Supreme Court Review

Covering significant cases decided by the NC & US Supreme Courts in 2015.
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Contents

Criminal Procedure ... 2
- Ineffective Assistance of Counsel ... 2
- Indictment & Pleading Issues ... 2
- Judge's Expression of Opinion ... 3
- Jury Argument ... 4
- Jury Deliberations ... 4
- Suppression—Procedural Issues ... 5

Evidence ... 5
- Introduction of Civil Judgment/Pleadings ... 5
- Relevancy & Its Limits ... 6
- *Crawford* & Confrontation Clause ... 6
- Prior Acts─404(b) Evidence ... 7
- Opinions ... 8

Arrest, Search, and Investigation ... 8
- Arrests & Investigatory Stops ... 8
- Exigent Circumstances & Plain View ... 10
- Searches ... 11

Criminal Offenses ... 13
- DVPO Offenses ... 13
- Sexual Assaults & Sex Offender Crimes ... 13
- Possession & Unauthorized Use ... 15
- Breaking or Entering & Related Offenses ... 16
- Drug Offenses ... 16

Defenses ... 17

Capital Law ... 17

Post-Conviction Proceedings ... 18

Criminal Procedure

Ineffective Assistance of Counsel

Woods v. Donald, 575 U.S. ___, 135 S. Ct. 1372 (Mar. 30, 2015) (per curiam). In this habeas corpus case, the Court reversed the Sixth Circuit, which had held that defense counsel provided per se ineffective assistance of counsel under *United States v. Cronic*, 466 U. S. 648 (1984), when he was briefly absent during testimony concerning other defendants. The Court determined that none of its decisions clearly establish that the defendant is entitled to relief under *Cronic*. The Court clarified: "We have never addressed whether the rule announced in *Cronic* applies to testimony regarding codefendants' actions." The Court was however careful to note that it expressed no view on the merits of the underlying Sixth Amendment principle.

Maryland v. Kulbicki, 577 U.S. ___ (Oct. 5, 2015). The Court reversed the state decision below which had held that the defendant's lawyers were ineffective under *Strickland.* At the defendant's 1995 murder trial, the State offered FBI Agent Peele as an expert witness on Comparative Bullet Lead Analysis (CBLA). Peele's testimony linked a bullet fragment removed from the victim's brain to the defendant's gun. In 2006, the defendant asserted a post-conviction claim that his defense attorneys were ineffective for failing to question the legitimacy of CBLA. At this point—eleven years after his conviction--CBLA had fallen out of favor. In fact, in 2006, the Court of Appeals of Maryland held that CBLA evidence was not generally accepted by the scientific community and was therefore inadmissible. Although the defendant's post-conviction claim failed in the trial court, he appealed and the Maryland appellate court reversed. According to the Maryland court, defendant's lawyers were deficient because they failed to unearth a report co-authored by Peele in 1991 and containing a single finding which could have been used to undermine the CBLA analysis. The Supreme Court reversed, noting at the time of the defendant's trial "the validity of CBLA was widely accepted, and courts regularly admitted CBLA evidence." And in fact, the 1991 report at issue "did not question the validity of CBLA, concluding that it was a valid and useful forensic tool to match suspect to victim." The Court held: "Counsel did not perform deficiently by dedicating their time and focus to elements of the defense that did not involve poking methodological holes in a then-uncontroversial mode of ballistics analysis." Furthermore the Court noted, it is unclear that counsel would have been able to uncover the report, if a diligent search was made.

Indictment & Pleading Issues

State v. Ellis, ___ N.C. ___, ___ S.E.2d ___ (Sept. 25, 2015). Reversing the opinion below, *State v. Ellis,* __ N.C. App. __, 763 S.E.2d 574 (Oct. 7, 2014), the court held that an information charging injury to personal property was not fatally flawed. The information alleged the victims as: "North Carolina State University (NCSU) and NCSU High Voltage Distribution." The court noted that the defendant did not dispute that North Carolina State University is expressly authorized to own property by statute, G.S. 116-3, "and is, for that reason, an entity inherently capable of owning property." Rather, the defendant argued that the information was defective because "NCSU High Voltage Distribution" was not alleged to be an entity capable of owning property. The court held: "Assuming, without deciding, that the … information did not

adequately allege that 'NCSU High Voltage Distribution' was an entity capable of owning property, that fact does not render the relevant count facially defective." In so holding the court rejected the defendant's argument that when a criminal pleading charging injury to personal property lists two entities as property owners, both must be adequately alleged to be capable of owning property. The court continued:

> [A] criminal pleading purporting to charge the commission of a property-related crime like injury to personal property is not facially invalid as long as that criminal pleading adequately alleges the existence of at least one victim that was capable of owning property, even if the same criminal pleading lists additional victims who were not alleged to have been capable of owning property as well.

State v. Campbell, ___ N.C. ___, 772 S.E.2d 440 (June 11, 2015). Reversing the decision below, *State v. Campbell*, __ N.C. App. __, 759 S.E.2d. 380 (2014), the court held that a larceny indictment was not fatally flawed even though it failed to specifically allege that a church, the co-owner of the property at issue, was an entity capable of owning property. The indictment named the victim as Manna Baptist Church. The court held: "[A]lleging ownership of property in an entity identified as a church or other place of religious worship, like identifying an entity as a 'company' or 'incorporated,' signifies an entity capable of owning property, and the line of cases from the Court of Appeals that has held otherwise is overruled."

State v. Pendergraft, ___ N.C. ___, ___ S.E.2d ___ (Sept. 25, 2015) (per curiam). Because the participating Justices were equally divided, the decision below, *State v. Pendergraft*, ___ N.C. App. ___, 767 S.E.2d 674 (Dec. 31, 2014), was left undisturbed and without precedential value. In the decision below the court of appeals had held, over a dissent, that an indictment alleging obtaining property by false pretenses was not fatally defective. After the defendant filed false documents purporting to give him a property interest in a home, he was found to be occupying the premises and arrested. The court of appeals rejected the defendant's argument that the indictment was deficient because it failed to allege that he made a false representation. The indictment alleged that the false pretense consisted of the following: "The defendant moved into the house … with the intent to fraudulently convert the property to his own, when in fact the defendant knew that his actions to convert the property to his own were fraudulent." Acknowledging that the indictment did not explicitly charge the defendant with having made any particular false representation, the court of appeals found that it "sufficiently apprise[d] the defendant about the nature of the false representation that he allegedly made," namely that he falsely represented that he owned the property as part of an attempt to fraudulently obtain ownership or possession of it. The court of appeals also rejected the defendant's argument that the indictment was defective in that it failed to allege the existence of a causal connection between any false representation by him and the attempt to obtain property, finding the charging language sufficient to imply causation.

