Criminal Case Update -- Covering Cases Decided Oct. 19, 2009-June 15, 2010

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Contents:

Criminal Procedure

Absolute Impasse

State v. Freeman, __ N.C. App. __, __ S.E.2d __ (Mar. 2, 2010). When the defendant and trial counsel reached an absolute impasse regarding the use of a peremptory challenge to strike a juror, the trial court committed reversible error by not requiring counsel to abide by the defendant's wishes. "It was error for the trial court to allow counsel's decision to control when an absolute impasse was reached on this tactical decision, and the matter had been brought to the trial court's attention."

Appeal

State v. Bunch, __ N.C. __, __ S.E.2d __ (Mar. 12, 2010). Applying the harmless error standard to the defendant's claim that his rights under Article I, Section 24 of the North Carolina Constitution were violated when the trial court omitted elements of a crime from its instructions to the jury. On the facts presented, any error that occurred was harmless.

Bond Forfeiture

State v. Dunn, __ N.C. App. __, __ S.E.2d __ (Nov. 3, 2009). A probation violation was a separate case from the original criminal charges for purposes of G.S. 15A-544.6(f) (providing that no more than two forfeitures may be set aside in any case).

Counsel Issues

State v. Reid, __ N.C. App. __, __ S.E.2d __ (May 18, 2010). The trial court did not err in allowing the defendant to represent himself after complying with the requirements of G.S. 15A-1242. The court rejected the defendant's argument that his conduct during a pre-trial hearing and at trial indicated that he was mentally ill and not able to represent himself, concluding that the defendant's conduct did not reflect mental illness, delusional thinking, or a lack of capacity to carry out self-representation under *Indiana v. Edwards*, 128 S. Ct. 2379 (2008).

State v. Wheeler, __ N.C. App. __, __ S.E.2d __ (Jan. 19, 2010). The trial court's action denying the defendant's mid-trial request to discharge counsel and proceed pro se was not an abuse of discretion and did not infringe on the defendant's right to self-representation. Prior to trial, the defendant waived his right to counsel and standby counsel was appointed. Thereafter, he informed the trial court that he wished standby counsel to select the jury. The trial court allowed the defendant's request, informing the defendant that he would not be permitted to discharge counsel again. The defendant accepted the trial court's conditions and stated that he wished to proceed with counsel. After the jury had been selected and the trial had begun, the defendant once again attempted to discharge counsel. The trial court denied the defendant's request, noting that the defendant already had discharged four or five lawyers and had been uncooperative with appointed counsel.

State v. Sullivan, __ N.C. App. __, __ S.E.2d __ (Dec. 22, 2009). A defendant does not have a right to be represented by someone who is not a lawyer.

State v. Williams, __ N.C. __, __ S.E.2d __ (Dec. 11, 2009). In a capital case, the trial court did not err by removing second-chair counsel, who was re-appointed by Indigent Defense Services, after having been allowed to withdraw by the trial court. Nor did the trial court err by failing to ex mero motu conduct a hearing on an unspecified conflict of interest between the defendant and counsel that was never raised by the defendant. The trial court did not err by failing to rule on the defendant's pro se motions, made when the defendant was represented by counsel.

Discovery and Related Issues

State v. Remley, __ N.C. App. __, __ S.E.2d __ (Nov. 17, 2009). The trial court did not abuse its discretion by granting a recess instead of dismissing the charges or barring admission of the defendant's statement to the police, when that statement was not provided to the defense until the second day of trial in violation of the criminal discovery rules. When making its ruling, the trial court said that it would "consider anything else that may be requested," short of dismissal or exclusion of the evidence, but the defense did not request other sanctions or remedies.

State v. Small, __ N.C. App. __, __ S.E.2d __ (Dec. 8, 2009). The trial court did not err by denying the defendant's motion to dismiss the charges and her motion in limine, both of which asserted that the State violated the discovery rules by failing to provide her with the victim's pretrial statement to the prosecutor. The victim made a statement to the police at the time of the crime. In a later statement to the prosecutor, the victim recounted the same details regarding the crime but said that he did not remember speaking to the police at the crime scene. The victim's account of the incident, including his identification of the defendant as the perpetrator, remained consistent. Even though the victim told the prosecutor that he did not remember making a statement to the police at the scene, this was not significantly new or different information triggering a duty on the part of the State to disclose the statement.

Double Jeopardy

Renico v. Lett, 559 U.S. __ (May 3, 2010). The Michigan Supreme Court's decision concluding that the defendant's double jeopardy rights were not violated by a second prosecution after a mistrial on grounds of jury deadlock was not an unreasonable application of federal law. The state high court had elaborated on the standard for manifest necessity and noted the broad deference to be given to trial court judges; it had found no abuse of discretion in light of the length of the deliberations after a short and uncomplicated trial, a jury note suggesting heated discussion, and the foreperson's statement that the jury would be unable to reach a verdict. In light of these circumstances, it was reasonable for that court to determine that the trial judge had exercised sound discretion.

State v. Rahaman, __ N.C. App. __, __ S.E.2d __ (Jan. 19, 2010). The trial court did not err by denying the defendant's pre-trial motion to dismiss a charge of felonious possession of stolen property on double jeopardy grounds. Although the defendant was indicted for felony possession of stolen property (a Toyota truck) under G.S. 14-71.1, at the first trial, the jury was instructed on felony possession of a stolen motor vehicle under G.S. 20-106. The defendant was found guilty and he successfully appealed on grounds that the trial judge erred by instructing the jury on an offense not charged in the indictment. When the defendant was retried for felony possession of stolen property, he moved to dismiss on double jeopardy grounds, arguing that by failing to instruct on felony possession of stolen property, the trial court effectively dismissed that charge and that dismissal constituted an acquittal. Relying on prior case law, the court agreed that the trial court effectively dismissed the crime of possession of stolen property. However, the court went on to hold that this effective dismissal did not amount to an acquittal for double jeopardy purposes because it was not a dismissal for insufficient evidence.

DWI Procedure

State v. Mangino, __ N.C. App. __, __ S.E.2d __ (Oct. 20, 2009). Following *State v. Fowler*, __ N.C. App. __, 676 S.E.2d 523 (2009), and holding that G.S. 20-38.6(f) does not violate the defendant's substantive due process, procedural due process or equal protection rights. Also finding no violation of the constitutional provision on separation of powers.

State v. Rackley, __ N.C. App. __, __ S.E.2d __ (Oct. 20, 2009). Following *State v. Fowler*, __ N.C. App. __, 676 S.E.2d 523 (2009), and dismissing as interlocutory the State's appeal from a decision by the superior court indicating its agreement with the district court's pretrial indication pursuant to G.S. 20-38.6(f).
Steinkrause v. Tatum, __ N.C. App. __, __ S.E.2d __ (Dec. 8, 2009). On the facts, the trial judge did not err in concluding that the petitioner willfully refused to submit to a breath test.

Lee v. Gore, __ N.C. App. __, __ S.E.2d __ (Jan. 19, 2010). The Division of Motor Vehicles lacked authority to revoke a driver's license under G.S. 20-16.2 where the affidavit received by the Division did not include a sworn statement of willful refusal. The affidavit was not "properly executed" as required by G.S. 20-16.2(c1). Form DHHS 3908 was not a substitute for a properly executed affidavit.

Fifth Amendment -- Use of Defendant's Silence at Trial

State v. Jackson, __ N.C. App. __, __ S.E.2d __ (Feb. 16, 2010). Although the State may use a defendant's pre-arrest silence for impeachment purposes at trial, once the defendant has been arrested and advised of his or her *Miranda* rights, the State's use of the defendant's silence at trial violates the right against self-incrimination. Even if the State impermissibly used the defendant's post-arrest silence against him at trial, the error was harmless beyond a reasonable doubt.

Habitual Felon

State v. Haymond, __ N.C. App. __, __ S.E.2d __ (April 6, 2010). Trial judge could have could have consolidated into a single judgment multiple offenses, all of which were elevated to a Class C because of habitual felon status.

Indictment Issues

General Matters

State v. Pettigrew, __ N.C. App. __, __ S.E.2d __ (June 1, 2010) (available at: http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091226-1.pdf). In a child sex case, there was substantial evidence that the defendant abused the victim during the period alleged in the indictment and specified in the bill of particulars (Feb. 1, 2001 – Nov. 20, 2001) and at a time when the defendant was sixteen years old and thus could be charged as an adult. The evidence showed that the defendant abused the victim for a period of years that included the period alleged and that the defendant, who turned sixteen on January 23, 2001, was sixteen during the entire time frame alleged. Relying on the substantial evidence of acts committed while the defendant was sixteen, the court also rejected the defendant's argument that by charging that the alleged acts occurred "on or about" February 1, 2001 – November 20, 2001, the indictment could have encompassed acts committed before he turned sixteen.

State v. Freeman, __ N.C. App. __, __ S.E.2d __ (Mar. 2, 2010). Short-form murder indictment put the defendant on notice that the State might proceed on a theory of felony-murder.

State v. Johnson, __ N.C. App. __, __ S.E.2d __ (Mar. 2, 2010). No fatal variance where an indictment charging sale and delivery of a controlled substance alleged that the sale was made to "Detective Dunabro." The evidence at trial showed that the detective had gotten married and was known by the name Amy Gaulden. Because Detective Dunabro and Amy Gaulden were the same person, known by both a married and maiden name, the indictment sufficiently identified the purchaser. The court noted that "[w]here different names are alleged to relate to the same person, the question is one of identity and is exclusively for the jury to decide."

State v. Curry, __ N.C. App. __, __ S.E.2d __ (April 20, 2010). Indictment alleging that the defendant discharged a barreled weapon into an occupied residence properly charged the Class D version of this felony (shooting into occupied dwelling or occupied conveyance in operation) even though it erroneously listed the punishment as the Class E version (shooting into occupied property).

Specific Offenses

Conspiracy

State v. Pringle, __ N.C. App. __, __ S.E.2d __ (June 15, 2010) (online at: http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091246-1.pdf). When a conspiracy indictment names specific individuals with whom the defendant is alleged to have conspired and the evidence shows the defendant may have conspired with others, it is error for the trial court to instruct the jury that it may find the defendant guilty based upon an agreement with persons not named in the indictment. However, the jury instruction need not specifically name the individuals with whom the defendant was alleged to have conspired as long as the instruction comports with the material allegations in the indictment and the evidence at trial. In this case, the indictment alleged that the defendant conspired with Jimon Dollard and an unidentified male. The trial court instructed the jury that it could find the defendant guilty if he conspired with "at least one other person." The evidence showed that defendant and two other men conspired to commit robbery. One of the other men was identified by testifying officers as Jimon Dollard. The third man evaded capture and never was identified. Although the instruction did not limit the conspiracy to those named in the indictment, it was in accord with the material allegations in the indictment and the evidence presented at trial and there was no error.

Assault by Strangulation

State v. Williams, __ N.C. App. __, __ S.E.2d __ (Dec. 8, 2009). Even if there was a fatal variance between the indictment, which alleged that the defendant accomplished the strangulation by placing his hands on the victim's neck, and the evidence at trial, the variance was immaterial because the allegation regarding the method of strangulation was surplusage.

Assault on Government Officer

State v. Noel, __ N.C. App. __, __ S.E.2d __ (Mar. 2, 2010). Indictment charging assault on a government officer under G.S. 14-33(c)(4) need not allege the specific duty the officer was performing and if it does, it is surplusage.

State v. Roman, __ N.C. App. __, __ S.E.2d __ (May 4, 2010). There was no fatal variance between a warrant charging assault on a government officer under G.S. 14-33(c)(4) and the evidence at trial. The warrant charged that the assault occurred while the officer

was discharging the duty of arresting the defendant for communicating threats but at trial the officer testified that the assault occurred when he was arresting the defendant for being intoxicated and disruptive in public. The pivotal element was whether the assault occurred while the officer was discharging his duties; what crime the arrest was for is immaterial.

Malicious Conduct by Prisoner

State v. Noel, __ N.C. App. __, __ S.E.2d __ (Mar. 2, 2010). Indictment charging malicious conduct by prisoner under G.S. 14-258.4 need not allege the specific duty the officer was performing and if it does, it is surplusage.

Burglary

State v. McCormick, __ N.C. App. __, __ S.E.2d __ (May 18, 2010). No fatal variance existed when a burglary indictment alleged that defendant broke and entered "the dwelling house of Lisa McCormick located at 407 Ward's Branch Road, Sugar Grove Watauga County" but the evidence at trial indicated that the house number was 317, not 407. On this point, the court followed *State v. Davis*, 282 N.C. 107 (1972) (no fatal variance where indictment alleged that the defendant broke and entered "the dwelling house of Nina Ruth Baker located at 840 Washington Drive, Fayetteville, North Carolina," but the evidence showed that Ruth Baker lived at 830 Washington Drive). The court also held that the burglary indictment was not defective on grounds that it failed to allege that the breaking and entering occurred without consent. Following, *State v. Pennell*, 54 N.C. App. 252 (1981), the court held that the indictment language alleging that the defendant "unlawfully and willfully did feloniously break and enter" implied a lack of consent.

Weapons Offenses

State v. Curry, __ N.C. App. __, __ S.E.2d __ (April 20, 2010). Fact that indictment charging discharging a barreled weapon into an occupied dwelling used the term "residence" instead of the statutory term "dwelling" did not result in a lack of notice to the defendant as to the relevant charge.

State v. Taylor, __ N.C. App. __, __ S.E.2d __ (April 20, 2010). Felon in possession indictment that listed the wrong date for the prior felony conviction was not defective, nor was there a fatal variance on this basis (indictment alleged prior conviction date of December 8, 1992 but judgment for the prior conviction that was introduced at trial was dated December 18, 1992).

Drug Offenses

State v. LePage, __ N.C. App. __, __ S.E.2d __ (May 18, 2010). Indictments charging the defendant with drug crimes and identifying the controlled substance as "BENZODIAZEPINES, which is included in Schedule IV of the North Carolina Controlled Substances Act[.]" were defective. Benzodiazepines is not listed in Schedule IV. Additionally, benzodiazepine describes a category of drugs, some of which are listed in Schedule IV and some of which are not.

State v. Johnson, __ N.C. App. __, __ S.E.2d __ (Mar. 2, 2010). No fatal variance where an indictment charging sale and delivery of a controlled substance alleged that the sale was made to "Detective Dunabro." The evidence at trial showed that the detective had since gotten married and was known by the name Amy Gaulden. Because Detective Dunabro and Amy Gaulden were the same person, known by both married and maiden name, the indictment sufficiently identified the purchaser. The court noted that "[w]here different names are alleged to relate to the same person, the question is one of identity and is exclusively for the jury to decide."

State v. Hinson, __ N.C. App. __, __ S.E.2d __ (April 6, 2010). The defendant was indicted for manufacturing methamphetamine by "chemically combining and synthesizing precursor chemicals to create methamphetamine." However, the trial judge instructed the jury that it could find the defendant guilty if it found that he produced, prepared, propagated, compounded, converted or processed methamphetamine, either by extraction from substances of natural origin or by chemical synthesis. The court held, over a dissent, that this was plain error as it allowed the jury to convict on theories not charged in the indictment.

State v. White, __ N.C. App. __, __ S.E.2d __ (Feb. 16, 2010). The trial court did not err by allowing the State to amend a habitual impairing driving indictment that mistakenly alleged a seven-year look-back period (instead of the current ten-year look-back), where all of the prior convictions alleged in the indictment fell within the ten-year period. The language regarding the seven-year look-back was surplusage.

Habitual Felon

State v. Lackey, __ N.C. App. __, __ S.E.2d __ (May 18, 2010). Rejecting the defendant's argument that his sentence of 84-110 months in prison for possession of cocaine as a habitual felon constituted cruel and unusual punishment.

