

**Criminal Case Update**  
**District Court Judge Virtual Fall Conference**  
**October 7, 2020**

Cases covered include reported decisions from the North Carolina Appellate Courts, the Fourth Circuit Court of Appeals, and the U.S. Supreme Court decided between May 6, 2020 and September 15, 2020. The summaries were prepared by Shea Denning, Phil Dixon, Jonathan Holbrook, Jamie Markham, John Rubin, Christopher Tyner, and Brittany Williams. To view all of the summaries, go to the [Criminal Case Compendium](#). To obtain the summaries automatically by email, sign up for the [Criminal Law Listserv](#).

**Contents**

Criminal Procedure .....	3
Appellate Issues .....	3
Bond Forfeiture .....	4
Counsel Issues .....	5
Double Jeopardy .....	6
Indictment & Pleading Issues .....	8
Jury Instructions .....	10
Sentencing .....	10
Sex Offenders .....	12
Evidence .....	15
Best Evidence Rule .....	15
Opinions .....	16
Arrest, Search, and Investigation .....	18
Arrests & Investigatory Stops .....	18
Interrogation and Confession .....	20
Criminal Offenses .....	21
Assaults .....	21
Abuse Offenses .....	22
Threats & Related Offenses .....	23
Kidnapping & Related Offenses .....	24
Robbery .....	25
Drug Offenses .....	28

Defenses .....	30
Entrapment and Entrapment by Estoppel.....	30
Self-Defense.....	31
Capital Law.....	32
Racial Justice Act .....	32
Post-Conviction Proceedings.....	35
Clerical Errors/Error Correction.....	35
Judicial Administration.....	36
Contempt .....	36

## Criminal Procedure

### Criminal Procedure

#### Appellate Issues

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**(1) Since the defendant timely moved to dismiss and timely renewed his motion, he sufficiently preserved for appellate review whether the State presented sufficient evidence of each element of the crime for which he was convicted; (2) The trial court properly denied the defendant's motion to dismiss as the defendant falls within the "teacher" category as defined in G.S. 14-27.7.**

**State v. Smith, \_\_\_\_ N.C. \_\_\_, 846 S.E.2d 492 (Aug. 14, 2020)**

The defendant worked full-time at Knightdale High School, initially as an In-School Suspension teacher and then as a Physical Education teacher. Although not certified as a teacher, he worked the same hours as a certified teacher, which included a regularly scheduled planning period. During his time teaching at the school, the defendant met a minor, D.F., a student at the school. On October 29, 2014, D.F. went to the defendant's home and later alleged the two engaged in sexual activity.

The defendant was indicted for two counts of engaging in sexual activity with a student pursuant to G.S. 14-27.7. At the close of the State's evidence, defense counsel made a motion to dismiss based on insufficient evidence, asserting that the State's evidence was conflicting. The trial court denied the motion. At the end of all the evidence, defense counsel renewed the motion to dismiss, asserting that there was no physical evidence. The trial court again denied the motion, and the defendant was ultimately convicted of two counts of sexual activity with a student.

(1) On appeal, the defendant argued that (1) the evidence at trial did not establish that he was a "teacher" within the meaning of G.S. 14-27.7, and (2) alternatively, there was a fatal variance between the indictment and proof at trial since the indictment alleged that he was a "teacher," but his status as a substitute teacher made him "school personnel" under G.S. 14-27.7(b). The Court of Appeals concluded that the defendant failed to preserve either argument for appellate review, reasoning that because the defendant's motions to dismiss "focused on the veracity of D.F.'s testimony and the lack of physical evidence" that sexual conduct had occurred, the defendant preserved a sufficiency of the evidence argument for only that specific element. The Court of Appeals also concluded that the fatal variance argument was not preserved because it was not expressly presented to the trial court.

At the time that the Court of Appeals decided this case, the Supreme Court has not addressed the issue of when a motion to dismiss preserves all sufficiency of the evidence issues for appellate review. Subsequently, in *State v. Golder*, the Court held that "Rule 10(a)(3) provides that a defendant preserves all insufficiency of the evidence issues for appellate review simply by making a motion to dismiss the action at the proper time." 374 N.C. 238 (2020). The Court held that because the defendant here made a general motion to dismiss at the appropriate time and renewed that motion to dismiss at the close of the evidence., his motion properly preserved all sufficiency of the evidence issues.

## **Criminal Procedure**

(2) On the merits of the case, the defendant argued that there was no substantial evidence that he was a “teacher” under the statute. G.S. 14-27.7(b) (2013) provides: “For purposes of this subsection, the terms “school”, “school personnel”, and “student” shall have the same meaning as in G.S. 14-202.4(d),” which in turn refers to G.S. 115C-332. The latter statute provides that “school personnel” includes substitute teachers, driving training teachers, bus drivers, clerical staff, and custodians. The Court determined that it was “evident that the General Assembly intended to cast a wide net prohibiting criminal sexual conduct with students by any adult working on school property” and that “a person’s categorization as a ‘teacher’ should be based on a common-sense evaluation of all of the facts of the case, not a hyper-technical interpretation based solely on the individual’s title.”

Despite his lack of certification, defendant was at the school on a long-term assignment, an employee of Wake County Public Schools, and held to the same standards as a certified teacher. Defendant taught at the school daily, had a planning period, and had full access to students as any certified teacher would. The only difference between the defendant and other teachers was his title based on his lack of a teaching certificate at that time. The Court held that the defendant was correctly deemed a teacher in this case and the trial court properly denied the defendant’s motion to dismiss.