Judge's Expression of Opinion

State v. Berry, ___ N.C. ___, 773 S.E.2d 54 (June 11, 2015), In this child sexual assault case and for the reasons stated in the dissenting opinion below, the court reversed *State v. Berry*, __ N.C. App. __, 761 S.E.2d 700 (2014), which had held that the trial court did not express an opinion on a question of fact to be decided by the jury in violation of G.S. 15A-1222 or express an opinion

as to whether a fact had been proved in violation of G.S. 15A-1232 when instructing the jury on how to consider a stipulation. In the opinion below the dissenting judge believed that the trial court's instruction could have been reasonably interpreted by the jury as a mandate to accept certain disputed facts in violation of G.S. 15A-1222 and 15A-1232. The stipulation at issue concerned a report by a clinical social worker who had interviewed the victim; in it the parties agreed to let redacted portions of her report come in for the purpose of corroborating the victim's testimony. The dissenting judge interpreted the trial court's instructions to the jury as requiring them to accept the social worker's report as true.

Jury Argument

State v. Hembree, ___ N.C. ___, 770 S.E.2d 77 (April 10, 2015). During closing arguments at the guilt-innocence phase of this capital murder trial, the State improperly accused defense counsel of suborning perjury. The prosecutor argued in part: "Two years later, after [the defendant] gives all these confessions to the police and says exactly how he killed [the victims] . . . the defense starts. The defendant, along with his two attorneys, come together to try and create some sort of story." Although the trial court sustained the defendant's objection to this statement it gave no curative instruction to the jury. The prosecutor went to argue that the defendant lied on the stand in cooperation with defense counsel. These latter statements were grossly improper and the trial court erred by failing to intervene ex mero motu.

Jury Deliberations

State v. May, ___ N.C. ___, 772 S.E.2d 458 (June 11, 2015). The court reversed *State v. May*, __ N.C. App. __, 749 S.E.2d 483 (2013), which had held that the trial court committed reversible error when charging a deadlocked jury. The court of appeals held that the trial court erred when it instructed the deadlocked jury to resume deliberations for an additional thirty minutes, stating: "I'm going to ask you, since the people have so much invested in this, and we don't want to have to redo it again, but anyway, if we have to we will." The court of appeals concluded that instructing a deadlocked jury regarding the time and expense associated with the trial and a possible retrial resulted in coercion of a deadlocked jury in violation of the N.C. Constitution. The court of appeals went on to hold that the State had failed to show that the error was harmless beyond a reasonable doubt. The State petitioned for discretionary review on whether the court of appeals had erred in holding that the State had the burden of proving that the purported error in the trial court's instructions was harmless beyond a reasonable doubt. The supreme court reversed, distinguishing *State v. Wilson*, 363 N.C. 478, 484 (2009) (claim that instructions given to less than the full jury violated the constitution was preserved as a matter of law), and concluding that because the defendant failed to raise the constitutional coercive verdict issue below, it was waived on appeal. Nevertheless, the supreme court continued, because the alleged constitutional error occurred during the trial court's instructions to the jury, it could review for plain error. The court also concluded that because the defendant failed to assert at trial his argument that the instructions violated G.S. 15A-1235 and because the relevant provisions in G.S. 15A-1235 were permissive and not mandatory, plain error review applied to that claim as well. Turning to the substance of the claims, the court concluded that the trial court's instructions substantially complied with G.S. 15A-1235. It further held that "Assuming without deciding that the court's instruction to continue deliberations for thirty minutes and the court's isolated

mention of a retrial were erroneous, these errors do not rise to the level of being so fundamentally erroneous as to constitute plain error."

Suppression—Procedural Issues

State v. Bartlett, ___ N.C. ___, ___ S.E.2d ___ (Sept. 25, 2015). The court reversed the decision below, *State v. Bartlett*, __ N.C. App. __, 752 S.E.2d 237 (Dec. 17, 2013), holding that a new suppression hearing was required. At the close of the suppression hearing, the superior court judge orally granted the defendant's motion and asked counsel to prepare a written order. However, that judge did not sign the proposed order before his term ended. The defendant presented the proposed order to a second superior court judge, who signed it, over the State's objection, and without conducting a hearing. The order specifically found that the defendant's expert was credible, gave weight to the expert's testimony, and used the expert's testimony to conclude that no probable cause existed to support defendant's arrest. The State appealed, contending that the second judge was without authority to sign the order. The court of appeals found it unnecessary to reach the State's contention because that court considered the first judge's oral ruling to be sufficient. Reviewing the law, the Supreme Court clarified, "our cases require findings of fact only when there is a material conflict in the evidence and allow the trial court to make these findings either orally or in writing." It added that to the extent that cases such as *State v. Williams*, 195 N.C. App. 554 (2009), "suggest otherwise, they are disavowed." Turning to the case at hand, the court concluded that at the suppression hearing in this case, disagreement between the parties' expert witnesses created a material conflict in the evidence. Thus, a finding of fact, whether written or oral, was required. Here, however, the first judge made no such finding. The court noted that while he did attempt to explain his rationale for granting the motion, "we cannot construe any of his statements as a definitive finding of fact that resolved the material conflict in the evidence." Having found the oral ruling was inadequate, the Court considered whether the second judge had authority to resolve the evidentiary conflict in his written order even though he did not conduct the suppression hearing. It held that he did not, reasoning that G.S. 15A-977 contemplates that the same trial judge who hears the evidence must also find the facts. The court rejected the defendant's argument that G.S. 15A-1224(b) authorized the second judge to sign the order, concluding that provision applies only to criminal trials, not suppression hearings.

