challenged strikes was amply justified on race-neutral grounds timely offered by the State at the *Batson* hearing."

24. **U.S. v. Mathis**, 932 F.3d 242 (4th Cir., July 31, 2019).

No error to empanel anonymous jury in capital gang prosecution.

This multi-defendant prosecution of Blood gang members in the Western District of Virginia involved the murder of a police officer, witness tampering and violent crimes in furtherance of racketeering. During the first trial, the court became aware that one of the defendants had obtained a list of the jury panel members and removed it from the courtroom. The defendants moved for a mistrial, which was granted. Venue was moved to an adjacent district at the defendant's request, and the court granted the government's motion for an anonymous jury. "In a capital case, a district court may empanel an anonymous jury only after determining 'by a preponderance of the evidence that providing the [juror] list . . . may jeopardize the life or safety of any person.'" Slip op. at 10. This rare decision must be based on record evidence, not merely the allegations of the offenses. There must be "strong reasons" to believe the jury is at risk or that the jury's function is at risk, and reasonable precautions must be taken to protect the defendants from any potential resulting prejudice. Courts will consider five factors in this inquiry:

> (1)the defendant's involvement in organized crime; (2) the defendant's participation in a group with the capacity to harm jurors; (3) the defendant's past attempts to interfere with the judicial process; (4) the potential that, if convicted, the defendant will suffer a lengthy period of incarceration and substantial monetary penalties; and (5) extensive publicity that could enhance the possibility that jurors' names would become public and expose them to intimidation or harassment. *Id.*

Here, the case involved a "violent street gang" who were accused of murdering a potential witness to the crimes, and evidence indicated that the gang included other members, not party to

the current prosecution, that were capable of harming jurors. Evidence was presented to the court regarding the gang's history of not only retaliating against perceived enemies, but also taking actions to prevent harm to the organization. Evidence showed that two defendants continued recruiting for the gang while in pretrial detention for this case. This evidence, coupled with the events surrounding the first mistrial and the severe penalties faced by the defendants, justified the decision. Further, the court acted to protect the defendants from any prejudice by giving venire persons a neutral explanation of the decision, allowing full voir dire of potential jurors, and providing redacted jury questionnaires to the defendants (the defense attorneys were allowed to view unredacted versions). The decision was therefore supported by the evidence and met the "strict standard" for an anonymous jury. Finding no abuse of discretion, the decision was affirmed on appeal.

Jury Argument

25. **State v. Cagle**, ___ N.C. App. ___, 830 S.E.2d 893 (July 2, 2019).

Trial court did not err by refusing to intervene ex mero motu during prosecutor's closing argument.

The trial court did not err in this murder case by failing to intervene ex mero motu to strike prosecutor's comments during closing arguments. Citing case precedent, the court held that neither the prosecutor's characterization of the defendant as "evil" nor a brief reference to the defense experts as "hacks" were so grossly improper that the judge erred by failing to intervene ex mero motu during the closing argument.

Jury Instructions

26. **State v. Harvey**, ___ N.C. ___, 828 S.E.2d 481 (June 14, 2019).

Defendant was not entitled to instruction on perfect or imperfect self-defense in homicide case.

In a 5-to-1 decision, the Court affirmed the decision of a divided panel of the Court of Appeals, ___ N.C. App. ___, 817 S.E.2d 500 (2018) (unpublished), finding that the trial court did not err in refusing to instruct the jury on self-defense or imperfect self-defense in the stabbing death of the victim. Relying on previous decisions, the majority found that the defendant was not entitled to self-defense instructions because he referred to the stabbing as "the accident," stated that his purpose in getting a knife was because he was "scared" that the victim was going to try to hurt him, and that what he sought to do with the knife was to make the victim leave. The majority found that the defendant's testimony did not establish that he feared death or great bodily harm as a result of the victim's actions or that he inflicted the fatal blow to protect himself from such harm. Because the defendant failed to present evidence that he formed a reasonable belief that it was necessary for him to fatally stab the victim in order to protect himself from death or great bodily harm, he was not entitled to an instruction on perfect or imperfect self-defense. The dissent criticized the majority for usurping the jury's role in determining whether the killing was justified; imposing a "magic words" requirement for the defendant's testimony; disregarding

evidence favorable to the defendant and crediting contradictory evidence; and failing to take into account that the defendant was inarticulate.

27. **State v. Cagle**, ___ N.C. App. ___, 830 S.E.2d 893 (July 2, 2019).

Trial court did not err by refusing to give defendant's requested jury instructions.

The trial court did not err in this murder case by declining to include a special jury instruction on specific intent in the final mandate. On the issue of specific intent, the trial judge gave the jury an instruction regarding voluntary intoxication and its effect on specific intent, but did not repeat the instruction as part of the final mandate. The appellate court held that the defendant failed to preserve the issue by not objecting, and further held that it was not plain error because the trial judge was not required to restate the specific intent instruction in the final mandate.

The defendant also requested a special jury instruction that paraphrased a passage from *State v. Buchanan*, 287 N.C. 408 (1975) to explain the concept of deliberation. The trial judge did not err by refusing that request and using the pattern jury instruction on deliberation instead. The pattern jury instruction was a correct statement of the law, and it embraced the substance of the defendant's request.

28. **State v. Pender**, ___ N.C. App. ___, 830 S.E.2d 686 (June 18, 2019).

A defendant is not entitled to a jury instruction on self-defense using deadly force where the evidence is not sufficient to support a finding that the defendant reasonably apprehended death or great bodily harm.

In this assault with a deadly weapon inflicting serious injury case, the trial court properly instructed the jury regarding self-defense. The defendant was in a physical altercation with another woman, during which she cut the other woman a number of times with a knife. "Recognizing that a defendant may only use deadly force to protect herself from great bodily injury or death," the North Carolina Pattern Jury Instructions provide two different sets of jury instructions for self-defense: NCPI-Criminal 308.40 describes when the use of non-deadly force is justified; NCPI-Criminal 308.45 describes when the use of deadly force is justified. The trial court instructed the jury pursuant to NCPI-Criminal 308.40 and the defendant argued that this was error because the jury could have determined that the knife was a deadly weapon, entitling her to an instruction pursuant to NCPI-Criminal 308.45. The Court of Appeals disagreed. Viewing the evidence in the light most favorable to the defendant, the court concluded that the evidence was not sufficient to support a finding that the defendant "reasonably apprehended death or great bodily harm when she struck the defendant with the knife," and, thus, the trial court did not err by failing to instruct the jury pursuant to NCPI-Criminal 308.45.

Motions

29. **State v. Osborne**, ___ N.C. ___, 831 S.E.2d 328 (Aug. 16, 2019).

The lack of a scientifically valid chemical analysis of a substance identified by officers as heroin did not require the trial court to grant the defendant's motion to dismiss for insufficiency of the evidence.

On discretionary review of a unanimous decision of the Court of Appeals, ___ N.C. App. ___, 821 S.E.2d 268 (2018), the Supreme Court concluded that the Court of Appeals misapplied *State v. Ward*, 356 N.C. 133 (2010), when it held that the absence of a scientifically valid chemical analysis meant that the State had not established beyond a reasonable doubt that the seized substance was heroin, and that the trial court therefore erred when it denied the defendant's motion to dismiss for insufficiency of the evidence. *Ward*, the Supreme Court clarified, was a case about the admissibility of evidence under Rule of Evidence 702, not sufficiency. In this case, the defendant did not object to officers' trial testimony that they found the defendant with syringes, spoons, and a rock substance that officers visually identified and twice field tested as heroin. An officer also testified without objection that when the defendant regained consciousness, she confirmed that she had ingested heroin. The Supreme Court concluded that the Court of Appeals erred by applying *Ward*'s high bar for the admissibility of evidence relating to the identity of a controlled substance to a motion to dismiss for insufficiency of the evidence. The court emphasized that

> [F]or purposes of examining the sufficiency of the evidence to support a criminal conviction, it simply does not matter whether some or all of the evidence contained in the record should not have been admitted; instead, when evaluating the sufficiency of the evidence, all of the evidence, regardless of its admissibility, must be considered in determining the validity of the conviction in question.

The court also disapproved of language in *State v. Llamas-Hernandez*, 363 N.C. 8 (2009), which had suggested that expert testimony is required to establish the identity of a controlled substance in the context of a motion to dismiss.

Applying the appropriate standard of review, and assuming without deciding that some of the evidence might have been excluded if the defendant had objected to its admission, the court determined that there was ample evidence showing that the substance the defendant allegedly possessed was heroin. The court therefore reversed the Court of Appeals and remanded the case for consideration of the defendant's remaining arguments.
Justice Earls wrote a concurring opinion questioning whether the Good Samaritan law in G.S. 90-96.2, which came into effect in 2013, placed a limit on the trial court's jurisdiction to prosecute the defendant in this case.

30. **State v. Parisi** , ___ N.C. ___, 831 S.E.2d 236 (Aug. 16, 2019).

The trial courts' findings of fact failed to support the legal conclusion that the investigating officer lacked the probable cause needed to place defendant under arrest for impaired driving.

On appeal from a divided panel of the Court of Appeals, State v. Parisi, ___ N.C. App. ___, 817 S.E.2d 228 (2018) the Supreme Court held that the trial court erred by granting the defendant's motion to suppress in this impaired driving case. The Supreme Court considered whether the trial

courts' findings—which are conclusive on appeal if supported by competent evidence—supported the ultimate conclusions of law. Here, where the trial court made findings that the defendant admitted to consuming three beers, that defendant's eyes were red and glassy, that a moderate odor of alcohol emanated from defendant's person, and that the defendant exhibited multiple indicia of impairment while performing various sobriety tests, the Supreme Court had "no hesitation" in concluding that those facts sufficed, as a matter of law, to support the officer's decision to arrest the defendant for impaired driving.

31. **State v. Williams** , ___N.C. App. ___, ___ S.E.2d ___ (Sept. 17, 2019).

(1) A judge who denies a motion to suppress without explaining why fails to provide adequate conclusions of law; (2) A search warrant was not supported by probable cause where it was based on a reliable informant's claims of having purchased drugs from the defendant at some point in the past plus a middleman's recent purchase of drugs from "the general area of defendant's home."

Officers obtained a search warrant to search the defendant's house. They executed the warrant, found drugs, and charged the defendant with drug offenses. The defendant moved to suppress, arguing that the warrant contained material misrepresentations and did not provide probable cause to support the issuance of the warrant. A superior court judge denied the motion, and the defendant was convicted and appealed. The court of appeals reversed. (1) The trial judge did not set forth adequate conclusions of law. Although formal findings of fact are not required when the evidence regarding a motion to suppress is not in conflict, a judge must still provide conclusions of law, i.e., must explain the reason for the judge's ruling. In this case, the defendant made multiple challenges to the warrant and the trial judge merely denied the motion without further explanation. (2) The warrant was not supported by probable cause. The application was based on information from a confidential and reliable informant. The informant claimed to have purchased drugs from the defendant in the past, but reported that the defendant had become more cautious recently and now would sell drugs only through a specific middleman. The informant reported that she had recently picked up the middleman, dropped the middleman off in "the general area of defendant's home" and picked him up shortly thereafter in possession of drugs. The court of appeals concluded that this did not provide probable cause as the middleman was of unknown reliability and no one had observed him entering the defendant's home. A dissenting judge would have found that the informant's history of purchasing drugs from the defendant, plus what amounted to an imperfectly controlled purchase by the middleman, provided probable cause.

Pleas

32. **State v. Konakh**, ___ N.C. App. ___, ___ S.E.2d ___ (Aug. 6, 2019).

The trial court did not err by denying the defendant's motion to withdraw his guilty plea where the defendant did not establish that withdrawal of his plea would prevent manifest injustice.

In this case involving a motion to withdraw a plea and an MAR, the trial court did not err by denying the defendant's motions. On April 10, 2018 the defendant pleaded guilty to felony drug offenses, answering affirmatively that he understood the charges to which he was pleading and

that he was in fact guilty of the charges. On April 12, 2018 the defendant filed the motions at issue, alleging that he "felt dazed and confused" at the time of the plea because of lack of sleep and medications he was taking, did not understand that he was pleading to three felonies, did not understand what a consolidated judgment meant, did not have enough time to consider his plea and felt pressure to make a decision, and was not aware of the negative employment ramifications of his plea. On April 16, the motions were heard in Superior Court, where the court made extensive findings of fact supporting its conclusion that the motions were without merit. The defendant argued on appeal that the trial court erred because the circumstances demonstrated that withdrawal of his plea would prevent manifest injustice. Specifically, the defendant argued that his plea should be withdrawn because he (1) is innocent, (2) pled guilty in haste, and (3) pled guilty in confusion based on erroneous beliefs about the nature of a consolidated judgment. The court reviewed the record and, for reasons stated in the opinion, found each of these arguments meritless.

33. **State v. Lankford**, ___ N.C. App. ___, 831 S.E.2d 109 (July 2, 2019).

Trial court did not err by refusing to allow defendant to withdraw his no contest plea more than two months after defendant was advised of what his sentence would be, even though final judgment had not been entered.

Pursuant to a plea agreement, the defendant entered a no contest plea to charges including fleeing to elude and being an habitual felon, and in return several other charges were dismissed by the state. The defendant was advised of what his sentence would be, but was released on conditions until his sentencing date two months later. The defendant failed to appear for sentencing, and an order for his arrest was issued. At the next court hearing, the defendant asked to withdraw his no contest plea. The trial court denied the request and entered judgment.

As a matter of first impression, the Court of Appeals held that when a defendant has been advised of what his or her sentence will be, the standard for evaluating whether the defendant should have been allowed to withdraw from the plea is the same as the standard used after a defendant has been sentenced: "it is appropriate to review the trial court's denial of Defendant's motion only to determine whether it amounted to a manifest injustice, and not according to the 'any fair and just reason' standard." The court reasoned that the same considerations (e.g, the possibility that the defendant will view the plea as a 'tactical mistake' once he learns the sentence, the state's detrimental reliance on the plea, and the policy of protecting the finality of convictions) are present in both situations, so the same standard should apply.

Alternatively, even under the lower 'any fair and just reason' standard that applies to requests to withdraw a guilty or no contest plea prior to sentencing, the particular facts of this case did not warrant relief.

34. **State v. Marsh**, ___ N.C. App. ___, 829 S.E.2d 245 (June 4, 2019).

The trial court erred by imposing a sentence inconsistent with that set out in his plea agreement without informing the defendant that he had a right to withdraw his guilty plea.

The defendant was charged with multiple counts involving multiple victims and occurring between 1998 and 2015. On the third day of trial, he negotiated a plea agreement with the State, whereby he would plead guilty to a number of offenses and would receive a single, consolidated active sentence of 290 to 408 months imprisonment. Over the next weeks and prior to sentencing, the defendant wrote to the trial court asserting his innocence to some of the charges and suggesting his desire to withdraw from the plea agreement. The trial court acknowledged receipt of the letters and forwarded them to defense counsel. When the defendant later appeared for sentencing, he formally moved to withdraw his guilty plea, which was denied. Contrary to the plea agreement, the trial court entered two judgments, one for the 2015 offenses and one for the 1998 offenses, based on the different sentencing grids that applied to the crimes. Specifically, the trial court sentenced the defendant to 290 to 408 months for the 2015 offenses, and for the 1998 offenses a separate judgment sentencing the defendant to 288 to 355 months imprisonment. The trial court ordered that the sentences would run concurrently. The defendant appealed. Because the concurrent sentences imposed by the trial court differed from the single sentence agreed to by the defendant in his plea agreement, the defendant was entitled to withdraw his plea. Any change by the trial judge in the sentence agreed to in the plea agreement, even a change benefiting the defendant, requires the judge to give the defendant an opportunity to withdraw his plea.

Sentencing

35. **United States v. Haymond**, 588 U.S. ___, 139 S. Ct. 2369 (June 26, 2019).

A plurality of the Court held that 18 U.S.C. § 3583(k) is unconstitutional, with four Justices determining that the statute's required mandatory revocation of supervised release and imposition of a minimum five-year prison sentence where a judge sitting without a jury finds by a preponderance of the evidence that a person has committed certain new criminal offenses ran afoul of the Apprendi line of cases.

