Significant 2010 Cases: U.S. & N.C. Supreme Courts

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Criminal Procedure

Appeal

State v. Ray, __ N.C. __, __ S.E.2d. __ (Aug. 27, 2010) (http://www.aoc.state.nc.us/www/public/sc/opinions/2010/pdf/307PA09-1.pdf). Reversing a decision of the court of appeals, __ N.C. App. __, 678 S.E.2d 378 (July 7, 2009) (ordering a new trial in a child sex case on grounds that the trial court erroneously admitted 404(b) evidence pertaining to instances of domestic violence between the defendant and his former girlfriend that occurred 15 years before the incident in question), the court held that although the defendant objected when the State forecast its evidence, by failing to object when the evidence was introduced at trial, the defendant failed to preserve the issue for appellate review. The defendant lost his remaining opportunity for appellate review by failing to argue plain error in the court of appeals. Finally, even if the defendant had preserved the issue, he would not be entitled to a new trial because he could not show prejudice.

State v. Davis, __ N.C. __, __ S.E.2d __ (Aug. 27, 2010) (http://www.aoc.state.nc.us/www/public/sc/opinions/2010/pdf/320PA09-1.pdf). (1) By failing to raise a constitutional double jeopardy argument at trial, the defendant failed to preserve the argument for appellate review. (2) Notwithstanding his failure to raise at trial a claim that under G.S. 20-141.4(b) the trial court lacked authority to impose punishment for certain motor vehicle crimes, the issue was preserved for appeal. When a trial court acts contrary to a statutory mandate and a defendant suffers prejudice, the right to appeal is preserved, notwithstanding a failure to object at trial.

State v. Waring, __ N.C. __, __ S.E.2d __ (Nov. 5, 2010) (http://www.aoc.state.nc.us/www/public/sc/opinions/2010/pdf/525A07-1.pdf). (1) A capital defendant unsuccessfully moved pretrial for suppression of certain statements that he made to the police. Because the defendant failed to object to the admission of those statements at trial, plain error review applied. (2) The court rejected a capital defendant's argument that the trial court committed plain error by failing to instruct the jury that the same evidence could not be used to support more than one aggravating circumstance. Because the trial court was under no duty to give such an instruction in the absence of a request, plain error review was not available to defendant.

State v. Bunch, __ N.C. __, __ S.E.2d __ (Mar. 12, 2010) (http://www.aoc.state.nc.us/www/public/sc/opinions/2010/pdf/203A09-1.pdf). Applying the harmless error standard to the defendant's claim that his rights under Article I, Section 24 of the North Carolina Constitution were violated when the trial court omitted elements of a crime from its instructions to the

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jury. On the facts presented, any error that occurred was harmless.

Civil Commitment

United States v. Comstock, 560 U.S. __ (May 17, 2010) (http://www.supremecourt.gov/opinions/09pdf/08-1224.pdf). The Court upheld the federal government's power to civilly commit a mentally ill, sexually dangerous federal prisoner beyond the date the prisoner would otherwise be released from prison. For a more detailed discussion of this case, see http://sogweb.sog.unc.edu/blogs/ncclaw/?p=1283

Double Jeopardy

Renico v. Lett, 559 U.S. __ (May 3, 2010) (http://www.supremecourt.gov/opinions/09pdf/09-338.pdf). The Michigan Supreme Court's decision concluding that the defendant's double jeopardy rights were not violated by a second prosecution after a mistrial on grounds of jury deadlock was not an unreasonable application of federal law. The state high court had elaborated on the standard for manifest necessity and noted the broad deference to be given to trial court judges; it had found no abuse of discretion in light of the length of the deliberations after a short and uncomplicated trial, a jury note suggesting heated discussion, and the foreperson's statement that the jury would be unable to reach a verdict. In light of these circumstances, it was reasonable for that court to determine that the trial judge had exercised sound discretion.

Indictment Issues

State v. Hinson, __ N.C. __, __ S.E.2d __ (Oct. 8, 2010) (http://www.aoc.state.nc.us/www/public/sc/opinions/2010/pdf/176A10-1.pdf). For the reasons stated in the dissenting opinion below, the court reversed *State v. Hinson*, __ N.C. App. __, 691 S.E.2d 63 (April 6, 2010). The defendant was indicted for manufacturing methamphetamine by "chemically combining and synthesizing precursor chemicals to create methamphetamine." However, the trial judge instructed the jury that it could find the defendant guilty if it found that he produced, prepared, propagated, compounded, converted or processed methamphetamine, either by extraction from substances of natural origin or by chemical synthesis. The court of appeals held, over a dissent, that this was plain error as it allowed the jury to convict on theories not charged in the indictment. The dissenting judge concluded that while the trial court's instructions used slightly different words than the indictment, the import of both the indictment and the charge were the same. The dissent reasoned that the manufacture of methamphetamine is accomplished by the chemical combination of precursor elements to create methamphetamine and that the charge to the jury, construed contextually as a whole, was correct.

