Supreme Court Review

Covering significant N.C. & U.S. Supreme Court cases, Jan. 2017 – present

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Criminal Procedure

Appellate Issues

State v. Campbell, ___ N.C. ___, 799 S.E.2d 600 (June 9, 2017)

The Court of Appeals failed to recognize its discretion under Rule 2 of Rules of Appellate Procedure to refrain from undertaking a review of the defendant's fatal variance claim, apparently acting under the erroneous belief that it was required to reach the merits of the claim. The defendant was found guilty of felony larceny. On appeal, he asserted in part that the

trial court erred by failing to dismiss the larceny charge due to a fatal variance with respect to ownership of the property. Because counsel failed to raise the issue at trial, the defendant sought review under Rule 2. Noting that a previous panel of the court had invoked that Rule to review a fatal variance issue, the Court of Appeals, without further discussion or analysis, addressed the merits of the defendant's argument, finding a fatal variance and vacating the larceny convictions. The State petitioned the Supreme Court for discretionary review on the issue of whether the Court of Appeals erred by invoking Rule 2 under the circumstances of the case. The Supreme Court noted that Rule 2 relates to the residual power of the appellate courts to consider "in exceptional circumstances" significant issues. Whether a case warrants application of Rule 2 must be determined based on a case-by-case basis and "precedent cannot create an automatic right to review via Rule 2." Here, the Court of Appeals erroneously believed that a fatal variance issue automatically entitled the defendant to appellate review under Rule 2. In so doing, it failed to recognize its discretion to refrain from undertaking such a review. The court reversed and remanded to the Court of Appeals "so that it may independently and expressly determine whether, on the facts and under the circumstances of this specific case, to exercise its discretion to employ Rule 2" to reach the merits of the defendant's claim.

Counsel Issues

Lee v. United States, 582 U.S. ___, 137 S. Ct. 1958 (June 23, 2017)
By wrongly advising the defendant that a guilty plea to a drug charge would not result in deportation, counsel rendered ineffective assistance of counsel (IAC) in connection with the defendant's plea. After he was charged with possessing ecstasy with intent to distribute, the defendant feared that a criminal conviction might affect his status as a lawful permanent resident. His attorney assured him that the Government would not deport him if he pleaded guilty. As a result the defendant, who had no real defense to the charge, accepted a plea that carried a lesser prison sentence than he would have faced at trial. The defendant's attorney was wrong: The conviction meant that the defendant was subject to mandatory deportation. Before the Court, the Government conceded that the defendant received objectively unreasonable representation when counsel assured him that he would not be deported if he pleaded guilty. The question before the Court was whether the defendant could show prejudice as a result. The Court noted that when an IAC claim involves a claim of attorney error during the course of a legal proceeding—for example, that counsel failed to raise an objection at trial or to present an argument on appeal—a defendant raising such a claim can demonstrate prejudice by showing a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. This case, however was different. The Court explained:

> But in this case counsel's "deficient performance arguably led not to a judicial proceeding of disputed reliability, but rather to the forfeiture of a proceeding itself." When a defendant alleges his counsel's deficient performance led him to accept a guilty plea rather than go to trial, we do not ask whether, had he gone to trial, the result of that trial "would have been different" than the result of the plea bargain. That is because, while we ordinarily "apply a strong

> presumption of reliability to judicial proceedings," "we cannot accord" any such presumption "to judicial proceedings that never took place."
>
> We instead consider whether the defendant was prejudiced by the "denial of the entire judicial proceeding . . . to which he had a right." As we held in *Hill v. Lockhart*, when a defendant claims that his counsel's deficient performance deprived him of a trial by causing him to accept a plea, the defendant can show prejudice by demonstrating a "reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." (citations omitted).

The Court rejected the dissent's argument that the defendant must also show that he would have been better off going to trial. It conceded "[t]hat is true when the defendant's decision about going to trial turns on his prospects of success and those are affected by the attorney's error—for instance, where a defendant alleges that his lawyer should have but did not seek to suppress an improperly obtained confession." The Court found that the error at issue was different. Here, the defendant "knew, correctly, that his prospects of acquittal at trial were grim, and his attorney's error had nothing to do with that. The error was instead one that affected [the defendant's] understanding of the consequences of pleading guilty." And here, the defendant argues that he never would have accepted a guilty plea had he known that he would be deported as a result; the defendant insists he would have gambled on trial, risking more jail time for whatever small chance there might be of an acquittal that would let him remain in the United States. Considering this claim, the Court rejected the Government's request for a per se rule that a defendant with no viable defense cannot show prejudice from the denial of his right to trial. Instead it held: "In the unusual circumstances of this case, we conclude that [the defendant] has adequately demonstrated a reasonable probability that he would have rejected the plea had he known that it would lead to mandatory deportation."

Weaver v. Massachusetts, 582 U.S. ___, 137 S. Ct. 1899 (June 22, 2017)
In a case where the defendant failed to preserve a claim of structural error with respect to improper closure of the courtroom and raised it later in the context of an ineffective assistance claim, the Court held that the defendant was not relieved of his burden of establishing prejudice, which he failed to do. During the defendant's state criminal trial, the courtroom was occupied by potential jurors and closed to the public for two days of jury selection. Defense counsel neither objected to the closure at trial nor raised the issue on direct review. The case came to the Court in the context of an ineffective assistance of counsel claims. On the facts presented, the Court held that the defendant had not established prejudice. It explained:

> In the criminal justice system, the constant, indeed unending, duty of the judiciary is to seek and to find the proper balance between the necessity for fair and just trials and the importance of finality of judgments. When a structural error is preserved and raised on direct review, the balance is in the defendant's favor, and a new trial generally will be granted as a matter of right. When a structural error is raised in the context of an ineffective assistance claim, however, finality concerns are far more pronounced. For this reason, and in light

of the other circumstances present in this case, petitioner must show prejudice in order to obtain a new trial. As explained above, he has not made the required showing.

Buck v. Davis, 580 U.S. ___, 137 S. Ct. 759 (Feb. 22, 2017)
In this Texas capital murder case, the defendant's Sixth Amendment right to effective assistance of counsel was violated when his lawyer introduced evidence from a psychologist that the defendant was statistically more likely to act violently because he is black. A Texas jury convicted the defendant of capital murder. Under state law, the jury could impose a death sentence only if it found that the defendant was likely to commit acts of violence in the future. The defendant's attorney called a psychologist to offer his opinion on that issue. The psychologist testified that the defendant probably would not engage in violent conduct. But he also stated that one of the factors pertinent in assessing a person's propensity for violence was his race, and that the defendant was statistically more likely to act violently because he is black. The jury sentenced the defendant to death. With respect to first prong of the *Strickland* attorney error standard, the Court held that counsel's performance fell outside the bounds of competent representation. Counsel knew that the expert's report reflected the view that the defendant's race disproportionately predisposed him to violent conduct; he also knew that the principal point of dispute during the trial's penalty phase was whether the defendant was likely to act violently in the future. Counsel nevertheless called the expert to the stand and specifically elicited testimony about the connection between the defendant's race and the likelihood of future violence. Additionally counsel put into evidence the expert's report stating that the defendant's race, "Black," suggested an "[i]ncreased probability" as to future dangerousness. This report "said, in effect, that the color of [the defendant's] skin made him more deserving of execution. It would be patently unconstitutional for a state to argue that a defendant is liable to be a future danger because of his race." The Court went on to hold that the second prong of the *Strickland* test—prejudice--also was satisfied, finding that it was reasonably probable that the proceeding would have ended differently had counsel rendered competent representation. It noted that the evidence at issue was "potent" and "appealed to a powerful racial stereotype—that of black men as 'violence prone.'" The expert's opinion "coincided precisely with a particularly noxious strain of racial prejudice, which itself coincided precisely with the central question at sentencing." The court concluded: "the effect of this unusual confluence of factors was to provide support for making a decision on life or death on the basis of race." This effect was heightened because the witness took the stand as a medical expert, "bearing the court's imprimatur." The Court rejected the notion that any mention of race was de minimis, concluding "Some toxins can be deadly in small doses." [This case also addresses a number of procedural issues that apply in federal court; because they are not relevant to state court proceedings they are not summarized here.]