In a plurality opinion, a majority of the Court held that 18 U.S.C. § 3583(k) is unconstitutional. The defendant Haymond was convicted by a jury of possessing child pornography in violation of federal law and was sentenced to a prison term of 38 months, followed by 10 years of supervised release. While on supervised release, Haymond was discovered to be in possession of apparent child pornography and the government, in the plurality's words, "sought to revoke [his] supervised release and secure a new and additional prison sentence." At a hearing conducted before a district judge acting without a jury, and under a preponderance of the evidence standard, the judge found that Haymond knowingly downloaded and possessed certain images. Acting in accordance with § 3583(k), the judge revoked Haymond's supervised release and required him to serve a five-year term of imprisonment. The Tenth Circuit held that this violated Haymond's right to a trial by jury under the Fifth and Sixth Amendments and the Supreme Court granted review to evaluate this constitutional holding.

Generally under 18 U.S.C. § 3583(e), a judge who finds a violation of a condition of supervised release by a preponderance of the evidence has discretion as to whether to revoke the term of supervised release. Upon deciding to revoke the term of release, a judge also has discretion as to the amount of time a person must serve in prison as a consequence of the revocation. 18 U.S.C. § 3583(k) modifies this general rule in situations such as Haymond's where a defendant required

to register under SORNA has his or her supervised release revoked because of a judge's determination that he or she has committed one of several criminal offenses enumerated in the statute. In such a case, § 3583(k) requires the judge to revoke the term of supervised release and further requires the imposition of a term of imprisonment of at least five years.

Writing for himself and Justices Ginsburg, Kagan, and Sotomayor, Justice Gorsuch determined that § 3583(k) ran afoul of principles laid down in *Blakely v. Washington*, *Apprendi v. New Jersey*, and *Alleyne v. United States*, saying that under the statute "judicial factfinding triggered a new punishment in the form of a prison term of at least five years and up to life." Likening this situation to that of *Alleyne* Gorsuch said that "the facts the judge found here increased 'the legally prescribed range of allowable sentences' in violation of the Fifth and Sixth Amendments." Gorsuch continued, saying that "what was true in [*Alleyne*] can be no less true here: A mandatory minimum 5-year sentence that comes into play *only* as a result of additional judicial factual findings by a preponderance of the evidence cannot stand." Contrasting § 3583(k) against other provisions in § 3583 regarding revoking supervised release and requiring a defendant to serve a term of imprisonment, Gorsuch explained that "§ 3583(k) alone requires a substantial increase in the minimum sentence to which a defendant may be exposed based solely on judge-found facts."

Justice Breyer concurred in the judgment and said that § 3583(k) is unconstitutional because "it is less like ordinary revocation and more like punishment for a new offense, to which the jury right would typically attach." However, Breyer said that he would "not transplant the *Apprendi* line of cases to the supervised-release context" and that he agreed with much of the dissent.

Justice Alito dissented, joined by Chief justice Roberts, Justice Thomas, and Justice Kavanaugh. Justice Alito said that the plurality opinion "is not grounded on any plausible interpretation of the original meaning of the Sixth Amendment," and generally criticized the plurality for extending the Sixth Amendment right to a jury trial to the supervised release context.

Aggravating Factors/Sentence

36. **State v. Helms,** ___ N.C. ___, ___ S.E.2d ___ (Sept. 27, 2019).

Evidence that the defendant had a relationship with the victim's mother was insufficient to support an aggravating factor that the defendant took advantage of a position or trust or confidence to commit a sexual offense against the victim.

The defendant began a relationship with B.F. in 2012. The criminal offenses occurred in 2014, when B.F. brought her daughter L.F. (age 3 at the time) to the defendant's parents' house. While B.F. and L.F. were sitting on a bed with the defendant and watching a children's television show, the defendant instructed B.F. to take off both her own and L.F.'s clothes, and she complied. At the defendant's request, B.F. touched L.F. in a sexual manner while the defendant watched and masturbated. Afterwards, again at the defendant's request, B.F. moved L.F. into a position where the defendant could place L.F.'s mouth on his penis. When L.F. later told her stepmother what

had happened, the stepmother contacted law enforcement and social services, leading to an investigation and criminal charges. At trial, the defendant was convicted of two counts of engaging in a sex offense with a child under 13 years of age, and two counts of taking indecent liberties with a child. The jury also found that the state proved two aggravating factors: the victim was very young, and the defendant took advantage of a position of trust or confidence to commit the offense. On appeal, the defendant argued that there was insufficient evidence to support the second aggravating factor under G.S. 15A-1340.16(d)(15), because the only relationship involving a position of trust or confidence was between the defendant and B.F., rather than with the victim of the offense, L.F. The Supreme Court agreed, reversing the Court of Appeals, and held that the state's evidence "failed to show that the relationship between L.F. and defendant was conducive to her reliance on him" and only established "that L.F. trusted defendant in the same way she might trust any adult acquaintance, a fact which our courts have found to be insufficient to support this aggravating factor." Justice Newby dissented, and would have held that the aggravating factor was appropriate on these facts because the defendant took advantage of his position of trust or confidence with B.F. in order to facilitate the commission of the offense against L.F., and the statute does not require that the relationship be between the defendant and the victim.

Costs

37. **State v. Rieger**, __ N.C. App. __, ___ S.E.2d ___ (Oct. 1, 2019).

When multiple charges arising out of a single incident are adjudicated together in the same proceeding, only one court cost may be imposed.

The defendant was stopped in his vehicle for following too closely, and officers discovered marijuana and drug paraphernalia in his possession. The defendant was charged with two separate misdemeanor drug offenses and convicted of both at a jury trial. The trial court entered two judgments and assessed two court costs. G.S. 7A-304(a) states that court costs shall be assessed "in every criminal case," so the issue on appeal was whether this matter represented one case or two (i.e., the one underlying event or the two separate criminal charges). The Court of Appeals concluded that there were reasonable arguments in favor of both interpretations, and neither the plain language nor the legislative history of the statute provides a clear answer. Turning to the spirit and purpose behind the act, the appellate court held that court costs are not intended to be a punishment or a fine; instead, they are only intended to recoup the actual costs imposed on the justice system. "With this in mind, we hold that when multiple criminal charges arise from the same underlying event or transaction and are adjudicated together in the same hearing or trial, they are part of a single 'criminal case' for purposes of the costs statute. Accordingly, we vacate the imposition of costs in one of the two judgments against Rieger."

Prior Record Level

38. **State v. Glover**, ___ N.C. App. ___, ___ S.E.2d ___ (Sept. 3, 2019).

Court finds that the defendant should have been sentenced in prior record level V, not prior record level VI.

The defendant was charged with possession of various drugs found in his bedroom and an adjoining alcove, which he said was his personal space. The defendant shared the house with a number of people, including a woman named Ms. Stepp. The defendant consented to a search of his bedroom and alcove, stating to the officers he did not believe they would find any illegal substances, only drug paraphernalia. When asked whether he had ingested any illegal substances, the defendant admitted having used methamphetamine and prescription pills. The search of the defendant's bedroom uncovered a white rectangular pill marked G3722, a small bag of marijuana, and drug paraphernalia. The search of the alcove uncovered a metal tin containing methamphetamine, cocaine, heroin, and a small pill similar to the one found in his bedroom. The defendant was charged with and convicted of possession of methamphetamine, heroin, and cocaine and having attained the status of an habitual felon.

Based on the stipulation of counsel to the prior record worksheet, the trial judge found that the defendant had 47 prior convictions and was in prior record level VI. The Court found that the following 32 convictions should not have been counted: convictions used to support habitual felon status in this case; convictions rendered in the same week or session of court other than the one with the highest points; and Class 2 and lower misdemeanor convictions. The Court held that of the 15 remaining convictions, six were out-of-state convictions and were incorrectly classified. Only two should have been counted and then as Class I felonies. The Court held that precedent continues to prohibit the parties from stipulating to the similarity of out-of-state convictions or the resulting North Carolina classification. The Court distinguished State v. Arrington, ___ N.C. ___, 819 S.E.2d 329 (2018), which held that when an offense is split into two separate crimes and the defendant stipulates to the higher offense class, it is assumed that the higher classification is sufficiently supported by the underlying facts of the crime. For out-of-state convictions, in contrast, the parties must establish that the elements of the out-of-state conviction are similar to those of a North Carolina offense; only then may a stipulation determine the underlying facts of the offense and the appropriate classification. Based on this review, the Court found the defendant had 11 convictions that could be used, which placed him in prior record level V. A judge who dissented on a different issue concurred in this part of the opinion but would not have reached the issue because she found that the defendant was entitled to a new trial.

39. **State v. Ellis**, ___ N.C. App. ___, ___ S.E.2d ___ (Aug. 20, 2019), *temp. stay allowed*, ___ N.C. ___, 831 S.E.2d 347 (Aug. 29, 2019).

A defendant may not stipulate to the use in calculating his or her prior record level of a prior offense that is classified as an infraction at the time of the current offense.

The court determined that the trial court erred in calculating the defendant's prior record level (PRL) based on the defendant's stipulation that a prior conviction for expired operators' license was a Class 2 misdemeanor. At the time of the instant offense, driving with an expired license had been reclassified as an infraction. G.S. 15A-1340.21(b) provides that an offense may be included in determining a defendant's PRL only "if it is either a felony or misdemeanor at the time the offense for which the offender is being sentenced is committed." Distinguishing *State v. Arrington*, ___ N.C. ___, 819 S.E.2d 329 (2018), which held that a defendant's stipulation

regarding the classification of a prior felony conviction was binding as a factual determination where two possible classifications existed for the offense at issue, the court explained that because "no misdemeanor category crime for possession of an expired operators' license existed" at the relevant time, as a matter of law the defendant could not stipulate as he did.

40. **State v. Green**, ___ N.C. App. ___, ___ S.E.2d ___ (July 16, 2019).

Applying State v. Arrington, Court of Appeals holds (1) stipulation to drug paraphernalia as class 1 misdemeanor was binding; (2) stipulation to felony where the court had judgment of conviction before it showing offense was a misdemeanor was improper; (3) stipulation to carrying concealed weapon as a class 1 misdemeanor was improper.

The defendant pled guilty pursuant to *Alford* to drug and firearms offenses and to habitual felon status. The plea agreement specified that the offenses would be consolidated for judgment and the defendant sentenced in a specific mitigated range. The defense stipulated to a Prior Record Level Worksheet, identifying 19 prior conviction points and classifying the defendant as a Level VI for felony sentencing. On appeal, the defendant argued that three convictions on the record level worksheet were improperly counted. The three convictions at issue were (1) a 1994 drug paraphernalia conviction, listed as a class 1 misdemeanor on the worksheet; (2) a 1993 conviction for maintaining a vehicle/dwelling, listed as a class I felony; and (3) a 1993 conviction for carrying a concealed weapon, listed as a class 1 misdemeanor. A copy of the judgment for the maintaining a vehicle/dwelling was introduced at trial and classified the offense as a misdemeanor (but failed to identify the class).

1. In the recent case of *State v. Arrington*, 371 N.C. 518 (2018), the North Carolina Supreme Court instructed: "[W]hen a defendant stipulates to a prior conviction on a worksheet, the defendant is admitting that certain past conduct constituted a stated criminal offense." (internal citation omitted) As to the drug paraphernalia conviction, the court found that *Arrington* applied:

> Here, on the Worksheet, Defendant—as 'the person most familiar with the facts surrounding his offense'—stipulated that his 1994 Possession-of-Drug-Paraphernalia conviction was classified as a class 1 misdemeanor. Thus, Defendant was stipulating that the facts underlying his conviction justify that classification. (citing *Arrington*)

There was therefore no error to include a record level point for that conviction.

2. As to the 1993 maintaining a vehicle/dwelling conviction, the court determined *Arrington* did not apply when a copy of the judgment of conviction was before the court, which showed the offense was classified as a misdemeanor. In the court's words:
[W]hen evidence (such as a certified copy of the judgment) is presented to the trial court conclusively showing a defendant's stipulation is to an incorrect classification—as is the case here—*Arrington* does not apply, and a reviewing court should defer to the record evidence rather than a defendant's stipulation.

3. As to the final conviction for carrying a concealed weapon, the defendant pointed out that that offense is typically a class 2 misdemeanor under G.S. 14-269, and therefore should not have been counted as a felony sentencing point. That offense may be elevated to a class H felony when the defendant has been previously convicted of the misdemeanor, but in no case is a violation of that statute a class 1 misdemeanor. Here, nothing showed the defendant had a prior conviction for the crime. The court acknowledged this was a "conundrum" under *Arrington*. The court identified one circumstance under the statutes where the offense could possibly be classified as a class 1 misdemeanor—when a defendant with a concealed weapon permit carries a concealed handgun while consuming alcohol, under G.S. 14-415.21(a1) (and by reference to G.S. 14-415.11). It was therefore possible for the conviction to be counted as a class 1 misdemeanor. However, the court observed:

> [W]e do not believe the intent of *Arrington* was to require a reviewing court to undertake *sua sponte* a voyage of discovery through our criminal statutes to locate a possibly applicable statute and imagine factual scenarios in which it could apply. Rather, we defer to the parties who stipulated to the prior conviction as to what statute applies. Therefore, because Section 14-269 does not provide for a violation of its provisions to be classified as a Class 1 misdemeanor, we conclude *Arrington* is inapplicable and that the trial court erred in accepting the Defendant's stipulation.

The maintaining a vehicle/dwelling and carrying concealed weapon convictions added two points to the defendant's record level worksheet, without which the defendant would have been classified as a prior record level V. The errors were therefore not harmless. Because the defendant's sentence was imposed pursuant to a plea bargain, remand for resentencing was inappropriate. The court instead vacated the judgment, set aside the entire plea, and remanded for trial or plea on the original charges.

Probation

41. **State v. Morgan**, ___ N.C. ___, 831 S.E.2d 254 (Aug. 16, 2019).

A trial court may not revoke a defendant's probation after it has expired without making the statutorily required finding of fact that good cause exists to do so.

On appeal from a divided panel of the Court of Appeals, ___ N.C. App. ___, 814 S.E.2d 843 (2018), the Supreme Court considered the statutory requirements for revoking probation after it has expired. In this case the defendant's probation officer filed a violation report on May 12, 2016 alleging, among other things, that the defendant committed a new criminal offense. His probation expired on August 28, 2016, and then came on for a violation hearing in early September. The trial court revoked the defendant's probation based on the defendant's admission that he absconded and committed a new criminal offense. On appeal, the defendant argued that the trial court erred by revoking his probation after expiration without making a specific finding that it was doing so for good cause shown and stated as required by G.S. 15A-1344(f)(3). The Court of Appeals held, over a dissent, that under *State v. Regan*, 253 N.C. App. 351 (2017), no specific findings were required. The Supreme Court reversed, concluding that the plain language

of the statute does require a finding of good cause—just as former G.S. 15A-1344(f)(2) required a finding that the State had made a "reasonable effort" to notify a probationer and conduct a violation hearing earlier to give a court jurisdiction to act on a case after probation expired. *See* State v. Bryant, 361 N.C. 100 (2006). The court remanded the case to the trial court to make a determination of whether good cause existed to revoke the defendant's probation after it had already expired and, if so, to make an appropriate finding of fact.

42. **State v. Pavkovic**, __ N.C. App. __, __ S.E.2d __ (Sept. 17, 2019).

Where a defendant was arrested at a demonstration outside an abortion clinic, a probation condition requiring him to stay 1,500 feet away from the clinic was reasonably related to his rehabilitation.

The defendant was speaking at an anti-abortion event outside an abortion clinic in Charlotte. He was using an amplified microphone and was sitting at the table where the amplification controls were located. Officers measured his amplified voice at more than 80 decibels and approached him to cite him for violating the city's noise ordinance. The defendant refused to produce identification, so the officers arrested him and charged him with resisting, delaying, and obstructing a law enforcement officer as well as the noise ordinance violation. At a bench trial in superior court, a judge convicted the defendant of R/D/O and dismissed the noise ordinance violation because, although the judge concluded that the defendant had violated the ordinance, the city "had discretion to decide which enforcement penalties it would levy against a violator of the noise ordinance, but . . . failed to do so." The judge sentenced the defendant to probation, one condition of which was that the defendant stay at least 1,500 feet away from the abortion clinic where the event took place. The defendant appealed. Among other issues: (1) The defendant's conduct was covered by the ordinance, so the officers' initial stop was valid. The ordinance applies, in part, to persons "operating . . . sound amplification equipment." The defendant contended that simply speaking into a microphone does not amount to "operating" any "amplification equipment." The court of appeals viewed that construction as "unduly narrow" and found that the "plain meaning" of the ordinance was that speaking into an amplified microphone, while sitting at a table with the amplification controls present, was covered. (2) The probation condition is reasonably related to the defendant's rehabilitation as required by statute, in part because it reduces the likelihood that he will commit a similar offense again.