Jury Selection

Berghuis v. Smith, 559 U.S. __ (Mar. 30, 2010) (http://www.supremecourt.gov/opinions/09pdf/08-1402.pdf). The state supreme court did not unreasonably apply clearly established federal law with respect to the defendant's claim that the method of jury selection violated his sixth amendment right to be tried by an impartial jury drawn from sources reflecting a fair cross-section of the community. The state supreme court assumed that African-Americans were underrepresented in venires from which juries were selected but went on to conclude that the defendant had not shown the third prong of the *Duren* prima facie case for fair cross section claims: that the underrepresentation was due to systemic exclusion of the group in the jury-selection process. The Court expressly declined to address the methods or methods by

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which underrepresentation is appropriately measured. For a more detailed discussion of this case, see the blog post at: http://sogweb.sog.unc.edu/blogs/ncclaw/?p=1175

Thaler v. Haynes, 559 U.S. __ (Feb. 22, 2010) (http://www.supremecourt.gov/opinions/09pdf/09-273.pdf). When an explanation for a peremptory challenge is based on a prospective juror's demeanor, the trial judge should consider, among other things, any observations the judge made of the prospective juror's demeanor during the voir dire. However, no previous decisions of the Court have held that a demeanor-based explanation must be rejected if the judge did not observe or cannot recall the prospective juror's demeanor.

Skilling v. United States, 561 U.S. __ (June 24, 2010) (http://www.supremecourt.gov/opinions/09pdf/08-1394.pdf). The defendant was tried for various federal crimes in connection with the collapse of Enron. The Court held that the defendant's Sixth Amendment right to trial by an impartial jury was not violated when the federal district court denied the defendant's motion to change venue because of pretrial publicity. The Court distinguished the case at hand from previous decisions and concluded that given the community's population (Houston, Texas), the nature of the news stories about the defendant, the lapse in time between Enron's collapse and the trial, and the fact that the jury acquitted the defendant of a number of counts, a presumption of juror prejudice was not warranted. The Court went on to conclude that actual prejudice did not infect the jury, given the voir dire process.

State v. Waring, __ N.C. __, __ S.E.2d __ (Nov. 5, 2010) (http://www.aoc.state.nc.us/www/public/sc/opinions/2010/pdf/525A07-1.pdf). (1) The trial court did not err in denying a capital defendant's *Batson* challenge when the defendant failed to established a prima facie case that the prosecutor's use of a peremptory challenge against Juror Rogers, an African-American female, was motivated by race. Because Ms. Rogers was the first prospective juror peremptorily challenged, there was no pattern of disproportionate use of challenges against African-Americans. Ms. Rogers was the only juror who stated, when first asked, that she was personally opposed to the death penalty. (2) The trial court did not err in denying a capital defendant's *Batson* challenge to the State's peremptory challenge of a second juror. There did not appear to be a systematic effort by the State to prevent African-Americans from serving when the State accepted 50% of African-American prospective jurors. The prosecutor's race-neutral reasons were that the juror had not formulated views on the death penalty, did not read the newspaper or watch the news, had been charged with a felony, and gave information regarding disposition of that charge that was inconsistent with AOC records. Considering these reasons in the context of the prosecutor's examination of similarly situated whites who were not peremptorily challenged, the court found they were not pretextual and that race was not a significant factor in the strike. (3) The court rejected the defendant's argument that a remand was required for further findings of fact under *Snyder v. Louisiana*, 552 U.S. 472 (2008). Unlike in *Snyder*, the case at hand did not involve peremptory challenges involving demeanor or other intangible observations that cannot be gleaned from the record. However, the court stated that "[c]onsistent with *Snyder*, we encourage the trial courts to make findings . . . to elucidate aspects of the jury selection process that are not preserved on the cold record so that review of such subjective factors as nervousness will be possible."

Jury Argument

State v. Waring, __ N.C. __, __ S.E.2d __ (Nov. 5, 2010) (http://www.aoc.state.nc.us/www/public/sc/opinions/2010/pdf/525A07-1.pdf). (1) No gross impropriety occurred in closing argument in the guilt-innocence phase of a capital trial when the prosecutor (a) asserted that a mark on the victim's forehead was caused by the defendant's shoe and evidence supported

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the statement; (b) improperly expressed his personal belief that there was overwhelming evidence of guilt; (c) improperly injected his personal opinion that a stab wound to the victim's neck showed intent; (d) suggested that the defendant's accomplice committed burglary at the victim's home; the comment only referred the accomplice, neither the defendant nor the accomplice were charged with burglary, and the trial court did not instruct the jury to consider burglary; or (e) suggested that the victim was killed to eliminate her as a witness when the argument was a reasonable extrapolation of the evidence made in the context of explaining mental state. (2) The trial court did not err by failing to intervene ex mero motu during the State's opening statement during the sentencing phase of a capital trial when the prosecutor stated that the "victim and the victim's loved ones would not be heard from." According to the defendant, the statement inflamed and misled the jury. The prosecutor's statement described the nature of the proceeding and provided the jury a forecast of what to expect. (3) The trial court did not err by failing to intervene ex mero motu during closing argument in the sentencing phase of a capital trial when the prosecutor (a) made statements regarding evidence of aggravating circumstances; the court rejected the argument that the prosecutor asked the jury to use the same evidence to find more than one aggravating circumstance; (b) improperly injected his personal beliefs, repeatedly using the words, "I think" and "I believe;" (c) used the words "laugh, laugh" when impeaching the credibility of a defense expert; (d) properly used a neighbor's experience to convey the victim's suffering and nature of the crime; (e) offered a hypothetical conversation with the victim's father; (f) referred to "gang life" to indicate lawlessness and unstrained behavior, and not as a reference to the defendant being in a gang or that the killing was gang-related; also the prosecutor's statements were supported by evidence about the defendant's connection to gangs; (g) asserted that defense counsel's mitigation case was a "lie" based on "half-truths" and omitted information. (4) The collective impact of these arguments did not constitute reversible error.

