UNC SCHOOL OF GOVERNMENT

2017 Annual Contractors and Assigned Counsel Training

June 23, 2017— UNC-Chapel Hill School of Government

Sponsored by the UNC-Chapel Hill School of Government
North Carolina Office of Indigent Defense Services
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8:00	**Check- in**	
8:45 – 9:00 **Room 2603**	**Welcome & Announcements** Austine Long, Program Attorney, UNC School of Government, Chapel Hill, NC	
9:00 – 10:00 **Room 2603**	**Critical Moments in Client Representation [Ethics 60 min.]** Tucker Charns, Regional Defender, NC Office of Indigent Defense Services, Durham, NC	
10:00 – 11:00 **Room 2603**	**Case Law Update [60 min.]** Phil Dixon, Defender Educator, UNC School of Government, Chapel Hill, NC John Rubin, Prof. of Public Law & Government., UNC School of Government, Chapel Hill, NC	
11:00 – 11:15	**Break**	
11:15 – 12:15	**Suppressing Evidence in District Court [60 min]** John Rubin, Prof. of Public Law & Government., UNC School of Government, Chapel Hill, NC	**Defending Habitual Felon Cases [60 min.]** Toussaint Romain, Assistant Public Defender Mecklenburg County, NC Sunny Panyanouvong-Rubeck, Assistant Public Defender Mecklenburg County, NC
12:15 – 1:00	**Lunch** (provided in the building) Address by Tom Maher, Executive Director, NC Office of Indigent Defense Services, NC	
1:00 – 2:00	**Defending Domestic Violence Cases [60 min.]** Valerie Pearce, Regional Defender, NC Office of Indigent Defense Services, Durham, NC	
2:00 – 3:00	**Mitigation Investigation [60 min]** Elaine Gordon, Attorney & Mitigation Investigator Raleigh, NC	
3:00 – 3:15	**Break** (Light snack provided) Atrium	
3:15 – 4:15	**Immigration [60 min]** Tom Fulghum, Attorney at Law, Durham, NC	

CLE Hours: **General: 5.0**
Ethics: 1.0

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2017 Criminal Law Contractors Training

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UNC SCHOOL OF GOVERNMENT

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If your e-mail address is *not* included on an IDS listserv and you would like to receive information and updates about Indigent Defense Education trainings, manuals, and other resources, please visit the School of Government's Indigent Defense Education site at:

www.sog.unc.edu/programs/indigentdefense

(Click *Sign Up for Program Information and Updates*)

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UNC School of Government
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Indigent Defense Education at the UNC School of Government
https://www.sog.unc.edu/resources/microsites/indigent-defense-education

TRAINING

Calendar of Live Training Events
https://www.sog.unc.edu/resources/microsites/indigent-defense-education/calendar-live-events

Online Training
https://www.sog.unc.edu/resources/microsites/indigent-defense-education/online-training-cles

MANUALS

Orientation Manual for Assistant Public Defenders
https://www.sog.unc.edu/resources/microsites/indigent-defense-education/orientation-manual-assistant-public-defenders-introduction

Indigent Defense Manual Series (collection of reference manuals addressing law and practice in areas in which indigent defendants and respondents are entitled to representation of counsel at state expense)
http://defendermanuals.sog.unc.edu/

UPDATES

On the Civil Side Blog
http://civil.sog.unc.edu/

NC Criminal Law Blog
https://www.sog.unc.edu/resources/microsites/criminal-law-north-carolina/criminal-law-blog

Criminal Law in North Carolina Listserv (to receive summaries of criminal cases as well as alerts regarding new NC criminal legislation)
http://www.sog.unc.edu/crimlawlistserv

TOOLS and RESOURCES

Collateral Consequences Assessment Tool (centralizes collateral consequences imposed under NC law and helps defenders advise clients about the impact of a criminal conviction)
http://ccat.sog.unc.edu/

Motions, Forms, and Briefs Bank
https://www.sog.unc.edu/resources/microsites/indigent-defense-education/motions-forms-and-briefs

Training and Reference Materials Index (includes manuscripts and materials from past trainings co-sponsored by IDS and SOG)
http://www.ncids.org/Defender%20Training/Training%20Index.htm

CRITICAL MOMENTS IN CLIENT REPRESENTATION

CASE LAW UPDATE

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Criminal Case Update

(includes selected cases decided between October 4, 2016 and June 6, 2017)

The summaries are drawn from criminal case summaries prepared by Jessica Smith. To view all of the summaries, go to the Criminal Case Compendium. Summaries of Fourth Circuit cases were prepared by Bob Farb. To obtain the summaries automatically by email, sign up for the Criminal Law Listserv.

Contents

Investigation Issues

Warrantless Stops and Searches

Applying *California v. Hodari*, 499 U.S. 621 (1991), court rules that no seizure occurred until the defendant's vehicle stopped and submitted to the officer's authority. The circumstances arising between the activation of the officer's blue lights and the defendant submitting to the officer's authority may be considered as part of the inquiry into reasonable suspicion.

State v. Mangum, ___ N.C. App. ___, 795 S.E.2d 106 (Dec. 6, 2016). (1) In this impaired driving case, the defendant was not seized within the meaning of the fourth amendment until he submitted to the officer's authority by stopping his vehicle. The court rejected the defendant's argument that the seizure occurred when the officer activated his blue lights. Because the defendant continued driving after the blue lights were activated, there was no submission to the officer's authority and no seizure until the defendant stopped his vehicle. As a result, the reasonable suspicion inquiry can consider circumstances that arose after the officer's activation of his blue lights but before the defendant's submission to authority. (2) The vehicle stop was supported by reasonable suspicion. An officer received an anonymous report that a drunk driver was operating a black, four-door Hyundai headed north on Highland Capital Boulevard. The officer located the vehicle as reported and observed that the defendant drove roughly 15 miles below the 35 mph speed limit; that the defendant stopped at an intersection without a stop sign or traffic signal for "longer than usual"; that the defendant stopped at a railroad crossing and remained motionless for 15 to 20 seconds, although no train was coming and there was no signal to stop; that after the officer activated his blue lights, the defendant continued driving for approximately two minutes, eventually stopping in the middle of the road, and in a portion of the road with no bank or curb, having passed several safe places to pull over. [Bob Farb blogged about the case here.]

Where uniformed officer on foot waved his hands for a vehicle to stop to seek information on another person but did not obstruct or otherwise formally display police authority, the encounter was consensual and no seizure occurred under the totality of the circumstances.

State v. Wilson, ___ N.C. App. ___, 793 S.E.2d 737 (Dec. 6, 2016). In this impaired driving case, the court held, over a dissent, that the trial court properly denied the defendant's motion to suppress where no seizure occurred. An officer went to a residence to find a man who had outstanding warrants for his arrest. While walking towards the residence, the officer observed a pickup truck leaving. The officer waved his hands to tell the driver—the defendant—to stop. The officer's intention was to ask the defendant if he knew anything about the man with the outstanding warrants; the officer had no suspicion that the defendant was the man he was looking for or was engaged in criminal activity. The officer was in uniform but had no weapon drawn; his police vehicle was not blocking the road and neither his vehicle's blue lights nor sirens were activated. When the defendant stopped the vehicle, the officer almost immediately smelled an odor of alcohol from inside the vehicle. After the defendant admitted that he had been drinking, the officer arrested the defendant for impaired driving. Because a

reasonable person would have felt free to decline the officer's request to stop, no seizure occurred; rather, the encounter was a consensual one. [Shea Denning blogged about the case here.]

Stop was supported by reasonable suspicion.

State v. Evans, ___ N.C. App. ___, 795 S.E.2d. 444 (Jan. 17, 2017). Reasonable suspicion supported the stop. An officer patrolling a "known drug corridor" at 4 am observed the defendant's car stopped in the lane of traffic. An unidentified pedestrian approach the defendant's car and leaned in the window. The officer found these actions to be indicative of a drug transaction and thus conducted the stop.

That a state allows the concealed carry of firearms pursuant to a permit system does not alter the ability of an officer to frisk an individual otherwise lawfully stopped where reasonable suspicion exists to believe they are armed and dangerous. The 4th Circuit holds 'armed and dangerous' is a unitary concept.

United States v. Robinson, 846 F.3d 694 (4th Cir. Jan. 23, 2017) (*en banc*). "After receiving a[n anonymous] tip that a man in a parking lot well known for drug-trafficking activity had just loaded a firearm and then concealed it in his pocket before getting into a car as a passenger . . . police stopped the car after observing that its occupants were not wearing seatbelts. Reasonably believing that the . . . passenger . . . was armed, the police frisked him and uncovered the firearm, leading to his arrest for the possession of a firearm by a felon." The defendant moved to suppress, arguing that the officers lacked reasonable suspicion to believe that he was armed and dangerous, as they had no reason to believe that he was not a concealed carry permit holder. The Fourth Circuit disagreed, "concluding that an officer who makes a lawful traffic stop and who has a reasonable suspicion that one of the automobile's occupants is armed may frisk that individual for the officer's protection and the safety of everyone on the scene." The court determined that a risk of danger sufficient to justify a frisk arises "from the combination of a forced police encounter and the presence of a weapon," even if the weapon is possessed legally. Indeed, the court stated that "traffic stops alone are inherently dangerous for police officers." It also emphasized that whether a detainee is armed and dangerous does not require two separate inquiries; one who is "armed [is] therefore dangerous." The dissent would have rejected the idea that "armed" implies "dangerous" and argued that "there is no reason to think that a person carrying or concealing a weapon during a traffic stop—[when] fully sanctioned by state law—is anything but a law-abiding citizen who poses no threat to the authorities." [Bob Farb blogged about this case here.]

Extension of vehicle stop by supported by reasonable suspicion under the totality of circumstances where vehicle not registered to the defendant, the defendant was visibly nervous and vague about travel plans, and possessed a prepaid cell phone and particular air freshener commonly used by drug traffickers, among other factors.

State v. Downey, ___ N.C. App. ___, 796 S.E.2d 517 (Feb. 7, 2017). Over a dissent, the court held that reasonable suspicion supported extension of the traffic stop. After an officer stopped the defendant for a traffic violation, he approached the vehicle and asked to see the driver's license and registration. As the defendant complied, the officer noticed that his hands were shaking, his breathing was rapid, and

that he failed to make eye contact. He also noticed a prepaid cell phone inside the vehicle and a Black Ice air freshener. The officer had learned during drug interdiction training that Black Ice freshener is frequently used by drug traffickers because of its strong scent and that prepaid cell phones are commonly used in drug trafficking. The officer determined that the car was not registered to the defendant, and he knew from his training that third-party vehicles are often used by drug traffickers. In response to questioning about why the defendant was in the area, the defendant provided vague answers. When the officer asked the defendant about his criminal history, the defendant responded that he had served time for breaking and entering and that he had a cocaine-related drug conviction. After issuing the defendant a warning ticket for the traffic violation and returning his documentation, the officer continued to question the defendant and asked for consent to search the vehicle. The defendant declined. He also declined consent to a canine sniff. The officer then called for a canine unit, which arrived 14 minutes after the initial stop ended. An alert led to a search of the vehicle and the discovery of contraband. The court rejected the defendant's argument that the officer lacked reasonable suspicion to extend the traffic stop, noting that before and during the time in which the officer prepared the warning citation, he observed the defendant's nervous behavior; use of a particular brand of powerful air freshener favored by drug traffickers; the defendant's prepaid cell phone; the fact that the defendant's car was registered to someone else; the defendant's vague and suspicious answers to the officer's questions about why he was in the area; and the defendant's prior conviction for a drug offense. These circumstances constituted reasonable suspicion to extend the duration of stop.

Once the purpose of the insurance violation stop was completed and no independent reasonable suspicion was developed, the officer unreasonably extended the stop to search for contraband.

State v. Miller, ___ N.C. App. ___, 795 S.E.2d 374 (Dec. 20, 2016), *temporary stay allowed*, ___ N.C. ___, 794 S.E.2d 534 (Jan. 4, 2017). (1) An officer unlawfully extended a traffic stop under *Rodriguez*. An officer stopped the vehicle for speeding and failure to pay insurance premiums. The owner of the vehicle was in the passenger seat; the defendant was driving. The officer asked the defendant for his driver's license. When he learned that the passenger was the registered owner of the vehicle, the officer inquired about the status of his insurance. The passenger handed the officer an insurance card showing that he recently purchased car insurance. At the officer's request the passenger also produced his driver's license and told the officer they were coming from a friend's house on Randleman Road. The officer found this response interesting in light of where the vehicle was stopped. He then ordered the passenger out of the vehicle. As the passenger complied, the officer asked him if he had any weapons or drugs. When the passenger said that he did not, he was motioned to stand with another officer who had arrived on the scene. The officer then asked the defendant to step out of the vehicle. As the defendant complied, the officer asked him if he had any weapons or drugs. The defendant said that he did not. According to the officer he then asked the defendant, "Do you mind if I check?" To which the defendant allegedly responded, "No." The officer then search the defendant and found cocaine. The defendant was charged with possession of cocaine and convicted. Applying *Rodriguez*, the court held that the officer unduly extended the traffic stop. The court noted that the officer "was more concerned with discovering contraband than issuing traffic tickets." It noted:

> He readily accepted [the passenger's] insurance card as proof that [the passenger] had been paying the premiums, and he even testified at trial that he had no way to determine if the insurance card was invalid. Thereafter, [the] Officer . . . took no action to issue a citation, to address the speeding violation, or to otherwise indicate a diligent investigation into the reasons for the traffic stop. Instead, he ordered [the passenger] and defendant out of the vehicle and began an investigation into the presence of weapons and drugs.

Here, the State did not allege, nor did the evidence show, that the encounter had become consensual. Moreover, the court rejected the State's argument that the officer had reasonable suspicion to extend the stop. The only facts offered by the State to support this conclusion were that the officer observed the vehicle while patrolling "problem areas," that the defendant gave supposedly "incongruent" answers to questions about his travel, that the defendant raised his hands as he stepped out of the vehicle, and that the defendant was driving the vehicle instead of the passenger, its registered owner. The court noted in part that the defendant's responses in fact were not "incongruent." (2) Even assuming that the traffic stop was lawful up to the point when the defendant consented to the search, his consent was not valid. Although the officer testified that the defendant verbally agreed to the search, footage from the body camera revealed a different version of the interaction. Specifically, the officer had the defendant turned around, facing the rear of the vehicle with his arms and legs spread before he asked for his consent. The court concluded: "this was textbook coercion. If defendant did respond to Officer Harris's request—and it is still not apparent that he did—it was certainly not a free and intelligent waiver of his constitutional rights." [Phil Dixon blogged about the case here.]

Search of vehicle for evidence of driving while impaired justified by search incident to arrest where officers reasonably believed evidence of the crime would be found inside (and in fact was found inside).

State v. Martinez, ___ N.C. App. ___, 795 S.E.2d 386 (Dec. 20, 2016). After the defendant's arrest for impaired driving, officers properly searched his vehicle as a search incident to arrest. Applying *Arizona v. Gant*, the court found that the officer had a reasonable basis to believe that evidence of impaired driving might be found in the vehicle. The defendant denied ownership, possession, and operation of the vehicle to the officer both verbally and by throwing the car keys under the vehicle. Based on the totality of the circumstances, including the strong odor of alcohol on the defendant, the defendant's efforts to hide the keys and refusal to unlock the vehicle, and the officer's training and experience with regard to impaired driving investigations, the trial court properly concluded that the officer reasonably believed that the vehicle may contain evidence of the offense. In the factual discussion, the court noted that the officer had testified that he had conducted between 20-30 impaired driving investigations, that at least 50% of those cases involved discovery of evidence associated with impaired driving inside the vehicle, such as open containers of alcohol, and that he had been trained to search a vehicle under these circumstances. [Jeff Welty blogged about the case here.]

Other Warrantless Actions

Where officers had reasonable suspicion to stop the defendant's vehicle for driving while license revoked, activated their blue lights and commanded him to stop, the failure of the defendant to do so justified warrantless entry into the home under the doctrine of hot pursuit.

State v. Adams, ___ N.C. App. ___, 794 S.E.2d 357 (Dec. 6, 2016). Exigent circumstances justified the officers' warrantless entry into the defendant's home to arrest him. It was undisputed that the officers had reasonable suspicion to stop the defendant for driving while license revoked. They pulled into the defendant's driveway behind him and activated blue lights as the defendant was exiting his vehicle and making his way toward his front door. The defendant did not stop for the blue lights and continued hurriedly towards the front door after the officers told him to stop. "At that point," the court explained, "the officers had probable cause to arrest defendant for resisting a public officer and began a 'hot pursuit' of defendant." The officers arrived at the front door just as the defendant was making his way across the threshold and were able to prevent him from closing the door. The officers then forced the front door open and detained and arrested the defendant just inside the door. The court held that the warrantless entry and arrest was proper under *United States v. Santana*, 427 U.S. 38 (1976). It explained: Hot pursuit has been recognized as an exigent circumstance sufficient to justify a warrantless entry into a residence where there is probable cause, without consideration of immediate danger or destruction of evidence.

Court rejects community caretaking and knock and talk as justifications for warrantless search of curtilage of a home where basis for officer's suspicion was a car in the driveway with a door open.

State v. Huddy, ___ N.C. App. ___, ___ S.E.2d ___ (April 18, 2017). Because an officer violated the defendant's fourth amendment rights by searching the curtilage of his home without a warrant, the trial court erred by denying the defendant's motion to suppress. The officer saw a vehicle with its doors open at the back of a 150-yard driveway leading to the defendant's home. Concerned that the vehicle might be part of a break-in or home invasion, the officer drove down the driveway, ran the vehicle's tags, checked—but did not knock—on the front door, checked the windows and doors of the home for signs of forced entry, "cleared" the sides of the house, and then went through a closed gate in a chain-link fence enclosing the home's backyard and approached the storm door at the back of the house. As the officer approached the door, which was not visible from the street, he smelled marijuana, which led to the defendant's arrest for drug charges. At the suppression hearing, the State relied on two exceptions to the warrant requirement to justify the officer's search of the curtilage: the knock and talk doctrine and the community caretaker doctrine. The court found however that neither exception applies. First, the officer did more than nearly knock and talk. Specifically, he ran a license plate not visible from the street, walked around the house examining windows and searching for signs of a break-in, and went first to the front door without knocking and then to a rear door not visible from the street and located behind a closed gate. "These actions went beyond what the U.S. Supreme Court has held are the permissible actions during a knock and talk." Likewise, the community caretaker doctrine does not support the officer's action. "The presence of a vehicle in one's driveway with its doors open is not the sort of emergency that justifies the community caretaker exception." The court also noted that because

the fourth amendment's protections "are at their very strongest within one's home," the public need justifying the community caretaker exception "must be particularly strong to justify a warrantless search of a home."

Search Warrants

Search warrant was not supported by probable cause where application and affidavit failed to connect the property to be searched and the objects sought; court recognizes that no good faith exception to the exclusionary rule exists under the state constitution

State v. Parson, ___ N.C. App. ___, 791 S.E.2d 528 (Oct. 18, 2016). (1) In this methamphetamine trafficking case, the trial court erred by denying the defendant's motion to suppress evidence seized during execution of a search warrant. Noting that a factual showing sufficient to support probable cause "requires a truthful showing of facts," the court rejected the defendant's argument that a statement in the affidavit supporting the search warrant was made in reckless disregard for the truth. However, the court went on to find that the application for the search warrant and attached affidavit insufficiently connected the address in question to the objects sought. It noted that none of the allegations in the affidavit specifically refer to the address in question and none establish the required nexus between the objects sought (evidence of a methamphetamine lab) and the place to be searched. The court noted that the defendant's refusal of an officer's request to search the property cannot establish probable cause to search. (2) Although federal law recognizes a good-faith exception to the exclusionary rule where evidence is suppressed pursuant to the federal Constitution, no good faith exception exists for violations of the North Carolina Constitution.

Search warrant was supported by sufficient probable cause based on the information provided by a confidential informant under the totality of the circumstances

State v. Jackson, ___ N.C. App. ___, 791 S.E.2d 505 (Oct. 4, 2016). Over a dissent, the court held that the search warrant was supported by sufficient probable cause in this drug case. At issue was the reliability of information provided by a confidential informant. Applying the totality of the circumstances test, and although the informant did not have a "track record" of providing reliable information, the court found that the informant was sufficiently reliable. The court noted that the information provided by the informant was against her penal interest (she admitted purchasing and possessing marijuana); the informant had a face-to-face communication with the officer, during which he could assess her demeanor; the face-to-face conversation significantly increase the likelihood that the informant would be held accountable for a tip that later proved to be false; the informant had first-hand knowledge of the information she conveyed; the police independently corroborated certain information she provided; and the information was not stale (the informant reported information obtained two days prior).

Where confidential informant had bought drugs from the defendant within the last two weeks under law enforcement supervision, had seen drug evidence in the defendant's home within the last 48 hours, and had demonstrated to police a familiarity with drug trafficking in the city, the informant was sufficiently reliable to establish probable cause for a search warrant.

State v. Brody, ___ N.C. App. ___, 796 S.E.2d 384 (Feb. 7, 2017). In this drug case, a search warrant application relying principally upon information obtained from a confidential informant was sufficient to support a magistrate's finding of probable cause and a subsequent search of the defendant's home. The court rejected the defendant's argument that the affidavit failed to show that the confidential informant was reliable and that drugs were likely to be found in the home. The affidavit stated that investigators had known the confidential informant for two weeks, that the informant had previously provided them with information regarding other people involved in drug trafficking and that the detective considered the informant to be reliable. The confidential informant had demonstrated to the detective that he was familiar with drug pricing and how controlled substances are packaged and sold for distribution. Moreover, the informant had previously arranged, negotiated and purchased cocaine from the defendant under the detective's direct supervision. Additionally, the confidential informant told the detective that he had visited the defendant's home approximately 30 times, including within 48 hours before the affidavit was prepared, and saw the defendant possessing and selling cocaine each time. The court noted: "The fact that the affidavit did not describe the precise outcomes of the previous tips from the [informant] did not preclude a determination that the [informant] was reliable." It added: "although a general averment that an informant is 'reliable' -- taken alone -- might raise questions as to the basis for such an assertion," the fact that the detective also specifically stated that investigators had received information from the informant in the past "allows for a reasonable inference that such information demonstrated the [confidential informant's] reliability." Moreover, the detective had further opportunity to gauge his reliability when the informant arranged, negotiated and purchased cocaine from the defendant under the detective's supervision. [Jeff Welty blogged about the case here.]

Attempted knock and talk where officers observed signs of a marijuana grow operation at the front door and the smell of marijuana at the side door, along with information from confidential informant, supported issuance of search warrant.

State v. Kirkman, ___ N.C. App. ___, 795 S.E.2d 379 (Dec. 20, 2016). (1) In this drug case, a search warrant was properly supported by probable cause. In this drug case, an officer lawfully approached the front of the defendant's home and obtained information that was later used to procure a search warrant. Specifically, he heard a generator and noticed condensation and mold, factors which in his experience and training were consistent with the conditions of the home set up to grow marijuana. The court stated, "It is well-established that an officer may approach the front door of a home, and if he is able to observe conditions from that position which indicate illegal activity, it is completely proper for him to act upon that information." Also at issue was whether information provided by a confidential informant was sufficiently reliable to support a finding of probable cause. The affidavit noted that the confidential informant was familiar with the appearance of illegal narcotics and that all previous information the informant provided had proven to be truthful and accurate. This information was sufficient to establish the confidential informant's reliability.

Search of rental vehicle belonging to an overnight guest of the residence and parked within the home's curtilage was within the scope of the search warrant for the home.

State v. Lowe, ___ N.C. ___, 794 S.E.2d 282 (Dec. 21, 2016). (1) Affirming the Court of Appeals, the court held that a search warrant authorizing a search of the premises where the defendant was arrested was supported by probable cause. The affidavit stated that officers received an anonymous tip that Michael Turner was selling, using and storing narcotics at his house; that Turner had a history of drug related arrests; and that a detective discovered marijuana residue in the trash from Turner's residence, along with correspondence addressed to Turner. Under the totality of the circumstances there was probable cause to search the home for controlled substances. (2) Reversing the Court of Appeals, the court held that a search of a vehicle located on the premises was within the scope of the warrant. The vehicle in question was parked in the curtilage of the residence and was a rental car of the defendant, an overnight guest at the house. If a search warrant validly describes the premises to be searched, a car on the premises may be searched even though the warrant contains no description of the car. In departing from this general rule, the Court of Appeals held that the search of the car was invalid because the officers knew that the vehicle in question did not belong to the suspect in the drug investigation. Noting that the record was unclear as to what the officers knew about ownership and control of the vehicle, the court concluded; "Nonetheless, regardless of whether the officers knew the car was a rental, we hold that the search was within the scope of the warrant." [Bob Farb blogged about the case here.]

Defendant's misrepresentation as to his address coupled with his history of drug convictions and drug-dealing evidence seized from a vehicle supported a search warrant for his residence, despite no clear nexus to the home.

State v. Allman, ___ N.C. ___, 794 S.E.2d 301 (Dec. 21, 2016). Reversing the Court of Appeals, the court held that because the magistrate had a substantial basis to find that probable cause existed to issue the search warrant, the trial court erred by granting the defendant's motion to suppress. The affidavit stated that an officer stopped a car driven by Jeremy Black. Black's half-brother Sean Whitehead was a passenger. After K-9 alerted on the car, a search found 8.1 ounces of marijuana packaged in a Ziploc bag and $1600 in cash. The Ziploc bag containing marijuana was inside a vacuum sealed bag, which in turn was inside a manila envelope. Both individuals had previously been charged on several occasions with drug crimes. Whitehead maintained that the two lived at Twin Oaks Dr. The officer went to that address and found that although neither individual lived there, their mother did. The mother informed the officer that the men lived at 4844 Acres Drive and had not lived at Twin Oaks Drive for years. Another officer went to the Acres Drive premises and determined that its description matched that given by the mother and that a truck outside the house was registered to Black. The officer had experience with drug investigations and, based on his training and experience, knew that drug dealers typically keep evidence of drug dealing at their homes. Supported by the affidavit, the officer applied for and received a search warrant to search the Acres Drive home. Drugs and paraphernalia were found. Based on the quantity of marijuana and the amount of cash found in the car, the fact that the marijuana appeared to be packaged for sale, and Whitehead's and Black's criminal histories, it was reasonable for the magistrate to infer that the brothers were drug dealers. Based on the mother's statement that the two lived at the Acres Drive premises, the fact that her description of that home matched its actual appearance, and that

one of the trucks there was registered to Black, it was reasonable for the magistrate to infer that the two lived there. And based on the insight from the officer's training and experience that evidence of drug dealing was likely to be found at their home and that Whitehead lied about where the two lived, it was reasonable for the magistrate to infer that there could be evidence of drug dealing at the Acres Drive premises. Although nothing in the affidavit directly connected the defendant's home with evidence of drug dealing, federal circuit courts have held that a suspect drug dealer's lie about his address in combination with other evidence of drug dealing can give rise to probable cause to search his home. Thus, under the totality of the circumstances there was probable cause to support search warrant. [Bob Farb blogged about this case here.]

Interrogations

Cumulative effect of officer's coercive statements and actions while interrogating the defendant rendered confession involuntary, although error was harmless based on substantial other evidence of guilt. **When confronted with forensic evidence sufficient to support murder charge, defendant was functionally under arrest and should have been Mirandized then.**

State v. Johnson, ___ N.C. App. ___, 795 S.E.2d. 625 (Jan. 17, 2017). Although the trial court erred by concluding that the defendant's confession was voluntary, the error was harmless beyond a reasonable doubt. The defendant was asked to voluntarily show up at the police department for an interview in connection with a murder, after previously having denied ever having had contact with the murder victim. Approximately 20 minutes into the interview the defendant was shown a DNA analysis, indicating that his DNA was retrieved from under the victim's fingernails. At this point, a reasonable person would have believed that he was under arrest and the officer should have given *Miranda* warnings. The court noted that the detectives continued to reinforce the position that the defendant was not free to leave through their subsequent and continuing interrogation. They continued to challenge the defendant for over four hours until he was finally told that he was under arrest and given *Miranda* warnings. He subsequently confessed. The entirety of the interrogation, from when the defendant first should have been Mirandized, up until his inculpatory statements, rendered the inculpatory statements involuntary even though the defendant never confessed before being Mirandized. Finding these circumstances coercive, the court concluded:

> Defendant was questioned for hours after he should have been Mirandized and, throughout this questioning, the detectives repeatedly told Defendant they knew he was lying; that they had DNA proof of Defendant's guilt; that only a guilty person would have known [the victim] was shot in the back of the neck; that this could be a capital case, and that Defendant's treatment would depend on his cooperation; that the district attorney's office would usually work with those who cooperated; that Detective Ward would consider testifying on Defendant's behalf; that Defendant would feel better if he confessed and did right by God and his children; and that Defendant should get the "best seat on the bus" by giving statements against the two other men involved. It is also clear that the detectives decided to arrest Defendant at the time they did in order to shake him up and, in Detective Ward's words: "I felt in

> my heart like the only thing that's going to make you understand that this isn't going to go away is to charge you with murder. So I charged you with murder."

The court, however, went on to find that the State proved that the error was harmless beyond a reasonable doubt in light of the overwhelming evidence of guilt.

No *Miranda* violation where officer read warrants to defendant and co-defendant together, and defendant volunteered that the cocaine belonged to him.

State v. Burton, ___ N.C. App. ___, 796 S.E.2d. 65 (Jan. 17, 2017). The court rejected the defendant's claim that counsel was ineffective by failing to object to the admission of his statement to an officer that the cocaine in question belonged to him and not a passenger in the vehicle. The court rejected the defendant's argument that the statements were obtained in violation of his Fifth Amendment rights because the officer failed to advise him of his *Miranda* rights before reading the warrants to him and the passenger in each other's presence. After the two were arrested and taken to the county detention center, the officer read the arrest warrants to the defendant and the passenger in each other's presence. When the officer finished reading the charges, the defendant told the officer that the cocaine belonged to him. The court concluded that the defendant's admission is properly classified as a spontaneous statement, not the product of an interrogation.

No *Miranda* violation where defendant contacted the detective, agreed to come to the station and provided a voluntary inculpatory statement.

State v. Parlier, ___ N.C. App. ___, 797 S.E.2d 340 (Mar. 7, 2017). In this child sexual assault case, the court rejected the defendant's argument that his confession was obtained in violation of *Miranda*. During an interview at the sheriff's department, the defendant admitted that he had sex with the victim. The transcript and videotape of the interview were admitted at trial. The court rejected the defendant's argument that a custodial interrogation occurred. The defendant contacted a detective investigating the case and voluntarily traveled to the sheriff's department. After the detective invited the defendant to speak with her, the defendant followed her to an interview room. The defendant was not handcuffed or restrained and the interview room door and hallway doors were unlocked. The defendant neither asked to leave nor expressed any reservations about speaking with the detective. A reasonable person in the defendant's position would not have understood this to be a custodial interrogation.

Court rejects Court of Appeals holding on need of officer to clarify ambiguous statement of juvenile defendant; "Can I call my mom" not a clear and unequivocal invocation of right to have parent present during interrogation; remand for inquiry into voluntariness of waiver of rights.

State v. Saldierna, ___ N.C. ___, 794 S.E.2d 474 (Dec. 21, 2016). Reversing the Court of Appeals, the court held that the juvenile defendant's request to telephone his mother while undergoing custodial questioning by police investigators was not a clear indication of his right to consult with a parent or guardian before proceeding with the questioning. The trial court had found that the defendant was advised of his juvenile rights and after receiving forms setting out these rights, indicated that he understood them; that the juvenile informed the officer that he wished to waive his juvenile rights and

signed a form to that effect; and that although the defendant unsuccessfully tried to contact his mother by telephone, he did not at any time indicate that he had changed his mind regarding his desire to speak to the officer, indicate that he revoked his waiver of rights, or make an unambiguous request to have his mother present during questioning. The trial court found that the defendant's rights were not violated under G.S. 7B-2101 or the constitution. The Court of Appeals concluded that a juvenile need not make a clear and unequivocal request in order to exercise his or her right to have a parent present during questioning. Instead, it concluded that when a juvenile between the ages of 14 and 18 makes an ambiguous statement that potentially pertains to the right to have a parent present, an interviewing officer must clarify the juvenile's meaning before proceeding with questioning. The court granted the State's petition for discretionary review. It first held that the defendant's statement--"Um. Can I call my mom?"—was not a clear and unambiguous invocation of his right to have his parent or guardian present during questioning and thus his rights under G.S. 7B-2101 were not violated. The court remanded for a determination of whether the defendant knowingly, willingly, and understandingly waived his rights. [LaToya Powell blogged about the case here.]

No Miranda violation where the officer had taken the defendant's license and asked questions about travel and drinking. The defendant was not formally arrested or restrained to a degree associated with formal arrest and thus was not in custody for purposes of Miranda.

State v. Burris, ___ N.C. App. ___, ___ S.E.2d ___ (May 16, 2017). In this impaired driving case, the court rejected the defendant's argument that the trial court erred by denying his motion to suppress self-incriminating statements made without *Miranda* warnings, finding that the defendant was not in custody at the time. The standard for determining whether an individual is in custody for purposes of *Miranda* is, based on the totality of the circumstances, whether there was a formal arrest or restraint on freedom of movement to a degree associated with a formal arrest. In this case, the defendant argued that when the detective retained his drivers license he was seized, not free to leave, and thus entitled to *Miranda* warnings. The court found that the defendant had erroneously conflated the *Miranda* custody standard with the standard for a seizure. Noting that the defendant was not under formal arrest at the time he was questioned, the court determined that under the totality of the circumstances the defendant's movement was not restrained to the degree associated with a formal arrest. The court noted that the inquiry is an objective one, not a subjective one. Here, the defendant was standing outside of his own vehicle while speaking with the detective. He was not told he was under arrest or handcuffed, and other than his license being retained, his movement was not stopped or limited further. No mention of any possible suspicion of the defendant being involved in criminal activity, impaired driving or otherwise, had yet been made. A reasonable person in these circumstances would not have believed that he was under arrest at the time.

No interrogation, and therefore no Miranda violation, where the defendant gave statements in response to questions from a dispatcher to the arresting officer over the radio.

State v. Moore, ___ N.C. App. ___, ___ S.E.2d ___ (May 16, 2017). The trial court properly denied the defendant's suppression motion where the defendant's statements were not made in response to police interrogation. Here, there was no dispute that the defendant made inculpatory statements while in

custody and without being given his *Miranda* rights. The defendant made the statements in question after being arrested and while being transported to the police department. While en route to the police department, the defendant heard the officer's lieutenant asking questions of the officer over the police radio and offered the statements in question. The trial court found that the defendant's statements were spontaneous utterances and not made in response to questions posed to him. The court of appeals agreed, relying on prior case law and holding that the defendant's statements were not the result of an interrogation.

Pretrial and Trial Procedure

Discovery

Where near two-month continuance granted for defense counsel to review and prepare for untimely expert discovery provided on the eve of trial, no abuse of discretion in allowing experts to testify at later trial.

State v. Mendoza, ___ N.C. App. ___, 794 S.E.2d 828 (Dec. 6, 2016). In this child sexual assault case, the court rejected the defendant's argument that the trial court erred by permitting certain testimony by the State's experts because of a discovery violation. The defendant argued that the State violated G.S. 15A-903(a)(2) by not timely providing the expert reports and records, and that as a result, he was prejudiced by lack of time to adequately prepare for cross-examination. The State served notice of expert witnesses on November 24, 2014, listing the expert names, and indicating that the State would make the expert's reports available during discovery and that their CVs would be forthcoming. The State provided initial discovery on December 2, 2014, including a report from each expert. On January 29, 2015, the defendant filed a motion for additional materials, requesting that each expert prepare a meaningful and detailed report. At a hearing on February 2, 2015, the trial court instructed the State to have the State's experts couch their diagnoses in the form of opinions. In mid-February 2015, the State provided further discovery, including additional therapy notes and a revised letter from one expert outlining the basis of her opinion, as well as a DVD recording of the other expert's interview with the child. The defendant then asked the trial court to either exclude the expert opinions or give the defense additional time to prepare. The trial court continued the matter until April 13, 2015. On these facts, the court rejected the defendant's argument that he did not have time to adequately prepare to effectively cross-examine the experts.

No *Brady* violation where defendant's former trial counsel viewed, but did not copy or otherwise preserve, a video of the incident that was subsequently destroyed between the district court trial and trial *de novo*.

State v. Mylett, ___ N.C. App. ___, ___ S.E.2d ___ (April 18, 2017). In this assault on a government officer case, no *Brady* violation occurred when recordings from police body cameras were reviewed by

the defendant's original trial counsel and then destroyed pursuant to the police department's evidence retention schedule. The defendant's original trial counsel reviewed the video recordings but opted not to obtain copies or use the footage at the defendant's district court trial. The defendant was convicted and appealed for trial de novo to superior court. In the meantime, the original recordings were destroyed in accordance with the police department's evidence retention schedule. The defendant's new trial counsel moved for a continuance to allow time for counsel to prepare a motion to dismiss, arguing that such a remedy was warranted because the recordings had been destroyed and thus were unavailable for use by the defense. The trial court denied the motion. The defendant was convicted and appealed. The court stated: "Defense counsel's decision not to make or preserve copies of the videos — regardless of counsel's reason for declining to do so — cannot serve as a basis for arguing a *Brady* violation was committed by the State."

Pleadings

Indictment sufficiently charged burning of building in violation of G.S. 14-62 although it omitted term "wantonly" from allegations

State v. Hunt, ___ N.C. App. ___, 792 S.E.2d 552 (Nov. 1, 2016). The indictment properly charged the defendant with burning of a building in violation of G.S. 14-62. The indictment alleged that the "defendant . . . unlawfully, willfully and feloniously did set fire to, burn, cause to be burned and aid the burning" of a specified building. The court rejected the defendant's argument that the indictment was defective because it did not allege that the defendant acted "wantonly," noting that North Carolina courts have held that the terms "willfully" and "wantonly" are essentially the same.

Trial court erred by instructing jury it could convict defendant of safecracking offense by means not alleged in indictment

State v. Ross, ___ N.C. App. ___, 792 S.E.2d 155 (Oct. 4, 2016). The trial court committed plain error in this safecracking case by instructing the jury that it could convict the defendant if it determined that he obtained the safe combination "by surreptitious means" when the indictment charged that he committed the offense by means of "a fraudulently acquired combination." One essential element of the crime is the means by which the defendant attempts to open a safe. Here, there was no evidence that the defendant attempted to open the safe by the means alleged in the indictment.

Amendment of child abuse indictment from "negligent failure to treat child's wounds" to "failure to provide a safe environment" was a substantial alteration and was improperly allowed.

State v. Frazier, ___ N.C. App. ___, 795 S.E.2d 654 (Feb. 7, 2017). In this child abuse case the trial court erred by allowing the State to amend the indictment. The defendant was indicted for negligent child abuse under G.S. 14-318.4(a5) after police discovered her unconscious in her apartment with track marks on her arms and her 19-month-old child exhibiting signs of physical injury. Under that statute, a parent is guilty of negligent child abuse if the parent's "willful act or grossly negligent omission in the

care of the child shows a reckless disregard for human life" and the parent's act or omission "results in serious bodily injury to the child." The indictment charged that the defendant committed this offense by negligently failing to treat her child's wounds. At trial, the trial court allowed the State to amend the indictment "to include failure to provide a safe environment as the grossly negligent omission as well." This amendment was improper because it constituted a substantial alteration of the indictment. The amendment alleged conduct that was not alleged in the original indictment and which constituted the "willful act or grossly negligent omission," an essential element of the charge. The amendment thus allowed the jury to convict the defendant of conduct not alleged in the original indictment. Additionally, the amendment violated the North Carolina Constitution, which requires the grand jury to indict and the petit jury to convict for offenses charged by the grand jury.

Indictment for discharging a weapon within an occupied building to incite fear was fatally flawed and failed to confer jurisdiction where the language of the indictment substituted 'into' for 'within' a building.

State v. McLean, ___ N.C. App. ___, 796 S.E.2d 804 (Feb. 7, 2017). The State conceded, and the court held, that the indictment was insufficient to support a conviction for discharging a firearm within an enclosure to incite fear. The indictment improperly alleged that the defendant discharged a firearm "into" an occupied structure; the statute, G.S. 14-34.10, requires that the defendant discharge a firearm "within" an occupied building.

No variance where indictment served to provide defendant sufficient notice of the charges and accuser.

State v. Fink, ___ N.C. App. ___, ___ S.E.2d ___ (Mar. 21, 2017). There was no fatal variance in a larceny by employee indictment where the indictment alleged that the defendant's employer was "Precision Auto Care, Inc. (PACI), a corporation" but the evidence at trial showed the actual name of the corporation to be "Precision Franchising, Inc." doing business as "Precision Tune Auto Care." The court noted in part: "Our courts have repeatedly held that minor variations between the name of the corporate entity alleged in the indictment and the evidence presented at trial are immaterial, so long as [t]he defendant was adequately informed of the corporation which was the accuser and victim. A variance will not be deemed fatal where there is no controversy as to who in fact was the true owner of the property." The court noted that the variation in names did not impair the defendant's ability to defend against the charges.

Larceny indictment fatally flawed where it failed to show the corporate victim was an entity capable of ownership; the same defect was not fatal for the offense of possession of stolen goods.

State v. Garner, ___ N.C. App. ___, ___ S.E.2d ___ (Mar. 21, 2017). A felonious larceny indictment alleging that the defendant took the property of "Pinewood Country Club" was fatally defective. The State conceded that the indictment was defective because it failed to allege that the named victim was an entity capable of owning property. The court noted however that the indictment's failure to specify the country club as an entity capable of owning property was not fatal with respect to a separate charge of possession of stolen goods.

Amendment of indictment from Schedule II hydrocodone to Schedule III hydrocodone not a substantial alteration and not prejudicial.

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.

(1) No variance where indictment named several items in a possession of burglary tools indictment and the court instructed that the jury could convict if they found he possessed any of the several tools or an additional item, unnamed in the indictment. (2) An indictment for injury to personal property need not allege the owner of the property is an entity capable of ownership where a different count in the same indictment for breaking and entering of a place of worship expressly identified the owner as a place of worship, following *State v. Campbell*

State v. McNair, ___ N.C. App. ___, ___ S.E.2d ___ (April 18, 2017). (1) There was no fatal variance in a possession of burglar's tools indictment. The indictment identified the tools as a prybar and bolt cutters. The trial court instructed the jury that it could find the defendant guilty if he possessed either a prybar, bolt cutters, *or work gloves*. The court held that the indictment's identification of the specific tools was mere surplusage, and the indictment charged the essential elements of the crime. (2) There was no fatal defect in an indictment charging the defendant with injury to personal property. The defendant asserted that the indictment was invalid because it failed to allege that the owner, a church, as an entity capable

of owning property. In *State v. Campbe*ll, 368 N.C. 83 (2015), the Supreme Court held that alleging ownership of property in an entity identified as a church or other place of religious worship is sufficient to allege an entity capable of owning property. Here, count one of the indictment alleged breaking or entering a place of religious worship and identified the church expressly as "a place of religious worship." The count alleging injury to personal property simply referred to the church by name. The court found that identifying the church as a place of religious worship in the first count and subsequently listing the church as the owner of the personal property in a later count was sufficient. A contrary ruling, requiring the church to be identified as a place of worship in each portion of the indictment, "would constitute a hypertechnical interpretation of the requirements for indictments." (3) By failing to assert a claim of fatal variance between the indictment and the evidence with respect to a charge of injury to personal property, the defendant failed to preserve the issue for appellate review. Nevertheless, the court considered the issue and rejected the defendant's claim. The indictment alleged that the defendant injured the personal property of the church, specifically a lock on a door. The defendant asserted that the evidence showed that the damaged device was owned not by the church but rather by the lessor of the property. The court concluded however that the evidence was sufficient to allow the jury to find that the church owned the lock and that it was damaged.

Fatal defect where indictment for possession of methamphetamine precursors failed to allege that the defendant knew or reasonably should have known that the precursors would be used to manufacture methamphetamine.

State v. Maloney, ___ N.C. App. ___, ___ S.E.2d ___ (May 16, 2017). An indictment charging the defendant with possession of methamphetamine precursors was fatally defective and the defect could not be cured by amendment. Specifically, the indictment failed to allege that the defendant possessed the precursors knowing or having reasonable cause to believe that they would be used to manufacture methamphetamine. The trial court allowed the State to amend the indictment to add this allegation at trial. The amendment was improper and the indictment was fatally defective.

Indictment alleging obtaining property by false pretenses was defective where it described the property obtained as "United States Currency."

State v. Mostafavi, ___ N.C. App. ___, ___ S.E.2d ___ (June 6, 2017). Citing prior case law the court held, over a dissent, that an indictment alleging obtaining property by false pretenses was defective where it described the property obtained as "United States Currency." The court stated: the cases instruct that where money is the thing obtained, "the money must be described at least by the amount, as, for instance, so many dollars and cents" (quotation omitted). Noting prior opinions of the court that approved of such language, the court found that it was bound to follow Supreme Court precedent. The court further rejected the notion that G.S. 15-149 compelled a different holding.

Motions to Suppress and Exclude

Defendant's motion to suppress on the same grounds as a previously-denied motion to suppress in a related case was properly denied by application of collateral estoppel.

State v. Williams, ___ N.C. App. ___, 796 S.E.2d 823 (Mar. 7, 2017). The trial court properly applied the doctrine of collateral estoppel when it denied the defendant's second motion to suppress. The defendant was in possession of a bag containing two separate Schedule I substances, Methylone and 4-Methylethcathinone. He was charged with possession with intent to manufacture, sell or deliver Methylone (Charge 1) and with possession with intent to manufacture, sell or deliver Methylethcathinone (Charge 2). Before trial, he filed a motion to suppress, which the court denied. He was convicted on both counts. On appeal, the court affirmed his conviction on the first charge but vacated the second because of a defective indictment. The State then re-indicted on the second charge. The then defendant filed a motion to suppress, functionally identical to the motion to suppress filed before his first trial. The trial court denied the second motion based on the doctrine of collateral estoppel. The defendant was tried and convicted. The trial court properly applied the doctrine of collateral estoppel when it denied the defendant's second motion where the parties and the issues raised by the motions were the same; the issues were raised and fully litigated during the hearing on the first motion; the issue was material and relevant to the disposition of the prior action; and the trial court's determination was necessary and essential to the final judgment.

Where trial counsel did not object during testimony about the defendant's prior incarceration and appellate counsel failed to argue plain error, appellate review of the issue was waived.

State v. China, ___ N.C. App. ___, 797 S.E.2d 324 (Feb. 21, 2017), *temporary stay allowed*, ___ N.C. ___, 797 S.E.2d 303 (Mar. 27, 2017). The defendant failed to preserve for appellate review a challenge to the admission of evidence at trial concerning the defendant's previous incarceration. Although the defendant objected to the admission of the evidence during a hearing outside of the jury's presence and in a pretrial motion, he did not subsequently object when the evidence was actually introduced at trial. Appellate counsel did not specifically argue that admission of this testimony constituted plain error. Thus, the defendant failed to preserve for appellate review the trial court's decision to admit this evidence.

Appellate review waived where trial counsel failed to object to evidence at trial that was the subject of a pretrial motion to suppress.

State v. Gullette, ___ N.C. App. ___, 796 S.E.2d. 396 (Feb. 21, 2017). In this drug trafficking case, the defendant did not preserve for appellate review his argument that the trial court erred by denying his motion to suppress in-court and out-of-court identifications. The trial court denied the defendant's pretrial motion to suppress, based on alleged violations of the Eyewitness Identification Reform Act (EIRA), concluding that the current version of the EIRA did not apply to the defendant's case because the statute came into force after the identification at issue. When the relevant evidence was offered at trial, the defendant did not object. A trial court's evidentiary ruling on a pretrial motion to suppress is not sufficient to preserve the issue of admissibility for appeal unless the defendant renews the objection

during trial. The court rejected the defendant's argument that he could raise the issue on appeal because the trial court failed to apply a statutory mandate in the EIRA and that violations of statutory mandates are preserved without the need for an objection at trial. It concluded that the trial court did not violate any statutory mandate because the mandates of the statute only arise if the court determines that the EIRA applies to the case in question.

Pleas

Considering the totality of the transcript of the plea hearing, defendant's plea was voluntary and knowing where the trial court warned him that the guilty plea could result in waiver of his 15A-711 claim and transcript of plea otherwise did not reflect a conditional plea.

State v. Ross, ___ N.C. ___, 794 S.E.2d 289 (Dec. 21, 2016). Reversing the Court of Appeals, the court held that the defendant's plea was knowing and voluntary. The Court of Appeals had held that because the defendant conditioned his plea on the appealability of an issue that was not appealable, the plea was not knowing and voluntary. The court however concluded that the defendant's plea was not conditionally entered on such a right of appeal. Thus, the terms and conditions of the plea agreement did not attempt to preserve the right to appellate review of a non-appealable matter. The defendant received the benefit of his plea bargain.

A defendant is entitled to appellate review after a guilty plea and a denial of a motion to withdraw the plea. No error in denying the motion to withdraw the plea where the trial court imposed a sentence (including a fine) authorized under the terms of the plea agreement and the defendant offered no specific reason to withdraw the plea.

State v. Zubiena, ___ N.C. App. ___, 796 S.E.2d 40 (Dec. 30, 2016). (1) Over a dissent, the court held that it had jurisdiction to consider the defendant's appeal under G.S. 15A-1444(e). After the trial court announced the sentence in open court, defense counsel indicated that the defendant would like to strike her plea because she would like "to take it to trial." The court declined to strike the plea and the defendant appealed. The court held that notwithstanding *State v. Carriker*, 180 N.C. App. 470 (2006), under G.S. 15A-1444(e) and *State v. Dickens*, 299 N.C. 76 (1980), a defendant has a right to appeal when a motion to withdraw a guilty plea has been denied. (2) The trial court did not err by denying the defendant's post-sentence motion to withdraw her guilty plea. On appeal the defendant argued that the trial court erred by denying her motion because the plea agreement and plea colloquy contained no indication that a fine would be imposed as part of her punishment. In fact, a fine of $1000 was imposed.

The court noted that under G.S. 15A-1024, if at the time of sentencing a judge decides to impose a sentence other than that provided for in a plea arrangement, the judge must inform the defendant of that fact and inform the defendant that he may withdraw the plea. If, however, the sentence imposed is consistent with the plea agreement, the defendant is entitled to withdraw his plea after sentencing only upon a showing of manifest injustice. Here, the plea agreement specified only three things: the crime to which the defendant would plead guilty; the charges that would be dismissed; and the defendant's prior record level and number of prior record level points. The plea agreement did not contain any specific

terms regarding the sentence. Thus, the court found itself unable to conclude that the trial court imposed a sentence other than that provided for in the plea arrangement. Having determined that the sentence was not inconsistent with the plea agreement and that the defendant was not entitled to relief under G.S. 15A-1024 the court went on to conclude that no manifest injustice supported granting the post-sentence motion to withdraw the guilty plea. Here, the defendant provided no specific reason in support of her motion to withdraw, except that she had decided she would like to take her case to trial.

Where the defendant received a sentence greater than what was specified in his plea agreement, error not to provide defendant an opportunity to withdraw his plea.

State v. Kirkman, ___ N.C. App. ___, 795 S.E.2d 379 (Dec. 20, 2016). As conceded by the State, the trial court erred by resentencing the defendant to a sentence greater than that provided for in his plea agreement without giving the defendant an opportunity to withdraw his plea, as required by G.S. 15A-1024.

While a defendant generally has the right to withdraw a guilty plea before sentencing for any fair and just reason, no error to deny motion to withdraw plea where no evidence offered to support defendant's contentions that the plea was made under duress. Court rejects argument that an *Alford* plea is evidence of the defendant's assertion of legal innocence of purposes of the motion.

State v. Whitehurst, ___ N.C. App. ___, ___ S.E.2d ___ (May 2, 2017). The trial court did not err by denying the defendant's motion to withdraw his *Alford* plea. After finding that there was no support in the record for various factual assertions made by the defendant on appeal, the court found that the defendant had offered no fair and just reason for withdrawal of his plea. Among other things, the court rejected the defendant's argument that he entered his plea while under duress because he was in custody at the time, holding: "Defendant cites no authority for the proposition that the fact that a defendant is incarcerated is *per se* evidence of coercion, and we decline to adopt the position proposed by defendant." That the defendant entered an Alford plea was not adequate evidence of his assertion of innocence for purposes of withdrawing his plea. Thus, the defendant failed to meet his burden of demonstrating a fair and just reason to set aside the plea.

Right to Counsel

Sovereign citizen knowingly and voluntarily waived right to counsel for probation violation hearing

State v. Faulkner, ___ N.C. App. ___, 792 S.E.2d 836 (Nov. 15, 2016). Because the trial court properly conducted the inquiry required by G.S. 15A-1242, the court rejected the defendant's argument that his waiver of counsel, in connection with a probation violation hearing, was not knowing and voluntary. In addition to finding that the trial court's colloquy with the defendant established that the waiver was knowing and voluntary, the court noted that its conclusion was consistent with G.S. 7A-457(a). That provision states that a waiver of counsel shall be effective only if the court finds that the indigent person acted with "full awareness of his rights and of the consequences of the waiver," and that in making such a finding the court must consider among other things the person's age, education, familiarity with the English language, mental condition and complexity of the crime charged. Here, the defendant was 23

years old, spoke English, had a GED degree, had attended college for one semester, and had no mental defects of record; additionally, there were no factual or legal complexities associated with the probation violation. The defendant described himself as a "Moorish National" and a "sovereign citizen." The court rejected the defendant's argument that certain responses to the judge's statements during the waiver colloquy indicated that the waiver was not knowing and voluntary. The court noted that a defendant's contention that he does not understand the proceedings is a common aspect of a sovereign citizen defense.

In requiring the defendant to proceed *pro se*, the trial court relied on a misrepresentation of the prosecutor that an earlier trial judge had stated the defendant must have counsel at the next setting or be ready to proceed *pro se*. Because the first judge had not made that statement, it was error for the trial court to require the defendant to proceed *pro se*.

State v. Curlee, ___ N.C. App. ___, 795 S.E.2d 266 (Dec. 20, 2016). The trial court erred by requiring the defendant to proceed to trial *pro se*. On February 7, 2013, the defendant was determined to be indigent and counsel was appointed. On May 30, 2014, the defendant waived his right to assigned counsel, indicating that he wished to hire a private lawyer, Mr. Parker. Between May 2014 and May 2015 the trial was continued several times to enable the defendant to obtain funds to pay Parker. On May 11, 2015, Parker informed the court that the defendant had not retained him and that if the court would not agree to continue the case, Parker would move to withdraw. Although the defendant was employed when he first indicated his desire to hire Parker, he subsequently lost his job and needed time to obtain funds to pay counsel. The trial court continued the case for two months, to give the defendant more time to obtain funds to pay Parker. On June 29, 2015, Parker filed a motion to withdraw for failure to pay. On July 6, 2015, after the trial court allowed Parker to withdraw, the defendant asked for new counsel. The trial court declined this request, the case proceeded *pro se*, and the defendant was convicted. The court found that the trial court's ruling requiring the defendant to proceed pro se was based in part on the ADA's false representation that at the May 11, 2015 hearing the defendant was asked if he wanted counsel appointed, was warned that the case would be tried in July regardless of whether he were able to hire Parker, and was explicitly warned that if he had not retained counsel by July he would be forced to proceed to trial *pro se*. The court concluded: "None of these representations are accurate." Thus, the court held that the trial court's denial of defendant's request for appointed counsel and its ruling that the defendant had waived the right to appointed counsel were not supported by competent evidence.