43. **State v. Matthews**, ___ N.C. App. ___, ___ S.E.2d ___ (Aug. 6, 2019).

The district court had subject matter jurisdiction over a probation revocation hearing because of the defendant's implied consent to the court's exercise of jurisdiction.

In this probation revocation case that was appealed by a petition for writ of certiorari, the court held that the defendant failed to demonstrate error with respect to the district court's exercise of subject matter jurisdiction to revoke her probation. On May 5, 2017, the defendant was placed on 12 months of supervised probation pursuant to a conditional discharge plea agreement related to a felony drug charge. On March 4, 2018, the defendant's probation officer filed a violation report asserting that she had only completed a small fraction of her court-ordered community service hours and had not yet paid in full her court costs and supervised probation fee. At a May

4, 2018, hearing on the violation report, which resulted in the trial court finding a willful violation of probation and entering judgment on the felony drug charge, the defendant did not object to the district court's jurisdiction and fully participated in the hearing.

The court first addressed its appellate jurisdiction, noting that the defendant's various attempts to appeal the judgment did not comply with the Rules of Appellate Procedure but deciding to use its discretion to allow the defendant's petition for writ of certiorari, in part because the issue of the district court's subject matter jurisdiction to revoke her probation was one of first impression. The court then turned to the merits, first explaining that under G.S. 7A-271(e) "the superior court generally exercises exclusive jurisdiction over probation revocation hearings even when the underlying felony conviction and probationary sentence were imposed through a guilty plea in district court." The court went on to explain that notwithstanding the statute's general rule, it further provides as an exception that the district court has jurisdiction over probation revocation hearings when the State and the defendant, using the statute's term, "consent" to the district court's jurisdiction. Noting that the term "consent" is not defined in the statute and has not been construed in this context by a North Carolina appellate court, the court rejected the defendant's argument that it was necessary that her "express consent" appear in the record. Instead, the court held that the term encompasses implied consent and that the defendant's conduct in this case – fully participating in the hearing without objection and even going so far as to request additional relief from the court during the hearing – constitutes implied consent.

44. **State v. Tincher**, ___ N.C. App. ___, ___ S.E.2d ___ (July 16, 2019).

Court lacked jurisdiction to revoke probation when violation filed after expiration of probationary term.

The defendant was serving an active sentence when he pled guilty to other felony charges. The sentencing court imposed two 20 to 24 month sentences, suspended for 36 months on the condition of supervised probation. In the event the defendant violated probation, the two sentences would be run consecutively to the then-existing sentence. In one of the new sentences, the court indicated the probation would run at the expiration of the defendant's current sentence. The other new sentence did not. The defendant violated probation and the consecutive terms were imposed. On appeal, the defendant complained that the violation report for one of the cases was filed too late—since only one judgment indicated probation was to begin at the expiration of his existing sentence, probation from the other judgment began running concurrently while the defendant was still incarcerated. The court agreed. Under G.S. 15A-1346, probation runs concurrently to any active sentence if not otherwise specified. Because one of the judgments failed to indicate probation ran consecutive to the defendant's existing sentence, it was concurrent by default and probation began on the day of that judgment. Here, the violation was filed after that probationary period expired, and the trial court lacked jurisdiction to revoke the defendant's probation. The judgement of revocation in that case was therefore vacated.

Restitution

45. **State v. Williams**, ___ N.C. App. ___, 829 S.E.2d 518 (June 4, 2019), *temp. stay allowed*, ___ N.C. ___, 829 S.E.2d 206 (June 25, 2019).

A release clause in a related civil settlement did not bar imposition of criminal restitution.

In this embezzlement case, the trial court did not err by ordering the defendant to pay restitution. On 13 February 2017, the defendant and the victim entered into a settlement agreement resolving civil claims arising from the defendant's conduct. The agreement obligated the defendant to pay the victim $13,500 and contained a release cause. Subsequently, the defendant was charged by information with embezzlement. She subsequently entered an Alford plea. As part of a plea arrangement, the State agreed, in part, to a probationary sentence to allow the defendant to make restitution payments. Both parties agreed that the trial court would hold a hearing to determine the amount of restitution. At the restitution hearing, the defendant asserted that she did not owe restitution because the release clause in the civil settlement agreement discharged her obligation. The trial court determined $41,204.85 was owed. The trial court credited the defendant for paying $13,500 under the civil agreement and set the balance of restitution at the difference. The defendant appealed, arguing that the trial court erred by ordering her to pay criminal restitution where the settlement agreement contained a binding release cause. Noting that the issue was one of first impression, the court held that the release clause in the civil settlement agreement does not bar imposition of criminal restitution.

Sex Offenders

46. **State v. Grady**, ___ N.C. ___, ___ S.E.2d ___ (Aug. 16, 2019).

North Carolina's satellite-based monitoring program is unconstitutional as applied to all individuals subject to mandatory lifetime SBM based solely on their status as a recidivist who have completed their prison sentences and are no longer on probation, parole, or post-release supervision.

On appeal from a decision of a divided panel of the Court of Appeals, ___ N.C. App. ___, 817 S.E.2d 18 (2018), the Supreme Court affirmed the Court of Appeals' decision finding satellite-based monitoring (SBM) to be an unreasonable and therefore unconstitutional search in the defendant's case. The court modified the lower court decision to apply it not just to the defendant, but also to all sex offenders subject to mandatory lifetime SBM based solely on their status as recidivists who are no longer on probation, parole, or post-release supervision. In this case, the trial judge conducting the defendant's SBM determination hearing (on remand from the Supreme Court of the United States, Grady v. North Carolina, 135 S. Ct. 1368 (2015)), considered the State's evidence of the defendant's prior sex crimes, the defendant's full criminal record, copies of G.S. 14-208.5 and -208.43, photographs of the equipment the State uses to administer the SBM program, and testimony from a probation supervisor on the operation of the SBM equipment and the nature of the program. The defendant presented statistical reports, Community Corrections policy governing SBM, and an excerpt of SBM training materials for probation staff. Based on the totality of the circumstances, the trial judge entered an order

concluding that SBM was a reasonable search as applied to the defendant and that the statute is facially constitutional, and ordered the defendant to enroll in SBM for life.

On appeal, the Court of Appeals concluded that although the defendant's expectation of privacy was appreciably diminished as a sex offender, the State failed to prove that SBM was a reasonable search as applied to him under the Fourth Amendment. The State appealed as of right.

The Supreme Court declined to address the facial constitutionality of North Carolina's SBM program in its entirety, instead addressing the program as applied to the narrower category of recidivists to which the defendant belongs. The court rejected the State's argument that SBM was valid as a special needs search, because the State never identified any special need beyond the normal need for law enforcement, and because the defendant was no longer on probation or parole.

The court also found SBM unconstitutional under a reasonableness analysis, concluding that, given the totality of the circumstances, SBM's intrusion into the defendant's Fourth Amendment interests outweighed its promotion of legitimate governmental interests. As to the nature of the privacy interest, the court deemed SBM to be uniquely intrusive—presenting even greater privacy concerns than the cell-site location information at issue in *Carpenter v. United States*, 138 S. Ct. 2206 (2018). The court rejected the State's arguments that felons generally and sex offenders in particular who have fully served their sentences have a diminished expectation of privacy. Regarding the character of the complained of intrusion, the court noted the absence of front-end discretion on the part of the judge who imposes SBM and the limited relief available on the back end through the Post-Release Supervision and Parole Commission, which has thus far declined all sixteen requests to terminate SBM filed under G.S. 14-208.43. Finally, as to the nature and purpose of the search, the court noted the State's failure to provide evidence about how successfully the SBM program advances its stated purpose of protecting the public or any evidence regarding the recidivism rates of sex offenders. The court contrasted that lack of evidence with the copious evidence of student drug use the Supreme Court of the United States found critical in upholding random drug screening in Vernonia School District 47J v. Acton, 515 U.S. 646 (1995). Balancing those factors, the court determined that the State did not meet its burden of establishing the reasonableness of SBM for recidivists who have completed their sentence. The court concluded by emphasizing the limited scope of its holding, reiterating that it does not apply to SBM enrollees in other categories (for example, those enrolled based on an aggravated offense), regardless of whether they also happen to be a recidivist, or to enrollees still on parole, post-release supervision, or probation.

Justice Newby dissented, joined by Justice Morgan, arguing that the State's paramount interest in protecting children outweighed the intrusion into the defendant's diminished Fourth Amendment privacy interests, and that the SBM program is thus constitutional, both facially and as applied to the defendant.

47. **State v. Anthony**, ___ N.C. App. ___, ___ S.E.2d ___ (Aug. 20, 2019), *temp. stay allowed*, ___ N.C. ___, 831 S.E.2d 352 (Sep. 5, 2019).

Order imposing lifetime satellite-based monitoring was not supported by evidence of reasonableness.

The court reversed the trial court's order requiring the defendant to submit to lifetime satellite-based monitoring (SBM) on the basis that it ordered an unreasonable search. Though the State mentioned statistics and studies related to the risk of recidivism posed by sex offenders in its argument, it did not present those studies to the trial court, and they were not subject to judicial notice under Rule 201. In addition, the State presented no evidence on the efficacy of SBM to reduce recidivism.

48. **State v. Tucker**, ___ N.C. App. ___, ___ S.E.2d ___ (Aug. 6, 2019), *temp. stay allowed*, ___ N.C. ___, 831 S.E.2d 95 (Aug. 22, 2019).

The court vacated the trial court's imposition of lifetime SBM where the State did not produce evidence that lifetime SBM is effective to protect the public from sex offenders, as required by State v. Griffin.

Over a dissent in this SBM case, the court relied on State v. Griffin, ___ N.C. App. ___, 818 S.E.2d 336 (2018) to vacate the trial court's imposition of lifetime satellite-based monitoring of the defendant. Under *Griffin*, "trial courts cannot impose satellite-based monitoring unless the State presents actual evidence—such as 'empirical or statistical reports'—establishing that lifetime satellite-based monitoring prevents recidivism." Here, the State did not produce the sort of evidence required by *Griffin*. The court noted that *Griffin* and several related cases were pending in the North Carolina Supreme Court. A dissenting judge criticized *Griffin* and would have held that imposition of lifetime SBM in this case was reasonable under the circumstances and thus was reasonable under the Fourth Amendment.

49. **State v. Gambrell**, ___ N.C. App. ___, 828 S.E.2d 749 (June 4, 2019).

The trial court erred by imposing imposition of lifetime SBM on a recidivist sex offender when the State did not produce evidence that lifetime SBM is effective to protect the public from sex offenders.

In a case where the defendant was convicted of taking indecent liberties with a child, the court held that the State failed to meet its burden of showing the reasonableness of the SBM program as applied to the defendant by failing to produce evidence concerning the efficacy of the program. It thus reversed the trial court's order requiring lifetime SBM.

Speedy Trial & Related Issues

50. **Washington v. Cline**, ___ N.C. App. ___, ___ S.E.2d ___ (Sept. 3, 2019).

Court of Appeals refuses to recognize civil cause of action for violation of state constitutional right to a speedy trial.

The plaintiff sued the State of North Carolina, City of Durham, various people who worked for the State Bureau of Investigation, the Durham Police Department, and the Durham County District Attorney's office for a permanent injunction and money damages to redress harms allegedly suffered in connection with his pretrial detention, investigation, and prosecution. The plaintiff, then the criminal defendant, was arrested in 2002 for a home invasion involving an armed robbery and attempted sexual assault and was tried almost five years later. The Court of Appeals, in State v. Washington, 192 N.C. App. 277, vacated his conviction, finding a denial of his speedy trial rights under the United States and North Carolina Constitutions. The trial judge in this case granted the civil defendants' motion for summary judgment against the plaintiff on his claim that the defendants violated his state constitutional right to a speedy trial. The Court of Appeals recognized that a victim of a constitutional violation may sue for some constitutional violations, such as a violation of the Fourth Amendment protection against unreasonable searches and seizures under the United States Constitution, but the right to sue for damages has not been extended to the deprivation of the Sixth Amendment right to a speedy trial. The Court declined to recognize a private cause of action for the deprivation of the right to a speedy trial under the North Carolina Constitution. Noting that the plaintiff did not appeal the trial judge's decision about the causes of action alleged by the plaintiff other than his state constitutional claim, the Court declined to address the other causes of action.

Evidence

Limiting Instructions

51. **State v. Betts**, ___ N.C. App. ___, ___ S.E.2d ___ (Sept. 3, 2019).

Majority of Court of Appeals finds that trial judge did not commit plain error in instructions in indecent liberties case.

The defendant was charged with three counts of indecent liberties with a child. At trial, the State's witnesses included two expert witnesses, who testified to the profile and characteristics of children who have been sexually abused. The defendant argued that the trial judge should have given a limiting instruction so that the jury would not have treated the testimony as substantive evidence. The Court rejected the defendant's argument because he did not request a limiting instruction.

The trial judge gave a limiting instruction to the jury on consideration of testimony about the diagnosis that the child had PTSD. The judge instructed the jury that it could consider the testimony to corroborate the child's testimony and to explain a delay in reporting. The Court

rejected the defendant's argument that the second purpose was improper, finding that prior decisions had found that explaining delay was a permissible purpose of such evidence.

Best Evidence Rule

52. **State v. Edgerton**, ___ N.C. App. ___, ___ S.E.2d ___ (Aug. 6, 2019).

Use of an ACIS printout to prove one of the defendant's prior convictions during the habitual felon phase of trial was competent evidence that did not violate the best evidence rule.

In this habitual larceny case where the defendant was sentenced as a habitual felon, the use of an ACIS printout to prove one of the defendant's prior convictions during the habitual felon phase of trial was competent evidence that did not violate the best evidence rule. Citing State v. Waycaster, ___ N.C. App. ___, 818 S.E.2d 189 (2018), the court explained that G.S. 14-7.4 permits an original or certified copy of the court record of a prior conviction to be admitted into evidence to prove the prior conviction but does not mandate that manner of proof. The same case held that a certified copy of an ACIS printout is sufficient evidence of a prior conviction under the habitual felon statute.

Relevancy—Rule 401

53. **State v. Betts**, ___ N.C. App. ___, ___ S.E.2d ___ (Sept. 3, 2019).

Majority of Court of Appeals finds that trial judge did not commit plain error in admission of various evidence in indecent liberties case.

The defendant was charged with three counts of indecent liberties with a child. The State offered evidence of past incidents of domestic violence by the defendant against the child and her mother. The defendant argued that the evidence was of no consequence to whether he took indecent liberties with the child. The Court found that such evidence can be permissible where the victim has delayed reporting sexual abuse out of fear or apprehension.

Limits on Relevancy

54. **State v. Canady**, ___ N.C. App. ___, ___ S.E.2d ___ (Sept. 3, 2019).

Trial judge did not abuse discretion in admitting crime scene photographs into evidence.

The defendant was convicted of first-degree murder, assault with a deadly weapon with intent to kill inflicting serious injury, and attempted first-degree murder. The opinion describes in detail the beatings inflicted with a bat by the defendant and two others on the deceased and her fiancé, who was severely injured but survived. The sole issue on appeal was whether the trial judge erred in admitting roughly fifty photographs of the crime scene displaying the victims' injuries and blood throughout the house. The defendant argued that the trial judge erred in allowing an excessive number of bloody and gruesome photographs that had little probative value and were unfairly prejudicial under Rule 403 of the North Carolina Rules of Evidence. The Court of

Appeals held that the trial judge did not abuse its discretion in admitting the photographs. The Court stated, "'Even gory or gruesome photographs are admissible so long as they are used for illustrative purposes and are not introduced solely to arouse the jurors' passions'" (*quoting* State v. Hennis, 323 N.C. 279 (1988)). The Court ruled that the trial judge, having conducted an in camera review of the photographs and considered the defendant's objections, completed its task of reviewing the content and manner in which the photographs were to be used and that the admission of the photographs reflected a thoroughly reasoned decision. The Court further ruled that the defendant was unable to show that the photographs were prejudicial because of other overwhelming evidence of the defendant's guilt.