Waiver of Fatal Variance Issue

State v. Curry, __ N.C. App. __, __ S.E.2d __ (April 20, 2010). On appeal, the defendant argued that there was a fatal variance between the indictment charging him with possession of a firearm and the evidence introduced at trial. Specifically, the defendant argued there was a variance as to the type of weapon possessed. By failing at the trial level to raise fatal variance or argue generally about insufficiency of the evidence as to the weapon used, the defendant waived this issue for purposes of appeal.

Retrial

State v. Rahaman, __ N.C. App. __, __ S.E.2d __ (Jan. 19, 2010). Citing *State v. Johnson*, 9 N.C. App. 253 (1970), and noting in dicta that the granting of a motion to dismiss due to a material fatal variance between the indictment and the proof presented at trial does not preclude a retrial for the offense alleged on a proper indictment.

Judge -- Expression of Opinion

State v. Jackson, __ N.C. App. __, __ S.E.2d __ (Feb. 16, 2010). The trial court did not err by using the word "victim" in the jury charge in a child sex offense case.

Jury Argument

State v. Sanders, __ N.C. App. __, __ S.E.2d __ (Jan. 5, 2010). The trial court did not err by failing to intervene ex mero motu when, in closing argument, the prosecutor suggested that the defendant was lying. The comments were not so grossly improper as to constitute reversible error.

State v. Riley, __ N.C. App. __, __ S.E.2d __ (Feb. 2, 2010). Prosecutor's comment during jury argument was improper. The comment attacked the integrity of defense counsel and was based on speculation that the defendant changed his story after speaking with his lawyer.

Jury Instructions

Failure to Request Instruction in Writing

State v. Bivens, __ N.C. App. __, __ S.E.2d __ (June 1, 2010) (available at: http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/090483-1.pdf). In a counterfeit controlled substance case, the trial court did not err by failing to give a jury instruction where the defense failed to submit the special instruction in writing.

***Allen* Charge**

State v. Price, __ N.C. App. __, __ S.E.2d __ (Nov. 17, 2009). The court upheld the language in N.C. Criminal Pattern Jury Instruction 101.40, instructing the jury that "it is your duty to do whatever you can to reach a verdict."

State v. Lackey, __ N.C. App. __, __ S.E.2d __ (May 18, 2010). The trial judge did not abuse his discretion in giving an *Allen* instruction. After an hour of deliberation, the jury foreman sent a note stating that the jury was not able to render a verdict and were split 11-1. The trial court recalled the jury to the courtroom and, with the consent of the prosecutor and defendant, instructed the jury in accordance with N.C.P.I. Criminal Charge 101.40, failure of the jury to reach a verdict. The jury then returned to deliberate for 30 minutes before the trial judge recessed court for the evening. The next morning, before the jury retired to continue deliberations, the trial court again gave the *Allen* instruction.

Willfully

State v. Breathette, __ N.C. App. __, __ S.E.2d __ (Mar. 2, 2010). In an indecent liberties case where the defendant alleged that she did not know the victim's age, the trial court did not err by declining the defendant's proposed instruction on willfulness which would have instructed that willfully means something more than an intention to commit the offense and implies committing the offense purposefully and designed in violation of the law. Instead, the trial court instructed that willfully meant that the act was done purposefully and without justification or excuse. Although not given verbatim, the defendant's instruction was given in substance.

In Response to Notes from the Jury

State v. Price, __ N.C. App. __, __ S.E.2d __ (Nov. 17, 2009). The trial court did err by failing to ex mero motu investigate the competency of a juror after the juror sent two notes to the trial court during deliberations. After the juror sent a note saying that the

juror could not convict on circumstantial evidence alone, the trial judge re-instructed the whole jury on circumstantial evidence and reasonable doubt. After resuming deliberations, the juror sent another note saying that the juror could not apply the law as instructed and asked to be removed. The trial judge responded by informing the jury that the law prohibits replacing a juror once deliberations have begun, sending the jury to lunch, and after lunch, giving the jury an *Allen* charge. The court found no abuse of discretion and noted that if the judge had questioned the juror, the trial judge would have been in the position of instructing an individual juror in violation of the defendant's right to a unanimous verdict.

Instructing Less Than Full Jury in Violation of Right to Unanimous Verdict

State v. Price, __ N.C. App. __, __ S.E.2d __ (Nov. 17, 2009). The trial court did err by failing to ex mero motu investigate the competency of a juror after the juror sent two notes to the trial court during deliberations. After the juror sent a note saying that the juror could not convict on circumstantial evidence alone, the trial judge re-instructed the whole jury on circumstantial evidence and reasonable doubt. After resuming deliberations, the juror sent another note saying that the juror could not apply the law as instructed and asked to be removed. The trial judge responded by informing the jury that the law prohibits replacing a juror once deliberations have begun, sending the jury to lunch, and after lunch, giving the jury an *Allen* charge. The court found no abuse of discretion and noted that if the judge had questioned the juror, the trial judge would have been in the position of instructing an individual juror in violation of the defendant's right to a unanimous verdict.

Lesser Included Offenses

State v. Clark, __ N.C. App. __, __ S.E. 2d __ (Dec. 8, 2009). In a case in which the defendant was convicted, among other things, of assault with a deadly weapon on a governmental official, the trial court committed plain error by failing to instruct the jury on the lesser included offense of misdemeanor assault on a government official. Because the trial court did not conclude as matter of law that the weapon was a deadly one, but rather left the issue for the jury to decide, it should have instructed on the lesser included non-deadly weapon offense.

Jury Selection

Berghuis v. Smith, 559 U.S. __ (Mar. 30, 2010). The state supreme court did not unreasonably apply clearly established federal law with respect to the defendant's claim that the method of jury selection violated his sixth amendment right to be tried by an impartial jury drawn from sources reflecting a fair cross-section of the community. The state supreme court assumed that African-Americans were underrepresented in venires from which juries were selected but went on to conclude that the defendant had not shown the third prong of the *Duren* prima facie case for fair cross section claims: that the underrepresentation was due to systemic exclusion of the group in the jury-selection process. The Court expressly declined to address the methods or methods by which underrepresentation is appropriately measured. For a more detailed discussion of this case, see the blog post at:
http://sogweb.sog.unc.edu/blogs/ncclaw/?p=1175

Thaler v. Haynes, 559 U.S. __ (Feb. 22, 2010). When an explanation for a peremptory challenge is based on a prospective juror's demeanor, the trial judge should consider, among other things, any observations the judge made of the prospective juror's demeanor during the voir dire. However, no previous decisions of the Court have held that a demeanor-based explanation must be rejected if the judge did not observe or cannot recall the prospective juror's demeanor.

Mistrial

State v. Sanders, __ N.C. App. __, __ S.E.2d __ (Jan. 5, 2010). The trial court did not abuse its discretion by denying the defendant's mistrial motion made after the State twice violated a court order forbidding any mention of polygraph examinations. The court disapproved of the State's action in submitting to the jury unredacted exhibits containing references to a polygraph examination but noted that the exhibits did not contain any evidence of the results of such examination.

Motions to Continue & to Suppress

State v. Wright, __ N.C. App. __, __ S.E.2d __ (Nov. 3, 2009). The trial court did not violate the defendant's due process rights by denying the defendant's motion to continue, which had asserted that pretrial publicity had the potential to prejudice the jury pool and deprive the defendant of a fair trial. No evidence regarding pretrial publicity was in the record and even if it had been, the record showed that publicity did not improperly influence the jury.

State v. Paige, __ N.C. App. __, __ S.E.2d __ (Feb. 16, 2010). The defendant's motion to suppress was untimely where the defendant had approximately seven weeks of notice that the State intended to use the evidence, well more than the required 20 working days.

Pleas

Factual Basis

State v. Salvetti, __ N.C. App. __, __ S.E.2d __ (Jan. 19, 2010). There was an adequate factual basis for the defendant's *Alford* plea in a child abuse case based on starvation where the trial court heard evidence from a DSS attorney, the victim, and the defendant's expert witness.

Motion to Withdraw a Plea

State v. Chery, __ N.C. App. __, __ S.E.2d __ (April 6, 2010). The trial court did not err by denying the defendant's motion to withdraw his plea, made before sentencing. The fact that the plea was a no contest or *Alford* plea did not establish an assertion of legal innocence for purposes of the *State v. Handy* analysis that applies to pre-sentencing plea withdrawal requests. Although the defendant testified at a co-defendant's trial that he did not agree to take part in the crime, that testimony was negated by his stipulation to the factual basis for his plea and argument for a mitigated sentence based on acceptance of responsibility. The court also concluded that the State's uncontested proffer of the factual basis at the defendant's plea hearing was strong and that the fact that the co-defendant was acquitted at trial was irrelevant to the analysis. The court held that based on the full colloquy accompanying the plea, it was voluntarily entered. It also rejected the defendant's argument that an alleged misrepresentation by his original retained counsel caused him to enter the plea when such counsel later was discharged and the defendant was represented by new counsel at the time of the plea. Although the defendant sought to withdraw his plea only nine days after its entry, this factor did not weigh in favor of withdrawal where the defendant executed the plea transcript approximately 3½ months before the plea was entered and never waivered in this decision.

State v. Salvetti, __ N.C. App. __, __ S.E.2d __ (Jan. 19, 2010). The trial court did not err in denying the defendant's motion to withdraw a plea, made after sentencing. Such pleas should be granted only to avoid manifest injustice, which was not shown on the facts presented.

Plea Colloquy

State v. Salvetti, __ N.C. App. __, __ S.E.2d __ (Jan. 19, 2010). The defendant, who had entered an *Alford* plea, was not prejudiced by the trial judge's failure to inform him of his right to remain silent, the maximum possible sentence, and that if he pleaded guilty he would be treated as guilty even if he did not admit guilt. (In addition to the trial court's failure to verbally inform the defendant of the maximum sentence, a worksheet attached to the signed Transcript of Plea form incorrectly stated the maximum sentence as 89 months; the correct maximum was 98 months). The court further held that based on the questions that were posed, the trial judge properly determined that the plea was a product of the defendant's informed choice.

Improper Pressure

State v. Salvetti, __ N.C. App. __, __ S.E.2d __ (Jan. 19, 2010). The prosecutor's offer of a package deal in which the defendant's wife would get a plea deal if the defendant pleaded guilty did not constitute improper pressure within the meaning of G.S. 15A-1021(b). Although special care may be required to determine the voluntariness of package deal pleas, the court's inquiry into voluntariness was sufficient in this case.

Sentencing

Aggravating Factors

State v. Blakeman, __ N.C. App. __, __ S.E.2d __ (Feb. 2, 2010). In a sexual assault case involving a 13-year-old victim, the evidence was insufficient to establish aggravating factor G.S. 15A-1340.16(d)(15) (took advantage of a position of trust or confidence, including a domestic relationship). The defendant was the stepfather of the victim's friend. The victim required parental permission to spend the night with her friend, and had done so not more than ten times. There was no evidence that the victim's mother had arranged for the defendant to care for the victim on a regular basis, or that the defendant had any role in the victim's life other than being her friend's stepfather. There was no evidence suggesting that the victim, who lived nearby, would have relied on the defendant for help in an emergency, rather than going home. There was no evidence of a familial relationship between the victim and the defendant, that they had a close personal relationship, or that the victim relied on the defendant for any physical or emotional care. The evidence showed only that the victim "trusted" the defendant in the same way she might "trust" any adult parent of a friend.

Mitigating Factors

State v. Simonovich, __ N.C. App. __, __ S.E.2d __ (Jan. 19, 2010). The trial court did not err by failing to find the G.S. 15A-1340.16(e)(8) mitigating factor that the defendant acted under strong provocation or that the relationship between the defendant and

the victim was otherwise extenuating. As to an extenuating relationship, the evidence showed only that the victim (who was the defendant's wife) repeatedly had extra-marital sexual relationships and that the couple fought about that behavior. As to provocation, there was no evidence that the victim physically threatened or challenged the defendant in any way; the only threat she made was to commit further adultery and to report the defendant as an abuser.

Extraordinary Mitigation

State v. Riley, __ N.C. App. __, __ S.E.2d __ (Feb. 2, 2010). The trial court abused its discretion by determining that two normal mitigating factors, without additional facts being present, constituted extraordinary mitigation.

***Blakely* Issues**

State v. Jacobs, __ N.C. App. __, __ S.E.2d __ (Jan. 19, 2010). Trial judge's *Blakely* error with respect to aggravating factors was not harmless and required a new sentencing hearing.

Consolidated Offenses

State v. Jacobs, __ N.C. App. __, __ S.E.2d __ (Jan. 19, 2010). G.S. 15A-1340.15(b) requires that when offenses are consolidated for judgment, the trial judge must enter a sentence for the most serious offense.

Impermissibly Based on Exercise of Rights

State v. Haymond, __ N.C. App. __, __ S.E.2d __ (April 6, 2010). Ordering a new sentencing hearing where there was a reasonable inference that the trial judge ran the defendant's ten felony sentences consecutively in part because of the defendant's rejection of a plea offer and insistence on going to trial. Even though the sentences were elevated to Class C felonies because of habitual felon status, the trial judge could have consolidated them into a single judgment. At a pretrial hearing and in response to an offer by the prosecutor to recommend a ten-year sentence, the defendant asked the trial court to consider a sentence of five years in prison and five years of probation. The trial court responded saying, "So I'm just telling you up front that the offer the State made is probably the best thing." The defendant declined the state's offer, went to trial, and was convicted. At sentencing, the trial judge stated: "[w]ay back when we dealt with that plea different times and, you know, you told me . . . what you wanted to do, and I told you that the best offer you're gonna get was that ten-year thing, you know." This statement created an inference arises that the trial court based its sentence at least in part on defendant's failure to accept the State's plea offer.

Juveniles

Graham v. Florida, 560 U.S. __ (May 17, 2010). The Eighth Amendment's Cruel and Unusual Punishments Clause does not permit a juvenile offender to be sentenced to life in prison without the possibility of parole for a non-homicide crime. For a more detailed discussion of this case, see http://sogweb.sog.unc.edu/blogs/ncclaw/?p=1285

State v. Pettigrew, __ N.C. App. __, __ S.E.2d __ (June 1, 2010) (available at: http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091226-1.pdf). The defendant, who was sixteen years old when he committed the sexual offenses at issue, was sentenced to 32 to 40 years imprisonment. The court held that the sentence did not violate the constitutional prohibitions against cruel and unusual punishment.

Misdemeanors

State v. Remley, __ N.C. App. __, __ S.E.2d __ (Nov. 17, 2009). The trial court violated G.S. 15A-1340.22(a) when it imposed a consecutive sentence on multiple misdemeanor convictions that was more than twice that allowed for the most serious misdemeanor, a Class 1 misdemeanor. The statute provides, in part, that if the trial court imposes consecutive sentences for two or more misdemeanors and the most serious offense is a Class A1, Class 1, or Class 2 misdemeanor, the total length of the sentences may not exceed twice the maximum sentence authorized for the most serious offense.

State v. Brown, __ N.C. App. __, __ S.E.2d __ (Feb. 16, 2010). Prejudice enhancement in G.S. 14-3(c) was properly applied where the defendant, a white male, assaulted another white male because of the victim's interracial relationship with a black female.

Prior Record Level

Substantially Similar Misdemeanor

State v. Armstrong, __ N.C. App. __, __ S.E.2d __ (April 20, 2010). For purposes of assigning one prior record level point for out-of-

state misdemeanors that are substantially similar to a North Carolina A1 or 1 misdemeanor, North Carolina impaired driving is a Class 1 misdemeanor. Thus, the trial court did not err by assigning one prior record level point to each out-of-state impaired driving conviction. The state presented sufficient evidence that the out-of-state convictions were misdemeanors in the other state.

All Elements of Current Offense Included in Prior Conviction

State v. Williams, __ N.C. App. __, __ S.E.2d __ (Nov. 3, 2009). Following *Ford*, discussed above, and holding that the trial court properly assigned a prior record level point based on the fact that all elements of the offense at issue−delivery of a controlled substance, cocaine−were included in a prior conviction for delivery of a controlled substance, marijuana.