Sentencing

Graham v. Florida, 560 U.S. __ (May 17, 2010) (http://www.supremecourt.gov/opinions/09pdf/08-7412Modified.pdf). The Eighth Amendment's Cruel and Unusual Punishments Clause does not permit a juvenile offender to be sentenced to life in prison without the possibility of parole for a non-homicide crime. For a more detailed discussion of this case, see http://sogweb.sog.unc.edu/blogs/ncclaw/?p=1285

State v. Mumford , __ N.C. __, __ S.E.2d __ (Oct. 8, 2010) (http://www.aoc.state.nc.us/www/public/sc/opinions/2010/pdf/32PA10-1.pdf). The court reversed *State v. Mumford*, __ N.C. App. __, 688 S.E.2d 458 (Jan. 5, 2010) (trial court erred in its order requiring the defendant to pay restitution; vacating that portion of the trial court's order), and held that although the trial court erred by ordering the defendant to pay restitution when the defendant did not stipulate or otherwise unequivocally agree to the amount of restitution ordered, the error was not prejudicial. As to prejudice, the court reasoned: "[A]t the time the judgment is collected, defendant cannot be made to pay more than what is actually owed, that is, the amount actually due to the various entities that provided medical treatment to defendant's victims. Because defendant will pay the lesser of the actual amount owed or the amount ordered by the trial court, there is no prejudice to defendant."

Jones v. Keller, __ N.C. __, __ S.E.2d __ (Aug. 27, 2010) (http://www.aoc.state.nc.us/www/public/sc/opinions/2010/pdf/518PA09-1.pdf). The trial court erred by granting the petitioner habeas corpus relief from incarceration on the grounds that he had accumulated various credits against his life sentence, imposed on September 27, 1976. The petitioner had argued that when his good time, gain time, and merit time were credited to his life sentence, which was statutorily defined as a sentence of 80 years, he was entitled to unconditional release. The court rejected that

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argument, concluding that DOC allowed credits to the petitioner's sentence only for limited purposes that did not include calculating an unconditional release date. DOC had asserted that it recorded gain and merit time for the petitioner in the event that his sentence was commuted, at which time they would be applied to calculate a release date; DOC asserted that good time was awarded solely to allow him to move to the least restrictive custody grade and to calculate a parole eligibility date. The court found that the limitations imposed by DOC on these credits were statutorily and constitutionally permissible and that, therefore, the petitioner's detention was lawful. The court also rejected the petitioner's ex post facto and equal protection arguments.

Brown v. North Carolina DOC, __ N.C. __, __ S.E.2d __ (Aug. 27, 2010) (http://www.aoc.state.nc.us/www/public/sc/opinions/2010/pdf/517PA09-1.pdf). For the reasons stated in *Jones* (discussed above), the court held that the trial court erred by granting the petitioner habeas corpus relief from incarceration on the grounds that she had accumulated various credits against her life sentence.

Sex Offenders

Satellite-Based Monitoring (SBM)

State v. Bowditch, __ N.C. __, __ S.E.2d __ (Oct. 8, 2010) (http://www.aoc.state.nc.us/www/public/sc/opinions/2010/pdf/448PA09-1.pdf). Subjecting defendants to satellite-based monitoring (SBM) does not violate the constitutional prohibition against ex post facto laws. The defendants all pleaded guilty to multiple counts of taking indecent liberties with a child; all of the offenses occurred before the SBM statutes took effect. The defendants challenged their eligibility for SBM, arguing that their participation would violate prohibitions against ex post facto laws. The court rejected this argument, concluding that the SBM program was not intended to be criminal punishment and is not punitive in purpose or effect. The court first determined that in enacting the SBM program, the General Assembly's intention was to enact a civil, regulatory scheme, not to impose criminal punishment. It further concluded that, applying the *Mendoza-Martinez* factors, the SMB program is not so punitive either in purpose or effect as to negate the General Assembly's civil intent.

State v. Wagoner, __ N.C. __, __ S.E.2d __ (Oct. 8, 2010) (http://www.aoc.state.nc.us/www/public/sc/opinions/2010/pdf/396A09-1.pdf). For the reasons stated in *Bowditch*, the court affirmed *State v. Wagoner*, ___ N.C. App. ___, 683 S.E.2d 391 (Sept. 1, 2009) (holding, over a dissent, that requiring the defendant to enroll in SBM does not violate the constitutional prohibition against ex post facto law or double jeopardy).

State v. Morrow, __ N.C. __, __ S.E.2d __ (Oct. 8, 2010) (http://www.aoc.state.nc.us/www/public/sc/opinions/2010/pdf/461A09-1.pdf). For the reasons stated in *Bowditch*, the court affirmed *State v. Morrow*, __ N.C. App. __, 683 S.E.2d 754 (Oct. 6, 2009) (concluding, over a dissent, that the SBM statute does not violate the ex post facto clause).