No *Harbison* error where defense counsel admitted some but not all elements of the charges.

State v. Cholon, ___ N.C. App. ___, 796 S.E.2d 504 (Feb. 7, 2017). In this case, involving charges of statutory sexual offense and taking indecent liberties with a child, no *Harbison* error occurred when defense counsel admitted some elements of the charged offenses. In his closing argument to the jury, defense counsel conceded that the victim was a minor and that the defendant's oral and written confessions to the police were true. In those statements, the defendant admitted engaging in sexual activity with the victim, who had represented himself to be 18 years old. With respect to those statements, counsel argued to the jury that the defendant was truthful with the police. The court

rejected the defendant's argument that this constituted a *Harbison* error, reasoning that counsel "only implicitly conceded some--but not all--of the elements of each charge and urged jurors to find Defendant not guilty of each charge." The court noted that *Harbison* and its progeny applies when counsel concedes the defendant's guilt to either the offense charged or to a lesser included offense without the defendant's consent. It continued, stating that the courts have distinguished cases, like this one, where counsel did not expressly concede guilt or admitted only certain elements of the charged offense. Finally, the court held that even if the defendant could establish that counsel's conduct was deficient under the *Strickland* standard, he could not show prejudice in light of the overwhelming evidence of guilt. [Jessica Smith blogged about the case here.]

Where the record was silent as to the nature and extent of the impasse between the defendant and his counsel concerning cross-examination of the State's witness, further findings required to determine defendant's claim of ineffective assistance of counsel.

State v. Floyd, ___ N.C. ___, 794 S.E.2d 460 (Dec. 21, 2016). The court reversed the Court of Appeals' determination that the defendant was entitled to a new trial based on the trial court's alleged failure to recognize and address an impasse between the defendant and his attorney during trial. The court concluded that the record did not allow it to determine whether the defendant had a serious disagreement with his attorney regarding trial strategy or whether he simply sought to hinder the proceedings. It remanded for entry of an order dismissing the defendant's ineffective assistance of counsel claim without prejudice to his right to assert it in a motion for appropriate relief.

Defendant failed to meet his burden of presenting evidence to support his motion to suppress a prior conviction under G.S. 15A-980 and could not overcome the presumption of regularity afforded to court records.

State v. Thorpe, ___ N.C. App. ___, ___ S.E.2d ___ (April 18, 2017). The trial court did not err by denying the defendant's motion to suppress filed under G.S. 15A-980. The defendant argued for suppression of a conviction used in two habitual misdemeanor assault indictments on grounds that it was obtained in violation of his right to counsel. At hearing on the motion the defendant testified that when he pleaded guilty to the charge, he was not represented by counsel and did not waive his right to counsel. At the suppression hearing, an assistant clerk testified that the only remaining records of the proceeding indicated that the defendant was represented by a retained attorney. Specifically, the designations "R" and "N/A" appeared in the electronic record. She testified that the designation "R" was used to reflect the fact that a defendant had retained counsel. "N/A" was used when the handwritten notes on the shuck were not legible or the attorney's name was unknown and the designation "N/A" was never used when a defendant was unrepresented . Applying the presumption of regularity, the court presumed that the information contained in the records was accurate and found that the defendant failed to rebut the presumption with competent, material and substantial evidence.

While it was error for the State to elicit testimony concerning the defendant's efforts to hire counsel before his arrest, the admission of the evidence on these facts did not have a probable impact on the verdict and did not rise to the level of plain error.

State v. Stroud, ___ N.C. App. ___, 797 S.E.2d 34 (Mar. 7, 2017). Although the trial court erred by allowing the introduction of evidence regarding the defendant's attempts to hire legal counsel prior to his arrest, the error did not rise to the level of plain error. On appeal, the defendant argued that admission of this testimony violated his Six Amendment rights. Although the court had "no difficulty" concluding that the evidence violated the defendant's Sixth Amendment right to counsel and should not have been admitted, the error did not constitute plain error.

In capital sentencing hearing, defendant received ineffective assistance where defense counsel elicited expert opinion that, due to the defendant's race, he was more likely to commit violence in the future.

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.]

Double Jeopardy

Indictment for attempted first-degree murder that failed to allege malice was properly interpreted as charging attempted voluntary manslaughter. Because the indictment was not fatally flawed, it was error for the court to declare a mistrial over the defendant's objection, and double jeopardy precluded retrial.

State v. Schalow, ___ N.C. App. ___, 795 S.E.2d 567 (Dec. 20, 2016), *review allowed*, ___ N.C. ___, 796 S.E.2d 791 (Mar. 16, 2017). The court vacated the defendant's attempted murder conviction on double jeopardy grounds. The defendant was originally charged and indicted for attempted murder of his wife. After the trial began, the trial court, over the defendant's objection, ruled that the indictment was fatally defective because it failed to allege that the defendant acted with malice aforethought and declared a mistrial. When the defendant was re-indicted for attempted murder, he asserted that the second prosecution was barred by double jeopardy. The defendant argued that there was no fatal defect in the first indictment; that the trial court abused its discretion in declaring the mistrial; and that once jeopardy attached on the dismissed indictment for attempted voluntary manslaughter, the defendant could not be prosecuted again for the greater offense of attempted murder. The trial court denied the defendant's motion to dismiss and the defendant was convicted. The court first determined that although the original indictment failed to properly charge attempted first-degree murder, it sufficiently alleged of attempted voluntary manslaughter. Thus, the trial court's decision to terminate the first prosecution was based on the erroneous belief that the defect in the indictment deprived the court of jurisdiction. An order of mistrial after jeopardy has attached may only be entered over the defendant's objection where manifest necessity exists. If a mistrial results from manifest necessity, double jeopardy does not bar retrial. However if there is no manifest necessity and the order of mistrial has been improperly entered over a defendant's objection, jeopardy bars a subsequent prosecution. Here, the original indictment was not fatally defective because it sufficiently alleged attempted voluntary manslaughter. Since the trial court retained jurisdiction, it could have proceeded on attempted voluntary manslaughter, as the defendant requested. The court was careful to distinguish this case from those in which a dismissal or mistrial is entered on the defendant's motion or with the defendant's consent, noting: "if a *defendant* successfully seeks to avoid his trial prior to its conclusion by actions or a motion of mistrial or dismissal, the Double Jeopardy Clause is generally not offended by a second prosecution." Having found that no manifest necessity existed to declare a mistrial on the first indictment that properly charged attempted voluntary manslaughter, the court held that double jeopardy precluded a second prosecution for the greater offense of attempted first-degree murder. [Phil Dixon blogged about the case here.]

Where jury returns inconsistent verdicts, acquitting on some counts and convicting on others, and where the convictions are subsequently overturned for reasons unrelated to the inconsistency, Double Jeopardy does not bar retrial of the vacated convictions.

Bravo-Fernandez v. United States, 580 U.S. ___, 137 S. Ct. 352 (Nov. 29, 2016). The issue-preclusion component of the Double Jeopardy Clause does not bar the Government from retrying the defendants after a jury has returned irreconcilably inconsistent verdicts of conviction and acquittal and the convictions are later vacated on appeal because of error in the judge's instructions unrelated to the verdicts' inconsistency. Because the jury's inconsistent verdict did not clearly resolve the issues, the defendant cannot prove that the jury resolved the issues in his favor. Under these facts, the acquitted counts do not have preclusive effect as to the counts for which convictions were obtained. Thus, while the government is barred from retrying the defendant on the acquitted counts, Double Jeopardy does not prevent the retrial of the convictions later vacated on other grounds.

Capacity to Proceed

The court has a duty to conduct a competency hearing where there is a *bona fide* doubt about the capacity of the defendant; an expert should have been appointed to determine capacity where the defendant was unable to stay awake during trial, admitted to taking more than 25 medications daily, and the medications had psychoactive side effects.

State v. Mobley, ___ N.C. App. ___, 795 S.E.2d. 437 (Jan. 17, 2017). In this drug trafficking case, the trial court erred by failing to appoint an expert to investigate the defendant's competency to stand trial. Prior to the start of trial, defense counsel expressed concern about the defendant having fallen asleep in the courtroom. The trial court conducted a discussion with the defendant and defense counsel and ruled that the defendant was competent to proceed to trial. The colloquy revealed, among other things, that the defendant was having difficulty hearing and understanding the judge and that the defendant took over 25 medications daily in connection with a heart condition and a diagnosis of bipolar schizophrenia. Defense counsel related never having seen the defendant so lethargic. Although the defendant seemed to understand the charges against him and possible sentences he might receive, he had little memory of meeting with counsel prior to trial. After the trial began, defense counsel informed the court that the defendant was sleeping during the trial. The court concluded that the evidence indicated a significant possibility at the time of trial that the defendant was incompetent, requiring the trial court to appoint an expert to ascertain whether the defendant was competent to proceed to trial. The court noted that its holding was based on "long-standing legal principles" and that it "should not be interpreted as articulating a new rule or standard." It was careful to state that the trial court is not required to order a competency evaluation in every case where a criminal defendant is drowsy or suffers from mental or physical illness.

Protections against Delay

The issuance of a citation and magistrate's order in a driving while impaired case did not toll the statute of limitations under G.S. 15-1, and the failure of the State to prosecute the case within that two-year window of time barred prosecution.

State v. Turner, ___ N.C. App. ___, 793 S.E.2d 287 (Dec. 6, 2016), *review allowed*, ___ N.C. ___, 797 S.E.2d 4 (Mar. 16, 2017). Because the State failed to prosecute the defendant's impaired driving misdemeanor charge within two years, the trial court did not err by dismissing that charge. According to the court, the defendant "received a citation for driving while impaired" and "was arrested and brought before a magistrate, who issued a magistrate's order." The court stated: "The issuance of a citation did not toll the statute of limitations pursuant to N.C. Gen. Stat. § 15-1; the State had two years to either commence the prosecution of its case, or to issue a warrant, indictment, or presentment which would toll the statute of limitations. Because the State failed to do so, the statute of limitations expired, and the State was barred from prosecuting this action. The trial court did not err in dismissing the charge."

No speedy trial violation where the primary cause of the delay attributable to the State was a backlog at the State Crime Lab. Court rejects the defendant's argument that his pre-trial incarceration was prejudicial where he was also incarcerated on additional, unrelated charges at the same time.

State v. Evans, ___ N.C. App. ___, 795 S.E.2d. 444 (Jan. 17, 2017). No violation of the defendant's speedy trial right occurred. The court began by finding that the delay of two years and 10 months was extensive enough to trigger consideration of the other speedy trial factors. Rejecting the defendant's argument to the contrary, the court held that with respect to the second factor--reason for the delay--the defendant has the burden of producing evidence establishing a prima facie case that the delay resulted from the neglect or willfulness of the State. Once that showing is made, the burden shifts to the State to rebut the defendant's evidence. Here, the defendant failed to make the prima facie showing. The court noted that between the time of arrest and trial, the defendant was represented by five different attorneys, each of whom needed time to become familiar with the case and that a significant portion of the delay resulted from delays at the State Crime Lab. With respect to the third factor--the defendant's assertion of a speedy trial right--the court noted that the defendant asserted his right in a timely pro se motion, later adopted by counsel. Turning to the last factor—prejudice--the court noted that the defendant's primary claims of prejudice were supported by his own testimony and no other evidence. Conceding that the trial court did not find his testimony credible, the defendant argued that the trial court failed to give adequate consideration to the prejudice inherent in pretrial incarceration. The court was unpersuaded, noting that during the time that he was incarcerated on the present charges he also was incarcerated on unrelated felony charges. Balancing the factors, the court found no speedy trial violation.

No speedy trial violation under four-part *Barker v. Wingo* test.

State v. Johnson, ___ N.C. App. ___, 795 S.E.2d 126 (Dec. 20, 2016). In a case where the trial was delayed because of backlogs at the crime lab and because of issues with counsel, the trial court properly denied

the defendant's speedy trial motion, made shortly before trial. Applying the *Barker v. Wingo* four-part speedy trial analysis, the court began by noting that the 28-month delay between arrest and trial raises a question of reasonableness requiring the court to consider the additional *Barker* factors. As to the second factor—reason for the delay—it was undisputed that the last four months of delay resulted from issues with defense counsel. Delay caused by the defendant's indecision about counsel, counsel's lapse in communicating with the defendant, and counsel's scheduling conflicts should not be weighed against the State. The primary cause of the delay was a backlog at the state crime lab, a matter over which the prosecutor had no control. Acknowledging that governmental responsibility for delay should be weighed against the State, the court concluded that the defendant failed to make a prima facie showing that either the prosecution or the crime lab negligently or purposefully underutilized resources available to prepare the State's case for trial. Thus, the 18 months of delay caused by crime lab backlogs was a "neutral reason." Turning to the third factor in the analysis—the defendant's assertion of a speedy trial right—the court held that the "eleventh-hour nature of Defendant's speedy trial motion carries minimal weight in his favor." The court was also unpersuaded by the defendant's argument with respect to the fourth factor in the analysis, prejudice.

Closing Argument

The prosecutor arguing that the defendant presented no evidence to support contentions made in opening statements by defense counsel was not an impermissible comment on the defendant's assertion of his right to remain silent. The defense lodged no objection to the actions of the prosecutor in pointing a rifle in evidence at himself during closing, and the court did not err in failing to intervene on its own motion. Various parts of closing, though "troublesome," did not warrant reversal.

State v. Martinez, ___ N.C. App. ___, 795 S.E.2d 386 (Dec. 20, 2016). (1) During closing statements to the jury, the prosecutor did not impermissibly comment on the defendant's failure to take the stand. In context, the prosecutor's statements summarized the evidence before the jury and asserted that no evidence was presented to support defense counsel's assertions in his opening statement. Even if the prosecutor's statements constituted an impermissible comment on the defendant's right to remain silent, the error was harmless beyond a reasonable doubt. (2) The court rejected the defendant's argument that the prosecutor improperly misled the jury during closing argument by asserting facts not in evidence. The defendant failed to show any gross impropriety that was likely to influence the verdict. (3) The defendant failed to show gross impropriety warranting intervention *ex mero motu* to when the prosecutor handled a rifle in evidence by pointing it at himself. The defendant argued that the prosecutor's actions inflamed the jurors' emotions and causing them to make a decision based on fear (4) Notwithstanding these conclusions, the court noted that it found the prosecutor's words and actions "troublesome," stating: "the prosecutor flew exceedingly close to the sun during his closing argument. Only because of the unique circumstances of this case has he returned with wings intact." It went on to emphasize that a prosecutor "has the responsibility of the Minister of Justice and not simply that of an advocate; the prosecutor's duty is to seek justice, not merely to convict" (quotation omitted).

Jury Issues

U.S. Supreme Court recognizes exception to "no impeachment of jury verdict" rule, holding that where there is evidence that racial animus was a significant motivating factor in the verdict, it may violate the 6th Amendment guarantee of a fair trial and may be the subject of judicial inquiry.

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. [Emily Coward and Alyson Grine blogged about the case here.]

Jury trial properly waived.

State v. Swink, ___ N.C. App. ___, 797 S.E.2d 330 (Mar. 7, 2017). In this child sexual assault case, the court upheld the defendant's conviction, obtained after a bench trial. (1) The court rejected the defendant's argument that the trial court lacked authority to try him without a jury. The defendant asserted that the statute allowing a jury trial waiver applies only to cases arraigned on or after December 1, 2014. The defendant argued that the statute did not apply to him because he was never formally arraigned and thus should not have been allowed to waive his jury trial right. The court noted in part that arraignment is not mandatory, and will be held only if a defendant files a written request for arraignment. Here, the defendant never made such a request. Additionally, the March 2, 2015 hearing on the defendant's motion to waive a jury trial--a hearing date after the statute's effective date--"essentially served the purpose of an arraignment." (2) The defendant's waiver of his jury trial right was knowing and voluntary where the court engaged in a full colloquy with the defendant.

No prejudice found where trial court preemptively informed jurors that a request to review evidence would not be entertained by the court, despite such instruction violating the provisions of G.S. 15A-1233(a).

State v. Lyons, ___ N.C. App. ___, 793 S.E.2d 755 (Dec. 6, 2016). In this murder case, although the trial court erred by making comments prior to closing arguments suggesting to the jury that it would be futile to request to review witness testimony, the error was not prejudicial. The trial judge had stated:

> When you go back and start deliberating, if six of you say, Well, I remember this witness says things this way and the other six of you say, No, I don't remember it that way . . . you don't have the option of saying, Well, let's go ask the judge and let the judge tell us what did that witness really say. Because if you ask that question, my response it going to be, That's part of your job, to figure it out and to make that determination based on your recollection[.]

The court rejected the State's argument that the trial court's comments merely made it clear to the jurors that if they asked for his interpretation of witness testimony, the judge would instruct them to make that determination based on their own recollections. However, the court declined to find that the error was prejudicial.

Evidence supported jury instruction on flight despite the fact that the defendant was not driving the vehicle.

State v. Bradford, ___ N.C. App. ___, ___ S.E.2d ___ (Mar. 21, 2017). In this assault and discharging a firearm into occupied property case, the trial court did not abuse its discretion by providing a jury instruction on flight. The defendant fired his weapon at the victims as a vehicle carrying the defendant sped from a gas station. The court rejected the defendant's argument that because he was a passenger in the car—and not the driver—there was no evidence supporting a flight instruction. The court noted that the bar for an instruction on flight "is low." Here, the defendant fired his gun while the vehicle in which he was a passenger was speeding away from the gas station; the defendant later told the driver to stop at a specified location and then abandoned the vehicle and left the area on foot; and the defendant intentionally disposed of his weapon shortly thereafter. This evidence "plainly supports an instruction on flight in spite of the fact that Defendant was not actually driving the [vehicle] when it fled the . . . station."

Prospective Juror's remark that her uncle, a criminal defense attorney, had told her that his job was to "get the bad guys off" did not amount to an improper comment on the defendant's guilt or the case at issue.

State v. Martinez, ___ N.C. App. ___, ___ S.E.2d ___ (May 16, 2017). In this child sexual assault case, the court rejected the defendant's argument that a statement made by a prospective juror violated his constitutional right to an impartial jury and constituted plain error. Specifically, the defendant argued that the prospective juror's statement that her uncle was a local defense attorney who had told her his job was to "get the bad guys off" amounted to a comment on the defendant's guilt from a reliable source. The court found that the statement in question was generic and did not imply any particular knowledge of the defendant's case or the possibility that the defendant might be guilty.

No prejudicial error where the court instructed the jury on a sexual act not supported by the evidence, where the instruction did not have a probable impact on the verdict.

State v. Martinez, ___ N.C. App. ___, ___ S.E.2d ___ (May 16, 2017). In this child sex case, no prejudicial error occurred when the trial court instructed the jury on a sexual act that was not supported by the evidence. The defendant was convicted of four felonies under G.S. 14-27.4(a)(1) (first degree sexual offense with a child) and two felonies under G.S. 14-27.7(a) (sex offense in a parental role). Both statutes require that the defendant engage in a "sexual act" with the victim. The term sexual act is defined as cunnilingus, fellatio, analingus, or anal intercourse. The evidence at trial showed that the defendant engaged in fellatio and anal intercourse with victim. There was however no evidence that the defendant engaged in analingus with the victim. However, the trial court instructed the jury that it could find the defendant guilty of the six felonies if it found that he committed fellatio, anal intercourse, or

analingus with the victim. The court noted that it cannot be discerned from the verdict sheets which theory the jury relied upon to find the defendant guilty. In its first opinion in the case, the court held that the trial court's inclusion of analingus, where no evidence of that act was offered at trial, constituted plain error per se. The Supreme Court however remanded, instructing the court to revisit its holding in light of *State v. Boyd*, 366 N.C. 548 (2013). In *Boyd,* the trial court instructed the jury that it could convict the defendant of kidnapping based on three alternative theories: confinement, restraint, or removal. On appeal to the court of appeals, two members of the panel held that the instruction constituted plain error because there was no evidence that the defendant had removed the victim. A dissenting judge agreed with the majority that the trial court erred by instructing on the theory of removal but disagreed that the error rose to the level of plain error. The dissenting judge did not assume that the jury relied on the theory of removal to support the kidnapping conviction; rather, she cited the overwhelming evidence supporting the other kidnapping theories, confinement and restraint, to conclude that the defendant failed to show that absent the error the jury would have returned a different verdict. The Supreme Court reversed the court of appeals in *Boyd*, adopting the dissenting opinion from the intermediate appellate court. In this second appeal, the court noted that the Supreme Court's approach in *Boyd* represented a shift away from the per se rule that had been previously applied in cases involving disjunctive instructions where one of the theories was not supported by the evidence. Turning to the case at hand, the court concluded that the defendant failed to meet his burden of showing that the trial court's inclusion of analingus in the jury instruction had any probable impact on the verdict. It noted that the victim was clear in her testimony regarding the occasions where fellatio and anal intercourse had occurred.

Continuances

(1) Trial court's oral indication that the case would be continued from a future trial setting was not an order of the court and could be overruled by another judge, absent an actual order. (2) The defendant failed to show the denial of his continuance motion violated his rights where counsel did not file a motion, did not specify with particularity why more time was needed, and offered no explanation for failure to prepare other than the earlier trial judge's oral indication.

State v. Moore, ___ N.C. App. ___, ___ S.E.2d ___ (May 16, 2017). In this case involving charges of fleeing to elude arrest, resisting an officer, driving without a license and other charges, the trial court did not err by denying the defendant's motion for a continuance. Following the defendant's arrest on May 22, 2015 attorney Doyle was appointed to represent the defendant. The defendant was later charged with first-degree murder in an unrelated case and attorney Mannette was appointed to represent him on that charge. On March 9, 2016, the defendant's homicide case was continued until September 2016. Attorney Doyle was present at the hearing and moved the trial court to allow him to withdraw as counsel on the charges at issue in this case and appoint Ms. Mannette. The prosecutor informed the court that the charges were scheduled for trial on April 18, 2016. Mannette said that she believed the charges were headed towards resolution but that she would not be prepared to try the case in a month. The trial court indicated that the "bottom line" was that the case was "going to get continued" if the State was prepared to proceed to trial on April 18th. When the case was called for trial on April 18,

2006, Mannette orally moved for a continuance, explaining that when she took the case she indicated that if the parties could not reach a non-trial disposition she would not be prepared to try the case. Defense counsel acknowledged that she had received discovery a month earlier. Counsel stated that she had not interviewed a witness or conducted legal research to support her pretrial motions. The trial court denied the continuance motion. On appeal the defendant argued that the denial of his motion to continue deprived him of his constitutional right to effective assistance of counsel because counsel had insufficient time to prepare a defense. The court rejected this argument. First, it rejected the defendant's argument that the trial court's remark made at the March 9th hearing constituted a judgment or order that could not be overruled by another judge. The court noted that an order rendered in open court is not enforceable until it is entered, that is, reduced to writing, signed by the judge, and filed with the clerk of court. Thus, the oral statement by the judge, which was not reduced to writing or entered as an order or judgment, was not a judgment or order that may not be overruled by another judge. Second, the court rejected the defendant's argument regarding his need for additional time to prepare a defense. At the pretrial hearing, defense counsel stated that there was a lay witness she had not interviewed, a suppression motion for which she had not conducted the necessary research, and other unspecified motions in limine that needed to be filed and argued. Defense counsel did not identify the witness or articulate any material factual issue upon which the witness might testify. Nor did counsel offer an explanation, other than her reliance on the prior judge's comment at the earlier hearing, for failure to interview the witness, conduct the necessary research, or file a properly supported written motion to continue. Additionally, the trial was not unusual or complex. The court thus concluded that the defendant had failed to establish that the denial of his continuance motion violated his constitutional rights.

Trial court committed prejudicial error when it denied defendant's motion to continue after the State disclosed, on the evening before trial, evidence of the victim's assaultive behavior

State v. Bass, ___ N.C. App. ___, ___ S.E.2d ___ (June 6, 2017). In this assault case involving self-defense the court held, over a dissent, that the trial court committed prejudicial error by denying the defendant's motion to continue, made after the prosecutor provided defense counsel with additional reports of the victim's assaultive behavior on the evening before trial, where that behavior was relevant to the defendant's self-defense assertion that the victim was the aggressor. The defendant should have been permitted adequate time to investigate these additional instances of the victim's violent and explosive conduct in order to adequately prepare his defense. The court concluded: "Failure to allow counsel any time to investigate after the State's disclosures, provided the night before trial, . . . violated Defendant's rights to effective assistance of counsel and to present a complete defense."

Other Procedural Issues

District court acted within its authority in dismissing case for failure to prosecute where, after district court denied the State's motion to continue and directed the State to call the case or dismiss, the State refused to take any action

State v. Loftis, ___ N.C. App. ___, 792 S.E.2d 886 (Nov. 15, 2016). In this DWI case, the district court properly dismissed the charges *sua sponte*. After the district court granted the defendant's motion to suppress, the State appealed to superior court, which affirmed the district court's pretrial indication and remanded. The State then moved to continue the case, which the district court allowed until June 16, 2015, indicating that it was the last continuance for the State. When the case was called on June 16th the State requested another continuance so that it could petition the Court of Appeals for writ of certiorari to review the order granting the defendant's motion to suppress. The district court judge denied the State's motion to continue and filed the final order of suppression. The district court judge then directed the State to call the case or move to dismiss it. When the State refused to take any action, the district court, on its own motion, dismissed the case because of the State's failure to prosecute. Affirming, the court noted that when the case came on for final hearing on June 16th, the State had failed to seek review of the suppression motion. And, given that the prosecutor knew that there was no admissible evidence supporting the DWI charge in light of the suppression ruling, a State Bar Formal Ethics Opinion required dismissal of the charges. The court noted: the "State found itself in this position by its own in action."

Evidence

Photographs

Photographs used for illustrative evidence were properly authenticated and admitted for non-substantive purposes.

State v. Little, ___ N.C. App. ___, ___ S.E.2d ___ (April 18, 2017). In this armed robbery case, the trial court did not err by admitting photographs for illustrative purposes. The photographs were admitted solely to illustrate the testimony of witnesses and the trial court appropriately instructed the jury. The court rejected the defendant's argument that photographs admitted for illustrative purposes must be authenticated in the same manner as photographs admitted as substantive evidence.

Rape Shield

No error for trial court to exclude cross-examination of State's expert on the child victim's sexual activity with others where expert testified to PTSD diagnosis of the victim and the victim's consensual sexual activity with others did not inform the expert's diagnosis.

State v. Mendoza, ___ N.C. App. ___, 794 S.E.2d 828 (Dec. 6, 2016). In this child sexual assault case, the trial court did not err by precluding the defendant from cross-examining the State's expert witness about information in the treatment records regarding the child's sexual activity with partners other than the defendant. The defendant unsuccessfully sought to cross-examine an expert who testified that the victim suffered from PTSD about information she learned regarding the victim's sexual activity with other individuals. During *voir dire* the expert testified that any information about the victim's consensual sexual activity with others did not play a role and was not relevant to her PTSD diagnosis. The trial court found the evidence to be irrelevant. The court noted that having so found, the trial court was not required to proceed under a Rule 403 balancing test.

Evidence of victim's STDs not admissible under Rule 412 where defendant's evidence raised only a speculation that the victim was sexually active with someone else.

State v. Jacobs, ___ N.C. App. ___, ___ S.E.2d ___ (Mar. 21, 2017). In this child sexual assault case, the trial court did not err by concluding that evidence regarding the victim's sexually-transmitted diseases was inadmissible under Rule 412. The defendant had wanted to call an expert witness to testify that the victim—his daughter--had STDs but that the defendant tested negative for those diseases. The defendant argued that the evidence would make a sexual relationship between himself and the victim less likely and would show that someone else had sexual relations with the victim. The court began by holding that the presence of an STD is indicative of prior sexual behavior and thus implicates Rule 412. The court went on to reject the defendant's argument that evidence of the STDs was admissible under the exception to the Rule that allows evidence of "specific instances of sexual behavior offered for the purposes of showing that the act or acts charge were not committed by the defendant." The defendant offered no alternative explanation or specific act to prove that any sexual act committed was done by someone other than him. Rather, he offered evidence of the victim's STDs and his own negative testing to raise speculation and insinuate that the victim must have been sexually active with someone else. The court found that the presence of an STD was not relevant and was properly excluded. One judge wrote separately, concurring in result only to emphasize that evidence regarding STDs "is not a class of evidence unto itself that should be included wholesale" under the Rule. [Phil Dixon blogged about the preservation aspect of the case here.]

Failure to make an offer of proof concerning the victim's responses to questions about her past sexual history bars consideration of Rule 412 issue on appeal.

State v. Parlier, ___ N.C. App. ___, 797 S.E.2d 340 (Mar. 7, 2017). In this child sexual assault case, because the defendant did not make an offer of proof to show what the victim's responses to questions about her past sexual behavior would have been, he failed to preserve for appellate review whether he

should have been allowed to question the victim regarding her general sexual history (a Rape Shield issue).

Rule 404(b)

Defendant's sexual act with wife was sufficiently similar to the child's allegation of sexual abuse and was admissible to show common scheme or plan, pattern, or modus operandi

State v. Godbey, ___ N.C. App. ___, 792 S.E.2d 820 (Nov. 15, 2016), *review allowed*, ___ N.C. ___, 795 S.E.2d 213 (Jan. 26, 2017). In this child abuse case, the trial court did not abuse its discretion by admitting evidence regarding consensual sexual activity between the defendant and his wife. Here, after the child described to the wife a sexual act performed by the defendant, the wife signed a statement indicating that she and the defendant had engaged in the same act. The act in question was to turn her over on her stomach and "hump" and ejaculate on her back. The wife's testimony was admissible to show common scheme or plan, pattern and/or common modus operandi and was sufficiently similar to the child's allegation of sexual abuse. The court distinguished this case from one involving "a categorical or easily-defined sexual act" such as anal sex. Here, the case involved "a more unique sexual act."

Bare evidence of the defendant's prior incarceration, while not necessarily Rule 404(b) evidence under existing precedent, was nonetheless improper character evidence under Rule 404(a).

State v. Rios, ___ N.C. App. ___, 795 S.E.2d 234 (Dec. 20, 2016). In this drug case, a new trial was required where character evidence was improperly admitted. When cross-examining the defendant's witness, the prosecutor elicited testimony that the defendant had been incarcerated for a period of time. The court viewed this testimony as being equivalent to testimony regarding evidence of a prior conviction. Because the defendant did not testify at trial, the State could not attack his credibility with evidence of a prior conviction. The court rejected the State's argument that the defendant opened the door to this testimony, finding that the defendant did not put his good character at issue. [Phil Dixon blogged about the case here.]

Recording of conversations between defendant and testifying jailhouse informant proper to show the nature and context of the relationship between the two men under Rules 404(b) and 403.

State v. Carvalho, ___ N.C. ___, 794 S.E.2d 497 (Dec. 21, 2016). The court *per curiam* affirmed the Court of Appeals in *State v. Carvalho* ___, N.C. App. ___, 777 S.E.2d 78 (Oct. 6, 2015). In this murder case, the Court of Appeals held, over a dissent, that the trial court did not err by admitting under Rule 404(b) portions of an audiotape and a corresponding transcript, which included a conversation between the defendant and an individual, Anderson, with whom the defendant was incarcerated. Anderson was a key witness for the State and his credibility was crucial. The recorded conversation included discussions of plans to commit future robbery and murder, when a murderer becomes a serial killer, how to become a hitman, and similar topics. The 404(b) evidence was not admitted for propensity but rather to show: that the defendant trusted and confided in Anderson; the nature of their relationship, in that the defendant was willing to discuss commission of the crimes at issue with Anderson; and relevant factual

information to the murder charge for which the defendant was on trial. These were proper purposes. Additionally, the trial court did not abuse its discretion in admitting this evidence under the Rule403 balancing test.

Evidence of prior arson committed four years ago by the defendant under circumstances similar to the current arson offense properly admitted under Rule 404(b) as evidence of defendant's intent.

State v. Wilson-Angeles, ___ N.C. App. ___, 795 S.E.2d 657 (Feb. 7, 2017). In this arson case, the trial court properly admitted 404(b) evidence to show the defendant's intent. The evidence in question pertained to another arson, which was sufficiently similar to the incident in question. Both arsons occurred in the same town during nighttime hours and involved the same building location. In both instances the defendant was intoxicated, knew the buildings were occupied, and was angry about a perceived harm perpetrated against her by an occupant of the residence. Although the other incident occurred approximately four years earlier, there was a sufficient temporal proximity to the conduct at issue.

Evidence of 4 year-old embezzlement by defendant admissible under Rule 404(b) to show intent, motive, plan, and absence of mistake.

State v. Fink, ___ N.C. App. ___, ___ S.E.2d ___ (Mar. 21, 2017). In this larceny by employee case, the trial court did not err by admitting 404(b) evidence. The charges arose out of a 2014 incident in which the defendant, a manager of an auto shop, kept for himself cash paid by a customer for auto repairs. At trial, an officer testified that in 2010 he investigated the defendant for embezzlement. The defendant, who was working as a restaurant manager, admitted stealing from the restaurant by voiding out cash transactions and keeping the cash for himself. The court found that evidence showing that the defendant embezzled from a previous employer four years prior was clearly relevant to show intent, plan, or absence of mistake or accident. In both cases, the defendant worked for the business, held a managerial position, took cash paid and intended for the business, kept the cash for himself, and manipulated accounting procedures to cover his tracks. The prior incident was sufficiently similar to the current one and was not too remote in time. Additionally, the trial court gave a proper limiting instruction.

Prejudicial error to admit 404(b) evidence of prior gun possession by defendant.

State v. Williams, ___ N.C. App. ___, ___ S.E.2d ___ (May 16, 2017). In this possession of a firearm by a felon case, the court held, over a dissent, that the trial court erred by admitting 404(b) evidence. The current charges were filed after officers found an AK-47 rifle in the back seat of a vehicle and a Highpoint .380 pistol underneath the vehicle, next to the rear tire on the passenger side. At trial, the State offered, and the trial court admitted, evidence of a prior incident in which officers found a Glock 22 pistol in a different vehicle occupied by the defendant. The evidence was admitted to show the defendant's knowledge and opportunity to commit the crime charged. The defendant offered evidence tending to show that he had no knowledge of the rifle or pistol recovered from the vehicle. The trial court erred by admitting the evidence as circumstantial proof of the defendant's knowledge. The court

reasoned, in part, that "[a]bsent an immediate character inference, the fact that defendant, one year prior, was found to be in possession of a different firearm, in a different car, at a different location, during a different type of investigation, does not tend to establish that he was aware of the rifle and pistol in this case." The court found that the relevance of this evidence was based on an improper character inference. The court further held that the trial court abused its discretion by admitting the evidence as circumstantial proof of the defendant's opportunity to commit the crime charged. The court noted, in part, that the State offered no explanation at trial or on appeal of the connection between the prior incident, opportunity, and possession. The court went on to hold that the trial court's error in admitting the evidence for no proper purpose was prejudicial and warranted a new trial. The dissenting judge believed that the defendant did not properly preserve his objection, that the issue should be reviewed under the plain error standard, and that no plain error occurred.

Character Evidence

Trial court committed prejudicial error by excluding the testimony of three character witnesses pertaining to the victim's past instances of violent conduct.

State v. Bass, ___ N.C. App. ___, ___ S.E.2d ___ (June 6, 2017). In this assault case involving self-defense the court held, over a dissent, that the trial court committed prejudicial error by excluding the testimony of three character witnesses pertaining to the victim's past instances of violent conduct. Under Rule 405(b), the defendant was entitled to present evidence of specific acts of the victim's violent conduct to show that the victim, not the defendant, was the aggressor. This right applies regardless of whether the victim's specific instances of conduct were known or unknown to the defendant. Here, the excluded evidence tends to show that the victim had a history not only of violence, but of explosive, unprovoked, and irrational violence, even with strangers. Citing *Holmes v. South Carolina*, 547 U.S. 319 (2006), the court held that by excluding this evidence the defendant was denied his constitutional right to present a complete defense.

Confrontation

Statements offered for corroborative purposes did not violate defendant's confrontation rights even though they included additional information

State v. Thompson, ___ N.C. App. ___, 792 S.E.2d 177 (Oct. 18, 2016). In this kidnapping and rape case, the defendant's confrontation rights were not violated when the trial court admitted, for the purposes of corroboration, statements made by deceased victims to law enforcement personnel. The statements were admitted to corroborate statements made by the victims to medical personnel. The court rejected the defendant's argument that because the statements contained additional information not included in the victims' statements to medical personnel, they exceeded the proper scope of corroborative evidence and were admitted for substantive purposes. The court noted in part, "the mere fact that a corroborative statement contains additional facts not included in the statement that is being corroborated does not render the corroborative statement inadmissible."

Statement offered to show course of investigation not offered for the truth of the matter asserted and therefore non-testimonial for purposes of the Confrontation Clause.

State v. Garner, ___ N.C. App. ___, ___ S.E.2d ___ (Mar. 21, 2017). In this case involving a larceny from a country club, the Confrontation Clause was not violated when the trial court admitted evidence that the owners of the country club received an anonymous phone call providing information about the perpetrator. The trial court admitted the statement with a limiting instruction that it was not to be considered for its truth but only to show the course of the officers' investigation based on the information provided by the caller. Because the statement was admitted for a purpose other than the truth of the matter asserted, it falls outside of the protections afforded by the Confrontation Clause.

Hearsay

Where statement by non-testifying declarant offered to establish why the defendant was under police surveillance, it was not offered for the truth of the matter asserted and did not violate the hearsay prohibition.

State v. Rogers, ___ N.C. App. ___, 796 S.E.2d 91 (Feb. 7, 2017), *temporary stay allowed*, ___ N.C. ___, 796 S.E.2d 21 (2017). In this drug case, the trial court did not err by allowing an officer to testify about information collected from a non-testifying witness during an investigation. The statement was not offered for its truth but rather to explain the officer's subsequent conduct and how the investigation of the defendant unfolded. The court explained, "hearsay testimony given by an informant to the witness concerning a defendant's conduct was admissible to 'explain how the investigation of the defendants unfolded, why defendants were under surveillance, and why the witnesses followed the defendant's vehicle.'"

Where the witness testified that a jailer told her the defendant was in jail at the same time as her and that statement was offered to explain why the witness was afraid to testify, the statement was not offered for the truth of the matter asserted and did not violate the hearsay ban.

State v. McLean, ___ N.C. App. ___, 796 S.E.2d 804 (Feb. 7, 2017). The trial court did not err by allowing a witness to testify that after the incident in question and while she was incarcerated, a jailer told her that the defendant was in an adjacent cell. The defendant argued that because the jailer did not testify at trial, this was inadmissible hearsay. The court disagreed, finding that the statement was not offered to prove its truth but rather to explain why the witness was afraid to testify. Because the defendant did not object, even if the statement was hearsay, its admission did not rise to the level of plain error.

When witness did not recall her statement to law enforcement, the video of the interview was properly admitted as a "past recollection recorded" hearsay exception under Rule 803(5); playing the video a second time to corroborate the officer's testimony about the interview was permissible and not error.

State v. Harris, ___ N.C. App. ___, ___ S.E.2d ___ (May 2, 2017). The trial court did not err by allowing the introduction of a video recording of the State's witness being interviewed by law enforcement as substantive evidence. It was admissible as a past recollection recorded once the witness failed to recall the details of the interview. The court rejected the notion that the video had been introduced to refresh the witnesses recollection under Rule 612. A second playing of the video to corroborate the officer's testimony about the interview was also permissible.

Impeachment

No prejudice where trial court limited cross-examination of State's expert, prohibiting questions on letters to the editor regarding child abuse and other topics written by the expert 10 years earlier.

State v. Mendoza, ___ N.C. App. ___, 794 S.E.2d 828 (Dec. 6, 2016). In this child sexual assault case, even if the trial court erred by denying the defendant's request to admit into evidence three letters to the editor written by the State's expert witness and published in a newspaper 10 years before the expert's interview with the child in question, the error was not prejudicial. The defendant contended that the letter showed possible bias or prejudice in child advocacy matters and that he should have been permitted to cross-examine the expert about their content. The court determined, however, that the defendant had failed to demonstrate a reasonable possibility that a different result at trial would have occurred if the letters had been admitted.

(1) Where the victim's husband testified to biographical information about the victim and the injuries sustained by their child (also a victim), no error to limit the scope of cross-examination and exclude questions about the pending civil complaint or possible financial bias. (2) No error for the trial court to exclude evidence that the child was not properly restrained in a child set. Per G.S. 20-137.1, such evidence is typically not admissible in criminal proceedings.

State v. Cox, ___ N.C. App. ___, ___ S.E.2d ___ (May 2, 2017). (1) In this impaired driving second-degree murder case, the trial court did not err by preventing the defendant from cross-examining witness Cooke regarding the contents of a verified complaint that Cooke had filed against the defendant and the estate of the deceased victim on behalf of himself and Cooke's son, who was injured in the crash. The State filed a motion *in limine* to prevent the defendant from cross-examining Cooke regarding the contents of the verified civil complaint. The trial court granted the State's motion and prohibited the defendant from cross-examining Cooke regarding the allegations in the complaint or about any bias that might result from Cooke's financial interest in the defendant's prosecution. Cooke was called by the State to testify about his family and the child's injuries. The State did not elicit any testimony from him regarding cause of the crash and he did not offer any testimony that would tend to sway the jury in deciding the defendant's guilt. The defendant failed to show that the trial court's decision to limit the

scope of cross-examination influenced the jury's verdict. (2) The trial court did not err by excluding evidence that a child victim was not properly restrained in a child seat. Although G.S. 20-127.1 provides that passengers less than 16 years old must be properly secured in a vehicle, the statute also provides that evidence of failure to wear a seatbelt is not admissible in any criminal action, subject to exceptions that do not apply in this case.

Error to exclude impeachment evidence of mother's previous accusations against the defendant, but no prejudice in light of other evidence of guilt.

State v. Martinez, ___ N.C. App. ___, ___ S.E.2d ___ (May 16, 2017). In this child sexual assault case, the trial court erred by excluding evidence which tended to show the victim's mother's bias against the defendant. After concluding that the defendant failed to preserve his challenges with respect to three pieces of impeachment evidence, the court concluded that exclusion of impeachment evidence that the mother had previously accused the defendant of domestic abuse constituted error. The evidence at issue showed that the mother had accused the defendant of domestic violence, the police declined to prosecute, that she subsequently took out a private warrant, and that she failed to prosecute those charges. The court agreed that exclusion of this evidence was error, explaining: "Evidence that Mother had accused Defendant of domestic violence could have indicated Mother's bias against Defendant and may have influenced the jury's assessment of her credibility as a witness." However, considering the entire record, the court went on to conclude that there was no reasonable possibility that had the jury heard the evidence a different result would have been reached at trial.

Privileges

G.S. 8-57.1 overrode husband-wife privilege in child abuse case

State v. Godbey, ___ N.C. App. ___, 792 S.E.2d 820 (Nov. 15, 2016), *review allowed*, ___ N.C. ___, 795 S.E.2d 213 (Jan. 26, 2017). The trial court did not err by applying G.S. 8-57.1 (husband-wife privilege waived in child abuse) in this child abuse case. The defendant asserted that the trial court erred by admitting privileged evidence about consensual sexual activity between the defendant and his wife. Specifically, he argued that the trial court erroneously concluded that the marital communications privilege was waived by G.S. 8-57.1. The defendant argued that the statute does not completely abrogate the privilege and is limited to judicial proceedings related to a report pursuant to the Child Abuse Reporting Law. The court disagreed, holding that the privilege was waived under the statute.

Vouching

Improper vouching for law enforcement officer to testify that the victim seemed truthful, but error did not rise to level of plain error given the lack of objection at trial and the corroborating testimony of other witnesses.

State v. McLean, ___ N.C. App. ___, 796 S.E.2d 804 (Feb. 7, 2017). In this case involving armed robbery and other charges, the trial court erred by allowing an officer to testify that when the victim provided a statement he "seemed truthful." The error, however, did not rise to the level of plain error. At trial, the

prosecutor asked the officer to describe the victim's demeanor. The officer responded that he was agitated and seemed to be in pain but that "he was—to me, he seemed truthful." This constituted improper vouching for the witness.

Where defense counsel failed to object to improper vouching for child victim by the State's expert, argument not preserved for appellate review.

State v. Mendoza, ___ N.C. App. ___, 794 S.E.2d 828 (Dec. 6, 2016).). In this child sexual assault case, the defendant failed to preserve the argument that the trial court committed prejudicial error by allowing the State's expert witness to testify that she diagnosed the child with PTSD, thus improperly vouching for the witness. At trial, the defendant did not object to the expert's testimony on the basis that it impermissibly vouched for the child's credibility or the veracity of the sexual abuse allegations; rather, his objection was grounded on the fact that a licensed clinical social worker is not sufficiently qualified to give an opinion or diagnosis regarding PTSD.

Experts

Trial court committed plain error by allowing officer to testify about results of HGN test without qualifying him as expert

State v. Killian, ___ N.C. App. ___, 792 S.E.2d 883 (Nov. 15, 2016). In this DWI case, the trial court committed plain error by denying the defendant's motion to exclude an officer's Horizontal Gaze Nystagmus ("HGN") testimony and allowing the officer to testify about the results of the HGN test without qualifying him as an expert under Rule 702. Citing *State v. Godwin*, ___ N.C. App. ___, 786 S.E.2d 34, 37 (2016), the court held that it was error to allow the officer to testify without being qualified as an expert. The court went on to conclude that the error did not have a probable impact on the jury's verdict under the plain error standard.

Where fire investigator was not offered as expert and testified without objection, trial court did not err by failing *sua sponte* to inquire whether he was qualified to testify as expert

State v. Hunt, ___ N.C. App. ___, 792 S.E.2d 552 (Nov. 1, 2016). In this burning of a building case, the trial court did not commit plain error by allowing Investigator Gullie to offer opinion testimony about his inspection of fire. Investigator Gullie was neither tendered nor admitted as expert in field of fire investigation and testified without objection. Noting the procedural posture of the case, the court stated:

> In challenging the trial court's performance of its gatekeeping function for plain error, defendant implicitly asks this Court to hold the trial court's failure to *sua sponte* render a ruling that Investigator Gullie was qualified to testify as an expert pursuant to Rule 702 amounted to error. And to accept defendant's premise would impose upon this Court the task of determining from a cold record whether Investigator Gullie's opinion testimony *required* that he be qualified as an expert in fire investigation, where neither the State

> nor defendant respectively sought to proffer Investigator Gullie as an expert or challenge his opinion before the trial court.

The court went on to hold that even assuming the trial court erred, the defendant could not establish plain error in light of other evidence presented in the case.

Defense expert is not required to examine or interview prosecuting witness to testify about issues relating to witness, but trial court did not abuse discretion in excluding expert's testimony about the suggestibility of memory in this case.

State v. Walston, ___ N.C. ___, ___ S.E.2d ___ (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 petitioned 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.

Expert's comment that "in fact she did experience abuse", in context, referred to a hypothetical victim and did not constitute improper vouching for the victim.

State v. Martinez, ___ N.C. App. ___, ___ S.E.2d ___ (May 16, 2017). In this child sexual assault case, the State's medical expert did not impermissibly testify that the victim had been abused. Case law holds that

in the absence of physical evidence to support a diagnosis of sexual abuse, expert testimony that sexual abuse has in fact occurred is not admissible because it is an impermissible opinion regarding the victim's credibility. Here however the expert's statement, considered in context, does not amount to an assertion that the child was in fact abused. Rather, the expert was speaking of a hypothetical victim when she made the statement in question. In fact, she testified that the victim's medical exam was normal and that she could not determine from the exam whether or not the child had been sexually abused.

Videos

Error to admit video surveillance tape without proper foundation, but not prejudicial in light of other evidence of guilt.

State v. Moore, ___ N.C. App. ___, ___ S.E.2d ___ (May 16, 2017). The State failed to lay a proper foundation for the introduction of a video as either illustrative or substantive evidence. An officer testified that the day after the incident in question, he asked the manager of a Kangaroo convenience store for a copy of the surveillance video made by cameras at the store. The manager allowed the officer to review the video. The officer used the video camera function on his cell phone to make a copy of the surveillance footage. At trial he testified that the cell phone video accurately showed the contents of the video he had seen at the store. The store clerk also reviewed the video but was not asked any questions about the creation of the original video or whether it accurately depicted the events that he observed on the day in question. No testimony was elicited at trial concerning the type of recording equipment used to make the video, its condition on the day in question or its general reliability. No witness was asked whether the video accurately depicted events that he had observed, and no testimony was offered on the subject. However, the court went on to hold that the error was not prejudicial.

Crimes

Acting in Concert

Plain error for the trial court to instruct on acting in concert where State's evidence showed mere presence of the defendant at the residence of another where drugs found; motion to dismiss for insufficiency should have been allowed.

State v. Holloway, ___ N.C. App. ___, 793 S.E.2d 766 (Dec. 6, 2016), *temporary stay allowed*, ___ N.C. ___, 794 S.E.2d 526 (Dec. 20, 2016). In this drug case, the trial court committed plain error by instructing the jury on the theory of acting in concert. The State presented no evidence that the defendant had a common plan or purpose to possess the contraband with his alleged accomplice, McEntire. At most, the evidence showed that the two were acquainted and the defendant was present when the drugs were found at McEntire's home. Mere presence at the scene of a crime, however, is insufficient where the State presented no evidence that the two shared any criminal intent.

Evidence of acting in concert was sufficient where the defendant drove the shooter to the scene of the crime, assisted the shooter in attempting to restrain the victim, and drove the shooter away from the scene.

State v. Johnson, ___ N.C. App. ___, 795 S.E.2d 126 (Dec. 20, 2016). The evidence was sufficient to sustain a charge of assault with a deadly weapon inflicting serious injury based on a theory of acting in concert. It was undisputed that the victim sustained serious injury; the only real issue was whether the evidence was sufficient to allow a reasonable inference that the defendant was a perpetrator of the crime. Another individual, Mr. Robinson, shot the victim. The evidence showed that the defendant and the victim's wife drove to the victim's residence, where the victim and his wife engaged in a dispute over custody of their children until the police arrived and required the defendant and the victim's wife to leave without the children. The next evening the defendant drove his vehicle, with Robinson and the victim's wife, back to the victim's residence, carrying with them firearms, bulletproof vests, and walkie-talkie radios that were turned on and set to the same channel. The vehicle was waiting in the victim's apartment parking lot when he arrived home. Robinson, who did not know the victim, shot the victim and asked him if he wanted to die. The defendant assisted Robinson in restraining the victim, placed a handcuff on one of the victim's wrists, tried to cuff both of the victim's wrists, searched the victim's pockets, and escorted the victim's children from his apartment to the vehicle where the victim's wife was waiting. After neighbors found the victim bleeding from gunshot wounds, the defendant sped away from the scene with the victim's wife, Robinson, and the children. This evidence was sufficient to sustain and acting in concert charge.

Assault

Attempted assault with deadly weapon inflicting serious injury is a cognizable offense in North Carolina and may serve as a predicate offense in a habitual felon prosecution.

State v. Floyd, ___ N.C. ___, 794 S.E.2d 460 (Dec. 21, 2016). The Court of Appeals improperly found that attempted assault is not a recognized criminal offense in North Carolina. The court rejected the notion that attempted assault is an "attempt of an attempt." Thus, a prior conviction for attempted assault with a deadly weapon inflicting serious injury can support a later charge of possession of a firearm by a felon and serve as a prior conviction for purposes of habitual felon status. [Jessica Smith blogged about the case here.]

Spitting at people walking behind officer supported conviction of assault on officer when spit hit officer.

State v. Mylett, __ N.C. App. ___, ___ S.E.2d ___ (April 18, 2017). The evidence was sufficient to support a conviction for assault on a government officer under G.S. 14-33(c)(4). While attempting to separate the defendant from other individuals, the defendant spit at people walking behind the officer, hitting the officer with his spit. The defendant argued that because he intended to assault individuals standing behind the officer, the State failed to establish that he intended to assault the officer. The court rejected this argument, holding that the offense was a general intent crime. Here, the defendant conceded that

he knew the victim was a law enforcement officer and that he intended to commit an assault. The court concluded that "we are satisfied that when Defendant spat at members of the crowd and [the] Officer . . . was struck by Defendant's spit, the requirements of [the statute] were satisfied." It continued: "the knowledge element of assault on a government officer in violation of [G.S. 14-33(c)(4)] is satisfied whenever a defendant while in the course of assaulting another individual instead assaults an individual he knows, or reasonably should know, is a government officer."

Sexual Assault

Evidence was insufficient support sexual battery.

In re S.A.A., ___ N.C. App. ___, 795 S.E.2d 602 (Dec. 20, 2016). The State failed to introduce sufficient evidence of sexual battery. The 13-year-old juvenile was adjudicated delinquent in part based on two counts of sexual battery against two 11-year-old female schoolmates. It was alleged that he draped his arms around the girls' shoulders in order to smear a glowing liquid on them during an evening of Halloween trick-or-treating. The State failed to introduce sufficient evidence that the juvenile touch the tops of the girls' breasts for a sexual purpose. One girl testified that the juvenile rubbed "this green glow stick stuff" on her leaving glowing liquid on her shirt above her collarbone. The other girl testified that the juvenile reached his arm around her shoulder and "put this weird green glowing stuff" on her arm and back, also touching her "boobs" over her sweatshirt. In criminal cases involving adult defendants the element of acting for the purpose of sexual arousal, sexual gratification, or sexual abuse may be inferred from the very act itself. However, an intent to arouse or gratify sexual desires may not be inferred in children under the same standard. Rather, a sexual purpose does not exist without some evidence of the child's maturity, intent, experience, or other factor indicating his purpose in acting. Here, the juvenile denied touching either girl's breasts, saying that he only put his hand around their shoulders; this account was supported by witnesses. Neither the location nor the alleged manner of the touching was secretive in nature; rather, the incident occurred on a busy public street on Halloween. The evidence was undisputed that the juvenile have been wiping green glowing liquid on trees, signs, and other young people during the evening. Nothing about his attitude suggested a sexual motivation; neither girl said that he made any sexual remarks. And when the girls ran away, he did not try to pursue them. [Jessica Smith blogged about the case here.]

Breaking and Entering

Breaking and entering of a building on church grounds not regularly used for worship but instead used for storage cannot sustain conviction for breaking and entering of a place of worship.