Proof Issues & Stipulations

State v. Bethea, __ N.C. App. __, __ S.E.2d __ (June 15, 2010). The defendant was properly assigned two prior record level points for a federal felony. The State presented a prior record level worksheet, signed by defense counsel, indicating that the defendant had two points for the federal conviction. During a hearing, the prosecutor asked defense counsel if the defendant stipulated to having two points and defense counsel responded: "Judge, I saw one conviction on the worksheet. [The defendant] has agreed that's him. Two points." Defense counsel made no objection to the worksheet. When the defendant was asked by counsel if he wanted to say anything, the defendant responded, "No, sir." The worksheet, defense counsel's remark, and defendant's failure to dispute the existence of his out-of-state conviction are sufficient to prove that the prior conviction exists, that the defendant is the person named in the prior conviction, and that the prior offense carried two points.

State v. Henderson, __ N.C. App. __, __ S.E.2d __ (Dec. 8, 2009). A defendant's stipulation to the existence of out-of-state convictions and their classification as felonies or misdemeanors can support a "default" classification for prior record level purposes. However, a stipulation to substantial similarity is ineffective, as that issue is a matter of law that must be determined by the judge.

State v. Jacobs, __ N.C. App. __, __ S.E.2d __ (Feb. 2, 2010). The trial court erred by sentencing the defendant at prior record level VI. Although the prosecutor submitted a Felony Sentencing Worksheet (AOC-CR-600), there was no stipulation, either in writing on the worksheet or orally by the defendant. The court noted that the relevant form now includes signature lines for the prosecutor and either the defendant or defense counsel to acknowledge their stipulation to prior conviction level but that this revision seems to have gone unnoticed.

State v. Fortney, __ N.C. App. __, __ S.E.2d __ (Jan. 5, 2010). A printout from the FBI's National Crime Information Center (NCIC) contained sufficient identifying information to prove, by a preponderance of the evidence, that the defendant was the subject of the report and the perpetrator of the offenses specified in it. The printout listed the defendant's prior convictions as well as his name, date of birth, sex, race, and height. Because the printout included the defendant's weight, eye and hair color, scars, and tattoos, the trial court could compare those characteristics to those of the defendant. Additionally, the State tendered an official document from another state detailing one of the convictions listed in the NCIC printout. Although missing the defendant's year of birth and social security number, that document was consistent in other respects with the NCIC printout.

State v. Best, __ N.C. App. __, __ S.E.2d __ (Mar. 2, 2010). A printed copy of a screen-shot from the N.C. Administrative Office of the Courts (AOC) computerized criminal record system showing the defendant's prior conviction is sufficient to prove the defendant's prior conviction under G.S. 15A-1340.14(f)(3). Additionally, the information in the printout provides sufficient identifying information with respect to the defendant to give it the indicia of reliability to prove the prior conviction under subsection (f)(4).

Probation

State v. Riley, __ N.C. App. __, __ S.E.2d __ (Feb. 2, 2010). The trial judge violated G.S. 15A-1351 by imposing a period of special probation that exceeded ¼ of the maximum sentence of imprisonment imposed. The trial judge also violated G.S. 15A-1343.2 by imposing a term of probation greater than 36 months without making the required specific findings supporting the period imposed.

State v. Mauk, __ N.C. App. __, __ S.E.2d __ (June 15, 2010) (online at: http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091042-1.pdf). The trial court had jurisdiction to revoke the defendant's probation. In 2003, the defendant was convicted in Haywood County and placed on probation. In 2007, the defendant's probation was modified in Buncombe County. In 2009, it was revoked in Buncombe County. Appealing the revocation, the defendant argued that under G.S. 15A-1344(a), Buncombe County was not a proper place to hold the probation violation hearing. The court held that the 2007 Buncombe County modification made that county a place "where the sentence of probation was imposed," and thus a proper place to hold a violation hearing.

Restitution

State v. Mumford, __ N.C. App. __, __ S.E.2d __ (Jan. 5, 2010). Restitution was improper where defense counsel's statements could not be viewed as a stipulation and no other evidence was presented.

State v. Mauer, __ N.C. App. __, __ S.E.2d __ (Feb. 16, 2010). The trial court erred by ordering restitution where no evidence was presented supporting the restitution worksheet. The defendant's silence when the trial court orally entered judgment cannot constitute a stipulation to restitution.

Sex Offenders

Satellite-Based Monitoring (SBM)

Constitutionality

State v. Vogt, __ N.C. App. __, __ S.E.2d __ (Nov. 3, 2009). Over a dissent, following *State v. Bare*, __ N.C. App. __, 677 S.E.2d 518 (June 16, 2009). Declining to take judicial notice of the DOC's Sex Offender Management Interim Policy.

State v. Bowlin, __ N.C. App. __, __ S.E.2d __ (May 18, 2010). Following *State v. Bare*, __ N.C. App. __, 677 S.E.2d 518 (June 16, 2009), and holding that G.S. 14-208.40B does not violate the ex post facto clause. Following *Vogt* (discussed above) and declining to take judicial notice of the DOC's Sex Offender Management Interim Policy.

State v. Hagerman, __ N.C. App. __, __ S.E.2d __ (Nov. 3, 2009). Rejecting the defendant's *Apprendi* challenge to SBM. The court reasoned that because SBM is a civil remedy, it did not increase the maximum penalty for the crime.

State v. McCravey, __ N.C. App. __, __ S.E.2d __ (May 4, 2010). The statutory definition of an aggravated offense in G.S. 14-208.6(1a) is not unconstitutionally vague for failure to define the term "use of force."

Aggravated Offense

State v. Davison, __ N.C. App. __, __ S.E.2d __ (Dec. 8, 2009). Remanding for failure to properly conduct the SBM determination, as outlined in the court's opinion. The court also held that when determining whether an offense is an aggravated offense for purposes of SBM, the trial court may look only at the elements of the conviction offense and may not consider the facts supporting the conviction.

State v. McCravey, __ N.C. App. __, __ S.E.2d __ (May 4, 2010). Applying the "elements test," second-degree rape committed by force and against the victim's will is an aggravated offense triggering lifetime SBM.

State v. Phillips, __ N.C. App. __, __ S.E.2d __ (April 6, 2010). Following *Davison* and holding that when considering whether a pleaded-to offense is an aggravated one for purposes of SBM, the trial court may look only to the elements of the offense, and not at the factual basis for the plea. In this case, the defendant pleaded guilty to felonious child abuse by the commission of a sexual act in violation of G.S. 14-318.4(a2) and taking indecent liberties with a child. Following *Singleton* and holding that notwithstanding the factual basis for the plea, taking indecent liberties was not an aggravated offense. The court went on to hold that considering the elements only, the trial court erred when it determined that the defendant's conviction for felonious child abuse by the commission of any sexual act under G.S. 14-318.4(a2) was an aggravated offense.

State v. Brooks, __ N.C. App. __, __ S.E.2d __ (May 18, 2010). Sexual battery is not an aggravated offense for the purposes of SBM.

State v. Singleton, __ N.C. App. __, __ S.E.2d __ (Jan. 5, 2010). Following *Davison* and holding that the pleaded-to offense of indecent liberties was not an aggravated offense under the elements test.

State v. King, __ N.C. App. __, __ S.E.2d __ (May 18, 2010). Following *Singleton* and holding that indecent liberties is not an aggravated offense.

Offense Involving Physical, Mental of Sexual Abuse of Minor

State v. Smith, __ N.C. App. __, __ S.E.2d __ (Jan. 5, 2010). Statutory rape constitutes an offense involving the physical, mental, or sexual abuse of a minor. Once the trial judge determines that the defendant has been convicted of such an offense, the trial judge should order the DOC to perform a risk assessment. The trial court then must decide, based on the risk assessment and any other evidence presented, whether defendant requires "the highest possible level of supervision and monitoring." If the trial court determines that the defendant requires such supervision and monitoring, then the court must order the offender to enroll in SBM for a period of time specified by the court.

Highest Level of Supervision and Monitoring

State v. King, __ N.C. App. __, __ S.E.2d __ (May 18, 2010). Remanding for a determination of whether the defendant required the highest level of supervision and monitoring. Although the DOC's risk assessment indicated that the defendant was a moderate risk, there was evidence that he had violated six conditions of probation, including failure to be at home for two home visits, failure to pay his monetary obligation, failure to obtain approval before moving, failure to report his new address and update the sex offender registry, failure to enroll in and attend sex offender treatment, and failure to inform his supervising officer of his whereabouts, leading to the conclusion that he had absconded supervision. Noting that in *Morrow* (discussed above), the probation revocation hearing and the SBM hearing were held on the same day and before the same judge and in this case they were held at different times, the court found that distinction irrelevant. It stated: "The trial court can consider the number and frequency of defendant's probation violations as well as the nature of the conditions violated in making its determination. In particular, defendant's violations of failing to report his residence address and to update the sex offender registry as well as his failure to enroll in and attend sex offender treatment could support a finding that defendant poses a higher level of risk and is thus in need of SBM."

Period of SBM Set by the Court

State v. Smith, __ N.C. App. __, __ S.E.2d __ (Jan. 5, 2010). Once the trial judge determines that the defendant has been convicted of such an offense, the trial judge should order the DOC to perform a risk assessment. The trial court then must decide, based on the risk assessment and any other evidence presented, whether defendant requires "the highest possible level of supervision and monitoring." If the trial court determines that the defendant requires such supervision and monitoring, then the court must order the offender to enroll in SBM for a period of time specified by the court.

Appeal

State v. Singleton, __ N.C. App. __, __ S.E.2d __ (Jan. 5, 2010). Because a SBM order is a final judgment from the superior court, the Court of Appeals has jurisdiction to consider appeals from SBM monitoring determinations under G.S. 14-208.40B pursuant to G.S. 7A-27.

State v. Brooks, __ N.C. App. __, __ S.E.2d __ (May 18, 2010). A defendant's appeal from a trial court's order requiring enrollment in SBM for life is a civil matter. Thus, oral notice of appeal pursuant to N.C.R. App. P. 4(a)(1) is insufficient to confer jurisdiction on the court of appeals. Instead, a defendant must give notice of appeal pursuant to N.C.R. App. P. 3(a) as is proper "in a civil action or special proceeding[.]"

Civil Commitment

United States v. Comstock, 560 U.S. __ (May 17, 2010). The Court upheld the federal government's power to civilly commit a mentally ill, sexually dangerous federal prisoner beyond the date the prisoner would otherwise be released from prison. For a more detailed discussion of this case, see http://sogweb.sog.unc.edu/blogs/ncclaw/?p=1283

Trafficking Offenses

State v. Nunez, __ N.C. App. __, __ S.E.2d __ (May 18, 2010). The trial judge had discretion whether to run two drug trafficking sentences imposed at the same time concurrently or consecutively. G.S. 90-95(h) provides that, "[s]entences imposed pursuant to this subsection shall run consecutively with and shall commence at the expiration of any sentence being served by the person sentenced hereunder." This means that if the defendant is already serving a sentence, the new sentence must run consecutively to that sentence. It does not mean that when a defendant is convicted of multiple trafficking offenses at a term of court that those sentences, as a matter of law, must run consecutively to each other.

Resentencing -- More Severe Sentence After Appeal or Collateral Attack

State v. Daniels, __ N.C. App. __, __ S.E.2d __ (April 6, 2010). After being found guilty of first-degree rape and first-degree kidnapping, the defendant was sentenced to consecutive terms of 307-378 months for the rape and 133-169 for the kidnapping. On appeal, the court held that the trial judge erred by allowing the same sexual assault to serve as the basis for the rape and first-degree kidnapping convictions. The court remanded for a new sentencing hearing, instructing the trial judge to either arrest judgment on first-degree kidnapping and resentence on second-degree kidnapping, or arrest judgment on first-degree rape and resentence on first-degree kidnapping. The trial judge chose the first option, resentencing the defendant to 370-453 months for first-degree rape and to a consecutive term of 46-65 months for second-degree kidnapping. The resentencing violated G.S. 15A-1335 because the trial court imposed a more severe sentence for the rape conviction after the defendant's successful appeal. The court rejected the State's

argument that when applying G.S. 15A-1335, the court should consider whether the aggregated new sentences are greater than the aggregated original sentences.

Verdict

State v. Mumford, __ N.C. App. __, __ S.E.2d __ (Jan. 5, 2010). Jury verdicts convicting the defendant of felony driving while impaired inflicting serious injury and acquitting defendant of driving while impaired are inconsistent and contradictory. The trial court should have declined to accept the verdicts, reinstructed the jury, and directed it to retire and deliberate further.

State v. Lackey, __ N.C. App. __, __ S.E.2d __ (May 18, 2010). Based on the facts of the case, the clerk properly polled the jury in accordance with G.S. 15A-1238.

Evidence

404(b) Evidence

State v. Jacobs, __ N.C. __, __ S.E.2d __ (Mar. 12, 2010). In a murder and attempted armed robbery trial, the trial court erred when it excluded the defendant's proposed testimony that he knew of certain violent acts by the victim and that the victim had spent time in prison. This evidence was relevant to the defendant's claim of self-defense to the murder charge and to his contention that he did not form the requisite intent for attempted armed robbery because "there is a greater disincentive to rob someone who has been to prison or committed violent acts." The evidence was admissible under Rule 404(b) because it related to the defendant's state of mind. The court also held that certified copies of the victim's convictions were admissible under Rule 404(b) because they served the proper purpose of corroborating the defendant's testimony that the victim was a violent person who had been incarcerated. *State v. Wilkerson*, 148 N.C. App. 310, *rev'd per curiam*, 356 N.C. 418 (2002) (bare fact of the defendant's conviction, even if offered for a proper Rule 404(b) purpose, must be excluded under Rule 403), did not require exclusion of the certified copies of the victim's convictions. Unlike evidence of the defendant's conviction, evidence of certified copies of the victim's convictions does not encourage the jury to acquit or convict on an improper basis.

State v. Mobley, ___ N.C. App. ___, ___ S.E.2d ___ (Nov. 3, 2009). The trial court did not abuse its discretion by admitting, to show identification, intent, and modus operandi, a bad act that occurred 2 ½ years after the crime at issue. Bad acts that occur subsequent to the offense being tried are admissible under Rule 404(b). When the evidence is admitted to show intent and modus operandi, remoteness becomes less important.

State v. Paddock, __ N.C. App. __, __ S.E.2d __ (June 1, 2010) (available at: http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/090538-1.pdf). In a case in which the defendant was found guilty of felonious child abuse inflicting serious bodily injury and first-degree murder, the trial court did not abuse its discretion by admitting 404(b) evidence showing that the defendant engaged in continual and systematic abuse of her other children to show a common plan, scheme, system or design to inflict cruel suffering for the purpose of punishment, persuasion, and sadistic pleasure; motive; malice; intent; and lack of accident.

Best Evidence Rule

State v. Haas, __ N.C. App. __, __ S.E.2d __ (Feb. 2, 2010). Where an audio recording of a prior juvenile proceeding was available to all parties and the content of the recording was not in question, Rule 1002 was not violated by the admission of a written transcript of the proceeding.

Character of Victim

State v. Jacobs, __ N.C. __, __ S.E.2d __ (Mar. 12, 2010). In a murder and attempted armed robbery trial, the trial court erred when it excluded the defendant's proposed testimony that he knew of certain violent acts by the victim and that the victim's time in prison. This evidence was relevant to the defendant's claim of self-defense to the murder charge and to his contention that he did not form the requisite intent for attempted armed robbery because "there is a greater disincentive to rob someone who has been to prison or committed violent acts." The evidence was admissible under Rule 404(b) because it related to the defendant's state of mind.