State v. Vogt, __ N.C. __, __ S.E.2d __ (Oct. 8, 2010) (http://www.aoc.state.nc.us/www/public/sc/opinions/2010/pdf/465A09-1.pdf). For the reasons stated in *Bowditch*, the court affirmed *State v. Vogt*, __ N.C. App. __, 685 S.E.2d 23 (Nov. 3, 2009) (concluding, over a dissent, that the SBM statute does not violate the ex post facto clause).

State v. Hagerman, __ N.C. __, __ S.E.2d __ (Oct. 8, 2010) (http://www.aoc.state.nc.us/www/public/sc/opinions/2010/pdf/491A09-1.pdf). For the reasons stated in *Bowditch*, the court affirmed *State v. Hagerman*, __ N.C. App. __, 685 S.E.2d 153 (Nov. 3, 2009)

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(rejecting the defendant's *Apprendi* challenge to SBM; reasoning that because SBM is a civil remedy, it did not increase the maximum penalty for the crime.

Venue

Skilling v. United States, 561 U.S. __ (June 24, 2010) (http://www.supremecourt.gov/opinions/09pdf/08-1394.pdf). The defendant was tried for various federal crimes in connection with the collapse of Enron. The Court held that the defendant's Sixth Amendment right to trial by an impartial jury was not violated when the federal district court denied the defendant's motion to change venue because of pretrial publicity. The Court distinguished the case at hand from previous decisions and concluded that given the community's population (Houston, Texas), the nature of the news stories about the defendant, the lapse in time between Enron's collapse and the trial, and the fact that the jury acquitted the defendant of a number of counts, a presumption of juror prejudice was not warranted. The Court went on to conclude that actual prejudice did not infect the jury, given the voir dire process.

Verdict

Inconsistent Verdicts

State v. Mumford , __ N.C. __, __ S.E.2d __ (Oct. 8, 2010) (http://www.aoc.state.nc.us/www/public/sc/opinions/2010/pdf/32PA10-1.pdf). The court reversed *State v. Mumford*, __ N.C. App. __, 688 S.E.2d 458 (Jan. 5, 2010), and held that because a not guilty verdict under G.S. 20-138.1 (impaired driving) and a guilty verdict under G.S. 20-141.4(a3) (felony serious injury by vehicle) were merely inconsistent, the trial court did not err by accepting the verdict where it was supported with sufficient evidence. To require reversal, the verdicts would have to be both inconsistent and legally contradictory, also referred to as mutually exclusive verdicts (for example, guilty verdicts of embezzlement and obtaining property by false pretenses; the verdicts are mutually exclusive because property cannot be obtained simultaneously pursuant to both lawful and unlawful means). The court overruled *State v. Perry*, 305 N.C. 225 (1982) (affirming a decision to vacate a sentence for felonious larceny when the trial court returned a guilty verdict for felonious larceny but a not guilty verdict of breaking or entering), and *State v. Holloway*, 265 N.C. 581 (1965) (per curiam) (ordering a new trial when the defendant was found guilty of felonious larceny, but was acquitted of breaking or entering and no evidence was presented at trial to prove the value of the stolen goods), to the extent they were inconsistent with its holding.

Evidence

404(b) Evidence

State v. Jacobs, __ N.C. __, __ S.E.2d __ (Mar. 12, 2010) (http://www.aoc.state.nc.us/www/public/sc/opinions/2010/pdf/169A09-1.pdf). In a murder and attempted armed robbery trial, the trial court erred when it excluded the defendant's proposed testimony that he knew of certain violent acts by the victim and that the victim had spent time in prison. This evidence was relevant to the defendant's claim of self-defense to the murder charge and to his contention that he did not form the requisite intent for attempted armed robbery because "there is a greater disincentive to rob someone who has been to prison or committed violent acts." The evidence was admissible under Rule 404(b) because it related to the defendant's state of mind. The court also held that certified copies of the victim's convictions were admissible under Rule 404(b) because they served the proper purpose of corroborating the defendant's testimony that the victim was a violent person who had been incarcerated. *State v. Wilkerson*, 148 N.C. App. 310, *rev'd per curiam*, 356 N.C. 418 (2002) (bare fact of the

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defendant's conviction, even if offered for a proper Rule 404(b) purpose, must be excluded under Rule 403), did not require exclusion of the certified copies of the victim's convictions. Unlike evidence of the defendant's conviction, evidence of certified copies of the victim's convictions does not encourage the jury to acquit or convict on an improper basis.

Cross Examination

State v. Waring, __ N.C. __, __ S.E.2d __ (Nov. 5, 2010) (http://www.aoc.state.nc.us/www/public/sc/opinions/2010/pdf/525A07-1.pdf). (1) In the guilt phase of a capital trial, the trial court did not err by limiting the defendant's recross-examination of law enforcement officers about whether an alleged accomplice cooperated with the police. The defendant failed to establish how the accomplice's cooperation was relevant to the defendant's guilt. Furthermore, the State's questioning did not elicit responses that required explanation or rebuttal or otherwise opened the door for the defendant's questions. (2) In the sentencing phase of a capital trial, the trial court did not abuse its discretion by overruling the defendant's objection to the State's cross-examination of a defense expert seeking to elicit a concession that other experts might disagree with his opinions regarding whether the defendant was malingering. (3) In the sentencing phase of a capital trial, the trial court did not err by failing to intervene ex mero motu when the prosecutor asked the defendant's expert witness whether he was ethically obligated to record the defendant's test results on a score sheet and about the defendant's scores in the scale for violence potential.