Crawford Issues & Confrontation Clause

55. **State v. Bowman**, ___ N.C. ___, 831 S.E.2d 316 (Aug. 16, 2019).

The trial court committed prejudicial error in limiting the defendant's ability to cross-examine the State's principal witness, violating the defendant's Sixth Amendment right to confront the witnesses against him.

On appeal from a divided panel of the Court of Appeals, ___ N.C. App. ___, 818 S.E.2d 718 (2018), the Supreme Court held that the trial court violated the defendant's Sixth Amendment right to confront witnesses against him. In this murder, robbery with a dangerous weapon, and possession of a firearm by a felon case, the trial judge erred by limiting the defendant's ability to question the State's principal witness about whether she expected to receive a favorable plea offer for drug trafficking charges pending in Guilford County in exchange for her testimony against the defendant in Forsyth County. In a voir dire hearing, the defendant showed that prosecutors in the two counties had been in touch by email and discussed a possible plea deal for the witness in Guilford based on her testimony at the defendant's trial. By limiting the witness's testimony about this possible deal, the trial court prohibited the jury from considering evidence that could have shown bias on the witness's part, and thus violated the defendant's confrontation rights. The court distinguished previous cases in which it had deemed similar errors harmless, reasoning that this involved a limit on the testimony of the State's principal witness. Moreover there was no physical evidence linking the defendant to the crime and no other witness placing him at the scene. As a result, the court concluded that the trial judge's error was not harmless beyond a reasonable doubt and affirmed the Court of Appeals' decision to vacate the verdict and order a new trial.

Justice Ervin, joined by Justice Newby, dissented, writing that the trial judge allowed ample cross-examination of the witness about her pending charges in Guilford County, and that the limitations the court imposed were an appropriate exercise of its discretion to control the scope and extent of cross-examination to prevent confusion and eliminate undue repetition.

56. **State v. Crumitie**, ___ N.C. App. ___, ___ S.E.2d ___ (July 16, 2019).

Substitute expert testimony on cell site data properly admitted and did not violate defendant's confrontation rights.

In this murder and attempted murder case, the trial court did not err in allowing a substitute expert witness to testify to another expert's conclusions on cell site location data connected to the defendant. The defendant complained that his rights to confront the witness were violated by the absence at trial of the expert that prepared the report. Rejecting this challenge, the court observed:

> Our courts have consistently held that an expert witness may testify as to the testing or analysis conducted by another expert if: (i) that information is reasonably relied on by experts in the field in forming their opinion; and (ii) the testifying expert witness independently reviewed the information and reached his or her own conclusions in this case.

Here, that standard was met—the substitute expert explained the process of cell site analysis and his review of the first expert's report, and he gave an independent opinion about the defendant's cell data. The defendant was able to cross-examine the substitute expert with the first expert's report. He was also given notice ahead of trial of the State's intention to rely on a substitute expert witness. There was therefore no error in admitting the testimony, and the convictions were unanimously affirmed.

Cross-Examination, Impeachment, Corroboration & Related Issues

57. **State v. Bowman**, ___ N.C. ___, 831 S.E.2d 316 (Aug. 16, 2019).

The trial court committed prejudicial error in limiting the defendant's ability to cross-examine the State's principal witness, violating the defendant's Sixth Amendment right to confront the witnesses against him.

On appeal from a divided panel of the Court of Appeals, ___ N.C. App. ___, 818 S.E.2d 718 (2018), the Supreme Court held that the trial court violated the defendant's Sixth Amendment right to confront witnesses against him. In this murder, robbery with a dangerous weapon, and possession of a firearm by a felon case, the trial judge erred by limiting the defendant's ability to question the State's principal witness about whether she expected to receive a favorable plea offer for drug trafficking charges pending in Guilford County in exchange for her testimony against the defendant in Forsyth County. In a voir dire hearing, the defendant showed that prosecutors in the two counties had been in touch by email and discussed a possible plea deal for the witness in Guilford based on her testimony at the defendant's trial. By limiting the witness's testimony about this possible deal, the trial court prohibited the jury from considering evidence that could have shown bias on the witness's part, and thus violated the defendant's confrontation rights. The court distinguished previous cases in which it had deemed similar errors harmless, reasoning that this involved a limit on the testimony of the State's principal witness. Moreover there was no physical evidence linking the defendant to the crime and no other witness placing him at the scene. As a result, the court concluded that the trial judge's error was not harmless beyond a reasonable doubt and affirmed the Court of Appeals' decision to vacate the verdict and order a new trial.

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Fifth Amendment (Self-Incrimination) Issues

58. **State v. Diaz**, ___ N.C. ___, ___ S.E.2d ___ (Aug. 16, 2019).

(1) The trial court erred when it admitted the defendant's affidavit of indigency into evidence, violating his right against self-incrimination; (2) The error was harmless beyond a reasonable doubt.

(1) On discretionary review of a unanimous decision of the Court of Appeals, ___ N.C. App. ___, 808 S.E.2d 450 (2017), the court affirmed the Court of Appeals' conclusion that the trial judge erred by admitting the defendant's affidavit of indigency into evidence over the defendant's objection to show his age, which was an element of the charged crimes in this abduction of a child and statutory rape case. The trial judge had ruled that the affidavit of indigency was admissible under Rule 902 of the Rules of Evidence as a self-authenticating document, but the Supreme Court concluded that allowing the document into evidence impermissibly compelled the defendant to surrender one constitutional right—his Fifth Amendment right against self-incrimination—in order to complete the paperwork required for him to assert his Sixth Amendment right to the assistance of counsel as an indigent defendant.

(2) The Supreme Court deemed the trial judge's error to be harmless beyond a reasonable doubt, reversing the Court of Appeals on that issue. Other trial testimony from victim—who knew the defendant sufficiently well to provide a competent opinion on his age—sufficed to prove the defendant's age to the requisite level of precision and left no reasonable possibility that the exact birth date shown on the defendant's affidavit of indigency contributed to his conviction.

59. **United States v. Oloyede**, 933 F.3d 302 (4th Cir., July 31, 2019).

Unlocking cell phone upon law enforcement request was not testimonial communication under the Fifth Amendment.

In this multi-defendant wire fraud case from the District of Maryland, one defendant moved to suppress evidence obtained from her cell phone. While police were executing a search warrant at her home, an agent discovered a locked cell phone in the defendant's bedroom. He asked the defendant, "Could you please unlock your iPhone?" Slip op. at 6. The defendant then unlocked the phone and gave it back to the agent. Her motion to suppress alleged that this was a Fifth Amendment violation of her right to remain silent, and that she should have been Mirandized before the request. The district court rejected this argument, finding that the act of unlocking her phone was not a communication subject to *Miranda*. It further found that the request was not "coercive" and that the defendant voluntarily complied. The Fourth Circuit affirmed.

The Fifth Amendment protection from self-incrimination applies to compelled testimonial communications that inculpate the defendant. A testimonial communication may consist of an act, but "the act must 'relate a factual assertion or disclose information;' it must 'express the contents of [the person's] mind.'" *Id*. at 8. Here, the agent did not ask the defendant the password; he asked her to enter it herself. The defendant did not show the agent the password and the agent did not see it when she entered it to unlock the phone. "Unlike a circumstance, for instance, in which she gave the passcode to the agent for the agent to enter, here she simply used the unexpressed contents of her mind to type the passcode herself." *Id*. This act did not qualify as a testimonial communication and was unprotected by the Fifth Amendment. Furthermore, even if the act of unlocking her phone did constitute a testimonial communication, the phone would still have been admissible: "'[T]he *Miranda* rule is a prophylactic employed to protect against violations of the Self-Incrimination Clause' and . . . the Clause 'is not implicated by the admission into evidence of the physical fruit of a *voluntary statement*.'" *Id*. at 9, (*citing U.S. v. Patane*, 542 U.S. 630 (2004). This situation fell within the *Patane* rule, in that use of the phone evidence at trial did not create any risk that coerced statements by the defendant would be used at trial. The trial court's denial of the motion to suppress was consequently affirmed. Other challenges to evidentiary rulings, joinder of the defendants, the jury instructions, the sufficiency of the evidence, and the sentences were all likewise rejected, and the convictions unanimously affirmed.

Hearsay

60. **State v. Stephenson** , ___ N.C. App. ___, ___ S.E.2d ___ (Sept. 17, 2019).

An indictment for larceny of motor vehicle parts must allege more than $1,000 in damage to a single vehicle.

The defendant stole fuel injectors from a salvage yard. Among other issues: (1) The defendant's indictment for larceny of motor vehicle parts in violation of G.S. 14-72.8 was insufficient. The statute requires that "the cost of repairing the motor vehicle is one thousand dollars . . . or more," but the indictment alleged only that the total value of all the injectors taken from an unspecified number of vehicles was $10,500. The court of appeals construed the statute to require at least $1,000 in damage to a single motor vehicle. (2) A detective testified that he contacted an auto parts company in Maryland and learned that the defendant had sold the company 147 fuel injectors for nearly $10,000. This testimony was not hearsay as it was admitted "to describe [the detective's] investigation," not to prove that the defendant stole anything.

Opinions

61. **State v. Neal**, ___ N.C. App. ___, ___ S.E.2d ___ (Sept. 17, 2019).

A DRE may testify about a driver's impairment based on information obtained from other officers.

An anonymous person contacted law enforcement to report that a small green vehicle with license plate RCW-042 was in a specific area, had run several vehicles off the road, had struck a

vehicle, and was attempting to leave the scene. Deputies went to the area and immediately stopped a vehicle matching the description given by the caller. The defendant was driving the vehicle. She was unsteady on her feet and appeared to be severely impaired. A trooper arrived and administered SFSTs, which the trooper terminated because the defendant could not complete them safely. A subsequent blood test revealed multiple drugs in the defendant's system. The defendant was charged with impaired driving, was convicted in district court and in superior court, and appealed.

The defendant argued that the superior court judge erred by allowing a drug recognition expert (DRE) who was not involved in the stop to testify that in her opinion, based on her conversation with the trooper and her review of his report, the defendant was impaired by a central nervous system depressant and a narcotic analgesic. The reviewing court found no error, noting that N.C. R. Evid. 702(a1)(2) allows DREs to offer opinions regarding impairment.

62. **State v. Betts**, ___ N.C. App. ___, ___ S.E.2d ___ (Sept. 3, 2019).

Majority of Court of Appeals finds that trial judge did not commit plain error in admission of various evidence in indecent liberties case.

The defendant was charged with three counts of indecent liberties with a child. The State's experts and lay witnesses repeatedly used the term "disclose" or variations thereof when summarizing the child's statements to them. The defendant argued that use of this term lent credibility to the child's statements and was a comment on her credibility in violation of the prohibition on "vouching" for a witness's credibility. The Court held that the term "disclose," standing alone, does not convey believability or credibility and an unpublished opinion suggesting the contrary (State v. Jamison, ___ N.C. App. ___, 821 S.E.2d 665 (2018)), is not persuasive.

The State offered into evidence a report about the child from one of its experts. The defendant argued that the opinions and recommendations in the report showed that the expert found the child credible. The defendant's counsel initially objected to the report but, after the State redacted portions of the report, told the trial court that she had no objection The Court held that to the extent it was error to admit the report, the error was invited.

A dissenting judge found that the trial judge plainly erred in admitting evidence that improperly vouched for the credibility of the child, who was six years old at the time of the alleged events. He stated: "The credibility of the complainant was the sole evidence and issue before the jury. . . . The State produced no other physical evidence, eyewitness testimony or anything else to corroborate these allegations, other than improper bolstering babble restating M.C.'s allegations. The trial court plainly erred in admitting evidence that improperly vouched for the credibility of the complainant, the sole province of the jury."

63. **State v. Miles**, ___ N.C. App. ___, ___ S.E.2d ___ (Aug. 20, 2019).

Trial court did not commit plain error in allowing officer to testify about the modus operandi of the crime and similar incidents in the area.

An officer testified at trial, without objection by the defendant, that the modus operandi of the crime was to use a female in a car by herself to gain access to the home for the purpose of committing an armed robbery. He further testified that there had been similar incidents in the area around the same time. Rejecting the defendant's argument that the testimony was an inadmissible law witness opinion as to the defendant's guilt, the court explained that a lay witness may testify about "details 'helpful to the fact-finder in presenting a clear understanding of [the] investigative process' as long as such details are rational to the lay witness's perception and experience." Moreover, given that the State presented substantial evidence supporting the charge of criminal conspiracy, the court of appeals concluded that the trial court did not commit plain error in admitting the testimony.

64. **State v. Denton**, ___ N.C. App. ___, 829 S.E.2d 674 (June 4, 2019), *temp. stay allowed*, ___ N.C. ___, 828 S.E.2d 33 (June 14, 2019).

The trial court committed reversible error by admitting lay opinion testimony identifying the defendant as the driver of the vehicle, where the expert accident reconstruction analyst was unable to form an expert opinion based upon the same information available to the lay witness.

In this felony death by vehicle case, the defendant and Danielle Mitchell were in a car when it ran off the road and wrecked, killing Mitchell. The defendant was charged with felony death by vehicle and the primary issue at trial was whether the defendant was driving. At trial, Trooper Fox testified that he believed the defendant was driving because "the seating position was pushed back to a position where I did not feel that Ms. Mitchell would be able to operate that vehicle or reach the pedals." Fox, however, acknowledged that he was not an expert in accident reconstruction. Trooper Souther, the accident reconstruction expert who analyzed the accident, could not reach a conclusive expert opinion about who was driving. The defendant was convicted and he appealed, arguing that the trial court erred by allowing Fox, who was not an expert, to testify to his opinion that the defendant was driving. The court noted that accident reconstruction analysis requires expert testimony and it found no instance of lay accident reconstruction analysis testimony in the case law. Here, Fox based his lay opinion on the very same information used by Souther but without the benefit of expert analysis. The court concluded: "the facts about the accident and measurements available were simply not sufficient to support an expert opinion — as Trooper Souther testified — and lay opinion testimony on this issue is not admissible under Rule 701." Having found error, the court went on to conclude that it was prejudicial, requiring a new trial.

Miscellaneous Cases

65. **State v. Barrett**, ___ N.C. App. ___, 830 S.E.2d 696 (June 18, 2019).

The State laid a proper foundation for the admission of tracking dog evidence despite the fact that there was no testimony as to the breed of the dog.

In this common law robbery case, the State laid a proper foundation for the admission of evidence located by a tracking dog, "Carlo." Citing precedent, the court stated the four-factor test used to establish reliability of a tracking dog as follows:

> [T]he action of bloodhounds may be received in evidence when it is properly shown: (1) that they are of pure blood, and of a stock characterized by acuteness of scent and power of discrimination; (2) that they possess these qualities, and have been accustomed and trained to pursue the human track; (3) that they have been found by experience [to be] reliable in such pursuit; (4) and that in the particular case they were put on the trail of the guilty party, which was pursued and followed under such circumstances and in such way as to afford substantial assurance, or permit a reasonable inference, of identification.

With regard to the first factor, the court rejected the defendant's argument that the State failed to lay a proper foundation for the tracking dog evidence because "[t]here was never any testimony as to what kind of dog Carlo was" and the State never proffered any evidence that Carlo was "of pure blood." Noting that the four-factor test "has been modified over time," the court explained that "courts have recently placed less emphasis on the breed of the dog and placed more emphasis on the dog's ability and training." The Court found that by Officer McNeal's testimony as to Carlo's ability, training, and behavior during the search, "[t]he State laid a proper foundation for admission into evidence the actions and results by Carlo, the tracking dog."

66. **United States v. Galecki**, 932 F.3d 176 (4th Cir., July 29, 2019).

Refusal to compel DEA chemist to testify for the defense violated Sixth Amendment compulsory process rights.