Crawford Issues

Briscoe v. Virginia, 559 U.S. __ (Jan. 25, 2010). Certiorari was granted in this case four days after the Court decided *Melendez-Diaz v. Massachusetts*, 557 U.S. __, 129 S. Ct. 2527 (June 25, 2009). The case presented the following question: If a state allows a prosecutor to introduce a certificate of a forensic laboratory analysis, without presenting the testimony of the analyst who prepared the certificate, does the state avoid violating the Confrontation Clause by providing that the accused has a right to call the analyst as his or her own

witness? The Court's two-sentence per curiam decision vacated and remanded for "further proceedings not inconsistent with the opinion in *Melendez-Diaz.*"

State v. Brewington, __ N.C. App. __, __ S.E.2d __ (May 18, 2010). The trial court committed reversible error by allowing a substitute analyst to testify to an opinion that a substance was cocaine. For a more detailed discussion of this case, see my blog post online at: http://sogweb.sog.unc.edu/blogs/ncclaw/?p=1291

State v. Mobley, ___ N.C. App. ___, ___ S.E.2d ___ (Nov. 3, 2009). No *Crawford* violation occurred when a substitute analyst testified to her own expert opinion, formed after reviewing data and reports prepared by non-testifying expert. For a more detailed discussion of this case, see my blog post on point, available online at: http://sogweb.sog.unc.edu/blogs/ncclaw/?p=830

State v. Hough, __ N.C. App. __, __ S.E.2d __ (Mar. 2, 2010). Distinguishing *State v. Locklear*, ___ N.C. ___, ___ S.E.2d ___ (Aug. 28, 2009), and *Galindo* and following *Mobley* to hold that no *Crawford* violation occurred when reports done by non-testifying analyst as to composition and weight of controlled substances were admitted as the basis of a testifying expert's opinion on those matters. The testifying expert performed the peer review of the underlying reports and the underlying reports were offered not for their truth but as the basis of the testifying expert's opinion. The court was careful to note that "It is not our position that every 'peer review' will suffice to establish that the testifying expert is testifying to his or her own expert opinion."

State v. Galindo, __ N.C. App. __, __ S.E.2d __ (Oct. 20, 2009). A *Crawford* violation occurred when the State's expert gave an opinion, in a drug trafficking case, as to the weight of the cocaine at issue, based "solely" on a laboratory report by a non-testifying analyst. For a more detailed discussion of this case, see my blog post on point, available online at: http://sogweb.sog.unc.edu/blogs/ncclaw/?p=797

State v. Brennan, __ N.C. App. __, __ S.E.2d __ (May 4, 2010). Applying *State v. Locklear*, ___ N.C. ___, ___ S.E.2d ___ (Aug. 28, 2009), and *Mobley*, both discussed above, the court concluded that testimony of a substitute analyst identifying a substance as cocaine base violated the defendant's confrontation clause rights. The court characterized the substitute analyst's testimony as "merely reporting the results of [non-testifying] experts." Rather than conduct her own independent review, the testifying analyst's review "consisted entirely of testifying in accordance with what the underlying report indicated." For more discussion of this case, see the blog post at http://sogweb.sog.unc.edu/blogs/ncclaw/?p=1252

State v. Steele, __ N.C. App. __, __ S.E.2d __ (Jan. 5, 2010). The court upheld the constitutionality of G.S. 90-95(g)'s notice and demand statute for forensic laboratory reports in drug cases. Since the defendant failed to object after the State gave notice of its intent to introduce the report without the presence of the analyst, the defendant waived his Confrontation Clause rights.

State v. Batchelor, __ N.C. App. __, __ S.E.2d __ (Mar. 2, 2010). Statements of a non-testifying informant to a police officer were non-testimonial when offered not for the truth of the matter asserted but rather to explain the officer's actions.

Hearsay

State v. Hough, __ N.C. App. __, __ S.E.2d __ (Mar. 2, 2010). Reports by a non-testifying analyst as to composition and weight of controlled substances were not hearsay when they were admitted not for their truth but as the basis of a testifying expert's opinion on those matters.

State v. Hernandez, __ N.C. App. __, __ S.E.2d __ (Feb. 2, 2010). A murder victim's statements to her mother were properly admitted under the Rule 803(3) exception for then-existing mental, emotional or physical condition. The victim told her mother that she wanted to leave the defendant because he was wanted in another jurisdiction for attempting to harm the mother of his child; the victim also told her mother that she previously had tried to leave the defendant but that he had stalked and physically attacked her. The statements indicate difficulties in the relationship prior to the murder and are admissible to show the victim's state of mind.

Judicial Notice

State v. McCormick, __ N.C. App. __, __ S.E.2d __ (May 18, 2010). In a burglary case, the trial court properly took judicial notice of the time of sunset and of civil sunset as established by the Naval Observatory and instructed the jury that it "may, but is not required to, accept as conclusive any fact judicially noticed."

Opinions

Expert Opinions

Child Victim Cases

State v. Paddock, __ N.C. App. __, __ S.E.2d __ (June 1, 2010) (available at: http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/090538-1.pdf). In a case in which the defendant was found guilty of felonious child abuse inflicting serious bodily injury and first-degree murder, the trial court did not err by admitting testimony of the State's expert in the field of developmental and forensic pediatrics. Based on a review of photographs, reports, and other materials, the expert testified that she found the histories of the older children very consistent as eyewitnesses to what the younger children described. She also testified about ritualistic and sadistic abuse and torture, stating that torture occurs when a person "takes total control and totally dominates a person's behavior and most the [sic] basic of behaviors are taken control of. Those basic behaviors are eating, eliminating and sleeping." As an example, she described binding a child at night, placing duct tape over the mouth, and then placing furniture on the child for the purpose of immobilization. The expert stated that she was not testifying to a legal definition of torture but was defining the term based on her medical expertise. She testified that one sibling suffered from sadistic abuse and torture; another from sadistic abuse, ritualistic abuse, and torture; and a third from sadistic abuse and torture. The jury was instructed to consider this testimony for the limited purpose for which it was admitted under Rule 404(b). Additionally, the trial court instructed the jury that torture was a "course of conduct by one who intentionally inflicts grievous pain and suffering upon another for the purpose of punishment, persuasion or sadistic pleasure." The expert's testimony was not inadmissible opinion testimony on the credibility of the children and admission of the expert's testimony regarding the use of the word torture was not an abuse of discretion.

Drug Cases

State v. Brunson, __ N.C. App. __, __ S.E.2d __ (June 1, 2010) (available at: http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/090976-1.pdf). Following *State v. Ward*, __ N.C. App. __, 681 S.E.2d 354 (2009), *disc. review granted*, 363 N.C. 662 (2009), and holding that the trial court committed plain error by admitting the testimony of the State's expert chemist witness that the substance at issue was hydrocodone, an opium derivative. The State's expert used a Micromedics database of pharmaceutical preparations to identify the pills at issue according to their markings, color, and shape but did no chemical analysis on the pills.

State v. Ferguson, __ N.C. App. __, __ S.E.2d __ (June 15, 2010) (online at: http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091048-1.pdf). The trial court did not err by allowing a police officer to testify that seized substances were marijuana, even though the officer did not perform chemical testing on the substances. Although the officer was not tendered as an expert, the court treated him as such. The officer had been in law enforcement for eight years and had received drug interdiction training from the State Highway Patrol, the Drug Enforcement Agency, and the Bureau of Alcohol, Tobacco, and Firearms, including instruction in the identification of marijuana. The court concluded that nothing in *Llamas-Hernandez*, 363 N.C. 8 (2009), or *State v. Ward*, __ N.C. App. __, 681 S.E.2d 354 (2009), *disc. review granted*, 363 N.C. 662 (2009), casts any doubt on the court's earlier decision in *State v. Fletcher*, 92 N.C. App. 50 (1988), which the court characterized as holding that officers can offer expert testimony that a substance is marijuana. Finally, the court concluded that the lack of evidence about the extent to which the officer opened the containers in which the marijuana was found and the extent to which he based his opinions on the substances' odor goes to weight not admissibility.

State v. Meadows, __ N.C. App. __, __ S.E.2d __ (Jan. 5, 2010). A new trial was required in a drug case where the trial court erred by admitting expert testimony as to the identity of the controlled substance when that testimony was based on the results of a NarTest machine. Applying *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440 (2004), the court held that the State failed to demonstrate the reliability of the NarTest machine.

Impaired Driving

State v. Armstrong, __ N.C. App. __, __ S.E.2d __ (April 20, 2010). In a DWI/homicide case, the trial court erred by allowing a state's witness to testify about ingredients and effect of Narcan. Although the state proffered the testimony as lay opinion, it was actually expert testimony. When the state called the witness, it elicited extensive testimony regarding his training and experience and the witness testified that Narcan contains no alcohol and has no effect on blood-alcohol content. Because the witness offered expert testimony and because the state did not notify the defendant during discovery that it intended to offer this expert witness, the trial court erred by allowing him to testify as such. However, the error was not prejudicial.

Lay Opinions

State v. Meadows, __ N.C. App. __, __ S.E.2d __ (Jan. 5, 2010). Citing *Ward*, discussed above under expert opinions, the court held that the trial judge erred by allowing a police officer to testify that he "collected what [he] believe[d] to be crack cocaine." Controlled

substances defined in terms of their chemical composition only can be identified by the use of a chemical analysis rather than through the use of lay testimony based on visual inspection.

State v. Davis, __ N.C. App. __, __ S.E.2d __ (Feb. 16, 2010). Not mentioning *Meadows*, discussed immediately above, and stating that notwithstanding *State v. Llamas-Hernandez*, 363 N.C. 8 (Feb. 6, 2009), *State v. Freeman*, 185 N.C. App. 408 (2007), stands for the proposition that an officer may offer a lay opinion that a substance is crack cocaine.

State v. Williams, __ N.C. __, __ S.E.2d __ (Dec. 11, 2009). An officer's testimony that a substance found on a vehicle looked like residue from a car wash explained the officer's observations about spots on the vehicle and was not a lay opinion. The officer properly testified to a lay opinion that (1) the victims were not shot in the vehicle, when that opinion was rationally based on the officer's observations regarding a lack of pooling blood in or around the vehicle, a lack of shell casings in or around the car, very little blood spatter in the vehicle, and no holes or projectiles found inside or outside the vehicle; (2) one of the victim was "winched in" the vehicle using rope found in the vehicle, when that opinion was based upon his perception of blood patterns, the location of the vehicle, and the positioning of and tension on the rope on the seat and the victim's hands; and (3) the victims were dragged through the grass at the defendant's residence, when that opinion was based on his observations at the defendant's residence and his experience in luminol testing.

State v. Belk, __ N.C. App. __, __ S.E.2d __ (Dec. 8, 2009). The trial court committed reversible error by allowing a police officer to give a lay opinion identifying the defendant as the person depicted in a surveillance video. The officer only saw the defendant a few times, all of which involved minimal contact. Although the officer may have been familiar with the defendant's "distinctive" profile, there was no basis for the trial court to conclude that the officer was more likely than the jury correctly to identify the defendant as the person in the video. There was is no evidence that the defendant altered his appearance between the time of the incident and the trial or that the individual depicted in the footage was wearing a disguise and the video was of high quality.

State v. Rahaman, __ N.C. App. __, __ S.E.2d __ (Jan. 19, 2010). The trial court did not abuse its discretion by allowing an officer to give a lay opinion as to the value of a stolen Toyota truck in a felony possession trial. The officer had worked as a car salesman, was very familiar with Toyotas, and routinely valued vehicles as a police officer. He also spent approximately three hours taking inventory of the truck.

In Re D.L.D, __ N.C. App. __, __ S.E.2d __ (April 20, 2010). The trial court did not err by admitting lay opinion testimony from an officer regarding whether, based on his experience in narcotics, he knew if it was common for a person selling drugs to have possession of both money and drugs. Officer also gave an opinion about whether a drug dealer would have a low amount of inventory and a high amount of money or vice versa. The testimony was based on the officer's personal experience and was helpful to the determination of whether the juvenile was selling drugs.

State v. Armstrong, __ N.C. App. __, __ S.E.2d __ (April 20, 2010). In a DWI/homicide case, the trial court erred by allowing a state's witness to testify about ingredients and effect of Narcan. Although the state proffered the testimony as lay opinion, it actually was expert testimony. When the state called the witness, it elicited extensive testimony regarding his training and experience and the witness testified that Narcan contains no alcohol and has no effect on blood-alcohol content. Because the witness offered expert testimony and because the state did not notify the defendant during discovery that it intended to offer this expert witness, the trial court erred by allowing him to testify as such. However, the error was not prejudicial.

Relevancy

State v. Samuel, __ N.C. App. __, __ S.E.2d __ (May 4, 2010). In an armed robbery case, admission of evidence of two guns found in the defendant's home was reversible error where "not a scintilla of evidence link[ed] either of the guns to the crimes charged."

State v. Espinoza-Valenzuela, __ N.C. App. __, __ S.E.2d __ (April 20, 2010). In a child sexual abuse case, evidence of the defendant's prior violence towards the victims' mother, with whom he lived, was relevant to show why the victims were afraid to report the sexual abuse and to refute the defendant's assertion that the victims' mother was pressuring the victims to make allegations in order to get the defendant out of the house. Evidence that the victims' mother had been sexually abused as a child was relevant to explain why she delayed notifying authorities after the victims told her about the abuse and to rebut the defendant's assertion that the victims were lying because their mother did not immediately report their allegations.

Rule 403

State v. Jacobs, __ N.C. __, __ S.E.2d __ (Mar. 12, 2010). *State v. Wilkerson*, 148 N.C. App. 310, *rev'd per curiam*, 356 N.C. 418 (2002) (bare fact of the defendant's conviction, even if offered for a proper Rule 404(b) purpose, must be excluded under Rule 403), did not require exclusion of certified copies of the victim's convictions. Unlike evidence of the defendant's conviction, evidence of the

victim's convictions does not encourage the jury to acquit or convict on an improper basis.

State v. Stitt, __ N.C. App. __, __ S.E.2d __ (Dec. 8, 2009). The trial court did not err in admitting four objected-to photographs of the crime scene where the defendant did not did not object to 23 other crime scene photographs, the four objected-to photographs depicted different perspectives of the scene and focused on different pieces of evidence, the State used the photographs in conjunction with testimony for illustrative purposes only, and the photographs were not used to inflame the jury's passions.

State v. Fortney, __ N.C. App. __, __ S.E.2d __ (Jan. 5, 2010). Following *State v. Little*, 191 N.C. App. 655 (2008), and *State v. Jackson*, 139 N.C. App. 721 (2000), and holding that the trial court did not abuse its discretion by allowing the State to introduce evidence of the defendant's prior conviction in a felon in possession case where the defendant had offered to stipulate to the prior felony. The prior conviction, first-degree rape, was not substantially similar to the charged offenses so as to create a danger that the jury might generalize the defendant's earlier bad act into a bad character and raise the odds that he perpetrated the charged offenses of drug possession, possession of a firearm by a felon, and carrying a concealed weapon.

Rule 410 -- Pleas and Plea Discussions

State v. Haymond, __ N.C. App. _, __ S.E.2d __ (April 6, 2010). Admission of the defendant's statements did not violate Evidence Rule 410 where it did not appear that the defendant thought that he was negotiating a plea with the prosecuting attorney or with the prosecutor's express authority when he made the statements at a court hearing. Instead, the statements were made in the course of the defendant's various requests to the trial court.

State v. Riley, __ N.C. App. __, __ S.E.2d __ (Feb. 2, 2010). G.S. 15A-1025 (the fact that the defendant or counsel and the prosecutor engaged in plea discussions or made a plea arrangement may not be received in evidence) was violated when the prosecutor asked the defendant whether he was charged with misdemeanor larceny as a result of a plea bargain.