State v. McNair, ___ N.C. App. ___, ___ S.E.2d ___ (April 18, 2017). (1) The evidence was insufficient to convict the defendant of breaking or entering into a place of religious worship. The defendant was alleged to have broken into a place of religious worship used by Vision Phase III International Outreach Center ("Vision"), a church engaged in international missions and renting a building called the "Chapel" for the purpose of conducting its church services. Several other structures were situated behind the Chapel, including a small barn, located approximately 50 feet away. The property owner allowed Vision

to use the barn to store equipment that could not be kept in the Chapel. The only building that the defendant was alleged to have broken into was the barn, which the State conceded was not used for religious worship. However, the State argued that the barn was within the curtilage of the Chapel, and for this reason should be deemed an extension of the Chapel for purposes of the statute. The court rejected this argument reasoning, in part, that based on the statute's wording "it is clear" that to be convicted of breaking or entering into a place of religious worship, the specific building broken into must be a "building that is regularly used, and clearly identifiable, as a place for religious worship." (2) The evidence was sufficient to convict the defendant of felony breaking or entering a building. The court rejected the defendant's argument that the evidence showed only his presence at the scene, noting, among other things, that responding to a possible break-in, officers found the defendant scaling a 10-foot brick wall near the barn. The court also found that the evidence was sufficient to support an inference that the defendant intended to commit a larceny when he entered the barn, noting, among other things, that items had been removed from the barn and placed in the fenced in area around it.

Robbery

Evidence was sufficient to support the element of unlawful taking from the person where the defendant, along with three masked men, entered a building, ordered the occupants to the ground and property was taken from the victim.

State v. McLean, ___ N.C. App. ___, 796 S.E.2d 804 (Feb. 7, 2017). In this armed robbery case, there was sufficient evidence that the defendant committed a taking from the victim's person or presence. The evidence showed that the defendant and three other men entered a building in the early morning. The armed intruders ordered the occupants to lie face-down on the ground and take off their clothing. The defendant ordered, "Give me all your money," and the victim's cell phone was taken at this time.

Threating or endangering element of armed robbery is viewed objectively; actual fear of the victim is irrelevant. Display of a weapon satisfies this element, whether or not the gun is pointed at a victim and regardless of whether an explicit threat is made.

State v. Wright, ___ N.C. App. ___, ___ S.E.2d ___ (April 4, 2017). In this armed robbery case, the trial court did not err by failing to instruct the jury on the lesser-included offense of common law robbery. The defendant entered three convenience stores with his face covered and a gun in his hand and stole money in the presence of the store clerks. The defendant argued that the State failed to present evidence that the victims' lives were endangered or threatened. With respect to two of the robberies, the defendant argued that there was no evidence that he actually pointed his gun at the clerks. With respect to the third, he noted that the clerk testified that she was "never scared." The court distinguished cases holding that mere possession of a weapon during a robbery is insufficient to support a finding that the victim's life was endangered or threatened on the basis that in those cases, neither the victim nor the bystanders actually saw the weapon. It went on to note that where the evidence establishes that a defendant held a dangerous weapon that was seen by the victim or a witness during the robbery, cases hold that this element is satisfied. Thus, with respect to the robberies where the clerks saw the defendant holding the gun, the evidence was sufficient. With respect to the third

robbery, the court held, citing prior case law, that the State is not required to prove that the victim was in fact afraid. [Jeff Welty blogged about the case here.]

Child Abuse

Error to leave 'moderate punishment' undefined in jury instructions in child abuse prosecution. Where a defense of parental discipline is raised, the State must prove lasting injury, a malicious purpose, or cruel and grossly inappropriate corrective procedures.

State v. Varner, ___ N.C. App. ___, 796 S.E.2d 834 (Mar. 7, 2017), *temporary stay allowed*, ___ N.C. ___, ___ S.E.2d ___ (Apr. 10, 2017). In this misdemeanor child abuse case, where the defendant hit his son with a paddle, the trial court committed reversible error with respect to the jury instructions. After the defendant paddled his 10-year-old son for refusing to eat at the family dinner table, the child experienced bruising and pain for several days. The defendant was charged with felony child abuse. At the charge conference, the trial judge told the parties that he would instruct the jury that it could not convict the defendant if it found that the child's injuries were inflicted as a result of the defendant's "moderate punishment to correct" his child. Neither party objected to this instruction. The trial judge further indicated that he would give an instruction defining "moderate punishment" as "punishment that does not cause lasting injury." The State objected to this definition, arguing that moderate punishment should not be limited to that which produced lasting injuries. The trial judge agreed and, over the defendant's objection, struck this definition. Thus, the trial judge left the term moderate punishment undefined. The jury found the defendant guilty of misdemeanor child abuse. On appeal the defendant argued that the trial court erred when it struck the proposed instruction defining moderate punishment as punishment which caused lasting injury to the child. The court agreed that the instructions impermissibly allowed the jury to convict the defendant simply because they thought his degree of punishment was excessive, even if they thought he was acting in good faith and did not inflict a lasting injury on the child. The court reversed and remanded for a new trial, noting that based on the case law discussed in the court's opinion, "it would have been proper for the State to request an instruction advising the jury that it could nonetheless convict if it determined that Defendant acted out of 'wickedness of purpose,' irrespective of the extent of the physical injuries." [Shea Denning blogged about this case here.]

Conspiracy

Evidence was sufficient to support a conviction for conspiracy to possess stolen property where the defendant called his accomplice from jail, the accomplice arrived at the defendant's home where the stolen property was located, and the accomplice admitted to working with the defendant.

State v. Greene, ___ N.C. App. ___, 795 S.E.2d. 815 (Jan. 17, 2017). The evidence was sufficient to support a charge of conspiracy to possess stolen goods, a pistol. After the defendant took the pistol and other items from the victims' purses, the pistol was found in the field near a residence. The defendant's alleged accomplice was present at the residence and admitted to officers that he was working with the

defendant. This occurred after the defendant called the alleged accomplice from jail. From this evidence a jury could reasonably infer that the accomplice conspired with the defendant to possess the pistol.

(1) Husband's involvement in defendant's drug sales to undercover agent went beyond mere presence and was sufficient to support conspiracy charge. (2) While multiple conspiracies require proof of separate agreements, the evidence here was sufficient to support conspiracy charges for each transaction.

State v. Glisson, ___ N.C. App. ___, 796 S.E.2d 124 (Feb. 7, 2017). (1) The evidence was sufficient to support a conviction for conspiracy to traffic in opium by sale and delivery. The defendant was indicted on multiple drug offenses arising from three separate controlled buys. On appeal the defendant argued that the State failed to present evidence, aside from an accomplice's mere presence at the second control buy, that the defendant conspired with the accomplice to traffic in opium. The court rejected this argument, noting, among other things that the defendant brought the accomplice to the drug transaction location for all three controlled buys. The location of the second exchange was one the defendant did not like and the sale took place at or near dark. The drugs were maintained in the same vehicle as the accomplice and the defendant exchanged the drugs and counted the money in front of him. From this evidence, it would be reasonable for the jury to infer that the accomplice was present at the defendant's behest to provide safety and comfort to the defendant during the transaction. (2) The evidence supported multiple conspiracy charges. The court rejected the defendant's argument that the evidence showed only one agreement to engage in three separate transactions. It noted that the first two transactions were separated by one month and that approximately three months passed between the second and third buys. There was no evidence suggesting that the defendant planned the transactions as a series. Rather, the informant or the detective initiated each.

Drugs

Convictions vacated for insufficient evidence of constructive possession by guest present at a residence where drugs found.

State v. Holloway, ___ N.C. App. ___, 793 S.E.2d 766 (Dec. 6, 2016), *temporary stay allowed*, ___ N.C. ___, 794 S.E.2d 526 (Dec. 20, 2016). (1) In this drug case, there was insufficient evidence of constructive possession. Officers responded to a report of a breaking and entering at a residence. They heard a commotion inside and noticed smoke coming from the house. Two men, the homeowner and the defendant, left through the front door. Because the officers had responded to a breaking and entering in progress, they placed the men in custody. The source of the smoke turned out to be a quantity of marijuana burning in the oven. A subsequent search of the premises found over 19 pounds of marijuana and other items including drug paraphernalia. A photograph of the defendant was found in a container in a bedroom. The defendant was indicted on multiple drug charges including trafficking, possession with intent, maintaining a dwelling and possession of drug paraphernalia. At trial, the defendant's mother explained why the homeowner had a photograph of the defendant. The homeowner testified that the defendant was merely visiting on the day in question, that the contraband was his, and that the defendant did not know about its presence. The trial court denied the defendant's motion to dismiss,

which asserted insufficiency of the evidence. The defendant was convicted. The court found that the State failed to present substantial evidence demonstrating the defendant's constructive possession of the contraband. The only evidence tying the defendant to the residence or the contraband was his presence on the afternoon in question and a single photograph of him found face down in a plastic storage bin located in a bedroom. There was no evidence that the defendant had any possessory interest in the house, that he had a key to the residence, that his fingerprints were found on any of the seized items, that any items belonging to him were found in the residence (on this issue it noted that the photograph belong to the homeowner), or that any incriminating evidence was found on his person. (2) The evidence was insufficient with respect to the maintaining a dwelling charge. There was no evidence that the defendant was the owner or lessee of the residence, there was no evidence that he paid for its utilities or upkeep, there was no evidence that he had been seen in or around the dwelling and there was no evidence that he lived there.

Habitual felon conviction based on enhanced felony sentence for repeat possession of marijuana under G.S. 90-95(e)(3) rejected.

State v. Howell, ___ N.C. App. ___, 792 S.E.2d 898 (Dec. 6, 2016), *review allowed*, ___ N.C. ___, 796 S.E.2d 789 (Mar. 16, 2017). G.S. 90-95(e)(3) operates as a sentence enhancement not a separate offense. The defendant was charged with possession of marijuana of over ½ ounce but less than 1½ ounces, a Class I misdemeanor, of having previously been convicted of any offense in violation of the Controlled Substances Act, and with attaining the status of habitual felon. The defendant pled guilty to the possession charge, acknowledged his prior conviction subjecting him to enhanced punishment and acknowledged attaining habitual felon status. The trial court treated the marijuana misdemeanor as a Class I felony because of the prior conviction and then elevated that conviction to a Class E felony because of habitual felon status. On appeal the defendant argued that under G.S. 90-95(e)(3), the prior conviction was merely a sentence enhancement, and could not serve to elevate the misdemeanor offense to a felony offense. The court agreed, concluding: "it appears that our General Assembly intended that section (e)(3) to act as a sentence enhancement rather than a separate offense." It continued: "Thus, while defendant's Class 1 misdemeanor is punishable as a felony under the circumstances present here, the substantive offense remains a Class 1 misdemeanor." The court went on to conclude that as a result, the defendant's habitual felon status had no impact on his sentence as a misdemeanant. [John Rubin blogged about the case here.]

Where the evidence showed only that drugs were possessed in the defendant's vehicle for only a short amount of time on one occasion, defendant's motion to dismiss the charge of maintaining a vehicle for keeping controlled substances should have been granted.

State v. Rogers, ___ N.C. App. ___, 796 S.E.2d 91 (Feb. 7, 2017), *temporary stay allowed*, ___ N.C. ___, 796 S.E.2d 21 (2017). Over a dissent, the court held that "[b]ecause the evidence did not establish continuous possession of a vehicle for the purpose of keeping or selling a controlled substance, the trial court erred in denying defendant's motion to dismiss the charge of maintaining a vehicle for the keeping and/or selling of a controlled substance." The State failed to demonstrate continuous maintenance or possession of the vehicle by the defendant beyond the brief period of time when he was observed by

the police on the afternoon of his arrest or that the defendant had used the vehicle on a prior occasion to keep or sell drugs. The evidence showed only that the defendant possessed drugs in the vehicle on one occasion.

Where multiple Schedule I controlled substances were found in one mixture, the defendant may be prosecuted for each substance.

State v. Williams, ___ N.C. App. ___, 796 S.E.2d 823 (Mar. 7, 2017). Where the defendant was in possession of a bag containing two separate Schedule I controlled substances, Methylone and 4-Methylethcathinone, two convictions were proper. Noting that it had already rejected the argument advanced by the defendant in another case, the court held that the defendant could be punished for two offenses where two different drugs are found in the same mixture.

Where the evidence showed two separate methamphetamine labs, defendant was properly convicted of and sentenced for two separate manufacturing methamphetamine offenses.

State v. Maloney, ___ N.C. App. ___, ___ S.E.2d ___ (May 16, 2017). The court rejected the defendant's argument that the trial court erred by entering judgment for two separate counts of manufacturing methamphetamine. The defendant had argued that the crime was a single continuing offense and that therefore one of the conviction should be vacated. However two separate methamphetamine labs were discovered, in the trunk of a vehicle and in a storage unit. It was clear that the separate and distinct locations contained two separate methamphetamine manufacturing processes. Thus, the trial court did not err by entering judgment for two separate counts of manufacturing methamphetamine.

Homicide

Discharging a weapon into occupied property is not an assault crime for purposes of felony murder merger doctrine.

State v. Spruiell, ___ N.C. App. ___, ___ S.E.2d ___ (April 4, 2017). Rejecting the defendant's ineffective assistance of counsel claim with respect to his first-degree felony murder conviction, the court also rejected the proposition that a felony murder conviction cannot be predicated on a felony of shooting into occupied property where that felony also was the cause of the victim's death. Reviewing the relevant case law, the court concluded:

> [I]t is clear that neither the Supreme Court nor this Court has ever expressly recognized an exception to the felony murder rule for the offense of discharging a weapon into occupied property. At most, North Carolina courts have recognized a very limited "merger doctrine" that precludes use of the felony murder rule in situations where the defendant has committed one assault crime against one victim and the State seeks to use that assault as the predicate felony for a felony murder conviction.

While a single assault on a single victim cannot serve as the underlying felony for felony murder, the

offense of discharging a weapon into an occupied vehicle can serve as a predicate offense for felony murder, regardless of the number of victims. . [Shea Denning blogged about the case here.]

(1) Verdict for second-degree murder that failed to specify which theory of malice supported conviction not ambiguous where the evidence only supported deadly-weapon implied malice (the B1 variety). (2) Depraved-heart malice (the B2 variety), although inapplicable here, is not limited to DWI homicide cases.

State v. Lail, ___ N.C. App. ___, 795 S.E.2d 401 (Dec. 30, 2016). (1) In this second-degree murder case, the trial court did not err by sentencing the defendant as a Class B1 felon. The defendant argued that the trial court erred because the jury returned a general verdict that failed to specify whether he had been found guilty of a Class B1 or B2 felony. The State proceeded under a deadly weapon implied malice theory rising from the defendant's alleged use of a butcher knife to slash the victim's throat. The trial judge instructed the jury on the definitions of express malice and deadly weapon implied malice (B1 second-degree murder) but not on depraved heart malice (B2 second-degree murder). The jury returned a general verdict of second-degree murder. The court held that since the jury was not presented with evidence supporting a finding of depraved heart malice, its general verdict was unambiguous and the B1 sentence was proper. It noted, however, that where the jury is presented with both B2 depraved heart malice and a B1 malice theory a general verdict would be ambiguous. It stated: "in this situation, trial judges . . . should frame a special verdict requiring the jury to specify which malice theory supported it second-degree murder verdict." (2) In the course of its ruling the court also noted that depraved heart malice is not limited to driving while intoxicated homicide cases. The evidence here showed that the defendant engaged in a deliberate attempt to take the life of the victim by repeatedly cutting his throat, which is not the type of reckless and indifferent malice that would qualify for the B2 classification.

Hit and Run

The trial court committed plain error by failing to instruct the jury on willfulness where the defendant's sole defense was that he left the scene of the crash to get assistance for the victim

State v. Scaturro, ___ N.C. App. ___, ___ S.E.2d ___ (June 6, 2017). In a hit and run case involving failure to remain at the scene, the trial court committed plain error by failing to instruct the jury with respect to willfulness where the defendant's sole defense was that his departure was authorized and required to get assistance for the victim. The court continued:

> To prevent future confusion and danger, we also take this opportunity to address the State's argument that N.C.G.S. § 20-166 prohibits a driver from leaving the scene of an accident to obtain medical care for himself or others and instead only authorizes a driver to temporarily leave to in order to call for help. While it is true that subsection (a) instructs that a driver may not leave the scene of an accident "for any purpose other than to call for a law enforcement officer, to call for medical assistance or medical treatment," we do not read statutory subsections in isolation. Instead, statutes dealing

with the same subject matter must be *construed in pari materia* and reconciled, if possible.

Applying that principle here leads us to conclude that, even though N.C.G.S. §20-166(a) instructs that drivers may only leave for the limited purpose of calling for aid, that authorization is expanded by N.C.G.S. § 20-166(b)'s requirement that drivers, among other things, "*shall* render to any person injured in such crash *reasonable assistance*, including the calling for medical assistance" permitted by subsection (a). (Emphasis added). The plain language of this provision indicates that a driver's obligation to an injured person permits him to take action including but not limited to that which is authorized by subsection (a). Accordingly, it is clear that taking a seriously injured individual to the hospital to receive medical treatment is not prohibited by the statute in the event that such assistance is reasonable under the circumstances. In fact, the violation of that directive is itself a Class 1 misdemeanor.

Impaired Driving

G.S. 20-16.2(a), requiring law enforcement to read an impaired-driving suspect the implied consent rights, is satisfied by the officer reading the rights and making a written copy available, regardless of the ability of the suspect to understand the rights in their native language.

State v. Mung, ___ N.C. App. ___, 795 S.E.2d 284 (Dec. 20, 2016). The trial court did not err by denying the defendant's motion to suppress in this DWI case. The defendant had argued that the arresting officer failed to comply with the requirements of G.S. 20-16.2. Specifically, the defendant asserted that he was not adequately informed of his rights under the statute due to the fact that English is not his first language and that the officer's failure to ensure that these rights were communicated to him in his native language of Burmese resulted in violation of the statute. The court held that *State v. Martinez*, __ N.C. App. __, 781 S.E.2d 346 (2016) (holding that the admissibility of the results of a chemical analysis test are not conditioned on a defendant's subjective understanding of the information disclosed to him pursuant to the requirements of G.S. 20-16.2(a)), was controlling. It held: "as long as the rights delineated under N.C. Gen. Stat. § 20-16.2(a) are disclosed to a defendant — which occurred in the present case — the requirements of the statute are satisfied and it is immaterial whether the defendant comprehends them."

State has no right of appeal from district court's final order of suppression.

State v. Parisi, ___ N.C. App. ___, 796 S.E.2d 524 (Feb. 7, 2017), *temporary stay allowed*, ___ N.C. ___, 796 S.E.2d 20 (Feb. 24, 2017). For reasons discussed in the court's opinion, the court held that it lacked jurisdiction to hear the State's appeal of the defendant's motion to suppress and that the superior court erred when it remanded the case to the district court with instructions to dismiss. [Shea Denning blogged about this case here.]

Where retrograde extrapolation expert's BAC opinion relied on unsubstantiated assumption that the defendant's BAC was declining, the expert opinion should have been excluded under Rule 702.

State v. Babich, ___ N.C. App. ___, 797 S.E.2d 359 (Mar. 7, 2017). In this DWI case, the trial court erred by admitting retrograde extrapolation testimony by the State's expert witness. That expert used the defendant's 0.07 blood alcohol concentration 1 hour and 45 minutes after the traffic stop to extrapolate that the defendant had a blood alcohol concentration of 0.08 to 0.10 at the time of the stop. To reach this conclusion, the expert assumed that the defendant was in a post-absorptive state at the time of the stop, meaning that alcohol was no longer entering the defendant's bloodstream and thus her blood alcohol level was declining. The expert conceded that there were no facts to support this assumption. The expert made this assumption not because it was based on any facts in the case, but because her retrograde extrapolation calculations could not be done unless the defendant was in a post-absorptive state. The expert's testimony was inadmissible under the *Daubert* standard that applies to Evidence Rule 702. The court added: "Although retrograde extrapolation testimony often will satisfy the *Daubert* test, in this case the testimony failed *Daubert*'s 'fit' test because the expert's otherwise reliable analysis was not properly tied to the facts of this particular case." It explained:

> [W]hen an expert witness offers a retrograde extrapolation opinion based on an assumption that the defendant is in a post-absorptive or post-peak state, that assumption must be based on at least some underlying facts to support that assumption. This might come from the defendant's own statements during the initial stop, from the arresting officer's observations, from other witnesses, or from circumstantial evidence that offers a plausible timeline for the defendant's consumption of alcohol.
>
> When there are at least some facts that can support the expert's assumption that the defendant is post-peak or post-absorptive, the issue then becomes one of weight and credibility, which is the proper subject for cross-examination or competing expert witness testimony. But where, as here, the expert concedes that her opinion is based entirely on a speculative assumption about the defendant—one not based on any actual facts—that testimony does not satisfy the *Daubert* "fit" test because the expert's otherwise reliable analysis is not properly tied to the facts of the case.

The court went on to find that in light of the strength of the State's evidence that the defendant was appreciably impaired, the error was not prejudicial. [Shea Denning blogged about the case here.]

No prejudice for seven-hour delay between arrest and appearance before magistrate when the defendant had several opportunities to contact a witness or attorney; defendant's motion to dismiss for alleged G.S. 15A-501 and *Knoll* violations properly denied.

State v. Cox, ___ N.C. App. ___, ___ S.E.2d ___ (May 2, 2017). In this impaired driving second-degree murder case, the trial court did not err by denying the defendant's motion to dismiss which had asserted that violation of G.S. 15A-501 required dismissal of the charges. Under G.S. 15A-501, a law enforcement must bring a person arrested before a judicial official without unnecessary delay and must without

unnecessary delay advise the person of his right to communicate with counsel and friends and must allow him a reasonable time and opportunity to do so. The vehicle crash occurred at 2:37 AM. An officer arrived at the scene between 3:15 and 3:20 AM and conducted field sobriety testing on the defendant. The defendant was arrested without a warrant for impaired driving and violation of his .04 BAC drivers license restriction. The defendant was taken to a hospital to have blood drawn. He arrived at the hospital around 4:33 AM. The officer advised the defendant of his rights and the defendant signed a rights form; he did not ask to have a witness or attorney present. A telephone was available to the defendant in the hospital room. The defendant's blood was drawn at 4:55 AM and he was examined by a physician and cleared. The defendant was then taken to a law enforcement center where the lead detective arrived to interview the defendant at about 5:52 AM. The interview began at about 6:15 AM, at which time the defendant was read his *Miranda* rights and waived his rights. The interview concluded after an hour. The defendant was then charged with second-degree murder and felony serious injury by vehicle. After the detective checked the defendant's criminal and driving history, an officer transported the defendant to the county jail for processing at 9:35 AM. He was brought before magistrate at approximately 11:11 AM. Prior to seeing the magistrate, the defendant made a phone call to a friend but did not ask the friend come to the jail until after he knew the conditions of his release. Reviewing these facts, the court noted that there was a seven hour delay between the defendant's arrest and his appearance before a magistrate. The court noted that the defendant was afforded multiple opportunities to have witnesses or an attorney present and chose not to take advantage of those opportunities. It concluded: "Defendant cannot now assert that he was prejudiced to gain relief, either by the absence of a witness or attorney or by the time period between his arrest and appearance before a magistrate."

Error for trial court to instruct on .08 BAC prong of driving while impaired where no evidence supported that theory.

State v. Fowler, ___ N.C. App. ___, ___ S.E.2d ___ (May 16, 2017). In this impaired driving case, the trial court committed reversible error by instructing the jury that it could find the defendant guilty if he was driving under the influence of an impairing substance or had a blood alcohol concentration of .08 or more, where no evidence supported a conviction under the .08 prong of the impaired driving statute. Although disjunctive jury instructions generally are permissible for impaired driving, in this case the State presented no evidence supporting the .08 prong. The trial court improperly instructed the jury on alternative theories, one of which is not supported by the evidence. Because it is impossible to conclude, based on the record and the general verdict form, upon which theory the jury based its verdict, the court found that it must assume that the jury based its verdict on the theory for which it received an improper instruction. The court went on to reject the State's argument that the error was harmless or non-prejudicial and noted that this is not a case where there is overwhelming evidence of impaired driving.

Exigent circumstances for warrantless blood draw established where the officer testified that he believed the defendant was close to a .08 BAC, the officer was the only one on the scene, and obtaining a search warrant for the blood test would have taken an additional 1-1.5 hours.

State v. Burris, ___ N.C. App. ___, ___ S.E.2d ___ (May 16, 2017). In this impaired driving case the trial court properly denied the defendant's motion to suppress where exigent circumstances supported a warrantless blood draw. The defendant tested at .10 on a roadside test, was arrested at 2:48 AM and then was transported to the police department, where he arrived 18 minutes later. When the defendant refused to comply with further testing within 2 to 3 minutes after arriving at the police department, the detective decided to compel a blood test. The closest hospital was approximately 4 miles away from the police department and 8 miles from the magistrate's office. The detective read the defendant his rights regarding the blood draw at the hospital at 3:24 AM and waited for the defendant to finish making a phone call before starting the blood draw at 3:55 AM. The detective testified that based on the information he had at the time, he thought the defendant was close to a blood alcohol level of .08. The detective further indicated that he thought it would have taken an additional hour to an hour and half to get a search warrant. The detective was the only officer on the scene and would have had to wait for another officer to arrive before he could travel to the magistrate to get the search warrant. The trial court's finding regarding the detective's reasonable belief that the delay would result in the dissipation of alcohol in the defendant's blood was supported by competent evidence. Thus, the trial court did not err in denying the defendant's motion to suppress the blood draw.

Sufficient evidence of defendant's operation of the motor vehicle existed where the vehicle was found underneath the overhang of the front of a hotel, the defendant was sitting in the driver's seat, the vehicle was registered to the defendant and he admitted driving.

State v. Burris, ___ N.C. App. ___, ___ S.E.2d ___ (May 16, 2017). In this impaired driving case the court rejected the defendant's argument that the trial court erred by denying his motion to dismiss at the close of the State's evidence. The defendant had argued that there was no independent evidence, other than his admission, to establish that he was operating a motor vehicle at any relevant time period. Here, the defendant admitted to the detective that he had been driving the vehicle and described in detail the route he took to get to the scene. When the detective approached the vehicle, the engine was not running but it was parked under an overhang area by the front door of a hotel, where guests typically stop to check in. The detective observed the defendant sitting in the drivers seat and the vehicle was registered to the defendant. The circumstantial evidence, along with the defendant's admissions to driving the vehicle and the route he took, was sufficient evidence for the jury to determine that the defendant drove the vehicle

Larceny

Evidence that showed the defendant stole items from sleeping patients in the hospital without their awareness was insufficient to support larceny from the person. That the thefts were captured on video was not a substitute for the victims' awareness at the time of the taking.

State v. Greene, ___ N.C. App. ___, 795 S.E.2d. 815 (Jan. 17, 2017). (1) The evidence was insufficient to support convictions of felony larceny from the person. Items were stolen from the victims' purses while they were sleeping in a hospital waiting room. At the time the items were stolen, the purses were not attached to or touching the victims. The court rejected the State's argument that the purses were under their owners' protection because hospital surveillance cameras operated in the waiting room. The court noted: "Video surveillance systems may make a photographic record of the taking, but they are no substitute for 'the awareness of the victim of the theft at the time of the taking.'" The court noted that the State's theory would convert any larceny committed in areas monitored by video to larceny from the person. (2) The court rejected the defendant's argument that one of the larceny convictions had to be arrested because both occurred as part of a single continuous transaction. The court reasoned that where the takings were from two separate victims, the evidence supported two convictions

Money paid by customer to store manager as a deposit on repairs subsequently stolen by the manager was the store's property for purposes of larceny by employee.

State v. Fink, ___ N.C. App. ___, ___ S.E.2d ___ (Mar. 21, 2017). There was sufficient evidence to convict the defendant of larceny by employee. The victim brought her vehicle in for repairs at an auto shop. The defendant, who was the shop manager, provided an estimate for the work, which the victim accepted. When she was told her vehicle was ready, the victim paid the defendant in cash and took her vehicle, later learning that the work had not been done. The defendant deposited a portion of the cash paid by the victim to the shop's account and kept the remaining amount. As soon as the victim tendered payment to the defendant as the shop's manager and agent, the funds became the property of the shop for purposes of larceny by employee.

Possession of Stolen Goods

Sufficient evidence of other incriminating circumstances existed to prove constructive possession of firearm where defendant jointly possessed vehicle with another, admitted ownership of another item of property in the vehicle, and exhibited nervous and irrational behavior.

State v. Rice, ___ N.C. App. ___, ___ S.E.2d ___ (April 4, 2017). The evidence was sufficient to establish that the defendant constructively possessed two stolen firearms found in a van he had rented. The defendant was convicted of two counts of possession of stolen goods in violation of G.S. 14-71.1. The weapons in question were stolen during two separate home invasions. Officers learned that a van spotted on the premises of the second home was rented to Shirelanda Clark. Clark informed officers that she had re-rented the vehicle to the defendant and an individual named Dezmon Bullock. At the request of the police, Clark arranged a meeting with the defendant and Bullock. The two arrived in the

van and consent was given to search the vehicle. As the search began, officers found a new basketball goal still in its box. After claiming ownership of the basketball goal, the defendant abruptly left the scene, leaving the item behind. The search continued, and the two stolen weapons were discovered. On appeal the court rejected the defendant's contention that the evidence was insufficient to establish constructive possession of the weapons, reasoning that although the defendant did not have exclusive possession of the van, other incriminating circumstances existed to establish constructive possession. Those circumstances included: the defendant's "nervous disposition;" the fact that the defendant "admitted ownership of the basketball goal in proximity to the stolen firearms;" the fact that the defendant had rented the van from Clark; and that the defendant "exhibited irrational conduct tending to indicate he was fearful that the firearms would be discovered during the course of the search — specifically his sudden and abrupt departure from the area when [officers] began the search of the van . . . leaving behind his personal property for which he did not return."

Obtaining Property by False Pretenses

Actual deceit of the victim at the time of the offense, while necessary for the completed offense of obtaining property by false pretenses, is not necessary to support a conviction for an attempt.

State v. Phillips, ___ N.C. App. ___, ___ S.E.2d ____ (Mar. 7, 2017). The trial court did not err by denying the defendant's motion to dismiss a charge of attempting to obtain property by false pretenses. After an officer learned about larcenies of Michael Kors items from a local store, he found an online posting for similar items in an online flea market. Using a fake name and address, the officer created a social media account and started a conversation with the seller, later determined to be the defendant, to discuss purchase of the items. The two agreed to meet. Unbeknown to the defendant, the officer decided to set up an undercover purchase for one of the items to determine if it in fact was stolen from the local store or whether it was counterfeit merchandise. The undercover purchase occurred and the item in question was determined to be counterfeit. Noting that actual deceit is not an element of attempting to obtain property by false pretenses, the court held that the evidence was sufficient to sustain the conviction. The court rejected the defendant's argument that because he did not actually represent the item as an authentic Michael Kors item, there was no evidence of a false pretense or intent to deceive. The court noted that the defendant advertised the items as Michael Kors bags and described them as such to the undercover officer. Additionally, the defendant purchased the bags from a warehouse in Atlanta that sold them for only a fraction of their worth, suggesting that the defendant knew the merchandise was counterfeit. The court also rejected the defendant's argument that because the offense was completed, a conviction for attempt was improper. The offense only occurs if the property actually is obtained in consequence of the victim's reliance on the false pretense. Here, because of the undercover operation, the officer was never deceived by the defendant's misrepresentation. As such, a conviction for attempt was appropriate.

Evidence that the defendant falsely reported that his girlfriend had written 3 checks on his account without authorization, which resulted in the defendant's receipt of a provisional credit on his bank account, was sufficient to sustain a conviction for obtaining property by false pretenses.

State v. Buchanan, ___ N.C. App. ___, ___ S.E.2d ___ (June 6, 2017). (1) The evidence was sufficient to sustain a conviction for obtaining property by false pretenses. After the defendant falsely reported that his girlfriend had written 3 checks on his account without authorization, he received a provisional credit on his bank account with respect to one of the checks. He asserted, in part, that the provisional credit did not constitute a "thing of value." The court disagreed, concluding that the provisional credit was the equivalent of money placed into his account, to which the defendant had access, at least temporarily. (2) The trial court did not commit plain error by failing to instruct the jury that the defendant could not be convicted of obtaining property by false pretenses and of attempting to obtain property by false pretenses based on a single transaction. The defendant attempted to obtain $900 from his bank by making a false representation in an affidavit that 3 unauthorized checks were written on his account. He obtained $600 of the $900 he had attempted to obtain; this amount was attributable to one of the checks. He was charged and convicted of both obtaining property by false pretenses and of an attempted version of the crime with respect to the money he did not obtain. Construing the statute, the court concluded: "the General Assembly did not intend to subject a defendant to multiple counts of obtaining property by false pretenses where he obtains multiple items in a single transaction. Rather, the statute provides for an increase in punishment if the value of the property taken exceeds $100,000." Here, the defendant attempted to collect the value of three checks in a single transaction but was successful only in obtaining credit for one of the checks. Notwithstanding this, the court concluded that the trial court did not err in its jury instructions. The court reasoned that the error was a double jeopardy issue and because the defendant failed to object at trial, the issue was waived on appeal.

Kidnapping

Where evidence showed that the victim was restrained to no more degree than was required to effectuate the concurrent assault and sex offense, it was error to deny motion to dismiss the kidnapping offense.

State v. China, ___ N.C. App. ___, 797 S.E.2d 324 (Feb. 21, 2017), *temporary stay allowed*, ___ N.C. ___, 797 S.E.2d 303 (Mar. 27, 2017). Over a dissent, the court held that because there was no evidence that the defendant restrained the victim beyond the degree of restraint that is inherent in the commission of a sexual or physical assault, the evidence was insufficient on the restraint element of kidnapping. The case involved a sudden attack, in which the defendant broke down the door of an apartment, ran into the bedroom where the victim was dressing, and assaulted him. After the defendant entered the bedroom, he immediately punched the victim hard enough to throw the victim onto the bed. The defendant continued punching the victim while he committed a brief, brutal sexual attack. After the sexual offense, the defendant dragged the victim off the bed and the defendant and his companion kicked the victim in the head and body. The entire incident took no more than a few minutes. The court agreed with the defendant that there was no evidence that the victim was subjected to any restraint beyond that inherent in the defendant's commission of the sex offense and assault.

The robbery of two victims downstairs that were subsequently moved upstairs to facilitate the robbery of more victims there was not a mere technical asportation or integral part of the robberies; thus, motion to dismiss the kidnapping offenses was properly denied.

State v. Curtis, ___ N.C. ___, 794 S.E.2d 501 (Dec. 21, 2016).The court *per curiam* affirmed the Court of Appeals, ___ N.C. App. ___, 782 S.E.2d 522 (2016). The Court of Appeals had held, over a dissent, that where the restraint and removal of the victims was separate and apart from an armed robbery that occurred at the premises, the trial court did not err by denying the defendant's motion to dismiss kidnapping charges. The defendant and his accomplices broke into a home where two people were sleeping upstairs and two others--Cowles and Pina--were downstairs. The accomplices first robbed or attempted to rob Cowles and Pina and then moved them upstairs, where they restrained them while assaulting a third resident and searching the premises for items that were later stolen. The robberies or attempted robberies of Cowles and Pina occurred entirely downstairs; there was no evidence that any other items were demanded from these two at any other time. Thus, the court could not accept the defendant's argument that the movement of Cowles and Pina was integral to the robberies of them. Because the removal of Cowles and Pina from the downstairs to the upstairs was significant, the case was distinguishable from others where the removal was slight. The only reason to remove Cowles and Pina to the upstairs was to prevent them from hindering the subsequent robberies of the upstairs residents and no evidence showed that it was necessary to move them upstairs to complete those robberies. Finally, the court noted that the removal of Cowles and Pina to the upstairs subjected them to greater danger.

Weapons Offenses

Where evidence raised merely a conjecture of guilt, motion to dismiss was improperly denied.

State v. Battle, ___ N.C. App. ___, ___ S.E.2d ___ (April 18, 2017). In this felon in possession case, there was insufficient evidence that the defendant possessed the rifle in question. While attempting to locate the defendant, deputies established a perimeter around a large section of woods and deployed a canine, Max, to track human sent in the area. Following a scent, Max brought the officers to a loaded assault rifle. While Max continued to track the scent, another man emerged from the woods. After losing the scent and taking a rest break outside of the woods, Max resumed tracking, picking up a scent, and leading the officers to the defendant, who was discovered lying on the ground. The distance between where the rifle was recovered and where the defendant was found was between 75 and 100 yards. No evidence was presented regarding ownership of the rifle. DNA swabs taken from the rifle and compared to the defendant's DNA were inconclusive. No other evidence connected the defendant to the rifle. Notwithstanding the fact that Max was trained not to veer off of one human scent and on to another, the rifle was not found in the defendant's physical possession or in the immediate area over which he had the ability to control. Additionally, another man was present in the woods. The court noted that it had upheld convictions where defendants were identified as the perpetrator by tracking canines but found those cases distinguishable. Here, testimony of the canine's tracking behavior constituted the *only* evidence offered to establish constructive possession of the rifle. In one of those prior cases, hair and shoe print evidence also was presented to identify the defendant as the perpetrator. In the other,

the canines were offered a scent source of the defendant and the codefendant and were tracking a known scent, as compared to the case at hand where Max was tracking an unknown scent. Also, in neither of the prior cases did the canine lose the track, take a break, and then resume. Additionally, here the defendant was not alone in the area and no other evidence linked him to the rifle or the site where it was recovered. The court concluded:

> The officers' testimony is insufficient to establish any link between Defendant and the firearm. The canine tracking evidence on an unknown scent fails to raise, as a matter of law, a reasonable inference of either actual or constructive possession of a firearm by Defendant as a convicted felon. Viewed in the light most favorable to the State, the evidence raises only a "suspicion [or] conjecture" that Defendant possessed the rifle. The trial court erred in denying Defendant's motion to dismiss.

Error to instruct on constructive possession of firearm where evidence did not support that theory.

State v. Malachi, ___ N.C. App. ___, ___ S.E.2d ___ (April 18, 2017). In this felon in possession of a firearm case, the trial court erred by instructing the jury, over the defendant's objection, that it could find the defendant guilty based on actual or constructive possession of the firearm where no evidence supported a theory of constructive possession. After an officer's frisk of the defendant revealed a revolver in his waistband, the defendant was arrested and brought to trial. After the trial court instructed the jury, the jury sought clarification of the "legal definition" of "possession of a firearm." The trial court, again over defense counsel's objection, responded with definitions of both actual and constructive possession. The jury found the defendant guilty. Finding that the trial court erred, the court noted that "[a]n instruction related to a theory not supported by the evidence confuses the issues, introduces an extraneous matter, and does not declare the law applicable to the evidence." Additionally, cases "have consistently held that a trial court's inclusion of a jury instruction unsupported by the evidence presented at trial is reversible error. The court noted that when the trial court has instructed on alternative theories of guilt, one of which is supported by the evidence and the other is unsupported, it has presumed that the defendant was found guilty based on the theory that was not supported by the evidence. This presumption has been applied regardless of whether a defendant properly objected to the instruction at trial. The court noted however that recently, in *State v. Boyd*, 366 N.C. 548, the Supreme Court declared that such an instructional error not objected to a trial is not plain error per se. The court, however, interpreted *Boyd* as applying only to plain error review and not as eliminating the long-established presumption that the jury relied on an erroneous disjunctive instruction not supported by the evidence when given over an objection. Here, the evidence supported only a theory of actual possession and the constructive possession instruction was given over defense counsel's objection.

Defenses

Defendant not entitled to unrequested jury instruction on accident where he carried a loaded gun to the scene, initiated a physical confrontation with the victim and testified that, while his finger was on the trigger, the gun discharged by accident.

State v. Robinson, ___ N.C. App. ___, 795 S.E.2d 136 (Dec. 20, 2016). In a case involving attempted murder and other charges, the defendant was not entitled to a jury instruction on the defense of accident. The defendant testified that his gun discharged accidentally during the fight with the victim. The evidence, however, even considered in the light most favorable to the defendant, shows the defendant was engaged in wrongdoing when he shot the victim. The defendant admitted that he physically assaulted the victim and had his hand on the trigger of his gun when it discharged. By his own admission, he was engaged in wrongful conduct when he shot the victim. He thus was not entitled to a jury instruction on the defense of accident had one been requested by trial counsel, and it was not plain error for the court to fail to give the instruction on its own motion.

(1) Imperfect self-defense is not available in felony murder prosecutions. Although perfect self-defense is a defense, the defendant here was not entitled to an instruction on it or on the lesser-included offenses. (2) On plain error review, no prejudice from court's inclusion of aggressor doctrine as a part of self-defense instruction. Even if it was error, defendant failed to demonstrate likelihood of a different result without it.

State v. Juarez, ___ N.C. ___, 794 S.E.2d 293 (Dec. 21, 2016).(1) Reversing the Court of Appeals in this first-degree felony murder case, the court held that the trial court did not commit reversible error by failing to instruct the jury on the lesser included offenses of second-degree murder and voluntary manslaughter. The underlying felony for first-degree felony murder was discharging a firearm into an occupied vehicle in operation. The trial court denied the defendant's request for instructions on second-degree murder and voluntary manslaughter. The Court of Appeals held that it was error not to instruct on the lesser because the evidence was conflicting as to whether the defendant acted in self-defense. The court found this reasoning incorrect, noting that self-defense is not a defense to felony murder. Perfect self-defense may be a defense to the underlying felony, which would defeat the felony murder charge. Imperfect self-defense, however, is not available as a defense to the underlying felony used to support a felony murder charge because allowing such a defense when the defendant is in some manner at fault "would defeat the purpose of the felony murder rule." In order to be entitled to instructions on the lesser-included offenses, "the conflicting evidence must relate to whether defendant committed the crime charged, not whether defendant was legally justified in committing the crime." Here, there is no conflict regarding whether the defendant committed the underlying felony. The defendant does not dispute that he committed this crime; rather he claims only that his conduct was justified because he was acting in self-defense. (2) Reversing the Court of Appeals, the court held that the trial court did not commit plain error when it instructed the jury on the aggressor doctrine of self-defense. The trial court instructed the jury on perfect self-defense including the aggressor doctrine (that a defendant is not entitled to the benefit of self-defense if he was the aggressor); the defendant did not object. When

there is no evidence that a defendant was the initial aggressor, it is reversible error for the trial court to instruct on the aggressor doctrine. The Court of Appeals determined that there was no evidence that the defendant was the aggressor. It failed, however, to analyze whether such error had the type of prejudicial impact that seriously affected the fairness, integrity or public reputation of the judicial proceeding. Therefore, that court's analysis was insufficient to conclude that the alleged error constituted plain error. The court found it unnecessary to decide whether an instruction on the aggressor doctrine was improper because the defendant failed to show that the alleged error was so fundamentally prejudicial as to constitute plain error.

No error or ineffective assistance of counsel where counsel failed to request an instruction on voluntary intoxication when no substantial evidence supported the defense.

State v. Wilson-Angeles, ___ N.C. App. ___, 795 S.E.2d 657 (Feb. 7, 2017). In this arson case, the evidence was not sufficient to entitle the defendant to a voluntary intoxication instruction. While the evidence showed that the defendant was intoxicated at the time in question, there was no evidence about how much alcohol she had consumed or about the length of time over which she had consumed it. The State's evidence showed only that the defendant had consumed some amount of some type of alcohol over some unknown period; the defendant did not present evidence. The court also noted that the defendant's conduct in committing the crime and behavior with law enforcement afterwards indicated some level of awareness of her situation.

Prosecutor's emphasis in closing argument on the likelihood of release from civil commitment within 50 days in the event the jury found the defendant not guilty by reason of insanity held improper and prejudicial, requiring a new trial.

State v. Dalton, ___ N.C. ___, 794 S.E.2d 485 (Dec. 21, 2016). Affirming the Court of Appeals in this murder case, the court held that the prosecutor's closing argument exaggerating the defendant's likelihood of being released from civil commitment upon a finding of not guilty by reason of insanity and constituted prejudicial error requiring a new trial. At trial the defendant asserted the insanity defense. At the charge conference, the prosecutor asked the trial court if he could comment on the civil commitment procedures that would apply if the defendant was found not guilty by reason of insanity. The trial court agreed to permit the comment, but cautioned the prosecutor not to exaggerate the defendant's chance of being released after 50 days. During closing arguments the prosecutor stated that it was "very possible that in 50 days, if she shows by a preponderance of the evidence that she is not a threat to anyone else or herself, she will be back home." The defendant unsuccessfully objected to this comment and the prosecutor continued, arguing "She very well could be back home in less than two months." The court began by rejecting the State's argument that because the defendant failed to object to the prosecutor's second statement, that statement should be reviewed under a stricter standard of review. The court concluded that the second statement was not separate and distinct from the first. Turning to the propriety of the prosecutor's argument, it noted that if the jury finds a defendant not guilty by reason of insanity, the trial court must order the defendant civilly committed. Within 50 days of commitment, the trial court must provide the defendant with a hearing. If at that time the defendant shows by a preponderance of the evidence that she no longer has a mental illness or is dangerous to

others the court will release the defendant. Clear, cogent and convincing evidence that an individual has committed homicide in the relevant past is prima facie evidence of dangerousness to others. Here, the evidence did not support the prosecutor's assertion that if the defendant was found not guilty by reason of insanity it is "very possible" that she would be released in 50 days. Instead, it demonstrated that the defendant will suffer from mental illness and addiction "for the rest of her life" and that her "risk of recidivism would significantly increase if she were untreated and resumed her highly unstable lifestyle." Additionally, the homicide for which she was convicted is prima facie evidence of dangerousness to others. Therefore the only reasonable inference from the evidence is that it is highly unlikely that the defendant would be able to demonstrate by a preponderance of the evidence within 50 days that she no longer is dangerous to others.

The trial court committed reversible error by failing to instruct the jury that the defendant had no duty to retreat before using deadly force in self-defense and by later instructing the jury that the law regarding no duty to retreat "does not apply to this case."

State v. Bass, ___ N.C. App. ___, ___ S.E.2d ___ (June 6, 2017). In this assault case, the court held, over a dissent, that the trial court committed reversible error by failing to instruct the jury that the defendant had no duty to retreat before using deadly force in self-defense and by later instructing the jury that the law regarding no duty to retreat "does not apply to this case." Under G.S. 14-51.3, a person is justified in the use of deadly force and does not have a duty to retreat in any place he or she has a lawful right to be if he or she reasonably believes that such force is necessary to prevent imminent death or great bodily harm or under circumstances permitted by G.S. 14-51.2. G.S. 14-51.2(b) in turn provides that the lawful occupant of the home, motor vehicle or workplace is presumed to have held a reasonable fear of imminent death or serious bodily harm when using defensive force intended to cause death or serious bodily harm under certain conditions. The trial court, concluding that the defendant was not within the curtilage of his home, declined the defendant's requests for a no duty to retreat instruction. The court concluded that the trial court was under the erroneous impression that the no duty to retreat language only applies when the defendant acts in self-defense while in his home, workplace or motor vehicle in fact there is no duty to retreat whenever a defendant is in a place where he or she has a lawful right to be. During deliberations, the jury sent a note to the trial court asking for further explanation on the law regarding no duty to retreat. The trial court instructed the jury, in part, that law "does not apply in this case." The court found this "clearly contrary to law." It concluded:

> Not only did the initial instructions fail to inform the jury that Defendant statutorily had no duty to retreat under the circumstances set forth in N.C. Gen. Stat. § 14-51.3(a)(1), the further instruction stated the "no duty to retreat" statute "does not apply," and may have required the jury to conclude Defendant would have had a duty to retreat under the circumstances to avoid criminal liability.

The court went on to reject the argument made in the dissenting opinion that *State v. Lee*, __ N.C. App.__, *disc. review allowed*, __ N.C. __, 797 S.E.2d 301 (2017), controlled.

Preservation

Where specific elements were challenged in motion to dismiss for sufficiency of the evidence, appellate review of the sufficiency of other, unchallenged elements of the offenses was waived.

State v. Walker, ___ N.C. App. ___, ___ S.E.2d ___ (Mar. 21, 2017). In this multi-count assault and attempted murder case, because the defendant failed to challenge the sufficiency of the evidence as to the intent elements of the challenged convictions in the trial court, the issue was not preserved for appellate review. The court concluded: "Because defense counsel argued before the trial court the sufficiency of the evidence only as to specific elements of the charges and did not refer to a general challenge regarding the sufficiency of the evidence to support each element of each charge, we hold Defendant failed to preserve the issues of the sufficiency of the evidence as to the other elements of the charged offenses on appeal." [Phil Dixon blogged about the case here.]

Sentencing

Fine of $1,000 as part of sentence for assault by strangulation was permissible.

State v. Zubiena, ___ N.C. App. ___, 796 S.E.2d 40 (Dec. 30, 2016). The trial court did not err by ordering the defendant to pay a $1000 fine as part of her sentence upon a conviction for assault by strangulation. North Carolina statutes provide that a person who has been convicted of a crime may be ordered to pay a fine as provided by law and that unless otherwise provided the amount of the fine is in the discretion of the court. The court noted that there is no statutory provision specifically addressing the fine amount that may be imposed for the offense at issue. Accordingly, the amount is left to the trial court's discretion. Here, the court found itself unable to identify any basis for determining that the fine was an abuse of discretion or otherwise unlawful. The court specifically rejected the defendant's argument that the fine violated the prohibition on excessive fines under the Eighth Amendment.

Evidence was sufficient for bulletproof vest sentencing enhancement.

State v. Johnson, ___ N.C. App. ___, 795 S.E.2d 126 (Dec. 20, 2016). In this assault inflicting serious injury case, the evidence was sufficient for a bulletproof vest sentencing enhancement. The victim testified that when he punched the defendant's chest, it felt padded; the victim told two police officers that both attackers wore bulletproof vests; and when the defendant's vehicle was stopped after the shooting, a bulletproof vest was found on the floor where the defendant was sitting.

Instruction on bulletproof vest enhancement was not improper.

State v. Robinson, ___ N.C. App. ___, 795 S.E.2d 136 (Dec. 20, 2016). The trial court's jury instruction regarding the bulletproof vest enhancement was not improper. The defendant argued that the trial court erred by instructing the jury that it could find this enhancement if it found that he wore or had in his immediate possession a bulletproof vest. The defendant argued that this instruction improperly

presented the jury with two alternative theories, only one of which was supported by the evidence. The court rejected the defendant's argument that there was no evidence that he had such a vest in his immediate possession. Among other things, the police found a bulletproof vest in the back of the vehicle where the defendant had been sitting when fleeing the crime scene.

Notice of intent to seek prior record level point for the defendant being on probation, parole, or post-release supervision at the time of the offense was insufficient under 15A-1340.16(a6) where the notice was a prior record level worksheet with a handwritten notation given in discovery.

State v. Wilson-Angeles, ___ N.C. App. ___, 795 S.E.2d 657 (Feb. 7, 2017). The trial court erred by assessing one prior record level point because the offense was committed while the offender was on probation, parole, or post-release supervision where the State did not give notice of its intent to seek this point. Including a prior record level worksheet in discovery materials is insufficient to meet the notice requirement. The statute requires written notice at least 30 days before trial or plea and existing precedent requires that notice be provided in a manner other than a prior record level worksheet in discovery. Ideally, such notice would utilize the AOC form created for this purpose.

No 8th Amendment violation where juvenile sentenced to life with the possibility of parole for felony murder.

State v. Jefferson, ___ N.C. App. ___, ___ S.E.2d ____ (Mar. 7, 2017). The defendant's sentence of life imprisonment with the possibility of parole after a term of 25 years does not violate the Eighth Amendment under *Miller v. Alabama*, 132 S. Ct. 2455 (2012). As a 15-year-old, the defendant was charged with first-degree murder. He was found guilty under the felony murder rule and under then-applicable law, was sentenced to a mandatory term of life without the possibility of parole. While the defendant's appeal was pending, the United States Supreme Court decided *Miller,* holding that mandatory life without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment. The General Assembly then amended the statute to provide that the sentence for a defendant found guilty of first-degree murder solely under the felony murder rule shall be life in prison with the possibility of parole; a defendant sentenced under this provision must serve a minimum of 25 years before becoming eligible for parole. The defendant's sentence was vacated on appeal and remanded to the trial court for resentencing pursuant to the new statute. The trial court held a resentencing hearing and imposed a life sentence with the possibility of parole after 25 years. The court declined the defendant's invitation to extend *Miller* to sentences that include the possibility of parole. It added, however:

> Nevertheless, we note there may indeed be a case in which a mandatory sentence of life with parole for a juvenile is disproportionate in light of a particular defendant's age and immaturity. That case is not now before us. Defendant chooses only to assert that [the statute] fails to provide a trial judge with discretion to consider the mitigating factors of youth and immaturity. He does not show the existence of circumstances indicating the sentence is particularly cruel or unusual as-applied to him.

The court affirmed the sentence, noting that the defendant had failed to meet the burden of the facial constitutional challenge and did not bring an as-applied challenge.

***Miller* U.S. Supreme Court opinion holding 8th Amendment prohibits mandatory life sentences without the possibility of parole for juveniles is retroactive.**

State v. Perry, ___ N.C. ___, 794 S.E.2d 280 (Dec. 21, 2016). The State conceded and the court agreed that pursuant to *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016), *Miller v. Alabama*, 132 S. Ct. 2455 (2012) (holding that imposition of a mandatory sentence of life in prison without the possibility of parole upon a juvenile violates the Eighth Amendment), applies retroactively to cases that became final before *Miller* was decided. This is one of several cases from the court recognizing the retroactivity of *Miller v. Alabama*.

Use of intellectual standards under existing Texas state law that failed to account for current medical standards in determining death-eligibility for purposes of Atkins inquiry violated 8th Amendment.

Moore v. Texas, 581 U.S. ___, 137 S. Ct. 1039 (Mar. 28, 2017). Vacating and remanding in this capital case, the Court held that a Texas court was wrong to fault a lower court for using a current definition of intellectual disability and by focusing on superseded standards and non-clinical factors for determining intellectual disability. Consulting current medical diagnostic standards, a state habeas court found in 2014 that the defendant was intellectually disabled and recommended relief. The Texas Court of Criminal Appeals (CCA) rejected this recommendation and denied the defendant relief. It reasoned that the habeas court erred by using the most current standards regarding the diagnosis of intellectual disability rather than the test set out in *Ex parte Briseno*, 135 S. W. 3d 1 (Tex. Crim. App. 2004) which incorporated older medical standards and set forth "seven evidentiary factors," later described by the Supreme Court as being unsupported by any authority, medical or judicial. The CCA determined that the *Briseno* standards "remai[n] adequately 'informed by the medical community's diagnostic framework.'" Applying them, that court found that relief was not warranted. One judge dissented, arguing that *Atkins* and *Hall* require courts to consult current medical standards to determine intellectual disability and criticizing the majority for relying on manuals superseded in the medical community. The dissenting judge also questioned the legitimacy of the seven *Briseno* factors, noting that they deviate from the current medical consensus. Before the Supreme Court the issue was whether the Texas court's "adherence to superseded medical standards and its reliance on *Briseno* comply with the Eighth Amendment and this Court's precedents." The Court held that it did not. It noted that although its decisions in *Atkins* and *Hall* left to the States the task of developing appropriate ways to enforce the restriction on executing intellectually disabled individuals, that determination must be informed by the medical community's diagnostic framework. Here, the habeas court applied current medical standards in concluding that the defendant is intellectually disabled and therefore not eligible for the death penalty. The CCA, however, faulted the habeas court for disregarding the CCA's case law and using a current definition of intellectual disability. The CCA instead "fastened its intellectual-disability determination" on a 1992 American Association on Mental Retardation manual definition adopted in *Briseno.* "By rejecting the habeas court's application of medical guidance and clinging to the standard it laid out in *Briseno,* including the wholly nonclinical *Briseno* factors, the CCA failed adequately to inform

itself of the medical community's diagnostic framework." (quotation omitted). [Jeff Welty blogged about the case here.]