State v. Todd, ___ N.C. ___, 799 S.E.2d 834 (June 9, 2017)
The Court of Appeals erred by holding that the defendant received ineffective assistance of counsel when appellate counsel failed to challenge the sufficiency of the evidence supporting the defendant's armed robbery conviction. Before the Supreme Court, the State argued that appellate counsel made a strategic decision not to challenge the sufficiency of the evidence.

However, because the lower courts did not determine whether there was a strategic reason for counsel to refrain from addressing the sufficiency of the evidence, the record was insufficient to determine the merits of the ineffective assistance claim. The court reversed and remanded so that the trial court could fully address whether counsel made a strategic decision not to raise the sufficiency of the evidence argument, if such a decision was reasonable and whether the defendant suffered prejudice.

Discovery Issues

Turner v. United States, 582 U.S. ___, 137 S. Ct. 1885 (June 22, 2017)
Evidence withheld by the Government was not material under *Brady.* In 1985, a group of defendants were tried together in the Superior Court for the District of Columbia for the kidnaping, armed robbery, and murder of Catherine Fuller. Long after their convictions became final, it emerged that the Government possessed certain evidence that it failed to disclose to the defense. The only question before the Court was whether the withheld evidence was "material" under *Brady*. The Court held it was not, finding that the withheld evidence as "too little, too weak, or too distant from the main evidentiary points to meet *Brady*'s standards." [Author's note: For a more detailed discussion of the withheld evidence and the Court's reasoning, see my colleague's blog post here].

Experts

McWilliams v. Dunn, 582 U.S. ___, 137 S. Ct. 1790 (June 19, 2017)
The Court held, in this federal habeas case, that the Alabama courts' refusal to provide a capital murder defendant with expert mental health assistance was contrary to, or involved an unreasonable application of, clearly established federal law. After the jury recommended that the defendant receive the death penalty, the trial court scheduled a judicial sentencing hearing for about six weeks later. It also granted a defense motion for neurological and neuropsychological exams on the defendant for use in connection with the sentencing hearing. Consequently, Dr. John Goff, a neuropsychologist employed by the State's Department of Mental Health, examined the defendant. He filed his report two days before the judicial sentencing hearing. The report concluded, in part, that the defendant presented "some diagnostic dilemmas." On the one hand, the defendant was "obviously attempting to appear emotionally disturbed" and "exaggerating his neuropsychological problems." But on the other hand, it was "quite apparent that he ha[d] some genuine neuropsychological problems," including "cortical dysfunction attributable to right cerebral hemisphere dysfunction." The report added that the defendant's "obvious neuropsychological deficit" could be related to his "low frustration tolerance and impulsivity," and suggested a diagnosis of "organic personality syndrome." Right before the hearing, defense counsel received updated records indicating that the defendant was taking an assortment of psychotropic medications. Over a defense objection that assistance from a mental health expert was needed to interpret the report and information, the hearing proceeded. The trial court sentenced the defendant to death. It later issued a written sentencing order, finding that the defendant "was not and is not psychotic," and that "the preponderance of the evidence from these tests and reports show [the

defendant] to be feigning, faking, and manipulative." It further found that even if his mental health issues "did rise to the level of a mitigating circumstance, the aggravating circumstances would far outweigh this as a mitigating circumstance." The case came before the U.S. Supreme Court on habeas. The Court began by noting that *Ake v. Oklahoma*, 470 U. S. 68 (1985), clearly established that, when certain threshold criteria are met, the State must provide an indigent defendant with access to a mental health expert who is sufficiently available to the defense and independent from the prosecution to effectively "assist in evaluation, preparation, and presentation of the defense." Here, no one denied that the conditions that trigger application of *Ake* are present: the defendant is and was an indigent defendant, his mental condition was relevant to the punishment he might suffer, and that mental condition--his sanity at the time of the offense--was seriously in question. As a result *Ake,* required the State to provide the defendant with access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense. The question before the Court was: whether the Alabama courts' determination that the defendant got all the assistance that *Ake* requires was contrary to, or involved an unreasonable application of, clearly established federal law. The defendant urged the Court to answer this question "yes," asserting that a State must provide an indigent defendant with a qualified mental health expert retained specifically for the defense team, not a neutral expert available to both parties. The Court however found that it need not decide whether this claim is correct. It explained:

> *Ake* clearly established that a defendant must receive the assistance of a mental health expert who is sufficiently available to the defense and independent from the prosecution to effectively "assist in evaluation, preparation, and presentation of the defense." As a practical matter, the simplest way for a State to meet this standard may be to provide a qualified expert retained specifically for the defense team. This appears to be the approach that the overwhelming majority of jurisdictions have adopted. It is not necessary, however, for us to decide whether the Constitution requires States to satisfy *Ake*'s demands in this way. That is because Alabama here did not meet even *Ake*'s most basic requirements.

Here, although the defendant was examined by Dr. Goff, neither Goff nor any other expert helped the defense evaluate Goff's report or the defendant's extensive medical records and translate these data into a legal strategy; neither Goff nor any other expert helped the defense prepare and present arguments that might, for example, have explained that the defendant's purported malingering was not necessarily inconsistent with mental illness; and neither Goff nor any other expert helped the defense prepare direct or cross-examination of any witnesses, or testified at the judicial sentencing hearing himself. The Court concluded: "Since Alabama's provision of mental health assistance fell so dramatically short of what *Ake* requires, we must conclude that the Alabama court decision affirming [the defendant's] conviction and sentence was contrary to, or involved an unreasonable application of, clearly established Federal law."

Indictment & Pleading Issues

State v. Brice, ___ N.C. ___, ___ S.E.2d ___ (Nov. 3, 2017)
On discretionary review from unanimous decision of the Court of Appeals, ___ N.C. App. ___, 786 S.E.2d 812 (2016), concluding that the habitual misdemeanor larceny indictment was defective, the court reversed. The Court of Appeals concluded that the indictment was defective because it failed to comply with G.S. 15A-928, a defect that was jurisdictional. The indictment alleged that the defendant stole the property after having been previously convicted of misdemeanor larceny on four separate occasions. The court began by holding that the indictment alleged all of the essential elements of habitual misdemeanor larceny. However, it failed to comply with G.S. 15A-928, which provides that when the fact that the defendant has been previously convicted of an offense raises the present offense to a higher grade and thereby becomes an element, the indictment must be accompanied by a special indictment charging the prior convictions or these allegations must be included as a separate count. Thus, the issue before the court was whether the fact that the indictment failed to comply with the separate indictment or separate account requirements set out in G.S. 15A-928 constituted a fatal defect depriving the trial court of jurisdiction. The court concluded that noncompliance with the statute was not a jurisdictional issue and thus could not be raised on appeal where, as here, the defendant raised no objection or otherwise sought relief on the issue before the trial court. The court overruled State v. Williams, 153 N.C. App. 192 (2002), which the Court of Appeals had relied on to conclude that a violation of G.S. 15A-928 was jurisdictional.

State v. Carter, ___ N.C. ___, 805 S.E.2d 480 (Nov. 3, 2017)
On discretionary review from a unanimous unpublished decision of the Court of Appeals vacating a conviction for carrying a concealed gun on grounds that the indictment was fatally defective, the court reversed per curiam for the reasons stated in *State v. Brice*, ___ N.C. ___, ___ S.E.2d ___ (Nov. 3, 2017). The defendant was charged with felony carrying a concealed weapon, an offense that became a felony because of a prior conviction. The indictment did not comply with G.S. 15A-928, which requires a special indictment or separate count alleging the prior conviction. The Court of Appeals found that failure to comply with the statute was a jurisdictional defect; the Supreme Court reversed.