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## **Bond Forfeiture**

**A pretrial detainee subject to an ICE detainer who was held in custody until he was picked up by federal authorities and deported was not “released” from custody within the meaning of the bail statutes and the trial court therefore had no authority to enter a bail bond forfeiture based on the defendant’s failure to appear at trial**

**State v. Lemus, \_\_\_ N.C. App. \_\_\_, \_\_\_ S.E.2d \_\_\_ (Aug. 18, 2020)**

The trial court had no statutory authority to enter a bail bond forfeiture where the defendant was not “released” from custody within the meaning of Article 26 of G.S. Chapter 15A because he was subject to an ICE detainer, was picked up by federal agents, and was deported to Mexico. In 2018, the defendant was charged with a felony and a \$100,000 secured bond was set as a condition of his pretrial release. The defendant and his surety posted the bond, but the defendant was not released. Instead, he was held for about 24 hours until ICE agents took him into custody directly from deputies from the Granville County Sheriff’s Office and eventually deported him. Because he had been deported, the defendant failed to appear at trial and, consequently, the trial court entered a bond forfeiture order. The surety filed a petition for remission of forfeiture under the “extraordinary circumstances” provision of G.S. 15A-544.8(b)(2). The trial court denied the petition and the court of appeals reversed. Saying that the case was one of first impression, the court conducted plain-language statutory interpretation and summarized that analysis as follows:

The bond forfeiture statutes apply only to “a defendant who was released” under those statutes. Lemus was never released. Therefore, the trial court had

## Criminal Procedure

no authority to conduct a forfeiture proceeding and should have granted the petition to set aside the forfeiture for that reason.

The court went on to reject various procedural and policy arguments advanced by the school board as to why the forfeiture was properly ordered.

### Counsel Issues

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#### **The record on appeal did not support a determination that the defendant forfeited his right to counsel**

**State v. Patterson, \_\_\_ N.C. App. \_\_\_, 846 S.E.2d 814 (July 21, 2020)**

The defendant was charged with multiple crimes related to a break-in at the home of the elected district attorney. The trial court allowed the defendant's first appointed lawyer to withdraw based on an unspecified conflict in February 2018. In April 2018 his second appointed lawyer also moved to withdraw when the defendant was uncooperative. The trial court allowed the motion and appointed a third lawyer. The third lawyer moved to withdraw in November 2018. The court held a hearing on that motion, ultimately granting it and finding that the defendant had forfeited his right to counsel based on his conduct, "including incessant demands and badgering" of his three appointed lawyers. The trial judge appointed the third lawyer as standby counsel. The defendant represented himself at trial, presented no evidence, was convicted of all charges and sentenced. On appeal, the defendant argued that the trial court erred by determining that he had forfeited his right to counsel. In light of *State v. Simpkins*, 373 N.C. 530 (2020)—a case decided by the Supreme Court while the defendant's appeal was pending—the Court of Appeals agreed. The test first articulated in *Simpkins* is that a finding that a defendant has forfeited his right to counsel requires "egregious dilatory or abuse conduct on the part of the defendant which undermines the purpose of the right to counsel." The Supreme Court further clarified that forfeiture is appropriate when the defendant's behavior is so threatening or abusive toward counsel that it makes the representation itself physically dangerous, or when the defendant's actions related to counsel are an attempt to obstruct the proceedings and prevent them from coming to completion. Here, the defendant's attorneys moved to withdraw because the defendant was uncooperative, uncivil, and made unreasonable demands based at least in part on his concern that any court-appointed counsel would be biased against him due to his or her relationship with the victim in the case—the District Attorney. However, no evidence in the record suggested that the defendant threatened or physically abused his lawyers. And nothing in the record indicated that the defendant's behavior actually delayed or obstructed the proceedings. The defendant's actions therefore did not fit within the forfeiture criteria recently spelled out in *Simpkins*, and the Court of Appeals vacated the criminal judgments. Nevertheless, based on the reference in the trial court's order to the defendant's "abusive nature" and "abuse of counsel," the court remanded the matter for a new forfeiture hearing at which the trial judge could put into the record any evidence from prior in-chambers discussions with counsel that might support a forfeiture under either prong of the new *Simpkins* test.

## Criminal Procedure

**Defense counsel's performance was deficient in the punishment phase of a capital murder trial because counsel failed to conduct an adequate investigation into the mitigation case as well as into the State's aggravation case**

**Andrus v. Texas**, 590 U.S. \_\_\_, 140 S. Ct. 1875 (June 15, 2020)

In a per curiam decision, the Court determined that defense counsel's performance in the punishment phase of a capital murder trial was deficient and remanded the case to the Texas Court of Criminal Appeals for that court to address the prejudice prong of a *Strickland* ineffective assistance of counsel analysis. Noting that under prevailing professional norms defense counsel had an obligation to conduct a thorough investigation of the defendant's background, the Court found that defense counsel fell short of that obligation in multiple ways:

First, counsel performed almost no mitigation investigation, overlooking vast tranches of mitigating evidence. Second, due to counsel's failure to investigate compelling mitigating evidence, what little evidence counsel did present backfired by bolstering the State's aggravation case. Third, counsel failed adequately to investigate the State's aggravating evidence, thereby forgoing critical opportunities to rebut the case in aggravation.

Calling defense counsel's nominal case in mitigation "an empty exercise," the court explained that counsel was "barely acquainted" with the witnesses he called during the punishment phase and did not prepare them to testify, that he "did not look into or present the myriad tragic circumstances that marked [the defendant's] life," and that he ignored avenues of investigation of which he should have been aware. The Court went on to explain that because of his failure to investigate the mitigation case, defense counsel essentially introduced aggravating evidence as he elicited witness testimony that did not accurately reflect the defendant's life experience and presented the defendant in a poor light. Finally, the court noted that defense counsel's failure to investigate the State's case in aggravation resulted in a deficient failure to rebut critical aggravation evidence. Finding defense counsel's performance deficient as a matter of law, the Court said that there was a "significant question" as to whether the Texas Court of Criminal Appeals had properly considered the prejudice prong of the *Strickland* analysis and remanded the case so that issue could be addressed.

Justice Alito, joined by Justices Thomas and Gorsuch, dissented, disagreeing with the majority's view that the lower court had not properly considered the prejudice prong of the analysis.