Following conviction after trial for offenses relating to the distribution of controlled substance analogues, defendants appealed, arguing in part that the district court erred in denying a request to compel a DEA chemist to testify for the defense. The offenses require that the government show that the defendant knew the substances were controlled substances (or substantially similar to controlled substances) and intended the substance to be ingested by humans. The defendants argued at trial that the substance at issue was not substantially similar to a controlled substance and that they had no knowledge that the about the similarity of their product to controlled substances. They sought to compel the testimony of a DEA chemist who had reviewed the similarity of the substance to existing controlled substances for that agency and determined the two were not substantially similar. Despite that opinion from their expert, the DEA later classified the substance at issue as substantially similar (and thus subject to the analogue controlled substances act). The defendants presented expert testimony from two other chemists that offered the same opinion—that the substance at issue was not similar to existing controlled substances. The district court refused to compel the DEA chemist. The jury hung at the first trial and convicted at the second. The defendants appealed, and the Fourth Circuit remanded, ordering the district court to determine the materiality of the excluded testimony. On remand, the district court determined that the excluded testimony of the DEA chemist was merely cumulative to the other defense experts, and that no Sixth Amendment violation occurred. The defendants again appealed, and the Fourth Circuit reversed.

To show a compulsory process violation, the defendant must demonstrate that the excluded testimony was favorable and material. Material evidence "must be exculpatory; it must be 'not merely cumulative to the testimony of available witnesses;' [and] it must present 'a reasonable likelihood that the testimony could have affected the judgment of the trier of fact;' and it must otherwise be admissible." Slip op. at 15. Here, the excluded testimony was admissible, exculpatory, and not cumulative. The DEA chemist testimony was "qualitatively different" from the other defense experts. Unlike the defense experts, the DEA chemist would not have been paid by the defense to make the opinion or to testify. The prosecution impeached the defense experts at trial with the fact that they were "hired guns," and specifically argued this point at trial. "[The DEA chemist's] inability to be impeached on the basis of pecuniary interest made his testimony unique and particularly relevant, not cumulative." *Id*. at 16. That witness was also uniquely situated to rebut the government's DEA expert, showing the jury that there was disagreement on the similarity of the substances even within the DEA itself. This testimony reasonably may have led to a different outcome at trial and should have been allowed. This Sixth Amendment violation of the right to compulsory process was not harmless and required a new trial. The court also addressed several other evidentiary rulings and declined to reassign the matter to a different trial judge on remand. The convictions were therefore unanimously vacated and the matter remanded.

Arrest, Search, and Investigation

Arrests & Investigatory Stops

67. **State v. Parisi**, ___ N.C. ___, 831 S.E.2d 236 (Aug. 16, 2019).

The trial courts' findings of fact failed to support the legal conclusion that the investigating officer lacked the probable cause needed to place defendant under arrest for impaired driving.

On appeal from a divided panel of the Court of Appeals, State v. Parisi, ___ N.C. App. ___, 817 S.E.2d 228 (2018), the Supreme Court held that the trial court erred by granting the defendant's motion to suppress in this impaired driving case. The Supreme Court considered whether the trial courts' findings—which are conclusive on appeal if supported by competent evidence—supported the ultimate conclusions of law. Here, where the trial court made findings that the defendant admitted to consuming three beers, that defendant's eyes were red and glassy, that a moderate odor of alcohol emanated from defendant's person, and that the defendant exhibited multiple indicia of impairment while performing various sobriety tests, the Supreme Court had "no hesitation" in concluding that those facts sufficed, as a matter of law, to support the officer's decision to arrest the defendant for impaired driving.

68. **State v. Neal**, ___ N.C. App. ___, ___ S.E.2d ___ (Sept. 17, 2019).

A detailed anonymous tip regarding bad driving may provide reasonable suspicion of impaired driving.

An anonymous person contacted law enforcement to report that a small green vehicle with license plate RCW-042 was in a specific area, had run several vehicles off the road, had struck a vehicle, and was attempting to leave the scene. Deputies went to the area and immediately stopped a vehicle matching the description given by the caller. The defendant was driving the vehicle. She was unsteady on her feet and appeared to be severely impaired. A trooper arrived and administered SFSTs, which the trooper terminated because the defendant could not complete them safely. A subsequent blood test revealed multiple drugs in the defendant's system. The defendant was charged with impaired driving, was convicted in district court and in superior court, and appealed.

The defendant argued that the stop was not supported by reasonable suspicion as it was based on an anonymous tip and was not corroborated by any observation of bad driving. The court of appeals disagreed, noting some tension between prior North Carolina case law emphasizing the need to corroborate anonymous tips and *Navarette v. California*, 572 U.S. 393 (2014), which found reasonable suspicion of impaired driving based on an anonymous caller's report that a vehicle had nearly run the caller off the road. The court stated that it "need not resolve the apparent tension between our previous case law and *Navarette*" because the tip in this case involved a very timely report of multiple driving incidents and so was sufficiently reliable to provide reasonable suspicion.

69. **State v. Mahatha** , ___ N.C. App. ___, ___ S.E.2d ___ (Sept. 3, 2019).

Evidence was sufficient to support speeding to elude arrest where law enforcement was performing lawful duty of office at time of traffic stop.

The defendant was charged with driving while license revoked, not an impaired revocation; assault on a female; possession of a firearm by a person previously convicted of a felony; attempted robbery with a dangerous weapon; and habitual felon status. The State proceeded to trial on the charges of speeding to elude arrest and attaining habitual felon status, dismissing the other charges. The defendant was found guilty of both, and the trial judge sentenced the defendant to 97 to 129 months' imprisonment.

The defendant argued that the trial judge erred in failing to dismiss the speeding to elude arrest charge. According to the defendant, at the time the law enforcement officer activated his blue lights and siren to initiate a traffic stop, the officer did not have reasonable suspicion to stop the defendant and therefore was not performing a lawful duty of his office. The Court of Appeals rejected this argument, holding that the circumstances before and after an officer signals his intent to stop a defendant determine whether there was reasonable suspicion for a stop. Here, after the officer put on his lights and siren, the defendant accelerated to speeds of 90 to 100 miles per hour, drove recklessly by almost hitting other cars, pulled onto the shoulder to pass other cars, swerved and fishtailed across multiple lanes, crossed over the double yellow line, and ran a stop sign before he parked in a driveway and took off running into a cow pasture, where the officers found him hiding in a ditch. These circumstances gave the officer reasonable suspicion of criminal activity before he seized the defendant.

70. **State v. Holley** , ___ N.C. App. ___, ___ S.E.2d ___ (Sept. 3, 2019).

(1) Flight from unlawful investigatory stop did not constitute resisting, delaying, or obstructing an officer; (2) Because defendant voluntarily abandoned gun before he submitted to officer's authority, gun was not obtained as result of unlawful seizure and was admissible at trial.

The defendant was charged with possession of a firearm by a person previously convicted of a felony and resisting, delaying, or obstructing an officer. The State dismissed the resisting charge before trial, and the defendant filed a motion to suppress the firearm. The trial judge denied the motion to suppress, the defendant did not object to the introduction of the firearm at trial, and the defendant was convicted. Because the defendant failed to object to the firearm at trial, the Court of Appeals applied plain error review to the denial of his suppression motion.

(2) When the second officer detained the defendant, the defendant did not have a firearm on him. Rather, a K-9 unit recovered the firearm underneath a shed along the defendant's "flight path." The Court of Appeals found that the defendant voluntarily abandoned the firearm before he was seized by law enforcement officers. The evidence was therefore not the fruit of an unlawful seizure, and the Fourth Amendment did not bar its admission at trial.

71. **State v. Ellis**, ___ N.C. App. ___, ___ S.E.2d ___ (Aug. 20, 2019), *temp. stay allowed*, ___ N.C. ___, 831 S.E.2d 347 (Aug. 29, 2019).

The defendant's act of gesturing in the direction of a law enforcement officer with his middle finger extended while also in the midst of traffic gave rise to reasonable suspicion to conduct an investigatory stop of the vehicle in which the defendant was traveling.

While assisting a stalled motorist, a trooper observed the defendant gesture towards him "in an up-and-down pumping motion with his middle finger extended," which caused the trooper to pursue the defendant's vehicle and pull it over. The trooper was unclear as to whether the defendant was gesturing to him or someone in a nearby vehicle. After he stopped the vehicle, the trooper asked the defendant for his identification but the defendant refused to comply. Over a dissent, the court held that the traffic stop was justified based on reasonable suspicion. The court concluded that "[w]hile it may be reasonable for the trooper to suspect that the gesturing was, in fact, meant for him, and therefore maybe constitutionally protected speech, it was also objectively reasonable for the trooper to suspect that the gesturing was directed toward someone in another vehicle and that the situation was escalating." The court explained that such a "continuous and escalating gesturing directed at a driver in another vehicle, if unchecked, could constitute the crime of 'disorderly conduct.'"

The dissent would have held that the facts did not support a determination that the defendant's gesture was an attempt to provoke a violent retaliation in violation of the disorderly conduct statute. And, the dissent concluded, "extending one's middle finger to a police officer from a moving vehicle, while tasteless and obscene is . . . protected speech under the First Amendment and therefore cannot give rise to a reasonable suspicion of disorderly conduct."

72. **State v. Cabbagestalk**, ___ N.C. App. ___, 830 S.E.2d 5 (June 18, 2019).

Sight of a known person drinking beer on the porch, coupled with seeing her purchase more beer at the store and drive away approximately two hours later, did not provide reasonable suspicion for stop.

In this driving while impaired case, the officer observed the defendant sitting on a porch and drinking a tall beer at approximately 9:00 p.m. The defendant was known to the officer as someone he had previously stopped for driving while license revoked and an open container offense. Around 11:00pm, the officer encountered the defendant at a gas station, where she paid for another beer and returned to her car. The officer did not observe any signs of impairment while observing her at the store and did not speak to her. When the defendant drove away from the store, the officer followed her and saw her driving "normally"—she did not speed or drive too slow, she did not weave or swerve, she did not drink the beer, and otherwise conformed to all rules of the road. After two or three blocks, the officer stopped the car. He testified the stop was based on having seen her drinking beer earlier in the evening, then purchase more beer at the store later and drive away. The trial court denied the motion to suppress and the defendant was convicted at trial. The court of appeals unanimously reversed. The court noted that a traffic violation is not always necessary for reasonable suspicion to stop (collecting sample cases), but observed that "when the basis for an officer's suspicion connects only tenuously with the criminal behavior suspected, if at all, courts have not found the requisite reasonable suspicion." Here, the officer had no information that the defendant was impaired and did not observe any traffic violations. The court also rejected the State's argument that the defendant's past criminal history for driving while license revoked and open container supplemented the officer's suspicions: "Prior charges alone, however, do not provide the requisite reasonable suspicion and these particular priors are too attenuated from the facts of the current controversy to aid the State's argument." Despite the lack of objection at trial, the court found the trial court's finding of reasonable suspicion to be an error which had a probable impact on the jury's verdict, reversing the denial of the motion and vacating the conviction under plain error review.

Exclusionary Rule

73. **State v. Holley** , ___ N.C. App. ___, ___ S.E.2d ___ (Sept. 3, 2019).

(1) Flight from unlawful investigatory stop did not constitute resisting, delaying, or obstructing an officer; (2) Because defendant voluntarily abandoned gun before he submitted to officer's authority, gun was not obtained as result of unlawful seizure and was admissible at trial.

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Identification of Defendant

74. **State v. Crumitie**, ___ N.C. App. ___, ___ S.E.2d ___ (July 16, 2019).

Identification by officer was not subject to EIRA and suppression properly denied.

In this murder and attempted murder case, an officer responded to the shooting at the victim's apartment. Upon arrival, he saw a man running with a towel in his hands and gave chase. The officer could not catch the man and instead found one of the victims, the defendant's ex-girlfriend. She was able to describe the assailant and provide his name. The officer then located a DMV picture of the suspect and identified the defendant as the person he saw running earlier. The defendant sought to suppress this identification as a violation of the Eyewitness Identification Reform Act ("EIRA"). Specifically, the defendant argued the officer failed to conduct the "show-up" in accord with EIRA procedure. The trial court denied the motion and the court of appeals affirmed. The EIRA applies to "live lineups, photo lineups, and show-ups." "Here, the inadvertent out-of-court identification of defendant, based on a single DMV photo accessed by an investigating officer, was neither a lineup or a show-up under the EIRA, and thus not subject to those statutory protections." Even if the identification was suggestive, there was no substantial likelihood of misidentification under the facts of the case, and the denial of the motion was affirmed.

Knock & Talk

75. **State v. Ellis**, ___ N.C. App. ___, 829 S.E.2d 912 (June 18, 2019).

Officers exceeded authority for knock and talk by walking around defendant's yard and peering through a fan into the crawlspace of the home.

After discovering stolen property at a home across the street, officers approached the front door of the defendant's residence after being informed by a witness that the person who stole the property was at the residence. No one answered the knock, and officers observed a large spiderweb in the door frame. After knocking several minutes, an officer observed a window curtain inside the home move. An officer went to the back of the home. No one answered the officer at the back door either, despite the officer again knocking for several minutes. That officer then left the back door and approached the left front corner of the home. There, the officer smelled marijuana. Another officer confirmed the smell, and they observed a fan loudly blowing from the crawl space area of the home. The odor of marijuana was emanating from the fan and an officer looked between the fan slats, where he observed marijuana plants. A search

warrant was obtained on this basis, and the defendant was charged with trafficking marijuana and other drug offenses. The trial court denied the motion to suppress, finding that the smell and sight of the marijuana plants were in plain view. The court of appeals unanimously reversed. *Florida v. Jardines*, 569 U.S. 1 (2013), recognizes the importance of the home in the Fourth Amendment context and limits the authority of officers conducting a knock and talk. *Jardines* found a search had occurred when officers conducting a knock and talk used a drug sniffing dog on the suspect's front porch, and that such action exceeded the permissible boundaries of a knock and talk. Even though no police dog was present here, "[t]he detectives were not permitted to roam the property searching for something or someone after attempting a failed 'knock and talk'. Without a warrant, they could only 'approach the home by the front path, knock promptly, and then (absent invitation to linger longer) leave." (citing *Jardines*). North Carolina applies the home protections to the curtilage of the property, and officers here exceeded their authority by moving about the curtilage of the property without a warrant. Once the knocks at the front door went unanswered, the officers should have left. The court discounted the State's argument that the lack of a "no trespassing" sign on the defendant's property meant that the officers could be present in and around the yard of the home. In the words of the court:

> While the evidence of a posted no trespassing sign may be evidence of a lack of consent, nothing . . . supports the State's attempted expansion of the argument that the lack of such a sign is tantamount to an invitation for someone to enter and linger in the curtilage of the residence.

Because the officers here only smelled the marijuana after leaving the front porch and lingering in the curtilage, officers were not in a position they could lawfully be, and the plain view exception to the Fourth Amendment did not apply. Even if officers were lawfully present in the yard, the defendant had a reasonable expectation of privacy in his crawl space area, and officers violated that by looking through the fan slats. The denial of the motion to suppress was therefore reversed.

Search Warrants

76. **State v. Lewis**, ___ N.C. ___, 831 S.E.2d 37 (Aug. 16, 2019).

The trial courts lacked probable cause to issue search warrants for both the defendant's residence and vehicle when the officer omitted key facts from the search warrant application.

On discretionary review of a consolidated appeal from two decisions of the Court of Appeals, ___ N.C. App. ___, 816 S.E.2d 212 (2018), and ___ N.C. App. ___, 812 S.E.2d 730 (2018) (unpublished), the Supreme Court affirmed in part and reversed in part the decisions of the Court of Appeals. A sheriff's deputy arrested Robert Lewis, who had been recognized as the possible perpetrator of a string of bank robberies committed over two months. After arresting the defendant, an officer observed in plain sight a BB&T money bag on the floor of a Kia Optima that matched the description of a vehicle reportedly used to flee the scene of one of the robberies. The officer also spoke with the defendant's stepfather, who confirmed that the defendant lived at the residence. A detective prepared a search warrant application seeking permission to search the residence where the defendant was arrested, the Kia, and another

vehicle reportedly used to flee a different robbery. The affidavit accompanying the search warrant application failed to disclose several pieces of information, including that the defendant lived at the residence to be searched, that the first detective had seen the Kia parked in front of the residence, and that the Kia contained the incriminating money bag. A magistrate nonetheless issued the warrant, which led to the seizure of more evidence linking the defendant to the robberies. After the defendant was indicted on multiple counts of armed robbery, kidnapping, and common law robbery, he filed motions to suppress, arguing that there was an insufficient connection between the items sought and the property to be searched, and that the search of the Kia was not permissible under the plain view doctrine. The trial court denied the motion. The defendant pled guilty, preserving his right to appeal the denial of his motion to suppress, which he did. The Court of Appeals deemed the detective's warrant application sufficient to establish probable cause to search the cars but insufficient to establish probable cause to search the dwelling because the supporting affidavit failed to state that the defendant resided there.