State v. Murrell, ___ N.C. ___, 804 S.E.2d 504 (Sept 29, 2017)
Affirming an unpublished opinion of the Court of Appeals, the court held that a robbery indictment was fatally defective. The indictment alleged, in relevant part, that the defendant committed the bank robbery "by way of reasonably appearing to the [named] victim . . . that a dangerous weapon was in the defendant's possession, being used and threatened to be used by communicating that he was armed to her in a note." The Court of Appeals had held that the indictment was defective because it failed to name any dangerous weapon that the defendant allegedly employed. The Supreme Court noted that an essential element of armed robbery is that the defendant possessed, used, or threatened use of a firearm or other dangerous weapon. Here, the indictment does not adequately allege this element. The court instructed: an armed robbery indictment "must allege the presence of a firearm or dangerous weapon used to threaten or endanger the life of a person."

State v. Stith, ___ N.C. ___, 796 S.E.2d 784 (Mar. 17, 2017)
The court per curiam affirmed the decision below, *State v. Stith,* ___ N.C. App. ___, 787 S.E.2d 40 (April 5, 2016). In that decision, the court of appeals held, over a dissent, that an indictment charging the defendant with possessing hydrocodone, a Schedule II controlled substance, was sufficient to allow the jury to convict the defendant of possessing hydrocodone under Schedule III, based on its determination that the hydrocodone pills were under a certain weight and combined with acetaminophen within a certain ratio to bring them within Schedule III. The original indictment alleged that the defendant possessed "acetaminophen and hydrocodone bitartrate," a substance included in Schedule II. Hydrocodone is listed in Schedule II. However, by the start of the trial, the State realized that its evidence would show that the hydrocodone possessed was combined with a non-narcotic such that the hydrocodone is considered to be a Schedule III substance. Accordingly, the trial court allowed the State to amend the indictment, striking through the phrase "Schedule II." At trial the evidence showed that the defendant possessed pills containing hydrocodone bitartrate combined with acetaminophen, but that the pills were of such weight and combination to bring the hydrocodone within Schedule III. The court concluded that the jury did not convict the defendant of possessing an entirely different controlled substance than what was charged in the original indictment, stating: "the original indictment identified the controlled substance … as hydrocodone, and the jury ultimately convicted Defendant of possessing hydrocodone." It also held that the trial court did not commit reversible error when it allowed the State to amend the indictment. The court distinguished prior cases, noting that here the indictment was not changed "such that the identity of the controlled substance was changed. Rather, it was changed to reflect that the controlled substance was below a certain weight and mixed with a non-narcotic (the identity of which was also contained in the indictment) to lower the punishment from a Class H to a Class I felony." Moreover, the court concluded, the indictment adequately apprised the defendant of the controlled substance at issue. The court of appeals applied the same holding with respect to an indictment charging the defendant with trafficking in an opium derivative, for selling the hydrocodone pills.

Jury Argument

State v. Huey, ___ N.C. ___, ___ S.E.2d ___ (Sept. 29, 2017)
Reversing a unanimous decision of the Court of Appeals in this murder case, the court held that while certain statements made by the prosecutor in his closing argument were improper, the arguments did not amount to prejudicial error. The ADA opened closing arguments by saying "Innocent men don't lie." During his argument, the prosecutor used some variation of the verb "to lie" at least thirteen times. The prosecutor also made negative comments regarding defense counsel and regarding a defense expert witness. Regarding the defense expert, the prosecutor argued that the expert made more than $300,000 per year working for defendants, that he was not impartial and that "he's just a $6,000 excuse man." Defense counsel did not object and the trial court did not intervene ex mero motu. The Court of Appeals held that the trial court erred by failing to intervene ex mero motu, concluding that the defendant's entire defense was predicated on his credibility and on the credibility of his expert witness. The court reversed. It began by holding that there was "no doubt" that the prosecutor's statements directed at the

defendant's credibility were improper. However it went on to hold that the statements were not so grossly improper as to result in prejudice, noting that the evidence supports the inference that the defendant's testimony lacked credibility. For example, the defendant gave six different versions of the shooting, five to the police and one to the jury. The court concluded: "While we do not approve of the prosecutor's repetitive and dominant insinuations that defendant was a liar, we do believe sufficient evidence supported the premise that defendant's contradictory statements were untruthful." The court also found that the prosecutor's assertion that the defense expert was "just a $6,000 excuse man" also was improper in that it implied the witness was not trustworthy because he was paid for his testimony. While a lawyer may point out potential bias resulting from payment, it is improper to argue that an expert should not be believed because he would give untruthful or inaccurate testimony in exchange for pay. The court also noted that the prosecutor's use of the word "excuse" amounts to name-calling, "which is certainly improper." Finally, the court agreed that the prosecutor improperly argued that defense counsel should not be believed because he was paid to represent the defendant. Although ultimately concluding that it was not reversible error for the trial court to fail to intervene ex mero motu, the court added:

> Nonetheless, we are disturbed that some counsel may bepurposefully crafting improper arguments, attempting to get away with as much as opposing counsel and the trial court will allow, rather than adhering to statutory requirements and general standards of professionalism. Our concern stems from the fact that the same closing argument language continues to reappear before this Court despite our repeated warnings that such arguments are improper. . . . Our holding here, and other similar holdings finding no prejudice in various closing arguments, must not be taken as an invitation to try similar arguments again. We, once again, instruct trial judges to be prepared to intervene ex mero motu when improper arguments are made.

Jury Instructions

State v. Godwin, ___ N.C. ___, 800 S.E.2d 47 (June 9, 2017)
In this DWI case, the trial court did not err by denying the defendant's request for a special jury instruction explaining that results of a chemical breath test are not conclusive evidence of impairment. Following the pattern jury instructions for DWI, the trial court explained to the jury that impairment could be proved by an alcohol concentration of .08 or more and that a chemical analysis was "deemed sufficient evidence to prove a person's alcohol concentration." The trial court also inform the jury that they were the sole judges of the credibility of each witness and the weight to be given to each witness's testimony. This statement signaled to the jury that it was free to analyze the weight and effect of the breathalyzer evidence, along with all the evidence presented at trial. Therefore, the standard jury instruction on credibility was sufficient and the trial court adequately conveyed the substance of the defendant's request instructions to the jury.

Pleas

Kernan v. Cuero, 583 U.S. ___ (Nov. 6, 2017)
In a per curiam decision in a case decided under the Antiterrorism and Effective Death Penalty Act of 1996, the Court held that no decision from the Court clearly establishes that a state court must impose a lower, originally expected sentence when—after the defendant has pled guilty—the State is allowed to amend the criminal complaint, subjecting the defendant to a higher sentence, and the defendant is allowed to withdraw his plea but chooses to enter into a new plea agreement based on the amended complaint. A California court permitted the State to amend a criminal complaint to which the defendant had pleaded guilty. That guilty plea would have led to a maximum sentence of 14 years, 4 months. The court acknowledged that permitting the amendment would lead to a higher sentence, and it consequently permitted the defendant to withdraw his guilty plea. The defendant then pleaded guilty to the amended complaint and was sentenced to a term with a minimum of 25 years. The Ninth Circuit held that the defendant was entitled to specific performance of the lower 14-year, 4-month sentence that he would have received had the complaint not been amended. The Court reversed. It began by assuming that the State violated the Constitution when it moved to amend the complaint. But it went on to conclude: "we still are unable to find in Supreme Court precedent that clearly established federal law demanding specific performance as a remedy. To the contrary, no holdin[g] of this Court requires the remedy of specific performance under the circumstances present here." (quotation omitted).