## Double Jeopardy

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**(1) Accessory after the fact and obstruction of justice are distinct offenses and evidence supported jury instructions on each; (2) Failure to instruct the jury on the defendant's belief that the killing was justified by self-defense was not plain error**

**State v. Cruz**, \_\_\_ N.C. App. \_\_\_, 845 S.E.2d 199 (July 7, 2020)

The defendant was convicted of accessory after the fact to a felony and felony obstruction of justice in Cleveland County relating to her efforts to assist a murder suspect (later convicted of

## Criminal Procedure

second-degree murder) evade capture. (1) The defendant argued the statutory offense of accessory after the fact abrogated the common law offense of obstruction of justice in part, such that she could not be convicted of both. The North Carolina Supreme Court previously rejected this argument in *In re Kivett*, 309 N.C. 635, 670 (1983), which defeated this claim. The defendant also argued that the two offenses were the same for purposes of double jeopardy, in that they are greater- and lesser-included offenses of each other. This argument has also been rejected by the prior decisions of the Court of Appeals, as the offenses have different elements: "This Court has expressly held that accessory after the fact and obstruction of justice do not constitute the same offense, and that neither is a lesser-included offense of the other." *Cruz* Slip op. at 9 (citation omitted). Substantial evidence supported each instruction as well. As to the accessory conviction, the evidence showed the defendant provided personal assistance to the suspect while knowing he was wanted for murder. As to the obstruction conviction, the defendant lied to detectives about seeing or communicating with the suspect and deleted information from her phone showing she was in communication with him after police expressed an interest in her phone. This evidence was sufficient to support the instructions for each offense and the trial court did not err by so instructing the jury.

(2) The trial court did not commit plain error by failing to instruct the jury that if the defendant believed the killing was done in self-defense, she could not be convicted of accessory after the fact. Even if the defendant believed the killing was justified, the evidence here was sufficient to raise "a reasonable inference that the [D]efendant knew precisely what had taken place," as she had notice of the suspect's outstanding arrest warrant for murder at the time of her assistance to the defendant and her deceptions to law enforcement. The convictions were therefore unanimously affirmed.

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## Habeas Corpus

**A state trial judge must summarily deny an application for the writ of habeas corpus from a petitioner held pursuant to an immigration-related arrest warrant or detainer by a sheriff who is a party to a 287(g) agreement**

### **Chavez v. McFadden**, 374 N.C. 458 (June 5, 2020)

Carlos Chavez and Luis Lopez, initially charged with state crimes and held in pretrial detention in the Mecklenburg County Jail, both became eligible for release from their state charges on October 13, 2017. But they were not released. The Sheriff, a participant in a § 287(g) agreement with the Department of Homeland Security, continued to hold them on immigration-related warrants and detainees. That same day, both men filed petitions for a writ of habeas corpus. A superior court judge entered orders finding that the men were being unlawfully detained and ordered their discharge from custody. The Sheriff declined to release either petitioner and delivered them to federal immigration custody. In November 2017, the Sheriff filed petitions for writ of certiorari with the Court of Appeals to review the trial judge's orders, and a writ of prohibition seeking to preclude similar orders in the future. The next month, the Court of Appeals allowed the petitions and entered an order prohibiting a trial court from issuing a writ of habeas corpus for a person detained pursuant to a 287(g) agreement. The following year the

## **Criminal Procedure**

Court of Appeals vacated the trial court orders for lack of jurisdiction, concluding that they infringed upon the federal government's exclusive authority over immigration matters. *Chavez v. Carmichael*, 262 N.C. App. 196 (2018).

The Supreme Court allowed discretionary review and affirmed in part. The Court concluded as a threshold matter that although the matter was rendered moot when the Sheriff turned the men over to immigration authorities, the case fell within the scope of the public interest exception to the mootness doctrine. Proceeding to the merits, the Court concluded that a state court judge cannot interfere with the custody and detention of individuals held pursuant to federal authority, which includes state officials acting in accordance with a § 287(g) agreement. A trial court has jurisdiction to determine as an initial matter whether it has the authority to issue the writ, but once that initial examination of the application shows that the petitioner is being held pursuant to an immigration-related warrant or detainer, the trial court should summarily deny the application. Here, the applications, on their face, informed the judge that the petitioners were being held on immigration related process by a custodian who was a party to a § 287(g) agreement, and should therefore have been denied. The Court said the Court of Appeals erred to the extent that it held that the trial court lacked jurisdiction to make even an initial determination as to the basis for the petitioners' detention, and also by addressing the extent to which habeas relief is available to petitioners detained on immigration-related documents by sheriffs who are not parties to § 287(g) agreements. In a footnote, the Court vacated the portion of the Court of Appeals' decision ordering that a copy of its decision be sent to the Judicial Standards Commission.

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## **Indictment & Pleading Issues**

**The State may amend a criminal pleading after arraignment through a statement of charges if doing so does not change the nature of the charges**

### **State v. Capps**, 374 N.C. 621 (June 5, 2020)

The defendant was charged by arrest warrant with misdemeanor injury to personal property, misdemeanor larceny, and reckless driving after he cut off the end of a truck stop's air hose, attempted to strike his passenger with it, and then quickly fled with it when confronted by an undercover officer. He was convicted in district court and appealed to superior court. Before trial in superior court, the State moved to amend the charging language to correct the name of the corporate property owner for the injury to personal property and larceny charges. The prosecutor made the amendment on a misdemeanor statement of charges form with no objection from the defendant. The defendant was convicted and appealed. A divided Court of Appeals held that the superior court lacked jurisdiction to try the charges amended through the statement of charges, reasoning that under the language of G.S. 15A-922(e), a statement of charges may be filed after arraignment only if the defendant objects to the State's original pleading. *State v. Capps*, \_\_\_ N.C. App. \_\_\_, 828 S.E.2d 733 (2019). The State appealed and the Supreme Court reversed, reinstating the convictions. The Court held that warrants may be amended at any time when doing so does not materially affect the nature of the charged offense or is otherwise authorized by law. And the State may make the amendment though a

## Criminal Procedure

statement of charges, because the General Assembly intended statements of charges to be generally treated like amendments. The Court rejected the defendant's argument that the defendant's objection to the sufficiency of a warrant is a necessary prerequisite to a post-arrainment statement of charges.