Stipulations

State v. Huey, __ N.C. App. __, __ S.E.2d __ (June 15, 2010) (online at: http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/090496-1.pdf). The defendant moved to suppress on grounds that an officer stopped him without reasonable suspicion. At a hearing on the suppression motion, the State stipulated that the officer knew, at the time of the stop, that the robbery suspects the officer was looking for were approximately 18 years old. The defendant was 51 years old. However, at the hearing, the officer gave testimony contradicting this stipulation and indicating that he did not learn of the suspects' age until after he had arrested the defendant. The court concluded that the stipulation was binding on the State, even though the defendant made no objection when the officer testified.

Arrest, Search, and Investigation

Arrests and Investigatory Stops

Arrests

State v. Mello, __ N.C. App. __, __ S.E.2d __ (Nov. 3, 2009). A provision in a city ordinance prohibiting loitering for the purpose of engaging in drug-related activity and allowing the police to arrest in the absence of probable cause violated the Fourth Amendment.

Steinkrause v. Tatum, __ N.C. App. __, __ S.E.2d __ (Dec. 8, 2009). There was probable cause to arrest the defendant for impaired driving in light of the severity of the one-car accident coupled with an odor of alcohol.

Seizure

State v. Williams, __ N.C. App. __, __ S.E.2d __ (December 22, 2009). An encounter between the defendant and an officer did not constitute a seizure. The officer parked his patrol car on the opposite side of the street from the defendant's parked car; thus, the officer did not physically block the defendant's vehicle from leaving. The officer did not activate his siren or blue lights, and there was no evidence that he removed his gun from its holster, or used any language or displayed a demeanor suggesting that the defendant was not free to leave. A reasonable person would have felt free to disregard the officer and go about his or her business; as such the encounter was entirely consensual.

Stops

State v. Huey, __ N.C. App. __, __ S.E.2d __ (June 15, 2010) (online at: http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/090496-1.pdf). An officer lacked reasonable suspicion for a stop. The State stipulated that the officer knew, at the time of the stop, that the robbery suspects the officer was looking for were approximately

18 years old. The defendant was 51 years old at the time of the stop. Even if the officer could not initially tell the defendant's age, once the officer was face-to-face with the defendant, he should have been able to tell that the defendant was much older than 18. In any event, as soon as the defendant handed the officer his identification card with his birth date, the officer knew that the defendant did not match the description of the suspects and the interaction should have ended.

State v. Mewborn, __ N.C. App. __, __ S.E.2d __ (Nov. 3, 2009). No stop occurred when the defendant began to run away as the officers exited their vehicle. The defendant did not stop or submit to the officers' authority at this time. Because the defendant was not stopped until after he ran away from the officers, his flight could be considered in determining that there was reasonable suspicion to stop.

State v. Mello, __ N.C. App. __, __ S.E.2d __ (Nov. 3, 2009). Over a dissent, the court held that reasonable suspicion supported a vehicle stop. While in a drug-ridden area, an officer observed two individuals approach and insert their hands into the defendant's car. After the officer became suspicious and approached the group, the two pedestrians fled, and the defendant began to drive off.

State v. McRae, __ N.C. App. __, __ S.E.2d __ (April 6, 2010). The officer had reasonable suspicion to stop when the officer saw the defendant commit a violation of G.S. 20-154(a) (driver must give signal when turning whenever the operation of any other vehicle may be affected by such movement). Because the defendant was driving in medium traffic, a short distance in front of the officer, the defendant's failure to signal could have affected another vehicle.

State v. Carrouthers, __ N.C. App. __, __ S.E.2d __ (Oct. 20, 2009). The trial court applied the wrong legal standard when granting the defendant's motion to suppress. The trial court held that an arrest occurred when the defendant was handcuffed by an officer, and the arrest was not supported by probable cause. The trial court should have determined whether special circumstances existed that would have justified the officer's use of handcuffs as the least intrusive means reasonable necessary to carry out the purpose of the investigative stop. The court remanded for the required determination.

Tips

Anonymous Tips

State v. Johnson, __ N.C. App. __, __ S.E.2d __ (June 1, 2010) (available at: http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/090908-1.pdf). An anonymous tip lacked a sufficient indicia of reliability to justify the warrantless stop. The anonymous tip reported that a black male wearing a white t-shirt and blue shorts was selling illegal narcotics and guns at the corner of Pitts and Birch Streets in the Happy Hill Garden housing community. The caller said the sales were occurring out of a blue Mitsubishi, license plate WT 3456. The caller refused to provide a name, the police had no means of tracking him or her down, and the officers did not know how the caller obtained the information. Prior to the officers' arrival in the Happy Hill neighborhood, the tipster called back and stated that the suspect had just left the area, but would return shortly. Due to construction, the neighborhood had only two entrances. Officers stationed themselves at each entrance and observed a blue Mitsubishi enter the neighborhood. The car had a license plate WTH 3453 and was driven by a black male wearing a white t-shirt. After the officers learned that the registered owner's driver's license was suspended, they stopped the vehicle. The court concluded that while the tip included identifying details of a person and car allegedly engaged in illegal activity, it offered few details of the alleged crime, no information regarding the informant's basis of knowledge, and scant information to predict the future behavior of the alleged perpetrator. Given the limited details provided, and the officers' failure to corroborate the tip's allegations of illegal activity, the tip lacked sufficient indicia of reliability to justify the warrantless stop. The court noted that although the officers lawfully stopped the vehicle after discovering that the registered owner's driver's license was suspended, because nothing in the tip involved a revoked driver's license, the scope of the stop should have been limited to a determination of whether the license was suspended.

Confidential Informant Tips

State v. Crowell, __ N.C. App. __, __ S.E.2d __ (June 1, 2010) (available at: http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/090635-1.pdf). A tip from a confidential informant had a sufficient indicia of reliability to support a stop of the defendant's vehicle where the evidence showed that: (1) a confidential informant who had previously provided reliable information told police that the defendant would be transporting cocaine that day and described the vehicle defendant would be driving; (2) the informant indicated to police that he had seen cocaine in defendant's possession; (3) a car matching the informant's description arrived at the designated location at the approximate time indicated by the informant; and (4) the informant, waiting at the specified location, called police to confirm that the driver was the defendant.

State v. Evans, __ N.C. App. __, __ S.E.2d __ (December 22, 2009). Information from a confidential informant provided probable cause. The informant told an officer that a cocaine delivery would occur that evening. The informant had provided information to the officer 15-20 times over the previous month; six of those occasions led to arrests; at least once, the informant's information served as the basis for a search warrant; and the officer once used the informant to make an undercover drug buy. The informant provided

information about the vehicle that would be used to deliver the drugs, the route the vehicle would take, its destination, and the exact time it arrived at its destination. The informant provided specific information about the vehicle's occupants including the names of the driver and the passenger, a detailed description of the passenger, and where the controlled substance would be on the passenger's person. All of this information was accurate.

State v. McRae, __ N.C. App. __, __ S.E.2d __ (April 6, 2010). In a drug case, a tip from a confidential informant provided reasonable suspicion justifying the stop where the relevant information was known by the officer requesting the stop but not by the officer conducting the stop. The confidential informant had worked with the officer on several occasions, had provided reliable information in the past that lead to the arrest of drug offenders, and gave the officer specific information (including the defendant's name, the type of car he would be driving, the location where he would be driving, and the amount and type of controlled substance that he would have in his possession).

Vehicle Stops -- Checkpoints

State v. Jarrett, __ N.C. App. __, __ S.E.2d __ (May 4, 2010). The vehicle checkpoint did not violate the defendant's Fourth Amendment rights. The primary programmatic purpose of the checkpoint—to determine if drivers were complying with drivers license laws and to deter citizens from violating these laws—was a lawful one. Additionally, the checkpoint itself was reasonable, based on the gravity of the public concerns served by the seizure, the degree to which the seizure advanced the public interest, and the severity of the interference with individual liberty. The court also held that the officer had reasonable, articulable suspicion to continue to detain the 18-year-old defendant after he produced a valid license and registration and thus satisfied the primary purpose of the vehicle checkpoint. Specifically, when the officer approached the car, he saw an aluminum can between the driver's and passenger's seat, and the passenger was attempting to conceal the can. When the officer asked what was in the can, the defendant raised it, revealing a beer can.

Consent

State v. Washburn, __ N.C. App. __, __ S.E.2d __ (Nov. 17, 2009). Police officers lawfully were present in a common hallway outside of the defendant's individual storage unit. The hallway was open to those with an access code and invited guests, the manager previously had given the police department its own access code to the facility, and facility manager gave the officers permission on the day in question to access the common area with a drug dog, which subsequently alerted on the defendant's unit.

State v. Stover, __ N.C. App. __, __ S.E.2d __ (Nov. 3, 2009). The evidence supported the trial court's conclusion that the defendant voluntarily consented to a search of his home. Although an officer aimed his gun at the defendant when he thought that the defendant was attempting to flee, the officer promptly lowered the gun. While the officers kicked down the door, they did not immediately handcuff the defendant. Rather, the defendant sat in his living room and conversed freely with the officers, and one officer escorted him to a neighbor's house to obtain child care. The defendant consented to a search of his house when asked after a protective sweep was completed.

State v. Hagin, __ N.C. App. __, __ S.E.2d __ (April 20, 2010). By consenting to a search of all personal and real property at 19 Doc Wyatt Road, the defendant consented to a search of an outbuilding within the curtilage of the residence. The defendant's failure to object when the outbuilding was searched suggests that he believed that the outbuilding was within the scope of his consent. For a more detailed analysis of this case, see the blog post at: http://sogweb.sog.unc.edu/blogs/ncclaw/?p=1227

Dog Sniff

State v. Washburn, __ N.C. App. __, __ S.E.2d __ (Nov. 17, 2009). Use of a dog by officers to sweep the common area of a storage facility, altering them to the presence of drugs in the defendant's storage unit, did not implicate a legitimate privacy interest protected by the Fourth Amendment.

Exclusionary Rule

State v. Barron, __ N.C. App. __, __ S.E.2d __ (Mar. 2, 2010). Even if the defendant was arrested without probable cause, his subsequent criminal conduct of giving the officers a false name, date of birth, and social security number need not be suppressed. "The exclusionary rule does not operate to exclude evidence of crimes committed subsequent to an illegal search and seizure."

Exigent Circumstances

Michigan v. Fisher, __ S. Ct. __ (Dec. 7, 2009). An officer's entry into a home without a warrant was reasonable under the emergency aid doctrine. Responding to a report of a disturbance, a couple directed officers to a house where a man was "going crazy." A pickup

in the driveway had a smashed front, there were damaged fence posts along the side of the property, and the home had three broken windows, with the glass still on the ground outside. The officers saw blood on the pickup and on clothes inside the truck, as well as on one of the doors to the house. They could see the defendant screaming and throwing things inside the home. The back door was locked and a couch blocked the front door. The Court concluded that it would be objectively reasonable to believe that the defendant's projectiles might have a human target (such as a spouse or a child), or that the defendant would hurt himself in the course of his rage.

State v. Stover, __ N.C. App. __, __ S.E.2d __ (Nov. 3, 2009). Exigent circumstances justified officers' entry into a home. The officers were told by an informant told that she bought marijuana at the house. When they approached for a knock and talk, they detected a strong odor of marijuana, and saw the defendant with his upper body partially out of a window. The possible flight by the defendant and concern with destruction of evidence given the smell provided exigent circumstances.

State v. Fletcher, __ N.C. App. __, __ S.E.2d __ (Jan. 19, 2010). G.S. 20-139.1(d1) (providing that in order to proceed with a non-consensual blood test without a warrant, there must be probable cause and the officer must have a reasonable belief that a delay in testing would result in dissipation of the person's blood alcohol content), codifies exigent circumstances with respect to impaired driving and is constitutional. Competent evidence supported the trial court's conclusions that the officer had a reasonable belief that a delay in testing would result in dissipation of the defendant's blood alcohol content and that exigent circumstances existed; the facts showed, in part, that obtaining a warrant to procure the blood would have caused a two to three hour delay.

Frisk

State v. Morton, __ N.C. __, __ S.E.2d __ (Dec. 11, 2009). For reasons stated in a dissent to the opinion below, the North Carolina Supreme Court reversed a Court of Appeals ruling that the trial judge erred in concluding that a frisk was justified because officers had reasonable suspicion to believe that the defendant was armed or dangerous. The dissent had concluded that, under the totality of the circumstances, the officers had reasonable suspicion to frisk the defendant for officer safety.

Disclosure of Confidential Informant's Identity

State v. Dark, __ N.C. App. __, __ S.E.2d __ (June 15, 2010). The trial court did not err by denying the defendant's motion to disclose the identity of a confidential informant in a drug case. The informant set up a drug transaction between an officer and the defendant, accompanied the officer during the transaction, but was not involved in it. When deciding whether disclosure of a confidential informant's identity is warranted, the trial court must balance the government's need to protect an informant's identity (to promote disclosure of crimes) with the defendant's right to present his or her case. However, the trial court is not required to engage in balancing until the defendant makes a sufficient showing that the circumstances mandate disclosure. Factors weighing in favor of disclosure are that the informer was a participant in the crime, and that the evidence contradicts on material facts that the informant could clarify. Factors weighing against disclosure include whether the defendant admits culpability, offers no defense on the merits, and whether evidence independent of the informer's testimony establishes guilt. Here, only the informant's presence and role in arranging the transaction favor disclosure. The defendant failed to forecast how the informant's identity could provide useful information to clarify any contradiction in the evidence. Moreover, the informant's testimony was not admitted at trial; instead, the officers' testimony established guilt. The defendant did not carry his burden of showing that the facts mandate disclosure of the informant's identity.

Interrogation

Miranda

***Miranda* Warnings**

Florida v. Powell, 559 U.S. __ (Feb. 23, 2010). Advice by law enforcement officers that the defendant had "the right to talk to a lawyer before answering any of [the law enforcement officers'] questions" and that he could invoke this right "at any time . . . during th[e] interview," satisfied *Miranda*'s requirement that the defendant be informed of the right to consult with a lawyer and have the lawyer present during the interrogation. Although the warnings were not as clear as they could have been, they were sufficiently comprehensive and comprehensible when given a commonsense reading. The Court cited the standard warnings used by the FBI as "exemplary," but declined to require that precise formulation to meet *Miranda*'s requirements.

"Custodial"/Break in Custody

In Re J.D.B., __ N.C. __, __ S.E.2d __ (Dec. 11, 2009). A juvenile was not in custody when he made incriminating statements to law enforcement officers at school and thus was not entitled to the protections of G.S. 7B-2101 and *Miranda*. For a student to be deemed to be in custody at school, the officers must subject the student to a restraint on freedom of movement that goes well beyond the restraints that characterize the school environment in general. Here, the juvenile was escorted from class to a conference room, the school resource officer had minimal involvement in the questioning, the juvenile was not restrained, no one guarded at the door, the

investigator asked the juvenile if he would agree to answer questions, indicating that responses were not required. After an initial confession, the investigator informed the juvenile that the juvenile did not need to speak with him and was free to leave, and the juvenile did so when the interview concluded. The court rejected the juvenile's argument that in the custody analysis, consideration should be given to the juvenile's age and status as a special education student; the court reiterated that the custody inquiry is an objective test.

State v. Allen, ___ N.C. App. ___, ___ S.E.2d ___ (Nov. 3, 2009). The defendant was not in custody while being treated at a hospital. Case law suggests that the following factors should be considered when determining whether questioning in a hospital constitutes a custodial interrogation: whether the defendant was free to go; whether the defendant was coherent in thought and speech, and not under the influence of drugs or alcohol; and whether officers intended to arrest the defendant. Additionally, courts have distinguished between questioning that is accusatory and that which is investigatory. On the facts presented, the defendant was not in custody. As to separate statements made by the defendant at the police station, the court held that although interrogation must cease once the accused invokes the right to counsel and may not be resumed without an attorney present, an exception exists where, as here, the defendant initiates further communication.

State v. Little, __ N.C. App. __, __ S.E.2d __ (May 4, 2010). The proper standard for determining whether a person was in custody for purposes of *Miranda* is not whether one would feel free to leave but whether there was indicia of formal arrest. On the facts presented, there was no indicia of arrest.