Defendant is entitled to new sentencing hearing where the trial court violated his right to speak on his own behalf at sentencing.

State v. Jones, ___ N.C. App. ___, ___ S.E.2d ___ (June 6, 2017). G.S. 15A-1334(b) provides that a defendant may make a statement on his behalf at sentencing. Here, defense counsel clearly informed the court that the defendant wanted to make a statement, and the trial court acknowledged the request. However, during defense counsel's presentation, the court indicated that it had already decided how to sentence defendant. After hearing from a detective who had investigated the case, the trial court became impatient, asking if those present expected the court to give defendant "a merit badge" and accusing them of portraying defendant as "a choir boy." Immediately thereafter, and without hearing from the defendant, the trial court pronounced judgment.

Probation and Post-Release Supervision

Notice of probation violation alleging pending charges without specifying which conditions were violated by the defendant incurring new charges was sufficient notice of revocation-eligible violation.

State v. Moore, ___ N.C. App. ___, 795 S.E.2d 598 (Dec. 20, 2016). The defendant was served with notice of probation violations alleging that the probationer had new pending charges, but the notice failed to specify which particular conditions of probation were violated, or to explicitly state that the alleged probation violations were revocation-eligible. In other words, the probation violation report did not specifically allege that the defendant had violated probation by committing a new criminal offense. Noting that no "magic" words are required, the court held: "Where the notice fails to allege specifically which condition was violated but where the allegations in the notice could only point to a revocation-eligible offense, the notice is adequate." The court notes that the better practice is to specify which condition of probation has been violated.

(1) The trial court where the probationer resides and where the violations occurred has jurisdiction to revoke probation, regardless of where the probation originated. (2) Failure of the trial court to make findings of good cause to revoke probation after its expiration was not error.

State v. Regan, ___ N.C. App. ___, ___ S.E.2d ___ (May 2, 2017). (1) The trial court had jurisdiction to revoke the defendant's probation. The court rejected the defendant's argument that the trial court in Harnett County lacked jurisdiction to commence a probation revocation hearing because the probation originated in Sampson County. It held: "A trial court located in a county where a defendant resides and violates the terms of her probation is vested with jurisdiction to revoke the defendant's probation." The court added however:

> In order to avoid disputes, uncertainty, and costly litigation, the better practice for probation officers is to specify on probation violation reports any address relevant to

> alleged probation violations, such as the last known address of a probationer who has left the jurisdiction without permission or the address of the probation office where a defendant failed to attend a scheduled meeting. Additionally, in a probation violation hearing, the better practice for the State is to introduce direct evidence of any address relevant to an alleged probation violation. In this case, the indirect evidence—sufficient to allow the reasonable inference that Defendant resided in Harnett County when she fled the jurisdiction and violated her probation in Harnett County by failing to meet with her probation officer there—supports the trial court's presumed findings necessary to support its judgment.

The court also rejected the defendant's argument that the trial court lacked jurisdiction to revoke her probation because there was no record showing that her probation had been transferred from Sampson County to Harnett County. The court noted that the defendant had offered no authority to support this assertion. (2) The court rejected the defendant's argument that the trial court erred by revoking her probation after its expiration because it did not make adequate findings of fact. Specifically, the defendant argued that the trial court erred by failing to make any written or oral findings of good cause to revoke her probation. The court noted that the statute at issue, G.S. 15A-1344(f), does not require that the trial court make any specific findings and that, here, the record indicates that the trial court found good cause to revoke.

Error for the court to order restitution award in the absence of supporting evidence.

State v. Whitehurst, ___ N.C. App. ___, ___ S.E.2d ___ (May 2, 2017). The trial court erred by ordering the defendant to pay $200 in restitution where no evidence was offered to support the amount of restitution ordered.

Error for court to order defendant to pay State's expert witness fee as a condition of post-release supervision in the absence of any statutory authorization.

State v. McLean, ___ N.C. App. ___, 796 S.E.2d 804 (Feb. 7, 2017). In this case involving armed robbery and other charges, the trial court erred by assessing a fee against the defendant for the State's expert witness. The expert medical witness testified regarding treatment he administered to the victim. The trial court ordered that the defendant, as a condition of any early release or post-release supervision, reimburse the State $780 for the expert's testimony. The court concluded that there was no statutory authority for the trial court to require this payment as a condition of early release or post-release supervision.

Plain error to admit evidence seized pursuant to warrantless probation search where search was not related to the purpose of probation supervision. Here, the search was a part of a task force targeting violent offenders (which the defendant was not), and the defendant's probation officer was not present and apparently not notified of the search.

State v. Powell, ___ N.C. App. ___, ___ S.E.2d ___ (May 16, 2017). Because the State failed to meet its burden of demonstrating that a warrantless search was authorized by G.S. 15A-1343(b)(13), the trial

court erred by denying the defendant's motion to suppress. The defendant was subjected to the regular condition of probation under G.S. 15A-1343(b)(13). This provision requires that the probationer "Submit at reasonable times to warrantless searches by a probation officer of the probationer's person and of the probationer's vehicle and premises while the probationer is present, for purposes directly related to the probation supervision . . . ." Here, the search of the defendant's home occurred as part of an ongoing operation of a US Marshal's Service task force. The court noted that while prior case law makes clear that the presence or participation of law enforcement officers does not, by itself, render a warrantless search under the statute unlawful, the State must meet its burden of satisfying the "purpose" element of the statute. The State failed to meet its burden here. To conclude otherwise would require the court to read the phrase "for purposes directly related to the probation supervision" out of the statute. The court emphasized however that its opinion should not be read as diminishing the authority of probation officers to conduct warrantless searches of probationers' homes or to utilize the assistance of law enforcement officers in conducting such searches. Rather, it held that on the specific facts of this case the State failed to meet its burden of demonstrating that the search was authorized under the statute.

Sex Offender Registration and Monitoring

Trial court lacked jurisdiction to reconsider its order terminating sex offender registration requirements.

In re Timberlake, ___ N.C. App. ___, 792 S.E.2d 525 (Oct. 18, 2016). The trial court lacked jurisdiction to reconsider the petitioner's request to terminate sex offender registration where the State failed to oppose termination at the initial hearing and did not appeal the initial order. At the initial hearing the trial court granted the defendant's motion to terminate registration. At that hearing, the assistant district attorney representing the State chose not to put on any evidence or argue in opposition to termination. At a rehearing on the matter, held after an assistant attorney general representing the North Carolina Division of Criminal Information wrote to the judge suggesting that the judge had incorrectly concluded that termination of registration complies with the Jacob Wetterling Act, the judge reversed course and denied the petition. It was this amended order that was at issue on appeal. The court found that the letter submitted to the trial judge by the assistant attorney general did not vest the trial court with jurisdiction to review the termination order for errors of law. For a further discussion of this decision, see John Rubin, When Agencies Disagree with Criminal Court Decisions, N.C. Crim. L. (Nov. 1, 2016).

Because evidence was insufficient to support trial court's finding that defendant was recidivist, court reversed order imposing lifetime satellite based monitoring

State v. Moore, ___ N.C. App. ___, 792 S.E.2d 540 (Oct. 18, 2016). The court reversed and remanded the trial court's order imposing lifetime SBM. The trial court erred by finding that the defendant was a recidivist where the only evidence presented by the State was the oral statement of the prosecutor that the defendant had obtained reportable offenses in 1989 and 2006. The State conceded that neither

witness testimony nor documentary evidence was presented to establish the defendant's prior criminal history and that statements by the lawyers constituted the only basis to find that the defendant had been convicted of the two offenses. The court held: "Something more than unsworn statements, which are unsupported by any documentation, is required as evidence under the statute to allow the trial court to impose lifetime SBM." The court also rejected the notion that defense counsel's statements to the court constituted a stipulation to the two prior convictions.

Failure to consider reasonableness of SBM monitoring was error requiring new hearing, but SBM statutes are not facially unconstitutional.

State v. Stroessenreuther, ___ N.C. App. ___, 793 S.E.2d 734 (Dec. 6, 2016). In this appeal from the trial court's order imposing SBM, the court rejected the defendant's argument that the state's SBM laws are facially unconstitutional but remanded for a determination of the reasonableness of the imposition of SBM. Before the trial court, the defendant argued that imposition of SBM violated his fourth amendment rights under *Grady v. North Carolina*, 135 S. Ct. 1368 (2015). The trial court accepted the State's argument that there was no need to address reasonableness under the fourth amendment because SBM was required by the applicable statute. On appeal, the State conceded that the trial court erred by imposing SBM without first considering whether it was reasonable, once the defendant raised the fourth amendment issue. The court thus vacated the SBM order and remanded.

In a petition to terminate sex offender registration, for purposes of making the finding that the relief requested complies with relevant federal law, the trial court should apply a categorical, elements-based approach in determining which Tier the offense would be under federal law, unless the statute is divisible. Where the statute at issue is divisible, a modified categorical approach is appropriate, whereby limited official court documentation may supplement the elements-based approach.

State v. Moir, ___ N.C. ___, 794 S.E.2d 685 (Dec. 21, 2016). The defendant was convicted of two counts of indecent liberties and registered as a sex offender. After 10 years, he petitioned the court to be removed from the registry. The trial court denied relief, finding that indecent liberties was a Tier II offense under federal law (which requires a minimum 25 years registration), and therefore that the relief requested did not comply with federal law. The trial court arrived at this conclusion that the offense was a Tier II by looking at the actual conduct for which the defendant was convicted, going beyond the pleadings and bare conviction (here, the young age of the victim was the determining factor). The court of appeals vacated the trial court. It held that the trial court erred in looking beyond the elements of the offense to the specific facts of the case, and found that indecent liberties was a Tier I offense under federal law. On discretionary review, the supreme court reversed the court of appeals. It held that the typical approach to determining the federal tier is to apply a categorical, elements-based approach. In other words, the court would look at the elements of the crime, only. If, however, a statute is divisible, or capable of being committed in more than one way, a modified-categorical approach would be appropriate. Under the modified-categorical approach, in addition to considering the elements, the court may consider certain official court documentation, such as the indictment or transcript of plea. Even under this approach, however, it is not appropriate for the court to broadly

consider the facts underlying the conduct; the purpose of the modified-categorical approach is to determine which prong of the statute was violated, and therefore what crime was actually committed by the defendant. The trial court should decide whether indecent liberties is a divisible statute, and apply the appropriate approach to determine the applicable federal tier on remand. [Jamie Markham blogged about the case here.]

Permanent no-contact orders under 15A-1340.50 can authorize protection of the victim from indirect contact by the defendant through the victim's friends or family when appropriate findings of fact are made.

State v. Barnett, ___ N.C. ___, 794 S.E.2d 306 (Dec. 21, 2016). If supported by appropriate findings as required by the statute, the trial court has authority to enter a "Convicted Sex Offender Permanent No Contact Order" under G.S. 15A-1340.50 prohibiting the defendant from any interaction with a rape victim's minor children. The defendant was convicted of a number of offenses including attempted second-degree rape. At sentencing the trial court entered a no contact order under the statute, stating that the order included the victim's minor children. The Court of Appeals vacated the no contact order and remanded for the trial court to remove mention of individuals other than the victim, concluding that the trial court lacked authority to enter a no contact order including persons who were not victims of the sex offense. On the State's petition for discretionary review, the court agreed that the statute protects victims of sex offense and not third parties and that its catchall provision cannot be read to expand the statute's reach. However, it held that the statute can authorize protection for the victim from indirect contact by the defendant to the victim's family or friends when appropriate findings are made. It specified: "By 'appropriate findings,' we mean findings indicating that the defendant's contact with specific individuals would constitute indirect engagement of any of the actions prohibited in subsections (f)(1) through (f)(7) [of the statute]." The court remanded for further proceedings.

(1) Error to order lifetime sex-offender registration for defendant convicted of sexual offense with a child or sexual activity by a substitute parent, as neither offense is an aggravated offense under the registration statute. (2) Error to order lifetime SBM without evidence of reasonableness of the search, following *Grady v. North Carolina*.

State v. Johnson, ___ N.C. App. ___, ___ S.E.2d ___ (May 2, 2017). (1) The trial court erred by ordering lifetime registration for the defendant. Although the defendant was convicted of reportable convictions and is therefore required to register as a sex offender, neither sexual offense with a child under G.S. 14-27.4A(a) nor sexual activity by a substitute parent under G.S. 14-27.7(a) constitute aggravated offenses requiring lifetime registration. (2) The trial court erred by ordering lifetime SBM without a determination that the program was a reasonable search as mandated under *Grady v. North Carolina*, __ U.S. __, 191 L. Ed. 2d 459 (2015). The parties agreed that no evidence was presented to demonstrate the reasonableness of lifetime SBM. The court thus reversed the SBM order and remanded for the reasonableness determination mandated by *Grady.*

(1) Double Jeopardy bars convictions for both failure to notify the sheriff of change of address and failure to report in person to the sheriff's office for the same conduct. (2) The evidence here was sufficient to support a conviction for failure to report change of address when the defendant failed to register his address after being released from a period of incarceration.

State v. Reynolds, ___ N.C. App. ___, ___ S.E.2d ___ (May 2, 2017). (1) In this sex offender registration case, double jeopardy barred convictions under both G.S. 14-208.11(a)(2) and (a)(7). The defendant was convicted of two separate crimes: one pursuant to G.S. 14-208.11(a)(2) (failure to notify the last registering sheriff of a change in address) and one pursuant to 14-208.11(a)(7) (failure to report in person to the sheriff's office as required by, here, G.S. 14-208.9(a) (in turn requiring that a person report in person and provide written notice of an address change)). The court noted that it has previously held that the elements of an offense under G.S. 14-208.11(a)(2) and under G.S. 14-208.9(a) are the same: that the defendant is required to register; that the defendant changed his or her address; and that the defendant failed to notify the last registering sheriff of the change. It concluded: "Because in this case North Carolina General Statute § 14-208.11(a)(2) and (a)(7) have the same elements, one of defendant's convictions must be vacated for violation of double jeopardy." The court went on to reject the State's argument that the legislature intended to allow separate punishment under both subsection (a)(2) and (a)(7). (2) There was sufficient evidence that the defendant changed his address. After the defendant registered in 2011, he was incarcerated and then released in 2013. The Supreme Court has clarified that while incarcerated, a registrant's address is that of the facility or institution in which he is confined and that when he is released from incarceration, his address necessarily changes. The court rejected the defendant's argument that his incarceration for only a month was not long enough to establish a new address at his place of confinement.

SUPPRESSING EVIDENCE IN DISTRICT COURT

Chapter 15

Stops and Warrantless Searches

15.1 General Approach

A. Five Basic Steps

This chapter outlines a five-step approach for analyzing typical "street encounters" with police. It covers situations involving both pedestrians and occupants of vehicles. For a fuller discussion of warrantless searches and seizures, see WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT (5th ed. 2012) [hereinafter LAFAVE, SEARCH AND SEIZURE] and ROBERT L. FARB, ARREST, SEARCH, AND INVESTIGATION IN NORTH CAROLINA (UNC School of Government, 4th ed. 2011) [hereinafter FARB].

Two additional resources on North Carolina law are: Jeff Welty, *Traffic Stops* (UNC School of Government, Mar. 2013) [hereinafter Welty, *Traffic Stops*] (reviewing permissible grounds for and actions during traffic stop), *available at* http://nccriminallaw.sog.unc.edu/wp-content/uploads/2013/03/2013-03-Traffic-Stops.pdf; and Jeffrey Welty, *Motor Vehicle Checkpoints*, ADMINISTRATION OF JUSTICE BULLETIN No. 2010/04 (UNC School of Government, Sept. 2010) [hereinafter Welty, *Motor Vehicle Checkpoints*], *available at* http://sogpubs.unc.edu/electronicversions/pdfs/aojb1004.pdf.

The five steps are:

1. Did the officer seize the defendant?

2. Did the officer have grounds for the seizure?
3. Did the officer act within the scope of the seizure?
4. Did the officer have grounds to arrest or search?
5. Did the officer act within the scope of the arrest or search?

Generally, if an officer lacks authorization at any particular step, evidence uncovered by the officer as a result of the unauthorized action is subject to suppression. A flowchart outlining these steps is attached to this chapter as Appendix 15-1.

B. Authority to Act without Warrant

In many (although not all) of the situations described in this chapter, an officer may act without first obtaining a warrant. The courts have long expressed a preference, however, for the use of both arrest and search warrants—even in situations where a warrant is not required. *See State v. Hardy*, 339 N.C. 207, 226 (1994) ("search and seizure of property unaccompanied by prior judicial approval in the form of a warrant is per se unreasonable unless the search falls within a well-delineated exception to warrant requirement"); *State v. Nixon*, 160 N.C. App. 31, 34–35 (2003), *relying on Aguilar v. Texas*, 378 U.S. 108, 110–11 (1964) ("informed and deliberate determinations of magistrates . . . are to be preferred over the hurried action of officers" (citation omitted)), *abrogated on other grounds by Illinois v. Gates*, 462 U.S. 213 (1983); *see also Flippo v. West Virginia*, 528 U.S. 11, 13 (1999) (court states that "warrantless search by the police is invalid unless it falls within one of the narrow and well-delineated exceptions to the warrant requirement"; court rejects any "homicide crime scene" exception to warrant requirement); *United States v. Ventresca*, 380 U.S. 102, 106 (1965) ("in a doubtful or marginal case a search under a warrant may be sustainable where without one it would fall"); *Beck v. Ohio*, 379 U.S. 89, 96 (1964) ("arrest without a warrant bypasses the safeguards provided by an objective predetermination of probable cause").

C. Effect of Constitutional and State Law Violations

Most of this chapter deals with violations of the U.S. Constitution, for which the remedy is suppression of evidence that is unconstitutionally obtained.

To the extent it provides greater protection, state constitutional law provides a basis for suppression of illegally obtained evidence. In the search and seizure context, the North Carolina courts have found that protections under the North Carolina Constitution differ from federal constitutional protections in limited instances. *See State v. Carter*, 322 N.C. 709 (1988) (rejecting good faith exception to exclusionary rule under state constitution); *see also supra* "Good faith exception for constitutional violations not valid in North Carolina" in § 14.2B, Search Warrants (discussing case law and impact of recent legislation). Several states have recognized additional circumstances in which their state constitutions provide greater protections than under the U.S. Constitution. Examples are cited in this chapter. North Carolina defense counsel should remain alert to opportunities for differentiating the North Carolina Constitution from more limited federal protections.

Substantial statutory violations also may warrant suppression under Section 15A-974 of the North Carolina General Statutes (hereinafter G.S.). In 2011, the N.C. General Assembly amended G.S. 15A-974, effective for trials and hearings commencing on or after July 1, 2011, to provide a good-faith exception to the exclusionary rule for statutory violations. *See* 2011 N.C. Sess. Laws Ch. 6 (H 3). For a further discussion of statutory violations and the effect of the 2011 legislation, see *supra* "Good faith exception for constitutional violations not valid in North Carolina" in § 14.2B, Search Warrants, and § 14.5, Substantial Violations of Criminal Procedure Act.

Violations of other states' laws, not based on federal constitutional requirements or North Carolina law, generally do not provide a basis for suppression. *See State v. Hernandez*, 208 N.C. App. 591, 604 (2010) (declining to suppress evidence for violation of New Jersey state constitution); *see also Virginia v. Moore*, 553 U.S. 164 (2008) (Virginia law enforcement officers who had probable cause to arrest defendant for a misdemeanor did not violate Fourth Amendment when they arrested him and conducted search incident to arrest although state law did not authorize an arrest); *cf. State v. Stitt*, 201 N.C. App. 233 (2009) (even if State did not fully comply with 18 U.S.C. 2703(d) of the Stored Communications Act in obtaining records pertaining to cell phones possessed by defendant, federal law did not provide for suppression remedy).

15.2 Did the Officer Seize the Defendant?

The Fourth Amendment prohibits an officer from stopping, or "seizing," a person without legally sufficient grounds, and evidence obtained by an officer after seizing a person may not be used to justify the seizure. *See* FARB at 27. It is therefore critical for Fourth Amendment purposes to determine exactly when a seizure occurs.

A. Consensual Encounters

"Free to leave" test. As a general rule, a person is seized when, in view of all of the circumstances, a reasonable person would have believed that he or she was not "free to leave." *See United States v. Mendenhall*, 446 U.S. 544 (1980); *Florida v. Royer*, 460 U.S. 491 (1983); *see also Florida v. Bostick*, 501 U.S. 429 (1991) (when a person's freedom of movement is restricted for reasons independent of police conduct, such as when a person is a passenger on a bus, the test is whether a reasonable person would have felt free to decline the officer's requests or terminate the encounter).

The "free to leave" test used to determine whether a person has been seized requires a lesser degree of restraint than the test for "custody" used to determine whether a person is entitled to *Miranda* warnings. *See State v. Buchanan*, 353 N.C. 332 (2001) (test for custody is whether there was formal arrest or restraint on freedom of movement of degree associated with formal arrest); *see also infra* § 15.4G, Does *Miranda* Apply? (discussing circumstances in which *Miranda* warnings may be required following a seizure).

A seizure clearly occurs if an officer takes a person into custody, physically restrains the person, or otherwise requires the person to submit to the officer's authority. An encounter may be considered "consensual" and not a seizure, however, if a person willingly engages in conversation with an officer.

Factors. Factors to consider in determining whether an encounter is consensual or a seizure include:

- number of officers present,
- display of weapon by officer,
- physical touching of defendant,
- use of language or tone of voice indicating that compliance is required,
- holding a person's identification papers or property,
- blocking the person's path, and
- activation or shining of lights.

See State v. Farmer, 333 N.C. 172 (1993) (discussing factors); *see also* Jeff Welty, *Is the Use of a Blue Light a Show of Authority?*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (Dec. 7, 2010) (suggesting that use of blue light is "conclusive" as to existence of seizure), http://nccriminallaw.sog.unc.edu/?p=1804.

Cases finding a seizure include: *State v. Icard*, 363 N.C. 303 (2009) (defendant was seized where officer initiated encounter, telling occupants of vehicle that the area was known for drug crimes and prostitution; was armed and in uniform; called for backup assistance; illuminated vehicle in which defendant was sitting with blue lights; knocked twice on defendant's window; and when defendant did not respond opened car door and asked defendant to exit, produce identification, and bring purse; backup officer also illuminated defendant's side of vehicle with take-down lights); *State v. Harwood*, ___ N.C. App. ___, 727 S.E.2d 891 (2012) (defendant was seized when officers parked directly behind his stopped vehicle, drew their firearms, ordered the defendant and his passenger to exit the vehicle, and placed defendant on the ground and handcuffed him); *State v. Haislip*, 186 N.C. App. 275 (2007) (defendant was seized where officer fell in behind defendant, activated blue lights, and after defendant parked car, got out, and began walking away, approached her and got her attention), *vacated and remanded on other grounds*, 362 N.C. 499 (2008) (remanded to trial court for written findings of fact and conclusions of law).

Cases not finding a seizure include: *State v. Campbell*, 359 N.C. 644 (2005) (defendant was not seized when officer parked her car in lot without turning on blue light or siren, approached defendant as defendant was walking from car to store, and asked defendant if she could speak with him; after talking with defendant, officer asked defendant to "hold up" while officer transmitted defendant's name to dispatcher; assuming that this statement constituted seizure, officer had developed reasonable suspicion by then to detain defendant); *State v. Williams*, 201 N.C. App. 566, 571 (2009) (officer parked his patrol car on the opposite side of the street from the driveway in which defendant was parked, did not activate the siren or blue lights on his patrol car, did not remove his gun

from its holster, or use any language or display a demeanor suggesting that defendant was not free to leave); *State v. Johnston*, 115 N.C. App. 711 (1994) (defendant was not seized where trooper drove over to where defendant's car was already parked, defendant voluntarily stepped out of car before trooper arrived, and trooper then exited his car and walked over to defendant).

B. Chases

Even if a reasonable person would not have felt "free to leave," the U.S. Supreme Court has held that a seizure does not occur until there is a physical application of force or submission to a show of authority. *See California v. Hodari D.*, 499 U.S. 621 (1991) (when police are chasing person who is running away, person is not "seized" until person is caught or gives up chase); *State v. Eaton*, 210 N.C. App. 142 (2011) (defendant was not seized before he discarded plastic baggie containing pills); *State v. Leach*, 166 N.C. App. 711 (2004) (following *Hodari D.* and holding that officers had not seized defendant until they detained him after high speed chase); *State v. West*, 119 N.C. App. 562 (1995) (following *Hodari D.*).

For example, under *Hodari D.*, if an officer directs a car to pull over, a seizure occurs when the driver stops, thus submitting to the officer's authority. A seizure also could occur when a person tries to get away from the police in an effort to terminate a consensual encounter. *See United States v. Wilson*, 953 F.2d 116 (4th Cir. 1991) (defendant initially agreed to speak with officer and produced identification at officer's request, but then declined request for consent to search and tried to leave; officer effectively seized defendant by following defendant and repeatedly asking for consent to search); *see also infra* § 15.3D, Flight (flight from consensual or illegal encounter does not provide grounds to stop person for resisting, delaying, or obstructing officer).

Generally, evidence observed or obtained before a seizure is not subject to suppression under the Fourth Amendment. *See State v. Eaton*, 210 N.C. App. 142 (2011) (defendant was not seized before he discarded plastic baggie containing pills; because defendant abandoned baggie in public place and seizure had not yet occurred, officer's recovery of baggie did not violate Fourth Amendment). If a defendant discards property as a result of illegal police action, however, he or she may move to suppress the evidence as the fruit of illegal action. *See State v. Joe*, ___ N.C. App. ___, 730 S.E.2d 779 (2012) (officers did not have grounds to arrest defendant for resisting an officer for ignoring their command to stop; bag of cocaine cannot be held to have been voluntarily abandoned by defendant when abandonment was product of unlawful arrest; suppression motion granted), *review granted*, ___ N.C. ___ , 736 S.E.2d 187 (2013).

C. Race-Based "Consensual" Encounters

If officers select a defendant for a "consensual" encounter because of the defendant's race, evidence obtained during the encounter potentially could be suppressed on equal protection and due process grounds. *See Whren v. United States*, 517 U.S. 806 (1996) (Equal Protection prohibits selective enforcement of law based on considerations such as

race); *United States v. Avery*, 137 F.3d 343 (6th Cir. 1997); *United States v. Taylor*, 956 F.2d 572 (6th Cir. 1992); *see also United States v. Washington*, 490 F.3d 765 (9th Cir. 2007) (in totality of circumstances, encounter between two white police officers and African-American defendant was not consensual, as a reasonable person in defendant's circumstances would not have felt free to leave; court relied on, among other things, strained relations between police and African-American community and reputation of police among African-Americans).

If an officer's actions amount to a stop, racial motivation also may undermine the credibility of non-racial reasons asserted by the officer as the basis for the stop. *See infra* § 15.3M, Race-Based Stops.

In recognition of the potential for racial profiling, North Carolina law requires the Division of Criminal Information of the N.C. Department of Justice to collect statistics on traffic stops by state troopers and other state law enforcement officers. *See* G.S. 114-10.01. This statute also requires the Division to collect statistics on many local law enforcement agencies. Unless a specific statutory exception exists, records maintained by state and local government agencies are public records. *See generally News and Observer Publishing Co. v. Poole*, 330 N.C. 465 (1992).

D. Selected Actions before Seizure Occurs

Running tags. *See State v. Chambers*, 203 N.C. App. 373, at *2 (2010) (unpublished) ("Defendant's license tag was displayed, as required by North Carolina law, on the back of his vehicle for all of society to view. Therefore, defendant did not have a subjective or objective reasonable expectation of privacy in his license tag. As such, the officer's actions did not constitute a search under the Fourth Amendment.").

Installation of GPS tracking device. *See United States v. Jones*, ___ U.S. ___, 132 S. Ct. 945 (2012) (Government's attachment of GPS device to vehicle to track vehicle's movements was search under the Fourth Amendment); *see also* Jeff Welty, *Advice to Officers after Jones*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (Jan. 30, 2012) (observing that *Jones* requires that officers ordinarily obtain prior judicial authorization to attach GPS device to vehicle), http://nccriminallaw.sog.unc.edu/?p=3250.

15.3 Did the Officer Have Grounds for the Seizure?

A. Reasonable Suspicion

Officers may make a brief investigative stop of a person—that is, they may seize a person—if they have reasonable suspicion of criminal activity by the person. *See Terry v. Ohio*, 392 U.S. 1 (1968); *see also State v. Styles*, 362 N.C. 412 (2008) (holding that U.S. Constitution allows traffic stop based on reasonable suspicion); *State v. Duncan*, 43 P.3d 513 (Wash. 2002) (holding that although *Terry* authorizes stop based on reasonable suspicion of criminal offense and possibility of noncriminal traffic violation, it does not

authorize stop based on reasonable suspicion of other noncriminal infractions). For a further discussion of the standard for traffic stops, see *infra* § 15.3E, Traffic Stops.

Factors to consider in determining reasonable suspicion include:

- the officer's personal observations,
- information the officer receives from others,
- time of day or night,
- the suspect's proximity to where a crime was recently committed,
- the suspect's reaction to the officer's presence, including flight, and
- the officer's knowledge of the suspect's prior criminal record

See also United States v. Foster, 634 F.3d 243, 248 (4th Cir. 2011) (in holding that stop was not supported by reasonable suspicion, court stated, "[w]e also note our concern about the inclination of the Government toward using whatever facts are present, no matter how innocent, as indicia of suspicious activity" and "we are deeply troubled by the way in which the Government attempts to spin these largely mundane acts into a web of deception").

B. High Crime or Drug Areas

Presence in a high crime or drug area, standing alone, does not constitute reasonable suspicion. Other factors providing reasonable suspicion must be present. *See Brown v. Texas*, 443 U.S. 47 (1979) (defendant's presence with others on a corner known for drug-related activity did not justify investigatory stop); *State v. Fleming*, 106 N.C. App. 165 (1992) (following *Brown*); *see also United States v. Massenburg*, 654 F.3d 480, 488 (4th Cir. 2011) (disallowing stop and frisk of person based on generic anonymous tip; court states that allowing officer's actions "would be tantamount to permitting a regime of general searches of virtually any individual residing in or found in high-crime neighborhoods").

Although not extensively discussed in the North Carolina cases, some courts have questioned the characterization of a neighborhood as a high crime area and have required the State to make an appropriate factual showing. For example, the First Circuit Court of Appeals has held that, when considering an officer's testimony that a stop occurred in a "high crime area," the court must identify the relationship between the charged offense and the type of crime the area is known for, the geographic boundaries of the allegedly "high crime area," and the temporal proximity between the evidence of criminal activity and the observations allegedly giving rise to reasonable suspicion. *United States v. Wright*, 485 F.3d 45 (1st Cir. 2007), *cited with approval in United States v. Swain*, 324 F. App'x. 219, at *222 (4th Cir. 2009) (unpublished) ("Reasonable suspicion is a context-driven inquiry and the high-crime-area factor, like most others, can be implicated to varying degrees. For example, an open-air drug market location presents a different situation than a parking lot where an occasional drug deal might occur."); *see also United States v. Montero-Camargo*, 208 F.3d 1122, 1138 (9th Cir. 2000) ("[t]he citing of an area as 'high-crime' requires careful examination by the court, because such a description,

unless properly limited and factually based, can easily serve as a proxy for race or ethnicity").

Cases finding a stop in a "high-crime" area not to be based on reasonable suspicion include:

State v. White, ___ N.C. App. ___, 712 S.E.2d 921, 928 (2011) (reasonable suspicion did not exist where officers responded to a complaint of loud music in a location they regarded as a high crime area but officers did not see the defendant engaged in any suspicious activity and did not see any device capable of producing loud music; that the defendant was running in the neighborhood did not establish reasonable suspicion; "[t]o conclude the officers were justified in effectuating an investigatory stop, on these facts, would render any person who is unfortunate enough to live in a high-crime area subject to an investigatory stop merely for the act of running")

State v. Hayes, 188 N.C. App. 313 (2008) (reasonable suspicion did not exist where defendant and another man were in area where drug-related arrests had been made in past, they were walking back and forth on a sidewalk in a residential neighborhood on a Sunday afternoon, the officer did not believe they lived in the neighborhood, and the officer observed in the car they had exited a gun under the seat of the defendant's companion but not of the defendant)

Cases finding a stop in a "high-crime" area to be justified by additional factors showing reasonable suspicion include:

State v. Butler, 331 N.C. 227 (1992) (presence of an individual on a corner specifically known for drug activity and the scene of multiple recent arrests for drugs, coupled with evasive actions by defendant, were sufficient to form reasonable suspicion to stop)

State v. Mello, 200 N.C. App. 437 (2009) (holding that the defendant's presence in a high-drug area, coupled with evasive action on the part of individuals seen interacting with defendant, provided reasonable suspicion to support a stop), *aff'd per curiam*, 364 N.C. 421 (2010)

In re I.R.T., 184 N.C. App. 579 (2007) (discussing factors relevant to whether an officer had reasonable suspicion)

C. Proximity to Crime Scenes or Crime Suspects

A factor similar to presence in a high-crime area, discussed in subsection B., above, is proximity to a crime scene. Without more, this factor does not establish reasonable suspicion. *See State v. Brown*, ___ N.C. App. ___, 720 S.E.2d 446 (2011) (proximity to area in which robbery occurred four hours earlier insufficient to justify stop); *State v. Chlopek*, 209 N.C. App. 358 (2011) (no reasonable suspicion to stop truck that drove into subdivision under construction and drove out thirty minutes later at a time of night when copper thefts had been reported in other parts of the county); *State v. Murray*, 192 N.C.

App. 684 (2008) (officer did not have reasonable suspicion to stop vehicle when officer was on patrol at 4:00 a.m. in area where there had been recent break-ins; vehicle was not breaking any traffic laws, officer did not see any indication of any damage or break-in that night, vehicle was on public street and was not leaving parking lot of any business, and officer found no irregularities on check of vehicle's license plate); *State v. Cooper*, 186 N.C. App. 100 (2007) (no reasonable suspicion where defendant, a black male, was in vicinity of crime scene and suspect was described as a black male); *compare State v. Campbell*, 188 N.C. App. 701 (2008) (court states that proximity to crime scene, time of day, and absence of other suspects in vicinity do not, by themselves, establish reasonable suspicion; however, noting other factors, court finds that reasonable suspicion existed in all the circumstances of the case).

Likewise, proximity to a person suspected of a crime or wanted for arrest, without more, does not establish reasonable suspicion. *See State v. Washington*, 193 N.C. App. 670 (2008) (defendant drove to and entered home of person who was wanted for several felonies; defendant and person came out of house a few minutes later and drove to nearby gas station, parked in lot, and got out of car, where officers arrested other person and ordered defendant to stop; trial court's finding that officer had right to make investigative stop of defendant because he transported wanted person was erroneous as matter of law).

D. Flight

Generally. In *Illinois v. Wardlow*, 528 U.S. 119 (2000), the U.S. Supreme Court held that the defendant's headlong flight on seeing the officers, along with his presence in an area of heavy narcotics trafficking, constituted reasonable suspicion to stop. The Court reaffirmed that mere presence in a high drug area does not constitute reasonable suspicion and cautioned that reasonable suspicion is based on the totality of the circumstances, not any single factor. *See also In re J.L.B.M.*, 176 N.C. App. 613 (2006) (officer did not have reasonable suspicion to stop in following circumstances: officer received police dispatch of suspicious person, described as Hispanic male, at gas station; when officer drove up, he saw a Hispanic male in baggy clothes, who spoke to someone in another car and then walked away from location of officer's patrol car).

Flight from consensual or illegal encounter not RDO. If an officer has grounds to seize a person, the person's flight may constitute resisting, delaying, or obstructing an officer in the lawful performance of his or her duties (RDO). *See, e.g.*, *State v. Lynch*, 94 N.C. App. 330 (1989). If the initial encounter between an officer and defendant is consensual and not a seizure, however, a defendant's attempt to leave would not constitute RDO. *See, e.g.*, *State v. Joe*, ___ N.C. App. ___, 730 S.E.2d 779 (2012), *review granted*, ___ N.C. ___, 736 S.E.2d 187 (2013); *State v. White*, __ N.C. App. __, 712 S.E.2d 921, 927–28 (2011) (so holding); *In re A.J. M.-B.*, 212 N.C. App. 586 (2011) (same); *State v. Sinclair*, 191 N.C. App. 485, 490–91 (2008) ("Although Defendant's subsequent flight may have contributed to a reasonable suspicion that criminal activity was afoot thereby justifying an investigatory stop, Defendant's flight from a consensual encounter cannot be used as evidence that Defendant was resisting, delaying, or obstructing [the officer] in the performance of his duties."); *compare State v. Washington*, 193 N.C. App. 670 (2008)

(officer had reasonable suspicion to stop defendant, so defendant's flight constituted RDO). For a discussion of the difference between consensual encounters and seizures, see *supra* § 15.2A, Consensual Encounters.

Likewise, if an officer illegally stops a person, the person's attempt to leave thereafter ordinarily would not give the officer grounds to stop the person and charge him or her with RDO. *See, e.g.*, *White*¸ ___ N.C. App. ___, 712 S.E.2d 921 (if officer is attempting to effect unlawful stop, defendant's flight is not RDO because officer is not discharging a lawful duty); *Sinclair*, 191 N.C. App. 485 (same); *State v. Swift*, 105 N.C. App. 550 (1992) (recognizing that person may flee illegal stop or arrest); JOHN RUBIN, THE LAW OF SELF-DEFENSE IN NORTH CAROLINA 137–38 (UNC Institute of Government, 1996) (person has limited right to resist illegal stop). *But cf. State v. Branch*, 194 N.C. App. 173 (2008) (officer had reasonable suspicion to stop defendant but did not have grounds to continue detention after completing purpose of stop; defendant had right to resist continued detention but used more force than reasonably necessary by driving away while officer was reaching into vehicle; officer therefore had probable cause to arrest defendant for assault); *In re J.L.B.M.*, 176 N.C. App. 613 (2006) (juvenile could be adjudicated delinquent of obstructing officer for giving false name to officer during illegal stop).

E. Traffic Stops

Standard for making stop. An officer may not randomly stop motorists to check their driver's license or vehicle registration; an officer must have at least reasonable suspicion of criminal activity. *See Delaware v. Prouse*, 440 U.S. 648 (1979). Police may establish systematic checkpoints, without individualized suspicion, under certain conditions. *See infra* § 15.3J, Motor Vehicle Checkpoints.

The N.C. Court of Appeals previously held in several opinions that when an officer makes a traffic stop based on a readily observed traffic violation, such as speeding or running a red light, the stop had to be supported by probable cause. In contrast, according to these decisions, reasonable suspicion was sufficient if the suspected violation was one that could be verified only by stopping the vehicle, such as impaired driving or driving with a revoked license. *See State v. Baublitz*, 172 N.C. App. 801 (2005) and cases cited therein; *see also State v. Ivey*, 360 N.C. 562 (2006) (suggesting under U.S. and N.C. constitutions that probable cause may be required to stop for any traffic violation). The N.C. Supreme Court has since held that reasonable suspicion, not probable cause, is sufficient for a traffic stop, regardless of whether the traffic violation is readily observed or merely suspected. *See State v. Styles*, 362 N.C. 412 (2008). *But cf.* G.S. 15A-1113(b) (an officer who has probable cause of a noncriminal infraction may detain the person to issue and serve a citation); *State v. Day*, 168 P.3d 1265 (Wash. 2007) (officer may not make investigatory stop for parking violation); *State v. Holmes*, 569 N.W.2d 181 (Minn. 1997) (to same effect).

Standing of passenger to challenge stop. In *Brendlin v. California*, 551 U.S. 249 (2007), the U.S. Supreme Court held that a passenger in a car is seized under the Fourth

Amendment when the police make a traffic stop, and the passenger may challenge the stop's constitutionality. *Accord State v. Canty*, ___ N.C. App. ___, 736 S.E.2d 532 (2012). Consequently, when evidence incriminating a passenger is obtained following an illegal stop, the passenger has standing to move to suppress the evidence. This ruling overrules any contrary authority in North Carolina. *See State v. Smith*, 117 N.C. App. 671 (1995) (suggesting that a passenger did not have standing to move to suppress). The North Carolina Court of Appeals has recognized under *Brendlin* that a passenger also has standing to challenge the duration of a stop. *See State v. Jackson*, 199 N.C. App. 236 (2009).

If a stop is valid, a passenger's standing to challenge actions taken during the stop (such as frisks or searches) will depend on whether the officer's actions infringe on the passenger's rights. *See State v. Franklin*, ___ N.C. App. ___, 736 S.E.2d 218 (2012) (although a passenger who has no possessory interest in a vehicle has standing to challenge a stop of the vehicle, that passenger does not have standing to challenge a search of the vehicle).

F. Selected Reasons for Traffic Stops

Delay at light. *Compare, e.g., State v. Barnard*, 362 N.C. 244 (2008) (driver's unexplained thirty-second delay before proceeding through green traffic light gave rise to reasonable suspicion of impaired driving in all the circumstances), *with State v. Roberson*, 163 N.C. App. 129 (2004) (defendant's eight to ten second delay after light turned green did not give officer reasonable suspicion to stop for impaired driving).

Failure to use turn signal. *Compare, e.g., State v. Ivey*, 360 N.C. 562 (2006) (failure to use turn signal when making turn did not give officer grounds to stop; failure to signal did not affect operation of any other vehicle or any pedestrian), *and State v. Watkins*, ___ N.C. App. ___, 725 S.E.2d 400 (2012) (suggesting that unsignaled lane change was insufficient to justify stop), *with State v. Styles*, 362 N.C. 412 (2008) (failure to use turn signal gave officer grounds to stop because failure could affect operation of another vehicle, in this case vehicle driven by officer, which was directly behind defendant), *and State v. McRae*, 203 N.C. App. 319 (2010) (similar).

Speeding or slowing. *See, e.g., State v. Canty*, ___ N.C. App. ___, 736 S.E.2d 532 (2012) (no reasonable suspicion; car touched fog line and slowed to 59 m.p.h. in 65 m.p.h. when officers passed car, and driver and passengers appeared nervous and failed to make eye contact with passing officer); *State v. Royster*, ___ N.C. App. ___, 737 S.E.2d 400 (2012) (officer had sufficient time to form opinion that defendant was speeding); *State v. Barnhill*, 166 N.C. App. 228 (2004) (officer's estimate that defendant was going 40 m.p.h. in 25 m.p.h. zone justified stop); *State v. Aubin*, 100 N.C. App. 628 (1990) (driving excessively slowly and weaving in own lane justified stop); *see also* Welty, *Traffic Stops*, at 3 (noting that "if a vehicle is speeding only slightly, an officer's visual estimate of speed may be insufficiently reliable and accurate to support a traffic stop"; citing cases), *available at* http://nccriminallaw.sog.unc.edu/wp-content/uploads/2013/03/2013-03-Traffic-Stops.pdf.

Weaving. Numerous cases address "weaving" in one's own lane. While weaving is not a traffic violation and alone may not provide reasonable suspicion, it may provide reasonable suspicion to stop when combined with other factors or when severe. *See also* Jeff Welty, *Weaving and Reasonable Suspicion*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (June 19, 2012), http://nccriminallaw.sog.unc.edu/?p=3677.

Cases not finding grounds for a stop include: *State v. Canty*, ___ N.C. App. ___, 736 S.E.2d 532 (2012) (no reasonable suspicion; car touched fog line and slowed to 59 m.p.h. in 65 m.p.h. when officers passed car and driver and passengers appeared nervous and failed to make eye contact with passing officer); *State v. Peele*, 196 N.C. App. 668 (2009) (single instance of weaving in own lane, without more, did not constitute reasonable suspicion to stop; officer's reliance on dispatcher's report of impaired driving in the area, in addition to officer's observation of weaving, did not provide reasonable suspicion; dispatcher's report was treated as based on anonymous tip, as State provided no evidence that report of bad driving came from identified caller); *State v. Fields*, 195 N.C. App. 740 (2009) (weaving in own lane three times, without more, did not establish reasonable suspicion to stop for impaired driving; defendant violated no other traffic laws, was driving at 4:00 p.m. in afternoon, which was not unusual hour, and was not near places that furnished alcohol); *see also State v. Tarvin*, 972 S.W.2d 910 (Tex. App. 1998) (trial court granted motion to suppress, observing that driving a car, in and of itself, is "controlled weaving"; appellate court upholds suppression of stop).

Cases finding grounds for a stop include: *State v. Kochuk*, ___ N.C. ___, 742 S.E.2d 801 (2013), *rev'g per curiam for reasons stated in dissenting opinion*, ___ N.C. App. ___, 741 S.E.2d 327 (2012); *State v. Otto*, 366 N.C. 134 (2012) (traffic stop justified by the defendant's "constant and continual" weaving for three quarters of a mile at 11:00 p.m. on Friday night); *State v. Fields*, ___ N.C. App. ___, ___, 723 S.E.2d 777, 778 (2012) (officer followed defendant for three quarters of a mile and saw him "weaving in his own lane . . . sufficiently frequent[ly] and erratic[ally] to prompt evasive maneuvers from other drivers"); *State v. Simmons*, 205 N.C. App. 509, 525 (2010) (stop was supported by reasonable suspicion where the defendant "was not only weaving within his lane, but was also weaving across and outside the lanes of travel, and at one point actually ran off the road"); *State v. Jacobs*, 162 N.C. App. 251, 255 (2004) (court recognizes that "defendant's weaving within his lane was not a crime," but finds that all of the facts—slowly weaving within own lane for three-quarters of a mile, late at night, in area near bars—justified stop); *State v. Thompson*, 154 N.C. App. 194 (2002) (weaving within the lane and touching the centerline with both left tires, combined with speeding and other factors, justified stop); *State v. Watson*, 122 N.C. App. 596 (1996) (driving on center line and weaving in own lane at 2:30 a.m. near nightclub justified stop); *State v. Aubin*, 100 N.C. App. 628 (1990) (driving excessively slowly and weaving in own lane justified stop); *see also State v. Hudson*, 206 N.C. App. 482 (2010) (crossing center line and fog line twice provided probable cause for stop for violation of G.S. 20-146(a), which requires driving on right side of highway).

Proximity to bars. *See, e.g.*, *State v. Roberson*, 163 N.C. App. 129 (2004) (driving at 4:30

a.m. in area with several bars and restaurants did not increase level of suspicion and justify stop; by law, those establishments must stop serving alcohol at 2:00 a.m.); *State v. Watson*, 122 N.C. App. 596 (1996) (proximity to nightclub at 2:30 a.m., combined with driving on center line and weaving in own lane, justified stop).

Anonymous tip of impaired driving. *See infra* § 15.3G, Anonymous Tips.

Ownership and registration. *See, e.g., State v. Burke*, 212 N.C. App. 654 (2011) (stop based merely on low number of temporary tag not supported by reasonable suspicion), *aff'd per curiam*, 365 N.C. 415 (2012); *State v. Hess*, 185 N.C. App. 530 (2007) (owner of car had suspended license; absent evidence that owner was not driving car, officer had reasonable suspicion to stop car to determine whether owner was driving); *State v. Hudson*, 103 N.C. App. 708 (1991) (officer had reasonable suspicion that faded, temporary registration had expired and that vehicle was improperly registered); *see also United States v. Wilson*, 205 F.3d 720 (4th Cir. 2000) (Fourth Amendment does not allow traffic stop simply because vehicle had temporary tags and officer could not read expiration date while driving behind defendant at night).

For a discussion of limitations on an officer's actions after discovering that a car was not improperly registered, *see infra* § 15.3L, Mistaken Belief by Officer.

Seatbelt violations. *See, e.g., State v. Villeda*, 165 N.C. App. 431 (2004) (trooper did not have grounds to stop defendant for seat belt violation; evidence indicated that trooper could not see inside vehicles driving in front of him at night on stretch of road on which defendant was stopped).

G. Anonymous Tips

General test. Information from informants is evaluated under the "totality of the circumstances," but the most critical factors are the reliability of the informant and the basis of the informant's knowledge. *See Alabama v. White*, 496 U.S. 325 (1990).

When a tip is anonymous, the reliability of the informant is difficult to assess, and the tip is insufficient to justify a stop unless the tip itself contains strong indicia of reliability or independent police work corroborates significant details of the tip. *See State v. Johnson*, 204 N.C. App. 259, 260–61 (2010) (finding tip insufficient under these principles; anonymous caller merely alleged that black male wearing a white shirt in a blue Mitsubishi with a certain license plate number was selling guns and drugs at certain street corner); *see also State v. Watkins*, 337 N.C. 437 (1994) (upholding stop based on corroboration), *rev'g* 111 N.C. App. 766 (1993); *State v. Harwood*, ___ N.C. App. ___, ___, 727 S.E.2d 891, 899 (2012) (uncorroborated, anonymous tip did not provide basis for stop; "tip in question simply provided that Defendant would be selling marijuana at a certain location on a certain day and would be driving a white vehicle"); *State v. Peele*, 196 N.C. App. 668 (2009) (officer's reliance on dispatcher's report of impaired driving in the area along with observation of single instance of weaving did not provide reasonable suspicion; dispatcher's report was treated as based on anonymous tip, as State provided

no evidence that report of bad driving came from identified caller); *see also State v. Coleman*, ___ N.C. App. ___, 743 S.E.2d 62 (2013) (even though caller gave her name, court concluded that information that defendant had open container of alcohol was no more reliable than information provided by anonymous tipster; caller did not identify or describe the defendant, did not provide any way for the officer to assess her credibility, failed to explain the basis of her knowledge, and did not include any information concerning defendant's future actions).

A tip from a person whom the police fail to identify might not be considered anonymous, or at least not completely anonymous, if the tipster has put his or her anonymity sufficiently at risk. *See State v. Maready*, 362 N.C. 614 (2008) (driver who approached officers in person to report erratic driving was not completely anonymous informant even though officers did not take the time to get her name; also, informant had little time to fabricate allegations); *State v. Allen*, 197 N.C. App. 208 (2009) (tip was not anonymous; victim had face-to-face encounter with police when reporting alleged assault); *State v. Hudgins*, 195 N.C. App. 430 (2009) (caller, although not identified, placed his anonymity at risk; he remained on his cell phone with the dispatcher for eight minutes, gave detailed information about the person who was following him, followed the dispatcher's instructions, which allowed an officer to intercept the person who was following the caller, and remained at scene long enough to identify person stopped by the officer).

Weapons offenses. In *Florida v. J.L.*, 529 U.S. 266 (2000), the Court found that an anonymous tip—stating that a young black male was at a particular bus stop wearing a plaid shirt and carrying a gun—did not give officers reasonable suspicion to stop. The tip lacked sufficient indicia of reliability and provided no predictive information about the person's conduct. The Court refused to adopt a "firearm exception," under which a tip alleging possession of an illegal firearm would justify a stop and frisk even if the tip fails the standard test for reasonable suspicion. *See also State v. Hughes*, 353 N.C. 200 (2000) (following *Florida v. J.L.*, court finds anonymous tip insufficient to support stop); *State v. Brown*, 142 N.C. App. 332 (2001) (to same effect).

Impaired driving cases. *Florida v. J.L.* indicates that the standard for evaluating anonymous tips should be the same regardless of the type of offense involved, with possible exceptions for certain offenses (such as offenses involving explosives).

In cases in North Carolina in which the police have received a tip about impaired or erratic driving, the courts have applied the same standard for assessing reasonable suspicion as in cases involving other offenses. They have not recognized an exception for impaired driving. *See State v. Maready*, 362 N.C. 614 (2008) (finding in totality of circumstances that tip about erratic driving and other information gave officers reasonable suspicion to stop); *State v. Peele*, 196 N.C. App. 668 (2009) (following *Maready*, court finds that tip about erratic driving and other information did not give officers reasonable suspicion to stop). However, a tip might not be treated as completely anonymous if the tipster placed his or her anonymity sufficiently at risk. *See supra* "General test" in this subsection G.

Drug cases. An anonymous tip to police that a person is involved in illegal drug sales is not sufficient, without more, to justify an investigatory stop. *See State v. McArn*, 159 N.C. App. 209 (2003) (anonymous tip that drugs were being sold from particular vehicle was not sufficient to justify stop of vehicle); *compare State v. Sutton*, 167 N.C. App. 242 (2004) (tip from pharmacist with whom officer had been working on ongoing basis to uncover illegal activity involving prescriptions, combined with officer's own observations, provided reasonable suspicion to stop defendant after defendant left pharmacy).

H. Information from Other Officers

Generally. An officer may stop a person based on the request of another officer if:

- the officer making the stop has reasonable suspicion for the stop based on his or her personal observations;
- the officer making the stop received a request to stop the defendant from another officer who, before making the request, had reasonable suspicion for the stop; or
- the officer making the stop received information from another officer before the stop, which when combined with the stopping officer's observations constituted reasonable suspicion.

See State v. Battle, 109 N.C. App. 367, 371 (1993) (discussing general standard for stops based on collective knowledge); *State v. Bowman*, 193 N.C. App. 104 (2008) (collective knowledge of team of officers investigating defendant imputed to officer who conducted search of vehicle); *State v. Watkins*, 120 N.C. App. 804 (1995) (information fabricated by one officer and supplied to stopping officer may not be used to show reasonable suspicion, even if stopping officer did not know that the information was fabricated); *see also State v. Harwood*, ___ N.C. App. ___, 727 S.E.2d 891 (2012) (anonymous tip did not provide basis for stop; court appears to reject argument that officers could rely on outstanding arrest warrant unknown to stopping officers when they stopped defendant); Jeff Welty, *Fascinating Footnote 3*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (Aug. 13, 2012) (discussing *Harwood*), http://nccriminallaw.sog.unc.edu/?p=3815.

Police broadcasts. Police broadcasts may or may not be based on an officer's observations. Without any showing as to the basis of the broadcast, it should be given no more weight than an anonymous tip. *See State v. Peele*, 196 N.C. App. 668 (2009) (dispatcher's report of impaired driving was treated as based on anonymous tip, as State provided no evidence that report of driving came from identified caller); *see also supra* § 15.3G, Anonymous Tips.

I. Pretext

In some instances, a court may find that a stop or search is unconstitutional because the purported justification for the stop or search is a pretext for an impermissible reason.

Stops based on individualized suspicion. The U.S. Supreme Court has significantly cut back the pretext doctrine. Generally, an officer's subjective motivation in stopping a person or vehicle is irrelevant under the Fourth Amendment if the officer has probable cause to make the stop. In *Whren v. United States*, 517 U.S. 806 (1996), the Court held that an officer's actual motivation in making a stop (for example, to investigate for drugs) is generally irrelevant if the officer has probable cause for the stop and could have stopped the person for that reason (for example, the person committed a traffic violation). *Accord State v. McClendon*, 350 N.C. 630 (1999) (adopting *Whren* under state constitution); *State v. Hamilton*, 125 N.C. App. 396 (1997) (court recognizes effect of *Whren* under U.S. Constitution); *compare State v. Ladson*, 979 P.2d 833 (Wash. 1999) (rejecting *Whren* under state constitution). Before *Whren*, the test in many jurisdictions, including North Carolina, was what a reasonable officer "would have" done in a similar circumstance, not what an officer lawfully "could have" done. *See State v. Hunter*, 107 N.C. App. 402 (1992) (stating former standard), *overruled on other grounds by State v. Pipkins*, 337 N.C. 431 (1994); *State v. Morocco*, 99 N.C. App. 421 (1990) (to same effect).