The Supreme Court granted the parties' petitions for discretionary review. As for the warrant to search the residence, though much of the information in the affidavit linked the defendant to the robberies, it failed to set forth the circumstances of the defendant's arrest at this particular address, including how the detective initially obtained the address from officers in Johnston County, and how the defendant's stepfather had confirmed where the defendant resided. Absent information linking the defendant to the residence, the magistrate lacked probable cause to issue a warrant to search it, and so the court affirmed the Court of Appeals' ruling that the defendant's motion to suppress should have been allowed. Regarding the search of the Kia, the court concluded that the limited information actually set out in the affidavit failed to establish probable cause for the search. As a result, the court reversed the portion of the Court of Appeals' decision concluding that there was probable cause and remanded the case for consideration of the trial judge's alternative finding that the vehicle search was valid under the plain view doctrine.

Justice Morgan, joined by Justice Newby, dissented in part, writing that he would have found probable cause for the search of the car based on the totality of the information contained in the search warrant application.

77. **State v. Williams**, ___ N.C. App. ___, ___ S.E.2d ___ (Sept. 17, 2019).

(1) A judge who denies a motion to suppress without explaining why fails to provide adequate conclusions of law; (2) A search warrant was not supported by probable cause where it was based on a reliable informant's claims of having purchased drugs from the defendant at some point in the past plus a middleman's recent purchase of drugs from "the general area of defendant's home."

Officers obtained a search warrant to search the defendant's house. They executed the warrant, found drugs, and charged the defendant with drug offenses. The defendant moved to suppress, arguing that the warrant contained material misrepresentations and did not provide probable cause to support the issuance of the warrant. A superior court judge denied the motion, and the defendant was convicted and appealed. The court of appeals reversed. (1) The trial judge did not set forth adequate conclusions of law. Although formal findings of fact are not required when the evidence regarding a motion to suppress is not in conflict, a judge must still provide conclusions

of law, i.e., must explain the reason for the judge's ruling. In this case, the defendant made multiple challenges to the warrant and the trial judge merely denied the motion without further explanation. (2) The warrant was not supported by probable cause. The application was based on information from a confidential and reliable informant. The informant claimed to have purchased drugs from the defendant in the past, but reported that the defendant had become more cautious recently and now would sell drugs only through a specific middleman. The informant reported that she had recently picked up the middleman, dropped the middleman off in "the general area of defendant's home" and picked him up shortly thereafter in possession of drugs. The court of appeals concluded that this did not provide probable cause as the middleman was of unknown reliability and no one had observed him entering the defendant's home. A dissenting judge would have found that the informant's history of purchasing drugs from the defendant, plus what amounted to an imperfectly controlled purchase by the middleman, provided probable cause.

78. **State v. Caddell**, ___ N.C. App. ___, ___ S.E.2d ___ (Sept. 17, 2019).

A search warrant based on information from a confidential and reliable informant should not be evaluated under the anonymous tip standard.

A confidential informant who had provided reliable information in the past told officers that the defendant was selling drugs from his home. The officers had the informant conduct a controlled buy, then obtained a search warrant for the residence. They executed the warrant, found drugs, and charged the defendant with drug trafficking and other offenses. The defendant moved to suppress, a judge denied the motion, and the defendant entered an *Alford* plea and appealed. On appeal, he argued that the search warrant should have been analyzed under the anonymous tip standard and was not supported by probable cause. The court of appeals ruled that the anonymous tip standard did not apply as the lead officer "met with [the informant] both before and after the controlled purchase and had worked with [the informant] previously." Furthermore, the controlled buy corroborated the informant's claims, so the warrant was supported by probable cause.

79. **State v. Bailey**, ___ N.C. App. ___, ___ S.E.2d ___ (Aug. 20, 2019).

Facts alleged in detective's application for a search warrant established probable cause that evidence of unlawful drug activity would be found in the residence ordered searched.

Carteret County Sheriff's deputies observed what they believed to be a drug transaction in the parking lot of an apartment complex. Two individuals known to one of the detectives to have previously been involved in the sale of unlawful drugs drove into the parking lot in a blue Jeep. After they arrived, a woman got out of a white Mercury parked in the lot, got into the blue Jeep for 30 seconds, and then walked back to the Mercury. Both cars then quickly left the parking lot. The Jeep traveled back to the apartment complex where the driver and passenger lived. Officers stopped the Mercury for traffic violations shortly after it left the parking lot. During the stop, the female driver said she had purchased a $20 bag of heroin from the male passenger in the Jeep that she snorted while driving down the road. A search warrant to search the apartment where the occupants of the blue Jeep lived was issued based on an affidavit setting forth these facts.

Over a dissent, the court held that the affidavit established "more than a fair probability" that evidence of illegal drug activity would be discovered at the apartment. The affidavit alleged that the occupants of the Jeep traveled directly from the scene of the alleged drug transaction to the apartment. The magistrate could reasonably have inferred that the twenty dollars the woman paid for the heroin would be in the apartment and that the two known "drug dealers whom the investigators had just observed deal heroin" would have additional drugs or paraphernalia stored there.

The dissent viewed the case as controlled by *State v. Campbell*, 282 N.C. 125 (1972) (invalidating search warrant for known residence of drug dealers that was issued based on an affidavit that failed to establish probable cause that unlawful drugs were possessed or sold in or about the residence).

80. **State v. Thompson**, ___ N.C. App. ___, ___ S.E.2d ___ (Aug. 20, 2019).

Defendant was not an occupant of the premises so as to justify his detention during the execution of a search warrant under Michigan v. Summers, 452 U.S. 692 (1981).

The defendant was cleaning his car in the street adjacent to his girlfriend's apartment when several law enforcement officers arrived to execute a search warrant for the apartment. Before entering the apartment, a law enforcement officer approached the defendant and asked for his driver's license. Officers remained outside with the defendant while the search warrant was executed. Defendant later consented to a search of his vehicle, where officers found marijuana, paraphernalia, and a firearm. He was charged with drug crimes and possession of firearm by a felon.

The defendant moved to suppress the evidence seized from the search of his vehicle on the basis that the officers obtained the evidence as a result of an unlawful, suspicionless seizure. The court of appeals in *State v. Thompson*, ___ N.C. App. ___, 809 S.E.2d 340 (2018) (*Thompson I*) determined, over a dissent, that the trial court's order denying the defendant's suppression motion did not resolve a pivotal issue of fact. Thus, the court vacated the judgment and remanded for further findings.

The North Carolina Supreme Court vacated *Thompson I* and remanded for reconsideration in light of *State v. Wilson*, 371 N.C. 920 (2018). *Wilson* addressed the authority of law enforcement officers to detain a person who arrives on the scene while a search warrant is being executed. *Wilson* held that pursuant to the rule announced by the United States Supreme Court in *Michigan v. Summers*, 452 U.S. 692 (1981), a search warrant authorizes the detention of (1) occupants, (2) who are within the immediate vicinity of the premises to be searched, and (3) who are presented during the execution of a search warrant for the premises. An occupant is a person who poses a real threat to the safe and efficient execution of a search warrant.

On remand, and again over a dissent, the court of appeals held that the defendant was not an occupant of the searched premises. The court noted that he remained inside his vehicle and did not attempt to approach the apartment or otherwise interfere with the search. Thus, the court found no circumstances to indicate that the defendant posed a threat to the safe and efficient

execution of the search. The court therefore again vacated the trial court's judgment and remanded the matter to the trial court for resolution of material factual disputes, pursuant to *Thompson I*.

The dissent would have held that the defendant was an occupant of the premises as he was within the line of sight of the apartment being searched and was a threat to enter or attempt to enter the premises.

Searches

81. **State v. Terrell** , ___ N.C. ___, 831 S.E.2d 17 (Aug. 16, 2019).

An officer's warrantless search of a USB drive was not valid under the private-search doctrine in the absence of a finding of "virtual certainty" that the device contained nothing of significance beyond what had already been discovered by a private party.

On appeal from a divided panel of the Court of Appeals, ___ N.C. App. ___, 810 S.E. 2d 719 (2018), the Supreme Court affirmed the Court of Appeals' decision that an officer's warrantless search of a defendant's USB drive following a prior search by a private individual violated the defendant's Fourth Amendment rights. While examining a thumb drive belonging to the defendant, the defendant's girlfriend saw an image of her 9-year-old granddaughter sleeping, exposed from the waist up. Believing the image was inappropriate, the defendant's girlfriend contacted the sheriff's office and gave them the thumb drive. Later, a detective conducted a warrantless search of the thumb drive to locate the image in question, during which he discovered other images of what he believed to be child pornography before he found the photograph of the granddaughter. At that point the detective applied for and obtained a warrant to search the contents of the thumb drive for "contraband images of child pornography and evidence of additional victims and crimes." The initial warrant application relied only on information from the defendant's girlfriend, but after the State Bureau of Investigation requested additional information, the detective included information about the images he found in his initial search of the USB drive. The SBI's forensic examination turned up 12 images, ten of which had been deleted and archived in a way that would not have been viewable without special forensic capabilities. After he was charged with multiple sexual exploitation of a minor and peeping crimes, the defendant filed a pretrial motion to suppress all of the evidence obtained as a result of the detective's warrantless search. The trial court denied the motion, finding that the girlfriend's private viewing of the images frustrated the defendant's expectation of privacy in them, and that the detective's subsequent search therefore did not violate the Fourth Amendment. After his trial and conviction, the defendant appealed the trial court's denial of his motion to suppress.

The Supreme Court agreed with the Court of Appeals that the girlfriend's opening of the USB drive and viewing some of its contents did not frustrate the defendant's privacy interest in the entire contents of the device. To the contrary, digital devices can retain massive amounts of information, organized into files that are essentially containers within containers. Because the trial court did not make findings establishing the precise scope of the girlfriend's search, it likewise could not find that the detective had the level of "virtual certainty" contemplated by

United States v. Jacobsen, 466 U.S. 109 (1984), that the device contained nothing else of significance, or that a subsequent search would not tell him anything more than he already had been told. The search therefore was not permissible under the private-search doctrine. The court affirmed the decision of the Court of Appeals and remanded the case for consideration of whether the warrant would have been supported by probable cause without the evidence obtained through the unlawful search.

Justice Newby dissented, writing that the majority's application of the virtual certainty test needlessly eliminates the private-search doctrine for electronic storage devices unless the private searcher opens every file on the device.

82. **State v. Jones**, __ N.C. App. __, __ S.E.2d __ (Oct. 1, 2019).

Warrantless search of a probationer's residence, conducted by law enforcement officers acting in coordination with probation officers, was permissible since it was "directly related" to probation supervision based on the defendant's risk assessment, suspected gang affiliation, and positive drug screen.

The defendant was on probation for a conviction of possession of a firearm by a convicted felon, and he was classified by his probation officer as "extreme high risk" for supervision purposes. Officers from several law enforcement agencies, working in conjunction with probation officers, conducted warrantless searches of the residences of high risk probationers in the county, including the defendant. Officers found drugs and paraphernalia during the search of defendant's residence, and he was charged with several drug-related felonies. The defendant moved to suppress the evidence from the warrantless search, arguing that it was illegal because it was not "directly related" to his probation supervision, as required by G.S. 15A-1343(b)(13). The appellate court disagreed and affirmed the denial of the defendant's suppression motion. The facts of this case were distinguishable from *State v. Powell*, __ N.C. App. __, 800 S.E.2d 745 (2017). In *Powell*, a U.S. Marshals task force conducted warrantless searches of random probationer's homes as part of an ongoing operation for its own purposes and did not even notify the probation office. The *Powell* court held that those warrantless searches were not "directly related" to probation supervision. By contrast, the defendant in this case was selected for the enforcement action by his probation officer based on "his risk assessment, suspected gang affiliation, and positive drug screen," and the "purpose of the search was to give the added scrutiny and closer supervision required of 'high risk' probationers such as the Defendant." The search was therefore directly related to his supervision.

Criminal Offenses

Participants in Crime

83. **State v. Glover** , ___ N.C. App. ___, ___ S.E.2d ___ (Sept. 3, 2019).

Majority of Court of Appeals holds that constructive possession and acting in concert instructions were supported by evidence in drug possession case.

The defendant was charged with possession of various drugs found in his bedroom and an adjoining alcove, which he said was his personal space. The defendant shared the house with a number of people, including a woman named Ms. Stepp. The defendant consented to a search of his bedroom and alcove, stating to the officers he did not believe they would find any illegal substances, only drug paraphernalia. When asked whether he had ingested any illegal substances, the defendant admitted having used methamphetamine and prescription pills. The search of the defendant's bedroom uncovered a white rectangular pill marked G3722, a small bag of marijuana, and drug paraphernalia. The search of the alcove uncovered a metal tin containing methamphetamine, cocaine, heroin, and a small pill similar to the one found in his bedroom. The defendant was charged with and convicted of possession of methamphetamine, heroin, and cocaine and having attained the status of an habitual felon.

At trial, over the defendant's objection, the trial judge instructed the jury that it could find the defendant guilty of possession on the theory of acting in concert in addition to the theory of constructive possession. On appeal, the defendant argued that the evidence did not support an instruction on acting in concert. The majority recognized that prior cases stated that the acting in concert theory is not generally applicable to possession offenses because it tends to get confused with other theories of guilt; however, acting in concert may occur if the evidence shows that the defendant was acting together with another person who did the acts necessary to constitute the crime pursuant to a common plan or purpose to commit the crime. The majority found sufficient evidence of acting in concert based on the testimony of Ms. Stepp, who the defendant called as a witness. She testified that she placed the metal tin in the dresser in the alcove, that the drugs were hers, that she intended to come back later to use them, and that she and the defendant had taken drugs together in the past. The majority found this sufficient evidence of acting in concert because the jury could have found that the defendant was aware of the presence of the drugs in the metal tin and that he facilitated Ms. Stepp's constructive possession by allowing her to keep her drugs in a place where they would be safe from others.

The dissent found that this evidence was insufficient to show that the defendant acted together with Ms. Stepp pursuant to a common plan or purpose to possess the drugs in the metal tin. The dissent found no evidentiary support for the majority's conclusion that the defendant facilitated Ms. Stepp's possession by allowing her to keep the drugs in the alcove. The dissent concluded that the error was not harmless and the defendant should receive a new trial.

General Crimes

84. **State v. Miles**, ___ N.C. App. ___, ___ S.E.2d ___ (Aug. 20, 2019).

State presented substantial evidence to withstand a motion to dismiss for conspiracy to commit robbery with a dangerous weapon.

The evidence showed that the defendant was in a car with two other men that arrived in a church parking lot near the victim's house at the same time as another car driven by a female. The female then drove to the victim's home and beeped her car horn. Shortly after the victim came out of his house and told the woman to leave, the defendant approached the victim with a gun and said, "Don't f**kin' move." After the victim and the defendant exchanged gunfire, the

defendant and two other man ran from the victim's house. The defendant got back into the car in the parking lot. This evidence was sufficient to show that the defendant agreed with at least one other person to commit robbery with a dangerous weapon. Defendant's actions were substantial evidence of his intent to rob the victim, and his arrival at the victim's home with the weapon was an overt act to carry out his intentions.

Homicide

85. **State v. Cheeks**, __ N.C. App. __ (Oct. 1, 2019).

In a "hybrid" bench trial that incorporated procedures from criminal jury trials and civil bench trials, the defendant's convictions for first-degree murder by starvation and negligent child abuse were supported by competent evidence and there was no fatal variance between the child abuse indictment and the evidence presented at trial.