Sentencing

Virginia v. LeBlanc, 582 U.S. ___, 137 S. Ct. 1726 (June 12, 2017)
In a per curiam decision, the Court held that the Virginia Supreme Court's ruling, holding that Virginia's "geriatric release" provision satisfies *Graham v. Florida* was not an objectively unreasonable application of *Graham*. In 1999, the defendant, who was 16 years old at the time, raped a 62-year-old woman. In 2003, a state court sentenced him to life in prison. At the time, Virginia had abolished traditional parole. However it had a geriatric release parole program which allowed older inmates to receive conditional release under some circumstances. Specifically, the statute provided: "Any person serving a sentence imposed upon a conviction for a felony offense . . . (i) who has reached the age of sixty-five or older and who has served at least five years of the sentence imposed or (ii) who has reached the age of sixty or older and who has served at least ten years of the sentence imposed may petition the Parole Board for conditional release." Seven years after the defendant was sentenced, the Court decided *Graham,* holding that the Eighth Amendment prohibits juvenile offenders convicted of non-homicide offenses from being sentenced to life without parole. *Graham* held that while a "State is not required to guarantee eventual freedom to a juvenile offender convicted of a nonhomicide crime," it must give defendants "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." The *Graham* Court left it to the States, "in the first instance, to explore the means and mechanisms for compliance" with the *Graham* rule. The defendant then sought to vacate his sentence in light of *Graham.* The Virginia courts rejected this motion, holding that Virginia's geriatric release statute satisfied *Graham*'s

requirement of parole for juvenile offenders. The defendant then brought a federal habeas action. The federal district court held that "there is no possibility that fairminded jurists could disagree that the state court's decision conflicts wit[h] the dictates of *Graham*." The Fourth Circuit affirmed. The Supreme Court reversed, noting in part:

> The Court of Appeals for the Fourth Circuit erred by failing to accord the state court's decision the deference owed under AEDPA. Graham did not decide that a geriatric release program like Virginia's failed to satisfy the Eighth Amendment because that question was not presented. And it was not objectively unreasonable for the state court to conclude that, because the geriatric release program employed normal parole factors, it satisfied Graham's requirement that juveniles convicted of a nonhomicide crime have a meaningful opportunity to receive parole.

Evidence

Crawford & the Confrontation Clause

State v. McKiver, ___ N.C. ___, 799 S.E.2d 851 (June 9, 2017)
Reversing the Court of Appeals, the Supreme Court held that the statements made by an anonymous 911 caller informing the police of a possible incident involving a firearm and describing the suspect were nontestimonial. The circumstances surrounding the caller's statements objectively indicate that the primary purpose was to enable law enforcement to meet an ongoing emergency. The primary purpose of the call was to inform the police of a possible dispute involving an unidentified man brandishing a firearm outside the caller's home on a public street in a residential subdivision. The caller reacted by going to her home and staying away from the window and an officer retrieved his patrol rifle before entering the scene. "As is evident from the precautions taken by both the caller and the officers on the scene, they believed the unidentified suspect was still roving subdivision with a firearm, posing a continuing threat to the public and law enforcement." To address this threat, an officer requested that the dispatcher place a reverse call to the caller to get more information about the individual at issue and, once received, quickly relayed that information to other officers to locate and apprehend the suspect.

404(b) Evidence

State v. Watts, ___ N.C. ___, 802 S.E.2d 905 (Aug. 18, 2017)
(per curiam). The court modified in part and affirmed the lower court's decision in *State v. Watts*, ___ N.C. App. ___, 783 S.E.2d 266 (April 5, 2016). In this child sexual assault case, the Court of Appeals held, over a dissent, that the trial court committed reversible error by admitting 404(b) evidence. The charges at issue arose from the defendant's alleged sexual assault on an eleven-year-old girl to whom defendant was like a "grandpa." The State sought to introduce at trial 404(b) evidence. Specifically a witness to testify that the defendant had forced his way into her apartment and raped her in 2003. Those alleged events resulted in indictments for rape and breaking or entering against the defendant, but those charges were dismissed in

2005. The trial court allowed the 404(b) evidence to be admitted. After the witness testified, defense counsel moved to strike the testimony, for limiting instruction, or in the alternative a mistrial. The trial court denied the defendant's motions. The Court of Appeals held that admission of this evidence was prejudicial error. It reasoned that the trial court erred by determining that the evidence was relevant to show opportunity and that the evidence was not sufficiently similar to show common plan or scheme. The Court of Appeals further concluded that "[a]dding to the prejudicial nature" of the testimony was the fact that the trial court did not instruct the jury to consider the evidence only for the 404(b) purpose for which it was admitted. The Supreme Court rejected the State's argument that defense counsel's motion did not constitute a request for a limiting instruction. It went on to hold:

> Our General Statutes provide that "[w]hen evidence which is admissible . . . for one purpose but not admissible . . . for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly." N.C.G.S. § 8C-1, Rule 105 (2015) (emphasis added). "Failure to give the requested instruction must be held prejudicial error for which [a] defendant is entitled to a new trial." Accordingly, because defendant was prejudiced by the trial court's failure to give the requested limiting instruction, we affirm, as modified herein, the opinion of the Court of Appeals that reversed defendant's convictions and remanded the matter to the trial court for a new trial. (citations omitted).

Opinions

State v. Walston, ___ N.C. ___, 798 S.E.2d 741 (May. 5, 2017)
Reversing the Court of Appeals in a case in which the amended version of Rule 702 applied, the Supreme Court held that the trial court did not abuse its discretion in excluding defense expert testimony regarding repressed memory and the suggestibility of memory. The case involved a number of child sex offense charges. Before trial, the State successfully moved to suppress testimony from a defense expert, Moina Artigues, M.D., regarding repressed memory and the suggestibility of children. The Court of Appeals had reversed the trial court and remanded for a new trial, finding that the trial court improperly excluded the expert's testimony based on the erroneous belief it was inadmissible as a matter of law because the expert had not interviewed the victims. The State petition the Supreme Court for discretionary review. Holding that the trial court did not abuse its discretion in excluding Dr. Artigues's testimony, the Court found that "the Court of Appeals was correct to clarify that a defendant's expert witness is not required to examine or interview the prosecuting witness as a prerequisite to testifying about issues relating to the prosecuting witness at trial." The Court noted: "Such a requirement would create a troubling predicament given that defendants do not have the ability to compel the State's witnesses to be evaluated by defense experts." The Court disagreed however with the Court of Appeals' determination that the trial court based its decision to exclude defendant's proffered expert testimony solely on an incorrect understanding of the law. It found that the Court of Appeals presumed that the testimony was excluded based on an erroneous belief that there was a per se rule of exclusion when an expert has not interviewed the victim. However,

the trial court never stated that such a rule existed or that it based its decision to exclude the testimony solely on that rule. The Court went on to note that Rule 702 does not mandate any particular procedural requirements for evaluating expert testimony. Here, the trial court ordered arguments from both parties, conducted voir dire, considered the proffered testimony, and considered the parties' arguments regarding whether the evidence could be excluded under Rule 403 even if it was admissible under Rule 702. With respect to the latter issue, the Court noted that Rule 403 allows for the exclusion of evidence that is otherwise admissible under Rule 702. The Court concluded that there is evidence to support the trial court's decision to exclude the testimony and that it properly acted as a gatekeeper in determining the admissibility of expert testimony.

State v. Godwin, ___ N.C. ___, 800 S.E.2d 47 (June 9, 2017)
Reversing the Court of Appeals, the court held that Evidence Rule 702(a1) does not require the trial court to *explicitly* recognize a law enforcement officer as an expert witness pursuant to Rule 702(a) before he can testify to the results of a HGN test. Rather, the court noted, prior case law establishes that an implicit finding will suffice. Reviewing the record before it, the court found that here, by overruling the defendant's objection to the witness's testimony, the trial court implicitly found that the officer was qualified to testify as an expert. The court noted however that its ability to review the trial court's decision "would have benefited from the inclusion of additional facts supporting its determination" that the officer was qualified to testify as an expert.