Whren did not specifically address whether a defendant may challenge as pretextual a stop based on reasonable suspicion. *See also Hamilton*, 125 N.C. App. 396 (dissent notes that *Whren* left this question open). It seems unlikely, however, that *Whren* would not apply to circumstances in which officers have reasonable suspicion to stop, a lesser degree of proof than probable cause but still a form of individualized suspicion. *See Ashcroft v. al-Kidd*, ___ U.S. ___, 131 S. Ct. 2074 (2011) (in upholding validity of material-witness arrest warrant requiring less than probable cause for issuance, Court states that subjective intent is pertinent only in cases not involving individualized suspicion).

Facts known to officer. *Whren* and cases following it consider the objective facts supporting a stop. Consequently, if the facts known to an officer amount to a violation of the law, the stop is valid even though the officer may have made the stop for a different reason. *See State v. Barnard*, 362 N.C. 244 (2008) (based on defendant's thirty-second delay after traffic light turned green, officer stopped defendant for impaired driving, for which there was reasonable suspicion, and for impeding traffic, which was not a traffic violation; court upholds stop, reasoning that its constitutionality depends on the objective facts observed by officer, not the officer's subjective motivation); *State v. Osterhoudt*, ___ N.C. App. ___, 731 S.E.2d 454 (2012) (trooper had reasonable, articulable suspicion to stop defendant based on observed traffic violations notwithstanding his mistaken belief that defendant violated different traffic law).

Relatedly, facts unknown to the officer at the time of the stop do not provide a basis for a stop. *See Devenpeck v. Alford*, 543 U.S. 146, 152 (2004) ("[w]hether probable cause exists depends upon the reasonable conclusion to be drawn from the facts known to the arresting officer at the time of the arrest"; officer's subjective reason for making arrest need not be criminal offense as to which known facts provide probable cause); *see also* 2 LAFAVE, SEARCH AND SEIZURE § 3.2(d), at 57–58 (for actions without warrant, information to be considered is totality of facts available to officer). For a discussion of

reliance on the collective knowledge of the investigating officers, see *supra* § 15.3H, Information from Other Officers.

Accordingly, if the facts known to an officer do not satisfy the State's burden of showing grounds for the stop, the stop is invalid. This result does not depend on whether the stop was or was not pretextual, although as a practical matter judges may scrutinize more closely whether grounds existed for the stop if they believe an officer acted for a pretextual reason. *See infra* § 15.3M, Race Based Stops (discussing cases); *see also State v. Franklin*, ___ N.C. App. ___, 736 S.E.2d 218 (2013) (Elmore, J., dissenting) (finding that evidence failed to show that officer observed seat belt violation and therefore failed to show officer possessed probable cause for stop).

Exceptions. There are some limits to *Whren.*

- *Whren* itself stated that a defendant may challenge as pretextual inventory searches or administrative inspections because they are not based on individualized suspicion.
- Likewise, a defendant may challenge as pretextual a license or other checkpoint when the real purpose is impermissible. *See infra* "Pretextual checkpoints" in § 15.3J, Motor Vehicle Checkpoints.
- A stop for a traffic violation or other matter still violates the Fourth Amendment if the officer exceeds the scope of the stop—for example, the officer unduly detains the defendant about a matter unrelated to the purpose of the stop without additional grounds to do so. *See infra* § 15.4E, Nature, Length, and Purpose of Detention.
- If an officer stops a defendant because of his or her race, the stop may violate equal protection regardless of whether probable cause exists. *See supra* § 15.2C, Race-Based "Consensual" Encounters. Or, the racial motivation may undermine the credibility of the officer's stated reason for the stop. *See infra* § 15.3M, Race-Based Stops.

Effect of not issuing citation. The failure of an officer to issue a citation for the traffic violation that was the basis of a traffic stop does not affect the stop's validity if objective circumstances indicate that the defendant committed a violation. *See State v. Baublitz*, 172 N.C. App. 801 (2005) (officer's "objective observation" that defendant's vehicle twice crossed center line of highway provided officer with probable cause to stop for traffic violation, regardless of officer's subjective motivation for making stop; court finds it irrelevant that officer did not issue traffic ticket to defendant after arresting him for possession of cocaine).

Nevertheless, a stop would be unlawful if the circumstances indicate that the officer did not have grounds for the stop—for example, the officer could not have observed the alleged traffic or other violation. *See State v. Villeda*, 165 N.C. App. 431 (2004) (trooper did not have probable cause to stop defendant for seat belt violation; evidence indicated that trooper could not see inside vehicles driving in front of him at night on stretch of road on which defendant was stopped). The failure to issue a citation, along with other factors, may bear on the credibility of the officer's claimed observation of a violation. *See State v. Parker*, 183 N.C. App. 1, 8 (2007) (noting rule in *Baublitz* that failure to

issue citation for violation that was basis of stop does not affect validity of stop if objective circumstances support stop, but also noting holding in *Villeda* that evidence may not support officer's claimed observations).

J. Motor Vehicle Checkpoints

The discussion below reviews selected principles governing motor vehicle checkpoints. For an in-depth discussion of checkpoints as well as additional information on some of the issues discussed below, see Welty, *Motor Vehicle Checkpoints, available at* http://sogpubs.unc.edu/electronicversions/pdfs/aojb1004.pdf.

License and registration checkpoints. In *Delaware v. Prouse*, 440 U.S. 648 (1979), the U.S. Supreme Court held that officers may not randomly stop motorists to check their driver's license or vehicle registration; the Court indicated, however, that checkpoints at which drivers' licenses and registrations are systematically checked may be permissible. *See also State v. Sanders*, 112 N.C. App. 477 (1993) (upholding license checkpoint under authority of *Prouse*). Motor vehicle checkpoints are authorized in North Carolina under G.S. 20-16.3A, which allows checkpoints for the purpose of determining compliance with G.S. Chapter 20. The N.C. Court of Appeals has questioned whether it is constitutionally permissible to set up a checkpoint to check for "any and all" motor vehicle violations; subsequent decisions have not specifically addressed the question. *State v. Veazey*, 191 N.C. App. 181, 189 (2008) (questioning whether it is constitutionally permissible to set up a checkpoint to check for "any and all" motor vehicle violations), *appeal after remand*, 201 N.C. App. 398 (2009) (finding that checkpoint was for lawful purpose of checking licenses and that checkpoint was tailored to that purpose); *see also* 5 LAFAVE, SEARCH AND SEIZURE § 10.8(b), at 420–22 (suggesting that vehicle safety checkpoints may be permissible if they do not involve unrestrained discretion and are not a subterfuge for other purposes). *But cf. infra* § 15.3K, Drug and Other Checkpoints (noting disapproval of general crime control checkpoints).

A license and registration checkpoint must comply with both constitutional limitations and the procedures in G.S. 20-16.3A. For a further discussion of these limitations, see Welty, *Motor Vehicle Checkpoints, available at* http://sogpubs.unc.edu/electronicversions/pdfs/aojb1004.pdf.

DWI checkpoints. The U.S. Supreme Court has upheld the constitutionality of impaired-driving checkpoints conducted under guidelines regulating officers' discretion. *See Michigan Dept. of State Police v. Sitz*, 496 U.S. 444 (1990). Impaired-driving checkpoints in North Carolina must comply with both constitutional limitations and the procedures in G.S. 20-16.3A. For a further discussion of these limitations, see Welty, *Motor Vehicle Checkpoints*.

Pretextual checkpoints. A license or impaired-driving checkpoint is subject to challenge as pretextual under the Fourth Amendment. *See City of Indianapolis v. Edmond*, 531 U.S. 32 (2000) (checkpoint is unconstitutional if primary purpose is unlawful; checkpoint was unlawful in this case because primary purpose was to investigate for drugs).

Avoiding checkpoint. In *State v. Foreman*, 351 N.C. 627 (2000), the North Carolina Supreme Court held that avoidance of a lawful checkpoint constituted reasonable suspicion to stop to inquire why the defendant turned away from the checkpoint. Cases since *Foreman* have looked at the totality of the circumstances, implicitly recognizing that turning away from a checkpoint may not always constitute reasonable suspicion to stop. *See State v. Griffin*, ___ N.C. ___, ___ S.E.2d ___ (2013) (defendant made three-point turn in middle of road, not at intersection, to avoid checkpoint where police lights were visible; court states that "even a legal turn, when viewed in the totality of the circumstances, may give rise to reasonable suspicion" and finds that "place and manner of defendant's turn in conjunction with his proximity to the checkpoint" provided reasonable suspicion to stop); *White v. Tippett*, 187 N.C. App. 285 (2007) (from a combination of the driver's evasion of the checkpoint, odor of alcohol surrounding the driver, and brief conversation with the driver, the officer had reasonable grounds to believe that the driver had committed an implied-consent offense); *State v. Bowden*, 177 N.C. App. 718 (2006) (defendant broke hard before checkpoint, causing front of car to dip, abruptly turned into parking lot, pulled in and out of parking space, headed toward exit, and pulled into another space when officer drove up; totality of circumstances justified officer in pursuing and stopping defendant's car).

Challenge to illegal checkpoint by person who turns away. The N.C. Court of Appeals has held that the illegality of a checkpoint is not relevant when a driver turns away from the checkpoint because the checkpoint is not the basis for the stop in those circumstances. *See State v. Collins*, ___ N.C. App. ___, 724 S.E.2d 82 (2012); *see also White v. Tippett*, 187 N.C. App. 285 (2007) (so stating in civil license proceedings). (These decisions are inconsistent with the decision of another panel of the court of appeals, but the decision of that panel was vacated and remanded for other reasons. *See State v. Haislip*, 186 N.C. App. 275 (2007) (if checkpoint is unconstitutional, turning away from checkpoint would not be grounds to stop defendant), *vacated and remanded on other grounds*, 362 N.C. 499 (2008) (remanded to trial court for written findings of fact and conclusions of law).)

The above principle does not necessarily end the inquiry. In remanding the case for further findings, the court in *Collins* recognized that an officer must have reasonable suspicion to stop a defendant who turns away from an unconstitutional checkpoint; mere turning away may not be sufficient. *See also State v. Griffin*, ___ N.C. ___, ___ S.E.2d ___ (2013) (stating that court did not need to address alleged unconstitutionality of checkpoint because in circumstances of case officer had reasonable suspicion to stop defendant). Also at play is the principle that a person has the right to avoid an illegal action. Turning away from an illegal checkpoint, along with other factors, may provide reasonable suspicion, just as running on foot from an unlawful stop, along with other factors, may provide reasonable suspicion. Without more, however, merely failing to obey an unlawful action by the police may not constitute reasonable suspicion. *See supra* § 15.3D, Flight; *see also* Jeff Welty, *Ruse Checkpoints*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (June 1, 2011) (citing cases holding that a person's avoidance of a "ruse" checkpoint—that is, one in which officers put up signs warning of a checkpoint ahead that does not actually exist or that is illegal so that officers may observe drivers'

reactions—does not without more provide reasonable suspicion to stop), http://nccriminallaw.sog.unc.edu/?p=2516.

Limits on detention at checkpoint. Although motorists may be briefly stopped at an impaired driving checkpoint, detention of a particular motorist for more extensive investigation, such as field sobriety testing, requires satisfaction of an individualized suspicion standard. *See Michigan Dept. of State Police v. Sitz*, 496 U.S. 444, 451 (1990). For a further discussion of these issues, see Welty, *Motor Vehicle Checkpoints*, at 6–7 (questions 10 and 11), *available at* http://sogpubs.unc.edu/electronicversions/pdfs/aojb1004.pdf.

K. Drug and Other Checkpoints

Drug and general crime control checkpoints. Drug checkpoints and general crime control checkpoints are not permissible. *See City of Indianapolis v. Edmond*, 531 U.S. 32 (2000).

Information-seeking checkpoints. Distinguishing *Edmond*, 531 U.S. 32, which found drug checkpoints unconstitutional, the Court held that brief stops of motorists at a highway checkpoint at which police sought information about a recent fatal hit-and-run accident on that highway were not presumptively invalid under the Fourth Amendment. *See Illinois v. Lidster*, 540 U.S. 419 (2004).

Public housing checkpoints. *See State v. Hayes*, 188 S.W.3d 505 (Tenn. 2006) (identification checkpoint at entrance to public housing development violated Fourth Amendment where goal was to reduce crime, exclude trespassers, and enforce lease agreement provisions to decrease crime and drug use; checkpoint was aimed at general crime control); *Wilson v. Commonwealth*, 509 S.E.2d 540 (Va. Ct. App. 1999) (drug checkpoint inside entrance to public housing project unconstitutional).

L. Mistaken Belief by Officer

A mistaken belief by an officer may or may not justify a stop depending on the nature of the belief. If a mistake of "law," the mistake generally does not justify a stop; if a mistake of "fact," the mistake may not invalidate the stop. Distinguishing between a mistake of law and mistake of fact may be difficult in some cases.

Mistake of law. Generally, a stop based on observed facts that do not amount to a violation of the law—a mistake of "law"—violates the Fourth Amendment. *See State v. McLamb*, 186 N.C. App. 124 (2007) (officer stopped defendant for speeding for going 30 m.p.h. in what the officer thought was a 20 m.p.h. zone; speed limit was actually 55 m.p.h., and stop violated Fourth Amendment); *State v. Schiffer*, 132 N.C. App. 22 (1999) (officer was mistaken in believing that out-of-state vehicle was subject to North Carolina's window-tinting restrictions; however, officer had reasonable suspicion to stop vehicle for violation of North Carolina's windshield-tinting restrictions, which do apply to out-of-state vehicles); *see also State v. Hopper*, 205 N.C. App. 175, 182–83 (2010) (upholding trial court's finding that defendant was driving on public street and therefore

was subject to traffic laws; therefore, case was distinguishable "from the line of decisions holding that a law enforcement officer's mistaken belief that a defendant had committed a traffic violation is constitutionally insufficient to support a traffic stop" [this opinion supersedes the court of appeals' prior opinion in this case, which was withdrawn, discussing whether the officer made a mistake of law or fact about whether the defendant was on a public street]); *cf. State v. Osterhoudt*, ___ N.C. App. ___, 731 S.E.2d 454 (2012) (trooper had reasonable suspicion to stop vehicle based on observed traffic violations even where trooper was mistaken about which motor vehicle statute had been violated).

In a 4 to 3 decision, the N.C. Supreme Court recognized an exception to the rule that a mistake of law will not support a stop. The Court held that if an officer makes a stop based on an objectively reasonable mistake of law, the stop is not invalid because of the mistake. *See State v. Heien*, 366 N.C. 271 (2012) (holding that although law requires vehicle to have only one working brake light, stop by officer based on mistaken belief that vehicles must have two working brake lights was objectively reasonable). This decision may have a limited impact. The court in *Heien* noted that North Carolina's brake light requirements were particularly ambiguous and, until this case, had not been interpreted by the appellate courts. In cases in which the legal requirements are clearer or more established, an officer's mistake would not meet the standard announced in *Heien*. *See State v. Coleman*, ___ N.C. App. ___, 743 S.E.2d 62 (2013) (finding that mistake of law about lawfulness of possession of open container of alcohol in public vehicular area was not reasonable).

The dissenters in *Heien* argued that the majority's decision is inconsistent with North Carolina cases refusing to recognizing a good faith exception to the exclusionary rule in search warrant cases and other instances in which the police rely on official records. The majority did not overrule or question that line of cases, however. *See supra* "Good faith exception for constitutional violations not valid in North Carolina" in § 14.2B, Search Warrants (discussing case law and impact of recent legislation).

Mistake of fact. A stop based on an officer's incorrect assessment of the facts—that is, a mistake of fact—does not violate the Fourth Amendment *if* the officer's mistake was reasonable. *See State v. Smith*, 192 N.C. App. 690 (2008) (so holding); *see also State v. Williams*, 209 N.C. App. 255 (2011) (officers had reasonable suspicion to stop a vehicle in which defendant was a passenger based on the officers' good faith belief that the driver had a revoked license and information about the defendant's drug sales, corroborated by the officers, from three reliable informants; the officer's mistake about who was driving the vehicle was reasonable under the circumstances).

Once the officer realizes his or her mistake, the officer must terminate the encounter unless he or she has developed additional reasonable suspicion for the stop. *See, e.g.*, *State v. Diaz*, 850 So. 2d 435 (Fla. 2003) (once officer determined that temporary license tag on defendant's automobile was valid, any further detention violated defendant's Fourth Amendment rights); *McGaughey v. State*, 37 P.3d 130 (Okla. Crim. App. 2001)

(although initial stop of truck was permissible based on officer's belief that truck's taillights were not working, officer could not continue to detain truck once officer saw that both taillights were working); *State v. Lopez*, 631 N.W.2d 810 (Minn. Ct. App. 2001) (officer, who stopped car for having no license plates but then discovered when approaching car that car had lawful temporary sticker, could continue stop long enough to explain to driver that he was free to go; when officer approached driver, odor of alcohol coming from interior of car provided officer with reasonable suspicion to continue detention and investigate).

M. Race-Based Stops

The North Carolina appellate courts have taken a closer look at stops that may have been motivated by the defendant's race. Although the Fourth Amendment does not prohibit a stop if the objective facts known to the officer justify the stop (*see supra* "Facts known to officer" in § 15.3I, Pretext), the courts have sometimes found that an officer's asserted, non-racial basis for the stop was not credible or not sufficient to support the stop. *See State v. Ivey*, 360 N.C. 562, 564 (2006) (court states that it could not determine whether stop of car driven by black male was "selective enforcement of the law based upon race," which would be a violation of equal protection; court states, however, that it "will not tolerate discriminatory application of the law" based on race and finds that officer did not have grounds to stop defendant for failure to use turn signal), *abrogated on other grounds by State v. Styles*, 362 N.C. 412 (2008); *In re J.L.B.M.*, 176 N.C. App. 613 (2006) (officer did not have reasonable suspicion to stop in following circumstances: officer received police dispatch of suspicious person, described as Hispanic male, at gas station; when officer drove up, he saw Hispanic male in baggy clothes, who spoke to someone in another car and then walked away from location of officer's patrol car); *State v. Villeda*, 165 N.C. App. 431 (2004) (court reviews at length evidence that trooper's stop of Hispanic driver was racially motivated; court upholds trial court's finding that trooper was not able to observe whether driver was wearing seat belt).

A stop based on race also may violate Equal Protection. *See supra* § 15.2C, Race-Based "Consensual" Encounters.

N. Limits on Officer's Territorial Jurisdiction

If an officer acts outside his or her territorial jurisdiction, the actions may constitute a substantial statutory violation under G.S. 15A-974 and warrant the exclusion of any evidence discovered. *See generally* FARB at 14–17, 89–90 (discussing territorial jurisdiction of city officers, campus officers, and others, and cases addressing motions to suppress); G.S. 20-38.2 ("[a] law enforcement officer who is investigating an implied-consent offense or a vehicle crash that occurred in the officer's territorial jurisdiction is authorized to investigate and seek evidence of the driver's impairment anywhere in-state or out-of-state, and to make arrests at any place within the State"); *cf. Parker v. Hyatt*, 196 N.C. App. 489 (2009) (State wildlife officer had authority to make warrantless stop for impaired driving).

A statutory violation by an officer may be excused if based on an objectively reasonable, good faith belief in the lawfulness of the action. *See* G.S. 15A-974(a); *see also supra* § 14.5, Substantial Violations of Criminal Procedure Act.

O. Community Caretaking

A detention may be constitutionally permissible if it is reasonably conducted in furtherance of the government agent's community caretaking function and is "totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute." *See Cady v. Dombrowski*, 413 U.S. 433, 441 (1973) (defendant, who was police officer and was apparently drunk, was in car accident and was taken to local hospital; permissible for other officers to return to car, which had been towed to garage and left outside on street, to look for and retrieve defendant's service revolver from car as public safety measure; *State v. Maddox*, 54 P.3d 464 (Idaho Ct. App. 2002) (stop of motorist not justified by community caretaking function; evidence did not show that motorist needed assistance); *see also* G.S. 15A-285 (authorizing non-law-enforcement actions when urgently necessary); *State v. Hocutt*, 177 N.C. App. 341 (2006) (officers were authorized to take defendant to jail to "sober up" under G.S. 122C-303; defendant was very intoxicated and was staggering, barefoot, dirty, and very scratched up on shoulder of highway in isolated area late at night).

15.4 Did the Officer Act within the Scope of the Seizure?

This part concentrates on the restrictions on an officer's investigation following a stop of a person based on reasonable suspicion. The same principles generally apply to stops for traffic violations, whether based on reasonable suspicion or probable cause. *See Arizona v. Johnson*, 555 U.S. 323, 330 (2009) ("most traffic stops . . . resemble, in duration and atmosphere, the kind of brief detention authorized in *Terry*" (citations omitted)); *Berkemer v. McCarty*, 468 U.S. 420, 439 (1984) ("the usual traffic stop is more analogous to a so-called 'Terry stop' . . . than to a formal arrest"); *State v. Styles*, 362 N.C. 412, 414 (2008) ("Traffic stops have 'been historically reviewed under the investigatory detention framework first articulated in *Terry*." (citation omitted)).

A. Frisks for Weapons

Grounds for frisk. An officer who has reasonable suspicion to stop a person does not automatically have the right to frisk the person for weapons. The officer must have reasonable suspicion that the person has a weapon and presents a danger to the officer or others. *See Terry v. Ohio*, 392 U.S. 1 (1968); *State v. Morton*, 363 N.C. 737 (2009) (per curiam) (finding frisk permissible for reasons stated in section one of dissenting opinion from court of appeals), *rev'g* 198 N.C. App. 206 (2009); *State v. Pearson*, 348 N.C. 272 (1998) (officer did not have grounds for weapons frisk during traffic stop; defendant's consent to search of car did not authorize frisk of person); *State v. Phifer*, ___ N.C. App. ___, 741 S.E.2d 446, 449 (2013) ("nervous pacing of a suspect, temporarily detained by an officer to warn him not to walk in the street," was insufficient to warrant further

detention and frisk for weapons); *State v. Rhyne*, 124 N.C. App. 84 (1996) (insufficient grounds for weapons frisk; drugs discovered during frisk suppressed); *State v. Artis*, 123 N.C. App. 114 (1996) (suppressing evidence for same reason); *see also United States v. Burton*, 228 F.3d 524 (4th Cir. 2000) (in absence of reasonable suspicion, officer may not frisk person merely because officer feels uneasy for his or her safety).

Factors. Circumstances to consider include:

- the nature of the suspected offense,
- a bulge in the person's clothing,
- observation of an object that appears to be a weapon,
- sudden, unexplained movements by the person,
- failure to remove a hand from a pocket, and
- the person's prior criminal record and history of dangerousness.

Other protective measures. Whether officers may take other protective measures in connection with a weapons frisk depends on the circumstances of the case. *See State v. Carrouthers*, ___ N.C. App. ___, 714 S.E.2d 460 (2011) (handcuffing permissible during stop if special circumstances exist and handcuffing is least intrusive means reasonably necessary to carry out purpose of investigatory stop); *State v. Campbell*, 188 N.C. App. 701 (2008) (handcuffing reasonable in light of previous occasions in which defendant had fled from law enforcement); *State v. Smith*, 150 N.C. App. 317 (lifting of long shirt to expose pants pocket during frisk was reasonable under circumstances), *aff'd per curiam*, 356 N.C. 605 (2002); *State v. Sanchez*, 147 N.C. App. 619 (2001) (multiple occupants of vehicle were briefly handcuffed while officers frisked for weapons and then handcuffs were removed; handcuffing did not exceed scope of stop and convert stop into arrest); *see also State v. Gay*, 748 N.W.2d 408 (N.D. 2008) (although officer had reasonable grounds to handcuff defendant initially, officer acted unreasonably by failing to remove handcuffs once frisk revealed no weapons and the officer's concerns were dissipated; evidence discovered thereafter was subject to suppression); *People v. Delaware*, 731 N.E.2d 904 (Ill. App. Ct. 2000) (stop was converted into arrest, requiring probable cause, when officers kept defendant handcuffed after patdown search revealed no weapons).

If protective measures are excessive, the stop may become a de facto arrest, for which probable cause is required. *See Carrouthers*, ___ N.C. App. at ___, 714 S.E.2d at 464 (so stating). If probable cause does not exist, evidence discovered following a de facto arrest is subject to suppression.

An officer likely does not have the authority to direct a suspect to empty his or her pockets as part of the officer's authority to frisk or take other protective action during a stop. *See In re V.C.R.*, ___ N.C. App. ___, 742 S.E.2d 566 (2013) (directing juvenile to empty pockets was unlawful, nonconsensual search); Jeff Welty, *Empty Your Pockets*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (Sept. 29, 2011), http://nccriminallaw.sog.unc.edu/?p=2924. A frisk during a consensual encounter likewise would be unauthorized in most circumstances. *See* Jeff Welty, *Terry Frisk During a Consensual Encounter?*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (Dec. 22, 2009), http://nccriminallaw.sog.unc.edu/?p=937.

B. Vehicles

Ordering driver to exit vehicle. On a stop based on reasonable suspicion, an officer may require the driver to exit the vehicle without specifically showing that requiring such an action was necessary for the officer's protection. *See Pennsylvania v. Mimms*, 434 U.S. 106 (1977); *see generally* 5 LAFAVE, SEARCH AND SEIZURE § 10.8(d), at 450–51 (in context of impaired-driving checkpoints, there is not automatically a need for self-protective measures and therefore an officer may not order a motorist out of a vehicle at such a checkpoint either as a matter of routine or on a hunch); Jeff Welty, *Traffic Stops, Part II*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (Oct. 28, 2009) (questioning whether officer may routinely require occupant of vehicle to sit in patrol car during stop), http://nccriminallaw.sog.unc.edu/?p=811.

Ordering passengers to exit or remain in vehicle; frisking of passengers. Under earlier decisions, officers could require passengers to exit the vehicle only if the officers had grounds to do so. *See State v. Hudson*, 103 N.C. App. 708 (1991) (officer had reasonable belief that passenger might be armed); *State v. Adkerson*, 90 N.C. App. 333 (1988) (officer arrested defendant for driving while impaired and had right to require passenger to exit vehicle so officer could search vehicle incident to arrest of driver). In *Maryland v. Wilson*, 519 U.S. 408 (1997), the Court held that an officer making a traffic stop may order the passengers out of the car, without specific grounds, pending completion of the stop. *Compare Commonwealth v. Gonsalves*, 711 N.E.2d 108 (Mass. 1999) (based on state constitution, court rejects rule that officer may automatically order driver or passenger to exit vehicle).

The Court in *Maryland v. Wilson* expressed no opinion on whether an officer may automatically detain a passenger during the duration of the stop. *See Wilson*, 519 U.S. at 415 n.3. In *Arizona v. Johnson*, 555 U.S. 323 (2009), the Court indicated that officers may detain passengers to frisk them if they reasonably believe the passengers are armed and dangerous, observing that officers are not constitutionally obligated to allow a passenger to depart without first ensuring that they are not "permitting a dangerous person to get behind" them. *Id.* at 334; *see also Owens v. Kentucky*, ___ U.S. ___, 129 S. Ct. 2155 (2009) (court summarily vacates state court decision authorizing automatic pat down of passengers when officers arrest a vehicle occupant and are preparing to conduct search incident to arrest; case remanded). Relatedly, officers may order a passenger to remain temporarily in the vehicle for safety reasons. *State v. Shearin*, 170 N.C. App. 222 (2005) (majority finds that officer had grounds to order passenger to remain temporarily inside vehicle).

These decisions do not resolve whether officers may continue to detain passengers once they have addressed safety concerns. Cases after *Wilson*, although before *Johnson*, indicate that an officer must have reasonable suspicion to do so. *See State v. Brewington*, 170 N.C. App. 264 (2005) (officer had reasonable suspicion of criminal activity by passenger to require that passenger remain at scene); *Shearin*, 170 N.C. App. at 235 (Wynn, J., concurring) (concurring judge disagrees with majority opinion to extent it suggests that officer may require passenger to remain in vehicle during traffic stop

without any reason to believe that passenger poses threat to safety or is engaged in criminal activity).

Regardless whether officers may detain a passenger during a stop, a passenger may challenge the validity and duration of the stop and thus may suppress the results of any investigation after an invalid stop or unduly extended stop. *See supra* "Standing of passenger to challenge stop" in § 15.3E, Traffic Stops.

Other actions involving passengers. *See Arizona v. Johnson*, 555 U.S. 323 (2009) (questioning of passengers during traffic stop that did not relate to justification for stop did not measurably lengthen stop and was constitutionally permissible); *Illinois v. Harris*, 543 U.S. 1135 (2005) (court summarily vacates Illinois Supreme Court decision, which found that officers could not run warrant check on passenger that did not prolong otherwise valid traffic stop).

Sweep of interior of vehicle. Officers may conduct a protective sweep of the passenger compartment of a vehicle in areas where a weapon may be located—in other words, they may conduct a "vehicle frisk" but not a search for evidence—if the officers reasonably believe that the suspect is dangerous and may gain immediate control of a weapon. *See Michigan v. Long*, 463 U.S. 1032 (1983) (stating standard); *State v. Minor*, 132 N.C. App. 478 (1999) (officer had insufficient grounds to search car for weapons); *State v. Green*, 103 N.C. App. 38 (1991) (officer could not look in glove compartment of defendant's car as part of protective weapons search; officer had already placed defendant in patrol car and defendant could not obtain any weapon or other item from car); *State v. Braxton*, 90 N.C. App. 204 (1988) (facts did not warrant belief that suspect was dangerous and could gain control of weapon); *see also infra* § 15.6B, Search Incident to Arrest (discussing *Arizona v. Gant*, 556 U.S. 332 (2009), which precludes search of vehicle incident to arrest of occupant if purpose is to prevent occupant from obtaining weapon or destroying evidence and occupant has already been secured by officers).

For a further discussion of car sweeps, see Welty, *Traffic Stops*, at 7 (reviewing cases and observing that "North Carolina's appellate courts have been fairly demanding regarding reasonable suspicion in this context, several times finding ambiguously furtive movements, standing alone, to be insufficient"), http://nccriminallaw.sog.unc.edu/wp-content/uploads/2013/03/2013-03-Traffic-Stops.pdf.

License, warrant, and record checks. *See* Welty, *Traffic Stops*, at 7 (reviewing authorities and observing that "courts have generally viewed these checks, and the associated brief delays, as permissible" during a traffic stop); *see also infra* § 15.4E, Nature, Length, and Purpose of Detention.

C. Plain View

Generally, observations by officers of things in "plain view" do not constitute a search. Under the Fourth Amendment, a seizure is lawful under the plain view doctrine if the officer is lawfully in a position to observe the items and it is immediately apparent to the

officer that the items are evidence of a crime, contraband, or otherwise subject to seizure. *See Horton v. California*, 496 U.S. 128 (1990) (discovery of evidence need not be inadvertent if these two conditions are met). *But see* G.S. 15A-253 (under North Carolina law, discovery of evidence in plain view during execution of search warrant must be inadvertent).

Shining a flashlight into a vehicle that has been lawfully stopped is ordinarily not considered a search, so objects that officers observe thereby are considered to be in plain view. *See Texas v. Brown*, 460 U.S. 730 (1983); *see also* 1 LAFAVE, SEARCH AND SEIZURE § 2.2(b), at 617–18 (discussing limits on this doctrine—for example, officer may not open door to shine flashlight into car unless officer has grounds to open door); *Kyllo v. United States*, 533 U.S. 27 (2001) (use of sense-enhancing technology—in this case, a thermal imager that detected relative amounts of heat within home—constituted search).

A defendant still may have grounds to suppress plain-view observations if the initial stop was invalid or, at the time of the observation, the officer was engaged in activity beyond the scope of the stop.

D. "Plain Feel" and Frisks for Evidence

General prohibition. An officer who stops a person on reasonable suspicion may not frisk the person for evidence. *See Ybarra v. Illinois*, 444 U.S. 85 (1979).

"Plain feel" exception. Under what has come to be known as the "plain feel" doctrine, when an officer conducts a proper weapons frisk and has probable cause to believe that an object is evidence of a crime, then the officer may remove it. But, if an officer does not *immediately* recognize that the object is evidence of a crime, he or she may not manipulate or explore the object further; such action constitutes a search, which is not authorized as part of a weapons frisk. *See Minnesota v. Dickerson*, 508 U.S. 366 (1993) (officer's continued exploration of lump until he developed probable cause to believe it was cocaine was an unlawful search); *In re D.B.*, ___ N.C. App. ___, 714 S.E.2d 522 (2011) (during frisk of juvenile for weapons, officer's removal of credit card, which turned out to be stolen, was not permissible; officer could not seize card on basis that juvenile did not identify himself and officer believed that card was identification card); *State v. Williams*, 195 N.C. App. 554 (2009) (under "plain feel" doctrine, officer must have probable cause to believe object is contraband; reasonable suspicion is insufficient); *State v. Wise*, 117 N.C. App. 105 (1994) (officer lawfully stopped vehicle for speeding and lawfully patted down defendant, but officer lacked probable cause to open non-transparent aspirin bottle that officer found on defendant); *State v. Beveridge*, 112 N.C. App. 688 (1993) (in frisking defendant for weapons, officer noticed cylindrical bulge that felt like plastic baggie; once officer determined that bulge was not weapon, he could not continue to search defendant to determine whether baggie contained illegal drugs), *aff'd per curiam*, 336 N.C. 601 (1994); *see also State v. Graves*, 135 N.C. App. 216 (1999) (warrantless search of wads of brown paper that fell from defendant's clothing not justified under plain view doctrine because it was not immediately apparent that wads contained contraband); *State v. Sapatch*, 108 N.C. App. 321 (1992) (under plain view

doctrine, officers did not have probable cause to believe film canisters contained evidence of crime and, therefore, were not justified in opening canisters); *compare State v. Robinson*, 189 N.C. App. 454 (2008) (it was immediately apparent to officer that film canister contained crack cocaine).

Even if an officer has probable cause to remove an object when frisking a person for weapons, the officer may need a search warrant before inspecting the interior of the object. *See infra* "Containers" in § 15.6D, Probable Cause to Search Person.

E. Nature, Length, and Purpose of Detention

Generally. As a general rule, an investigative detention must be temporary and last no longer than necessary to effectuate the purpose of the stop. *See Florida v. Royer*, 460 U.S. 491 (1983) (officers exceeded limits of *Terry*-stop and required probable cause); *see also* G.S. 15A-1113(b) (an officer who has probable cause to believe a person has committed an infraction may detain the person for a reasonable period of time to issue and serve citation). Whether an officer has exceeded this general limit has been the subject of considerable litigation, discussed below.

Requests for consent and questioning. Numerous cases have addressed whether an officer's questioning of a defendant or request for consent to search are permissible during a stop based on reasonable suspicion. In arguing that questioning or a request for consent were beyond the permissible scope of the stop, and therefore that evidence and information discovered as a result must be suppressed, the defendant is in the strongest position if the following factors are present: (1) the detention had not ended (that is, a reasonable person would not have felt free to leave) at the time of the request for consent or questioning; (2) the request or questions were not related to the basis for the stop; (3) the request or questions unduly prolonged the detention beyond what was necessary to effectuate the purpose of the stop; and (4) the officer had not developed reasonable suspicion of additional criminal activity. *See State v. Jackson*, 199 N.C. App. 236 (2009) (driver and passengers were detained when officers had not yet returned license and registration to driver; request for consent to search after reason for stop had ended unconstitutionally prolonged stop); *State v. Myles*, 188 N.C. App. 42 (2008) (nervousness of defendant and other passenger did not justify continued detention, questioning, and request for consent to search after officer considered traffic stop complete; search of defendant's car was unlawful), *aff'd per curiam*, 362 N.C. 344 (2008); *State v. Parker*, 183 N.C. App. 1, 9 (2007) ("[w]ithout additional reasonable articulable suspicion of additional criminal activity, the officer's request for consent exceeds the scope of the traffic stop and the prolonged detention violates the Fourth Amendment"; in this case, officer had reasonable suspicion to request that passenger consent to search of her purse after discovering what appeared to be a controlled substance in the door of the car next to where passenger was sitting); *State v. Hernandez*, 170 N.C. App. 299 (2005) (trooper expanded scope of stop for seat belt violation by asking defendant about contraband and weapons, but reasonable suspicion of criminal activity supported further detention); *State v. Sutton*, 167 N.C. App. 242 (2004) (questioning of defendant during stop was permissible; questions were brief and directly related to suspicion that gave rise to stop);

State v. Jacobs, 162 N.C. App. 251 (2004) (after traffic stop for erratic driving, officer developed reasonable suspicion that other criminal activity may have been afoot; officer could continue to detain defendant and ask for consent to search for drugs, and officer need not have had specific reasonable suspicion for requesting consent); *State v. Castellon*, 151 N.C. App. 675 (2002) (during traffic stop officer developed reasonable suspicion that defendant was engaged in illegal drug activity and was justified in asking for permission to search vehicle); *State v. Beveridge*, 112 N.C. App. 688 (1993) (once officer had frisked defendant for weapons, officer could not continue to search or question defendant), *aff'd per curiam*, 336 N.C. 601 (1994).

Whether questioning or a request for consent unduly prolongs a detention has become particularly important. This area of law is continuing to develop. In *Muehler v. Mena*, 544 U.S. 93 (2005), the Court held that it was not unconstitutional during the execution of a search warrant for officers to question a lawfully detained person about her immigration status. The Court reasoned that the officers did not require reasonable suspicion to ask the person for identifying information because the questioning did not prolong the detention. In *Arizona v. Johnson*, 555 U.S. 323 (2009), the Court held that an officer's questioning of passengers on matters unrelated to the justification for the traffic stop was constitutionally permissible because it did not measurably extend the duration of the stop. *See also infra* "Drug dog sniff during traffic stop" in § 15.4F, Drug Dogs (discussing cases in which courts have permitted de minimus delay for drug dog sniff during traffic stop).

Applying *Muehler* and *Johnson*, the Fourth Circuit Court of Appeals has recognized an important qualification on the duration of a traffic stop. The lawfulness of a delay in completing a stop depends not only on the length of the delay but also on whether the officer diligently pursued investigation of the purpose of the stop. If an officer abandons pursuit of the justification for the traffic stop and embarks on a sustained course of investigation into unrelated matters, the delay violates the Fourth Amendment and renders inadmissible evidence discovered during the unlawful detention. *United States v. Guijon-Ortiz*, 660 F.3d 757 (4th Cir. 2011); *United States v. Digiovanni*, 650 F.3d 498 (4th Cir. 2011).

The North Carolina appellate courts may treat requests for consent to search differently than questioning during a traffic stop, requiring reasonable suspicion to support a request for consent unrelated to the purpose of the stop. *See State v. Parker*, 183 N.C. App. 1, 9 (2007) (so stating).

The U.S. Supreme Court has declined to impose a time limit on the length of an investigative stop. *See United States v. Sharpe*, 470 U.S. 675 (1985). One writer suggests that, unless circumstances warrant a longer stop, "an officer normally should not detain a suspect the officer has stopped longer than twenty minutes." FARB at 43–44.

Consent after detention has ended. If the detention has ended and the person is free to leave, an officer generally may request consent to search. *See State v. Heien*, ___ N.C. App. ___, 741 S.E.2d 1 (2013) (over a dissent, majority concluded that after return of

documentation by police during traffic stop, defendant was aware that purpose of initial stop had been concluded and that further conversation, including request for and consent to search, was consensual); *State v. Morocco*, 99 N.C. App. 421 (1990) (trooper did not detain defendant in patrol car longer than necessary to write citation, and after detention ended defendant consented to search); *see also State v. Kincaid*, 147 N.C. App. 94 (2001) (questioning unrelated to traffic stop was permissible where defendant consented to being questioned after detention had ended).

In *Ohio v. Robinette*, 519 U.S. 33 (1996), the state supreme court held that officers must clearly inform a motorist that a traffic stop has ended and that the motorist is free to go before requesting consent to search on an unrelated matter. Without this warning, the state court held, the motorist's consent is involuntary. The U.S. Supreme Court rejected such a requirement, holding that the voluntariness of a motorist's consent is evaluated under the totality of circumstances. *Robinette* does not affect the law on the permissible duration of a stop. If an officer detains a person longer than necessary to effectuate the purpose of the stop, a request for consent to search may exceed the scope of the stop and violate the Fourth Amendment. *See, e.g., State v. Robinette*, 685 N.E.2d 762 (Ohio 1997) (on remand from U.S. Supreme Court, state supreme court found that officer exceeded scope of stop and that consent was therefore invalid). Any consent given must also be voluntary. *See infra* § 15.5D, Consent.

The return of paperwork to a driver may signal the end of a traffic stop, but it is not necessarily dispositive. *See* Welty, *Traffic Stops*, at 10 (so stating and reviewing North Carolina decisions and other authorities), *available at* http://nccriminallaw.sog.unc.edu/wp-content/uploads/2013/03/2013-03-Traffic-Stops.pdf.

F. Drug Dogs

When a drug dog sniff is a search. Walking a drug dog around a vehicle during a lawful traffic stop (discussed further below) is generally not considered a search. *See Illinois v. Caballes*, 543 U.S. 405 (2005); *State v. Branch*, 177 N.C. App. 104 (2006) (following *Caballes*); *United States v. Place*, 462 U.S. 696 (1983) (use of a drug dog to sniff luggage in public place was not a search under Fourth Amendment). *But cf. Florida v. Jardines*, 569 U.S. ___, 133 S. Ct. 1409 (2013) (entering homeowner's property and using drug-sniffing dog on homeowner's porch to investigate contents of home is a "search" within the meaning of the Fourth Amendment). These and other cases suggest that a drug dog sniff of a person would generally be subject to Fourth Amendment limitations. *See* Shea Denning, *Dog Sniffs of People and the Fourth Amendment*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (Oct. 9, 2012), http://nccriminallaw.sog.unc.edu/?p=3911; 1 LAFAVE, SEARCH AND SEIZURE § 2.2(g), at 703–04 (discussing issue).

Effect of alert. An "alert" by a drug dog to a vehicle may constitute probable cause to search the vehicle if a sufficient showing is made as to the dog's reliability to detect the presence of particular contraband. *See Florida v. Harris*, 568 U.S. ___, 133 S. Ct. 1050 (2013) (holding that dog sniff provided probable cause to search vehicle and refusing to set inflexible evidentiary requirements regarding a dog's reliability; also indicating that

certification of dog by bona fide organization creates presumption of reliability, which defendant may rebut by other evidence); *see also* Jeff Welty, *Supreme Court: Alert by a Trained or Certified Drug Dog Normally Provides Probable Cause*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (Feb. 20, 2013), http://nccriminallaw.sog.unc.edu/?p=4111; LeAnn Melton, *Drug Dogs—Reliability Issues and Case Law: How Good is that Doggie's Nose?* (North Carolina Fall Public Defender Seminar, Nov. 29, 2007), *available at* www.ncids.org/Defender%20Training/2007%20Fall%20Conference/DrugDogs.pdf.

A drug dog's positive alert to a vehicle does not give officers probable cause to search recent occupants of the vehicle. *State v. Smith*, ___ N.C. App. ___, 729 S.E.2d 120 (2012). For a discussion of related issues, see *infra* "Drug cases" in § 15.6E, Probable Cause to Search Vehicle.

Drug dog sniff during traffic stop. Although a drug dog sniff of the exterior of a vehicle is generally not considered a search, use of a drug dog is impermissible if it unduly prolongs the stop and the officer does not have reasonable suspicion to justify the delay. *See State v. McClendon*, 350 N.C. 630 (1999) (canine unit did not arrive until 15 to 20 minutes after conclusion of traffic stop, but officer had reasonable suspicion beyond basis for traffic stop); *State v. Sellars*, ___ N.C. App. ___, 730 S.E.2d 208 (2012) (four-minute, 37-second delay to conduct drug dog sniff did not unduly prolong stop); *State v. James Branch*, 194 N.C. App. 173 (2008) (officer did not have grounds to detain defendant for canine unit to arrive after officer finished checking defendant's license and registration); *State v. Brimmer*, 187 N.C. App. 451 (2007) (ninety-second delay for dog sniff was de minimus extension of traffic stop and did not require additional reasonable suspicion); *State v. Euceda-Valle*, 182 N.C. App. 268 (2007) (relying on *McClendon*, court finds that officer had reasonable suspicion to detain defendant for canine sniff of exterior of vehicle after officer handed defendant warning ticket and traffic stop ended); *State v. Monica Branch*, 177 N.C. App. 104, 107 n.1 (2006) (suggesting that if drug dog sniff extends duration of stop, it may be unconstitutional); *State v. Fisher*, 141 N.C. App. 448 (2000) (detaining defendant after traffic stop for drug dog sniff exceeded scope of stop); *State v. Falana*, 129 N.C. App. 813 (1998) (officer exceeded scope of traffic stop by detaining defendant for dog to do drug sniff).

As with questioning and requests for consent during a traffic stop (*see supra* "Requests for consent and questioning" in § 15.4E, Nature, Length, and Purpose of Detention), the length of detention has become a significant factor in evaluating the lawfulness of drug dog sniffs unrelated to the purpose of a traffic stop. This area of law is continuing to develop. The Fourth Circuit Court of Appeals has recognized an important qualification on the duration of a traffic stop. The lawfulness of a delay in completing a stop depends not only on the length of the delay but also on whether the officer diligently pursued investigation of the purpose of the stop. If an officer abandons pursuit of the justification for the traffic stop and embarks on a sustained course of investigation into unrelated matters, the delay violates the Fourth Amendment and renders inadmissible evidence discovered during the unlawful detention. *United States v. Guijon-Ortiz*, 660 F.3d 757 (4th Cir. 2011); *United States v. Digiovanni*, 650 F.3d 498 (4th Cir. 2011).

A drug dog sniff is also impermissible if it intrudes into protected areas—for example, the sniff is of the interior of the vehicle or of an occupant. If conducted at a license checkpoint, a drug dog sniff may indicate that the purpose of the checkpoint is general criminal investigation and thus impermissible. *See supra* § 15.3J, Motor Vehicle Checkpoints; § 15.3K, Drug and Other Checkpoints.

G. Does *Miranda* Apply?

A person generally is not entitled to *Miranda* warnings on a stop. *See Berkemer v. McCarty*, 468 U.S. 420 (1984); *State v. Braswell*, ___ N.C. App. ___, 729 S.E.2d 697 (2012) (traffic stops are typically non-coercive in nature and do not amount to custodial interrogations). Once taken into custody, a person is entitled to *Miranda* warnings before police questioning. *See Pennsylvania v. Muniz*, 496 U.S. 582 (1990) (in case involving allegedly impaired driver who had been taken into custody, *Miranda* warnings were required for police question calling for testimonial response).

Some stops may amount to custody for *Miranda* purposes even though the person may not be under arrest. *See* Mark A. Godsey, *When* Terry *Met* Miranda: *Two Constitutional Doctrines Collide*, 63 FORDHAM L. REV. 715 (1994); *see also State v. Buchanan*, 353 N.C. 332 (2001) (test for custody is whether there was formal arrest or restraint on freedom of movement of degree associated with formal arrest); *State v. Washington*, 330 N.C. 188 (1991) (on facts presented, defendant was in custody for *Miranda* purposes when officer placed him in back seat of patrol car), *rev'g* 102 N.C. App. 535 (1991); *State v. Hemphill*, ___ N.C. App. ___, 723 S.E.2d 142, 147 (2012) (holding that "a reasonable person in Defendant's position, having been forced to the ground by an officer with a taser drawn and in the process of being handcuffed, would have felt his freedom of movement had been restrained to a degree associated with formal arrest"); *State v. Johnston*, 154 N.C. App. 500 (2002) (defendant who was ordered out of his vehicle at gun point, handcuffed, placed in the back of a patrol car, and questioned by detectives was in custody for *Miranda* purposes).

H. Field Sobriety Tests

North Carolina cases have assumed (although have not specifically decided) that during a stop based on reasonable suspicion of impaired driving, field sobriety tests and questioning related to possible impairment are within the scope of the stop. *See generally Blasi v. State*, 893 A.2d 1152 (Md. Ct. Spec. App. 2006) (finding field sobriety tests permissible on traffic stop if officer has reasonable suspicion that driver is under the influence of alcohol); *see also State v. Worwood*, 164 P.3d 397 (Utah 2007) (off-duty officer had reasonable suspicion to stop driver for impaired driving, but stop became de facto arrest and violated Fourth Amendment when off-duty officer transported driver more than a mile away from the scene for on-duty officer to conduct field sobriety tests).

Conversely, if officers do not have reasonable suspicion of impaired driving, field sobriety tests are not within the permissible scope of the stop. *See* Jeff Welty, *Field Sobriety Tests During Traffic Stops*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG **(**Apr. 14, 2009) (reviewing

cases from other jurisdictions), http://nccriminallaw.sog.unc.edu/?p=245.

Once the defendant is considered to be in custody, *Miranda* warnings are required for questions calling for a testimonial response. *See supra* § 15.4G, Does *Miranda* Apply? Field sobriety tests may not require a testimonial response, however. *See State v. Flannery*, 31 N.C. App. 617, 623–24 (1976) ("the physical dexterity tests are not evidence of a testimonial or communicative nature . . . and are not within the scope of the *Miranda* decision"; court therefore holds that admitting evidence of defendant's refusal to do tests did not violate his Fifth Amendment right against self-incrimination; court also notes that *Miranda* warnings are not required for similar reasons before a breath test); *see also State v. White*, 84 N.C. App. 111, 115–16 (1987) (*Miranda* warnings not required before administering a breath test because results not testimonial).

I. Defendant's Name

In *Hiibel v. Sixth Judicial District Court of Nevada*, 542 U.S. 177 (2004), the U.S. Supreme Court upheld a defendant's conviction under a state statute requiring an individual stopped by police on the basis of reasonable suspicion to identify himself or herself. The Court stated, "Although it is well established that an officer may ask a suspect to identify himself in the course of a *Terry* stop, it has been an open question whether the suspect can be arrested and prosecuted for refusal to answer." *Id.* at 186–87. The Court held in this case that the stop was justified and the request for the defendant's name was reasonably related in scope to the circumstances that justified the stop (a suspected assault); therefore, enforcement of the state law requirement that the defendant give his name during the stop did not violate the Fourth Amendment. The Court also found no violation of the defendant's Fifth Amendment privilege against self-incrimination because in this case the defendant's refusal to disclose his name was not based on any articulated real and appreciable fear that his name would be used to incriminate him or would furnish a link in the chain of evidence needed to prosecute him.

North Carolina does not have a statute comparable to Nevada's statute requiring a person who is the subject of an investigative stop, other than a person driving a vehicle, to disclose his or her name. *See* G.S. 20-29 (person operating motor vehicle may be required to give his or her name). "Officers who lawfully stop someone for investigation may ask the person a moderate number of questions to determine his identity . . . ." *State v. Steen*, 352 N.C. 227, 239 (2000) (citing *Berkemer v. McCarty*, 468 U.S. 420, 439 (1984)). However, a person's mere refusal to disclose his or her name (when the person is not driving a vehicle) would appear insufficient to support a charge of violating G.S. 14-223 (resisting, delaying, or obstructing officer). *See also In re D.B.*, __ N.C. App. __, 714 S.E.2d 522 (2011) (officers may not search person during investigative stop to determine his or her identity).

J. VIN Checks

Officers may make a limited warrantless search of a vehicle when they need to determine its ownership. *See New York v. Class*, 475 U.S. 106 (1986) (check of vehicle

identification number valid); *State v. Green*, 103 N.C. App. 38 (1991) (check invalid on facts of case).

15.5 Did the Officer Have Grounds to Arrest or Search?

A. Probable Cause

Required for arrest or search. Although reasonable suspicion may be sufficient to support an officer's initial stop and certain investigative actions during the stop, an officer must have probable cause to make an arrest or probable cause or consent to search for evidence. *See, e.g.*, *State v. Joe*, ___ N.C. App. ___, 730 S.E.2d 779 (2012) (officers did not have probable cause to arrest, and evidence discovered as a result of illegal arrest suppressed), *review granted*, ___ N.C. ___ , 736 S.E.2d 187 (2013); *State v. Wise*, 117 N.C. App. 105 (1994) (officer lawfully stopped vehicle for speeding and lawfully patted down defendant, but officer lacked probable cause to open non-transparent aspirin bottle that officer found on defendant); *State v. Pittman*, 111 N.C. App. 808 (1993) (initial encounter was consensual and subsequent stop was supported by reasonable suspicion, but officers did not have probable cause to search). *Compare Maryland v. Pringle*, 540 U.S. 366 (2003) (police officer had probable cause to believe that defendant, who was the front-seat passenger in vehicle, committed the crime of possession of cocaine, either solely or jointly with other occupants of vehicle; defendant was one of three men riding in the vehicle at 3:16 a.m., $763 of rolled-up cash was found in the glove compartment directly in front of defendant, five plastic baggies of cocaine were behind the back-seat armrest and accessible to all three vehicle occupants, and the three men failed to offer any information with respect to the ownership of the cocaine or money; defendant's admissions to police after lawful arrest and *Miranda* warnings not subject to suppression).

Scope of search. The permissible scope of a search depends on whether the officers have probable cause to arrest or probable cause to search. For a further discussion of whether officers have probable cause to arrest or search and the permissible scope of the search, including in drug cases, see *infra* § 15.6, Did the Officer Act within the Scope of the Arrest or Search?

B. Circumstances Requiring Arrest Warrant and Other Limits on Arrest Authority

Arrest warrant. Usually, when an officer develops probable cause to arrest during a stop, the officer may make the arrest without a warrant. In some instances, however, a warrant may be required. An officer who has probable cause to arrest for a criminal offense may make an arrest without a warrant in the following circumstances: (a) the crime is committed in the officer's presence; or (b) the crime was not committed by the person in the officer's presence but (i) the crime is a felony; (ii) the crime is one of certain listed misdemeanors; or (iii) the crime is a misdemeanor and, unless arrested immediately, the person will not be apprehended or may cause physical injury or property damage. *See*

G.S. 15A-401(b) (also authorizing warrantless arrest for violation of pretrial release conditions).

Violations not subject to arrest. The U.S. Supreme Court has held that officers do not violate the Fourth Amendment if they have probable cause to make an arrest for a criminal offense even if state law does not authorize an arrest for that offense. *See Virginia v. Moore*, 553 U.S. 164 (2008) (Virginia law enforcement officers who had probable cause to arrest defendant for a misdemeanor did not violate Fourth Amendment when they arrested him and conducted search incident to arrest although state law did not authorize an arrest); *see also Atwater v. City of Lago Vista*, 532 U.S. 318 (2001) (Fourth Amendment does not bar officer from making warrantless arrest for criminal offense punishable by fine only, in this case a seat belt violation, a misdemeanor under Texas law).