**(1) Majority of Court of Appeals holds that attempted armed robbery must specifically name victims and that indictment that alleged victims as employees of business was fatally defective; (2) Whole plea agreement covering defective charge and other charges had to be vacated; parties may enter into new plea agreement or State may proceed to trial on all charges, including new indictment for armed robbery**

*State v. Oldroyd*, \_\_\_ N.C. App. \_\_\_, 843 S.E.2d 478 (May 19, 2020), *temp stay granted*, \_\_\_ N.C. \_\_\_, 842 S.E.2d 93 (June 5, 2020)

The defendant was indicted in 2013 for first-degree murder, attempted armed robbery, and conspiracy to commit murder for crimes committed in 1996. Pursuant to a plea agreement, the defendant pled guilty in June 2014 to a reduced charge of second-degree murder, attempted armed robbery, and conspiracy to commit robbery, for which he received a consolidated sentence of 120 to 153 months. In June 2015, the defendant filed a motion for appropriate relief claiming that the indictment for attempted armed robbery was fatally defective by failing to name any victim. The trial judge denied the motion, and the defendant petitioned for a writ of certiorari. (1) A majority of the Court of Appeals ruled that the indictment was fatally defective and did not provide the trial court with jurisdiction to enter judgment on the defendant's guilty plea to attempted armed robbery. The Court recognized that armed robbery is a crime against the person. Like common law robbery, it involves the taking of money or goods from the person or presence of another by violence or intimidation. The only difference is the use of a firearm or other dangerous weapon. Indictments for such crimes must specifically name the victim. The Court held that attempted armed robbery is indistinguishable from the completed crime in terms of the subject matter and the victim must be specifically named in the indictment. The indictment in this case alleged the victims as employees of the Huddle House. Relying on prior decisions, including the North Carolina Supreme Court's decision in *State v. Scott*, 237 N.C. 432 (1953), the Court ruled that this allegation was not sufficient to satisfy the requirement that the victim be specifically named. A dissenting judge would have found the indictment sufficient because the allegation that the defendant was attempting to steal property from the employees of Huddle House was sufficient to show that the defendant was taking others' property and the allegation that the lives of the employees were threatened or endangered by the defendant's possession of a firearm was sufficient to put him on notice of the manner and means by which the crime was perpetrated. (2) The Court of Appeals rejected the requested remedy of vacating his conviction for attempted armed robbery. The Court held that by successfully moving to vacate the judgment for armed robbery, the Court was obliged to vacate the whole plea agreement. The Court observed that the parties may enter into a new plea agreement or the State may proceed to trial on the charges, including attempted armed robbery pursuant to a new indictment.

## Criminal Procedure

### Jury Instructions

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**(1) Trial judge did not err in refusing to instruct the jury on consent in case involving assault inflicting serious bodily injury (AISBI); (2) Trial judge did not abuse discretion in refusing to impose sanctions for State's failure to disclose fee paid to expert about the victim's injuries**

**State v. Russell**, \_\_\_ N.C. App. \_\_\_, 844 S.E.2d 586 (May 19, 2020)

The defendant met his former girlfriend and new boyfriend, the victim in the case, at a bar. The defendant asked the victim to step outside to talk. During the exchange, the victim told the defendant to hit him. (According to the concurrence, the victim said, “If you want to hit me, hit me, but this is not the way we need to solve this issue.”). The defendant hit the victim and broke his jaw in two places, requiring surgery to repair the damage. (1) The defendant argued that the trial court erred in refusing to instruct the jury on AISBI. The majority stated that consent is not a defense to assault in North Carolina and held that the trial court did not err in refusing to instruct on consent for AISBI. The concurring judge found it unnecessary to decide whether consent is an element of or defense to assault, finding that the trial judge did not err in refusing to instruct on consent because the evidence did not show the victim consented to an assault inflicting serious bodily injury and arguably did not consent to an assault at all.

(2) At sentencing, the State advised the trial judge that it had failed to disclose the fee paid to an expert to testify about the victim’s injuries. The trial judge found the failure to disclose was an “honest mistake.” The Court stated that it was not clear whether the trial judge found that a discovery violation had occurred, but assuming a violation occurred, the defendant was not prejudiced.

### Sentencing

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**A defendant who disagrees with the jail credit calculated by the trial court should seek relief under the procedures in G.S. 15-196.4**

**State v. Galloway**, \_\_\_ N.C. App. \_\_\_, 844 S.E.2d 326 (May 19, 2020)

After the defendant pled guilty to multiple offenses, the trial court suspended his sentence and placed him on supervised probation. At a later probation violation hearing, the trial court revoked the defendant’s probation, reactivated his sentence, and awarded him 343 days of jail credit. The defendant appealed, asking the Court of Appeals to remand the case to the trial court to determine whether he should have received an additional 107 days of credit. The Court of Appeals dismissed the defendant’s appeal without prejudice to seek relief from the trial court pursuant to G.S. 15-196.4, which allows the defendant to petition the court for credit not previously allowed. Then, if necessary, the defendant could appeal the trial court’s determination with a record suitable for meaningful review by the Court of Appeals.

## Criminal Procedure

### The trial court erred in calculating the defendant's prior record level by using a joinable offense as a prior conviction

**State v. High, \_\_\_ N.C. App. \_\_\_, 845 S.E.2d 150 (June 2, 2020)**

The trial court erred in calculating the defendant's prior record level, which was proved by stipulation, by using a joinable offense as a prior conviction for sentencing purposes. In 2004 the defendant was convicted of first-degree murder and armed robbery based on an incident where he killed his father and took money from his father's bedroom. The defendant was 15 years old at the time of the offenses but was tried as an adult and sentenced to life in prison without the possibility of parole. In 2014 post-conviction proceedings based on *Miller v. Alabama*, the first-degree murder conviction was vacated and the defendant pleaded guilty to second-degree murder. As part of that plea agreement, the State and the defendant stipulated that the defendant had a prior record level of III, a record level that was the result of six prior record points arising from the 2004 armed robbery conviction. Noting that a defendant's stipulation regarding his or her prior record level does not preclude the court's review where calculation of the record level requires answering a legal question, the court found that use of the 2004 armed robbery conviction violated the rule from *State v. West*, 180 N.C. App. 664 (2006) that a joinable offense may not be used in calculating a defendant's prior record level.