State v. Crabtree, ___ N.C. ___, 804 S.E.2d 183 (Sept 29, 2017)
The court per curiam affirmed the decision below, *State v. Crabtree,* ___ N.C. App. ___, 790 S.E.2d 709 (Sept. 6, 2016). In this child sexual assault case, the Court of Appeals held that neither a child interviewer from the Child Abuse Medical Evaluation Clinic nor a DSS social worker improperly vouched for the victim's credibility; however, the Court of Appeals held, over a dissent, that although a pediatrician from the clinic improperly vouched for the victim's credibility, no prejudice occurred. In the challenged portion of the social worker's testimony, the social worker, while explaining the process of investigating a report of child sexual abuse, noted that the pediatrician and her team "give their conclusions or decision about those children that have been evaluated if they were abused or neglected in any way." This statement merely described what the pediatrician's team was expected to do before sending a case to DSS; the social worker did not comment on the victim's case, let alone her credibility. In the challenged portion of the interviewer's testimony, he characterized the victim's description of performing fellatio on the defendant as "more of an experiential statement, in other words something may have actually happened to her as opposed to something [seen] on a screen or something having been heard about." This testimony left the credibility determination to the jury and did not improperly vouch for credibility. However, statements made by the pediatrician constituted improper vouching. Although the pediatrician properly described the five-tier rating system that the clinic used to evaluate potential child abuse victims, she ventured into improper testimony when she testified that "[w]e have sort of five categories all the way from, you know, we're really sure [sexual abuse] didn't happen to yes, we're really sure that [sexual abuse] happened" and referred to the latter category as "clear disclosure" or "clear

indication" of abuse in conjunction with her identification of that category as the one assigned to the victim's interview. Also, her testimony that her team's final conclusion that the victim "had given a very clear disclosure of what had happened to her and who had done this to her" was an inadmissible comment on the victim's credibility. However, the defendant was not prejudiced by these remarks.

Verdict, Impeachment of

Pena-Rodriguez v. Colorado, 580 U.S. ___, 137 S. Ct. 855 (Mar. 6, 2017)
Where a juror makes a clear statement indicating that he or she relied on racial stereotypes or animus to convict a criminal defendant, the Sixth Amendment requires that the "no-impeachment rule" give way in order to permit the trial court to consider the evidence of the juror's statement and any resulting denial of the jury trial guarantee. A Colorado jury convicted the defendant of harassment and unlawful sexual contact. Following the discharge of the jury, two jurors told defense counsel that, during deliberations, Juror H.C. had expressed anti-Hispanic bias toward the defendant and the defendant's alibi witness. Counsel obtained affidavits from the two jurors describing a number of biased statements by H.C. The trial court acknowledged H.C.'s apparent bias but denied the defendant's motion for a new trial on the ground that Colorado Rule of Evidence 606(b) generally prohibits a juror from testifying as to statements made during deliberations in a proceeding inquiring into the validity of the verdict. The state appellate courts affirmed. The U.S. Supreme Court reversed. The no-impeachment rule evolved to give substantial protection to verdict finality and to assure jurors that, once their verdict has been entered, it will not later be called into question based on the comments or conclusions they expressed during deliberations. As the Court noted, this "case presents the question whether there is an exception to the no-impeachment rule when, after the jury is discharged, a juror comes forward with compelling evidence that another juror made clear and explicit statements indicating that racial animus was a significant motivating factor in his or her vote to convict." The affidavits by the two jurors in the case described a number of biased statements made by Juror H.C. H.C. told the other jurors that he "believed the defendant was guilty because, in [H.C.'s] experience as an ex-law enforcement officer, Mexican men had a bravado that caused them to believe they could do whatever they wanted with women." H.C. also stated his belief that Mexican men are physically controlling of women because of their sense of entitlement, and further stated, "I think he did it because he's Mexican and Mexican men take whatever they want." H.C. further explained that, in his experience, "nine times out of ten Mexican men were guilty of being aggressive toward women and young girls." And H.C. said that he did not find petitioner's alibi witness credible because, among other things, the witness was "an illegal." The Court noted that with respect to this last comment, the witness testified during trial that he was a legal resident of the United States. Noting that "It must become the heritage of our Nation to rise above racial classifications that are so inconsistent with our commitment to the equal dignity of all persons," the Court held that the Constitution requires an exception to the no-impeachment rule when a juror's statements indicate that racial animus was a significant motivating factor in his or her finding of guilt. The Court went on to elaborate that:

> Not every offhand comment indicating racial bias or hostility will justify setting aside the no-impeachment bar to allow further judicial inquiry. For the inquiry to proceed, there must be a showing that one or more jurors made statements exhibiting overt racial bias that cast serious doubt on the fairness and impartiality of the jury's deliberations and resulting verdict. To qualify, the statement must tend to show that racial animus was a significant motivating factor in the juror's vote to convict. Whether that threshold showing has been satisfied is a matter committed to the substantial discretion of the trial court in light of all the circumstances, including the content and timing of the alleged statements and the reliability of the proffered evidence.

Because the issue was not presented, the Court declined to address what procedures a trial court must follow when confronted with a motion for a new trial based on juror testimony of racial bias. It likewise declined to decide the appropriate standard for determining when evidence of racial bias is sufficient to require that the verdict be set aside and a new trial be granted.

Arrest, Search, and Investigation
Arrests & Investigatory Stops

State v. Goins, ___ N.C. ___, 804 S.E.2d 449 (Sept 29, 2017)
For the reasons stated in the dissenting opinion below, the court reversed the decision of the Court of Appeals in *State v. Goins,* ___ N.C. App. ___, 789 S.E.2d 466 (July 5, 2016). In that case, the Court of Appeals held, over a dissent, that a stop of the defendant's vehicle was not supported by reasonable suspicion. The stop occurred in an area of high crime and drug activity. The Court of Appeals majority concluded that the defendant's mere presence in such an area cannot, standing alone, provide the necessary reasonable suspicion for the stop. Although headlong flight can support a finding of reasonable suspicion, here, it determined, the evidence was insufficient to show headlong flight. Among other things, there was no evidence that the defendant saw the police car before leaving the premises and he did not break any traffic laws while leaving. Although officers suspected that the defendant might be approaching a man at the premises to conduct a drug transaction, they did not see the two engage in suspicious activity. The officers' suspicion that the defendant was fleeing from the scene, without more, did not justify the stop. The dissenting judge concluded that the officers had reasonable suspicion for the stop. The dissenting judge criticized the majority for focusing on a "fictional distinction" between suspected versus actual flight. The dissenting judge concluded: considering the past history of drug activity at the premises, the time, place, manner, and unbroken sequence of observed events, the defendant's actions upon being warned of the police presence, and the totality of the circumstances, the trial court correctly found that the officers had reasonable suspicion for the stop.

State v. Johnson, ___ N.C. ___, 803 S.E.2d 137 (Aug. 18, 2017)
The Supreme Court reversed the decision below, *State v. James Johnson*, ___ N.C. App. ___, 784 S.E.2d 633 (April 5, 2016), which had held that because a police officer lacked reasonable

suspicion for a traffic stop in this DWI case, the trial court erred by denying the defendant's motion to suppress. The defendant was stopped at a red light on a snowy evening. When the light turned green, the officer saw the defendant's truck abruptly accelerate, turn sharply left, and fishtail. The officer pulled the defendant over for driving at an unsafe speed given the road conditions. The Supreme Court held that the officer had reasonable suspicion to stop the defendant's vehicle. It noted that G.S. 20-141(a) provides that "[n]o person shall drive a vehicle on a highway or in a public vehicular area at a speed greater than is reasonable and prudent under the conditions then existing." The Court concluded:

> All of these facts show that it was reasonable for [the] Officer . . . to believe that defendant's truck had fishtailed, and that defendant had lost control of his truck, because of defendant's abrupt acceleration while turning in the snow. It is common knowledge that drivers must drive more slowly when it is snowing, because it is easier to lose control of a vehicle on snowy roads than on clear ones. And any time that a driver loses control of his vehicle, he is in danger of damaging that vehicle or other vehicles, and of injuring himself or others. So, under the totality of these circumstances, it was reasonable for [the] Officer . . . to believe that defendant had violated [G.S.] 20-141(a) by driving too quickly given the conditions of the road.

The Court further noted that no actual traffic violation need have occurred for a stop to occur. It clarified: "To meet the reasonable suspicion standard, it is enough for the officer to reasonably believe that a driver has violated the law."