An arrest permitted by the U.S. Constitution but in violation of North Carolina law may still be subject to suppression under G.S. 15A-974. Under North Carolina law, an officer has no authority to arrest for infractions, such as seat belt violations, which are noncriminal violations of law in North Carolina. *See* G.S. 15A-1113; FARB at 82 (noting limitation). An arrest for a noncriminal infraction also may violate the U.S. Constitution. *See Moore*, 553 U.S. 164 (U.S. Constitution authorizes arrest for minor misdemeanors; Court does not address noncriminal infractions).

An officer has no authority to arrest for a wildlife violation, whether a misdemeanor or infraction, by an out-of-state resident if the other state is a member of the interstate wildlife compact, the person agrees to comply with the terms of any citation, and the person provides adequate identification. *See* G.S. 113-300.6, art. III.

For a further discussion of the effect of state law violations, see *supra* § 14.5, Substantial Violations of Criminal Procedure Act.

C. Circumstances Requiring Search Warrant

For search of person. If officers have probable cause to arrest a person, they may search the person incident to arrest without a warrant. For cases discussing probable cause to arrest and potential limits on a search of a person incident to arrest, see *infra* § 15.6B, Search Incident to Arrest; § 15.6C, Other Limits on Searches Incident to Arrest.

If officers have probable cause to search a person, but not arrest him or her, the officers must have exigent circumstances to conduct the search without a warrant. For a discussion of exigent circumstances and potential limits on searches, see *infra* § 15.6D, Probable Cause to Search Person.

For search of vehicle. Generally, if officers have probable cause to search a vehicle, they may search without a warrant. For a discussion of probable cause to search a vehicle and limits on such searches, see *infra* § 15.6E, Probable Cause to Search Vehicle.

D. Consent

Officers may search without probable cause and without a warrant if they obtain consent. For various reasons a purported consent to search may be invalid or insufficient.

Effect of illegal detention. If a person is detained illegally, a consent to search obtained thereafter is subject to suppression on two potential grounds. First, the consent is generally considered the fruit of the poisonous tree because the consent is obtained as a result of the illegal seizure. *See generally Wong Sun v. United States*, 371 U.S. 471 (1963); *see also supra* § 14.2F, "Fruits" of Illegal Search or Arrest. Second, the consent may be involuntary in the totality of the circumstances, including the circumstances surrounding the illegal detention.

Length of detention. Officers may not unduly detain a person for the purpose of requesting consent to search. *See supra* § 15.4E, Nature, Length, and Purpose of Detention.

Clarity of consent. "There must be a clear and unequivocal consent" to authorize a consent search. *State v. Pearson*, 348 N.C. 272, 277 (1988) (consent to search of car was not consent to search of person; acquiescence to frisk when officer told defendant he was going to frisk him also was not consent to search).

Voluntariness of consent. Consent must be voluntary. *See Schneckloth v. Bustamonte*, 412 U.S. 218 (1973) (voluntariness determined from totality of circumstances); *State v. Crenshaw*, 144 N.C. App. 574 (2001) (State has burden of proving voluntariness); *United States v. Guerrero*, 374 F.3d 584 (8th Cir. 2004) (reasonable officer would not have believed that Spanish-speaking driver knowingly and voluntarily consented to search of his car; driver's signature on consent-to-search form written in Spanish was not sufficient); *United States v. Worley*, 193 F.3d 380 (6th Cir. 1999) (defendant did not give voluntary consent when he said, "You've got the badge, I guess you can" in response to officer's request to search); *see also supra* § 14.2H, Invalid Consent.

A threat to obtain a search warrant may affect the voluntariness of consent in some circumstances. *See* Jeff Welty, *Consent to Search under Threat of Search Warrant*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (Nov. 10, 2010) (observing that threat alone may not render consent involuntary but may be considered as part of totality of circumstances), http://nccriminallaw.sog.unc.edu/?p=1741; 4 LAFAVE, SEARCH AND SEIZURE § 8.2(c), at 92–100 (indicating circumstances in which such a threat may render a consent involuntary).

Miranda warnings are not required on a request for consent to search. *See State v. Cummings*, 188 N.C. App. 598 (2008) (so holding in reliance on federal cases, in which courts reasoned that request for consent to search does not constitute interrogation for *Miranda* purposes because the giving of consent is not an incriminating statement).

Authority to consent. The person must have authority to consent or, at least, the officer must reasonably believe the person has authority. *See Illinois v. Rodriguez*, 497 U.S. 177 (1990) (officers must reasonably believe person has authority to give consent); G.S. 15A-222 (to same effect); *compare State v. McLees*, 994 P.2d 683 (Mont. 2000) (rejecting apparent authority doctrine under state constitution; for consent to be valid against defendant, third party must have actual authority to give consent to search); *State v. Lopez*, 896 P.2d 889 (Haw. 1995) (to same effect).

Whether an officer's belief is reasonable depends on the facts of each case. *See State v. Jones*, 161 N.C. App. 615 (2003) (after seeing police, defendant entered car, removed his jacket, put it on back seat, and then exited, wearing t-shirt in freezing winter weather; driver had authority to give consent to search entire car, including jacket left by defendant); *State v. McDaniels*, 103 N.C. App. 175 (1991) (passenger failed to object when driver consented to search of car and contents; search of contents upheld), *aff'd per curiam*, 331 N.C. 112 (1992); *compare United States v. Purcell*, 526 F.3d 953 (6th Cir. 2008) (female's apparent authority to consent to search of luggage dissipated once officers realized that luggage contained only male's effects); *State v. Frank*, 650 N.W.2d 213 (Minn. Ct. App. 2002) (driver lacked authority to consent to search of defendant's suitcase in trunk of driver's car; officer has obligation to ascertain ownership of items not owned by or within control of the person purportedly giving consent when circumstances do not clearly indicate that the person is the owner or controls item to be searched); *State v. Matejka*, 621 N.W.2d 891, 894 n.3 (Wis. 2001) (collecting cases on consent to search passenger's belongings); *People v. James*, 645 N.E.2d 195 (Ill. 1994) (driver consented to search outside of hearing of defendant-passenger; consent did not authorize police to search purse on passenger's seat). *See also* 4 LAFAVE, SEARCH AND SEIZURE § 8.3(g), at 232–52 (discussing significance of reasonable but mistaken belief by police that third party has authority over place searched).

See also infra "Passenger belongings" in § 15.6C, Other Limits on Searches Incident to Arrest; "Passenger belongings" in § 15.6E, Probable Cause to Search Vehicle.

Scope of consent. General consent does not necessarily extend to all places within the area to be searched. *See Florida v. Jimeno*, 500 U.S. 248 (1991) (consent to general search of car would lead reasonable officer to believe that consent extended to unlocked containers that might hold object of search); *State v. Stone*, 362 N.C. 50 (2007) (officer exceeded scope of consent by pulling sweat pants away from defendant's body and shining flashlight on defendant's groin area); *State v. Pearson*, 348 N.C. 272 (1998) (defendant's consent to search of car did not authorize search of his person); *State v. Neal*, 190 N.C. App. 453 (2008) (female defendant knowingly and voluntarily consented to strip search by female officer); *State v. Johnson*, 177 N.C. App. 122 (2006) (consent to search of van did not authorize officer to pry open wall panel of van; general consent did not include intentional infliction of damage to vehicle), *vacated in part on other grounds*, 360 N.C. 541 (2006) (vacating portion of opinion finding that officers lacked probable cause, independent of consent, to pry open wall panel and remanding case to trial court for further findings of fact); *see also* Jeff Welty, *Scope of Consent to Search a Vehicle*, N.C. CRIM. L., UNC SCH.

OF GOV'T BLOG (Mar. 15, 2012) (suggesting that consent to search vehicle does not authorize damaging of vehicle), http://nccriminallaw.sog.unc.edu/?p=3402.

Withdrawal of consent. A person may withdraw consent at any time before completion of the search. *See* 4 LAFAVE, SEARCH AND SEIZURE § 8.1(c), at 57–65. Before withdrawal of consent, however, officers may have uncovered sufficient evidence to justify continuing the search regardless of the presence or absence of consent.

15.6 Did the Officer Act within the Scope of the Arrest or Search?

A. Questioning Following Arrest

Following a lawful arrest, officers must give an in-custody defendant *Miranda* warnings before questioning him or her. For a discussion of *Miranda* principles, see *supra* § 14.3B, *Miranda* Violations.

B. Search Incident to Arrest

Of person. Officers may search a person incident to a lawful arrest of that person. *See United States v. Robinson*, 414 U.S. 218 (1973). Whether officers may search containers in the person's possession is discussed further *infra* in "Containers" in § 15.6C, Other Limits on Searches Incident to Arrest.

Of vehicle. Previously, officers could search the passenger compartment of a vehicle, including containers found within, incident to a lawful arrest of an occupant. *See State v. Logner*, 148 N.C. App. 135 (2001) (warrantless search of defendant's vehicle proper incident to arrest of passenger). The stated rationale for this rule was that officers needed a bright-line rule allowing them to search in areas where an arrestee might be able to use a weapon or destroy evidence. *See New York v. Belton*, 453 U.S. 454 (1981) (stating basic rule); *see also State v. Andrews*, 306 N.C. 144 (1982) (applying *Belton* principles to search of vehicle incident to arrest); *State v. Cooper*, 304 N.C. 701 (1982) (to same effect).

In *Arizona v. Gant*, 556 U.S. 332 (2009), the U.S. Supreme Court held that lower courts had read *Belton* too broadly and ruled that the permissible scope of a search of a vehicle incident to the arrest of an occupant of the vehicle was much narrower. The Court ruled that an officer may search the passenger compartment of a vehicle incident to the arrest of an occupant only if (1) the arrestee is within reaching distance of the passenger compartment and thus able to obtain a weapon or destroy evidence or (2) it is reasonable to believe evidence relevant to the crime of arrest may be found. *Gant* overrules North Carolina decisions allowing an unlimited search of the passenger compartment of a vehicle incident to arrest of an occupant of the vehicle. *See State v. Carter*, 191 N.C. App. 152 (2008) (holding that *Belton* does not require that search incident to arrest of occupant of vehicle be only for evidence connected to the crime charged), *vacated and*

remanded, ___ U.S. ___, 129 S. Ct. 2158 (2009), *on remand*, 200 N.C. App. 47 (2009) (suppressing evidence in light of *Gant* and lack of any other ground to uphold search).

Generally, once officers have secured an arrestee—by, for example, handcuffing the arrestee—they may not search the vehicle based on the first ground identified in *Gant.* Most post-*Gant* cases have therefore involved the second ground for a search of a vehicle and focused on whether it was reasonable for the officer to believe evidence of the crime of arrest would be in the vehicle. *See State v. Mbacke*, 365 N.C.403 (2012) (analogizing the "reasonable to believe" standard in the second prong of *Gant* to the "reasonable suspicion" standard of a *Terry* stop).

Typically, an arrest for a motor vehicle offense will not justify a search incident to arrest on the second *Gant* ground because it will not be reasonable for an officer to believe that evidence relevant to the motor vehicle offense may be found in the vehicle. *See* FARB at 225–26 (so stating). A number of cases have reached this result. *See Meister v. Indiana*, ___ U.S. ___, 129 S. Ct. 2155 (2009) (court summarily vacates state court decision allowing search of vehicle incident to arrest of driver for suspended driver's license; case remanded for reconsideration in light of *Gant*); *State v. Johnson*, 204 N.C. App. 259 (2010) (disallowing search following arrest for suspended license); *State v. Carter*, 200 N.C. App. 47 (2009) (disallowing search following arrest for driving with expired registration tag and failing to notify Division of Motor Vehicles of change of address).

It is also unlikely that officers would have grounds to search a vehicle incident to arrest of an occupant for an outstanding arrest warrant. *See* FARB at 226.

In cases involving gun and drug offenses, courts have found that the officers had a reasonable basis to believe evidence of the offense of arrest could be found in the vehicle. The N.C. Supreme Court has cautioned, however, that a search of a vehicle incident to arrest of an occupant may "not routinely be based on the nature or type of the offense of arrest and that the circumstances of each case ordinarily will determine the propriety of any vehicular searches conducted incident to an arrest." *See State v. Mbacke,* 365 N.C. 403 (2012) (upholding search following arrest for carrying concealed weapon); *State v. Watkins*, ___ N.C. App. ___, 725 S.E.2d 400 (2012) (upholding search following arrest for possession of drug paraphernalia); *State v. Foy*, 208 N.C. App. 562 (2010) (upholding search following arrest for carrying concealed weapon); *see also State v. Toledo*, 204 N.C. App. 170 (2010) (holding that officers had probable cause to search vehicle for marijuana; also suggesting that officers may have had grounds to search vehicle incident to arrest of defendant for possession of marijuana).

C. Other Limits on Searches Incident to Arrest

Arizona v. Gant, discussed in subsection B., above, significantly limits the circumstances in which officers may search a vehicle incident to the arrest of a vehicle's occupant. Additional limits on searches of people and vehicles incident to arrest are discussed below, based on additional case law and *Gant.*

Citations. Officers may not search a person or vehicle incident to issuance of a citation if they do not arrest the person. *See Knowles v. Iowa*, 525 U.S. 113 (1998); *State v. Fisher*, 141 N.C. App. 448 (2000) (defendant had been issued citation for driving while license revoked but had not been placed under arrest; search could not be justified as search incident to arrest); *see also Sibron v. New York*, 392 U.S. 40, 63 (1968) ("It is axiomatic that an incident search may not precede an arrest and serve as part of its justification."); FARB at 223 (search may be made before actual arrest if arrest is made contemporaneously with search, but whatever is found during search before formal arrest cannot be used to support probable cause for the arrest).

Area and people. Cases before *Gant* permitted a search of the passenger compartment of a vehicle incident to arrest of an occupant of a vehicle, but not other areas, such as the vehicle's trunk, and not other occupants of the vehicle.

Gant does not appear to modify these limitations. *See* FARB at 226 (so stating); *see also Owens v. Kentucky*, ___ U.S. ___, 129 S. Ct. 2155 (2009) (court summarily vacates state court decision authorizing automatic pat down of passengers when officers arrest a vehicle occupant and are preparing to conduct search incident to arrest; case remanded for reconsideration in light of *Gant*); *State v. Schiro*, ___ N.C. App. ___, 723 S.E.2d 134 (2012) (search of trunk of vehicle not valid as search incident to arrest of vehicle occupant; however, search was valid based on defendant's consent).

Containers. Before *Gant*, the North Carolina Court of Appeals held that officers may not search locked containers incident to arrest of a person. *See State v. Thomas*, 81 N.C. App. 200 (1986) (officers could not search, incident to arrest, locked suitcase arrestee was carrying); *cf. State v. Brooks*, 337 N.C. 132 (1994) (officers may search locked compartments within vehicle as part of search incident to arrest).

Gant may limit searches of containers, whether locked or unlocked or whether following arrest of a person or arrest of an occupant of a vehicle. If officers cannot satisfy either ground identified in *Gant* for a search incident to arrest—that is, if the arrestee was secured and could not reach the container, and there was not a reasonable basis to believe that the container contained evidence related to the offense of arrest—officers may not be able to search containers incident to arrest. *See* Jeff Welty, *Is Arizona v. Gant Limited to Automobiles?*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (Sept. 2, 2010) (making this point and citing cases from other jurisdictions to that effect), http://nccriminallaw.sog.unc.edu/?p=1565; FARB at 224–25 n.338;

Cell phones. Cell phones are a form of container but, because of the wide range of data they may contain, may present tricky issues about the permissible scope of a search incident to arrest. The N.C. Supreme Court has upheld the search of a cell phone found on a person incident to arrest of the person, but did not specifically consider the impact of *Arizona v. Gant* or other potential issues. *State v. Wilkerson*, 363 N.C. 382, 432–34 (2009); *see also* Jeff Welty, *Warrantless Searches of Computers and Other Electronic Devices*, at 7–8 (UNC School of Government, Apr. 2011) (listing cases from around the country on this issue), *available*

at http://nccriminallaw.sog.unc.edu//wp-content/uploads/2011/05/2011-05-PDF-of-Handout-re-Warrantless-Searches.pdf; Jeff Welty, *Georgia Case on Searching Cell Phones Incident to Arrest*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (Dec. 20, 2010) (discussing potential issues), http://nccriminallaw.sog.unc.edu/?p=1835; FARB at 189–90.

Non-contemporaneous search of vehicle. Before *Gant*, some courts precluded a non-contemporaneous search of a vehicle following arrest of an occupant. *See Preston v. United States*, 376 U.S. 364 (1964) (where vehicle had been towed to garage, search of vehicle was not contemporaneous with arrest and was disallowed); *United States v. Vasey*, 834 F.2d 782 (9th Cir. 1987) (search of vehicle was not contemporaneous with arrest where search took place 30 to 45 minutes after occupant had been arrested, handcuffed, and placed in back of patrol car).

This limitation is implicit in the first ground for a search permitted by *Gant* because in virtually all instances the arrestee will not be within reaching distance of the vehicle at the time of a non-contemporaneous search. The courts also may be unwilling to allow vehicle searches long after arrest based on the "reasonable to believe" standard described in *Gant* and may require full probable cause or other grounds for non-contemporaneous searches. *See infra* § 15.6E, Probable Cause to Search Vehicle; § 15.6F, Inventory Search.

Strip search during search incident to arrest. A roadside strip search incident to arrest of a person may be impermissible unless probable cause to search and exigent circumstances exist. *See State v. Battle*, 202 N.C. App. 376, 387–88 (2010) (opinion for court so states); *accord State v. Fowler*, ___ N.C. App. ___, 725 S.E.2d 624, 628 (2012) (adopting language from *Battle*). For a discussion of the validity of strip searches based on probable cause, see *infra* "Strip searches based on probable cause" in § 15.6D, Probable Cause to Search Person.

Recent occupancy. In *Thornton v. United States*, 541 U.S. 615 (2004), a majority of the Court held that the *Belton* doctrine allowed a search of the passenger compartment of a vehicle after arrest of an "occupant" or "recent occupant." In *Thornton*, the Court found that the defendant was a recent occupant when he parked his car and exited right before the officer could pull the car over. *Thornton* appears to remain good law after *Gant*. Thus, if a person is not a "recent occupant" of the vehicle in question when approached by officers, a search of the vehicle incident to arrest of the person remains impermissible. *See State v. Dean*, 76 P.3d 429 (Ariz. 2003) (officers could not search defendant's car incident to arrest; defendant was not "recent occupant" of car when he had not occupied car for some two-and-one-half hours and his arrest occurred not in close proximity to automobile, which was parked in his driveway, but inside his residence). If a person is a recent occupant, officers still must meet one of the two grounds identified in *Gant* for a search of a vehicle incident to arrest of the person.

Passenger belongings. A passenger has standing to contest a search of his or her belongings within a vehicle, such as a purse, incident to arrest of an occupant of the

vehicle. *See State v. Mackey*, 209 N.C. App. 116 (2011) (recognizing principle but holding that passenger asserted no possessory interest in vehicle or contents and did not have standing to contest search of vehicle resulting in discovery of weapon under seat).

Pretext. Before *Whren* (discussed *supra* § 15.3I, Pretext), it could be argued that a search incident to arrest violates the Fourth Amendment if the officers arrest the person, rather than issue a citation, as a pretext to search the person incident to arrest. In *Arkansas v. Sullivan*, 532 U.S. 769 (2001), the Court extended the rule in *Whren* to arrests, holding that an officer's decision to arrest a person for a traffic violation, if supported by probable cause, is not invalid even though the arrest is a pretext for a narcotics search incident to arrest. (On remand, the Arkansas Supreme Court held that a pretextual arrest violates the state constitution. *See State v. Sullivan*, 74 S.W.3d 215 (Ark. 2002).)

D. Probable Cause to Search Person

Person. Officers may conduct a warrantless search of a person whom they have not arrested if both probable cause to search and exigent circumstances exist. *See, e.g.*, *State v. Williams*, 209 N.C. App. 255 (2011) (probable cause existed to believe defendant possessed illegal drugs and exigent circumstances existed based on belief that defendant was attempting to swallow them; permissible for officer to conduct warrantless search of the defendant's mouth by grabbing him around the throat, pushing him onto the hood of a vehicle, and demanding that he spit out whatever he was trying to swallow); *State v. Yates*, 162 N.C. App. 118 (2004) (officer had probable cause to search defendant based on strong odor of marijuana about defendant's person; exigent circumstances justified immediate warrantless search); *State v. Smith*, 118 N.C. App. 106, *rev'd on other grounds*, 342 N.C. 407 (1995); *State v. Watson*, 119 N.C. App. 395 (1995).

Containers. Officers may conduct a warrantless search of a container found on a person whom they have not arrested if both probable cause to search *and* exigent circumstances exist. If exigent circumstances do not exist, they must obtain a search warrant. *See State v. Simmons*, 201 N.C. App. 698 (2010) (officers did not have probable cause to search bag or vehicle based on defendant's statements that bag contained cigar guts); FARB at 216–17 (discussing rule and exceptions); *State v. Gilkey*, 18 P.3d 402 (Or. Ct. App. 2001) (officers could seize chapstick container found during frisk but could not open it without a warrant).

Strip searches based on probable cause. Because of their intrusiveness, roadside strip searches require a greater justification than other warrantless searches based on probable cause. Officers must have specific probable cause that the defendant is hiding the items (usually, drugs) on his or her person. Further, there must be "exigent circumstances that show some significant government or public interest would be endangered were the police to wait until they could conduct the search in a more discreet location." *State v. Fowler*, ___ N.C. App. ___, 725 S.E.2d 624, 628 (2012) (citation omitted). The strip search also must be conducted in a reasonable manner. *See also supra* "Strip search during search incident to arrest" in § 15.6C, Other Limits on Searches Incident to Arrest (applying similar standard).

Appellate judges have divided over whether strip searches meet these higher standards. *Compare State v. Battle*, 202 N.C. App. 376 (2010) (finding strip search unconstitutional), *with State v. Robinson*, ___ N.C. App. ___, 727 S.E.2d 712 (2012) (stating that showing of exigent circumstances was not required where officer had specific basis for believing weapons or contraband were under defendant's clothing) *and Fowler*, ___ N.C. App. ___, 725 S.E.2d 624 (finding exigent circumstances and upholding strip search). *See also State v. Smith*, 118 N.C. App. 106 (1995) (court of appeals holds that although officers' warrantless search was supported by probable cause and exigent circumstances, search was unreasonable where officers required defendant to pull down his pants on public street, shined a flashlight on his scrotum, and reached underneath his scrotum to remove paper towel), *rev'd in pertinent part*, 342 N.C. 407 (1995) (court adopts dissenting opinion, which found that search was not unreasonable under circumstances).

E. Probable Cause to Search Vehicle

Generally. Officers may conduct a warrantless search of an automobile, including the trunk and closed containers, if they have probable cause to believe the objects of the search may be located there. The rationale for what is known as the automobile exception to the warrant requirement is that cars are capable of being moved quickly and people have a reduced expectation of privacy in cars. *See California v. Acevedo*, 500 U.S. 565 (1991) (stating general standard); *State v. Holmes*, 109 N.C. App. 615 (1993) (to same effect); *State v. Corpening*, 109 N.C. App. 586 (1993) (to same effect); *see also Florida v. White*, 526 U.S. 559 (1999) (police do not need warrant to seize vehicle from public place when they have probable cause to believe that vehicle itself is forfeitable contraband). If probable cause exists to search an automobile, officers may conduct an immediate search at the scene, or a later search at the police station, without a warrant. *See Acevedo*, 500 U.S. at 570.

The scope of a warrantless search of a vehicle based on probable cause is broad but not unlimited. "The scope of a warrantless search of an automobile . . . is defined by the object of the search and the places in which there is probable cause to believe that it may be found." *See United States v. Ross*, 456 U.S. 798, 824–25 (1982) (holding that "[i]f probable cause justifies the search of a lawfully stopped vehicle, it justifies the search of every part of the vehicle and its contents that may conceal the object of the search; also observing that "[p]robable cause to believe that a container placed in the trunk of a taxi contains contraband or evidence does not justify a search of the entire cab").

Passenger belongings. In *Wyoming v. Houghton*, 526 U.S. 295 (1999), the Court held that officers with probable cause to search a car may search passengers' belongings found in the car that are capable of concealing the object of the search. *Compare State v. Boyd*, 64 P.3d 419 (Kan. 2003) (distinguishing *Houghton*, the court held that officers could not search a passenger's purse as part of their search of a car when they had ordered her to leave her purse in the car and they did not have probable cause to search the car or passenger at the time they gave the order).

Probable cause to search a car and its contents does not necessarily authorize officers to search passengers themselves. Nor does it necessarily authorize searches of passengers' belongings in other contexts—for example, when the driver but not the passenger consents to a search. *See supra* § 15.5D, Consent.

Seizure of object. Before seizing an object found during a search of a vehicle, officers must have probable cause to believe that the object constitutes evidence of a crime. *See State v. Bartlett*, 130 N.C. App. 79 (1998) (no probable cause to seize plastic-like substance found in car, which upon later laboratory analysis turned out to be controlled substance, because officers admitted that they did not know what substance was at time of seizure).

Drug cases. In *Maryland v. Dyson*, 527 U.S. 465 (1999), the Court reaffirmed that a finding of probable cause that a vehicle contains contraband satisfies the automobile exception to the search warrant requirement. At issue in such cases are what circumstances amount to probable cause to search and where officers may search. *See generally State v. Poczontek*, 90 N.C. App. 455 (1988) (officer lacked probable cause to search car for drugs based on informant's tip and officer's observations after stop).

When an officer detects the odor of marijuana emanating from a vehicle, probable cause exists for a warrantless search of the vehicle for marijuana. *See State v. Smith*, 192 N.C. App. 690 (2008) (so holding). Officers may search in areas of the car where they reasonably believe marijuana may be found. *See State v. Toledo*, 204 N.C. App. 170 (2010) (officer noted odor of marijuana from spare tire in the luggage area after defendant had validly consented to a search of the vehicle; after conducting a "ping test" by pressing the tire valve of the spare tire and noting a very strong odor of marijuana, officer searched second spare tire located under the vehicle; court finds that after first ping test, officer had probable cause to search second tire); *compare Commonwealth v. Garden*, 883 N.E.2d 905 (Mass. 2008) (odor of burnt marijuana on clothes of vehicle's occupant gave officer probable cause to search passenger compartment of vehicle; officer did not have probable cause, however, to search vehicle's trunk because officer could not reasonably believe that source of smell of burnt marijuana would be found in trunk), *abrogated on other grounds*, *Commonwealth v. Lobo*, 978 N.E.2d 807 (Mass. App. Ct. 2012).

Probable cause to search a vehicle for drugs does not necessarily give officers probable cause to search recent occupants of the vehicle. *See State v. Smith*, ___ N.C. App. ___, 729 S.E.2d 120 (2012) (drug dog's positive alert to a vehicle does not give officers probable cause to search recent occupants of the vehicle); *see also Bailey v. United States*, 568 U.S. ___, 133 S. Ct. 1031 (2013) (search warrant does not justify the detention of occupants beyond the immediate vicinity of the premises covered by a search warrant; in this case, the defendant left the premises before the search began and officers waited to detain him until he had driven about one mile away, which was impermissible in absence of other grounds for detention). *But cf. State v. Mitchell*, ___ N.C. App. ___, 735 S.E.2d 438 (2012) (possession of marijuana blunt by passenger gave officer probable cause to search car in which passenger was riding).

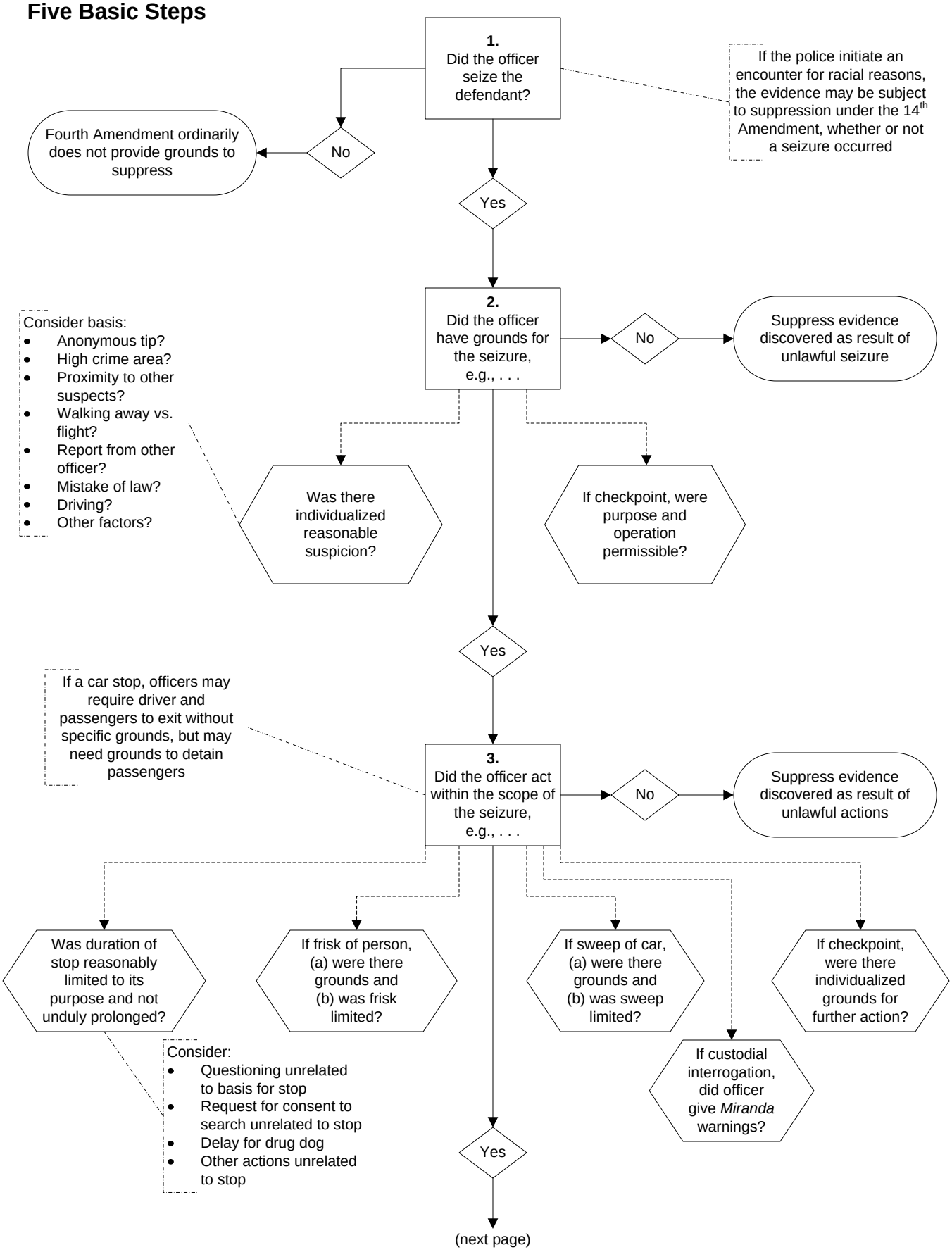
F. Inventory Search

Arrestees. Officers may search and inventory possessions of arrestee. *See* FARB at 229.

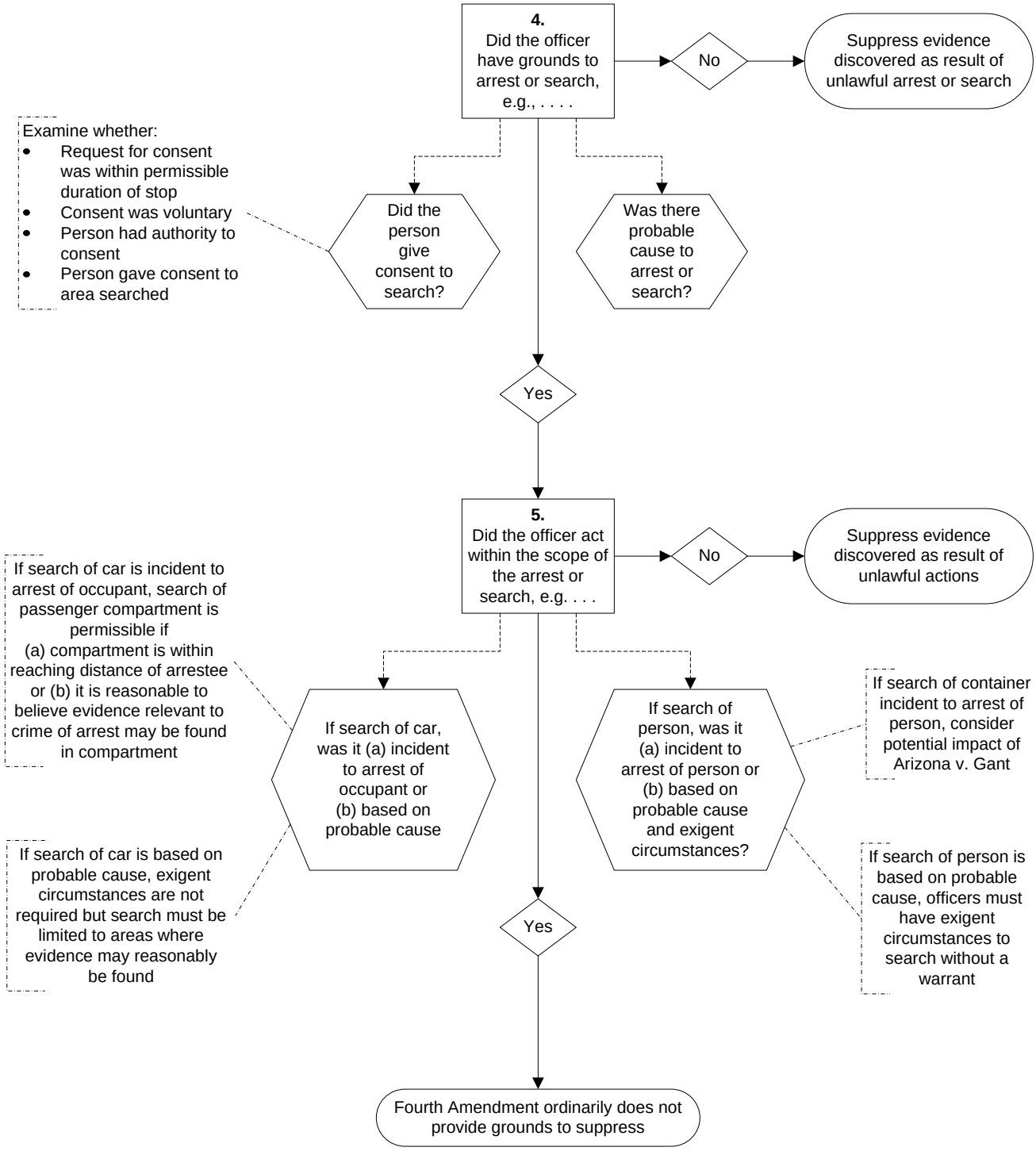
Vehicles. Officers may *impound* a vehicle if pursuant to departmental policy and grounds for impoundment exist, such as the need to safeguard the vehicle and its contents. Officers may *inventory* the vehicle and its contents if pursuant to departmental policy. *See State v. Phifer*, 297 N.C. 216 (1979) (failure to follow standardized procedure; inventory search suppressed); *State v. Peaten*, 110 N.C. App. 749 (1993) (inadequate grounds to impound vehicle; inventory search suppressed); FARB at 233–34 (discussing impoundment and inventory of vehicles).

Pretext. Inventory searches may be challenged as pretextual. *See supra* § 15.3I, Pretext.

Appendix 15-1
Stops and Warrantless Searches: Five Basic Steps



Five Basic Steps (cont'd)



Traffic Stops

Jeff Welty

August 2015

INTRODUCTION

This paper is intended to serve as a reference regarding the Fourth Amendment issues that arise in connection with traffic stops. It begins by addressing officers' conduct before a stop, proceeds to discuss making the stop itself, then considers investigation during traffic stops, and finally covers the termination of traffic stops.[1]

BEFORE THE STOP

"RUNNING TAGS"

Sometimes, an officer will decide to "run" a vehicle's "tag" – that is, run a computer check to determine whether the license plate on the vehicle is current and matches the vehicle, and perhaps whether the vehicle is registered to a person with outstanding warrants or who is not permitted to drive. When this is done randomly, without individualized suspicion, defendants sometimes argue that the officer has conducted an illegal search by running the tag. Courts have uniformly rejected this argument, finding that license plates are open to public view. See, e.g., State v. Chambers, 203 N.C. App. 373 (2010) (unpublished) ("Defendant's license tag was displayed, as required by North Carolina law, on the back of his vehicle for all of society to view. Therefore, defendant did not have a subjective or objective reasonable expectation of privacy in his license tag. As such, the officer's actions did not constitute a search under the Fourth Amendment."); Jones v. Town of Woodworth, 132 So.3d 422 (La. Ct. App. 2013) ("[A] survey of federal and state cases addressing this issue have concluded that a license plate is an object which is constantly exposed to public view and in which a person, thus, has no reasonable expectation of privacy, and that consequently, conducting a random license plate check is legal."); State v. Setinich, 822 N.W.2d 9 (Minn. Ct. App. 2012) (rejecting a defendant's challenge to an officer's suspicionless license plate check because "[a] driver does not have a reasonable expectation of privacy in a license plate number which is required to be openly displayed"); State v. Davis, 239 P.3d 1002 (Or. Ct. App. 2010) (upholding a random license check and stating that "[t]he state can access a person's driving records by observing a driver's registration plate that is displayed in plain view and looking up that registration plate number in the state's own records"), aff'd by an equally divided court, 295 P.3d 617 (2013); State v. Donis, 723 A.2d 35 (N.J. 1998) (holding that there is no reasonable expectation of privacy in the exterior of a vehicle, including the license plate, so an officer's ability to run a tag "should not be limited only to those instances when [the officer] actually witness[es] a violation of motor vehicle laws"). Cf. New York v. Class, 475 U.S. 106 (1986) (finding no reasonable expectation of privacy in a vehicle's VIN number because "it is unreasonable to have an expectation of privacy in an object required by law to be located in a place ordinarily in plain view from the exterior of the automobile"). See also infra p. 8 (discussion under heading "Driver's Identity" and cases cited therein).

[1] The organization of this paper was inspired in part by Wayne R. LaFave, The "Routine Traffic Stop" From Start to Finish: Too Much "Routine," Not Enough Fourth Amendment, 102 Mich. L. Rev. 1843 (2004).

MAKING THE STOP

LEGAL STANDARD

"Reasonable suspicion [is] the necessary standard for stops based on traffic violations." State v. Styles, 362 N.C. 412 (2008) (rejecting the argument that full probable cause is required for stops based on readily observable traffic violations). That is the same standard that applies to investigative stops in connection with more serious offenses. Terry v. Ohio, 392 U.S. 1 (1968). An officer may have reasonable suspicion of a traffic violation if a law is "genuinely ambiguous," and the officer reasonably interprets it to prohibit conduct that the officer has observed, even if the officer's interpretation of the law turns out to be mistaken.[2]

PRETEXTUAL STOPS

If an officer has reasonable suspicion that a driver has committed a crime or an infraction, the officer may stop the driver's vehicle. This is so even if the officer is not interested in pursuing the crime or infraction for which reasonable suspicion exists, but rather is hoping to observe or gather evidence of another offense. Whren v. United States, 517 U.S. 806 (1996) (emphasizing that the "[s]ubjective intentions" of the officer are irrelevant); State v. McClendon, 350 N.C. 630 (1999) (adopting Whren under the state constitution).[3] However, if an officer makes a pretextual traffic stop and then engages in investigative activity that is directed not at the traffic offense but at another offense for which reasonable suspicion is absent, the officer may exceed the permitted scope of the traffic stop. This issue is addressed below, in the section of this paper entitled Investigation During the Stop.

Because the officer's subjective intentions regarding the purpose of the stop are immaterial, whether "an officer conducting a traffic stop [did or] did not subsequently issue a citation is also irrelevant to the validity of the stop." State v. Parker, 183 N.C. App. 1 (2007).

WHEN REASONABLE SUSPICION MUST EXIST

[2] Heien v. North Carolina, __ U.S. __, ___, 135 S. Ct. 530, 541 (2014) (Kagan, J., concurring). In Heien, an officer stopped a motorist for having one burned-out brake light. The court of appeals ruled that the applicable statute required only one working brake light and that the stop was therefore unreasonable. The Supreme Court reviewed the case and ruled that the brake light statute was sufficiently difficult to parse that the officer's interpretation was reasonable even if mistaken, rendering the stop reasonable also. The majority opinion does not set forth a standard for when an officer's mistaken interpretation of law is reasonable, but Justice Kagan's concurrence argues that such an interpretation is reasonable only when the law itself is "genuinely ambiguous."

[3] Indeed, a stop may be legally justified even where the officer is completely unaware of the offense for which reasonable suspicion exists and makes the stop based entirely on the officer's incorrect belief that reasonable suspicion exists for another offense. See, e.g., Devenpeck v. Alford, 543 U.S. 146 (2004) ("[A]n arresting officer's state of mind (except for the facts that he knows) is irrelevant to the existence of probable cause. That is to say, his subjective reason for making the arrest need not be the criminal offense as to which the known facts provide probable cause." (internal citations omitted)); State v. Osterhoudt, 222 N.C. App. 620 (2012) (an officer stopped the defendant based on the officer's mistaken belief that the defendant's driving violated a particular traffic law; the court of appeals concluded that the law in question had no application to the defendant's driving, but upheld the stop because the facts observed by the officer provided reasonable suspicion that the defendant's driving violated a different traffic law, notwithstanding the fact that the officer did not act on that basis).

Normally, a law enforcement officer will attempt to develop reasonable suspicion before instructing a motorist to stop. But what if the officer does not have reasonable suspicion at that point, yet develops reasonable suspicion prior to the person's compliance with the officer's instruction? In California v. Hodari D., 499 U.S. 621 (1991), the United States Supreme Court held that a show of authority is not a seizure until the subject complies. Because the propriety of a seizure depends on the facts known at the time of the seizure, it appears that events after an officer's show of authority, but before a driver's submission to it, may be used to justify the stop. For example, an officer who activates his blue lights after observing a driver traveling 45 m.p.h. in a 55 m.p.h. zone may be without reasonable suspicion. But if the driver initially ignores the blue lights, continues driving, and weaves severely before stopping, the seizure may be upheld based on the driver's weaving in addition to his slow rate of speed. State v. Atwater, __ N.C. App. __, 723 S.E.2d 582 (2012) (unpublished) (adopting the foregoing analysis and concluding that "[r]egardless of whether [the officer] had a reasonable suspicion that defendant was involved in criminal activity prior to turning on his blue lights, defendant's subsequent actions [erratic driving and running two stop signs] gave [the officer] reasonable suspicion to stop defendant for traffic violations"); United States v. Swindle, 407 F.3d 562 (2d Cir. 2005) (reluctantly concluding that a court may "consider[] events that occur[] after [a driver is] ordered to pull over" but before he complies in determining the constitutionality of a seizure); United States v. Smith, 217 F.3d 746 (9th Cir. 2000) (relying on Hodari D. to reject the argument that "only the factors present up to the point when [the officer] turned on the lights of his patrol car can be considered in analyzing the validity of the stop"). Cf. United States v. McCauley, 548 F.3d 440 (6th Cir. 2008) ("We determine whether reasonable suspicion existed at the point of seizure – not . . . at the point of attempted seizure."); United States v. Johnson, 212 F.3d 1313 (D.C. Cir. 2000) (similar). Cf. generally 4 Wayne R. LaFave, Search and Seizure § 9.4(d) n.198 (5th ed. 2012) (collecting cases) (hereinafter, LaFave, Search and Seizure).

COMMON ISSUES

SPEEDING

Many traffic stops based on speeding are supported by radar or other technological means. However, an officer's visual estimate of a vehicle's speed generally is also sufficient to support a traffic stop for speeding. State v. Barnhill, 166 N.C. App. 228 (2004) (upholding a traffic stop based on the estimate of an officer who had no special training that the defendant was speeding 40 m.p.h. in a 25 m.p.h. zone, and stating that "it is well established in this State, that any person of ordinary intelligence, who had a reasonable opportunity to observe a vehicle in motion and judge its speed may testify as to his estimation of the speed of that vehicle"). However, if a vehicle is speeding only slightly, an officer's visual estimate of speed may be insufficiently reliable and accurate to support a traffic stop. Compare United States v. Sowards, 690 F.3d 583 (4th Cir. 2012) (officer's visual estimate that the defendant was speeding 75 m.p.h. in a 70 m.p.h. zone was insufficient to support a traffic stop; the officer also expressed some difficulty with units of measurement), with United States v. Mubdi, 691 F.3d 334 (4th Cir. 2012) (traffic stop was justified when two officers independently estimated that the defendant was speeding between 63 m.p.h. and 65 m.p.h. in a 55 m.p.h. zone), vacated on other grounds, __ U.S. __, 133 S. Ct. 2851 (2013).

DRIVING SLOWLY

Driving substantially under the posted speed limit is not itself necessarily unlawful. In fact, it is sometimes required by G.S. 20-141(a), which states 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." On the other hand, in some circumstances, driving slowly may constitute obstruction of traffic under G.S. 20-141(h) ("No person shall operate

a motor vehicle on the highway at such a slow speed as to impede the normal and reasonable movement of traffic . . . ."), or may violate posted minimum speed limits under G.S. 20-141(c) (unlawful to operate passenger vehicle at less than certain minimum speeds indicated by appropriate signs). Furthermore, the fact that a driver is proceeding unusually slowly may contribute to reasonable suspicion that the driver is impaired. See, e.g., State v. Bonds, 139 N.C. App. 627 (2000) (driver's blank look, slow speed, and the fact that he had his window down in cold weather provided reasonable suspicion; opinion quotes NHTSA publication regarding the connection between slow speeds, blank looks, and DWI); State v. Aubin, 100 N.C. App. 628 (1990) (fact that defendant slowed to 45 m.p.h. on I-95 and weaved within his lane supported reasonable suspicion of DWI); State v. Jones, 96 N.C. App. 389 (1989) (although the defendant did not commit a traffic infraction, "his driving 20 miles per hour below the speed limit and weaving within his lane were actions sufficient to raise a suspicion of an impaired driver in a reasonable and experienced [officer's] mind").

Whether slow speed alone is sufficient to provide reasonable suspicion of impairment is not completely settled in North Carolina. The state supreme court seemed to suggest that it might be in State v. Styles, 362 N.C. 412 (2008) ("For instance, law enforcement may observe certain facts that would, in the totality of the circumstances, lead a reasonable officer to believe a driver is impaired, such as weaving within the lane of travel or driving significantly slower than the speed limit."), but the court of appeals stated that it is not in a subsequent unpublished decision, State v. Brown, 207 N.C. App. 377 (2010) (unpublished) (stating that traveling 10 m.p.h. below the speed limit is not alone enough to create reasonable suspicion, but finding reasonable suspicion based on speed, weaving, and the late hour). The weight of authority in other states is that it is not. See, e.g., State v. Bacher, 867 N.E.2d 864 (Ohio Ct. App. 2007) (holding that "slow travel alone [in that case, 23 m.p.h. below the speed limit on the highway] does not create a reasonable suspicion," and collecting cases from across the country).

It is also unclear just how slowly a driver must be travelling in order to raise suspicions. Of course, driving a few miles per hour under the posted limit is not suspicious. State v. Canty, 224 N.C. App. 514 (2012) (fact that vehicle slowed to 59 m.p.h. in a 65 m.p.h. zone upon seeing officers did not provide reasonable suspicion). Ten miles per hour under the limit, however, may be enough to contribute to suspicion. Brown, 207 N.C. App 377 (finding reasonable suspicion where defendant was driving 10 m.p.h. under the speed limit and weaving within a lane); State v. Bradshaw, 198 N.C. App. 703 (2009) (unpublished) (late hour, driving 10 m.p.h. below the limit, and abrupt turns provided reasonable suspicion). Certainly, the more sustained and the more pronounced the slow driving, the greater the suspicion.

WEAVING

G.S. 20-146 requires that "[a] vehicle shall be driven as nearly as practicable entirely within a single lane and shall not be moved from such lane until the driver has first ascertained that such movement can be made with safety."

ACROSS LANES

Absent exceptional circumstances, weaving across lanes of traffic generally violates this provision and supports a traffic stop. See, e.g., State v. Osterhoudt, 222 N.C. App. 620 (2012) (where the "defendant crossed [a] double yellow line . . . he failed to stay in his lane and violated" G.S. 20-146); State v. Hudson, 206 N.C. App. 482 (2010) (where the defendant "crossed the center line of I–95 and pulled back over the fog line twice," an officer was justified in stopping him for a violation of G.S. 20-146). See also State v. Kochuk, 366 N.C. 549 (2013) (per curiam) (adopting the analysis of the dissenting opinion in the court of appeals where it was explained that a driver "momentarily crossed the right dotted line once while in the middle lane" and "later drove on the fog line twice";

the opinion cites Hudson, supra, and appears to suggest that a stop was justified under G.S. 20-146; however, the opinion focuses primarily on the presence of reasonable suspicion of impaired driving as a basis for the stop); State v. Simmons, 205 N.C. App. 509 (2010) (without discussing G.S. 20-146, the court ruled that a stop was supported by reasonable suspicion of DWI where the defendant "was not only weaving within his lane, but was also weaving across and outside the lanes of travel, and at one point actually ran off the road"). But cf. State v. Derbyshire, __ N.C. App. __, 745 S.E.2d 886 (2013) (holding that a stop was not supported by reasonable suspicion of DWI because it was based on only "one instance of weaving," even though "the right side of Defendant's tires crossed into the right-hand lane" during the weaving; the court did not address G.S. 20-146 as a possible basis for the stop).

Driving so that one's tires touch, but do not cross, a lane line should be treated as weaving within a lane, not weaving across lanes. Shea Denning, Keeping It Between the Lines, N.C. Crim. L. Blog (Mar. 11, 2015), http://nccriminallaw.sog.unc.edu/keeping-it-between-the-lines/ (discussing this point and citing State v. Peele, 196 N.C. App. 668 (2009), where the court ruled that there was no reasonable suspicion to stop a defendant whose tires touched the lane lines twice; although the court's discussion focuses on the presence or absence of reasonable suspicion of DWI and does not cite G.S. 20-146, the court does characterize the defendant's driving as weaving "within" a lane).

WITHIN A LANE

Weaving within a single lane does not violate G.S. 20-146 and so is not itself a crime or an infraction. In some circumstances, however, weaving within a single lane may provide, or contribute to, reasonable suspicion that a driver is impaired or is driving carelessly.

- *Moderate Weaving within a Lane: Weaving Plus.* In State v. Fields, 195 N.C. App. 740 (2009), the court of appeals held that an officer did not have reasonable suspicion that a driver was impaired where the driver "swerve[d] to the white line on the right side of the traffic lane" three times over a mile and a half. However, the court stated that weaving, "coupled with additional . . . facts," may provide reasonable suspicion. The court cited cases involving additional facts such as driving "significantly below the speed limit," driving at an unusually late hour, and driving in the proximity of drinking establishments. Thus, Fields stands for the proposition that moderate weaving within a single lane does not provide reasonable suspicion, but that 'weaving plus' may do so. Fields has been applied in cases such as State v. Wainwright, __ N.C. App. __, 770 S.E.2d 99 (2015) (mistakenly analyzing weaving across a lane line as if it were weaving within a lane, then finding reasonable suspicion of impaired driving based in part on the weaving and in part on the late hour and the proximity to bars); State v. Kochuk, 366 N.C. 549 (2013) (ruling that reasonable suspicion supported a stop where the defendant was weaving and it was 1:10 a.m.); State v. Derbyshire, __ N.C. App. __, 745 S.E.2d 886 (2013) (holding that weaving alone did not provide reasonable suspicion to support a stop, that driving at 10:05 p.m. on a Wednesday is "utterly ordinary" and insufficient to render weaving suspicious, and that having "very bright" headlights also was not suspicious); and State v. Peele, 196 N.C. App. 668 (2009) (finding no reasonable suspicion of DWI where an officer received an anonymous tip that defendant was "possibl[y]" driving while impaired, then saw the defendant "weave within his lane once").

- *Severe Weaving within a Lane.* While moderate weaving within a single lane is insufficient by itself to support a traffic stop, severe weaving may suffice. In State v. Fields, 219 N.C. App. 385 (2012), the court of appeals upheld a traffic stop conducted by an officer who followed the defendant for three quarters of a mile and saw him "weaving in his own lane . . . sufficiently frequent[ly] and erratic[ly] to prompt evasive maneuvers from

other drivers." The officer compared the defendant's vehicle to a "ball bouncing in a small room." The extensive weaving enabled the court of appeals to distinguish the precedents discussed in the preceding paragraph. See also State v. Otto, 366 N.C. 134 (2012) (traffic stop justified by the defendant's "constant and continual" weaving at 11:00 p.m. on a Friday night).

SITTING AT A STOPLIGHT

Like weaving within a single lane, remaining at a stoplight after the light turns green is not, in itself, a violation of the law. But also like weaving, it may provide or contribute to reasonable suspicion that the driver is impaired.[4] An important factor in such cases is the length of the delay. Compare State v. Barnard, 362 N.C. 244 (2008) (determining that reasonable suspicion supported an officer's decision to stop the defendant where the defendant was waiting at a traffic light in a high-crime area, near several bars, at 12:15 a.m., and "[w]hen the light turned green, defendant remained stopped for approximately thirty seconds" before proceeding), with State v. Roberson, 163 N.C. App. 129 (2004) (finding no reasonable suspicion where the defendant sat at a green light at 4:30 a.m., near several bars, for 8 to 10 seconds, and stating that "[a] motorist waiting at a traffic light can have her attention diverted for any number of reasons. . . . [so] a time lapse of eight to ten seconds does not appear so unusual as to give rise to suspicion justifying a stop").

UNSAFE MOVEMENT/LACK OF TURN SIGNAL

Under G.S. 20-154(a), "before starting, stopping or turning from a direct line[, a driver] shall first see that such movement can be made in safety . . . and whenever the operation of any other vehicle may be affected by such movement, shall give a signal as required." Litigation under this statute has focused on the phrase "the operation of any other vehicle may be affected." Generally, the appellate courts have held that a driver need not signal when making a mandatory turn, but must if the turn is optional and there is another vehicle following closely. Compare State v. Ivey, 360 N.C. 562 (2006) (the defendant was not required to signal at what amounted to a right-turn-only intersection; a right turn was the "only legal movement he could make," and the vehicle behind him was likewise required to stop, then turn right, so the defendant's turn did not affect the trailing vehicle), and State v. Watkins, 220 N.C. App. 384 (2012) (suggesting that there was insufficient evidence of unsafe movement where the defendant changed lanes without signaling while driving three to four car lengths in front of a police vehicle on a road with heavy traffic, because it was not clear that another vehicle was affected), with State v. Styles, 362 N.C. 412 (2008) (where the defendant changed lanes "immediately in front of" an officer, he violated the statute; "changing lanes immediately in front of another vehicle may affect the operation of the trailing vehicle"), and State v. McRae, 203 N.C. App. 319 (2010) (similar).