This case arose out of the death of a malnourished and neglected child with a genetic condition and developmental delays. The defendant, who was the stepfather and caregiver of the child, was convicted of first-degree murder by starvation and negligent child abuse. The trial judge adopted a "hybrid" procedure for conducting the bench trial that included holding a charge conference on the substantive law, as in a criminal jury trial, and making detailed findings of fact and conclusions of law, as in a civil bench trial. The Court of Appeals noted that the additional steps taken by the trial judge were not required by the rules of procedure or applicable statutes governing criminal bench trials, but they were "fully within the trial court's discretion" and helped provide "a full understanding of the law applied and the facts it determined to be true." Finding no case precedent addressing the appropriate standard of review for the hybrid procedures used at trial, the appellate court held that it would "review the trial court's order based upon the standards of review as set forth for findings of fact in criminal cases regarding motions to suppress and motions for a new trial." Under that standard, the trial court's findings of fact are binding on appeal if supported by any competent evidence, while conclusions of law are reviewed de novo. Applying those standards of review, the Court of Appeals addressed five issues.

First, even if there was conflicting evidence that the child was given some food, there was sufficient evidence to support the finding that the child was provided with an inadequate amount of food to keep him alive, which constituted "starvation" pursuant to *State v. Evangelista*, 319 N.C. 152 (1987) (starvation means "death from the deprivation of liquids or food necessary in the nourishment of the human body"). Second, the Court of Appeals rejected the argument that a "legal duty to feed" is a requisite element of murder by starvation under G.S. 14-17, and even if it is, the defendant was the primary caregiver for the child and therefore he did have a legal duty to feed him. Third, as with murder by poison or torture, murder by starvation implies the element of malice, and therefore no separate showing of malice is required. Fourth, given the ample and credible evidence that starvation was the proximate cause of the child's death, the trial court acting as the finder of fact could choose to believe or disbelieve conflicting testimony regarding other physical abuse or neglect may have contributed to the child's death. Finally, there was no fatal variance between the child abuse indictment and the evidence at trial. The indictment

adequately alleged all the essential elements of the offense, and any additional statements it contained about the failure to provide medical care, nutrition, or hydration were mere surplusage.

Assaults

86. **State v. Miller**, __ N.C. App. __, __ S.E.2d __ (Oct. 1, 2019).

A defendant who fires one shot into a moving vehicle occupied by two people may be charged and convicted for two offenses under G.S. 14-34.1, but judgment must be arrested on the lesser of the two counts.

After getting into an argument at a holiday party, the defendant fired a warning shot from a rifle into the air and then fired a single shot into a moving vehicle occupied by two people, striking one of them in the neck and seriously injuring him. Defendant was subsequently convicted and sentenced for four felonies related to the shooting, including charges for both: (1) discharging a weapon into an occupied vehicle in operation inflicting serious bodily injury, a Class C felony under G.S. 14-34.1(c) (for the injured victim); and (2) discharging a weapon into an occupied vehicle in operation, a Class D felony under G.S. 14-34.1(b) (for the second occupant). On appeal, the defendant argued that the trial court should have arrested judgment on the lesser of the two charges for firing into an occupied vehicle, because he could not be sentenced twice for the single act of firing one shot. The Court of Appeals agreed and held that although the defendant could be indicted and tried for both charges, upon conviction the trial court should have arrested judgment for the lesser offense. This case was distinguishable from other cases in which multiple judgments were supported because the defendant fired multiple shots or fired into multiple vehicles. In this case, where there was only one shot fired into one vehicle, the relevant inquiry under the statute is only whether the vehicle was occupied; the number of occupants is immaterial. To the extent that the presence of additional occupants in the vehicle increases the risk of injury or enhances the culpability of the act, that factor is accounted for by the ascending levels of punishment prescribed under the statute.

87. **State v. Jones**, ___ N.C. App. ___, 829 S.E.2d 507 (June 4, 2019).

A defendant cannot be convicted of two assault offenses based on a single assault.

The evidence was sufficient to support a conviction of discharging a weapon into occupied property. The defendant argued that the evidence was insufficient to show that the defendant knew that the property was occupied when he shot into the house. Here, an eyewitness testified that before discharging his firearm, the defendant loudly "called out" individuals inside the home, challenging them to come outside, and an individual was standing in the doorway just minutes earlier when the defendant slowly drove past, looking at the dwelling.

A defendant cannot be convicted of two assault offenses (here, assault by pointing a gun and assault with a deadly weapon) based on a single assault. For a defendant to be charged with multiple counts of assault, there must be multiple assaults; this requires evidence of a distinct interruption in the original assault followed by a second assault. Here, the charges arose from actions that occurred in rapid succession without interruption.

Sexual Assaults & Related Offenses

88. **State v. Patterson**, ___ N.C. App. ___, ___ S.E.2d ___ (Aug. 6, 2019).

The term "business day" as used in G.S. 14-208.9A means any calendar day except Saturday, Sunday, or Legal holidays declared by G.S. 103-4.

Over a dissent, the court held in this failure to register as a sex offender case that there was insufficient evidence that the defendant willfully failed to timely return an address verification form, deciding as a matter of first impression that the federal holiday Columbus Day is not a "business day" for purposes of G.S. 14-208.9A. G.S. 14-208.9A requires registrants to return verification forms to the sheriff within "three business days after the receipt of the form." The defendant received the address verification form on Thursday, October 9, 2014. The defendant brought the form to the sheriff's office on Wednesday, October 15, 2014. The intervening Monday, October 13, 2014 was Columbus Day. The defendant was arrested for failing to timely return the form while he was at the sheriff's office.

Noting that some statutory definitions of the term "business day" exclude Columbus Day while others include it, the court found the term as used in G.S. 14-208.9A ambiguous. The court looked to the legislative history of the statute and the circumstances surrounding its adoption but was unable to discern a clear meaning of the term in that effort. Operating under the rule of lenity, the court held that "the term 'business day,' as used in Chapter 27A, means any calendar day except Saturday, Sunday, or legal holidays declared in [G.S. 103-4]." Because Columbus Day is among the legal holidays declared in G.S. 103-4, there was insufficient evidence that the defendant violated G.S. 14-208.9A. A dissenting judge would have held that Columbus Day is a "business day," in part because the sheriff's office actually was open for business on that day and in part because G.S. 103-4 lists as "public holidays" various days "which no one would reasonably expect the Sheriff's Office to be closed for regular business to the public." The dissenting judge identified several such days, including Robert E. Lee's Birthday and Greek Independence Day.

89. **State v. Southerland**, ___ N.C. App. ___, ___ S.E.2d ___ (July 2, 2019).

Defendant was guilty of taking indecent liberties with a minor for attempting to send an 11-year-old girl a letter asking her to have sex with him.

The defendant, a 69 year-old male, wrote a letter to an 11 year-old girl and asked her grandmother to deliver the letter. The grandmother read the letter, in which the defendant asked the girl to have sex with him to make him "feel young again," and called the police. The defendant was charged and convicted of engaging in indecent liberties with a minor under G.S. 14-202.1(a)(1). A person is guilty of this offense if he "[w]illfully takes or attempts to take any immoral, improper, or indecent liberties with any child of either sex under the age of 16 years for the purpose of arousing or gratifying sexual desire[.]"

On appeal, the defendant argued that it was error to deny his motion to dismiss at trial because there was insufficient evidence to show that he was ever "with" the minor as contemplated by the

statute, or that he took any steps beyond mere preparation sufficient to constitute an "attempt" under the statute. The Court of Appeals rejected both arguments, citing to similar facts and holdings in *State v. McClary*, 198 N.C. App. 169 (2009). The statute does not require actual physical touching to constitute a taking or attempted taking of indecent liberties, and the delivery of the letter in this case was sufficient evidence of an attempt. Additionally, the letter itself provided adequate circumstantial evidence of the defendant's unlawful purpose.

Larceny, Embezzlement & Related Offenses

90. **State v. Stephenson**, ___ N.C. App. ___, ___ S.E.2d ___ (Sept. 17, 2019).

An indictment for larceny of motor vehicle parts must allege more than $1,000 in damage to a single vehicle.

The defendant stole fuel injectors from a salvage yard. Among other issues: (1) The defendant's indictment for larceny of motor vehicle parts in violation of G.S. 14-72.8 was insufficient. The statute requires that "the cost of repairing the motor vehicle is one thousand dollars . . . or more," but the indictment alleged only that the total value of all the injectors taken from an unspecified number of vehicles was $10,500. The court of appeals construed the statute to require at least $1,000 in damage to a single motor vehicle. (2) A detective testified that he contacted an auto parts company in Maryland and learned that the defendant had sold the company 147 fuel injectors for nearly $10,000. This testimony was not hearsay as it was admitted "to describe [the detective's] investigation," not to prove that the defendant stole anything.

91. **State v. Edgerton**, ___ N.C. App. ___, ___ S.E.2d ___ (Aug. 6, 2019).

A habitual larceny indictment was not facially invalid for failure to allege that the defendant was represented by or waived counsel in connection with prior larceny convictions.

In this habitual larceny case where the defendant was sentenced as a habitual felon, the court held that the habitual larceny indictment was not facially invalid for failure to allege all essential elements of the offense. The defendant argued that the habitual larceny indictment was facially invalid because it did not specifically allege that he was represented by counsel or had waived counsel in the proceedings underlying each of his prior larceny convictions. G.S. 14-72(b)(6) provides that a conviction for a larceny offense may not be used as a prior conviction for purposes of elevating misdemeanor larceny to felony habitual larceny unless the defendant was represented by counsel or waived counsel. Reviewing the structure of G.S. 14-72(b)(6), the North Carolina Supreme Court's definition of the elements of the offense in a prior case, and the availability to defendants of information regarding their counsel when they obtained prior convictions, the court held that representation by or waiver of counsel in connection with prior larceny convictions is not an essential element of felony habitual larceny and thus need not be alleged in an indictment for that offense. Because representation by or waiver of counsel is not an essential element of the offense, the court also rejected the defendant's related sufficiency of the evidence argument.

Robbery

92. **State v. Miles** , ___ N.C. App. ___, ___ S.E.2d ___ (Aug. 20, 2019).

State presented substantial evidence to withstand a motion to dismiss for conspiracy to commit robbery with a dangerous weapon.

The evidence showed that the defendant was in a car with two other men that arrived in a church parking lot near the victim's house at the same time as another car driven by a female. The female then drove to the victim's home and beeped her car horn. Shortly after the victim came out of his house and told the woman to leave, the defendant approached the victim with a gun and said, "Don't f**kin' move." After the victim and the defendant exchanged gunfire, the defendant and two other man ran from the victim's house. The defendant got back into the car in the parking lot. This evidence was sufficient to show that the defendant agreed with at least one other person to commit robbery with a dangerous weapon. Defendant's actions were substantial evidence of his intent to rob the victim, and his arrival at the victim's home with the weapon was an overt act to carry out his intentions.

93. **State v. Redmond**, ___ N.C. App. ___, ___ S.E.2d ___ (Aug. 6, 2019).

The defendant was not entitled to an instruction on common law robbery as a lesser included offense of armed robbery where the trial court could have found a box cutter to be a dangerous weapon as a matter of law, though it did not do so.

In this armed robbery case, the trial court did not err by failing to instruct the jury on the lesser included offense of common law robbery. The court began its analysis by noting that "[o]nly one element distinguishes common law robbery and robbery with a dangerous weapon, and that element is the use of a dangerous weapon." The trial court did not instruct the jury that the box cutter the state's evidence tended to show the defendant used during the robbery was a dangerous weapon as a matter of law and instead submitted that factual issue to the jury. Relying on State v. Clevinger, ___ N.C. App. ___, 791 S.E.2d 248 (2016), the court held that the defendant was not entitled to an instruction on the lesser included offense because, though it did not do so, the trial court could have found the box cutter to be a dangerous weapon as a matter of law.

Frauds

94. **State v. Miles**, ___ N.C. App. ___, ___ S.E.2d ___ (Aug. 20, 2019).

Trial court did not err in instructing the jury with respect to the identity theft charges that a person's name, date of birth, and address are personal identifying information.

When the defendant was treated at the hospital for gunshot wounds he sustained in his altercation with the victim, he provided another person's name, date of birth, and address. A warrant for his arrest was issued under this false identity, and he was subsequently charged with identity theft. The trial court instructed the jury that a person's name, date of birth, and address "would be personal identifying information" under the identity theft statute.

G.S. 14-113.20 sets forth fourteen examples of "identifying information," none of which specifically reference the appropriation of a person's name, date of birth, and address. A catch-all category incorporates "[a]ny other numbers or information that can be used to access a person's financial resources." The court rejected the notion that identifying information under the identity theft statute includes only the types of information listed by example. It also concluded that even if the list was exclusive, the defendant's use of another person's name, date of birth, and address would fall under the catch-all category. Thus, the court found no error in the trial court's jury instruction.

Burglary, Breaking or Entering, and Related Offenses

95. **State v. McDaniel**, ___ N.C. ___, 831 S.E.2d 283 (Aug. 16, 2019).

The evidence presented at trial concerning defendant's possession of goods was sufficient to support defendant's conviction under the doctrine of recent possession.

On appeal from a divided panel of the Court of Appeals, ___ N.C. App. ___, 817 S.E.2d 6 (2018), the Supreme Court determined that the evidence presented at trial supported the defendant's conviction under the doctrine of recent possession. Pursuant to a tip, a detective discovered stolen property from the victim's house at another house on nearby Ridge Street. Several days later, another detective saw the defendant across from the Ridge Street house, sitting in a white pickup truck. The truck matched the description of one that had reportedly been used to deliver the previously discovered property to the Ridge Street house, and now contained more items from the victim's house. After the trial judge denied the defendant's motion to dismiss for insufficiency of the evidence and instructed the jury on the doctrine of recent possession, the jury found the defendant guilty of felony breaking or entering and felony larceny for the first incident, and guilty of felony larceny for the second incident.

On appeal, the defendant argued that the evidence was insufficient to send the charges to the jury as to both her culpable possession of the items allegedly stolen in the first incident and the recency of her possession of those items. Considering the trial court ruling on a motion to dismiss de novo and with all evidentiary conflicts resolved in favor of the State, the court determined that the defendant's acknowledgment that she had been in control of the victim's items found at the Ridge Street house two weeks after the first incident brought her within the doctrine of recent possession. Though she claimed to have been acting at the direction of another man—a co-defendant also charged in connection with the initial offense—"exclusive possession" within the meaning of the doctrine of recent possession can, the court said, include joint possession of co-conspirators or persons acting in concert. As a result, the court concluded that there was substantial evidence of exclusive possession, and that the Court of Appeals majority erred by holding to the contrary and vacating the defendant's convictions. The court thus reversed the decision of the Court of Appeals and remanded the case for consideration of the defendant's remaining arguments.

Justice Earls dissented, writing that the evidence to support the defendant's conviction was insufficient in that the defendant was never found in possession of the items allegedly stolen in the first incident. To the contrary, she only admitted to having the items at the behest of her

employer (the co-defendant), and her possession was therefore not that of herself but of her employer.

Bombing, Terrorism, and Related Offenses

96. **State v. Carey**, ___ N.C. App. ___, ___ S.E.2d ___ (July 16, 2019), *temp. stay allowed*, ___ N.C. ___, 829 S.E.2d 910 (Aug. 5, 2019).

Flash bang grenades did not qualify as weapon of mass destruction.
The defendant was charged and convicted of possession of a weapon of mass destruction and impersonating an officer, following the defendant's traffic stop for using emergency lights on his vehicle and speeding. "Flash bang grenades" were found in the defendant's vehicle, and those were the basis for the weapon of mass destruction offense. The defendant argued his motion to dismiss for insufficiency of the evidence should have been granted, as these devices fall outside of the meaning of "grenade" as listed in G.S. 14-288.8(c). The court agreed and reversed that conviction. In the context of the statute, "grenade" is listed alongside other explosive devices like bombs, mines, rockets, and missiles. These items are unlike "diversionary" flash grenades and no trial evidence showed they were capable of causing the kind of harm that the statute was designed to prevent—possession of weapons that can cause "widespread and catastrophic death and destruction." Under the canon of construction *ejusdem generis* ("of the same kind"), the legislature is presumed to intend broad words paired together in a statute to be interpreted within the more specific context of the law. Further, the rule of lenity requires that an ambiguous statute be read narrowly. "The flash bang grenades found inside of Defendant's vehicle are not consistent with the purpose, do not fit within, and do not rise to the potential impacts of enumerated general items within the list constrained by the intent and purpose of the statute." The motion to dismiss the weapon of mass destruction should have been granted and the matter remanded for resentencing on the impersonation of officer offense only. The court concluded: "This decision does not prevent or prohibit the possession or use of flash bang grenades from being otherwise restricted or regulated by law." A judge dissenting in part would have found the flash bang grenades were a "grenade" within the meaning of the statute and upheld the trial court's ruling.