State v. Bullock, ___ N.C. ___, 805 S.E.2d 671 (Nov. 3, 2017)
On an appeal from a divided panel of the Court of Appeals, ___ N.C. App. ___, 785 S.E.2d 746 (2016), the court reversed, concluding that the stop at issue was not unduly prolonged. An officer puller over the defendant for several traffic violations. During the traffic stop that ensued, officers discovered heroin inside a bag in the car. The defendant moved to suppress the evidence, arguing that the search was unduly prolonged under *Rodriguez.* The trial court denied the motion and the Court of Appeals reversed, concluding that the stop had been unduly prolonged. The Supreme Court reversed. After initiating the stop, the officer asked the defendant, the vehicle's sole occupant, for his license and registration. The defendant's hand trembled as he provided his license. Although the car was a rental vehicle, the defendant was not listed as a driver on the rental agreement. The officer noticed that the defendant had two cell phones, a fact he associated, based on experience, with those transporting drugs. The defendant was stopped on I-85, a major drug trafficking thoroughfare. When the officer asked the defendant where he was going, the defendant said he was going to his girlfriend's house on Century Oaks Drive and that he had missed his exit. The officer knew however that the defendant was well past the exit for that location, having passed three exits that would have taken him there. The defendant said that he recently moved to North Carolina. The officer asked the defendant to step out of the vehicle and sit in the patrol car, telling him that he would receive a warning, not a ticket. At this point the officer frisked the defendant, finding $372 in cash. The defendant sat in the patrol car while the officer ran the defendant's

information through law enforcement databases, and the two continued to talk. The defendant gave contradictory statements about his girlfriend. Although the defendant made eye contact with the officer when answering certain questions, he looked away when asked about his girlfriend and where he was traveling. The database checks revealed that the defendant was issued a driver's license in 2000 and that he had a criminal history in North Carolina starting in 2001, facts contradicting his earlier claim to have just moved to the state. The officer asked the defendant for permission to search the vehicle. The defendant agreed to let the officer search the vehicle but declined to allow a search of a bag and two hoodies. When the officer found the bag and hoodies in the trunk, the defendant quickly objected that the bag was not his, contradicting his earlier statement, and said he did not want it searched. The officer put the bag on the ground and a police dog alerted to it. Officers opened the bag and found a large amount of heroin. The defendant did not challenge the validity of the initial stop. The court began by noting during a lawful stop, an officer can ask the driver to exit the vehicle. Next, it held that the frisk was lawful for two reasons. First, frisking the defendant before putting them in the patrol car enhanced the officer safety. And second, where, as here, the frisk lasted only 8-9 seconds it did not measurably prolong stop so as to require reasonable suspicion. The court went on to find that asking the defendant to sit in the patrol car did not unlawfully extend the stop. The officer was required to check three databases before the stop could be finished and it was not prolonged by having the defendant in the patrol car while this was done. This action took a few minutes to complete and while it was being done, the officer was free to talk with the defendant "at least up until the moment that all three database checks had been completed." The court went on to conclude that the conversation the two had while the database checks were running provided reasonable suspicion to prolong the stop. It noted that I-85 is a major drug trafficking corridor, the defendant was nervous and had two cell phones, the rental car was in someone else's name, the defendant gave an illogical account of where he was going, and cash was discovered during the frisk. All of this provided reasonable suspicion of drug activity that justified prolonging the stop shortly after the defendant entered the patrol car. There, as he continued his conversation with the officer, he gave inconsistent statements about his girlfriend and the database check revealed that the defendant had not been truthful about a recent move to North Carolina. This, combined with the defendant's broken eye contact, allowed the officer to extend the stop for purposes of the dog sniff.

State v. Reed, ___ N.C. ___, 805 S.E.2d 670 (Nov. 3, 2017)
On appeal from a divided panel of the Court of Appeals, ___ N.C. App. ___, 791 S.E.2d 486 (2016), the court vacated and remanded for reconsideration in light of its decision in *State v. Bullock*, ___ N.C. ___, ___ S.E.2d ___ (2017), holding that a stop was not unduly prolonged.

Interrogation and Confession

State v. Hammonds, ___ N.C. ___, 804 S.E.2d 438 (Sept 29, 2017)
Because the defendant was in custody while confined under a civil commitment order, the failure of the police to advise him of his *Miranda* rights rendered inadmissible his incriminating statements made during the interrogation. On December 10, 2012, a Stephanie Gaddy was robbed. On December 11, 2012, after the defendant was taken to a hospital emergency room

following an intentional overdose, he was confined pursuant to an involuntary commitment order upon a finding by a magistrate that he was "mentally ill and dangerous to self or others." Officers identified the defendant as a suspect in the robbery and learned he was confined to the hospital under the involuntary commitment order. On December 12 they questioned him without informing him of his *Miranda* rights. The defendant provided incriminating statements. At trial he unsuccessfully moved to suppress the statements made during the December 12th interview. The defendant was convicted and he appealed. Before the Court of Appeals, the majority determined that the trial court properly found that the defendant was not in custody at the time of the interview and that the trial court's findings of fact supported its conclusion of law that the confession was voluntary. A dissenting judge concluded that the trial court's findings of fact were insufficient. The defendant filed an appeal of right with the Supreme Court, which vacated the opinion of the Court of Appeals and instructed and the trial court to hold a new hearing on the suppression motion. After taking additional evidence the trial court again denied the motion. When the case came back before the Supreme Court, it reversed. The court noted, in part, that the defendant's freedom of movement was already severely restricted by the civil commitment order. However the officers failed to inform him that he was free to terminate the questioning and, more importantly, communicated to him that they would leave only after he spoke to them about the robbery. Specifically, they told him that "as soon as he talked, they could leave." The court found that "these statements, made to a suspect whose freedom is already severely restricted because of an involuntary commitment, would lead a reasonable person in this position to believe that he was not at liberty to terminate the interrogation without first answering his interrogators' questions about his suspected criminal activity." (quotations omitted).

State v. Knight, ___ N.C. ___, 799 S.E.2d 603 (June 9, 2017)
Applying *Berghuis v. Thompkins,* 560 U.S. 370 (2010), the court held that the defendant understood his *Miranda* rights and through a course of conduct indicating waiver, provided a knowing and voluntary waiver of those rights. During the interrogation, the defendant never said that he wanted to remain silent, did not want to talk with the police, or that he wanted an attorney. In fact, the 40-minute video of the interrogation shows that the defendant was willing to speak with the detective. After being read his rights, the defendant indicated that he wanted to tell his side of the story and he talked at length during the interrogation, often interrupting the detective, and responding without hesitation to the detective's questions. The video also shows that the defendant emphatically denied any wrongdoing; provided a detailed account of the evening's events; and seemed to try to talk his way out of custody. The court found this last point "worth emphasizing because it appears that, when faced with a choice between invoking his rights or trying to convince the police that he was innocent, defendant chose to do the latter." The court concluded that the defendant's course of conduct indicating waiver was much more pronounced than that of the defendant in *Berghuis,* who largely remained silent during a lengthy interrogation and who gave very limited responses when he did speak and nonetheless was found to have implicitly waived his rights. The court went on to conclude that, as in *Berghuis,* there was no evidence that the defendant's statements were involuntary. The defendant was not threatened in any way and the detective did not make any promises to get the defendant to talk. The interrogation was conducted in a standard room and lasted less than

40 minutes. The only factor that could even arguably constitute coercion was the fact that the defendant's arm was handcuffed to a bar on the wall in the interrogation room. The court noted however that his chair had an armrest, his arm had an ample range of motion, and he did not appear to be in discomfort during the interrogation. Thus, the court concluded, the defendant voluntarily waived his *Miranda* rights. The court went on to reject the defendant's argument that he did not understand his rights, again citing *Berghuis*. Here, the detective read all of the rights aloud, speaking clearly. The video shows that the defendant appeared to be listening and paying attention and that he speaks English fluently. The court noted that the defendant was mature and experienced enough to understand his rights, in part because of his prior experience with the criminal justice system. The trial court found the defendant gave no indication of cognitive issues, nor was there anything else that could have impaired his understanding of his rights. The court rejected the defendant's argument that the State must prove that the defendant explicitly stated that he understood his rights. Rather, it concluded that the State simply must prove, under the totality of the circumstances, that the defendant in fact understand them. The court went on to conclude that even if the defendant had expressly denied that he understood his rights, such a bare statement, without more, would not be enough to outweigh other evidence suggesting that he in fact understand them. The court summarized:

> [T]he fact that a defendant affirmatively denies that he understands his rights cannot, on its own, lead to suppression. Again, while an express written or oral statement of waiver of *Miranda* rights is usually strong proof of the validity of that waiver, it is neither necessary nor sufficient to establish waiver. Likewise, a defendant's affirmative acknowledgement that he understands his *Miranda* rights is neither necessary nor sufficient to establish that a defendant in fact understood them, because the test for a defendant's understanding looks to the totality of the circumstances. Just because a defendant says that he understands his rights, after all, does not mean that he actually understands them. By the same token, just because a defendant claims not to understand his rights does not necessarily mean that he does not actually understand them. In either situation, merely stating something cannot, in and of itself, establish that the thing stated is true. That is exactly why a trial court must analyze the totality of the circumstances to determine whether a defendant in fact understood his rights. As a result, even if defendant here had denied that he understood his rights—and again, in context it appears that he did not—that would not change our conclusion in this case. (citation omitted).

It continued, noting that any suggestion in the Court of Appeals' opinion suggesting that a defendant must make some sort of affirmative verbal response or affirmative gesture to acknowledge that he has understood his *Miranda* rights for his waiver to be valid "is explicitly disavowed." (citation omitted).

Blood Samples

State v. Romano, ___ N.C. ___, 800 S.E.2d 644 (June 9, 2017)
The court held, in this DWI case, that in light of the U.S. Supreme Court's decisions in *Birchfield v. North Dakota* (search incident to arrest doctrine does not justify the warrantless taking of a blood sample; as to the argument that the blood tests at issue were justified based on the driver's legally implied consent to submit to them, the Court concluded: "motorists cannot be deemed to have consented to submit to a blood test on pain of committing a criminal offense"), and *Missouri v. McNeely* (natural dissipation of alcohol in the bloodstream does not constitute an exigency in every case sufficient to justify conducting a blood test without a warrant; exigency must be determined on a case-by-case basis), G.S. 20-16.2(b) (allowing blood draw from an unconscious person) was unconstitutional as applied to defendant because it permitted a warrantless search that violates the Fourth Amendment. An officer, relying on G.S. 20-16.2(b), took possession of the defendant's blood from a treating nurse while the defendant was unconscious without first obtaining a warrant. The court rejected the State's implied consent argument: that because the case involved an implied consent offense, by driving on the road, the defendant consented to having his blood drawn for a blood test and never withdrew this statutorily implied consent before the blood draw. It continued:

> Here there is no dispute that the officer did not get a warrant and that there were no exigent circumstances. Regarding consent, the State's argument was based solely on N.C.G.S. § 20-16.2(b) as a per se exception to the warrant requirement. To be sure, the implied-consent statute, as well as a person's decision to drive on public roads, are factors to consider when analyzing whether a suspect has consented to a blood draw, but the statute alone does not create a per se exception to the warrant requirement. The State did not present any other evidence of consent or argue that under the totality of the circumstances defendant consented to a blood draw. Therefore, the State did not carry its burden of proving voluntary consent. As such, the trial court correctly suppressed the blood evidence and any subsequent testing of the blood that was obtained without a warrant.

Criminal Offenses

Sexual Assaults & Related Offenses

Packingham v. N.C., 582 U.S. ___, 137 S. Ct. 1730 (June 19, 2017)
North Carolina's statute, G.S. 14–202.5, making it a felony for a registered sex offender to gain access to a number of websites, including common social media websites like Facebook and Twitter, violates the First Amendment. After the defendant, a registered sex offender, accessed Facebook, he was charged and convicted under the statute. The Court of Appeals struck down his conviction, finding that the statute violated the First Amendment. The N.C. Supreme Court reversed. The U.S. Supreme Court granted certiorari and reversed North Carolina's high court. Noting the case "is one of the first this Court has taken to address the relationship between the First Amendment and the modern Internet," the Court noted that it "must exercise extreme

caution before suggesting that the First Amendment provides scant protection for access to vast networks in that medium." The Court found that even assuming that the statute is content neutral and thus subject to intermediate scrutiny, it cannot stand. In order to survive intermediate scrutiny, a law must be narrowly tailored to serve a significant governmental interest. Considering the statute at issue, the Court concluded:

> [T]the statute here enacts a prohibition unprecedented in the scope of First Amendment speech it burdens. Social media allows users to gain access to information and communicate with one another about it on any subject that might come to mind. By prohibiting sex offenders from using those websites, North Carolina with one broad stroke bars access to what for many are the principal sources for knowing current events, checking ads for employment, speaking and listening in the modern public square, and otherwise exploring the vast realms of human thought and knowledge. These websites can provide perhaps the most powerful mechanisms available to a private citizen to make his or her voice heard. They allow a person with an Internet connection to "become a town crier with a voice that resonates farther than it could from any soapbox."
>
> In sum, to foreclose access to social media altogether is to prevent the user from engaging in the legitimate exercise of First Amendment rights. It is unsettling to suggest that only a limited set of websites can be used even by persons who have completed their sentences. Even convicted criminals—and in some instances especially convicted criminals—might receive legitimate benefits from these means for access to the world of ideas, in particular if they seek to reform and to pursue lawful and rewarding lives. (citations omitted)

The Court went on to hold that the State had not met its burden of showing that "this sweeping law" is necessary or legitimate to serve its preventative purpose of keeping convicted sex offenders away from vulnerable victims. The Court was careful to note that its opinion "should not be interpreted as barring a State from enacting more specific laws than the one at issue." It continued: "Though the issue is not before the Court, it can be assumed that the First Amendment permits a State to enact specific, narrowly tailored laws that prohibit a sex offender from engaging in conduct that often presages a sexual crime, like contacting a minor or using a website to gather information about a minor."

State v. Baker, ___ N.C. ___, 799 S.E.2d 816 (June 9, 2017)
Reversing the Court of Appeals, the court held that the evidence was sufficient to support the defendant's conviction for attempted first-degree rape of a child. The Court of Appeals had reversed the defendant's conviction finding, in part, that the evidence supported only a conviction for completed rape, not an attempted rape. Citing precedent, the Supreme Court held that evidence of a completed rape is sufficient to support an attempted rape conviction.

Larceny

State v. Jones, ___ N.C. ___, 800 S.E.2d 54 (June 9, 2017)
The evidence was sufficient to support the defendant's convictions for three counts of felony larceny. The defendant, a truck driver who worked as an independent contractor, was overpaid because a payroll processor accidentally typed "$120,000" instead of "$1,200" into a payment processing system, resulting in an excess deposit in the defendant's bank account. Although the defendant was informed of the error and was asked not to remove the excess funds from his bank account, he made a series of withdrawals and transfers totaling over $116,000. In connection with one of the withdrawals, the defendant went to a bank branch. The teller who assisted him noted the large deposit and asked the defendant about it. The defendant replied that he had sold part of the business and requested further withdrawals. Because of the defendant's actions, efforts to reverse the deposit were unsuccessful. The defendant was convicted of three counts of larceny on the basis of his three withdrawals of the erroneously deposited funds. The Court of Appeals vacated the defendant's convictions, finding that he had not committed a trespassory taking. The Supreme Court reversed. The court noted that to constitute a larceny, a taking must be wrongful, that is, it must be "by an act of trespass." A larcenous trespass however may be either actual or constructive. A constructive trespass occurs when possession of the property is fraudulently obtained by some trick or artifice. However the trespass occurs, it must be against the possession of another. Like a larcenous trespass, another's possession can be actual or constructive. With respect to construing constructive possession for purposes of larceny, the court explicitly adopted the constructive possession test used in drug cases. That is, a person is in constructive possession of the thing when, while not having actual possession, he has the intent and capability to maintain control and dominion over that thing. The court found that the depositor retained constructive possession of the excess funds even after they had been transferred to the defendant's account. Specifically, the depositor had the intent and capability to maintain control and dominion over the funds by affecting a reversal of the deposit. The fact that the reversal order was not successful does not show that the depositor lacked constructive possession. The court went on to conclude that the defendant did not simultaneously have possession of the funds while they were in his account, a fact that would have precluded a larceny conviction. The court concluded that the defendant "was simply the recipient of funds that he knew were supposed to be returned in large part. He therefore had mere custody of the funds, not possession of them." It reasoned that when a person has mere custody of a property, he or she may be convicted of larceny when the property is appropriated to his or her own use with felonious intent.