LATE HOUR, HIGH-CRIME AREA

The United States Supreme Court has held that presence in a high-crime area, "standing alone, is not a basis for concluding that [a person is] engaged in criminal conduct." Brown v. Texas, 443 U.S. 47 (1979). Although the stop in Brown took place at noon, presence in a high-crime area at an unusually late hour is also alone insufficient to provide reasonable suspicion. State v. Murray, 192 N.C. App. 684 (2008) (no reasonable suspicion to stop defendant, who was driving in a commercial area with a high incidence of property crimes at 3:41 a.m.). But the

[4] Under some circumstances, it might also constitute obstructing traffic in violation of G.S. 20-141(h).

incidence of crime in the area and the hour of night are factors that, combined with others such as nervousness or evasive action, may contribute to reasonable suspicion. Cf. In re I.R.T., 184 N.C. App. 579 (2007) (listing factors); State v. Mello, 200 N.C. App. 437 (2009) (holding that the defendant's presence in a high-drug area, coupled with evasive action on the part of individuals seen interacting with defendant, provided reasonable suspicion supporting a stop).

COMMUNITY CARETAKING

The court of appeals recognized the community caretaking doctrine as a basis for a vehicle stop in State v. Smathers, __ N.C. App. __, 753 S.E.2d 380 (2014). In Smathers, an officer stopped the defendant to make sure that she was OK after her car hit a large animal that ran in front of her. The court ruled that the stop was justified, finding an objectively reasonable basis for the caretaking stop that outweighed the intrusion of the stop on the driver's privacy. The court set out a flexible test for community caretaking, yet cautioned that the doctrine should be applied narrowly, so its precise scope remains uncertain.

TIPS

Whether information from a tipster provides reasonable suspicion to stop a vehicle depends on the totality of the circumstances. Whether the tipster is identified is a critical factor, so this paper treats anonymous tips separately from other tips.

ANONYMOUS TIPS

Historically, information from an anonymous tipster has been viewed as insufficient to support a stop, at least without unusual indicia of reliability, such as very detailed information or meaningful corroboration of the tip by the police. State v. Coleman, __ N.C. App. __, 743 S.E.2d 62 (2013) (a tip that the court treated as anonymous did not provide reasonable suspicion, in part because it "did not provide any way for [the investigating officer] to assess [the tipster's] credibility, failed to explain her basis of knowledge, and did not include any information concerning defendant's future actions"); State v. Blankenship, __ N.C. App. __, 748 S.E.2d 616 (2013) (taxi driver's anonymous call to 911, reporting that a specific red Ford Mustang, headed in a specific direction, was "driving erratically [and] running over traffic cones," was insufficient to support a stop of a red Mustang located less than two minutes later headed in the described direction; officers did not corroborate the bad driving and the tip had "limited but insufficient indicia of reliability"); State v. Johnson, 204 N.C. App. 259 (2010) (stating that "[c]ourts have repeatedly recognized, as a general rule, the inherent unreliability of anonymous tips standing on their own" unless such a tip "itself possess[es] sufficient indicia of reliability, or [is] corroborated by [an] officer's investigation or observations"); State v. Peele, 196 N.C. App. 668 (2009) (an anonymous tip that the defendant was driving recklessly, combined with an officer's observation of a single instance of weaving, was insufficient to give rise to reasonable suspicion). This skepticism was rooted in part in Florida v. J.L., 529 U.S. 266 (2000), a non-traffic stop case in which the Court stated that "[u]nlike a tip from a known informant whose reputation can be assessed and who can be held responsible if her allegations turn out to be fabricated . . . an anonymous tip alone seldom demonstrates the informant's basis of knowledge or veracity," and so rarely provides reasonable suspicion. *Id.* (internal quotation marks and citation omitted.)

However, the Supreme Court recently decided Navarette v. California, 572 U.S. __, 134 S. Ct. 1683 (2014), ruling that a motorist's 911 call, reporting that a specific vehicle had just run the caller off the road, was an

anonymous tip that provided reasonable suspicion to stop the described vehicle 15 minutes later. The Court first ruled that the tip was reliable. It reasoned that the caller effectively claimed first-hand knowledge of the other vehicle's dangerous driving; that the call was "especially reliable" because it was contemporaneous with the dangerous driving; and that the call was made to 911, which "has some features [like recording and caller ID] that allow for identifying and tracing callers, and thus provide some safeguards against making false reports with immunity." Then the Court held that running another vehicle off the road "suggests lane-positioning problems, decreased vigilance, impaired judgment, or some combination of those recognized drunk driving cues," and so provided reasonable suspicion of DWI. Because the Court found reasonable suspicion based on a garden-variety anonymous 911 call that the officers did little to corroborate, Navarette almost certainly changes the law in North Carolina regarding anonymous tips and reasonable suspicion.[5] However, it is unclear how far Navarette will extend. Will it apply when the tip is received through a means other than 911? When it concerns a completed traffic offense rather than an ongoing one like DWI? These issues will need to be decided in future cases.

OTHER TIPS

Where an informant "willingly place[s] her anonymity at risk," by identifying herself or by speaking to an officer face to face, courts more readily conclude that the information provides reasonable suspicion. State v. Maready, 362 N.C. 614 (2008) (court gave significant weight to information provided by a driver who approached officers in person, thereby allowing officers to see her, her vehicle, and her license plate, notwithstanding the fact that the officers did not in fact make note of any identifying information about her). See also State v. Hudgins, 195 N.C. App. 430 (2009) (a driver called the police to report that he was being followed, then complied with the dispatcher's instructions to go to a specific location to allow an officer to intercept the trailing vehicle; when the officer stopped the second vehicle, the caller also stopped briefly; the defendant, who was driving the second vehicle, was impaired; the stop was proper, in part because "by calling on a cell phone and remaining at the scene, [the] caller placed his anonymity at risk").[6]

DRIVER'S IDENTITY

[5] North Carolina's appellate courts could adhere to the previous line of authority by ruling that the North Carolina Constitution provides greater protection than the Fourth Amendment, but that is unlikely given the courts' repeated statements that the state and federal constitutions provide coextensive protection from unreasonable searches and seizures. See, e.g., State v. Verkerk, __ N.C. App. __, 747 S.E.2d 658 (2013) (stating that "this Court and the [state] Supreme Court have clearly held that, as far as the substantive protections against unreasonable searches and seizures are concerned, the federal and state constitutions provide the same rights," and citing multiple cases holding that the two constitutions are coextensive in this regard), rev'd on other grounds, 367 N.C. 483 (2014).

[6] The Hudgins court emphasized that the caller remained at the scene of the stop, thereby relinquishing his anonymity. By contrast, in State v. Blankenship, __ N.C. App. __, 748 S.E.2d 616 (2013), a taxi driver called 911 on his cell phone to report an erratic driver. The taxi driver did not give his name, but "when an individual calls 911, the 911 operator can determine the phone number used to make the call. Therefore, the 911 operator was later able to identify the taxicab driver." Nonetheless, the court treated the call as an anonymous tip because "the officers did not meet [the taxi driver] face-to-face," and found that the tip failed to provide reasonable suspicion to support a stop of the other driver. See also State v. Coleman, __ N.C. App. __, 743 S.E.2d 62 (2013) (treating a telephone tip as anonymous even though "the communications center obtained the caller's name . . . and phone number").

"[W]hen a police officer becomes aware that a vehicle being operated is registered to an owner with a suspended or revoked driver's license, and there is no evidence appearing to the officer that the owner is not the individual driving the automobile, reasonable suspicion exists to warrant an investigatory stop." State v. Hess, 185 N.C. App. 530 (2007). See also State v. Johnson, 204 N.C. App. 259 (2010) ("[T]he officers did lawfully stop the vehicle after discovering that the registered owner's driver's license was suspended."). Presumably, an officer would also be justified in stopping a vehicle if he determined that the registered owner was the subject of an outstanding arrest warrant or other criminal process and if the officer could not rule out the possibility that the owner of the vehicle was driving.[7]

INVESTIGATION DURING THE STOP

ORDERING OCCUPANTS OUT OF THE VEHICLE

In the interest of officer safety, an officer may order any or all of a vehicle's occupants out of the vehicle during a traffic stop. Pennsylvania v. Mimms, 434 U.S. 106 (1977) (driver); Maryland v. Wilson, 519 U.S. 408 (1997) (passengers). Likewise, an officer may order the vehicle's occupants to remain in the vehicle. State v. Shearin, 170 N.C. App. 222 (2005); Robert L. Farb, Arrest, Search, and Investigation in North Carolina 45 & n.191 (4th ed. 2011) (collecting cases). Whether, and under what circumstances, an officer can order a driver or passenger into the back seat of the officer's cruiser is an open question in North Carolina and is the subject of a split of authority nationally. Jeff Welty, Traffic Stops, Part II, N.C. Crim. L. Blog (October 28, 2009), http://nccriminallaw.sog.unc.edu/traffic-stops-part-ii/.

FRISKING OCCUPANTS

A frisk does not follow automatically from a valid stop. It is justified only if the officer reasonably suspects that the person or people to be frisked are armed and dangerous. Terry v. Ohio, 392 U.S. 1 (1968). For example, a frisk was justified when a driver "had prior convictions for drug offenses, [an officer] observed [the driver's] nervous behavior inside his vehicle, and [the officer] saw him deliberately conceal his right hand and refuse to open it despite repeated requests." State v. Henry, __ N.C. App. __, 765 S.E.2d 94 (2014). An officer may frisk a passenger based on reasonable suspicion that the passenger is armed and dangerous, even if the officer does not suspect the passenger of criminal activity. Arizona v. Johnson, 555 U.S. 323 (2009).

"CAR FRISKS"

In Michigan v. Long, 463 U.S. 1032 (1983), the Supreme Court held that "the search of the passenger compartment of an automobile, limited to those areas in which a weapon may be placed or hidden, is permissible if the police officer possesses [reasonable suspicion] that the suspect is dangerous and the suspect may gain immediate control of weapons." Although Long was decided in the context of what might be described as a Terry stop rather than a traffic stop – because the vehicle in Long had already crashed when officers stopped to investigate – the two types

[7] In State v. Watkins, 220 N.C. App. 384 (2012), the court of appeals upheld a stop based in part on the fact that the registered owner of a vehicle had outstanding warrants even though the officers involved in the case were "pretty sure" that the driver was not the owner. The court noted that the defendant "was driving a car registered to another person," that the registered owner had outstanding warrants, and that there was a passenger in the vehicle who could have been the registered owner.

of stops are similar if not identical,[8] and the concept of a car frisk applies with equal force to traffic stops. State v. Hudson, 103 N.C. App. 708 (1991) (upholding car frisk arising out of a traffic stop).

Whether there is reasonable suspicion that a person is dangerous is similar to the inquiry that must be made in the Terry frisk context. Factors that courts have mentioned in the car frisk context include: furtive movements by the occupants of the vehicle; lack of compliance with police instructions; belligerence; reports that the suspect is armed; and visible indications that a weapon may be present in the car. See, e.g., State v. Edwards, 164 N.C. App. 130 (2004) (finding a car frisk justified where a sexual assault suspect was reported to have a gun; was noncompliant; and appeared to have reached under the seat of his vehicle); State v. Minor, 132 N.C. App. 478 (1999) (holding a car frisk not justified where a suspect appeared to access the center console of the vehicle and later rubbed his hand on his thigh near his pocket; these movements were not "clearly furtive"); State v. Clyburn, 120 N.C. App. 377 (1995) (ruling a car frisk justified where officers suspected that the defendant was involved in the drug trade and the defendant was belligerent during the stop).

Whether an officer's belief that a suspect may gain immediate control of a weapon is reasonable depends on the particular circumstances of a given traffic stop including the suspect's location relative to the vehicle and whether the suspect has been handcuffed. Compare Edwards, 164 N.C. App. 130 (defendant suspected of possessing handgun who was handcuffed and sitting on the curb was in sufficiently "close proximity to the interior of the vehicle" to gain access to a weapon), and State v. Parker, 183 N.C. App. 1 (2007) (defendant was handcuffed in the backseat of his own car when he disclosed that there was a gun in the car; two other passengers were also in the car; "these circumstances were sufficient to create a reasonable belief that defendant was dangerous and had immediate access to a weapon"), with State v. Braxton, 90 N.C. App. 204 (1988) (it was "uncontroverted that defendant [stopped for speeding] could not obtain any weapon . . . from the car" where he was not in the car and detective testified that defendant could not have reached the area searched).

As to the proper scope of a car frisk, there is little North Carolina law on point. In Parker, 183 N.C. App. 1, the court held that an officer properly searched "a drawstring bag located underneath a piece of newspaper that fell to the ground" as he assisted an occupant out of the vehicle. The court noted that the bag was located near a firearm and "was at least large enough to contain methamphetamine and a 'smoking device," perhaps suggesting a willingness to err on the side of officer safety when confronted with ambiguous facts.

LICENSE, WARRANT, AND RECORD CHECKS

Officers frequently check the validity of a driver's license, registration, and insurance during a traffic stop, and may also check for any outstanding arrest warrants against the driver. In Rodriguez v. United States, __ U.S. __, 135 S. Ct. 1609 (2015), the Supreme Court ruled that "checking the driver's license, determining whether there are outstanding warrants against the driver, and inspecting the automobile's registration and proof of insurance" are routine and permissible parts of an ordinary traffic stop.

This statement is consistent with prior North Carolina case law allowing these checks, and the associated brief delays. State v. Velazquez-Perez, __ N.C. App. __, 756 S.E.2d 869 (2014) (finding "no . . . authority" for the

[8] Berkemer v. McCarty, 468 U.S. 420 (1984) ("[T]he usual traffic stop is more analogous to a so-called 'Terry stop' than to a formal arrest." (internal citations omitted)); State v. Styles, 362 N.C. 412 (2008) ("Traffic stops have 'been historically reviewed under the investigatory detention framework first articulated in Terry.'" (citation omitted)).

defendant's claim that a document check exceeded the scope of a speeding stop, and noting that "officers routinely check relevant documentation while conducting traffic stops"); State v. Hernandez, 170 N.C. App. 299 (2005) (holding that "running checks on Defendant's license and registration" was "reasonably related to the stop based on the seat belt infraction"); State v. Castellon, 151 N.C. App. 675 (2002) (twenty-five minute "detention for the purpose of determining the validity of defendant's license was not unreasonable" when officer's computer was working slowly). See also, e.g., United States v. Villa, 589 F.3d 1334 (10th Cir. 2009) ("It is well-established that [a] law enforcement officer conducting a routine traffic stop may request a driver's license and vehicle registration, run a computer check, and issue a citation." (citation omitted)); See generally Wayne R. LaFave, The "Routine Traffic Stop" From Start to Finish: Too Much "Routine," Not Enough Fourth Amendment, 102 Mich. L. Rev. 1843, 1874-85 (2004) (noting that most courts have permitted license, warrant, and record checks incident to traffic stops, though criticizing some of these conclusions) [hereinafter LaFave, "Routine"].

Checks that focus on a motorist's criminal history rather than his or her driving status and the existence of outstanding arrest warrants may be permissible also, though the issue is less clearly settled. The Rodriguez Court briefly suggested that criminal record checks may be permissible as an officer safety measure. 135 S. Ct. at 1616 (citing United States v. Holt, 264 F.3d 1215 (10th Cir. 2001) (en banc), for the proposition that running a motorist's criminal record is justified by officer safety). However, the Court did not address the issue in detail and at least one state court has since found one variety of record check to be improperly directed at detecting evidence of ordinary criminal wrongdoing. United States v. Evans, 786 F.3d 779 (9th Cir. 2015) (ruling that an officer improperly extended a traffic stop to conduct an "ex-felon registration check," a procedure that inquired into a subject's criminal history and determined whether he had registered his address with the sheriff as required for certain offenders in the state in which the stop took place).

QUESTIONS ABOUT UNRELATED MATTERS

The United States Supreme Court held in Muehler v. Mena, 544 U.S. 93 (2005), that questioning is not a seizure, so the police may question a person who has been detained about matters unrelated to the justification for the detention, even without any individualized suspicion supporting the questions. Although Muehler involved a person who was detained during the execution of a search warrant, not the subject of a traffic stop, its reasoning applies equally in the traffic stop setting. The Court has recognized as much. Arizona v. Johnson, 555 U.S. 323 (2009) ("An officer's inquiries into matters unrelated to the justification for the traffic stop, this Court has made plain, do not convert the encounter into something other than a lawful seizure, so long as those inquiries do not measurably extend the duration of the stop."). See also e.g., United States v. Olivera-Mendez, 484 F.3d 505 (8th Cir. 2007); United States v. Stewart, 473 F.3d 1265 (10th Cir. 2007).

It should be emphasized that the questioning in Muehler did not extend the subject's detention; whether a traffic stop may be prolonged for additional questioning is discussed below.

USE OF DRUG-SNIFFING DOGS

Having a dog sniff a car is not a search and requires no quantum of suspicion. Illinois v. Caballes, 543 U.S. 405 (2005). Therefore, a dog sniff is permitted during any traffic stop, so long as the sniff does not extend the stop. Whether a traffic stop may be prolonged for a dog sniff is discussed below.

ASKING FOR CONSENT TO SEARCH

Requests to search made during a traffic stop probably should be analyzed just like any other inquiry about matters unrelated to the purpose of the stop: because such a request is not, in itself, a seizure, it does not implicate the Fourth Amendment unless it extends the duration of the stop. 4 LaFave, Search and Seizure § 9.3(e). See also United States v. Turvin, 517 F.3d 1097 (9th Cir. 2008) (because "officers do not need reasonable suspicion to ask questions unrelated to the purpose of an initially lawful stop," a request for consent to search that did not substantially prolong a traffic stop was permissible).

However, at least one North Carolina Court of Appeals case has stated that "[i]f the officer's request for consent to search is unrelated to the initial purpose for the stop, then the request must be supported by reasonable articulable suspicion of additional criminal activity." State v. Parker, 183 N.C. App. 1 (2007). The court's reasoning appears to have been that such a request inherently involves at least a minimal extension of the stop and is therefore unreasonable.[9] But cf. State v. Jacobs, 162 N.C. App. 251 (2004) ("Defendant argues alternatively that the State failed to establish that Officer Smith had sufficient reasonable suspicion to request defendant's consent for the search [during an investigative stop]. No such showing is required.").

PROLONGING THE STOP TO INVESTIGATE UNRELATED MATTERS

In Rodriguez v. United States, __ U.S. __, 135 S. Ct. 1609 (2015), the Supreme Court ruled that an officer could not briefly extend a traffic stop to deploy a drug sniffing dog. The Court reasoned that a stop may not be extended beyond the time necessary to complete the "mission" of the stop, which is "to address the traffic violation that warranted the stop . . . and attend to related safety concerns." That is, "[a]uthority for the seizure ends when tasks tied to the traffic infraction are – or reasonably should have been – completed." Because a dog sniff is not a task "tied to the traffic infraction," but rather is "aimed at 'detect[ing] evidence of ordinary criminal wrongdoing,'" any delay to enable a dog sniff violates the Fourth Amendment. The Court rejected the idea, widely endorsed by the lower courts,[10] that "de minimis" delays of just a few minutes did not rise to the level of Fourth Amendment concern. It therefore effectively overruled State v. Sellars, 222 N.C. App. 245 (2012) (delay of four minutes and thirty-seven seconds to allow a dog sniff to take place was de minimis and did not violate the Fourth

[9] This may not be so in some cases, as when one officer asks for consent to search while another is writing a citation. The issue of delays is addressed later in this manuscript.

[10] See, e.g., United States v. Rodriguez, 741 F.3d 905 (8th Cir. 2014) (a seven- or eight-minute delay to deploy a drug-sniffing dog was "a de minimis intrusion" that did not implicate the Fourth Amendment), vacated, __ U.S. __, 135 S. Ct. 1609 (2015); United States v. Green, 740 F.3d 275 (4th Cir. 2014) (running a "criminal history check added just four minutes to the traffic stop" and "at most, amounted to a de minimis intrusion . . . [that] did not constitute a violation of [the defendant's] Fourth Amendment rights"); United States v. Mason, 628 F.3d 123 (4th Cir. 2010) ("The one to two of the 11 minutes [that the stop took] devoted to questioning on matters not directly related to the traffic stop constituted only a slight delay that raises no Fourth Amendment concern."); United States v. Harrison, 606 F.3d 42 (2d Cir. 2010) (per curiam) (five to six minutes of questioning unrelated to the purpose of the traffic stop "did not prolong the stop so as to render it unconstitutional"); Turvin, 517 F.3d 1097 (asking a "few questions" unrelated to the stop that prolonged the stop by a "few moments" was not unreasonable, and collecting cases). See generally United States v. Everett, 601 F.3d 484 (6th Cir. 2010) (collecting cases and concluding that whether a delay is de minimis depends on all the circumstances, including whether the officer is diligently moving toward a conclusion of the stop, and the ratio of stop-related questions to non-stop-related questions).

Amendment), and State v. Brimmer, 187 N.C. App. 451 (2007) (delay of approximately four minutes to allow a dog sniff to take place was de minimis).[11]

The reasoning of Rodriguez extends beyond dog sniffs. The case clearly implies that an officer may not extend a stop in order to ask questions unrelated to the purpose of the stop, such as questions about drug activity. Lower courts have uniformly understood that implication. See, e.g., United States v. Archuleta, __ F. App'x __, 2015 WL 4296639 (10th Cir. July 16, 2015) (unpublished) (citing Rodriguez while ruling that a bicycle stop was improperly prolonged "in order to ask a few additional questions" unrelated to the bicycle law violations that prompted the stop); Amanuel v. Soares, 2015 WL 3523173 (N.D. Cal. June 3, 2015) (unpublished) (extending a traffic stop by 10 minutes to discuss a passenger's criminal history, ask whether the passenger had been subpoenaed to an upcoming criminal trial, and caution the passenger against perjuring himself, would amount to an improper extension of the stop in violation of Rodriguez); United States v. Kendrick, 2015 WL 2356890 (W.D.N.Y. May 15, 2015) (unpublished) (agreeing that "absent a reasonable suspicion of criminal activity, extending the stop . . . in order to conduct further questioning of the driver and the occupants about matters unrelated to the purpose of the traffic stop would appear to violate the . . . rule announced in Rodriguez," though finding that reasonable suspicion was present in the case under consideration).[12]

Presumably, Rodriguez also makes it improper for an officer to extend a stop in order to seek consent to search. See United States v. Hight, __ F. Supp. 3d __, 2015 WL 4239003 (D. Colo. June 29, 2015) (an officer stopped a truck for a traffic violation, ran standard checks on the driver and spoke briefly with him, and decided that he wanted to ask for consent to search; the officer called for backup and spent at least nine minutes waiting for another officer and working on a consent form; when backup arrived, the officer terminated the stop, then asked for and obtained consent; the court ruled that the nine-minute extension of the stop was improper and that it required suppression even if consent to search was obtained voluntarily after the stop ended). Of course, as noted above, Parker, 183 N.C. App. 1, is also a relevant precedent in this area.

Officers may respond to Rodriguez by multitasking: deploying a drug dog while waiting for a response on a license check, or asking investigative questions of the driver while filling out a citation. Defendants may argue that such multitasking inherently slows an officer down. Whether that is so in a particular case is a factual question. At least in two early cases on point, courts seem to have accepted officers' multitasking. See, e.g., State v. Jackson, __ N.E.3d __, 2015 WL 3824080 (Ohio Ct. App. 2015) (a traffic stop conducted by one Trooper was not impermissibly extended when a different Trooper conducted a dog sniff while the first Trooper investigated the defendant's background and wrote a traffic citation); Lewis v. State, 773 S.E.2d 423 (Ga. Ct. App. 2015) (similar). It may be worth noting that both Jackson and Lewis involved multiple officers, with one handling the dog while the other addressed the traffic violation.

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[11] Even before Rodriguez, the North Carolina Court of Appeals had limited Brimmer and Sellars in State v. Cottrell, __ N.C. App. __, 760 S.E.2d 274 (2014), where the court stated that it did "not believe that the de minimis analysis applied in Brimmer and Sellars should be extended to situations when, as here, a drug dog was not already on the scene."

[12] Even before Rodriguez, it was risky for an officer to measurably extend a stop to ask questions unrelated to the purpose of the stop in light of State v. Jackson, 199 N.C. App. 236 (2009) (finding that an officer unreasonably extended a traffic stop when she asked just a handful of drug-related questions).

One question that arises from Rodriguez is what sorts of conversation relate to the traffic stop. May an officer engage in brief chit-chat with a motorist, or does such interaction constitute an extension of the stop? What about inquiring about a motorist's travel plans, or a passenger's, where such inquiries may bear on the likelihood of driver fatigue but also may be used to seek out inconsistencies that may be evidence of illicit activity? One early case of note is United States v. Iturbe-Gonzalez, __ F. Supp. 3d __, 2015 WL 1843046 (D. Mont. April 23, 2015), where the court indicated that an officer may make "traffic safety-related inquiries of a general nature [including about the driver's] travel plans and travel objectives," and said that "any suggestion to the contrary would ask that officers issuing traffic violations temporarily become traffic ticket automatons while processing a traffic violation, as opposed to human beings." Of course, even if Iturbe-Gonzalez is correct that a question or two about travel plans are sufficiently related to the purpose of a traffic stop, a court might take a different view of an officer's extended discussion of itineraries with multiple vehicle occupants.

TOTAL DURATION

There is no bright-line rule regarding the length of traffic stops. As a rule of thumb, "routine" stops that exceed twenty minutes may deserve closer scrutiny. See Robert L. Farb, Arrest, Search, and Investigation in North Carolina 43 (4th ed. 2011). Stops of various lengths have been upheld by the courts. See, e.g., State v. Heien, __ N.C. App. __, 741 S.E.2d 1 (2013) (thirteen minutes was "not unduly prolonged"), aff'd per curiam, 367 N.C. 163 (2013), and aff'd on other grounds, __U.S. __, 135 S. Ct. 530 (2014); State v. Castellon, 151 N.C. App. 675 (2002) (twenty-five minutes, though some portion of that time may have been after reasonable suspicion developed); United States v. Rivera, 570 F.3d 1009 (8th Cir. 2009) (seventeen minutes); United States v. Eckhart, 569 F.3d 1263 (10th Cir. 2009) (twenty-seven minutes); United States v. Muriel, 418 F.3d 720 (7th Cir. 2005) (thirteen minutes).

TERMINATION OF THE STOP

WHEN TERMINATION TAKES PLACE

As a general rule, "an initial traffic stop concludes . . . after an officer returns the detainee's driver's license and registration." Jackson, 199 N.C. App. 236; State v. Heien, __ N.C. App. __, 741 S.E.2d 1 (2013) ("Generally, the return of the driver's license or other documents to those who have been detained indicates the investigatory detention has ended."), aff'd per curiam, 367 N.C. 163 (2013), and aff'd on other grounds, __ U.S. __, 135 S. Ct. 530 (2014). When an officer takes other documents from the driver, such as registration and insurance documents, these, too must be returned before the stop ends. State v. Velazquez-Perez, __ N.C. App. __, 756 S.E.2d 869 (2014) (even though an officer had returned a driver's license and issued a warning citation, "[t]he purpose of the stop was not completed until [the officer] finished a proper document check [of registration, insurance, and other documents the officer had taken] and returned the documents"). As the Fourth Circuit explains, when an officer returns a driver's documents, it "indicate[s] that all business with [the driver is] completed and that he [is] free to leave." United States v. Lattimore, 87 F.3d 647 (4th Cir. 1996).

This rule is not absolute and specific circumstances may dictate a different result. The North Carolina Court of Appeals has held, in at least one case, that under the totality of the circumstances, the occupants of a vehicle remained seized even after the return of the driver's paperwork, in part because the officer "never told [the driver] he was free to leave." State v. Myles, 188 N.C. App. 42 (2008), aff'd per curiam, 362 N.C. 344 (2008). See also State v. Kincaid, 147 N.C. App. 94 (2001) (suggesting that the return of a driver's license and registration is a necessary, but not invariably a sufficient, condition for the termination of a stop).

Some commentators have argued that many motorists will not feel free to depart until they are expressly permitted to do so. LaFave, "Routine" at 1899-1902. Certainly many officers mark the end of a stop by saying "you're free to go" or "you can be on your way" or something similar. Nonetheless, the United States Supreme Court has rejected the idea that drivers must expressly be told that they are free to go before a stop terminates. Ohio v. Robinette, 519 U.S. 33 (1996) (adopting a totality of the circumstances approach).

EFFECT OF TERMINATION

Once a stop has ended, the driver and any other occupants of the vehicle may depart. Any further interaction between the officer and the occupants of the vehicle is, therefore, consensual. The officer may ask questions about any subject at all, at any length; may request consent to search; and so on. In other words, the "time and scope limitations" that apply to a traffic stop cease to be relevant. LaFave, "Routine" at 1898.

DEFENDING HABITUAL FELON CASES

HABITUAL FELON

P. Sunny Panyanouvong-Rubeck, APD **June 23, 2017** Toussaint C. Romain, APD

OUTLINE

I. What is Habitual Offender Law?
II. How does one become a Habitual Felon?
III. How does one become a Violent Habitual Felon?
IV. How is Habitual Felon (or Violent H.F.) status charged?
V. What are key Pre-Trial considerations?
VI. What are key Guilty Plea considerations?
VII. What are key Trial considerations?
VIII. How does Habitual Felon (or Violent H.F.) enhance the Sentence?
IX. How does Habitual Felon status change the Prior Record Level Points?
X. What to expect in Client Communications?

I. What is Habitual Offender Law?

"The primary purpose of a recidivist statute is 'to deter repeat offenders and, at some point in the life of one who repeatedly commits criminal offenses serious enough to be punished as felonies, to segregate that person from the rest of society for an extended period of time.' " State v. Aldridge, 76 N.C. App. 638, 640 (1985).

a. General Rule: a law that allows for greater punishment for "repeat offenders."

b. Habitual Crimes vs. Habitual Felons.
   i. Habitual Crimes are initially misdemeanors, but due to the multiple convictions for the same offense, the crime is enhanced to a felony.
      1. Habitual Crime does not mean Habitual Felon, but Habitual Crimes could lead to Habitual Felon status.
      2. Examples of Habitual Crimes:
         a. Habitual DWI (***3+ prior impaired driving***) (N.C.G.S. §20-138.5;
         b. Habitual Larceny (***4+ prior Larcenies***) N.C.G.S. §14-72;
         c. Habitual Misdemeanor Assault (***2+ prior Assaults***) N.C.G.S. §14-33.2;
         d. Habitual Breaking &/or Entering (***1+ prior Breaking/Entering***) N.C.G.S. §§14-7.25 – 7.31;
         e. Armed Habitual Felon (***1+ prior Firearm related felony***) N.C.G.S. §§14-7.35 – 7.41.
   ii. Habitual Felon is different from Habitual crimes. There are two types:
      1. Habitual Felon (***3+ priors for ANY felony***) N.C.G.S. §§14-7.1 – 7.12.
         a. Three (3) prior felony convictions. Indicted on a new fourth (or more) felony. Sentenced at four (4) classes higher than the underlying felony, but no higher than a Class C felony punishment for sentencing."
         b. See **Attachment A** – *Habitual Felon Legal Definition; Punishment; Prior Record Example*.

2. Violent Habitual Felon (***2+ priors for ONLY Class A – E felonies***) N.C.G.S. §§14-7.6 & 7.7.
    a. Two (2) separate prior convictions for any Class A – E felonies. Indicted for any Class A – E felony. If convicted of the new Class A – E felony, the client will go to prison for LIFE without parole.
    b. See **Attachment B** – *Violent Habitual Felon Legal Definition; Punishment; Prior Record Example*.
    c. The existence of "factual violence" is irrelevant.

c. See Robert L. Farb's "*Habitual Offender Law*" online article: http://www.ncids.org/Defender%20Training/Kicking%20It%20Up/Habitual%20Offender%20Laws.pdf

II. How does one become a Habitual Felon?

a. Any person with three (3) non-overlapping felony convictions (federal or state) has reached Habitual Felon status. (**Attach. A**).
    i. This is a status, not a criminal charge.
    ii. A person with status as a Habitual Felon will have that status for life.
    iii. Legally, the felony convictions that establish the status must have occurred since July 1967. N.C.G.S. §14-7.1.
        1. The convictions do not have to be similar in nature to each other or to the newly charged offense.
        2. The convictions must be felonies in North Carolina or defined as felonies under the laws of any sovereign jurisdiction where the previous felony convictions occurred. Id.
        3. The previous felony convictions must be "non-overlapping," meaning that there is a break between the three convictions. Id.

    iv. Only one felony committed before the defendant was 18 years old may be counted toward his Habitual Felon status. Id.

III. How does one become a Violent Habitual Felon?

a. Any person with two (2) non-overlapping "violent felony" convictions has reached Violent Habitual status. (**Attach. B**).
    i. Violent Felony means (according to N.C.G.S. §14-7.7):
        1. Any Class A – Class E felony in North Carolina.
        2. Any repealed or superseded offenses that are the substantial equivalent to a current Class A – E felony in North Carolina.
        3. Any offense in another jurisdiction substantially similar to either (a) or (b) above.

IV. How is Habitual Felon (or Violent H.F.) status charged?

a. The decision to charge an individual as a Habitual Felon (or Violent H.F.) is entirely within the prosecutor's discretion. See State v. Parks, 146 N.C. App. 568 (2001).

b. See **Attachment C** – *Charging of Habitual Felon §14-7.3* and *Charging Violent Habitual Felon §14-7.9*.

c. Indictment. N.C.G.S. §14-7.3.
   i. The Indictment must be separate from the Principal Felony Indictments. Id.
      1. However, the Court of Appeals has allowed Habitual Felon Indictments to be listed as Count II to the Principal Felony. See State v. Young, 120 N.C. App. 456, 459-60 (1995).
   ii. The Habitual Felon Indictment must set forth the following:
      1. The date of the commission (*for each of the 3 felonies*);
      2. The date of the conviction (*for each of the 3 felonies*);
      3. The state or sovereign against which the felony was committed (*for each of the 3 felonies*); &
      4. The identity of the court in which the conviction took place (*for each of the 3 felonies*). N.C.G.S. §14-7.3.

d. What evidence is sufficient to prove the predicate convictions?
   i. Stipulation by both parties. N.C.G.S. §14-7.4.
   ii. The original or certified copy of the court record of the prior convictions. Id.
   iii. Note: The original or certified copy of the court record of conviction is *prima facie* evidence of that prior conviction. Id.

V. What are key Pre-Trial considerations?

a. Late identification by District Attorneys of Habitual Felon status.
   i. A client, typically, will not be identified as a Habitual Felon until after Bond Hearing or Probable Cause Hearing dates in District Court.
   ii. Remember, Habitual Felon is a "status" and not a standalone offense, so a Habitual Felon Indictment should not result in a new Bond or Order for Arrest.
   iii. You may become aware of your client's Habitual Felon status before the prosecutor does. In those instances, it might be advantageous to seek a disposition in the case as early as possible.

b. Critique every Habitual Felon Indictment; look for irregularities:
   i. Overlapping prior felonies.
   ii. Different names or dates of birth in court records.
   iii. Crimes alleged as predicate felonies that are not actually felonies. See State v. Moncree, 188 NC App 221 (2008).

c. Anti-Collateral Attack Rule
    i. If you believe that one of the predicate felony convictions might be effectively attacked by a *Motion for Appropriate Relief* make those efforts before the trial starts. See State v. Creason, 123 NC App 495 (1996).
    ii. EXCEPTION:
        1. Even during the trial proceedings on the Habitual Felon matter, a *Motion to Suppress* the prior convictions due to lack of counsel is still viable pursuant to N.C.G.S. §15A-980.

d. Beware of Rapidly Escalating Severity of Charges.
    i. Charges starting out as Misdemeanors can become Habitual Felon cases.
    ii. For example, a client can be charged with Misdemeanor Assault in District Court. Prosecutors could indict the client for Habitual Misdemeanor Assault, which would serve as the Principal felony for a Habitual Felon Indictment.
    iii. It is important that you analyze your clients record to the extent possible, and carefully interview him to determine his exposure to these Misdemeanor "bump-up" Felonies, and to the Habitual Felon status.

VI. What are key Guilty Plea considerations?

a. Most Habitual Felon cases are resolved with non-Habitual guilty pleas and sentences.
    i. A non-Habitual Felon Plea Transcript must be prepared as any other Felony plea.
    ii. On the other hand, if the plea involves an admission to Habitual Felon status, that admission must be part of the Plea Transcript. (**Attachment D** – *Example of general Transcript of Plea with Principal Felony + Habitual Felon Status*).
    iii. If there are multiple cases pending, try to wrap them up in one session of court, since Habitual Felony convictions in different sessions must run consecutively.

VII. What are key Trial considerations?

a. Habitual Felon trials are bifurcated.
    i. Phase-1: (The jury trial for the Principal/Substantive Felony.)
        1. A jury will deliberate on the Guilt/Innocence of the Principal Felony.
        2. The jury shall not hear about Habitual Felon status or sentence during the trial. N.C.G.S. §14-7.5.
        3. If a jury returns a verdict of Not Guilty, then the trial is over and the Habitual Felon charge must be dismissed.
        4. If a jury returns a verdict of Guilty on all or just one felony, then Phase-2 will begin.
        5. Permissible Closing Argument in Phase-1:
            a. You may not refer to the sentence your client might receive as a Habitual Felon.
            b. You may refer to the sentence your client might receive for the Principal Felony.

ii. Phase-2: (The jury trial for the Habitual Felon)
    1. The State must prove beyond reasonable doubt that the client has three (3) prior felony convictions, and thus is a Habitual Felon. N.C.G.S. §14-7.5.
    2. The main evidence for the State is typically certified court records.
    3. Permissible Closing Arguments in Phase-2:
        a. You may refer to the enhanced sentence your Habitual Felon client is expose to.
        b. If the State's certified records of judgments and convictions are sloppy, exploit those mistakes. (i.e. Different names or dates of birth vary, etc.)
        c. An effective argument to make is that "when the stakes are this high, discrepancies like "that" are unacceptable."

iii. See **Attachment E** – *Habitual Felon* and *Violent Habitual Felon Pattern Jury Instructions*.

b. You have leverage in Phase-2 for sentencing.
    i. If you get a guilty verdict on the Principal Felony, don't give up!
    ii. You still have some leverage for a decent sentence by releasing the jury, prior to Phase 2, in exchange for a "more lenient" sentence from the court.
    iii. Ask to Conference the case with the judge and the prosecutor. Explore whether the judge would be willing to impose a Mitigated Range sentence or a bottom of the Presumptive Range sentence in exchange for a stipulation to the Habitual Felon status, rather than making the jury stick around to commence a trial on the Habitual Phase-2.
    iv. Your client will have to agree, since he will have to execute a Habitual Felon Plea Transcript and admit his Habitual Felon status. (**Attachment F** – *Example of Transcript of Plea for Habitual Felon Status ONLY*).
    v. Although all parties must reach a consensus, the Habitual Felon Plea Transcript will usually read "sentencing will be in the Court's discretion." (**Attach. F**).

c. Possible Phase 3: If *aggravating* factors have been alleged, the jury could be asked to deliberate a third time on whether aggravating factors have been proven beyond reasonable doubt.

VIII. How does Habitual Felon (or Violent) enhance the Sentence?

a. Nothing, if a client's Principal Felony charge(s) is dismissed or if a jury acquits.
   i. The Habitual Felon (or Violent) status has no impact.
   ii. The "status" must be dismissed. It cannot stand alone.

b. For Habitual Felon sentencing:
   i. If a client is convicted of the principal felony charge, the Habitual Felon status will elevate the felony punishment four (4) classes higher for sentencing (capped at Class C). N.C.G.S. §14-7.6.

Class of Substantive Felony	Will Be Enhanced to	Habitual Felon Class
Class I	→	Class E
Class H	→	Class D
Class G	→	Class C
Class F	→	Class C
Class E	→	Class C
Class D	→	Class C
Class A, Class B1, Class B2	→	Class A, Class B1, Class B2

   ii. See **Attachment G** – *Habitual Felon Verdict and Judgment; Evidence of Prior Convictions of Felony Offenses; and Sentencing of Habitual Felons*.

c. For Violent Habitual Felon sentencing:
   i. If a client is convicted of the principal Class A – E felony with a Violent Habitual Indictment attached, the client will be sentenced to LIFE without Parole. N.C.G.S. §14-7.12.
   ii. The law does not specify a felony class for sentencing, but the effect appears to be the same as non-capital sentencing for a Class A felony.

Class of Substantive Felony	Will Be Enhanced to	Violent Habitual Felon Class
Class I	→	Not Applicable
Class H	→	Not Applicable
Class G	→	Not Applicable
Class F	→	Not Applicable
Class E	→	LIFE
Class D	→	LIFE
Class A, Class B1, Class B2	→	LIFE

   iii. See **Attachment H** – *Violent Habitual Felon Verdict and Judgment; Evidence of Prior Convictions of Felony Offenses;* and *Sentencing of Habitual Felons*.

IX. How does Habitual Felon status change the Prior Record Level Points?

a. If a client is indicted as a Habitual Felon, none of the felony convictions used to establish the client's Habitual Felon status can count toward the Prior Record Level point system. N.C.G.S. §14-7.6.

b. However, if a person was convicted of multiple felonies in one session of court, one of those felony convictions may be used as a predicate conviction toward Habitual Felon status, and a second one can be used toward the Prior Record Level. N.C.G.S. §14-7.12.

c. Sometimes, a Habitual Felon status client will face more time on a non-Habitual plea or conviction – so watch out.

X. What to expect in Client Communications?

a. Clients in Habitual Felon cases have special concerns.
   i. There is often an unwillingness or inability to accept the possibility of a Habitual Felon sentence.
   ii. As the attorney, you will be competing with myths about the Habitual Felon law.
   iii. Visit your clients early and often. Sit for a while. You need to build a relationship and trust in order to get through this with your client with the least amount of harm incurred on your client.
   iv. You have very little good news, but you must try to communicate that the offer is much better than the alternative.
   v. Younger/new Habitual Felon clients are generally more difficult to work with than older/previously Habitual Felon convicted clients.

b. See Jeff Welty's online article "*Advising a Defendant of the Maximum Possible Sentence During a Habitual Felon Plea.*" https://nccriminallaw.sog.unc.edu/advising-a-defendant-of-the-maximum-possible-sentence-during-a-habitual-felon-plea/

c. Decisions made with clients regarding strategy become more fraught with danger.
   i. For example, it is often easy to give up a reasonable plea offer and fight for suppression on a Class H drug felony.
   ii. However, if the client is Habitual Felon status, the rest of his life on the line.
   iii. Clients must know as soon as possible what they are facing so that decision-making can begin.
   iv. It is extremely important not to sugar coat any aspect of the case or the Habitual Felon status.

Habitual Felon cases can be tough to handle but know this – Habitual Felon cases can be won. These are still regular cases with the only difference being the amount of time your client faces. So, FIGHT but only when the case is worth it. Good luck!

Attachments

1. **Attachment A** – *Habitual Felon Legal Definition; Punishment; Prior Record Example*.
2. **Attachment B** – *Violent Habitual Felon Legal Definition; Punishment; Prior Record Example*.
3. **Attachment C** – *Charging Habitual Felon §14-7.3* and *Charging Violent Habitual Felon §14-7.9.*
4. **Attachment D** – *Example of general Transcript for Plea with Principal Felony + Habitual Felon Status*.
5. **Attachment E** – *Habitual Felon* and *Violent Habitual Felon Pattern Jury Instructions*.
6. **Attachment F** – *Example of Transcript of Plea for Habitual Felon Status ONLY*.
7. **Attachment G** – *Habitual Felon Verdict and Judgment; Evidence of Prior Convictions of Felony Offenses; and Sentencing of Habitual Felons*.
8. **Attachment H** – *Violent Habitual Felon Verdict and Judgment; Evidence of Prior Convictions of Felony Offenses; and Sentencing of Habitual Felons*.
9. **Quick Habitual Felon (& Violent H.F.) Statutory HyperLinks:**

Article 2A - Habitual Felons.

§ 14-7.1. Persons defined as habitual felons.
§ 14-7.2. Punishment.
§ 14-7.3. Charge of habitual felon.
§ 14-7.4. Evidence of prior convictions of felony offenses.
§ 14-7.5. Verdict and judgment.
§ 14-7.6. Sentencing of habitual felons.

Article 2B - Violent Habitual Felons.

§ 14-7.7. Persons defined as violent habitual felons.
§ 14-7.8. Punishment.
§ 14-7.9. Charge of violent habitual felon.
§ 14-7.10. Evidence of prior convictions of violent felonies.
§ 14-7.11. Verdict and judgment.
§ 14-7.12. Sentencing of violent habitual felons.

Attachment A

Habitual Felon Legal Definition; Punishment; Prior Record Example.

considered felonies for the purposes of this Article. For the purposes of this Article, felonies committed before a person attains the age of 18 years shall not constitute more than one felony. The commission of a second felony shall not fall within the purview of this Article unless it is committed after the conviction of or plea of guilty to the first felony. The commission of a third felony shall not fall within the purview of this Article unless it is committed after the conviction of or plea of guilty to the second felony. Pleas of guilty to or convictions of felony offenses prior to July 6, 1967, shall not be felony offenses within the meaning of this Article. Any felony offense to which a pardon has been extended shall not for the purpose of this Article constitute a felony. The burden of proving such pardon shall rest with the defendant and the State shall not be required to disprove a pardon. (1967, c. 1241, s. 1; 1971, c. 1231, s. 1; 1979, c. 760, s. 4; 1981, c. 179, s. 10; 2011-192, s. 3(b).)

§ 14-7.2. Punishment.

When any person is charged by indictment with the commission of a felony under the laws of the State of North Carolina and is also charged with being an habitual felon as defined in G.S. 14-7.1, he must, upon conviction, be sentenced and punished as an habitual felon, as in this Chapter provided, except in those cases where the death penalty or a life sentence is imposed. (1967, c. 1241, s. 2; 1981, c. 179, s. 11.)

a sample of the defendant's DNA has not previously been obtained and the defendant's DNA record has not previously been stored in the State DNA Database, or if previously obtained and stored, the defendant's DNA sample and record have been expunged.

Date	Name Of Prosecutor (Type Or Print)	Signature Of Prosecutor

V. PRIOR CONVICTION

NOTE: *Federal law precludes making computer printout of DCI-CCH (rap sheet) part of permanent public court record.*

NOTE: *The only misdemeanor offenses under Chapter 20 that are assigned points for determining prior record level for felony sentencing are misdemeanor death by vehicle [G.S. 20-141.4(a2)] and, for sentencing for felony offenses committed on or after December 1, 1997, impaired driving [G.S. 20-138.1] and commercial impaired driving [G.S. 20-138.2]. First Degree Rape and First Degree Sexual Offense convictions prior to October 1, 1994, are Class B1 convictions.*

Source Code	Offenses	File No.	Date Of Conviction	County (Name of State if not NC)	Class
	POSSESSION OF FIREARM BY FELON	14CRS020705	03/13/2015	MECK	G (1)
	AWDW INTENT TO KILL	14CRS020704	03/13/2015	MECK	E
	DISCHARGE WEAPON OCCUPIED PROP	14CRS020703	03/13/2015	MECK	E
	ROBBERY WITH DANGEROUS WEAPON	08CRS234883	01/28/2010	MECK	D
	CONSP ARMED ROBBERY BUS/PERS	08CRS234884	01/28/2010	MECK	E
	CONSP ROBBERY DANGRS WEAPON	08CRS238918	01/28/2010	MECK	E
	ROBBERY WITH DANGEROUS WEAPON	08CRS238917	01/28/2010	MECK	D (2)
	DWLR	08CR 227173	09/29/2009	MECK	/
	RESISTING PUBLIC OFFICER	08CR 227176	09/29/2009	MECK	2
	HIT/RUN FAIL STOP PROP DAMAGE	08CR 234926	11/10/2008	MECK	1
	POSSESS MARIJUANA UP TO 1/2 OZ	07CR 253047	01/31/2008	MECK	3
	FELONY POSSESSION OF COCAINE	06CRS249951	10/12/2007	MECK	I (3)
	LARCENY OF MOTOR VEHICLE (F)	07CRS217260	10/12/2007	MECK	H
	POSSESS MARIJUANA UP TO 1/2 OZ	05CR 030021	01/03/2007	MECK	3

Attachment B

Violent Habitual Felon Legal Definition; Punishment; Prior Record Example.

the conviction or plea of guilty or no contest to the first violent felony. Any felony to which a pardon has been extended shall not, for the purposes of this Article, constitute a felony. The burden of proving a pardon shall rest with the defendant, and this State shall not be required to disprove a pardon. Conviction as an habitual felon shall not, for purposes of this Article, constitute a violent felony.

(b) For purposes of this Article, "violent felony" includes the following offenses:

(1) All Class A through E felonies.

(2) Any repealed or superseded offense substantially equivalent to the offenses listed in subdivision (1).

(3) Any offense committed in another jurisdiction substantially similar to the offenses set forth in subdivision (1) or (2). (1994, Ex. Sess., c. 22, ss. 31, 32; 2000-155, s. 14.)

§ 14-7.8. Punishment.

When a person is charged by indictment with the commission of a violent felony and is also charged with being a violent habitual felon as defined in G.S. 14-7.7, the person must, upon conviction, be sentenced in accordance with this Article, except in those cases where the death penalty is imposed. (1994, Ex. Sess., c. 22, s. 31.)

a sample of the defendant's DNA has not previously been obtained and the defendant's DNA record has not previously been stored in the State DNA Database, or if previously obtained and stored, the defendant's DNA sample and record have been expunged.

Date	Name Of Prosecutor (Type Or Print)	Signature Of Prosecutor
	I.	

V. PRIOR CONVICTION

NOTE: *Federal law precludes making computer printout of DCI-CCH (rap sheet) part of permanent public court record.*

NOTE: *The only misdemeanor offenses under Chapter 20 that are assigned points for determining prior record level for felony sentencing are misdemeanor death by vehicle [G.S. 20-141.4(a2)] and, for sentencing for felony offenses committed on or after December 1, 1997, impaired driving [G.S. 20-138.1] and commercial impaired driving [G.S. 20-138.2]. First Degree Rape and First Degree Sexual Offense convictions prior to October 1, 1994, are Class B1 convictions.*

Source Code	Offenses	File No.	Date Of Conviction	County (Name of State if not NC)	Class
	POSSESS DRUG PARAPHERNALIA	10CR 236711	01/12/2011	MECK	1
	POSSESS DRUG PARAPHERNALIA	10CR 220959	10/13/2010	MECK	1
	POSSESS MARIJUANA UP TO 1/2 OZ	10CR 220958	10/13/2010	MECK	3
	FAIL TO HEED LIGHT OR SIREN	06CRS244390	03/13/2008	MECK	/
	MALICIOUS CONDUCT BY PRISONER	06CRS244382	03/13/2008	MECK	F
	RESISTING PUBLIC OFFICER	06CRS244389	03/13/2008	MECK	2
	RESISTING PUBLIC OFFICER	05CRS258457	01/25/2007	MECK	2
	COMMUNICATING THREATS	05CRS258458	01/25/2007	MECK	1
	AWDW SERIOUS INJURY	01CRS031465	04/12/2002	MECK	E
	AWDW SERIOUS INJURY	01CRS031466	04/12/2002	MECK	E
	RESISTING PUBLIC OFFICER	00CR 044574	12/11/2000	MECK	2
	ASSAULT WITH A DEADLY WEAPON	97CRS034255	05/24/1999	MECK	A1
	DISCHARGE WEAPON OCCUPIED PROP	97CRS034254	05/24/1999	MECK	E
	RESISTING PUBLIC OFFICER	98CR 017481	09/15/1998	MECK	2
	RESISTING PUBLIC OFFICER	98CR 002700	03/12/1998	MECK	2
	RESISTING PUBLIC OFFICER	97CR 030933	10/28/1997	MECK	2
	POSSESS MARIJUANA UP TO 1/2 OZ	97CR 009407	07/08/1997	MECK	3
	DISORDERLY CONDUCT	97CR 104710	04/28/1997	MECK	2

Attachment C

Charging Habitual Felon §14-7.3

and

Charging Violent Habitual Felon §14-7.9.

defendant charged with being an habitual felon in a bill of indictment shall be required to go to trial on said charge within 20 days of the finding of a true bill by the grand jury; provided, the defendant may waive this 20-day period. (1967, c. 1241, s. 3; 2011-192, s. 3(c).)

§ 14-7.9. Charge of violent habitual felon.

An indictment that charges a person who is a violent habitual felon within the meaning of G.S. 14-7.7 with the commission of any violent felony must, in order to sustain a conviction of violent habitual felon, also charge that the person is a violent habitual felon. The indictment charging the defendant as a violent habitual felon shall be separate from the indictment charging the defendant with the principal violent felony. An indictment that charges a person with being a violent habitual felon must set forth the date that prior violent felonies were committed, the name of the state or other sovereign against whom the violent felonies were committed, the dates of convictions of the violent felonies, and the identity of the court in which the convictions took place. A defendant charged with being a violent habitual felon in a bill of indictment shall not be required to go to trial on that charge within 20 days after the finding of a true bill by the grand jury unless the defendant waives this 20-day period. (1994, Ex. Sess., c. 22, s. 31.)

Attachment D

Example of general Transcript for Plea with

Principal Felony + Habitual Felon Status.

That CLIENT is a PRL 5 for Habitual Sentencing; pleading to a Class C felony.

That the Court will sentence CLIENT to an Active Sentence for a minimum of 114 months and to a maximum of 149 months.

☒ The State dismisses the charge(s) set out on Page Two, Side Two, of this transcript.

☐ The defendant stipulates to restitution to the party(ies) in the amounts set out on "Restitution Worksheet, Notice And Order (Initial Sentencing)" (AOC-CR-611).

21.	Is the plea arrangement as set forth within this transcript and as I have just described it to you correct as being your full plea arrangement?	(21) Yes
22.	Do you now personally accept this arrangement?	(22) Yes
23.	*(Other than the plea arrangement between you and the prosecutor)* has anyone promised you anything or threatened you in any way to cause you to enter this plea against your wishes?	(23) No
24.	Do you enter this plea of your own free will, fully understanding what you are doing?	(24) Yes
25.	Do you agree that there are facts to support your plea ☐ and admission to aggravating factors ☐ and sentencing points not related to prior convictions, and do you consent to the Court hearing a summary of the evidence?	(25) Yes
26.	Do you have any questions about what has just been said to you or about anything else connected to your case?	(26) No

ACKNOWLEDGEMENT BY DEFENDANT

I have read or have heard all of these questions and understand them. The answers shown are the ones I gave in open court and they are true and accurate. No one has told me to give false answers in order to have the Court accept my plea in this case. The terms and conditions of the plea as stated within this transcript, if any, are accurate.

SWORN/AFFIRMED AND SUBSCRIBED TO BEFORE ME		Date 06/24/2017
Date	Signature	Signature Of Defendant
☐ Deputy CSC ☐ Assistant CSC ☐ Clerk Of Superior Court		Name Of Defendant (Type Or Print) CLIENT

CERTIFICATION BY LAWYER FOR DEFENDANT

Attachment E

Habitual Felon and

Violent Habitual Felon

Pattern Jury Instructions.

individual who has been convicted of or pled guilty to felony offenses on at least three separate occasions since July 6, 1967. Each of these crimes must have been committed after the plea of guilty to or conviction of the one before it.[2]

For you to find the defendant guilty of being an habitual felon, the State must prove three things beyond a reasonable doubt:

First, that on (*name date*) the defendant, in (*name court*) [was convicted of] [pled guilty to] the felony of (*name felony*), that was committed on (*name date*) in violation of the law of the [State of North Carolina] [State of (*name other state*)] [United States].