### Trial court did not commit a clerical error in sentencing the defendant to a maximum sentence that was calculated based on the minimum term actually imposed

**State v. Wohlers, \_\_\_ N.C. App. \_\_\_, \_\_\_ S.E.2d \_\_\_ (Aug. 4, 2020)**

The defendant was convicted of indecent liberties with a child and felony child abuse by sexual act based on crimes committed against his daughter and stepdaughter. The court of appeals held that the trial court properly determined the defendant's maximum term of imprisonment for felony child abuse by sexual act, a Class D felony, based upon the minimum term it had selected (64 months) rather than the minimum term permitted by statute (51 months). G.S. 15A-1340.17(f) provides that, for offenders sentenced for reportable convictions that are Class B1 through E felonies, the maximum term of imprisonment "shall be equal to the minimum term of imprisonment and twenty percent (20%) of the minimum term of imprisonment, rounded to the next highest month, plus 60 additional months." Once the trial court set the defendant's minimum term of imprisonment at 64 months (the top of the presumptive range), it properly added 64 plus 13 (20 percent of 64, 12.8, rounded to the next highest month) plus 60, totaling 137 months.

## Criminal Procedure

### Sex Offenders

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**(1) Wake County Superior Court retained jurisdiction over hearing to determine whether the defendant was required to register as a sex offender based upon his conviction for felony secret peeping when defendant agreed to subsequent hearing that was postponed to allow defendant to demonstrate that he was not a danger to the community and where defendant received adequate notice of hearing; (2) Order remanded for correction of clerical error.**

**State v. Vorndran, \_\_\_ N.C. App. \_\_\_, \_\_\_ S.E.2d \_\_\_ (Aug. 4, 2020)**

On March 21, 2018, the defendant pled guilty in Wake County Superior Court to felony secret peeping in violation of G.S. 14-202(e). Pursuant to a plea agreement, the defendant was placed on four years of supervised probation. Among other conditions, the defendant was not permitted to be unsupervised around children under the age of 14. The trial judge conducted a separate hearing the same day on whether the defendant would be required to register as a sex offender pursuant to G.S. 14-202(l). The trial court opted, in light of the defendant's age, to give him a chance to show that he was not a danger to the community. The court announced that there would be a hearing in 12 months to see whether the defendant was in compliance with probation. The parties agreed to a subsequent hearing, which they agreed could be accelerated for noncompliance.

On December 1, 2018, the defendant was arrested in New Hanover County for felony secret peeping. Three days later, the State notified the defendant that based on his recent arrest he should be required to register for his Wake County conviction and that his registration hearing was being accelerated. On December 20, 2018, the defendant appeared in Wake County Superior Court before a superior court judge who was not the sentencing judge in the original Wake County case. The judge ordered the defendant to register as a sex offender for 30 years.

(1) The defendant argued on appeal that the trial court lacked jurisdiction over the December 20 hearing because the presiding judge was not the "sentencing court" as contemplated by G.S. 14-202(l).

The court of appeals rejected the defendant's argument, noting that the defendant agreed to a subsequent hearing, which he agreed could be accelerated, and agreed that he would not be unsupervised around any children under the age of 14. Thus, when he was arrested for felony secret peeping involving a nine-year-old child, he was in violation of the terms of his probation, and his hearing could be accelerated pursuant to the plea agreement. In addition, the State notified the defendant that it was accelerating his registration hearing, and the issues before the court in that hearing were to determine in the first instance whether the defendant was a danger to the community and whether his registration would further the purpose of the registration scheme. On these facts, the appellate court determined that Wake County Superior Court retained jurisdiction over the defendant's second hearing and affirmed its order.

(2) The trial court erroneously checked box 1(b) on form AOC-CR-615 (the sex offender registration determination form), indicating the defendant was convicted of a sexually violent offense rather than box 1(d), to indicate that the defendant was convicted of felony secret

## Criminal Procedure

peeping. The court of appeals remanded the matter to the trial court for the limited purpose of correcting that error.

### **Imposition of lifetime SBM was an unreasonable warrantless search in violation of the Fourth Amendment**

**State v. Hutchens, \_\_\_ N.C. App. \_\_\_, 846 S.E.2d 306 (June 16, 2020)**

In this rape and sex offense case, the Court of Appeals reversed the trial court's order imposing lifetime SBM. First addressing its appellate jurisdiction, the court explained that it allowed the defendant's petition for writ of certiorari in its discretion, notwithstanding procedural defects in his notice of appeal, because of the "meritorious nature" of the defendant's argument regarding SBM and the current "tumultuous" state of the law. Before turning to the merits of the SBM issue, the court also dismissed a portion of the defendant's appeal having to do with attorney's fees because an order for those fees had not been entered as a civil judgment.

As the defendant was not a recidivist and, consequently, the order requiring lifetime SBM was not facially unconstitutional under *State v. Grady*, 259 N.C. App. 664 (2018) ("*Grady III*"), the court conducted a reasonableness analysis guided by the principles of *Grady III*, namely that it is the State's burden to show that under the totality of the circumstances lifetime SBM is reasonable because its intrusion upon Fourth Amendment interests is balanced by its promotion of legitimate government interests. As to the intrusion side of the analysis, the court likened this case to *State v. Gordon*, \_\_\_ N.C. App. \_\_\_, 840 S.E.2d 907 (2020) where it explained that the State's ability to show the reasonableness of lifetime SBM is hampered in situations where it is imposed at sentencing but will not be implemented upon the defendant until he or she is released after a lengthy prison sentence. The court also noted the deeply intrusive nature of the ET-1 monitoring device at issue and the fact that the defendant's privacy interests will be less diminished following his completion of PRS. As to the State's interest in SBM and its efficacy, the court rejected the State's argument that SBM would discourage recidivism, saying that the State had not presented evidence to support that assertion, either generally or with respect to the defendant specifically. The court also rejected the State's argument that lifetime SBM would serve the purpose of keeping the defendant out of "exclusion zones," noting that his status as a registered sex offender already barred him from many such zones and that his offense involved an adult roommate. For a lack of evidence, the court also rejected the argument that lifetime SBM would ensure that he abided by an order to have no contact with the victim. Under the totality of the circumstances, the State did not show that lifetime SBM was a reasonable warrantless search in this case.