Evidence

Introduction of Civil Judgment/Pleadings

State v. Young, ___ N.C. ___, 775 S.E.2d 291 (Aug. 21. 2015). In this murder case the court held that the court of appeals erred by concluding that the trial court committed reversible error in allowing into evidence certain materials from civil actions. The relevant materials included a default judgment and complaint in a wrongful death suit stating that the defendant killed the victim and a child custody complaint that included statements that the defendant had killed his wife. The court of appeals had held that admission of this evidence violated G.S. 1-149 ("[n]o pleading can be used in a criminal prosecution against the party as proof of a fact admitted or alleged in it") and Rule 403. The court held that the defendant did not preserve his challenge to

the admission of the child custody complaint on any grounds. It further held that the defendant failed to preserve his G.S. 1-149 objection as to the wrongful death evidence and that his Rule 403 objection as to this evidence lacked merit. As to the G.S. 1-149 issue, the court found it dispositive that the defendant failed to object at trial to the admission of the challenged evidence on these grounds and concluded that the court of appeals erred by finding that the statutory language was mandatory and allowed for review absent an objection. On the 403 issue as to the wrongful death evidence, the court rejected the court of appeals' reasoning that substantial prejudice resulting from this evidence "irreparably diminished" defendant's presumption of innocence and "vastly outweighed [its] probative value." Instead, the court found that evidence concerning the defendant's response to the wrongful death and declaratory judgment action had material probative value. Although the evidence posed a significant risk of unfair prejudice, the trial court "explicitly instructed the jury concerning the manner in which civil cases are heard and decided, the effect that a failure to respond has on the civil plaintiff's ability to obtain the requested relief, and the fact that '[t]he entry of a civil judgment is not a determination of guilt by any court that the named defendant has committed any criminal offense.'"

Relevancy & Its Limits

State v. Hembree, ___ N.C. ___, 770 S.E.2d 77 (April 10, 2015). In this capital murder case in which the State introduced 404(b) evidence regarding a murder of victim Saldana to show common scheme or plan, the trial court erred by allowing Saldana's sister to testify about Saldana's good character. Evidence regarding Saldana's character was irrelevant to the charged crime. For this reason the trial court also abused its discretion by admitting this evidence over the defendant's Rule 403 objection.

State v. Triplett, ___ N.C. ___, ___ S.E.2d ___ (Aug. 21. 2015). Reversing the court of appeals in this murder and robbery case, the court held that the trial court did not abuse its discretion by prohibiting the defendant from introducing a tape-recorded voice mail message by the defendant's sister, a witness for the State, to show her bias and attack her credibility. Although the court found that the voice mail message was minimally relevant to show potential bias, the trial court did not abuse its discretion in its Rule 403 balancing. Because the sister was not a key witness for the State, any alleged bias on her part "becomes less probative." The trial court properly weighed the evidence's weak probative value against the confusion that could result by presenting the evidence, which related to a family feud that was tangential to the offenses being tried.

***Crawford* & Confrontation Clause**

Ohio v. Clark, 576 U.S. __, 135 S. Ct. 2173 (June 18, 2015). In this child abuse case the Court held that statement by the victim, L.P., to his preschool teachers were non-testimonial. In the lunchroom, one of L.P.'s teachers, Ramona Whitley, observed that L.P.'s left eye was bloodshot. She asked him "[w]hat happened," and he initially said nothing. Eventually, however, he told the teacher that he "fell." When they moved into the brighter lights of a classroom, Whitley noticed "[r]ed marks, like whips of some sort," on L.P.'s face. She notified the lead teacher, Debra Jones, who asked L.P., "Who did this? What happened to you?" According to Jones, L.P. "seemed kind of bewildered" and "said something like, Dee, Dee." Jones asked L.P. whether Dee is "big or

little;" L.P. responded that "Dee is big." Jones then brought L.P. to her supervisor, who lifted the boy's shirt, revealing more injuries. Whitley called a child abuse hotline to alert authorities about the suspected abuse. The defendant, who went by the nickname Dee, was charged in connection with the incident. At trial, the State introduced L.P.'s statements to his teachers as evidence of the defendant's guilt, but L.P. did not testify. The defendant was convicted and appealed. The Ohio Supreme Court held that L.P.'s statements were testimonial because the primary purpose of the teachers' questioning was not to deal with an emergency but rather to gather evidence potentially relevant to a subsequent criminal prosecution. That court noted that Ohio has a "mandatory reporting" law that requires certain professionals, including preschool teachers, to report suspected child abuse to government authorities. In the Ohio court's view, the teachers acted as agents of the State under the mandatory reporting law and obtained facts relevant to past criminal conduct. The Supreme Court granted review and reversed. It held:

> In this case, we consider statements made to preschool teachers, not the police. We are therefore presented with the question we have repeatedly reserved: whether statements to persons other than law enforcement officers are subject to the Confrontation Clause. Because at least some statements to individuals who are not law enforcement officers could conceivably raise confrontation concerns, we decline to adopt a categorical rule excluding them from the Sixth Amendment's reach. Nevertheless, such statements are much less likely to be testimonial than statements to law enforcement officers. And considering all the relevant circumstances here, L.P.'s statements clearly were not made with the primary purpose of creating evidence for [the defendant's] prosecution. Thus, their introduction at trial did not violate the Confrontation Clause.

The Court reasoned that L.P.'s statements occurred in the context of an ongoing emergency involving suspected child abuse. The Court continued, concluding that "[t]here is no indication that the primary purpose of the conversation was to gather evidence for [the defendant]'s prosecution. On the contrary, it is clear that the first objective was to protect L.P." In the Court's view, "L.P.'s age fortifies our conclusion that the statements in question were not testimonial." It added: "Statements by very young children will rarely, if ever, implicate the Confrontation Clause." The Court continued, noting that as a historical matter, there is strong evidence that statements made in similar circumstances were admissible at common law. The Court noted, "although we decline to adopt a rule that statements to individuals who are not law enforcement officers are categorically outside the Sixth Amendment, the fact that L.P. was speaking to his teachers remains highly relevant." The Court rejected the defendant's argument that Ohio's mandatory reporting statutes made L.P.'s statements testimonial, concluding: "mandatory reporting statutes alone cannot convert a conversation between a concerned teacher and her student into a law enforcement mission aimed primarily at gathering evidence for a prosecution."