Weapons Offenses

97. **State v. Holshouser**, ___ N.C. App. ___, ___ S.E.2d ___ (Sept. 3, 2019).

Defendant not entitled to instruction on defense of justification to possession of firearm by person previously convicted of a felony where he testified at trial that he did not possess the firearm.

The defendant was indicted for possession of a firearm—specifically, "a New England Firearms Pardner Model 12 Gauge Shotgun"—by a person previously convicted of a felon. The defendant initially told officers, who were investigating a report of a domestic dispute at the defendant's home, that he had no knowledge about a shotgun, but he later admitted to one of the deputies that he had thrown the shotgun into the woods and told the deputy where he had thrown it. At trial, the defendant testified that he had been involved in an altercation with his stepson but did not

remember taking the shotgun from him. He further testified that he did not take possession of "that gun." The trial judge gave the pattern instruction on possession of a firearm by a person previously convicted of a felony. There were no objections to the instruction, and the jury found the defendant guilty of the possession charge and of having attained habitual felon status. On appeal, the defendant argued that the trial judge committed plain error by failing to instruct the jury on the affirmative defense of justification. The Court of Appeals held that the defendant was not entitled to the instruction.

The Court first recognized that in State v. Mercer, ___ N.C. ___, 818 S.E.2d 375 (2018), it had recognized the defense of justification to possession of a firearm by a person previously convicted of a felony. The Court noted that the North Carolina Supreme Court has granted review in *Mercer* but stated that it would follow *Mercer* as it applied when the defendant's case was before the trial court. Assuming a justification defense as explained in *Mercer* applies in North Carolina, the Court stated first that it isn't clear that a justification defense is a "substantial and essential feature" of the possession charge, requiring an instruction by the trial judge, because the possession statute does not describe justification or self-defense as an element of the offense. The Court then ruled that the defendant's own testimony, in which he denied possessing the gun alleged in the indictment, rendered a justification defense unavailable. The Court stated that a defendant is not entitled to a justification instruction where he testifies that he did not commit the criminal act at all. The Court also rejected the defendant's claim of ineffective assistance of counsel based on counsel's failure to request a justification instruction, holding that even if counsel had requested such an instruction the trial court should not have granted it.

Obstruction of Justice and Related Offenses

98. **State v. Holley** , ___ N.C. App. ___, ___ S.E.2d ___ (Sept. 3, 2019).

(1) Flight from unlawful investigatory stop did not constitute resisting, delaying, or obstructing an officer; (2) Because defendant voluntarily abandoned gun before he submitted to officer's authority, gun was not obtained as result of unlawful seizure and was admissible at trial.

The defendant was charged with possession of a firearm by a person previously convicted of a felony and resisting, delaying, or obstructing an officer. The State dismissed the resisting charge before trial, and the defendant filed a motion to suppress the firearm. The trial judge denied the motion to suppress, the defendant did not object to the introduction of the firearm at trial, and the defendant was convicted. Because the defendant failed to object to the firearm at trial, the Court of Appeals applied plain error review to the denial of his suppression motion.

(1) The evidence showed that the police chief received a call about possible drug activity involving two black males outside a store and radioed the information to patrol officers. A patrol officer saw two men who matched the description walking on the sidewalk, and he parked his marked patrol car. The patrol officer testified that the two men saw him and continued walking. When the officer yelled for the defendant to stop, he looked at the officer and then ran. Another officer eventually located the defendant and arrested him for resisting, delaying, or obstructing an officer.

The Court of Appeals found that the evidence did not support the trial judge's findings of fact in its denial of the defendant's suppression motion. Thus, the trial judge found the area had been the scene of several drug investigations and shootings in the previous months, but the police chief testified that for approximately seven years he could recall three arrests for drugs and marijuana and did not testify that they took place in the past several months. The patrol officer testified that he had responded to one shooting in the area but didn't indicate when the shooting occurred and since then had responded to loitering and loud music issues. The trial judge also found that the defendant walked away "briskly" when he first saw the patrol officer, but the officer testified that the defendant was just walking down the sidewalk. The officer's later testimony at trial that the defendant kept walking away faster and faster was not before the judge at the suppression hearing and could not be used to support the judge's findings of fact. The Court found next that the trial judge's supported findings of fact did not support his conclusion that the officer had reasonable suspicion to stop the defendant initially or probable cause to arrest for resisting. Thus, even assuming the incident took place in a high crime area, the defendant's presence there and his walking away from the officer did not provide reasonable suspicion to stop. (The Court noted that the patrol officer was unaware of the tip received by the police chief and therefore did not consider the tip in measuring the reasonableness of the stopping officer's suspicion.) Because the officer did not have reasonable suspicion to stop, the Court found that the defendant was not fleeing from a lawful investigatory stop and the trial judge erred in concluding that there was probable cause to arrest the defendant for resisting.

Drug Offenses

99. **State v. Alvarez**, ___ N.C. ___, 828 S.E.2d 154 (June 14, 2019).

The evidence was sufficient to support the defendant's conviction of maintaining a vehicle for keeping or selling controlled substances.

The Court per curiam affirmed the decision of a divided panel of the Court of Appeals, ___ N.C. App. ___, 818 S.E.2d 178 (2018), finding no error in the trial court's denial of the defendant's motion to dismiss a felony maintaining a vehicle for keeping or selling controlled substances charge based on insufficient evidence.

The Court of Appeals had held, over a dissent, that the evidence was sufficient to support the defendant's conviction of maintaining a vehicle for keeping or selling controlled substances. The defendant argued that the State presented insufficient evidence that he kept or maintained the vehicle over a duration of time. The court disagreed. The determination of whether a vehicle is used for keeping or selling drugs depends on the totality of the circumstances and a variety of factors are relevant, including occupancy of the property, possession over time, the presence of large amounts of cash or paraphernalia, and the defendant's admission to selling controlled substances. Here, the totality of the circumstances supports a reasonable inference that the defendant knowingly kept or maintained the vehicle for the purposes of keeping or selling cocaine. Although the vehicle was registered in his wife's name, the defendant described it as his truck. He admitted that it was his work vehicle, that no one else used it, and that he built the wooden drawers and compartments located in the back of the vehicle. When searching the

vehicle, officers discovered a hidden compartment in the truck bed floor containing 1 kg of cocaine. The cocaine was packaged to evade canine detection. The defendant does not challenge the sufficiency of the evidence supporting his related trafficking convictions arising from the same incident. Additionally, evidence shows that the defendant knowingly participated in a drug transaction in a Walmart parking lot immediately before his arrest and that this was not an isolated incident. Specifically, evidence indicated that if the transaction worked out, further drug sales could occur in the future. The court concluded:

> [T]he evidence showed, generally, that defendant exercised regular and continuous control over the truck; that he constructed and knew about the false-bottomed compartment in which one kilogram of cocaine—an amount consistent with trafficking, not personal use— was discovered . . . ; that he was aware that cocaine was hidden in his truck and willingly participated in the transaction in the Walmart parking lot; and that he held himself out as responsible for the ongoing distribution of drugs like those discovered in the truck.

Motor Vehicle Offenses

100. **State v. Mahatha** , ___ N.C. App. ___, ___ S.E.2d ___ (Sept. 3, 2019).

Evidence was sufficient to support speeding to elude arrest where law enforcement was performing lawful duty of office at time of traffic stop.

The defendant was charged with driving while license revoked, not an impaired revocation; assault on a female; possession of a firearm by a person previously convicted of a felony; attempted robbery with a dangerous weapon; and habitual felon status. The State proceeded to trial on the charges of speeding to elude arrest and attaining habitual felon status, dismissing the other charges. The defendant was found guilty of both, and the trial judge sentenced the defendant to 97 to 129 months' imprisonment.

The defendant argued that the trial judge erred in failing to dismiss the speeding to elude arrest charge. According to the defendant, at the time the law enforcement officer activated his blue lights and siren to initiate a traffic stop, the officer did not have reasonable suspicion to stop the defendant and therefore was not performing a lawful duty of his office. The Court of Appeals rejected this argument, holding that the circumstances before and after an officer signals his intent to stop a defendant determine whether there was reasonable suspicion for a stop. Here, after the officer put on his lights and siren, the defendant accelerated to speeds of 90 to 100 miles per hour, drove recklessly by almost hitting other cars, pulled onto the shoulder to pass other cars, swerved and fishtailed across multiple lanes, crossed over the double yellow line, and ran a stop sign before he parked in a driveway and took off running into a cow pasture, where the officers found him hiding in a ditch. These circumstances gave the officer reasonable suspicion of criminal activity before he seized the defendant.

Defenses

Justification

101. **State v. Holshouser** , ___ N.C. App. ___, ___ S.E.2d ___ (Sept. 3, 2019).

Defendant not entitled to instruction on defense of justification to possession of firearm by person previously convicted of a felony where he testified at trial that he did not possess the firearm.

The defendant was indicted for possession of a firearm—specifically, "a New England Firearms Pardner Model 12 Gauge Shotgun"—by a person previously convicted of a felon. The defendant initially told officers, who were investigating a report of a domestic dispute at the defendant's home, that he had no knowledge about a shotgun, but he later admitted to one of the deputies that he had thrown the shotgun into the woods and told the deputy where he had thrown it. At trial, the defendant testified that he had been involved in an altercation with his stepson but did not remember taking the shotgun from him. He further testified that he did not take possession of "that gun." The trial judge gave the pattern instruction on possession of a firearm by a person previously convicted of a felony. There were no objections to the instruction, and the jury found the defendant guilty of the possession charge and of having attained habitual felon status. On appeal, the defendant argued that the trial judge committed plain error by failing to instruct the jury on the affirmative defense of justification. The Court of Appeals held that the defendant was not entitled to the instruction.

The Court first recognized that in State v. Mercer, ___ N.C. ___, 818 S.E.2d 375 (2018), it had recognized the defense of justification to possession of a firearm by a person previously convicted of a felony. The Court noted that the North Carolina Supreme Court has granted review in *Mercer* but stated that it would follow *Mercer* as it applied when the defendant's case was before the trial court. Assuming a justification defense as explained in *Mercer* applies in North Carolina, the Court stated first that it isn't clear that a justification defense is a "substantial and essential feature" of the possession charge, requiring an instruction by the trial judge, because the possession statute does not describe justification or self-defense as an element of the offense. The Court then ruled that the defendant's own testimony, in which he denied possessing the gun alleged in the indictment, rendered a justification defense unavailable. The Court stated that a defendant is not entitled to a justification instruction where he testifies that he did not commit the criminal act at all. The Court also rejected the defendant's claim of ineffective assistance of counsel based on counsel's failure to request a justification instruction, holding that even if counsel had requested such an instruction the trial court should not have granted it.

Self-Defense

102. **State v. Harvey** , ___ N.C. ___, 828 S.E.2d 481 (June 14, 2019).

Defendant was not entitled to instruction on perfect or imperfect self-defense in homicide case.

In a 5-to-1 decision, the Court affirmed the decision of a divided panel of the Court of Appeals, ___ N.C. App. ___, 817 S.E.2d 500 (2018) (unpublished), finding that the trial court did not err in refusing to instruct the jury on self-defense or imperfect self-defense in the stabbing death of the victim. Relying on previous decisions, the majority found that the defendant was not entitled to self-defense instructions because he referred to the stabbing as "the accident," stated that his purpose in getting a knife was because he was "scared" that the victim was going to try to hurt him, and that what he sought to do with the knife was to make the victim leave. The majority found that the defendant's testimony did not establish that he feared death or great bodily harm as a result of the victim's actions or that he inflicted the fatal blow to protect himself from such harm. Because the defendant failed to present evidence that he formed a reasonable belief that it was necessary for him to fatally stab the victim in order to protect himself from death or great bodily harm, he was not entitled to an instruction on perfect or imperfect self-defense. The dissent criticized the majority for usurping the jury's role in determining whether the killing was justified; imposing a "magic words" requirement for the defendant's testimony; disregarding evidence favorable to the defendant and crediting contradictory evidence; and failing to take into account that the defendant was inarticulate. The opinions do not discuss the statutes on self-defense in North Carolina.

103. **State v. Pender** , ___ N.C. App. ___, 830 S.E.2d 686 (June 18, 2019).

A defendant is not entitled to a jury instruction on self-defense using deadly force where the evidence is not sufficient to support a finding that the defendant reasonably apprehended death or great bodily harm.

In this assault with a deadly weapon inflicting serious injury case, the trial court properly instructed the jury regarding self-defense. The defendant was in a physical altercation with another woman, during which she cut the other woman a number of times with a knife. "Recognizing that a defendant may only use deadly force to protect herself from great bodily injury or death," the North Carolina Pattern Jury Instructions provide two different sets of jury instructions for self-defense: NCPI-Criminal 308.40 describes when the use of non-deadly force is justified; NCPI-Criminal 308.45 describes when the use of deadly force is justified. The trial court instructed the jury pursuant to NCPI-Criminal 308.40 and the defendant argued that this was error because the jury could have determined that the knife was a deadly weapon, entitling her to an instruction pursuant to NCPI-Criminal 308.45. The Court of Appeals disagreed. Viewing the evidence in the light most favorable to the defendant, the court concluded that the evidence was not sufficient to support a finding that the defendant "reasonably apprehended death or great bodily harm when she struck the defendant with the knife," and, thus, the trial court did not err by failing to instruct the jury pursuant to NCPI-Criminal 308.45.

Statute of Limitations

104. **State v. Stevens**, ___ N.C. App. ___, 831 S.E.2d 364 (July 2, 2019), *temp. stay allowed*, ___ N.C. ___, 829 S.E.2d 907 (Aug. 1, 2019).

Statute of limitations was tolled by filing of charges in district court, so presentment and indictment obtained more than two years after the date of the offense were not time-barred.

Defendant was charged with two counts of misdemeanor death by motor vehicle by citation on December 24, 2013. On December 21, 2015, the state filed a misdemeanor statement of charges alleging the same offenses. While those charges were pending in district court, the grand jury issued a presentment for the offenses on March 7, 2016, and the state obtained a corresponding indictment on March 21, 2016. The defense filed a motion to dismiss, arguing that the superior court indictments were obtained after the two-year statute of limitations for the offense had run. The trial court granted the motion.

The Court of Appeals reversed and remanded. Pursuant to *State v. Curtis*, 371 N.C. 355 (2018), the citation and misdemeanor statement of charges filed in district court tolled the statute of limitations. The court rejected the defendant's argument that the presentment and indictment "annulled" the original district court prosecution, thereby making the new charges in superior court untimely. The original charges were still pending in district court at the time the state obtained the indictment, and "[i]f an action in District Court was properly pending, as it was here, the statute of limitations continued to be tolled."

Judicial Administration

Contempt

105. **State v. Tincher**, ___ N.C. App. ___, ___ S.E.2d ___ (July 16, 2019).

Error to hold defendant in contempt without an opportunity to respond.

At the conclusion of a probation revocation hearing, the defendant yelled vulgarities within earshot of the court. The trial court found the defendant in criminal contempt and sentenced him to an additional 30 days, consecutive to his other sentences. The trial court did not give the defendant an opportunity to respond to the alleged contempt, in violation of G.S. 5A-14(b). The judge also struck language from the contempt order that would normally document the fact that the defendant was warned and given an opportunity to be heard. "'[T]he judicial official's findings in a summary contempt proceeding should clearly reflect that the contemnor was given an opportunity to be heard' and without that finding, the trial court's findings do not support the imposition of contempt." The contempt order and judgment were therefore reversed.