Maryland v. Shatzer, 559 U.S. __ (Feb. 24, 2010). The Court held that a 2½ year break in custody ended the presumption of involuntariness established in *Edwards v. Arizona*, 451 U.S. 477 (1981) (when a defendant invokes the right to have counsel present during a custodial interrogation, a valid waiver of that right cannot be established by showing that the defendant responded to further police-initiated custodial interrogation even if the defendant has been advised of his *Miranda* rights; the defendant is not subject to further interrogation until counsel has been provided or the defendant initiates further communications with the police). The defendant was initially interrogated about a sexual assault while in prison serving time for an unrelated crime. After *Miranda* rights were given, he declined to be interviewed without counsel, the interview ended, and the defendant was released back into the prison's general population. 2½ years later another officer interviewed the defendant in prison about the same sexual assault. After the officer read the defendant his *Miranda* rights, the defendant waived those rights in writing and made incriminating statements. At trial, the defendant unsuccessfully tried to suppress his statements pursuant to *Edwards.* The Court concluded: "The protections offered by *Miranda*, which we have deemed sufficient to ensure that the police respect the suspect's desire to have an attorney present the first time police interrogate him, adequately ensure that result when a suspect who initially requested counsel is reinterrogated after a break in custody that is of sufficient duration to dissipate its coercive effects." The Court went on to set a 14-day break in custody as the bright line rule for when the *Edwards* protection terminates. It also concluded that the defendant's release back into the general prison population to continue serving a sentence for an unrelated conviction constituted a break in *Miranda* custody.

"Interrogation"

State v. Stover, __ N.C. App. __, __ S.E.2d __ (Nov. 3, 2009). Officers did not interrogate the defendant within the meaning of *Miranda*. An officer asked the defendant to explain why he was hanging out of a window of a house that officers had approached on an informant's tip that she bought marijuana there. The defendant responded, "Man, I've got some weed." When the officer asked if that was the only reason for the defendant's behavior, the defendant made further incriminating statements. Additional statements made by the defendant were unsolicited.

In Re D.L.D, __ N.C. App. __, __ S.E.2d __ (April 20, 2010). The trial judge properly determined that a juvenile's statements, made after an officer's search of his person revealed cash, were admissible. The juvenile's stated that the cash was not from selling drugs and that it was his mother's rent money. The statement was unsolicited and spontaneous.

State v. Clodfelter, __ N.C. App. __, __ S.E.2d __ (Mar. 16, 2010). Defendant's mother was not acting as an agent of the police when, at the request of officers, she asked her son to tell the truth about his involvement in the crime. This occurred in a room at the police station, with officers present.

State v. Hensley, __ N.C. App. __, __ S.E.2d __ (Jan. 5, 2010). The defendant was subject to interrogation within the meaning of *Miranda* when he made incriminating statements to a detective. The detective should have known that his conduct was likely to elicit an incriminating response when, after telling the defendant that their conversation would not be on the record, the detective turned discussion to the defendant's cooperation with the investigation. Also, the detective knew that the defendant was particularly susceptible to an appeal to the defendant's relationship with the detective, based on prior dealings with the defendant, and that the defendant was still under the effects of an attempted overdose on prescription medication and alcohol. Additionally the defendant testified that he knew that the detective was trying to get him to talk.

Waiver of Rights Generally

State v. Brown, __ N.C. App. __, __ S.E.2d __ (June 15, 2010). A SBI Agent's testimony at the suppression hearing supported the trial court's finding that the Agent advised the defendant of his *Miranda* rights, read each statement on the *Miranda* form and asked the defendant if he understood them, put check marks on the list by each statement as he went through indicating that the defendant had assented, and then twice confirmed that the defendant understood all of the rights read to him. The totality of the circumstances fully supports the trial court's conclusion that the defendant's waiver of *Miranda* rights was made freely, voluntarily, and understandingly.

Invocation and Waiver of the Right to Remain Silent

Berghuis v. Thompkins, 560 U.S. __ (June 1, 2010) (available at: http://www.supremecourt.gov/opinions/09pdf/08-1470.pdf). The defendant was arrested in connection with a shooting that left one victim dead and another injured. At the start of their interrogation of the defendant, officers presented him with a written notification of his constitutional rights, which contained *Miranda* warnings. During the three-hour interrogation, the defendant never said that he wanted to remain silent, did not want to talk with the police, or he wanted a lawyer. Although he was largely silent, he gave a limited number of verbal answers, such as "yeah," "no," and "I don't know," and on occasion he responded by nodding his head. After two hours and forty-five minutes, the defendant was asked whether he believed in God and whether he prayed to God. When he answered in the affirmative, he was asked, "Do you pray to God to forgive you for shooting that boy down?" The defendant answered "yes," and the interrogation ended shortly thereafter. The Court rejected the defendant's argument that his answers to the officers' questions were inadmissible because he had invoked his privilege to remain silent by not saying anything for a sufficient period of time such that the interrogation should have ceased before he made his inculpatory statements. Noting that in order to invoke the *Miranda* right to counsel, a defendant must do so unambiguously, the Court determined that there is no reason to adopt a different standard for determining when an accused has invoked the *Miranda* right to remain silent. It held that in the case before it, the defendant's silence did not constitute an invocation of the right to remain silent. The Court went on to hold that the defendant knowingly and voluntarily waived his right to remain silent when he answered the officers' questions. The Court clarified that a waiver may be implied through the defendant's silence, coupled with an understanding of rights, and a course of conduct indicating waiver. In this case, the Court concluded that there was no basis to find that the defendant did not understand his rights, his answer to the question about praying to God for forgiveness for the shooting was a course of conduct indicating waiver, and there was no evidence that his statement was coerced. Finally, the Court rejected the defendant's argument that the police were not allowed to question him until they first obtained a waiver as inconsistent with the rule that a waiver can be inferred from the actions and words of the person interrogated.

Request for a Lawyer

State v. Little, __ N.C. App. __, __ S.E.2d __ (May 4, 2010). When the defendant asked, "Do I need an attorney?" the officer responded, "are you asking for one?" The defendant failed to respond and continued telling the officer about the shooting. The defendant did not unambiguously request a lawyer.

Juveniles

In Re J.D.B., __ N.C. __, __ S.E.2d __ (Dec. 11, 2009). A juvenile was not in custody when he made incriminating statements to law enforcement officers at school and thus was not entitled to the protections of G.S. 7B-2101 and *Miranda*. For a student to be deemed to be in custody at school, the officers must subject the student to a restraint on freedom of movement that goes well beyond the restraints that characterize the school environment in general. Here, the juvenile was escorted from class to a conference room, the school resource officer had minimal involvement in the questioning, the juvenile was not restrained, no one guarded at the door, the investigator asked the juvenile if he would agree to answer questions, indicating that responses were not required. After an initial confession, the investigator informed the juvenile that the juvenile did not need to speak with him and was free to leave, and the juvenile did so when the interview concluded. The court rejected the juvenile's argument that in the custody analysis, consideration should be given to the juvenile's age and status as a special education student; the court reiterated that the custody inquiry is an objective test.

In Re M.L.T.H., ___ N.C. App. ___, ___ S.E.2d ___ (Nov. 3, 2009). The trial court erred by denying the juvenile's motion to suppress his incriminating statement where the juvenile's waiver was not made "knowingly, willingly, and understandingly." The juvenile was not properly advised of his right to have a parent, guardian, or custodian present during questioning. After being told that he had a "right to have a parent, guardian, custodian, or any other person present," the juvenile elected to have his brother present. The brother was not a parent, guardian or custodian.

Plain Smell

State v. Stover, __ N.C. App. __, __ S.E.2d __ (Nov. 3, 2009). Officers had probable cause to enter a home and do a protective sweep

when an informant told them that she bought marijuana at the house and, as they approached the house for a knock and talk, they detected a strong odor of marijuana.

Search Warrants

Probable Cause - Generally

State v. Washburn, __ N.C. App. __, __ S.E.2d __ (Nov. 17, 2009). A positive alert for drugs by a specially trained drug dog provides probable cause to search the area or item where the dog alerts.

State v. Haymond, __ N.C. App. __, __ S.E.2d __ (April 6, 2010). An affidavit was sufficient to establish probable cause to believe that stolen items would be found in the defendant's home, notwithstanding alleged omissions by the officer.

State v. Hinson, __ N.C. App. __, __ S.E.2d __ (April 6, 2010). An informant's observations of methamphetamine production and materials at the location in question and an officer's opinion that, based on his experience, an ongoing drug production operation was present supplied probable cause supporting issuance of the warrant.

Informants' Tips

State v. Washburn, __ N.C. App. __, __ S.E.2d __ (Nov. 17, 2009). The fact that an officer who received the tip at issue had been receiving accurate information from the informant for nearly thirteen years sufficiently established the informant's reliability. The affidavit sufficiently described the source of the informant's information as a waitress who had been involved with the defendant. The reliability of the information was further established by an officer's independent investigation.

Staleness of Information

State v. Hinson, __ N.C. App. __, __ S.E.2d __ (April 6, 2010). Rejecting the defendant's argument that information relied upon by officers to establish probable cause was stale. Although certain information provided by an informant was three weeks old, other information pertained to the informant's observations made only one day before the application for the warrant was submitted. Also an officer opined, based on his experience, that an ongoing drug production operation was present at the location.

Searches

Incident to Arrest

State v. Johnson, __ N.C. App. __, __ S.E.2d __ (June 1, 2010) (available at: http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/090908-1.pdf). The defendant's Fourth Amendment rights were violated when the police searched his vehicle incident to his arrest for driving with a revoked driver's license. Under *Arizona v. Gant*, 129 S. Ct. 1710 (April 21, 2009), the officers could not reasonably have believed that evidence of the defendant's driving while license suspended might have been found in the car. Additionally, because the defendant was in the police car when the officers conducted the search, he could not have accessed the vehicle's passenger compartment at the time of the searched.

State v. Toledo, __ N.C. App. __, __ S.E.2d __ (May 18, 2010). A search of a tire found in the undercarriage of the defendant's vehicle was proper. An officer stopped the defendant for following too closely. The officer asked for and received consent to search the vehicle. During the consent search, the officer performed a "ping test" on a tire found inside the vehicle. When the ping test revealed a strong odor of marijuana, the officer arrested the defendant and searched the rest of the vehicle. At that point, the officer found a second tire located in the vehicle's undercarriage, which also contained marijuana. The search was justified because (1) the discovery of marijuana in the first tire gave the officer probable cause to believe that the vehicle was being used to transport marijuana and therefore the officer had probable cause to search any part of the vehicle that may have contained marijuana and (2) it was reasonable to believe that the vehicle contained evidence of the crime of arrest under *Arizona v. Gant*, 129 S. Ct. 1710 (April 21, 2009).

Of Students

In Re D.L.D, __ N.C. App. __, __ S.E.2d __ (April 20, 2010). The reasonableness standard of *New Jersey v. T.L.O.*, 469 U.S. 325 (1985), applied to a search of a student by an officer assigned to the school. The officer was working in conjunction with and at the direction of the assistant principal to maintain a safe and educational environment. For the reasons discussed in the opinion, the search satisfied the two-pronged inquiry for determining reasonableness: (1) whether the action was justified at its inception; and (2) whether the search as conducted was reasonably related in scope to the circumstances which justified the interference in the first place.

Of Vehicles

State v. Simmons, __ N.C. App. __, __ S.E.2d __ (Jan. 5, 2010). Standing alone, the defendant's statement that a plastic bag in his car contained "cigar guts" did not establish probable cause to search the defendant's vehicle. Although the officer testified that gutted cigars had become a popular means of consuming controlled substances, that evidence established a link between hollowed out cigars and marijuana, not between loose tobacco and marijuana. There was no evidence that the defendant was stopped in a drug-ridden area, at an unusual time of day, or that the officer had any basis, apart from the defendant's statements, for believing that the defendant possessed marijuana.

State v. Toledo, __ N.C. App. __, __ S.E.2d __ (May 18, 2010). A search of a tire found in the undercarriage of the defendant's vehicle was proper. An officer stopped the defendant for following too closely. The officer asked for and received consent to search the vehicle. During the consent search, the officer performed a "ping test" on a tire found inside the vehicle. When the ping test revealed a strong odor of marijuana, the officer arrested the defendant and searched the rest of the vehicle. At that point, the officer found a second tire located in the vehicle's undercarriage, which also contained marijuana. The search was justified because the discovery of marijuana in the first tire gave the officer probable cause to believe that the vehicle was being used to transport marijuana and therefore the officer had probable cause to search any part of the vehicle that may have contained marijuana.

Strip Searches

State v. Battle, __ N.C. App. __, __ S.E.2d __ (Feb. 16, 2010). A roadside strip search was unreasonable. The search was a strip search, even though the defendant's pants and underwear were not completely removed or lowered. Although the officer made an effort to shield the defendant from view, the search was a "roadside" strip search, distinguished from a private one. Roadside strip searches require probable cause and exigent circumstances, and no exigent circumstances existed here. Note that although a majority of the three-judge panel agreed that the strip search was unconstitutional, a majority did not agree as to why this was so.

Standing

State v. Stitt, __ N.C. App. __, __ S.E.2d __ (Dec. 8, 2009). The defendant did not have standing to assert a Fourth Amendment violation regarding cellular telephone records where there was no evidence that the defendant had an ownership interest in the telephones or had been given a possessory interest by the legal owner of the telephones. Mere possession of the telephones was insufficient to establish standing.

Telephone Records

State v. Stitt, __ N.C. App. __, __ S.E.2d __ (Dec. 8, 2009). Even if the State did not fully comply with 18 U.S.C. § 2703(d) of the Stored Communications Act, which governs disclosure of customer communications or records, there is no suppression remedy for a violation; the statute only provides for a civil remedy.

Wiretapping

Wright v. Town of Zebulon, __ N.C. App. __, __ S.E.2d __ (Feb. 16, 2010). Police department did not act "willfully" within the meaning of the North Carolina Electronic Surveillance Act (NCESA) by monitoring an officer's conversations in his patrol car in response to information that the officer was engaging in misconduct. As used in the NCESA, the term requires that the act be done with a bad purpose or without justifiable excuse. Where, as here, the monitoring is done to ensure public safety, it is not done with a bad purpose or without justifiable excuse.

Criminal Offenses

States of Mind

State v. Small, __ N.C. App. __, __ S.E.2d __ (Dec. 8, 2009). The doctrine of transferred intent permits the conviction of a defendant for discharging a weapon into occupied property when the defendant intended to shoot a person but instead shot into property that he or she knew was occupied.

Overbreadth and Vagueness

State v. Mello, __ N.C. App. __, __ S.E.2d __ (Nov. 3, 2009). A city ordinance prohibiting loitering for the purpose of engaging in drug-related activity is unconstitutionally overbroad. Additionally, one subsection of the ordinance is void for vagueness, and another provision violates the Fourth Amendment by allowing the police to arrest in the absence of probable cause.

First Amendment Issues

United States v. Stevens, __ U.S. __ (No. 08-769) (April 20, 2010). Federal statute enacted to criminalize the commercial creation, sale, or possession of certain depictions of animal cruelty was substantially overbroad and violated the First Amendment.

Homicide

State v. Tellez, __ N.C. App. __, __ S.E.2d __ (Nov. 3, 2009). There was sufficient evidence of malice to sustain a second-degree murder conviction where the defendant drove recklessly, drank alcohol before and while operating a motor vehicle, had prior convictions for impaired driving and driving while license revoked, and fled and engaged in elusive behavior after the accident.

State v. Armstrong, __ N.C. App. __, __ S.E.2d __ (April 20, 2010). A defendant may be convicted for both second-degree murder (for which the evidence of malice was the fact that the defendant drove while impaired and had prior convictions for impaired driving) and impaired driving.