## **Criminal Procedure**

**Imposition of satellite-based monitoring (SBM) for life was unreasonable search, but majority of Court of Appeals holds that imposition of SBM during the period of post-release supervision (PRS) was reasonable**

**State v. Hilton, \_\_\_ N.C. App. \_\_\_, 845 S.E.2d 81 (May 19, 2020)**

In 2007, the defendant pled guilty to statutory rape and statutory sexual offense and was sentenced to 144 to 182 months of imprisonment. With credit for presentence confinement, he was released in July 2017 subject to PRS, which included a condition that he not leave Catawba County without the consent of his probation officer. After his release, the defendant violated that condition by going to Caldwell County without the knowledge or approval of his probation officer. He was subsequently charged with taking indecent liberties with his fifteen-year-old niece and absconding to Caldwell County. During the pendency of his case in Caldwell County, the State initiated proceedings to enroll the defendant in SBM through a bring-back hearing pursuant to G.S. 14-208.40B. After a hearing, the trial judge ordered the defendant to enroll in SBM for life. The Court of Appeals ruled that the imposition of lifetime SBM on the defendant constituted an unreasonable search. A majority of the Court ruled further that the imposition of SBM during the defendant's period of PRS was reasonable. The majority found that the defendant's expectation of privacy is low during PRS. And, although the State failed to present evidence showing the efficacy of SBM in solving sex crimes, it presented evidence showing SBM's efficacy in determining whether the defendant violated the condition of PRS that he remain in Catawba County. The majority held that the "for life" language in G.S. 14-208.40B is severable from the rest of the statute and affirmed the trial judge's order to the extent it imposes SBM for the period of the defendant's PRS. A dissenting judge concurred with the majority's reversal of lifetime SBM but would have reversed the imposition of SBM for the period of PRS. He stated that the State did not show the efficacy of SBM during PRS and that statute on lifetime SBM could not be construed to authorize SBM for the period of PRS.

**There was uncertainty in the record as to which of two studies the trial court relied upon when ordering SBM and the court of appeals remanded for clarification of that issue**

**State v. Lindquist, \_\_\_ N.C. App. \_\_\_, \_\_\_ S.E.2d \_\_\_ (Aug. 18, 2020)**

In this case involving rape and other sex crimes where the defendant was ordered to enroll in lifetime SBM, the court of appeals vacated the order imposing SBM because of uncertainty surrounding the evidentiary basis of the trial court's decision. With regard to the issue of efficacy of SBM, at the SBM hearing a DPS employee testified regarding a 2015 California study of GPS monitoring of sex offenders and that study was introduced into evidence. However, the trial court's order imposing SBM referred to a 2012 California study of GPS monitoring of sex offenders. The court of appeals vacated the order and remanded for clarification as to which California study the trial court relied upon.

## Evidence

### Best Evidence Rule

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**The admission of an ACIS printout for the purpose of establishing the defendant's habitual felon status was proper**

**State v. Waycaster**, \_\_\_ N.C. \_\_\_, 846 S.E.2d 688 (Aug. 14, 2020)

After violating his probation, the defendant was indicted on charges of interfering with an electronic monitoring device and attaining the status of a habitual felon. The habitual felon indictment charged defendant with attaining habitual felon status based on three prior felony convictions in McDowell County: (1) a June 4, 2001 conviction for felonious breaking and entering; (2) a February 18, 2010 conviction for felonious breaking and entering; and (3) a July 22, 2014 conviction for safecracking. At trial, the State admitted into evidence certified copies of the judgments for the latter two convictions to prove their existence.

Although the State could not obtain the original judgment associated with the June 4, 2001 conviction, the State introduced as an exhibit a computer printout from the Automated Criminal/Infraction System (ACIS). The Clerk of Court for McDowell County testified that ACIS is a statewide computer system relied on by courts and law enforcement agencies for accessing information regarding a defendant's criminal judgments, offense dates, and conviction dates, manually entered into the database by an employee in the Clerk of Court's office. The ACIS printout offered by the State showed that the defendant had been convicted of felonious breaking and entering on June 4, 2001, and the Clerk testified that the printout was a "certified true copy of the ACIS system." The trial court admitted the printout into evidence over the defendant's objection, and the jury found that the defendant had attained the status of a habitual felon.

On appeal, the defendant unsuccessfully argues that the trial court improperly allowed the ACIS printout because G.S. 14-7.4 contained the exclusive methods for proving prior convictions in a proceeding to determine habitual felon status. The Court of Appeals concluded that the statute was permissive and did not exclude methods of proof not specifically delineated in the Habitual Felons Act. The Supreme Court affirmed. The Court relied on the presence of the word "may" in the statute, as well as its prior interpretation of the Fair Sentencing Act, which contained similar language.

The dissenting Court of Appeals judge concluded that the introduction of the printout violated the best evidence rule because the printout was introduced as evidence of the defendant's prior convictions and was not the original judgment. The majority rejected this argument, noting that the best evidence rule applies only when the contents of a document are at issue. The Court reasoned that here, the issue was not the contents of the conviction but rather the existence of the conviction. However, in a concurring opinion, Chief Justice Beasley noted that the nature of the Habitual Felons Act requires that the State prove that the defendant did, in fact, commit three prior felony offenses, and to do so requires the court to consider the contents of the record to be introduced for the purpose of confirming "that said person has been convicted of former felony offenses." While the Chief concluded that the best evidence

rule did apply to the introduction of the printout, the Chief noted that the State complied with the rule through the printout coupled with the Clerk's testimony.