Drug Offenses

State v. Rousseau, ___ N.C. ___, 805 S.E.2d 678 (Nov. 3, 2017)
On appeal from an unpublished decision of a divided panel of the Court of Appeals which had found no error with respect to the defendant's maintaining a vehicle conviction, the court affirmed per curiam. The defendant was convicted for maintaining a vehicle for the purpose of keeping a controlled substance. Before the Court of Appeals, he unsuccessfully argued that the trial court erred by denying his motion to dismiss for insufficiency of the evidence. Specifically,

the defendant argued that to prove the "keeping" element of the offense, the State must show that the vehicle was used over time for the illegal activity. The Court of Appeals found the cases cited by the defendant distinguishable, noting that here 29.927 grams of marijuana was found in a plastic bag, tucked in a sock, and placed in a vent inside the vehicle's engine compartment outside of the passenger area and remnants of marijuana were found throughout the vehicle's interior. The Court of Appeals noted, in part, that a jury may infer "keeping" from the remnants of the controlled substance found throughout the interior space of the vehicle and a storage space in it for the keeping of controlled substances in the engine compartment.

State v. Miller, ___ N.C. ___, 800 S.E.2d 400 (June 9, 2017)
Reversing a unanimous decision of the Court of Appeals, *State v. Miller*, ___ N.C. App. ___, ___, 783 S.E.2d 512 (2016), the court rejected the defendant's as-applied challenge to the constitutionality of G.S. 90-95(d1)(1)(c) (felony to possess a pseudoephedrine product when the defendant has a prior conviction for possession or manufacture of methamphetamine). After holding that the General Assembly intended the statute to be a strict liability offense, the Court of Appeals had gone on to hold that the statute was unconstitutional "as applied to a defendant in the absence of notice to the subset of convicted felons whose otherwise lawful conduct is criminalized thereby or proof beyond a reasonable doubt by the State that a particular defendant was aware that his possession of a pseudoephedrine product was prohibited by law." The Supreme Court began by noting that, as a general rule, ignorance of the law or a mistake of law is no defense to a criminal prosecution. In *Lambert v. California*, 355 U.S. 225 (1957), however, the United States Supreme Court sustained and as applied challenge to a municipal ordinance making it unlawful for any individual who had been convicted of a felony to remain in Los Angeles for more than five days without registering with the Chief of Police. In that case the defendant had no actual knowledge of the registration requirement and the ordinance did not require proof of willfulness. The issue presented was whether the registration act violated due process when applied to a person who has no actual knowledge of the duty to register, and where no showing is made of the probability of such knowledge. Acknowledging the rule that ignorance of the law is no excuse, the U.S. Supreme Court pointed out that due process conditions the exercise of governmental authority on the existence of proper notice where a person, wholly passive and unaware of any criminal wrongdoing, is charged with criminal conduct. Because the ordinance at issue in *Lambert* did not condition guilt on "any activity" and there were no surrounding circumstances which would have moved a person to inquire regarding registration, actual knowledge of the duty to register or proof of the probability of such knowledge and subsequent failure to comply were necessary before a conviction under the ordinance could stand consistent with due process. *Lambert* thus carves out a narrow exception to the general rule that ignorance of the law is no excuse. The subsequent *Bryant* decision from this court establishes that if the defendant's conduct is not "wholly passive," because it arises either from the commission of an act or failure to act under circumstances that reasonably could alert the defendant to the likelihood that inaction would subject him or her to criminal liability, *Lambert* does not apply. Turning to the facts of the case, the court noted that the defendant actively procured the pseudoephedrine product at issue. Moreover, the defendant never argued that he was ignorant of the fact that he possessed a pseudoephedrine product or that he had previously been convicted of methamphetamine

possession. His conduct thus differs from that at issue in *Lambert* and in this court's *Bryant* decision in that it was not a "wholly passive" failure to act. The court found no need to determine whether the surrounding circumstances should have put the defendant on notice that he needed to make inquiry into his ability to lawfully purchase products containing pseudoephedrine and that his as applied challenge failed. And it went on to conclude that the issue of whether the statute was a strict liability offense was not properly before it.

Defenses

State v. Holloman, ___ N.C. ___, 799 S.E.2d 824 (June 9, 2017)
Reversing the Court of Appeals, the Supreme Court held that the trial court's self-defense instructions were not erroneous. The court began by considering whether "North Carolina law allows an aggressor to regain the right to utilize defensive force based upon the nature and extent of the reaction that he or she provokes in the other party." Although historically North Carolina law did not allow an aggressor using deadly force to regain the right to exercise self-defense when the person to whom his or her aggression was directed responds by using deadly force in defense, changes in statutory law allow aggressor to regain that right under certain circumstances. But, G.S. 14-51.4(2)(a), allowing an aggressor to regain the right to utilize defensive force under certain circumstances, does not apply where the aggressor initially uses deadly force against the person provoked. Thus, the trial court did not err by instructing that a defendant who was the aggressor using deadly force had forfeited the right to use deadly force and that a person who displays a firearm to his opponent with the intent to use deadly force against him or her and provokes the use of deadly force in response is an aggressor. The court continued, noting that it also must determine whether the trial court erred by failing to instruct the jury, in accordance with the defendant's request, that he might have regained the right to use defensive force based on the victim's reaction to any provocative conduct in which the defendant might have engaged. The court concluded that a defendant "could have only been entitled to the delivery of such an instruction to the extent that his provocative conduct involved non-deadly, rather than deadly, force." Here, there was a complete absence of any evidence tending to show that the defendant used non-deadly force.

Post-Conviction Proceedings
Motions for Appropriate Relief

State v. Todd, ___ N.C. ___, 799 S.E.2d 834 (June 9, 2017)
The Supreme Court held that it had jurisdiction to decide an appeal from a divided decision of the Court of Appeals reversing a trial court's ruling denying a MAR. The defendant was convicted of armed robbery. He was unsuccessful on his direct appeal. The defendant then filed an MAR arguing that the evidence was insufficient to support his conviction and that his appellate counsel was ineffective for failing to raise this claim on appeal. The trial court denied the defendant's MAR. A divided Court of Appeals reversed, with instructions to grant the MAR and vacate the conviction. The Supreme Court noted that G.S. 7A-30(2) provides an automatic right of appeal based on a dissent at the Court of Appeals. However, that automatic right of appeal is limited by G.S. 7A-28, which states that decisions of the Court of Appeals upon review

of G.S. 15A-1415 MARs (MARs by the defendant filed more than 10 days after entry of judgment) are final and not subject to further review. However, the supervisory authority granted to the court by Article IV, Section 12 of the North Carolina Constitution gave the court a restriction to hear the appeal.

Recovery of Costs, Fees, Etc.

Nelson v. Colorado, 581 U.S. ___, 137 S. Ct. 1249 (Apr. 19, 2017)
The Court held that when a criminal conviction is invalidated by a reviewing court and no retrial will occur, is the State obliged to refund fees, court costs, and restitution exacted from the defendant upon, and as a consequence of, the conviction. Absent conviction of a crime, one is presumed innocent. Under the Colorado law in question, the State retains conviction-related assessments unless and until the prevailing defendant institutes a discrete civil proceeding and proves her innocence by clear and convincing evidence. The Court held that this scheme offends the Fourteenth Amendment's guarantee of due process. It concluded: "To comport with due process, a State may not impose anything more than minimal procedures on the refund of exactions dependent upon a conviction subsequently invalidated."