Character of Victim

State v. Jacobs, __ N.C. __, __ S.E.2d __ (Mar. 12, 2010) (http://www.aoc.state.nc.us/www/public/sc/opinions/2010/pdf/169A09-1.pdf). In a murder and attempted armed robbery trial, the trial court erred when it excluded the defendant's proposed testimony that he knew of certain violent acts by the victim and that the victim's time in prison. This evidence was relevant to the defendant's claim of self-defense to the murder charge and to his contention that he did not form the requisite intent for attempted armed robbery because "there is a greater disincentive to rob someone who has been to prison or committed violent acts." The evidence was admissible under Rule 404(b) because it related to the defendant's state of mind.

Crawford Issues

Briscoe v. Virginia, 559 U.S. __ (Jan. 25, 2010) (http://www.supremecourt.gov/opinions/09pdf/07-11191.pdf). Certiorari was granted in this case four days after the Court decided *Melendez-Diaz*. The case presented the following question: If a state allows a prosecutor to introduce a certificate of a forensic laboratory analysis, without presenting the testimony of the analyst who prepared the certificate, does the state avoid violating the Confrontation Clause by providing that the accused has a right to call the analyst as his or her own witness? The Court's two-sentence per curiam decision vacated and remanded for "further proceedings not inconsistent with the opinion in *Melendez-Diaz.*"

Opinions

Expert Opinions

State v. Ward, __ N.C. __, __ S.E.2d __ (June 17, 2010) (online at: http://www.aoc.state.nc.us/www/public/sc/opinions/2010/pdf/365PA09-1.pdf). In a drug case, the trial court abused its discretion by allowing the State's expert in chemical analyses of drugs and forensic

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chemistry to identify the pills at issue as controlled substances when the expert's method of making that identification consisted of a visual inspection and comparison with information in Micromedex literature, a publication used by doctors in hospitals and pharmacies to identify prescription medicines. The court concluded that the expert's proffered method of proof was not sufficiently reliable under the first prong of the *Howerton/Goode* analysis. It concluded: "Unless the State establishes before the trial court that another method of identification is sufficient to establish the identity of the controlled substance beyond a reasonable doubt, some form of scientifically valid chemical analysis is required." The court limited its holding to Rule 702 and stated that it "does not affect visual identification techniques employed by law enforcement for other purposes, such as conducting criminal investigations." Finally, the court indicated that "common sense limits this holding regarding the scope of the chemical analysis that must be performed." It noted that in the case at issue, the State submitted sixteen batches of over four hundred tablets to the laboratory, and that "a chemical analysis of each individual tablet is not necessary." In this regard, the court reasoned that the "SBI maintains standard operating procedures for chemically analyzing batches of evidence, and the propriety of those procedures is not at issue here. A chemical analysis is required in this context, but its scope may be dictated by whatever sample is sufficient to make a reliable determination of the chemical composition of the batch of evidence under consideration."

State v. Waring, __ N.C. __, __ S.E.2d __ (Nov. 5, 2010) (http://www.aoc.state.nc.us/www/public/sc/opinions/2010/pdf/525A07-1.pdf). The trial court properly sustained the State's objection to the defendant's attempt to introduce opinion testimony regarding his IQ from a special education teacher who met the defendant when he was eleven years old. Because the witness had not been tendered as an expert, her speculation as to IQ ranges was inadmissible.

Limits on Relevancy
Rule 403

State v. Jacobs, __ N.C. __, __ S.E.2d __ (Mar. 12, 2010) (http://www.aoc.state.nc.us/www/public/sc/opinions/2010/pdf/169A09-1.pdf). *State v. Wilkerson*, 148 N.C. App. 310, *rev'd per curiam*, 356 N.C. 418 (2002) (bare fact of the defendant's conviction, even if offered for a proper Rule 404(b) purpose, must be excluded under Rule 403), did not require exclusion of certified copies of the victim's convictions. Unlike evidence of the defendant's conviction, evidence of the victim's convictions does not encourage the jury to acquit or convict on an improper basis.

State v. Waring, __ N.C. __, __ S.E.2d __ (Nov. 5, 2010) (http://www.aoc.state.nc.us/www/public/sc/opinions/2010/pdf/525A07-1.pdf). In a capital murder case, the trial court did not abuse its discretion by allowing the State to introduce for illustrative purposes 18 autopsy photographs of the victim. Cynthia Gardner, M.D. testified regarding her autopsy findings, identified the autopsy photos, and said they accurately depicted the body, would help her explain the location of the injuries, and accurately depicted the injuries to which Dr. Gardner had testified. The photos were relevant and probative, not unnecessarily repetitive, not unduly gruesome or inflammatory, and illustrated both Gardner's testimony and the defendant's statement to the investigators.