## Opinions

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**(1) Trial judge erred in admitting expert testimony that substance was methamphetamine without first requiring that expert explain how she applied the GCMS test to the substance; however, error was not plain error; (2) Good cause did not exist for activating the defendant's suspended sentence on other charges after his period of probation expired; State could have proceeded for violation of "commit no crime" condition before defendant was convicted of current crime**

**State v. Sasek , \_\_\_ N.C. App. \_\_\_, 844 S.E.2d 328 (May 19, 2020)**

(1) The defendant was convicted of possession with intent to sell or deliver a Schedule II controlled substance and sale of methamphetamine. At trial, the State presented the testimony of an expert in drug chemistry from the North Carolina State Crime Lab. She testified that she performed a gas chromatography mass spectrometer (GCMS) test on the substance. She explained how the GCMS test works and how the examiner analyzes the results. Before she explained how she applied those methods on the sample in this case and the result she obtained, the State interrupted her testimony and asked about recognition of GCMS testing in the scientific community. The witness testified that GCMS was well-respected in the scientific community and confirmed that she had recorded the results of her testing in the lab report. The lab report was then admitted into evidence without objection, and the witness testified without objection that the substance was methamphetamine, Schedule II. The Court of Appeals held that although the witness was prepared to explain how she conducted GCMS testing in this case, she never did so. Further, the lab report stated only that the material that was examined was found to contain methamphetamine. The Court of Appeals found that this evidence failed to satisfy North Carolina Rule of Evidence 702(a)(3), which requires that the witness demonstrate that she applied the principles and methods reliably to the facts of the case. The Court ruled, however, that the defendant failed to establish plain error because the witness testified that she conducted the GCMS test, obtained positive results, and produced a lab report recording the results.

(2) The trial judge revoked the defendant's probation, imposed for other charges before the offenses in this case, based on violation of the condition that the defendant commit no criminal offense. The defendant argued and the State conceded that the trial judge erred by activating his suspended sentence without making a finding that good cause existed to revoke his probation after the period of probation expired. The defendant argued further that the probation revocation should be vacated, without remand, because the record was devoid of any evidence to show good cause to revoke after the expiration of the defendant's probation. The Court of Appeals agreed. A violation report was filed May 17, 2017, and a probation hearing was scheduled for June 13, 2017, but a hearing did not take place until March 2019, fourteen months after the defendant's probation expired. The Court found nothing in the record to show why the probation hearing was not held in June 2017 or at least before

expiration of his probation in January 2018. The Court noted that a criminal conviction is not required for the trial judge to revoke probation for a defendant's commission of a criminal act in violation of probation. A concurring judge would have remanded for further proceedings on whether the State made reasonable efforts to conduct a probation hearing before expiration of the defendant's probation.

**(1) Trial court did not err by permitting lay witness to testify that the shots defendant fired were individual shots that were not as rapid as shots fired from an automatic weapon; (2) Evidence of seven distinct shots was sufficient to support seven charges of discharging a firearm into an occupied vehicle**

**State v. Morrison, \_\_\_ N.C. App. \_\_\_, \_\_\_ S.E.2d \_\_\_ (Aug. 4, 2020)**

The defendant was convicted of possession of a firearm by a felon, three counts of assault with a deadly weapon and seven counts of discharging a firearm into an occupied vehicle based on an incident in which he chased two women from his house and fired at the car of a Good Samaritan who stopped to assist the women on the highway.

(1) Though the defendant did not object to the testimony at trial, he argued on appeal that the Good Samaritan should not have been permitted to testify as a lay witness that the shots were not fired from an automatic weapon. The court of appeals found no error in the admission of the testimony, which was based on the witness's first-hand knowledge of the incident and his familiarity with the distinction between automatic and semi-automatic rifle fire, gained through decades of military service.

(2) Defendant argued on appeal that the State failed to prove the six additional shots fired into the truck after the first shot were discharged willfully or wantonly within the meaning of G.S. 14-34.1(b). The court of appeals rejected the defendant's argument. The court noted that the Good Samaritan's testimony provided evidence that the defendant did not use an automatic weapon but instead used a weapon that required him to pull and release the trigger (and thus employ his thought process) each time he decided to shoot into the occupied truck. In addition, testimony from the Good Samaritan and one of the women established that the shooting continued over an identifiable period of time, as opposed to occurring in a rapid burst of gunfire.

Finally, the court of appeals dismissed the defendant's argument that he had been sentenced in violation of his right to be free from double jeopardy on the basis that the defendant failed to preserve the argument by objecting at trial.

## **Arrest, Search, and Investigation**

### **Arrests & Investigatory Stops**

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**(1) Presence of pocketknife in center console did not support *Terry* frisk; (2) Defendant's act of fleeing during an illegal search was not an intervening circumstance supporting application of attenuation doctrine; denial of motion to suppress reversed**

**State v. Duncan, \_\_\_ N.C. App. \_\_\_, 846 S.E.2d 315 (July 7, 2020)**

The defendant was stopped by a Charlotte-Mecklenburg police officer for a broken taillight and a passenger seatbelt violation. A second officer arrived shortly after the stop. The stopping officer saw an approximately five-inch closed pocketknife in the center console between the driver and passenger. The officer then asked the defendant to step out of the car so the knife could be secured and to check the defendant for weapons. The defendant exited the car and stated that having the knife was not a crime. The officer agreed, stating he was acting out of officer safety. The defendant stated he was not armed and did not consent to a frisk. When the officer said he was "just going to pat [Defendant] down," the defendant said, "all right," and raised his arms. The officer felt a bulge the size of a "large grape" near the defendant's exterior coat pocket but could not locate the item within the pocket. The officer suspected the item was marijuana and asked the defendant about it. The defendant replied that it was an item he purchased from a store. When asked to remove the item, the defendant produced several items wrapped in plastic, telling the officer, "It's not illegal, man." The officer then grabbed the bulge from the outside, lifted the defendant's coat, and reached inside an interior pocket. The defendant repeatedly asked for a supervisor on scene and protested: "This is not a *Terry* frisk, man. You're illegally searching me." At one point the defendant pushed the officer's arm away. The officer did not remove his hands from the defendant's pockets and the defendant eventually fled, falling nearby. As the defendant got up from the fall, the officer observed the defendant "digging in his waistband." The defendant was then tased and arrested at gunpoint. A bag was found nearby containing crack and powder cocaine. More crack, marijuana, and cash were found on the defendant. The defendant stated the drugs were for personal use during arrest processing. He was charged with possession with intent to sell or deliver cocaine and possession of cocaine and moved to suppress.