Second, that on (*name date*) the defendant, in (*name court*) [was convicted of] [pled guilty to] the felony of (*name felony*), that was committed on (*name date*) in violation of the law of the [State of North Carolina] [State of (*name other state*)] [United States].

And Third, that on (*name date*) the defendant, in (*name court*) [was convicted of] [pled guilty to] the felony of (*name felony*) that was committed on (*name date*) in violation of the law of the [State of North Carolina] [State of (*name other state*)] [United States].

If you find from the evidence beyond a reasonable doubt that:

(1) On (*name date*), the defendant in (*name court*) [was convicted of] [pled guilty to]

(3) On (*name date*), the defendant in (*name court*) [was convicted of] [pled guilty to] the felony of (*name felony*), that was committed on (name date) in violation of the law of the [State of North Carolina] [State of (*name other state*)] [United States]; it would be your duty to return a verdict of guilty. If you do not so find or have a reasonable doubt as to one or more of these things, it would be your duty to return a verdict of not guilty.

The defendant has been charged with being a violent habitual felon. A violent habitual felon is an individual who has been [convicted of] (or) [pled guilty to] (or) [pled no contest to] violent felony offenses[2] on at least two separate occasions since July 6, 1967. Each of these crimes must have been committed after the [conviction of] (or) [plea of guilty to] (or) [plea of no contest to] the one before it.[3]

For you to find the defendant guilty of being a violent habitual felon, the State must prove two things beyond a reasonable doubt:

First, that on (*name date*) the defendant, in (*name court*) [was convicted of] [pled guilty to] [pled no contest to] the violent felony of (*name violent felony*), that was committed on (*name date*) in violation of the law of the [State of North Carolina] [State of (*name other state*)] [United States];

And Second, that on (*name date*) the defendant, in (*name court*) [was convicted of] [pled guilty to] [pled no contest to] the violent felony of (*name violent felony*), that was committed on (*name date*) in violation of the law of the [State of North Carolina] [State of (*name other state*)] [United States];

(2) On (*name date*), the defendant in (*name court*) [was convicted of] [pled guilty to] [pled no contest to] the violent felony of (*name violent felony*), that was committed on (*name date*) in violation of the law of the [State of North Carolina] [State of (*name other state*)] [United States];

it would be your duty to return a verdict of guilty. If you do not so find or have reasonable doubt as to one or more of these things, it would be your duty to return a verdict of not guilty.

Attachment F

Example of Transcript of Plea

for Habitual Felon Status ONLY.

☒ The State dismisses the charge(s) set out on Page Two, Side Two, of this transcript.

☐ The defendant stipulates to restitution to the party(ies) in the amounts set out on "Restitution Worksheet, Notice And Order (Initial Sentencing)" (AOC-CR-611).

21.	Is the plea arrangement as set forth within this transcript and as I have just described it to you correct as being your full plea arrangement?	(21) Yes
22.	Do you now personally accept this arrangement?	(22) Yes
23.	*(Other than the plea arrangement between you and the prosecutor)* has anyone promised you anything or threatened you in any way to cause you to enter this plea against your wishes?	(23) No
24.	Do you enter this plea of your own free will, fully understanding what you are doing?	(24) Yes
25.	Do you agree that there are facts to support your plea ☐ and admission to aggravating factors ☐ and sentencing points not related to prior convictions, and do you consent to the Court hearing a summary of the evidence?	(25) Yes
26.	Do you have any questions about what has just been said to you or about anything else connected to your case?	(26) No

ACKNOWLEDGEMENT BY DEFENDANT

I have read or have heard all of these questions and understand them. The answers shown are the ones I gave in open court and they are true and accurate. No one has told me to give false answers in order to have the Court accept my plea in this case. The terms and conditions of the plea as stated within this transcript, if any, are accurate.

SWORN/AFFIRMED AND SUBSCRIBED TO BEFORE ME	*Date* 06/24/2017
Date / *Signature*	*Signature Of Defendant*
☐ *Deputy CSC* ☐ *Assistant CSC* ☐ *Clerk Of Superior Court*	*Name Of Defendant (Type Or Print)* CLIENT

CERTIFICATION BY LAWYER FOR DEFENDANT

Attachment G

Habitual Felon Verdict and Judgment;

Evidence of Prior Convictions

of Felony Offenses; and

Sentencing of Habitual Felons.

of this Article. If the jury finds that the defendant is not an habitual felon, the trial judge shall pronounce judgment on the principal felony or felonies as provided by law. (1967, c. 1241, s. 5.)

§ 14-7.4. Evidence of prior convictions of felony offenses.

In all cases where a person is charged under the provisions of this Article with being an habitual felon, the record or records of prior convictions of felony offenses shall be admissible in evidence, but only for the purpose of proving that said person has been convicted of former felony offenses. A prior conviction may be proved by stipulation of the parties or by the original or a certified copy of the court record of the prior conviction. The original or certified copy of the court record, bearing the same name as that by which the defendant is charged, shall be prima facie evidence that the defendant named therein is the same as the defendant before the court, and shall be prima facie evidence of the facts set out therein. (1967, c. 1241, s. 4; 1981, c. 179, s. 12.)

§ 14-7.6. Sentencing of habitual felons.

When an habitual felon as defined in this Article commits any felony under the laws of the State of North Carolina, the felon must, upon conviction or plea of guilty under indictment as provided in this Article (except where the felon has been sentenced as a Class A, B1, or B2

Attachment H

Violent Habitual Felon Verdict and Judgment;

Evidence of Prior Convictions

of Felony Offenses; and

Sentencing of Habitual Felons.

is a violent habitual felon, the trial judge shall enter judgment according to the provisions of this Article. If the jury finds that the defendant is not a violent habitual felon, the trial judge shall pronounce judgment on the principal violent felony or felonies as provided by law. (1994, Ex. Sess., c. 22, s. 31.)

§ 14-7.10. Evidence of prior convictions of violent felonies.

In all cases where a person is charged under this Article with being a violent habitual felon, the records of prior convictions of violent felonies shall be admissible in evidence, but only for the purpose of proving that the person has been convicted of former violent felonies. A prior conviction may be proved by stipulation of the parties or by the original or a certified copy of the court record of the prior conviction. The original or certified copy of the court record, bearing the same name as that by which the defendant is charged, shall be prima facie evidence that the defendant named therein is the same as the defendant before the court, and shall be prima facie evidence of the facts set out therein. (1994, Ex. Sess., c. 22, s. 31.)

§ 14-7.12. Sentencing of violent habitual felons.

A person who is convicted of a violent felony and of being a violent habitual felon must, upon conviction (except where the death penalty is imposed), be sentenced to life imprisonment without parole. Life imprisonment without parole means that the person will spend the remainder of the person's natural life in prison. The sentencing judge may not suspend the

DEFENDING DOMESTIC VIOLENCE CASES

MITIGATION INVESTIGATION

RECORDS CHECKLIST FOR MITIGATION INVESTIGATORS

	CASE OF STATE V. _____						
	CASE-RELATED DOCS						
		Charging Docs					
		LEO Invest. Repts					
		News Media Accts					
		Autopsy Report					
		Jail book-in recds					
		St Notice of Aggs					
	CLT RELEASE FOR REC						
		Omnibus					
		DOC					
		MH HIPAA					
		Unique to instit					
	FAMILY RELEASES						
		Mother					
		Father					
		Brothers					
		Sisters					
		Child					
	CLT CRIM RECORD						
		Local crim record					
		State crim record					
		FBI crim record					
		Arrest records					
		Court files					
			EVERYTHING				
			PSI Report				
			Sentcg transcript				
		All prior atty files					
			EVERYTHING				
			Discovery				
			Atty nts				
		Juvenile ct files					
			Petitions				
			Disp repts				
			Evaluations				
			Superv.recs				
			Service referrals				
			Progress repts				
		Juvenile facilities					
			Foster home				
			Admission recs				
			Progress repts				
			Evaluations				
			Education				
			Medical				

			Conduct recs				
			Discharge rept				
		Probation files					
			Superv.recs				
			Violations				
			Services provided				
			Revocation orders				
			Drug tests				
	JAIL RECORDS						
		Current incarceration					
		All Prior Incarcerations					
		Book-in records					
		Medical records					
		Mental Health recs					
		Programs attded					
		Wk assignmts					
		Infraction records					
		Visitation Logs					
	PRISON RECORDS						
		Assessment					
		Classification					
		Wk assignmts					
		Programs attded					
		Progress repts					
		Parole reviews					
		Infraction records					
		Medical records					
		Mental Health recs					
		Visitation Logs					
	CLIENT BIRTH						
		Birth Certificate					
		Hosp Birth Recs					
		Dr recs on birth					
	MOTHER						
		Medical records					
		Jail records					
		Prison records					
		Mental Health recs					
		Medical records					
		Educ Records					
		Work Records					
		Marriage/divorce					
	FATHER						
		Medical records					
		Jail records					
		Prison records					
		Mental Health recs					

		Medical records					
		Work Records					
		Marriage/divorce					
	CLIENT MEDICAL RECS						
		Birth Certificate					
		Birth records					
		Pediatric					
		Adult					
		Emerg Rm Recs					
		Hospitalizations					
		Primary Care					
		Recs of any testing					
		CT, MRI,EEG,ECK					
		Lab results					
	SOCIAL SERVICE RECS						
		DSS reports					
		DSS investigations					
		Evaluations					
		Test repts					
		Counseling repts					
		Intervention repts					
		Placemt recs					
		Treatmt recs					
		Public assistance recs					
	SCHOOL RECS						
		Cumulative File Entirety					
			Grades/Promotions				
			IQ Tests				
			Medical				
			Psych test results				
			Achievemt Test results				
			Teacher names				
			Reason for leaving				
		Exceptional Childrens Recs					
			Adaptive Behavior Rept				
			Functional Behavioral Assessmt				
			Behav. Intervention Plan				
			Psych test results				
			K-SEALS (Kaufman Survey of Early Academic				Skills)
			K-BIT-2	(Kaufman Brief Intelligence Test)			
			KTEA-II (Kaufman Test of Educ Achivemt-Second Edit.)				
			Medical evaluations				
			ADHD/ADD screening repts				
			Spch/Language testing				
			IQ Testing				
			Social/developmtal hx				
			Hearing/Audiology				

		Sch. Nurse Recs					
		Sch Secretary Name?!					
		Teacher Names					
		Sch Social Wker Name					
		Sch Counselor Name					
	SOCIAL SECURITY DE	**AILED EARNINGS REPT**					
		Company names					
		Years at company					
		Amount earned					
	EMPLOYMENT						
		Applications					
		Pay records					
		Job descriptions					
		Attendance recs					
		Perf evals					
		Supervisor					
		Start/end dates					
		Reason for leaving					
	MILITARY RECORDS						
		Expedite via congressional rep!					
		Complete rec of conduct					
		Plces stationed					
		Training					
		Duty					
		Medical records					
		Awards/Medals					
		Combut Duty?					
			Vietnam				
			Desert Storm				
			Afghanistan				
			Iraq				
			Combat Ch	ronologies			
			Daily Action Repts for unit				
	MENTAL HEALTH TRTMT						
		Places of trmt					
			Out patient				
			In-patient				
			Who referred				
			Ref rept				
			Assessment				
			Prog of trtmt				
			Intake Rept				
			Discharge summary				
		Trmt Period					
	SUBSTANCE ABUSE TRTMT						
		Places of trtmt					
			Out patient				

			In-patient				
			Who referred				
			Ref rept				
			Assessment				
			Program of trtmt				
			Intake Rept				
			Discharge Summary				
	SOCIAL SECURITY DIS	**ABILITY**					
		Applications for					
		DDS Work Sheets					
		Disability Rept					
		Vocational Rept					
		Repts of Contact					
		Psychiatric Review					
		Medical review					
		Representative Payee					
		Function Repts					
		Collateral Contacts					
	VISUAL EVIDENCE						
		Family photos					
		Clt Art Work?					
		Clt letters?					
		Clt Certificates					
		Clt tropies/badges					
		Other achievemts?					
	CLT INTERVIEWS						
	Birth info						
		Dt of birth					
		Place of birth					
		Knowledge of mom's pregnancy?					
		Complications of birth?					
		Health at birth					
	Family history						
		Info on birth parents					
		Adoptive or step parents					
		Guardians					
			Dates of birth				
			Places of birth				
			Educational Levels				
			Health histories				
			Dates of marriages				
			Ages at times of marriage				
			Relationships of parents				
			Clt relat w each parent				
		Ages/sex of siblings					
			Clt relat w each sibling				
	Early health of clt						

		Walk/talk age					
		Serious accidents?					
		Illnesses?					
		Injuries?					
	Family moves						
		Where lives					
		How Long					
		Reason for moves					
	Parents work						
		Mother					
		Father					
		Guardians					
	Clt view of educ						
		Schools					
		Perf in school					
		Promotions?					
		Favorite teachers	Interview these teachers!				
		Favorite classes					
		Special services					
		Conduct					
		Activities					
		Friends					
		Reason for leaving					
	Discipline in home						
		Manner of discipline					
		By Whom Administered					
		For What Conduct					
		Frequency					
		Consistency of targets?					
	Religious trng						
		Faith affiliation					
		Practices					
		Beliefs					
	Neighbors						
		Each residence					
	Friends						
		Each home/school					
	Youth Activities						
		Scouts?					
		Boys Club					
		Y?					
		Music?					
	Youth Jobs						
		Babysitting					
		Yard work					
		Other					
	Problems						

		Death/illness of fam member					
		Divorce of parents					
		Parental abandonment					
		Family violence					
		Parental subst abuse					
		Abuse of client					
			physical abuse				
			sexual abuse				
			emotional abuse				
	Clt hx of drug/alcohol						
		Age start					
		Drug/Alcohol					
		Why					
		Who introduced					
		How afford					
		Frequency					
		Negative consequences?					
	Clt running away?						
	Juvenile record						
		Juvenile court					
		Juvenile facility?					
		services provided					
	Clt view of self as child						
		Personality?					
		Behavior?					
		Feelings?					
		Responses to life					
		Relationships to others					
	CLT ADULT YEARS						
	Residential hx						
		Where lived					
		With whom					
		How long					
		Wht circumstances					
	Employment hx						
		Company name					
		Supervisor					
		Dates					
		Job Title					
		Job Description					
		Pay					
		Duties					
		Co-workers					
		Perf Evals					
		Signif job experiences					
		Reason for leaving					

	Education						
		GED?					
		High Sch Grad?					
		College?					
		Vocational					
		Job Corps?					
		Any other type trng					
	Military hx						
		Service branch					
		Dates of service					
		Classification					
		Training					
		Where stationed					
		Conduct					
		Awards/Medals					
		Duties					
		Combat?					
		Buddies					
		Signif experiences					
	Health						
		Physical					
		Mental					
		Serious accidents					
		Illnesses					
		Treatment received					
		Location of Trtmt					
		Drs treated					
		Acute/chronic symptoms					
	Substance use/abuse						
		Substances used					
		Amounts					
		Frequency					
		Affects of					
		Trmt received					
			Who referred				
			Why				
			Out pt				
			In pt				
			Where				
			Dts of trtmt				
		Who can corroborate					
	Sexual developmt						
		Age					
		practices					
		relationships					
	Signif Relationships						
		Girl/Boy Friends					

		Husbds/Wives					
		Chidlren					
		Nature/ Quality of Relationships					
	Friends						
		Names					
		Activities shared					
	Legal Hx						
		Arrests					
		Convictions					
		Probation experience					
		Jail experience					
		Prison experience					
		Parole experience					
		Exps with police					
	Religious						
		affiliation					
		practices					
	Political affiliation						
	Cultural bkgrd						
		Beliefs					
		Practices					
	POTENTIAL EXPERTS						
		Psychologist					
			Child psychologist				
			Adolescent psychologist				
			Neuropsychologist				
			Specialist in Child Sexual Abuse				
			Trauma/Abuse Specialist				
			Specialist in Intellectual Disability				
		Psychiatrist					
		Neurologist					
		Medical Doctor					
			Obstetrician				
			Pediatrician				
			Other				
		Substance Abuse					
			Neuropharmacologist				
		Prison Expert					
		Gang Expert					
		Cultural Anthropologist					
		Environmental Expert					
		Historian					
		Sexual Abuse Expert					
		Trauma Expert					
	LAY WITNESSES						

		Family members					
		Friends					
		Teachers					
		Employers					
		Church acquaintances					
		Military contacts					
		Co-workers					
		Social workers					
		Detention officers					

LIST OF CLIENT RECORDS TO OBTAIN & WHAT TO LOOK FOR

From Materials Provided by Lee Norton

Records to Obtain	**What to Look For**
Birth Certificate	**Paternity** **Incest** **Statutory Rape**
School Records	**Grades/Promotions** **Moves** **Parents/Guardians** **Absences** **Adaptive Skills** **Indications of Mental Illness** **Family Patterns (siblings)** **Indications of Neglect/Abuse** **Indications of Intellectual Disability** **Physical Health**
Institutions (such as)	
Foster Homes **Juvenile Facilities** **Detention Centers** **Jails** **Prisons** **Mental Health Facilities**	**Adequacy of Care** **Contact with Family** **Neglect/Abuse** **Overcrowding** **Lack of Education/Recreation** **Psychological Reports** **Doctor/Nurse Visits** **Standard of Care/ Lawsuits** **Child/Client's Special Needs** **Suicides** **Suspicious Deaths** **Punishment/Segregations** **Competency of Staff** **Staff Turnover** **Ratio of Staff to Patients** **Staff Disciplinary Records** **Appropriate Use of Medication** **Nature of "Rehabilitation"** **Classification Procedures**
Family	
Birth/Death **Marriage/Divorce** **Medical** **Mental Health** **Criminal** **Social Services**	**Genetic Patterns** **Poverty** **Educational Performances** **Criminal History** **Quality of Role Models (or lack of)** **Family Isolation/Stigmatization**

Jail/Prison Records

Institutionalization
Catastrophic Loss
Natural Disasters
Neglect/Abuse
Support Networks
Social Services
Corrupting Influences
Illnesses
Moves
Substance Abuse
Isolation/Lack of Support
Lack of Supervision
Employability

Look for Generational Effects of the Following:

Poverty on more than 2 generations
Lack of education on more than 2 generations
Alcoholism on more than 2 generations
Family violence on more than 2 generations
Unwed pregnancies on more than 2 generations
AIDS . . .
Criminality . . .
Street violence . . .
Drug addiction . . .
Prostitution . . .
Dislocation . . .
Mental Illness . . .
Intellectual Disability . . .

In order to demonstrate that the environment the client grew up in was toxic, find out where all of the client's peers growing up are now. Norton went door to door in one case asking about all of the client's friends. Then she corroborated what she was told with the records. She found that one friend was now serving a life sentence, another had just been released from lengthy sentence, another was a drug addict and another was killed in a drive-by shooting.

<u>Turning Aggravators into Mitigators</u>

Defiance
Rage
Meaness
Temper Tantrums **indicates Organicity**
(head banging)
Explosiveness
Fighting

Truancy
Laziness
Won't Mind
Stubborness
Defiant **Indicates Intellectual Disability**
Chronic Stealing
Sneaky
Chronic Lying
Bad Crowd

Wouldn't Mind
Wouldn't Listen **Indicates Seizure Disorder**
Blacks out

Stayed by Himself
Poor Hygiene **Indicates Schizophrenia**

Lee Norton says that mitigation investigation is a cyclical process, rather than linear. Meaning that every fact the investigator finds in records or interviews, should be asked about in subsequent interviews of witnesses until what you hear becomes redundant and there are no more new facts.

In searching for records on your client and client's family members, Norton says to blanket all regional institutions – not merely those the family tells you about.

Norton has two basic questions in conducting mitigation investigation:

1. **"What so?" (i.e., what are the facts?) and then,**
2. **"So what?" The state will often point to the fact that the client has siblings who had the same or similar environment and did well, while the client ended up committing murder.**

Norton analogizes the situation to dropping a carton of eggs on the sidewalk: not all will break.
Or to the analogy of juggling tennis balls as similar to the accumulation of stressors on the client:
Throw one ball up in the air and he can catch it. Throw 2 balls up and he can still catch them. Throw three balls up and it's perhaps. Throw four balls up and they all fall down – none are caught.

Also, remember that what we *don't* find in the investigation is often as important as what we *do* find, Remember the Sherlock Holmes story of "The Dog Who Didn't Bark."

[PD Office and/or Mitigation Specialist]	**CONSENT FOR THE RELEASE OF CONFIDENTIAL INFORMATION (HIPAA Compliant Authorization Form)**	
Client's Name	*Social Security Number*	*Date Of Birth*
Name Of Client Or Legally Responsible Person (Type Or Print) I, authorize the following agency or person:	*Name And Address Of Sentencing Services Agency To Whom Information Is To Be Released*	

Names Of Agency Or Person Holding Records:
Address

to disclose to the [person/agency] listed above the following information about the client:

(Client Or Legally Responsible Person Should Initial Each Category That Applies)

	Name and other personal identifying information;		Progress notes (not to include psychotherapy notes);
	Mental health treatment plan, treatment history, and diagnosis;		Date of discharge and discharge status;
	Alcohol and/or drug treatment plan, treatment history, and diagnosis;		Discharge plan;
	Developmental disabilities treatment plan, treatment history, and diagnosis;		Employment-related information;
	Admission assessment and screening;		Education records and training-related information;
	Mental health, substance abuse, and developmental disabilities evaluations;		Information on HIV, AIDS, AIDS-related condition, or any other communicable disease;
	Attendance and other compliance;		Other:_____
	Urinalysis results;		Other:_____

PURPOSE OF DISCLOSURE

The purpose of this disclosure is to provide the above [mitigation specialist/agency] with information needed to prepare a defense to my criminal or other charges, including development of evidence for the purpose of mitigating my potential sentence.

REDISCLOSURE

I understand that the above [mitigation specialist/agency] may redisclose to my defense attorney, the court, and the district attorney any information listed above, including summaries and excerpts of documents, that the [mitigation specialist/agency] believes should be presented to the court to defend me against charges pending against me and/or to mitigate my potential sentence.

I understand that I may revoke this consent by submitting a written statement of revocation to the service provider whose address is provided above at any time except to the extent action has been taken in reliance on it, and that, in any event, this consent expires automatically upon imposition of sentence or one year from this date, whichever occurs first. I further understand that I may refuse to sign this authorization and that the agency or person holding the records listed above will not condition my treatment, any payment, enrollment in a health plan, or eligibility for benefits on receiving my signature on this authorization.

Signature Of Client	*Date*
Signature of the Parent, Guardian, or Other Legally Responsible Person (when required)	*Date*

A clear and legible photocopy of this consent for release of information shall be considered to be as valid as the original. 10 N.C.A.C. 18D.0208

REQUEST FOR SOCIAL SECURITY EARNINGS INFORMATION

*Use This Form If You Need

1. Certified/Non-Certified Detailed Earnings Information
Includes periods of employment or self-employment and the names and addresses of employers.

OR

2. Certified Yearly Totals of Earnings
Includes total earnings for each year but does not include the names and addresses of employers.

DO NOT USE THIS FORM TO REQUEST YEARLY EARNINGS TOTALS

Yearly earnings totals are FREE to the public if you do not require certification.

To obtain FREE yearly totals of earnings, visit our website at www.ssa.gov/myaccount.

Privacy Act Statement
Collection and Use of Personal Information

Section 205 of the Social Security Act, as amended, authorizes us to collect the information on this form. We will use the information you provide to identify your records and send the earnings information you request. Completion of this form is voluntary; however, failure to do so may prevent your request from being processed.

We rarely use the information in your earnings record for any purpose other than for determining your entitlement to Social Security benefits. However, we may use it for the administration and integrity of Social Security programs. We may also disclose information to another person or to another agency in accordance with approved routine uses, which include but are not limited to the following:

1. To enable a third party or an agency to assist Social Security in establishing rights to Social Security benefits and/or coverage;
2. To comply with Federal laws requiring the release of information from Social Security records (e.g., to the Government Accountability Office and Department of Veterans' Affairs);
3. To make determinations for eligibility in similar health and income maintenance programs at the Federal, State, and local level; and,
4. To facilitate statistical research, audit, or investigative activities necessary to assure the integrity and improvement of Social Security programs.

A complete list of routine uses for earnings information is available in our Systems of Records Notices entitled, the Earnings Recording and Self-Employment Income System (60-0059), the Master Beneficiary Record (60-0090), and the SSA-Initiated Personal Earnings and Benefit Estimate Statement (60-0224).
In addition, you may choose to pay for the earnings information you requested with a credit card.
31 C.F.R. Part 206 specifically authorizes us to collect credit card information. The information you provide about your credit card is voluntary. Providing payment information is only necessary if you are making payment by credit card. You do not need to fill out the credit card information if you choose another means of payment (for example, by check or money order). If you choose the credit card payment option, we will provide the information you give us to the banks handling your credit card account and the Social Security Administration's (SSA) account.

Routine uses applicable to credit card information, include but are not limited to:
(1) to enable a third party or an agency to assist Social Security to effect a salary or an administrative offset or to an agent of SSA that is a consumer reporting agency for preparation of a commercial credit report in accordance with 31 U.S.C. §§ 3711, 3717 and 3718; and (2) to a consumer reporting agency or debt collection agent to aid in the collection of outstanding debts to the Federal Government.
A complete list of routine uses for credit card information is available in our System of Records Notice entitled, the Financial Transactions of SSA Accounting and Finance Offices (60-0231). The notice, additional information regarding this form, routine uses of information, and our programs and systems is available on-line at www.socialsecurity.gov or at your local Social Security office.

Paperwork Reduction Act Statement - This information collection meets the requirements of 44 U.S.C. § 3507, as amended by section 2 of the Paperwork Reduction Act of 1995. You do not need to answer these questions unless we display a valid Office of Management and Budget control number. We estimate that it will take about 11 minutes to read the instructions, gather the facts, and answer the questions. ***Send only comments relating to our time estimate above to:*** SSA, 6401 Security Blvd, Baltimore, MD 21235-6401.

REQUEST FOR SOCIAL SECURITY EARNINGS INFORMATION

1. Provide your name as it appears on your most recent Social Security card or the name of the individual whose earnings you are requesting.

First Name: Middle Initial:

Last Name:

Social Security Number (SSN) - - One SSN per request

Date of Birth: / / Date of Death: / /

Other Name(s) Used
(Include Maiden Name)

2. What kind of earnings information do you need? (Choose **ONE** of the following types of earnings or SSA must return this request.)

☐ **Itemized Statement of Earnings $115**
(Includes the names and addresses of employers)
If you check this box, tell us why you need this information below.

Year(s) Requested: to
Year(s) Requested: to

☐ Check this box if you want the earnings information **CERTIFIED** for an additional $33.00 fee.

☐ **Certified Yearly Totals of Earnings $33**
(Does not include the names and addresses of employers)
Yearly earnings totals are FREE to the public if you do not require certification. To obtain FREE yearly totals of earnings, visit our website at www.ssa.gov/myaccount.

Year(s) Requested: to
Year(s) Requested: to

3. If you would like this information **sent to someone else**, please fill in the information below.
I authorize the Social Security Administration to release the earnings information to:

Name

Address State

City ZIP Code

4. I am the individual to whom the record pertains (or a person authorized to sign on behalf of that individual). I understand that any false representation to knowingly and willfully obtain information from Social Security records is punishable by a fine of not more than $5,000 or one year in prison.

Signature AND Printed Name of Individual or Legal Guardian

SSA must receive this form within 120 days from the date signed

Date / /

Relationship (if applicable, you must attach proof) Daytime Phone:

Address State

City ZIP Code

Witnesses must sign this form ONLY if the above signature is by marked (X). If signed by mark (X), two witnesses to the signing who know the signee must sign below and provide their full addresses. Please print the signee's name next to the mark (X) on the signature line above.

1. Signature of Witness	2. Signature of Witness
Address *(Number and Street, City, State and ZIP Code)*	Address *(Number and Street, City, State and ZIP Code)*

REQUEST FOR SOCIAL SECURITY EARNINGS INFORMATION

INFORMATION ABOUT YOUR REQUEST

You may use this form to request earnings information for **only ONE** Social Security Number (SSN)

How do I get my earnings statement?

You must complete the attached form. Tell us the specific years of earnings you want, type of earnings record, and provide your mailing address. The itemized statement of earnings will be mailed to ONE address, therefore, if you want the statement sent to someone other than yourself, provide their address in section 3. Mail the completed form to SSA within 120 days of signature. If you sign with an "X", your mark must be witnessed by two impartial persons who must provide their name and address in the spaces provided. Select **ONE** type of earnings statement and include the appropriate fee.

1. Certified/Non-Certified Itemized Statement of Earnings
This statement includes years of self-employment or employment and the names and addresses of employers.

2. Certified Yearly Totals of Earnings
This statement includes the total earnings for each year requested but *does not* include the names and addresses of employers.

If you require one of each type of earnings statement, you must complete two separate forms. Mail each form to SSA with one form of payment attached to each request.

How do I get someone else's earnings statement?

You may get someone else's earnings information if you meet one of the following criteria, attach the necessary documents to show your entitlement to the earnings information and include the appropriate fee.

1. Someone Else's Earnings
The natural or adoptive parent or legal guardian of a minor child, or the legal guardian of a legally declared incompetent individual, may obtain earnings information if acting in the best interest of the minor child or incompetent individual. You must include proof of your relationship to the individual with your request. The proof may include a birth certificate, court order, adoption decree, or other legally binding document.

2. A Deceased Person's Earnings
You can request earnings information from the record of a deceased person if you are:
- The legal representative of the estate;
- A survivor (that is, the spouse, parent, child, divorced spouse of divorced parent); or
- An individual with a material interest (e.g., financial) who is an heir at law, next of kin, beneficiary under the will or donee of property of the decedent.

You must include proof of death and proof of your relationship to the deceased with your request.

Is There A Fee For Earnings Information?

Yes. We charge a $115 fee for providing information for purposes unrelated to the administration of our programs.

1. Certified or Non-Certified Itemized Statement of Earnings
In most instances, individuals request Itemized Statements of Earnings for purposes unrelated to our programs such as a private pension plan or personal injury suit. Bulk submitters may email OCO.Pension.Fund@ssa.gov for an alternate method of obtaining itemized earnings information.

We will **certify** the itemized earnings information for an additional $33.00 fee. Certification is usually not necessary unless you are specifically requested to obtain a certified earnings record.

Sometimes, there is no charge for itemized earnings information. If you have reason to believe your earnings are not correct (for example, you have previously received earnings information from us and it does not agree with your records), we will supply you with more detail for the year(s) in question. Be sure to show the year(s) involved on the request form and explain why you need the information. If you do not tell us why you need the information, we will charge a fee.

2. Certified Yearly Totals of Earnings
We charge $33 to certify yearly totals of earnings. However, if you do not want or need certification, you may obtain yearly totals *FREE* of charge at www.ssa.gov/myaccount. Certification is usually not necessary unless you are advised specifically to obtain a certified earnings record.

Method of Payment
This Fee Is Not Refundable. DO NOT SEND CASH.

You may pay by credit card, check or money order.
- Credit Card Instructions
  Complete the credit card section on page 4 and return it with your request form.

- Check or Money Order Instructions
  Enclose one check or money order per request form payable to the Social Security Administration and write the Social Security number in the memo.

How long will it take SSA to process my request?

Please allow SSA 120 days to process this request. After 120 days, you may contact 1-800-772-1213 to leave an inquiry regarding your request.

REQUEST FOR SOCIAL SECURITY EARNINGS INFORMATION

• Where do I send my complete request?

Mail the completed form, supporting documentation, and applicable fee to: **Social Security Administration** Division of Earnings and Business Services P.O. Box 33011 Baltimore, Maryland 21290-3003	If using private contractor such as FedEx mail form, supporting documentation and applicable fee to: **Social Security Administration** Division of Earnings and Business Services 6100 Wabash Ave. Baltimore, Maryland 21215

• How much do I have to pay for an Itemized Statement of Earnings?

Non-Certified Itemized Statement of Earnings	**Certified** Itemized Statement of Earnings
$115.00	$148.00

• How much do I have to pay for Certified Yearly Totals of Earnings?

Certified yearly totals of earnings cost $33.00. You may obtain non-certified yearly totals *FREE* of charge at www.ssa.gov/myaccount. Certification is usually not necessary unless you are specifically asked to obtain a certified earnings record.

YOU CAN MAKE YOUR PAYMENT BY CREDIT CARD

As a convenience, we offer you the option to make your payment by credit card. However, regular credit card rules will apply. You may also pay by check or money order. Make check payable to Social Security Administration.

CHECK ONE	☐ Visa ☐ American Express ☐ MasterCard ☐ Discover
Credit Card Holder's Name (Enter the name from the credit card)	First Name, Middle Initial, Last Name
Credit Card Holder's Address	Number & Street City, State, & ZIP Code
Daytime Telephone Number	(☐☐☐) ☐☐☐ - ☐☐☐☐ Area Code
Credit Card Number	☐☐☐☐ - ☐☐☐☐ - ☐☐☐☐ - ☐☐☐☐
Credit Card Expiration Date	(MM/YY)
Amount Charged See above to select the correct fee for your request. Applicable fees are $33, $115, or $148 SSA will return forms without the appropriate fee.	$
Credit Card Holder's Signature	

DO NOT WRITE IN THIS SPACE OFFICE USE ONLY	Authorization	
	Name	Date
	Remittance Control #	

Center for Death Penalty Litigation Inc.
Suite 301, 201 West Main Street
Durham, North Carolina 27701
Telephone: 919-956-9545
Facsimile: 919-956-9547
E-mail: stephanie@cdpl.org

August 26, 2013

Ms. Laura Loewe
Combined Records
NC Department of Prisons
2020 Yonkers Road
4226 MSC
Raleigh, NC 27699-4226
Phone: 919.716.3202
Fax: 919.716.3986

Via USPS, four pages

Re: xxxxxx
DOC # xxxxxx
DOB xxxxxx
SSN xxxxxx

Dear Ms. Loewe:

As part of our legal representation of Mr. **xxxxxx** we must collect records pertaining to Mr. **xxxxxx** background and history. We request that you provide us with a complete, legible copy of Mr. XXXXXX's entire combined records file from NC Department of Corrections as authorized in the accompanying Court Order.

Please provide all DOC records ***INCLUDING medical and mental health information.*** This request includes but is not limited to case management assessments and progress notes; administrative jacket; red jacket; work assignments and evaluations including program enrollments; **psychology records, psychological testing and evaluation;** classes such as anger management and life skills training; gain/earn time; housing assignments; disciplinary records; risk assessments, segregation evaluations, medical and mental health records; psychological testing including intelligence; substance abuse assessment, tox screens, treatment, programs such as DART, and treatment recommendations; Community Corrections including Community Service, TASC, Criminal Justice Resource Center, Second Chance, and other referrals. ***Please include second party, microfiche, computer and handwritten documents.***

A court order authorizing this disclosure is enclosed.

Please forward copies of this request to the relevant DOC departments. Please mail the files to my attention at the above address.

If you have any questions or require additional information, please contact me immediately at 919.956.9545 as the need for these records is urgent. Your prompt and thorough attention to this matter is greatly appreciated.

Sincerely,

Stephanie B. Bouis, MSW, LCSW
Mitigation Specialist

Enclosures

NORTH CAROLINA DEPARTMENT OF PUBLIC SAFETY
AUTHORIZATION FOR RELEASE OF INFORMATION

DEPARTMENT OF PUBLIC SAFETY NOTICE to the Requestor of Information: The documents attached contain health information regarding a current or former inmate. Based on NC State Laws and NC Department of Public Safety Policies and Procedures, the information may be discussed with the inmate, and copies of the information may be given directly to the inmate or anyone having proper authorization.

Complete All Lines on this Authorization.

PRINT Information

Name: _____ Inmate Number: _____

D.O.B.: _____ S.S.#: _____

I authorize DPS- Division of Adult Correction, Medical Records — 919-715-1570
Name of Facility/Person Releasing Information — *Phone Number*

2405 Alwin Court, MSC 4268 — 919-715-1581
Address — *Fax Number*

Raleigh, NC 27699-4268
City, State, Zip Code

to release information from my medical record to

_____ _____
Name of Facility/Person Receiving Information — *Phone Number*

_____ _____
Address — *Fax Number*

_____
City, State, Zip Code

This information shall include _____
Specify the information you wish to be disclosed

for the purpose of _____
Need for disclosure

I understand this information pertains to the time period of _____
Dates of Treatment

I understand that this authorization will expire on the following date, event or condition: _____

I understand that if I fail to specify an expiration date or condition, this authorization is valid for the period of time needed to fulfill its purpose for up to one year. I also understand that I may revoke this authorization at any time by signing the *Revocation Section* on the back of this form. I further understand that any action taken on this authorization prior to the rescinded date is legal and binding.

I understand that my information may not be protected from re-disclosure by the requester of the information; however if this information is protected by the Federal Substance Abuse Confidentiality Regulations, the recipient may not re-disclose such information without my further written authorization unless otherwise provided for by state or federal law.

I understand that if my record contains information relating to HIV infection, AIDS or AIDS-related conditions, alcohol abuse, drug abuse, psychological or psychiatric conditions, or genetic testing this disclosure will include that information. I also understand that I may refuse to sign this authorization and that my refusal to sign will not affect my ability to obtain treatment; however, if a service is requested by a non-treatment provider for the sole purpose of creating health information, service may be denied if authorization is not given. If treatment is research-related, treatment may be denied if authorization is not given.

I further understand that I may request a copy of this signed authorization.

_____ _____ _____ _____
Signature of Patient — *Date* — *Authorized Representative* — *Date*

_____ _____ _____
Witness Signature -When required (see back)* — *Date* — *Relationship to Patient of Authorized Representative*

DAC Use Only: Information released by _____ on _____
Print Name — *Date Information Released*

File: Outpatient, Section II / Inpatient
DC-436 (Rev 9/12) Page 1 of 2

This form is not to be amended, revised or altered without approval of the NCDPS, DAC Medical Director.

CHECKLIST FOR MITIGATION INVESTIGATION QUESTIONNAIRE

PRELIMINARY INFORMATION:

1. CLIENT'S NAME: _____

2. DATE OF BIRTH: _____

3. PLACE OF BIRTH: _____

4. PRISON NUMBER: _____

S. DATE OF OFFENSE: _____

6. RELIGION: _____

7. RACE: _____

8. OCCUPATION: _____

9. Material facts of offense and theory of defense based on facts adduced by the prosecution, as put in issue or contested by defendant:

_____
_____
_____
_____
_____
_____
_____
_____
_____

BIRTH, GROWTH AND DEVELOPMENT

10 - Any known complications with the pregnancy (e.g., bleeding, maternal illness, disease, toxemia, drugs ingested by the mother during pregnancy and during labor, etc.)

_____
_____
_____
_____

11. Any complications at birth (e.g., full term or premature, respiratory difficulties, jaundice, known defects, fevers, etc.):

_____
_____
_____
_____
_____

12. Any perceived difficulty in achieving early development tasks:

Approximate age at which each of the following was first accomplished:

(a) responsive smile (2 months): _____
(b) rolling over (4 months): _____
(c) crawling (9 months): _____
(d) pulling to stand (11 months): _____
(e) walking (1 year, 1 week): _____

ENVIRONMENTAL FACTORS:

13. Describe the members of client's family (in same household) from the time of his or her birth to the time he or she left the household:

14. Describe the physical conditions in which the family lived, including any change in conditions, over this period of time:

15. With reference to item above, how did the conditions compare to the conditions under which neighbors and/or nearby relatives live:

16, Describe any moves made by the client's family (household) from one locale to another during the period of time referred to in item 12, including the reason(s) why such moves were made:

17. Describe fully the relations between the client and his/her parents or parental figures, with reference to:

(a) Emotional support and nurturing, expressed and felt love:

(b) Praise for positive accomplishments or behavior:

(c) Discipline (techniques, whether use seemed excessive or appropriate to the offense, whether administered fairly between siblings):

(d) The infliction of physical harm or pain (by burning, beating, cutting, whipping, etc.). which was apparently not associated with culturally appropriate discipline- including patterns of behavior as well as specific incidents:

(e) Sexual Abuse (whether or not associated with discipline) or harassment, or aberrant sexual modeling:

(f) Any emotional abuse sustained throughout childhood and possibly through adulthood:

(g) Any other factor not already covered:

18. Describe fully the relationships between the client's siblings and his or her parents or parental figures, with reference to the six specific areas detailed above.

19. Describe fully the relationship between the client and his siblings, with particular attention to sexual relations (voluntary or coerced), the infliction of physical harm, and the manipulation of parental authority to the benefit or detriment of other siblings:

20. Describe the client's relationships (in general), while in the household in which he or she grew up, with:

(a) Non-parent adults:

(b) Age group peers:

(c) Older children:

(d) Younger children:

21. Describe in as much detail as possible any head trauma suffered by the client, including severe blows to the head (any part, including nose) and occasions of loss of consciousness: (SEE ATTACHED QUESTIONNAIRE FOR DETAILED QUESTIONS ON HEAD INJURIES):

INSTITUTIONAL RECORDS:

22. With respect to Schools:

(a) How old was the client when he or she began school (kindergarten or first grade, whichever place the client started):

(b) Did the client progress from one grade to the next without being held back (if not, explain):

(c) Did the client demonstrate unusual academic, vocational, or avocational strengths or weaknesses (detail-include schools, years attended, teachers, counselors, etc.)

(d) Did the client demonstrate behavioral difficulties (detail- include schools, years attended, teachers, counselors, etc.):

(e) Were the parents consulted on any regular basis concerning the client's behavior or performance (include schools, years attended, teachers, counselors, etc.):

(f) What was the highest level of school completed successfully including addresses and years of attendance:

(g) Provide names, addresses and any school personnel who knew the client well:

(h) Provide details of all schools attended (elementary, junior high, high, post high), including names, addresses, years attended, location of schools (states, cities, counties), clubs associated with, extra curricular activities, teacher, counselors, friends, etc.):

23. With respect to Juvenile Agencies:

(a) Has the client ever been charged as a juvenile, if so, for what:

(b) If charges, adjudicated; is so, for what:

(c) What was the character of the acts or circumstances underlying the charges of adjudications:

(d) Describe the disposition ordered for each adjudication (e.g.: probation, commitment, etc.) and what the client's behavior was like/what occurred to him or her, during disposition period:

(e) Get dates of incidents, locations of incidents (counties), names of victims, names of co-defendants, places of incarceration, etc.

24. With respect to the client's involvement with the criminal justice system as an adult:

(a) Has the client ever been previously charged; if so, for what:

(b) If charged, convicted, if so, for what:

(c) What was the character of the acts and circumstances underlying the charges or convictions:

(d) Describe the disposition ordered for each conviction (e.g.: probation, incarceration, etc.) and what the client's behavior was like/what occurred to him or her during the disposition period:

(e) Get dates of incidents, locations of incidents (counties, states), names of victims, names of co-defendants, places of incarceration, etc.

25. With respect to any other institution or agency with which the client has had contact (describe the contact as fully as possible):

(a) Military (applications to join, branch, ranks, locations of service, disciplinary actions, other significant experiences in military):

(b) Social Welfare Agencies:

(c) Social Security:

(d) Drug and Alcohol Treatment Facility:

(e) Mental Health Agency:

(f) Mental Health Hospital:

PHYSICAL HEALTH HISTORY:

26. Describe history of clients health in general and nature of any illnesses:

27. Nature of any medications taken on a long term basis:

28. Any history of seizures:

29. Any history of blackouts (alcohol and non-alcohol related):

30. Any history of dizziness:

31. Any history of sexually transmitted diseases:

32. Any history of head injuries, head aches, and/or head trauma:

MENTAL HEALTH HISTORY:

33. Describe generally the client's prior access to medical/mental health care (obtain names of physicians, hospitals, dates of treatments, location of hospitals/agencies, etc.):

34. Has the client suffered serious medical problems (disease, serious illness, traumas, etc.) for which he or she has or has not received treatment, if so, describe:

35. Reasons for treatment:

36. Emotional state prior to treatment (include any and all behavioral irregularities):

37. Has the client suffered mental illness or disorder which has been:

(a) Recognized by others (describe):

(b) Evaluated by mental health professionals (describe):

(c) Treated (describe):

38. Has the client ever been committed (voluntarily or involuntarily) to a mental health facility; is so, describe the circumstances; if not, but commitment was considered or proceedings were instituted, describe the circumstances (include names of facilities, doctors, locations of facilities, dates of events, diagnosis, medications, etc.):

VOCATION AND AVOCATIONAL PURSUITS:

39. Detail the client's prior employment record, including employer's names and addresses, type of work, dates of employment, reason for leaving) if available:

40. What is the client's perception of his employment and/or unemployment:

41. Was the client underemployed (explain):

42. If the client sustained lengthy period of unemployment, explain why:

43. Prior to his or her arrest, did the client have avocational pursuits, what were they:

44. Describe the goals client had to obtain his advocational goals:

SUBSTANCE ABUSE:

45. Has the client ingested quantities of alcohol and drugs in such a way as to suggest substance abuse; if so, describe:

46. History of drug and alcohol use:

(a) Circumstances of initiation into alcohol or drug use:

(b) Extent of use:

(c) Blackouts, withdrawal symptoms, D.T., etc.:

(d) Treatment for abuse (dates, locations, addresses, names of physicians/counselors, etc.):

(e) History of pathological intoxication (details):

47. Whether a substance abuser or not, was the client under the influence of alcohol or drugs at the time of the homicide; if so, describe:

PERCEPTUAL EXPERIENCES AND SELF-PERCEPTION:

48. Has the client ever experienced any of the following (if so, explain when, how often, and describe the experiences):

(a) Hallucinations (auditory, visual, both, other)

(b) Deja Vu feeling he or she has had an experience he or she has never had before:

(c) Opposite of Deja Vu (having an experience which he or she has had before but feeling as if he or she has never had the experience before):

(d) Macropsia (seeing objects become larger):

(e) Micropsia (seeing objects become smaller):

(f) Tics or repetitive "nervous movements":

(g) Feelings of persecution and/or victimization:

(h) Feelings about self or others that clearly have no basis in reality (e.g., delusions that are grandiose or paranoid):

49. Ask the client to describe himself or herself as completely as possible:

SEXUAL/SOCIAL HISTORY:

50. History of sexual development (nature and dates of sexual contacts):

51. History of significant interpersonal relationships:

(a) Names:

(b) Periods of relationships, including marriages:

(c) Personality of other person:

(d) Reasons for separation:

52. Information on client's children and spouses (names, ages, whereabouts, etc.)

CURRENT JAIL RECORD/TIME and PRIOR PRISON RECORDS/TIME:

53. Since the client's arrest/incarceration, has the client incurred any disciplinary punishment; if so, discuss the incidents, why they occurred, whether there have been repeated incidents:

54. Since the client's arrest/incarceration:

(a) How has the client spent his or her time:

(b) Has the client had any serious health problems (describe):

(c) Has the client been evaluated and/or "treated" by the jail's mental health staff (describe):

(d) Has that treatment included medications (describe medications and dosages):

55. Since the client's arrest/incarceration, who are the people who have come to know him, or have maintained contact with him the best (give names, addresses, telephone numbers, and relationship to client):

FAMILY HISTORY:

56. Have any family members ever been diagnosed or treated for mental illness or disorder (including epilepsy); if so, provide all known details (illness or disorder, treating physician or agency, course of treatment, location of facility, dates of treatment, etc.)--

(a) Mother:

(b) Father:

(c) Siblings:

(d) Grandparents:

(e) Aunts and Uncles:

57. Have any family members ever been suspected of having mental illness or disorder (e.g., uncontrolled temper or rages of anger, periods of significant memory loss, seizures, "crazy" behavior, substance abuse); if so, describe as fully as possible for each individual family member:

58. Describe the criminal records of any other family members (among those listed above) as fully as possible for each individual family member:

NARRATIVE OF THE CRIME:

59. Describe the client's recollection of the material facts of the crime, including in particular, how the client felt about what was happening and what he or she was doing:

60. Describe the client's relationship with other persons involved in the murder:

(a) The victim:

(b) Accomplices:

(c) Victim's family:

61. Describe the criminal record of his accomplice(s), including the status of any charges filed in connection with the murder:

PERCEPTIONS OF INTERVIEWER:

62. Appearance:

63. Behavior:

64. Orientation as to time and place:

65. Attention Span:

66. Perception:

67. Memory:

68. Affect::

69. Speech:

70. Delusions:

71. Hallucinations:

72. Suicidal Ideations:

73. Judgment:

74. Indications of Intoxication:

75. Estimated intelligence:

76. Insight:

PERSONAL HISTORY FORM
Confidential Attorney Work Product

Attorney_____

Defendant _____ DOB_____

Social Security # _____

County _____

File # _____

Criminal Charges_____

Education: *Get consent to obtain records. Either send consent to last school they attended or call school board to ask how to request records.*

Where did you go to school? _____

What was the last grade you attended?_____

Were you in special classes?_____

Where you on any medication to help learning? _____

Did you get into trouble at school? Describe Detention, suspensions or expulsions

_____

_____

What were you good at in school? This may include sports. Coaches/mentors?

_____

_____

Military: *Get Consent to obtain records.*

What branch? Date?_____

How many years did you serve?_____

What type of work?_____

Honors?_____

Type of discharge?_____

Employment: *Consider obtaining SS Earnings report which may reflect positive work history or conversely, inability to keep a job due to MR. These records take months to obtain.*

Are you currently employed? _____

Describe job_____

Describe past work history_____

_____

Medical History: *Describe significant and chronic health problems and hospitals where you have been treated. Obtain consent s to get records. Ask about head injuries.*

_____

_____

_____

Mental Health: *Get consents for records*

Have you ever been in individual or group counseling and if so where?

_____

_____

_____

Have you ever been on any mental health medication? Are you on medication now?

_____

_____

Have you ever attempted suicide? _____

Have you ever been psychiatrically hospitalized?_____

History of sexual abuse?

_____

_____

Legal: *Get court order for juvenile records and consent for prison/jail records*
Have you been arrested?

_____

_____

Have you been charged for a crime?

Have you ever been convicted?

Have you been to jail or prison?

Has your driver's license been suspended?

Substance Abuse History: *Get consents*

Have you ever been treated for substance abuse and if so when and where?

DRUG	First Use	Frequency of Use	Amount Used	Notes
Alcohol				
Marijuana				
Cocaine				
Crack				
LSD				
Heroine				
Speed/Meth				
Prescription (what type)				

LSD				
Huffing				
Other				

Have you had a DUI?

_____

Have you had legal consequences to alcohol or drug use?

_____

_____

Have you ever sold drugs or been involved with some aspect of drug sales?

_____

_____

Religious Beliefs

Current religious affiliation.

_____

Is there a minister or preacher?

_____

Relationship History

Do you have significant other? _____

Have you been married?_____ How long? _____ How many marriages?_____

How many children?_____ Names and ages_____

_____

Describe relationship with children.

_____

_____

Have you been involved in Domestic Violence (victim or accused)

How do you resolve conflict?

Personal History: *Significant events, trauma, moves, injuries, abuse, honors, achievements*

Age birth to 5:

Age 6 to 10

Age 11-15

Age 16-20

Age 21-30

Age 30 to Present

Other Notes:

STATE OF NORTH CAROLINA
COUNTY OF _____

IN THE GENERAL COURT OF JUSTICE
_____ COURT DIVISION
Case No. CRS

STATE OF NORTH CAROLINA

V.

***EX PARTE* MOTION FOR FUNDS TO EMPLOY MITIGATION SPECIALIST UNDER SEAL**

Defendant, through undersigned counsel, and pursuant to the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 19 and 23 of the Constitution of the State of North Carolina, respectfully moves this Honorable Court to enter an order authorizing funds for the services of a mitigation specialist to assist in the preparation of the defense in the above-captioned case. In support of this motion, Defendant states as follows:

1. The Defendant is charged in the instant case with _____.

2. These charges arose in connection with events which allegedly occurred on _____.

3. This Court has found the Defendant to be indigent and therefore, unable to afford costs associated with his defense.

4. If convicted of all pending charges, Defendant may be sentenced to a maximum of ___.

5. Because this request for funding necessarily involves revealing confidential communications including matters of defense strategy to the Court, counsel makes this motion *ex parte* in order to protect that information from disclosure to the state. Given the defendant's constitutional right not to incriminate himself as well as his right to the effective assistance of counsel, defendant is entitled to address this request for funding outside the presence of the State. *Ake v. Oklahoma*, 470 U.S. 68 (1985)*; State v. Ballard*, 333 N.C. 515, 428 S.E. 178 (1993).

6. These cases state that the Defendant is entitled to the services of an expert if he can show either that: 1) A material likelihood exists that the requested expert will assist the defense in preparation for, or presentation at trial, *or* 2) Without such assistance it is probable that the Defendant will not receive a fair trial.

7. In the instant case, preliminary investigation reveals that the Defendant suffers from *(Intellectual Disability/ Mental Illnesses/Physical Disability/ Trauma from Extreme Poverty/Abuse & Neglect/Military Experience, etc.)*

8. Counsel for the Defendant is obliged to investigate the Defendant's social history in order to determine the existence of potential defenses to the charges including *(specify defense) (if the defendant lacked the capacity to form specific intent to commit the alleged defense.)*

9. A roster of experienced mitigation investigators is maintained by the Office of the Capital Defender. IDS Mitigation Coordinator, Vicky L. McGee, is available to recommend the most suitable mitigation investigator based upon caseload, proximity and areas of particularized knowledge and case experience. These investigators have backgrounds predominantly in social work, counseling, or psychology and are skilled in reviewing institutional records, working with mental health experts, and conducting sensitive interviews with clients and their family members.

10. Specifically, mitigation specialists have training and experience critical to eliciting sensitive or embarrassing evidence (for example, history of sexual abuse) that a defendant might never have disclosed and to recognize congenital, mental or neurological conditions to understand how these conditions may have affected the defendant's development and behavior and to identify the most appropriate experts to examine the defendant or testify on his behalf.

11. Mitigation specialists have the skills required to conduct comprehensive life history investigations of clients in order to identify and to corroborate all relevant mitigation issues.

12. Due to the specialized skills of an experienced mitigation investigator, work performed by such an expert can be accomplished more efficiently and effectively than by undersigned counsel, and at a lower hourly cost. The mitigation investigator hourly rate is $50 as compared to the hourly rate of counsel at $65.

13. Finally, an investigator materially assists in the preparation of the defense by providing an independent witness who can testify at trial if needed.

14. Finally, if the Defendant is not provided with the requested expert assistance, s/he will be deprived of due process of law, equal protection of the laws, effective assistance of counsel, the right to confront witnesses, the right to a fair trial and the right to present evidence in his behalf.

15. Counsel has determined that an initial amount of $_____plus expenses, is necessary to retain a mitigation investigator in this case.

    WHEREFORE, the Defendant respectfully requests the granting of this motion and the requested funding to afford him the services of a mitigation investigator in this case.

Respectfully submitted, this the ___ day of 2017.

Attorney for the Defendant

IMMIGRATION