Arrest, Search, and Investigation
Arrests and Investigatory Stops
Arrests

Steinkrause v. Tatum, __ N.C. __, __ S.E.2d __ (Oct. 8, 2010) (http://www.aoc.state.nc.us/www/public/sc/opinions/2010/pdf/18A10-1.pdf). The court affirmed per

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curiam *Steinkrause v. Tatum*, __ N.C. App. __, 689 S.E.2d 379 (Dec. 8, 2009) (holding, over a dissent, that there was probable cause to arrest the defendant for impaired driving in light of the severity of the one-car accident coupled with an odor of alcohol).

Stops

State v. Mello, __ N.C. __, __ S.E.2d __ (Oct. 8, 2010) (http://www.aoc.state.nc.us/www/public/sc/opinions/2010/pdf/490A09-1.pdf). The court affirmed per curiam *State v. Mello*, __ N.C. App. __, __ S.E.2d __ (Nov. 3, 2009) (holding, over a dissent, that reasonable suspicion supported a vehicle stop; while in a drug-ridden area, an officer observed two individuals approach and insert their hands into the defendant's car; after the officer became suspicious and approached the group, the two pedestrians fled, and the defendant began to drive off).

Miranda

Florida v. Powell, 559 U.S. __ (Feb. 23, 2010) (http://www.supremecourt.gov/opinions/09pdf/08-1175.pdf). Advice by law enforcement officers that the defendant had "the right to talk to a lawyer before answering any of [the law enforcement officers'] questions" and that he could invoke this right "at any time . . . during th[e] interview," satisfied *Miranda*'s requirement that the defendant be informed of the right to consult with a lawyer and have the lawyer present during the interrogation. Although the warnings were not as clear as they could have been, they were sufficiently comprehensive and comprehensible when given a commonsense reading. The Court cited the standard warnings used by the FBI as "exemplary," but declined to require that precise formulation to meet *Miranda*'s requirements.

Maryland v. Shatzer, 559 U.S. __ (Feb. 24, 2010) (http://www.supremecourt.gov/opinions/09pdf/08-680.pdf). The Court held that a 2½ year break in custody ended the presumption of involuntariness established in *Edwards v. Arizona*, 451 U.S. 477 (1981) (when a defendant invokes the right to have counsel present during a custodial interrogation, a valid waiver of that right cannot be established by showing that the defendant responded to further police-initiated custodial interrogation even if the defendant has been advised of his *Miranda* rights; the defendant is not subject to further interrogation until counsel has been provided or the defendant initiates further communications with the police). The defendant was initially interrogated about a sexual assault while in prison serving time for an unrelated crime. After *Miranda* rights were given, he declined to be interviewed without counsel, the interview ended, and the defendant was released back into the prison's general population. 2½ years later another officer interviewed the defendant in prison about the same sexual assault. After the officer read the defendant his *Miranda* rights, the defendant waived those rights in writing and made incriminating statements. At trial, the defendant unsuccessfully tried to suppress his statements pursuant to *Edwards*. The Court concluded: "The protections offered by *Miranda*, which we have deemed sufficient to ensure that the police respect the suspect's desire to have an attorney present the first time police interrogate him, adequately ensure that result when a suspect who initially requested counsel is reinterrogated after a break in custody that is of sufficient duration to dissipate its coercive effects." The Court went on to set a 14-day break in custody as the bright line rule for when the *Edwards* protection terminates. It also concluded that the defendant's release back into the general prison population to continue serving a sentence for an unrelated conviction constituted a break in *Miranda* custody.

Berghuis v. Thompkins, 560 U.S. __ (June 1, 2010) (available at: http://www.supremecourt.gov/opinions/09pdf/08-1470.pdf). The defendant was arrested in connection with a shooting that left one victim dead and another injured. At the start of their interrogation of the

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

State v. Waring, __ N.C. __, __ S.E.2d __ (Nov. 5, 2010) (http://www.aoc.state.nc.us/www/public/sc/opinions/2010/pdf/525A07-1.pdf). (1) A capital defendant was not in custody when he admitted that he stabbed the victim. Considering the totality of the circumstances, the defendant is an adult with prior criminal justice system experience; the officer who first approached the defendant told him that he was being detained until detectives arrived but that he was not under arrest; when the detectives arrived and told him that he was not under arrest, the defendant voluntarily agreed to go to the police station; the defendant was never restrained and was left alone in the interview room with the door unlocked and no guard; he was given several bathroom breaks and offered food and drink; the defendant was cooperative; the detectives did not raise their voices, use threats, or make promises; the defendant was never misled, deceived, or confronted with false evidence; once the defendant admitted his involvement in the killing, the interview ended and he was given his *Miranda* rights. Although the first officer told the defendant that he was "detained," he also told the defendant he was not under arrest. Any custody associated with the detention ended when the defendant voluntarily accompanied detectives, who confirmed that he was not under arrest. The defendant's inability to leave the interview room without supervision or escort did not suggest custody; the defendant was in a non-public area of the station and prevention of unsupervised roaming in such a space would not cause a reasonable person to think that a formal arrest had occurred. (2) The court rejected the defendant's argument that by telling officers that he did not want to snitch on anyone and declining to reveal the name of his accomplice, the defendant invoked his right to remain silent requiring that all interrogation cease.