Prior Acts—404(b) Evidence

State v. Hembree, ___ N.C. ___, 770 S.E.2d 77 (April 10, 2015). In this capital murder case, the trial court erred by admitting an excessive amount of 404(b) evidence pertaining to the murder of another victim, Saldana. The court began by concluding that the trial court properly admitted evidence of the Saldana murder under Rule 404(b) to show common plan or design. However, the trial court abused its discretion under Rule 403 by admitting "so much" 404(b) evidence given the differences between the two deaths and the lack of connection between them, the

uncertainty regarding the cause of the victim's death, and the nature and extent of the 404(b) evidence (among other things, of the 8 days used by the State to present its case, 7 were spent on the 404(b) evidence; also, the jury viewed over a dozen photographs of Saldana's burned remains). The court stated: "Our review has uncovered no North Carolina case in which it is clear that the State relied so extensively, both in its case-in-chief and in rebuttal, on Rule 404(b) evidence about a victim for whose murder the accused was not currently being tried."

Opinions

State v. Taylor, ___ N.C. ___, ___ S.E.2d ___ (Sept. 25, 2015) (per curiam). The court reversed the opinion below, *State v. Taylor*, ___ N.C. App. ___, 767 S.E.2d 585 (Dec. 16, 2014), for the reasons stated in the dissenting opinion. Over a dissent, the court of appeals had held that the trial court committed plain error by permitting a Detective to testify that she moved forward with her investigation of obtaining property by false pretenses and breaking or entering offenses because she believed that the victim, Ms. Medina, "seemed to be telling me the truth." The court of appeals held that the challenged testimony constituted an impermissible vouching for Ms. Medina's credibility in a case in which the only contested issue was the relative credibility of Ms. Medina and the defendant. The dissenting judge did not believe that admission of the testimony in question met the threshold needed for plain error.

Arrest, Search, and Investigation

Arrests & Investigatory Stops

Rodriguez v. United States, 575 U.S. __, 135 S. Ct. 1609 (April 21, 2015). A dog sniff that prolongs the time reasonably required for a traffic stop violates the Fourth Amendment. After an officer completed a traffic stop, including issuing the driver a warning ticket and returning all documents, the officer asked for permission to walk his police dog around the vehicle. The driver said no. Nevertheless, the officer instructed the driver to turn off his car, exit the vehicle and wait for a second officer. When the second officer arrived, the first officer retrieved his dog and led it around the car, during which time the dog alerted to the presence of drugs. A search of the vehicle revealed a large bag of methamphetamine. All told, 7-8 minutes elapsed from the time the officer issued the written warning until the dog's alert. The defendant was charged with a drug crime and unsuccessfully moved to suppress the evidence seized from his car, arguing that the officer prolonged the traffic stop without reasonable suspicion to conduct the dog sniff. The defendant was convicted and appealed. The Eighth Circuit held that the de minimus extension of the stop was permissible. The Supreme Court granted certiorari "to resolve a division among lower courts on the question whether police routinely may extend an otherwise-completed traffic stop, absent reasonable suspicion, in order to conduct a dog sniff."

The Court reasoned that an officer may conduct certain unrelated checks during an otherwise lawful traffic stop, but "he may not do so in a way that prolongs the stop, absent the reasonable suspicion ordinarily demanded to justify detaining an individual." The Court noted that during a traffic stop, beyond determining whether to issue a traffic ticket, an officer's mission includes "ordinary inquiries incident to [the traffic] stop" such as checking the driver's license, determining whether the driver has outstanding warrants, and inspecting the

automobile's registration and proof of insurance. It explained: "These checks serve the same objective as enforcement of the traffic code: ensuring that vehicles on the road are operated safely and responsibly." A dog sniff by contrast "is a measure aimed at detect[ing] evidence of ordinary criminal wrongdoing." (quotation omitted). It continued: "Lacking the same close connection to roadway safety as the ordinary inquiries, a dog sniff is not fairly characterized as part of the officer's traffic mission."

Noting that the Eighth Circuit's de minimus rule relied heavily on *Pennsylvania v. Mimms*, 434 U.S. 106 (1977) (per curiam) (reasoning that the government's "legitimate and weighty" interest in officer safety outweighs the "de minimis" additional intrusion of requiring a driver, already lawfully stopped, to exit the vehicle), the Court distinguished *Mimms*:

> Unlike a general interest in criminal enforcement, however, the government's officer safety interest stems from the mission of the stop itself. Traffic stops are "especially fraught with danger to police officers," so an officer may need to take certain negligibly burdensome precautions in order to complete his mission safely. On-scene investigation into other crimes, however, detours from that mission. So too do safety precautions taken in order to facilitate such detours. Thus, even assuming that the imposition here was no more intrusive than the exit order in *Mimms*, the dog sniff could not be justified on the same basis. Highway and officer safety are interests different in kind from the Government's endeavor to detect crime in general or drug trafficking in particular. (citations omitted)

The Court went on to reject the Government's argument that an officer may "incremental[ly]" prolong a stop to conduct a dog sniff so long as the officer is reasonably diligent in pursuing the traffic-related purpose of the stop, and the overall duration of the stop remains reasonable in relation to the duration of other traffic stops involving similar circumstances. The Court dismissed the notion that "by completing all traffic-related tasks expeditiously, an officer can earn bonus time to pursue an unrelated criminal investigation." It continued:

> If an officer can complete traffic-based inquiries expeditiously, then that is the amount of "time reasonably required to complete [the stop's] mission." As we said in *Caballes* and reiterate today, a traffic stop "prolonged beyond" that point is "unlawful." The critical question, then, is not whether the dog sniff occurs before or after the officer issues a ticket . . . but whether conducting the sniff "prolongs"—i.e., adds time to—"the stop". (citations omitted).

In this case, the trial court ruled that the defendant's detention for the dog sniff was not independently supported by individualized suspicion. Because the Court of Appeals did not review that determination the Court remanded for a determination by that court as to whether reasonable suspicion of criminal activity justified detaining the defendant beyond completion of the traffic infraction investigation.

State v. Jackson, ___ N.C. ___, 772 S.E.2d 847 (June 11, 2015). Reversing the decision below, *State v. Jackson*, __ N.C. App. __, 758 S.E.2d 39 (2014), the court held that an officer had reasonable suspicion for the stop. The stop occurred at approximately 9:00 pm in the vicinity of Kim's Mart. The officer knew that the immediate area had been the location of hundreds of drug investigations. Additionally, the officer personally had made drug arrests in the area and was aware that hand to hand drug transactions occurred there. On the evening in question the officer saw the defendant and another man standing outside of Kim's Mart. Upon spotting the

officer in his patrol car, the two stopped talking and dispersed in opposite directions. In the officer's experience, this is typical behavior for individuals engaged in a drug transaction. The officer tried to follow the men, but lost them. When he returned to Kim's Mart they were standing 20 feet from their original location. When the officer pulled in, the men again separated and started walking in opposite directions. The defendant was stopped and as a result contraband was found. The court found these facts sufficient to create reasonable suspicion to justify the investigatory stop. The court noted that its conclusion was based on more than the defendant's presence in a high crime and high drug area.