State v. Neville, __ N.C. App. __, __ S.E.2d __ (Jan. 19, 2010). There was sufficient evidence of malice to support a second-degree murder conviction in a case where the defendant ran over a four-year-old child. When she hit the victim, the defendant was angry and not exhibiting self-control; the defendant's vehicle created "acceleration marks" and was operating properly; the defendant had an "evil look"; and the yard was dark, several small children were present, and the defendant did not know where the children were when she started her car.

State v. Simonovich, __ N.C. App. __, __ S.E.2d __ (Jan. 19, 2010). The trial court did not err by denying the defendant's request for a voluntary manslaughter instruction. Although the defendant knew that his wife was having sex with other men and she threatened to continue this behavior, the defendant did not find her in the act of intercourse with another or under circumstances clearly indicating that the act had just been completed. Additionally, the defendant testified that he strangled his wife to quiet her.

State v. Freeman, __ N.C. App. __, __ S.E.2d __ (Mar. 2, 2010). The trial court properly submitted felony-murder to the jury based on underlying felony of attempted sale of a controlled substance with the use of a deadly weapon. The defendant and an accomplice delivered cocaine to the victim. Approximately one week later, they went to the victim's residence to collect the money owed for the cocaine and at this point, the victim was killed. At the time of the shooting, the defendant was engaged in an attempted sale of cocaine (although the cocaine had been delivered, the sale was not consummated because payment had not been made) and there was no break in the chain of events between the attempted sale and the murder.

Assaults

Assault by Strangulation

State v. Williams, __ N.C. App. __, __ S.E.2d __ (Dec. 8, 2009). (1) The evidence was sufficient to establish assault by strangulation; the victim told an officer that she felt that the defendant was trying to crush her throat, that he pushed down on her neck with his foot, that she thought he was trying to "chok[e] her out" or make her go unconscious, and that she thought she was going to die. (2) Even if the offenses are not the same under the *Blockburger* test, the statutory language, "[u]nless the conduct is covered under some other provision of law providing greater punishment," prohibits sentencing a defendant for this offense and a more serious offense based on the same conduct.

Deadly Weapon

State v. Clark, __ N.C. App. __, __ S.E. 2d __ (Dec. 8, 2009). The vehicle at issue was not a deadly weapon as a matter of law where there was no evidence that the vehicle was moving at a high speed and given the victim's lack of significant injury and the lack of damage to the other vehicle involved, a jury could conclude that the vehicle was not aimed directly at the victim and that the impact was more of a glancing contact.

State v. Williams, __ N.C. App. __, __ S.E.2d __ (Dec. 8, 2009). There was sufficient evidence that the defendant's hands were a deadly weapon as to one victim when the evidence showed that the defendant was a big, stocky man, probably larger than the victim, who was a female and a likely user of crack cocaine, and the victim sustained serious injuries. There was sufficient evidence that the defendant's hands were a deadly weapon as to another victim when the evidence showed that the victim was a small-framed, pregnant woman with a cocaine addiction and the defendant used his hands to throw her onto the concrete floor, cracking her head open, and put his hands around her neck.

Serious Bodily Injury

State v. Williams, __ N.C. App. __, __ S.E.2d __ (Dec. 8, 2009). (1) There was sufficient evidence of serious bodily injury with respect to one victim where the victim suffered a cracked pelvic bone, a broken rib, torn ligaments in her back, a deep cut over her left eye, and was unable to have sex for seven months; the eye injury developed an infection that lasted months and was never completely cured; the incident left a scar above the victim's eye, amounting to permanent disfigurement; there was sufficient evidence of serious bodily injury as to another victim where the victim sustained a puncture wound to the back of her scalp and a parietal scalp hematoma and she went into premature labor as a result of the attack. (2) There was insufficient evidence of serious bodily injury as to another victim where the evidence showed that the victim received a vicious beating but did not show that her injuries placed her at substantial risk of death; although her ribs were "sore" five months later, there was no evidence that she experienced "extreme pain" in addition to the "protracted condition." (4) Based on the language in G.S. 14-32.4(b) providing that "[u]nless the conduct is covered under some other provision of law providing greater punishment," the court held that a defendant may not be sentenced to assault by strangulation and a more serious offense based on the same conduct. Because the statutory language in G.S. 14-32.4(a) proscribing assault inflicting serious bodily injury contains the same language, the same analysis likely would apply to that offense.

Discharging a Barreled Weapon or Firearm into Occupied Property

State v. Small, __ N.C. App. __, __ S.E.2d __ (Dec. 8, 2009). Only a barreled weapon must meet the velocity requirements of G.S. 14-34.1(a) (capable of discharging shot, bullets, pellets, or other missiles at a muzzle velocity of at least 600 feet per second); a firearm does not.

Malicious Conduct By Prisoner

State v. Noel, __ N.C. App. __, __ S.E.2d __ (Mar. 2, 2010). The evidence was sufficient to establish that the defendant emitted bodily fluids where it showed that he spit on an officer. The evidence was sufficient to show that the defendant acted knowingly and willfully where the defendant was uncooperative with the officers, was belligerent towards them, and immediately before the spitting, said to an approaching officer: "F--k you, n----r. I ain't got nothing. You ain't got nothing on me." The evidence was sufficient to show that the defendant was in custody when he was handcuffed and seated on a curb, numerous officers were present, and the defendant was told that he was not free to leave.

Multiple Convictions

State v. Williams, __ N.C. App. __, __ S.E.2d __ (Dec. 8, 2009). A defendant may not be convicted of assault with a deadly weapon inflicting serious injury and assault inflicting serious bodily injury arising out of the same conduct.

Secret Assault

State v. Holcombe, __ N.C. App. __, __ S.E.2d __ (April 20, 2010). The evidence was insufficient to support a conviction where the state failed to produce evidence that the assault was done in a secret manner. To satisfy this element, the state must offer evidence showing that the victim is caught unaware.

Sexual Assaults and Sex Offender Registration Offenses

Indecent Liberties

State v. Breathette, __ N.C. App. __, __ S.E.2d __ (Mar. 2, 2010). Mistake of age is not a defense to the crime of indecent liberties. The trial court did not err by declining the defendant's proposed instruction on willfulness which would have instructed that willfully means something more than an intention to commit the offense and implies committing the offense purposefully and designed in violation of the law. Instead, the trial court instructed the jury that the term willfully meant that the act was done purposefully and without justification or excuse. Although not given verbatim, the defendant's instruction was given in substance.

State v. Coleman, ___ N.C. App. ___, ___ S.E.2d ___ (Nov. 3, 2009). The court held that the (1) defendant, who had a custodial relationship with the child, committed an indecent liberty when he watched the child engage in sexual activity with another person and facilitated that activity; and (2) defendant's two acts−touching the child's breasts and watching and facilitating her sexual encounter with another person−supported two convictions.

Failure to Register/Notify of Address or Other Change

State v. Braswell, __ N.C. App. __, __ S.E.2d __ (May 4, 2010). The trial court erred by denying the defendant's motion to dismiss the charge of failing to register as a sex offender by failing to verify his address. In order to be convicted for failure to return the

verification form, a defendant must actually have received the form. In this case, the evidence was uncontroverted that the defendant never received the form.

Sexual Offense

State v. Williams, __ N.C. App. __, __ S.E.2d __ (Dec. 8, 2009). The defendant was properly convicted of two counts of sexual offense when the evidence showed that the victim awoke to find the defendant's hands in her vagina and in her rectum at the same time.

Sexual Activity by a Custodian

State v. Coleman, ___ N.C. App. ___, ___ S.E.2d ___ (Nov. 3, 2009). The court held that (1) the defendant, who was employed by a corporation at its boys' group home location was a custodian of the victim, who lived at the corporation's girls' group home location; and (2) the State need not prove that the defendant knew that he was the victim's custodian.

Solicitation of a Child by Computer

State v. Fraley, __ N.C. App. __, __ S.E.2d __ (Feb. 16, 2010). The defendant advised or enticed an officer posing as a child to meet the defendant, on the facts presented. The court noted that since the terms advise and entice were not defined by the statute, the General Assembly is presumed to have used the words to convey their natural and ordinary meaning.

Kidnapping

State v. Williams, __ N.C. App. __, __ S.E.2d __ (Dec. 8, 2009). The removal of the victim was without her consent when the defendant induced the victim to enter his car on the pretext of paying her money in exchange for sex, but his real intent was to assault her; a reasonable mind could conclude that had the victim known of such intent, she would not have consented to have been moved by the defendant. A defendant may be convicted of assault inflicting serious bodily injury and first-degree kidnapping when serious injury elevates the kidnapping conviction to first-degree.

Possession of Stolen Goods

State v. Rahaman, __ N.C. App. __, __ S.E.2d __ (Jan. 19, 2010). There was sufficient evidence that a stolen truck was worth more than $1,000. The sole owner purchased the truck new 20 years ago for $9,000.00. The truck was in "good shape"; the tires were in good condition, the radio and air conditioning worked, and the truck was undamaged, had never been in an accident and had been driven approximately 75,000 miles. The owner later had an accident that resulted in a "total loss" for which he received $1,700 from insurance; he would have received $2,100 had he given up title. An officer testified that the vehicle had a value of approximately $3,000. The State is not required to produce direct evidence of value, provided that the jury is not left to speculate as to value.

State v. Wilson, __ N.C. App. __, __ S.E.2d __ (April 20, 2010). The evidence was insufficient to establish that the defendant knew a gun was stolen. Case law establishes that guilty knowledge can be inferred from the act of throwing away a stolen weapon. In this case, shortly after a robbery, the defendant and an accomplice went to the home of the accomplice's mother, put the gun in her bedroom, and left the house. These actions were not analogous to throwing an item away for purposes of inferring knowledge that an item was stolen.

Robbery

State v. Williams, __ N.C. App. __, __ S.E.2d __ (Dec. 8, 2009). Distinguishing *State v. Holland*, 234 N.C. 354 (1951), and *State v. Murphy*, 225 N.C. 115 (1945), in which the victims were rendered unconscious by the defendants and regained consciousness bereft of their property, the court held that there was sufficient evidence that the defendant was the perpetrator of the robbery. Shoe prints placed the defendant at the scene, he admitted that he was with the victim on the morning in question, a receipt found at the scene bearing the defendant's name indicated that he was in the area at the time, a crack pipe with the victim's DNA was found in the defendant's vehicle, the defendant matched the description given by the victim to investigators, a third party encountered the defendant at the scene not long after the events occurred, and the defendant told conflicting stories to investigators.

Identity Theft

State v. Barron, __ N.C. App. __, __ S.E.2d __ (Mar. 2, 2010). The defendant's active (and false) acknowledgement to an officer that the last four digits of his social security number were "2301" constituted the use of identifying information of another within the meaning of G.S. 14-133.20(a).

Weapons Offenses

Felon in Possession

State v. Whitaker, __ N.C. App. __, __ S.E.2d __ (Dec. 8, 2009). Rejecting facial and "as applied" constitutional challenges to the felon in possession statute. The court distinguished *Britt v. North Carolina*, ___ N.C. ___, ___ S.E.2d ___ (Aug. 28, 2009), in connection with the as applied challenge. The court also rejected the defendant's contentions that the statute violates the prohibition against ex post facto laws and constitutes an unconstitutional bill of attainder.

State v. Taylor, __ N.C. App. __, __ S.E.2d __ (April 20, 2010). There was sufficient evidence of constructive possession. When a probation officer went to the defendant's cabin, the defendant ran away; a frisk of the defendant revealed spent .45 caliber shells that smelled like they had been recently fired; the defendant told the officer that he had been shooting and showed the officer boxes of ammunition close to the cabin, of the same type found during the frisk; a search revealed a .45 caliber handgun in the undergrowth close to the cabin, near where the defendant had run.

State v. Mewborn, __ N.C. App. __, __ S.E.2d. __ (Nov. 3, 2009). The evidence was sufficient to establish possession supporting convictions of felon in possession and carrying concealed where the defendant ran through a field in a high traffic area, appeared to have something heavy in his back pocket and to make throwing motions from that pocket, and a clean dry gun was found on the wet grass.

State v. Fortney, __ N.C. App. __, __ S.E.2d __ (Jan. 5, 2010). Following *State v. Little*, 191 N.C. App. 655 (2008), and *State v. Jackson*, 139 N.C. App. 721 (2000), and holding that the trial court did not abuse its discretion by allowing the State to introduce evidence of the defendant's prior conviction in a felon in possession case where the defendant had offered to stipulate to the prior felony. The prior conviction, first-degree rape, was not substantially similar to the charged offenses so as to create a danger that the jury might generalize the defendant's earlier bad act into a bad character and raise the odds that he perpetrated the charged offenses of drug possession, possession of a firearm by a felon, and carrying a concealed weapon.

Carrying Concealed

State v. Mewborn, __ N.C. App. __, __ S.E.2d. __ (Nov. 3, 2009). The evidence was sufficient to establish possession supporting convictions of felon in possession and carrying concealed where the defendant ran through a field in a high traffic area, appeared to have something heavy in his back pocket and to make throwing motions from that pocket, and a clean dry gun was found on the wet grass.

Possession of Deadly Weapon in Courthouse

State v. Sullivan, __ N.C. App. __, __ S.E.2d __ (Feb. 16, 2010). The court rejected the defendant's argument that as applied to him, G.S. 14-269.4 (carrying weapon in a courthouse) violated his right to bear arms under Article I, Section 30 of the North Carolina Constitution. The defendant had argued that the General Assembly had no authority to enact any legislation regulating or infringing on his right to bear arms. The court rejected this argument, noting that the state may regulate the right to bear arms, within proscribed limits. The court also held that the trial judge did not err by refusing to instruct the jury that it must consider whether the defendant knowingly or willfully violated the statute. The court concluded that an offender's intent is not an element of the offense.

Obstruction and Related Offenses

State v. Richardson, __ N.C. App. __, __ S.E.2d __ (Feb. 16, 2010). There was insufficient evidence of resisting an officer. The State argued that the defendant resisted by exiting a home through the back door after officers announced their presence with a search warrant. "We find no authority for the State's presumption that a person whose property is not the subject of a search warrant may not peacefully leave the premises after the police knock and announce if the police have not asked him to stay."

Gambling

McCracken v. Perdue, __ N.C. App. __, __ S.E.2d __ (December 22, 2009). Reversing the trial court's ruling that federal Indian gaming law prohibits the State from granting the Eastern Band of Cherokee Indians of North Carolina ("the Tribe") exclusive rights to conduct certain gaming on tribal land while prohibiting such gaming, in G.S. 14-306.1A, throughout the rest of the State. The court held that state law providing the Tribe with exclusive gaming rights does not violate federal Indian gaming law.

Drug Offenses

Possession

State v. Ferguson, __ N.C. App. __, __ S.E.2d __ (June 15, 2010) (online at: http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091048-1.pdf). There was insufficient evidence that the defendant had constructive possession of the drugs at issue. When an officer saw a minivan speeding, he signaled the van to stop and directed the driver to remain inside. Instead of complying, the driver drove around a corner out of sight. The officer pursued and found the vehicle in the middle of a nearby street in drive with the engine running. The driver had fled and three adults and a small child were running from the minivan towards a house. The driver was the child's father and the defendant had no relationship to the child. After placing the adults in custody, officers searched the van and found, underneath the front passenger seat, a large bag containing two smaller bags of marijuana; in the glove box, a small bag of marijuana; and in the defendant's handbag, a burned marijuana cigarette. The defendant had been sitting in the back seat. The defendant was neither the owner nor the driver of the van. There was no evidence that the defendant behaved suspiciously or failed to cooperate with investigating officers after being taken into custody. Finally, there was no evidence that the defendant made any incriminating admissions, had a relationship with the minivan's owner, had a history of selling drugs, or possessed an unusually large amount of cash.