Searches

City of Ontario v. Quon, 560 U.S. __ (June 17, 2010) (http://www.supremecourt.gov/opinions/09pdf/08-1332.pdf). Because a search of a government employee's text messages sent and received on a

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government-issued pager was reasonable, there was no violation of Fourth Amendment rights.

Criminal Offenses

First Amendment Issues

United States v. Stevens, __ U.S. __ (No. 08-769) (April 20, 2010) (http://www.supremecourt.gov/opinions/09pdf/08-769.pdf). Federal statute enacted to criminalize the commercial creation, sale, or possession of certain depictions of animal cruelty was substantially overbroad and violated the First Amendment.

Acting in Concert

State v. Waring, __ N.C. __, __ S.E.2d __ (Nov. 5, 2010) (http://www.aoc.state.nc.us/www/public/sc/opinions/2010/pdf/525A07-1.pdf). In a capital case involving two perpetrators, the court rejected the defendant's argument that the State should have been obligated to prove that the defendant himself had the requisite intent. The trial court properly instructed on acting in concert with respect to the murder charge, in accordance with *State v. Barnes*, 345 N.C. 184 (1998).

Possession of Stolen Goods

State v. Tanner, __ N.C. __, __ S.E.2d __ (June 17, 2010) (online at: http://www.aoc.state.nc.us/www/public/sc/opinions/2010/pdf/474PA08-1.pdf). Reversing the Court of Appeals and overruling *State v. Marsh*, 187 N.C. App. 235 (2007), and *State v. Goblet*, 173 N.C. App. 112 (2005), the Supreme Court held that a defendant who is acquitted of underlying breaking or entering and larceny charges may be convicted of felonious possession of stolen goods on a theory that the defendant knew or had reasonable grounds to believe that the goods were stolen.

Weapons Offenses

Constitutional Issues

McDonald v. City of Chicago, 561 U.S. __ (June 28, 2010) (http://www.supremecourt.gov/opinions/09pdf/08-1521.pdf). The Second Amendment right to keep and bear arms applies to the states. For a more detailed discussion of this case see the blog post, *McDonald's* Impact in North Carolina (online at: http://sogweb.sog.unc.edu/blogs/ncclaw/?p=1386).

State v. Whitaker, __ N.C. __, __ S.E.2d __ (Oct. 8, 2010) (http://www.aoc.state.nc.us/www/public/sc/opinions/2010/pdf/21A10-1.pdf). Affirming, *State v. Whitaker*, __ N.C. App. __, 689 S.E.2d 395 (Dec. 8, 2009), the court held that G.S. 14-415.1, the felon in possession statute, was not an impermissible ex post facto law or bill of attainder.

Motor Vehicle Offenses

State v. Davis, __ N.C. __, __ S.E.2d __ (Aug. 27, 2010) (http://www.aoc.state.nc.us/www/public/sc/opinions/2010/pdf/320PA09-1.pdf). The trial court erred by imposing punishment for felony death by vehicle and felony serious injury by vehicle when the defendant also was sentenced for second-degree murder and assault with a deadly weapon inflicting serious injury based on the same conduct. G.S. 20-141.4(a) prescribes the crimes of felony and misdemeanor death by vehicle, felony serious injury by vehicle, aggravated felony serious injury by vehicle, aggravated felony

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death by vehicle, and repeat felony death by vehicle. G.S. 20-141.4(b), which sets out the punishments for these offenses, begins with the language: "Unless the conduct is covered under some other provision of law providing greater punishment, the following classifications apply to the offenses set forth in this section[.]" Second-degree murder and assault with a deadly weapon inflicting serious injury provide greater punishment than felony death by vehicle and felony serious injury by vehicle. The statute thus prohibited the trial court from imposing punishment for felony death by vehicle and felony serious injury by vehicle in this case.

Defenses

Self-Defense

State v. Moore, __ N.C. __, __ S.E.2d __ (Jan. 29, 2010) (http://www.aoc.state.nc.us/www/public/sc/opinions/2010/pdf/60A09-1.pdf). The trial court erred by refusing to instruct the jury on self-defense and defense of a family member. Viewed in the light most favorable to the defendant, the evidence showed that the defendant was at his produce stand; the victim was a 16-year-old male, approximately 6 feet tall and 180 pounds; the victim had a physical altercation with the defendant's wife as he attempted to rob the cash box; the victim struck at the defendant's wife and violently pulled at the cash box; the defendant's wife, was "scared to death" and cried out for her husband; when the defendant ordered the victim to "back off", the victim did so, but placed his hand in his pocket, and as he again approached the defendant and the defendant's wife, began to pull his hand from his pocket; and defendant shot the victim once because he feared for the safety of his wife, his grandson, and himself. The defendant's evidence was sufficient to show that he believed that it was necessary to use force to prevent death or great bodily injury to himself or a family member.

State v. Cruz, __ N.C. __, __ S.E.2d __ (Oct. 8, 2010) (http://www.aoc.state.nc.us/www/public/sc/opinions/2010/pdf/193A10-1.pdf). The court affirmed per curiam *State v. Cruz*, __ N.C. App. __, 691 S.E.2d 47 (April 6, 2010) (holding, in a murder case, and over a dissenting opinion, that an instruction on self-defense was not required where there was no evidence that the defendant believed it was necessary to kill the victim in order to save himself from death or great bodily harm).