State v. Benton, ___ N.C. ___, 772 S.E.2d 238 (June 11, 2015). In this companion case to *Jackson* (above), the court vacated and remanded to the court of appeals in light *Jackson.* The opinion below in this case was unpublished.

Exigent Circumstances & Plain View

State v. Grice, 367 N.C. 753 (Jan. 23, 2015). (1) Reversing the court of appeals, the court held that officers did not violate the Fourth Amendment by seizing marijuana plants seen in plain view. After receiving a tip that the defendant was growing marijuana at a specified residence, officers went to the residence to conduct a knock and talk. Finding the front door inaccessible, covered with plastic, and obscured by furniture, the officers noticed that the driveway led to a side door, which appeared to be the main entrance. One of the officers knocked on the side door. No one answered. From the door, the officer noticed plants growing in several buckets about 15 yards away. Both officers recognized the plants as marijuana. The officers seized the plants, returned to the sheriff's office and got a search warrant to search the home. The defendant was charged with manufacturing a controlled substance and moved to suppress evidence of the marijuana plants. The trial court denied the motion and the court of appeals reversed. The supreme court began by finding that the officers observed the plants in plain view. It went on to explain that a warrantless seizure may be justified as reasonable under the plain view doctrine if the officer did not violate the Fourth Amendment in arriving at the place from where the evidence could be plainly viewed; the evidence's incriminating character was immediately apparent; and the officer had a lawful right of access to the object itself. Additionally, it noted, "[t]he North Carolina General Assembly has . . . required that the discovery of evidence in plain view be inadvertent." The court noted that the sole point of contention in this case was whether the officers had a lawful right of access from the driveway 15 yards across the defendant's property to the plants' location. Finding against the defendant on this issue, the court stated: "Here, the knock and talk investigation constituted the initial entry onto defendant's property which brought the officers within plain view of the marijuana plants. The presence of the clearly identifiable contraband justified walking further into the curtilage." The court rejected the defendant's argument that the seizure was improper because the plants were on the curtilage of his property, stating:

> [W]e conclude that the unfenced portion of the property fifteen yards from the home and bordering a wood line is closer in kind to an open field than it is to the paradigmatic curtilage which protects "the privacies of life" inside the home. However, even if the property at issue can be considered the curtilage of the home for Fourth Amendment purposes, we disagree with defendant's claim that a justified presence in one portion of the curtilage (the driveway and front porch)

> does not extend to justify recovery of contraband in plain view located in another portion of the curtilage (the side yard). By analogy, it is difficult to imagine what formulation of the Fourth Amendment would prohibit the officers from seizing the contraband if the plants had been growing on the porch—the paradigmatic curtilage—rather than at a distance, particularly when the officers' initial presence on the curtilage was justified. The plants in question were situated on the periphery of the curtilage, and the protections cannot be greater than if the plants were growing on the porch itself. The officers in this case were, by the custom and tradition of our society, implicitly invited into the curtilage to approach the home. Traveling within the curtilage to seize contraband in plain view within the curtilage did not violate the Fourth Amendment.

(citation omitted). (2) The court went on to hold that the seizure also was justified by exigent circumstances, concluding: "Reviewing the record, it is objectively reasonable to conclude that someone may have been home, that the individual would have been aware of the officers' presence, and that the individual could easily have moved or destroyed the plants if they were left on the property."

Searches

Grady v. North Carolina, 575 U.S. ___, 135 S. Ct. 1368 (Mar. 30, 2015) (per curiam). Reversing the North Carolina courts, the Court held that under *Jones* and *Jardines, s*atellite based monitoring for sex offenders constitutes a search under the Fourth Amendment. The Court stated: "a State … conducts a search when it attaches a device to a person's body, without consent, for the purpose of tracking that individual's movements." The Court rejected the reasoning of the state court below, which had relied on the fact that the monitoring program was "civil in nature" to conclude that no search occurred, explaining: "A building inspector who enters a home simply to ensure compliance with civil safety regulations has undoubtedly conducted a search under the Fourth Amendment." The Court did not decide the "ultimate question of the program's constitutionality" because the state courts had not assessed whether the search was reasonable. The Court remanded for further proceedings.

Los Angeles v. Patel, 576 U.S. ___, 135 S. Ct. 2443 (June 22, 2015). (1) In this case where a group of motel owners and a lodging association challenged a provision of the Los Angeles Municipal Code (LAMC) requiring motel owners to turn over to the police hotel registry information, the Court held that facial challenges under the Fourth Amendment are not categorically barred. With respect to the relevant LAMC provisions, §41.49 requires hotel operators to record information about their guests, including: the guest's name and address; the number of people in each guest's party; the make, model, and license plate number of any guest's vehicle parked on hotel property; the guest's date and time of arrival and scheduled departure date; the room number assigned to the guest; the rate charged and amount collected for the room; and the method of payment. Guests without reservations, those who pay for their rooms with cash, and any guests who rent a room for less than 12 hours must present photographic identification at the time of check-in, and hotel operators are required to record the number and expiration date of that document. For those guests who check in using an electronic kiosk, the hotel's records must also contain the guest's credit card information. This information can be maintained in either electronic or paper form, but it must be "kept on the hotel premises in

the guest reception or guest check-in area or in an office adjacent" thereto for a period of 90 days. LAMC section 41.49(3)(a) states, in pertinent part, that hotel guest records "shall be made available to any officer of the Los Angeles Police Department for inspection," provided that "[w]henever possible, the inspection shall be conducted at a time and in a manner that minimizes any interference with the operation of the business." A hotel operator's failure to make his or her guest records available for police inspection is a misdemeanor punishable by up to six months in jail and a $1,000 fine. The respondents brought a facial challenge to §41.49(3)(a) on Fourth Amendment grounds, seeking declaratory and injunctive relief. As noted, the Court held that facial challenges under the Fourth Amendment are not barred. (2) Turning to the merits of the claim, the Court held that the challenged portion on the LAMC is facially unconstitutional because it fails to provide hotel operators with an opportunity for precompliance review. The Court reasoned, in part:

> [A]bsent consent, exigent circumstances, or the like, in order for an administrative search to be constitutional, the subject of the search must be afforded an opportunity to obtain precompliance review before a neutral decisionmaker. And, we see no reason why this minimal requirement is inapplicable here. While the Court has never attempted to prescribe the exact form an opportunity for precompliance review must take, the City does not even attempt to argue that §41.49(3)(a) affords hotel operators any opportunity whatsoever. Section 41.49(3)(a) is, therefore, facially invalid. (citations omitted)

Clarifying the scope of its holding, the Court continued, "As they often do, hotel operators remain free to consent to searches of their registries and police can compel them to turn them over if they have a proper administrative warrant—including one that was issued ex parte—or if some other exception to the warrant requirement applies, including exigent circumstances." The Court went on to reject Justice Scalia's suggestion that hotels are "closely regulated" and that the ordinance is facially valid under the more relaxed standard that applies to searches of that category of businesses.

State v. McKinney, ___ N.C. ___, ___ S.E.2d ___ (Aug. 21. 2015). Reversing the court of appeals in this drug case, the court held that the trial court properly denied the defendant's motion to suppress, finding that probable cause existed to justify issuance of a search warrant authorizing a search of defendant's apartment. The application was based on the following evidence: an anonymous citizen reported observing suspected drug-related activity at and around the apartment; the officer then saw an individual named Foushee come to the apartment and leave after six minutes; Foushee was searched and, after he was found with marijuana and a large amount of cash, arrested; and a search of Fouchee's phone revealed text messages between Foushee and an individual named Chad proposing a drug transaction. The court rejected the defendant's argument that the citizen's complaint was unreliable because it gave no indication when the citizen observed the events, that the complaint was only a "naked assertion" that the observed activities were narcotics related, and that the State failed to establish a nexus between Foushee's vehicle and defendant's apartment, finding none of these arguments persuasive, individually or collectively. The court held that "under the totality of circumstances, all the evidence described in the affidavit both established a substantial nexus between the marijuana remnants recovered from Foushee's vehicle and defendant's residence, and also was sufficient to support the magistrate's finding of probable cause to search defendant's apartment."

State v. Elder, ___ N.C. ___, 773 S.E.2d 51 (June 11, 2015). Modifying and affirming the decision below, *State v. Elder*, __ N.C. App. __, 753 S.E.2d 504 (2014), the supreme court held that the district court exceeded its statutory authority under G.S. 50B-3 by ordering a search of defendant's person, vehicle, and residence pursuant to an ex parte civil Domestic Violence Order of Protection ("DVPO") and that the ensuing search violated the defendant's constitutional rights. Relying on G.S. 50B-3(a)(13) (authorizing the court to order "any additional prohibitions or requirements the court deems necessary to protect any party or any minor child") the district court included in the DVPO a provision stating: "[a]ny Law Enforcement officer serving this Order shall search the Defendant's person, vehicle and residence and seize any and all weapons found." The district court made no findings or conclusions that probable cause existed to search the defendant's property or that the defendant even owned or possessed a weapon. Following this mandate, the officer who served the order conducted a search as instructed. As a result of evidence found, the defendant was charged with drug crimes. The defendant unsuccessfully moved to suppress, was convicted and appealed. The supreme court concluded that the catch all provision in G.S. 50B-3 "does not authorize the court to order law enforcement, which is not a party to the civil DVPO, to proactively search defendant's person, vehicle, or residence." The court further concluded "by requiring officers to conduct a search of defendant's home under sole authority of a civil DVPO without a warrant or probable cause, the district court's order violated defendant's constitutional rights" under the Fourth Amendment.

Criminal Offenses

DVPO Offenses

State v. Edgerton, ___ N.C. ___, 769 S.E.2d 837 (April 10, 2015). In a case where the defendant was found guilty of violation of a DVPO with a deadly weapon, the court per curiam reversed and remanded for the reasons stated in the dissenting opinion below. In the decision below, *State v. Edgerton*, ___ N.C. App. ___, 759 S.E.2d 669 (2014), the court held, over a dissent, that the trial court committed plain error by failing to instruct the jury on the lesser included offense, misdemeanor violation of a DVPO, where the court had determined that the weapon at issue was not a deadly weapon per se. The dissenting judge did not agree with the majority that any error rose to the level of plain error.

Sexual Assaults & Sex Offender Crimes

State v. Packingham, ___ N.C. ___, ___ S.E.2d ___ (Nov. 6, 2015). Reversing the court of appeals, ___ N.C. App. ___, 748 S.E.2d 146 (2013), the court held that G.S. 14-202.5 (unlawful for registered sex offender to access certain social networking websites) is constitutional. The court of appeals had held that the statute was unconstitutional on its face and as applied to the defendant, as it violated the defendant's first amendment free speech rights. The court began by finding that the statute is a regulation on conduct, not speech, stating:

> [T]he essential purpose of section 14-202.5 is to limit conduct, specifically the ability of registered sex offenders to access certain carefully-defined Web sites. This limitation on conduct only incidentally burdens the ability of registered sex

> offenders to engage in speech after accessing those Web sites that fall within the statute's reach.

Next, the court held that rather than governing conduct on the basis of the content of speech, the statute is a content-neutral regulation. It explained:

> On its face, this statute imposes a ban on accessing certain defined commercial social networking Web sites without regard to any content or message conveyed on those sites. The limitations imposed by the statute are based not upon speech contained in or posted on a site, but instead focus on whether functions of a particular Web site are available for use by minors.