State v. Nunez, __ N.C. App. __, __ S.E.2d __ (May 18, 2010). The evidence was sufficient to establish that the defendant knowingly possessed and transported the controlled substance. The evidence showed that (1) the packages involved in the controlled delivery leading to the charges at issue were addressed to "Holly Wright;" although a person named Holly Wainwright had lived in the apartment with the defendant, she had moved out; (2) the defendant immediately accepted possession of the packages, dragged them into the apartment, and never mentioned to the delivery person that Wainwright no longer lived there; (3) Wainwright testified that she had not ordered the packages; (4) the defendant told a neighbor that another person (Smallwood) had ordered the packages for her; (5) the defendant did not open the packages, but immediately called Smallwood to tell him that they had arrived; (6) after getting off the phone with Smallwood, the defendant acted like she was in a hurry to leave; and (7) Smallwood came to the apartment within thirty-five minutes of the packages being delivered.

State v. Hough, __ N.C. App. __, __ S.E.2d __ (Mar. 2, 2010). There was sufficient evidence of constructive possession even though the defendant did not have exclusive control of the residence where the controlled substances were found. The defendant admitted that he resided there, officers found luggage, mail, and a cellular telephone connected to the defendant at the residence, the defendant's car was in the driveway, and when the officers arrived, no one else was present. Additionally, the defendant was found pushing a trash can that contained the bulk of the marijuana seized, acted suspiciously when approached by the officers, and ran when an officer attempted to lift the lid.

State v. Fortney, __ N.C. App. __, __ S.E.2d __ (Jan. 5, 2010). There was sufficient evidence that the defendant constructively possessed controlled substances found in a motorcycle carry bag even though the defendant did not own the motorcycle.

State v. Barron, __ N.C. App. __, __ S.E.2d __ (Mar. 2, 2010). There was insufficient evidence that the defendant constructively possessed the controlled substances at issue. The defendant did not have exclusive possession of the premises where the drugs were found; evidence showed only that the defendant was present, with others, in the room where the drugs were found.

State v. Richardson, __ N.C. App. __, __ S.E.2d __ (Feb. 16, 2010). There was insufficient evidence that the defendant constructively possessed cocaine and drug paraphernalia. When officers announced their presence at a residence to be searched pursuant to a warrant, the defendant exited through a back door and was detained on the ground; crack cocaine was found on the ground near the defendant and drug paraphernalia was found in the house. As to the cocaine, the defendant did not have exclusive control of the house, which was rented by a third party, and there was insufficient evidence of other incriminating circumstances. The defendant did not rent the premises, no documents bearing his name were found there, none of his family lived there, and there was no evidence that he slept or lived at the home. The defendant's connection to the paraphernalia was even weaker where no evidence connected the defendant to the paraphernalia or to the room where it was found.

State v. Hall, __ N.C. App. __, __ S.E.2d __ (May 4, 2010). A defendant may be convicted and sentenced for both possession of ecstasy and possession of ketamine when both of the controlled substances are contained in a single pill.

Manufacturing

State v. Hinson, __ N.C. App. __, __ S.E.2d __ (April 6, 2010). The offense of manufacturing a controlled substance does not require an intent to distribute unless the activity constituting manufacture is preparing or compounding. An indictment charging the defendant with manufacturing methamphetamine "by chemically combining and synthesizing precursor chemicals" does not charge compounding but rather charges chemically synthesizing and thus the State was not required to prove an intent to distribute.

Counterfeit Controlled Substance Offenses

State v. Bivens, __ N.C. App. __, __ S.E.2d __ (June 1, 2010) (available at: http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/090483-1.pdf). For purposes of the counterfeit controlled substance offenses, a counterfeit controlled substance is defined, in part, by G.S. 90-87(6) to include any substance intentionally represented as a controlled substance. The statute further provides that "[i]t is evidence that the substance has been intentionally misrepresented as a controlled substance" if certain factors are established. The court rejected the defendant's argument that for a controlled substance to be considered intentionally misrepresented, all of the factors listed in the statute must be proved, concluding that the factors are evidence that the substance has been intentionally misrepresented as a controlled substance, not elements of the crime. The court also concluded that the evidence was sufficient to establish that the defendant misrepresented the substance at issue—calcium carbonate—as crack cocaine where the defendant approached a vehicle, asked its occupants what they were looking for, departed to fill their request for "a twenty," and handed the occupants a little baggie containing a white rock-like substance. Finally, the court held that the statute does not require the State to prove that the defendant had specific knowledge that the substance was counterfeit.

Trafficking

State v. Beam, __ N.C. App. __, __ S.E.2d __ (Jan. 5, 2010). The term "deliver," used in the trafficking statutes, is defined by G.S. 90-87(7) to "mean[] the actual constructive, or attempted transfer from one person to another of a controlled substance, whether or not there is an agency relationship." Thus, an actual delivery is not required. In a prosecution under G.S. 90-95, the defendant bears the burden of establishing that an exemption applies, such as possession pursuant to a valid prescription. In this case, the trial court properly denied the defendant's motion to dismiss and properly submitted to the jury the issue of whether the defendant was authorized to possess the controlled substances.

Motor Vehicle Offenses

State v. Armstrong, __ N.C. App. __, __ S.E.2d __ (April 20, 2010). A defendant may be convicted for both second-degree murder (for which the evidence of malice was the fact that the defendant drove while impaired and had prior convictions for impaired driving) and impaired driving.

Animal Cruelty

State v. Mauer, __ N.C. App. __, __ S.E.2d __ (Feb. 16, 2010). The evidence was sufficient to establish misdemeanor cruelty to animals under G.S. 14-360(a) on grounds of torment. The odor of cat feces and ammonia could be smelled outside of the property and prevented officers from entering without ventilating and using a breathing apparatus; while the house was ventilated, residents from two blocks away were drawn outside because of the smell; fecal matter and debris blocked the front door; all doors and windows were closed; old and new feces and urine covered everything, including the cats; the cats left marks on the walls, doors and windows, trying to get out of the house.

Defenses

Duress

State v. Sanders, __ N.C. App. __, __ S.E.2d __ (Jan. 5, 2010). The trial court did not err in denying the defendant's request for a jury instruction on duress. The defendant voluntarily joined with his accomplices to commit an armed robbery, he did not object or attempt to exit the vehicle as an accomplice forced the victims into the car, and the defendant took jewelry from one victim while an accomplice pointed a gun at her. There was no evidence that any coercive measures were directed toward the defendant prior to the crimes being committed. Any threats made to the defendant occurred after the crimes were committed.

Entrapment

State v. Beam, __ N.C. App. __, __ S.E.2d __ (Jan. 5, 2010). In a drug case, the evidence failed to establish that the defendant was entitled to the entrapment defense as a matter of law. Thus, the trial court did not err by denying the defendant's motion to dismiss on grounds of entrapment and submitting the issue to the jury.

Self-Defense

State v. Moore, __ N.C. __, __ S.E.2d __ (Jan. 29, 2010). The trial court erred by refusing to instruct the jury on self-defense and defense of a family member. Viewed in the light most favorable to the defendant, the evidence showed that the defendant was at his produce stand; the victim was a 16-year-old male, approximately 6 feet tall and 180 pounds; the victim had a physical altercation with the defendant's wife as he attempted to rob the cash box; the victim struck at the defendant's wife and violently pulled at the cash box;

the defendant's wife, was "scared to death" and cried out for her husband; when the defendant ordered the victim to "back off", the victim did so, but placed his hand in his pocket, and as he again approached the defendant and the defendant's wife, began to pull his hand from his pocket; and defendant shot the victim once because he feared for the safety of his wife, his grandson, and himself. The defendant's evidence was sufficient to show that he believed that it was necessary to use force to prevent death or great bodily injury to himself or a family member.

State v. Jenkins, __ N.C. App. __, __ S.E.2d __ (Feb. 2, 2010). Reversing and remanding for a new trial where, despite the fact that there was no evidence that the defendant was the aggressor, the trial judge instructed the jury that in order to receive the benefit of self-defense, the defendant could not have been the aggressor.

State v. Cruz, __ N.C. App. __, __ S.E.2d __ (April 6, 2010). Holding, in a murder case, and over a dissenting opinion, that an instruction on self-defense was not required where there was no evidence that the defendant believed it was necessary to kill the victim in order to save himself from death or great bodily harm.

Capital

State v. Defoe, __ N.C. __, __ S.E.2d __ (April 15, 2010). The 2001 amendments to the capital sentencing statutes revoked the statutory mandate that provided the rationale for *State v. Rorie*, 348 N.C. 266 (1998) (holding that the trial court exceeded its authority to enforce Rule 24 by precluding the State from prosecuting a first-degree murder case capitally). Thus, the trial court has inherent authority to enforce Rule 24 by declaring a case noncapital in appropriate circumstances. Declaring a case noncapital is appropriate only when the defendant makes a sufficient showing of prejudice resulting from the State's delay in holding the Rule 24 conference. In this case, the defendant did not show sufficient prejudice to warrant declaring the cases noncapital.

State v. Williams, __ N.C. __, __ S.E.2d __ (Dec. 11, 2009). The random segregation of the entire jury pool so that it could be split among the defendant's proceeding and other matters being handled at the courthouse that day was a preliminary administrative matter at which defendant did not have a right to be present. A judge who did not preside over the guilt phase of a capital trial had jurisdiction to preside over the penalty phase. The first judge had declared a mistrial as to the penalty phase after the defendant attacked one of his lawyers and both counsel were allowed to withdraw. The fact that the original guilt phase jury did not hear the penalty phase when it was re-tried after the mistrial did not create a jurisdictional issue. A death sentence imposed after the re-trial of the penalty phase was not out-of-session or out-of-term.

Smith v. Spisak, 558 U.S. __ (Jan. 12, 2010). Distinguishing *Mills v. Maryland*, 486 U.S. 367 (1988), and holding that the penalty phase jury instructions and verdict forms were not unconstitutional. The defendant had asserted that the instructions improperly required the jury to consider in mitigation only those factors the jury unanimously found to be mitigating.

Post-Conviction

Clerical Errors

State v. Curry, __ N.C. App. __, __ S.E.2d __ (April 20, 2010). The trial judge committed a clerical error when he entered judgment for a violation of G.S. 14-34.1(a), the Class E version of discharging a firearm into occupied property. The record showed that, based on the defendant's prior record level, the judge's sentence reflected a decision to sentence the defendant to the Class D version of this offense (shooting into occupied dwelling) and at sentencing the judge stated that the defendant was being sentenced for discharging a firearm into an occupied dwelling, the Class D version of the offense.

State v. McCormick, __ N.C. App. __, __ S.E.2d __ (May 18, 2010). Inadvertent listing of the wrong criminal action number on the judgment was a clerical error.

State v. Yow, __ N.C. App. __, __ S.E.2d __ (May 18, 2010). The trial court's mistake of ordering SMB for a period of ten years (instead of lifetime registration) after finding that the defendant was a recidivist was not a clerical error.

DNA Testing

State v. Norman, __ N.C. App. __, __ S.E.2d __ (Feb. 2, 2010). A defendant does not have a right to appeal a trial judge's order denying relief following a hearing to evaluate test results.

Ineffective Assistance of Counsel

Padilla v. Kentucky, 559 U.S. __ (Mar. 31, 2010). After pleading guilty to a charge of transportation of a large amount of marijuana, the defendant, a lawful permanent resident of the United States for more than 40 years, faced deportation. He challenged his plea,

arguing that his counsel rendered ineffective assistance by failing to inform him that the plea would result in mandatory deportation and by incorrectly informing him that he did not have to worry about his immigration status because he had been in the country so long. The Court concluded that when, as in the present case, "the deportation consequence [of a plea] is truly clear," counsel must correctly inform the defendant of this consequence. However, the Court continued, where deportation consequences of a plea are "unclear or uncertain[] [t]he duty of the private practitioner . . . is more limited." It continued: "When the law is not succinct and straightforward . . . , a criminal defense attorney need do no more than advise a noncitizen client that pending criminal charges may carry a risk of adverse immigration consequences." The Court declined to rule whether the defendant was prejudiced by his lawyer's deficient conduct.

Porter v. McCollum, __ S. Ct. __ (Nov. 30, 2009) (per curiam). A capital defendant's trial counsel's conduct fell below an objective standard of reasonableness when counsel failed to investigate and present mitigating evidence, including evidence of the defendant's mental health, family background, and military service. The state court's holding that the defendant was not prejudiced by counsel's deficient representation was unreasonable. To establish prejudice, the defendant need not show that counsel's deficient conduct more likely than not altered the outcome; the defendant need only establish a probability sufficient to undermine the confidence in the outcome, as he did in this case.

Bobby v. Van Hook, __ S. Ct. __ (Nov. 9, 2009). Although restatements of professional conduct, such as ABA Guidelines, can be useful guides to whether an attorney's conduct was reasonable, they are relevant only when they describe the professional norms prevailing at the time that the representation occurred. In this case, the lower court erred by applying 2003 ABA standards to a trial that occurred eighteen years earlier. Moreover, the lower court erred by treating the ABA Guidelines "as inexorable commands with which all capital defense counsel must comply." Such standards are merely guides to what is reasonable; they do not define reasonableness. The Court went on to reject the defendant's arguments that counsel was ineffective under prevailing norms; the defendant had argued that his lawyers began their mitigation investigation too late and that the scope of their mitigation investigation was unreasonable. The Court held that even if the defendant's counsel had performed deficiently, the defendant suffered no prejudice.

Wong v. Belmontes, __ S. Ct. __ (Nov. 16, 2009). Even if counsel's performance was deficient with regard to mitigating evidence in a capital trial, the defendant could not establish prejudice. Trial counsel testified that he presented a limited mitigating case in order to avoid opening the door for the prosecution to admit damaging evidence regarding a prior murder to which the defendant admitted but for which the defendant could not be tried. The defendant did not establish a reasonable probability that the jury would have rejected a capital sentence after it weighed the entire body of mitigating evidence (including the additional testimony counsel could have presented, some of which was cumulative) against the entire body of aggravating evidence (including evidence of the prior murder, which would have be admitted had counsel made a broader case for mitigation).

Smith v. Spisak, 558 U.S. __ (Jan. 12, 2010). Even if counsel's closing argument at the sentencing phase of a capital trial fell below an objective standard of reasonableness, the defendant could not show that he was prejudiced by this conduct.

Wood v. Allen, 558 U.S. __ (Jan. 20, 2010). The state court's conclusion that the defendant's counsel made a strategic decision not to pursue or present evidence of his mental deficiencies was not an unreasonable determination of the facts. The Court did not reach the question of whether the strategic decision itself was a reasonable exercise of professional judgment under *Strickland.*

Procedural Default

Beard v. Kindler, __ S. Ct. __ (Dec. 8, 2009). A federal habeas court will not review a claim rejected by a state court if the state court decision rests on an adequate and independent state law ground. The Court held that a state rule is not inadequate for purposes of this analysis just because it is a discretionary rule.

Jails and Corrections

Wilkins v. Gaddy, 559 U.S. __ (Feb. 22, 2010). Trial court erred by dismissing the prisoner's excessive force claim on grounds that his injuries were de minimis. In an excessive force claim, the core inquiry is not whether a certain quantum of injury was sustained but rather whether the force was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm.

Judicial Administration

Sanctioning Lawyers

In Re Appeal from Order Sanctioning Benjamin Small, __ N.C. App. __, __ S.E.2d __ (Dec. 8, 2009). The trial court had inherent authority to order an attorney to pay $500 as a sanction for filing motions in violation of court rules, that were vexatious and without merit, and that were for the improper purpose of harassing the prosecutor. The attorney received proper notice that the sanctions might

be imposed and of the alleged grounds for their imposition, as well as an opportunity to be heard.

Closing the Courtroom

Presley v. Georgia, 558 U.S. __ (Jan. 19, 2010). The Sixth Amendment right to a public trial extends to the voir dire of prospective jurors. Trial courts are required to consider alternatives to closure even when they are not offered by the parties.