Post-Conviction

Ineffective Assistance of Counsel

***Strickland* Attorney Error Claims**

Padilla v. Kentucky, 559 U.S. __ (Mar. 31, 2010) (http://www.supremecourt.gov/opinions/09pdf/08-651.pdf). After pleading guilty to a charge of transportation of a large amount of marijuana, the defendant, a lawful permanent resident of the United States for more than 40 years, faced deportation. He challenged his plea, arguing that his counsel rendered ineffective assistance by failing to inform him that the plea would result in mandatory deportation and by incorrectly informing him that he did not have to worry about his immigration status because he had been in the country so long. The Court concluded that when, as in the present case, "the deportation consequence [of a plea] is truly clear," counsel must correctly inform the defendant of this consequence. However, the Court continued, where deportation consequences of a plea are "unclear or uncertain[] [t]he duty of the private practitioner . . . is more limited." It continued: "When the law is not succinct and straightforward . . . , a criminal defense attorney need do no more than advise a noncitizen client that pending criminal charges may carry a risk of adverse immigration consequences." The Court declined to rule whether the defendant was prejudiced by his lawyer's deficient conduct.

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Smith v. Spisak, 558 U.S. __ (Jan. 12, 2010) (http://www.supremecourt.gov/opinions/09pdf/08-724.pdf). Even if counsel's closing argument at the sentencing phase of a capital trial fell below an objective standard of reasonableness, the defendant could not show that he was prejudiced by this conduct.

Wood v. Allen, 558 U.S. __ (Jan. 20, 2010) (http://www.supremecourt.gov/opinions/09pdf/08-9156.pdf). The state court's conclusion that the defendant's counsel made a strategic decision not to pursue or present evidence of his mental deficiencies was not an unreasonable determination of the facts. The Court did not reach the question of whether the strategic decision itself was a reasonable exercise of professional judgment under *Strickland.*

Sears v. Upton, 561 U.S. __ (June 29, 2010) (per curiam) (http://www.supremecourt.gov/opinions/09pdf/09-8854.pdf). After the defendant was sentenced to death in state court, a state post-conviction court found that the defendant's lawyer conducted a constitutionally inadequate penalty phase investigation that failed to uncover evidence of the defendant's significant mental and psychological impairments. However, the state court found itself unable to assess whether counsel's conduct prejudiced the defendant; because counsel presented some mitigating evidence, the state court concluded that it could not speculate as to the effect of the new evidence. It thus denied the defendant's claim of ineffective assistance. The United State Supreme Court held that although the state court articulated the correct prejudice standard (whether there was a reasonable likelihood that the outcome of the trial would have been different if counsel had done more investigation), it failed to properly apply that standard. First, the state court put undue reliance on the assumed reasonableness of counsel's mitigation theory, given that counsel conducted a constitutionally unreasonable mitigation investigation and that the defendant still might have been prejudiced by counsel's failures even if his theory was reasonable. More fundamentally, the Court continued, in assessing prejudice, the state court failed to consider the totality of mitigation evidence (both that adduced at trial and the newly uncovered evidence). The prejudice inquiry, the Court explained, requires the state court to speculate as to the effect of the new evidence. A proper prejudice inquiry, it explained, requires the court to consider the newly discovered evidence along with that introduced at trial and assess whether there is a significant probability that the defendant would have received a different sentence after a constitutionally sufficient mitigation investigation.

Motions for Appropriate Relief--Claims That Can Be Raised

State v. Chandler, __ N.C. __, __ S.E.2d __ (Aug. 27, 2010) (http://www.aoc.state.nc.us/www/public/sc/opinions/2010/pdf/298PA09-1.pdf). On the State's petition for writ of certiorari, the court reversed the trial court and held that no significant change in the law pertaining to the admissibility of expert opinions in child sexual abuse cases had occurred and thus that the defendant was not entitled to relief under G.S. 15A-1415(b)(7) (in a motion for appropriate relief, a defendant may assert a claim that there has been a significant change in law applied in the proceedings leading to the defendant's conviction or sentence, and retroactive application of the changed legal standard is required). Contrary to the trial court's findings and conclusions, *State v. Stancil*, 355 N.C. 266 (2002), was not a significant change in the law, but merely an application of the court's existing case law on expert opinion evidence requiring that in order for an expert to testify that abuse occurred, there must be physical findings consistent with abuse.

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Jails and Corrections

Wilkins v. Gaddy, 559 U.S. __ (Feb. 22, 2010) (http://www.supremecourt.gov/opinions/09pdf/08-10914.pdf). Trial court erred by dismissing the prisoner's excessive force claim on grounds that his injuries were de minimis. In an excessive force claim, the core inquiry is not whether a certain quantum of injury was sustained but rather whether the force was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm.

Judicial Administration

Closing the Courtroom

Presley v. Georgia, 558 U.S. __ (Jan. 19, 2010) (http://www.supremecourt.gov/opinions/09pdf/09-5270.pdf). The Sixth Amendment right to a public trial extends to the voir dire of prospective jurors. Trial courts are required to consider alternatives to closure even when they are not offered by the parties.

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