The court found that the purpose of the statute—protecting minors from registered sex offenders—is unrelated to any speech on a regulated site. Nor, the court noted, "does the statute have anything to say regarding the content of any speech on a regulated site." As a result, intermediate scrutiny applied. Having found that the statute is a content-neutral regulation that imposes only an incidental burden on speech, the court applied the four-factor test from *United States v. O'Brien,* 391 U.S. 367 (1968) (regulation is sufficiently justified if it is within the constitutional power of the government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest). Here, the parties agreed that promulgating the statute is within the General Assembly's constitutional power and that protecting children from sexual abuse is a substantial governmental interest. The court then turned to the third *O'Brien* factor, whether this governmental interest is related to the suppression of free expression, and concluded: "The interest reflected in the statute at bar, which protects children from convicted sex offenders who could harvest information to facilitate contact with potential victims, is unrelated to the suppression of free speech." Next, the court found that the statute was narrowly tailored and left open ample alternative channels for communication that registered sex offenders may freely access, thus satisfying the fourth factor. Having so found, the court concluded that the defendant failed to show that the statute was facially invalid. Rejecting the defendant's as applied challenge, the court concluded: "the incidental burden imposed upon this defendant, who is barred from Facebook.com but not from many other sites, is not greater than necessary to further the governmental interest of protecting children from registered sex offenders." Next, the court rejected the defendant's argument that the statute was unconstitutionally overbroad, stating: "we conclude section 14-202.5 does not sweep too broadly in preventing registered sex offenders from accessing carefully delineated Web sites where vulnerable youthful users may congregate." Finally, the court held that the defendant's own conduct defeated his void for vagueness argument.

State v. Blow, ___ N.C. ___, ___ S.E.2d ___ (Sept. 25, 2015). For the reasons stated in the dissenting opinion, the court reversed the opinion below, *State v. Blow,* ___ N.C. App. ___, 764 S.E.2d 230 (Nov. 4, 2014). In this child sexual assault case in which the defendant was convicted of three counts of first-degree rape, the court of appeals had held that the trial court erred by failing to dismiss one of the rape charges. The court of appeals agreed with the defendant that because the victim testified that the defendant inserted his penis into her vagina "a couple" of times, without identifying more than two acts of penetration, the State failed to present substantial evidence of three counts of rape. The court of appeals found that the defendant's admission to three instances of "sex" with the victim was not an admission of vaginal intercourse

because the defendant openly admitted to performing oral sex and other acts on the victim but denied penetrating her vagina with his penis. The dissenting judge believed that the State presented substantial evidence that was sufficient, if believed, to support the jury's decision to convict of three counts of first degree rape. The dissenting judge agreed with the majority that the victim's testimony about penetration "a couple" of times would have been insufficient to convict the defendant of three counts, but noted that the record contains other evidence, including the defendant's admission that he "had sex" with the victim "about three times."

State v. Stepp, 367 N.C. 772 (Jan. 23, 2015) (per curiam). For reasons stated in the dissenting opinion below, the court reversed the court of appeals. In the decision below, *State v. Stepp*, __ N.C. App. __, 753 S.E.2d 485 (Jan. 21, 2014), the majority held that the trial court committed reversible error by failing to instruct the jury on an affirmative defense to a felony that was the basis of a felony-murder conviction. The jury convicted the defendant of first-degree felony-murder of a 10-month old child based on an underlying sexual offense felony. The jury's verdict indicated that it found the defendant guilty of sexual offense based on penetration of the victim's genital opening with an object. At trial, the defendant admitted that he penetrated the victim's genital opening with his finger; however, he requested an instruction on the affirmative defense provided by G.S. 14-27.1(4), that the penetration was for "accepted medical purposes," specifically, to clean feces and urine while changing her diapers. The trial court denied the request. The court of appeals found this to be error, noting that the defendant offered evidence supporting his defense. Specifically, the defendant testified at trial to the relevant facts and his medical expert stated that the victim's genital opening injuries were consistent with the defendant's stated purpose. The court of appeals reasoned:

> We believe that when the Legislature defined "sexual act" as the penetration of a genital opening with an object, it provided the "accepted medical purposes" defense, in part, to shield a parent – or another charged with the caretaking of an infant – from prosecution for engaging in sexual conduct with a child when caring for the cleanliness and health needs of an infant, including the act of cleaning feces and urine from the genital opening with a wipe during a diaper change. To hold otherwise would create the absurd result that a parent could not penetrate the labia of his infant daughter to clean away feces and urine or to apply cream to treat a diaper rash without committing a Class B1 felony, a consequence that we do not believe the Legislature intended.

(Footnote omitted). The court of appeals added that in this case, expert testimony was not required to establish that the defendant's conduct constituted an "accepted medical purpose." The dissenting judge did not believe that there was sufficient evidence that the defendant's actions fell within the definition of accepted medical purpose and thus concluded that the defendant was not entitled to an instruction on the affirmative defense. The dissenting judge reasoned that for this defense to apply, there must be "some direct testimony that the considered conduct is for a medically accepted purpose" and no such evidence was offered here.

Possession & Unauthorized Use

State v. Robinson, ___ N.C. ___, ___ S.E.2d ___ (Nov. 6, 2015). The court modified and affirmed the decision below, ___ N.C. App. ___, 763 S.E.2d 178 (2014), holding that unauthorized use of a motor vehicle is not a lesser-included offense of possession of a stolen

vehicle. The court noted that it has adopted a definitional test (as distinct from a factual test) for determining whether one offense is a lesser-included offense of another. Applying that rule, it reasoned that unauthorized use contains an essential element that is not an essential element of possession of a stolen vehicle (that the defendant took or operated a motor-propelled conveyance). The court overruled *State v. Oliver*, 217 N.C. App. 369 (2011) (holding that unauthorized use is not a lesser-included offense of possession of a stolen vehicle but, according to the *Robinson* court, mistakenly reasoning that *Nickerson* mandated that result), to the extent that it is inconsistent with its opinion.

Breaking or Entering & Related Offenses

State v. Campbell, ___ N.C. ___, 772 S.E.2d 440 (June 11, 2015). Reversing the decision below, *State v. Campbell*, __ N.C. App. __, 759 S.E.2d. 380 (2014), the court held that the State presented sufficient evidence of the defendant's intent to commit larceny in a place of worship to support his conviction for felonious breaking or entering that facility. The evidence showed that the defendant unlawfully broke and entered the church; he did not have permission to be there and could not remember what he did while there; and the church's Pastor found the defendant's wallet near the place where some of the missing items previously had been stored.

Drug Offenses

State v. Galaviz-Torres, ___ N.C. ___, 772 S.E.2d 434 (June 11, 2015). Reversing an unpublished opinion below in this drug trafficking case, the supreme court held that the trial court did not err in its jury instructions regarding the defendant's knowledge. The court noted that "[a] presumption that the defendant has the required guilty knowledge exists" when "the State makes a prima facie showing that the defendant has committed a crime, such as trafficking by possession, trafficking by transportation, or possession with the intent to sell or deliver, that lacks a specific intent element." However, the court continued: "when the defendant denies having knowledge of the controlled substance that he has been charged with possessing or transporting, the existence of the requisite guilty knowledge becomes 'a determinative issue of fact' about which the trial court must instruct the jury." As a result of these rules, footnote 4 to N.C.P.I. Crim. 260.17 (and parallel footnotes in related instructions) states that, "[i]f the defendant contends that he did not know the true identity of what he possessed," the italicized language must be added to the jury instructions:

> For you to find the defendant guilty of this offense the State must prove two things beyond a reasonable doubt:
>
> First, that the defendant knowingly possessed cocaine *and the defendant knew that what he possessed was cocaine*. A person possesses cocaine if he is aware of its presence and has (either by himself or together with others) both the power and intent to control the disposition or use of that substance.

The defendant argued that the trial court erred by failing to add the "footnote four" language to the jury instructions. The supreme court disagreed, reasoning:

> In this case, defendant did not either deny knowledge of the contents of the gift bag in which the cocaine was found or admit that he possessed a particular substance while denying any knowledge of the substance's identity. Instead,

> defendant simply denied having had any knowledge that the van that he was driving contained either the gift bag or cocaine. As a result, since defendant did not "contend[ ] that he did not know the true identity of what he possessed," the prerequisite for giving the instruction in question simply did not exist in this case. As a result, the trial court did not err by failing to deliver the additional instruction contained in footnote four . . . in this case. (citation omitted).

The court went on to distinguish the case before it from *State v. Coleman*, ___ N.C. App. ___, 742 S.E.2d 346 (2013).

Defenses

State v. Monroe, 367 N.C. 771 (Jan. 23, 2015) (per curiam). The court affirmed the decision below in *State v. Monroe*, __ N.C. App. __, 756 S.E.2d 376 (April 15, 2014) (holding, over a dissent, that even assuming arguendo that the rationale in *United States v. Deleveaux*, 205 F.3d 1292 (11th Cir. 2000), applies in North Carolina, the trial court did not err by denying the defendant's request to give a special instruction on self-defense as to the charge of possession of a firearm by a felon; the majority concluded that the evidence did not support a conclusion that the defendant possessed the firearm under unlawful and present, imminent, and impending threat of death or serious bodily injury).

Capital Law

Glossip v. Gross, 576 U.S. ___, 135 S. Ct. 2726 (June 29, 2015). In this case, challenging Oklahoma's lethal injection protocol, the Court affirmed the denial of the prisoner's application for a preliminary injunction. The prisoners, all sentenced to death in Oklahoma, filed an action in federal court, arguing that Oklahoma's method of execution violates the Eighth Amendment because it creates an unacceptable risk of severe pain. They argued that midazolam, the first drug employed in the State's three-drug protocol, fails to render a person insensate to pain. After holding an evidentiary hearing, the District Court denied the prisoner's application for a preliminary injunction, finding that they had failed to prove that midazolam is ineffective. The Tenth Circuit affirmed, as did the Supreme Court, for two independent reasons. First, the Court concluded that the prisoners failed to identify a known and available method of execution that entails a lesser risk of pain. Second, the Court concluded that the District Court did not commit clear error when it found that the prisoners failed to establish that Oklahoma's use of a massive dose of midazolam in its execution protocol entails a substantial risk of severe pain.

Brumfield v. Cain, 576 U.S. __, 135 S. Ct. 2269 (June 18, 2015). Because the Louisiana state court's decision rejecting the defendant's *Atkins* claim without affording him an evidentiary hearing was based on an unreasonable determination of the facts, the defendant was entitled to have his claim considered on the merits in federal court. After the defendant was convicted, the U.S. Supreme Court held, in *Atkins*, that "in light of . . . 'evolving standards of decency,'" the Eighth Amendment "'places a substantive restriction on the State's power to take the life' of a mentally retarded offender." The Court however left "to the State[s] the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences."

The Louisiana Supreme Court later held that "a diagnosis of mental retardation has three distinct components: (1) subaverage intelligence, as measured by objective standardized IQ tests; (2) significant impairment in several areas of adaptive skills; and (3) manifestations of this neuro-psychological disorder in the developmental stage." That court further held that an *Atkins* evidentiary hearing is required when an inmate has put forward sufficient evidence to raise a "reasonable ground" to believe him to be intellectually disabled. In a post-conviction motion in the case at bar, the defendant sought an *Atkins* hearing. Without holding an evidentiary hearing or granting funds to conduct additional investigation, the state trial court dismissed the defendant's petition. After losing in state court, the defendant pursued federal habeas relief. The defendant won at the federal district court but the Fifth Circuit reversed. The U.S. Supreme Court granted review and held that the state court's decision denying his *Atkins* claim was premised on an "unreasonable determination of the facts." In reaching this decision, the Court focused on the two underlying factual determinations on which the trial court's decision was premised: that the defendant's IQ score of 75 was inconsistent with a diagnosis of intellectual disability and that he had presented no evidence of adaptive impairment. The Court held that both of the state court's critical factual determinations were unreasonable.

State v. Hembree, ___ N.C. ___, 770 S.E.2d 77 (April 10, 2015). In this capital case, the court held that the cumulative effect of several errors at trial denied the defendant a fair trial; the court vacated the conviction and sentence and remanded for a new trial. Specifically, and as discussed in more detail in the summaries that follow, the trial court erred by admitting an excessive amount of 404(b) evidence pertaining to another murder; by admitting evidence of the 404(b) murder victim's good character; and by allowing the prosecution to argue without basis to the jury that defense counsel had in effect suborned perjury.

Post-Conviction Proceedings

State v. Stubbs, ___ N.C. ___, 770 S.E.2d 74 (April 10, 2015). Under G.S. 15A-1422, the court of appeals had subject matter jurisdiction to review the State's appeal from a trial court's order granting the defendant relief on his motion for appropriate relief. The court rejected the defendant's argument that Appellate Rule 21 required a different conclusion. In the decision below, *State v. Stubbs*, __ N.C. App. __, 754 S.E.2d 174 (2014), the court of appeals held, over a dissent that the trial court erred by concluding that the defendant's sentence of life in prison with the possibility of parole violated of the Eighth Amendment.