The trial court denied the motion. It found the frisk was not based on reasonable suspicion and was therefore unconstitutional, but the defendant's act of fleeing sufficiently attenuated that violation from the discovery of evidence. The defendant was convicted of two counts of possession of cocaine at trial and appealed. A divided Court of Appeals reversed.

(1) The State argued that the frisk was justified by the presence of the knife in the center console—since the defendant was armed, he was dangerous—and that the trial court erred in concluding otherwise. The majority disagreed. Two officers were present, the defendant was stopped for equipment violations only, and the stop occurred in the middle of the day in uptown Charlotte near the courthouse. The defendant was generally cooperative, did not attempt to conceal the knife, got out of the car (and away from the knife) upon request, and did not otherwise act suspiciously. These facts were "entirely inapposite" from cases where police had "reason to suspect the defendant possessed and concealed a dangerous weapon on

their person, *coupled* with behavior giving rise to a suspicion the defendant may be dangerous.” Slip op. at 12-13 (emphasis in original) (distinguishing *State v. Malachi*, \_\_\_ N.C. App. \_\_\_, 825 S.E.2d 666 (2019)). The trial court therefore did not err in concluding the frisk was unconstitutional.

(2) Under the attenuation doctrine, evidence that would be subject to suppression via the exclusionary rule is nonetheless admissible when the connection between the illegal action of law enforcement and the evidence is “remote or has been interrupted by some intervening circumstance.” See *Utah v. Strieff*, \_\_\_ U.S. \_\_\_, 136 S. Ct. 2056 (2016). Courts must examine the closeness in time between the police illegality and the discovery of the evidence, any intervening circumstances, and the “purpose and flagrancy of the official misconduct” when deciding whether the attenuation exception applies. *Duncan* Slip op. at 16 (citation omitted). As to the first factor, *Strieff* held that only the passing of “substantial time” between the police misconduct and the discovery of evidence favors attenuation. Because the discovery of evidence here occurred within minutes of the illegal frisk, this factor weighed against attenuation. As to the second factor, the trial court found that the defendant committed the crime of resisting a public officer by fleeing the encounter—officers then had probable cause to arrest for that offense and to search incident to the arrest, which was a sufficient intervening circumstance. The Court of Appeals disagreed, finding that even if the frisk was within the mission of the stop, the officer’s search of the defendant’s pocket for suspected marijuana was not. “Because the traffic stop was unlawful at the point of [the officer’s] unconstitutional search, the defendant had ‘the right to resist [the] unlawful arrest.’” *Id.* at 21. The court rejected the State’s contention that the defendant could have resisted the search by lesser means, pointing out that the defendant repeatedly asked for a supervisor, repeatedly objected to the search, and tried to remove the officer’s hand from his pocket before fleeing. Thus, the defendant’s flight did not constitute a crime or intervening circumstance weighing in favor of attenuation. The court observed that the final factor, the purpose and flagrancy of law enforcement misconduct, was the most significant factor in the analysis. The trial court found the officers acted in good faith and that this supported application of the attenuation doctrine. The majority again disagreed. “Instead of taking the opportunity—indeed, at Defendant’s invitation—to deescalate the situation, [the officer] proceeded with the flagrantly unconstitutional search.” *Id.* at 26. These “extraordinary facts” weighed against attenuation and in favor of suppression. The trial court’s order denying the motion to suppress was therefore reversed and a new trial ordered.

Judge Tyson dissented. He would have found that the frisk was justified and that attenuation applied to the extent the search became illegal, as well as other grounds supporting the denial of the motion.

## **Interrogation and Confession**

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### **Confession was voluntary and not the product of improper inducement**

**State v. Lee, \_\_\_ N.C. App. \_\_\_, 846 S.E.2d 508 (July 7, 2020)**

The defendant was accused of killing his aunt in Lenoir County. Following his arrest, the defendant initially requested an attorney and was not interrogated, but later contacted detectives and signed a *Miranda* waiver. The defendant offered to make a full statement if he could see his family face-to-face again (visits at the jail were conducted by computer and phone only). Officers initially declined the offer but eventually agreed to a face-to-face family visit, and the defendant confessed. The trial court refused to suppress the statement and the defendant was convicted of first-degree murder at trial. He appealed, arguing that his confession was the product of improper inducement by police and therefore not voluntary.

Due process prohibits the admission of an involuntary confession by a person in custody. “[A] confession obtained by the improper ‘influence of hope or fear implanted in the defendant’s mind’ by law enforcement can render the confession involuntary.” Slip. op. at 5. However, for an inducement to be improper, it “must promise relief from the criminal charge to which the confession relates, not to any merely collateral advantage.” *Id.* at 6 (citations omitted). Here, the defendant initiated the contact with law enforcement and offered to confess in exchange for the family visit; the plan did not originate with law enforcement. The defendant also testified at suppression that he was motivated in part to confess after talking with his father, who encouraged the defendant to make a truthful statement. The totality of circumstances showed that the confession was knowing and voluntary. Further, the purported inducement here related only to a collateral advantage and did not promise relief from the crime. The denial of the motion to suppress was therefore unanimously affirmed.

### **Defendant’s confession was induced by hope instilled by the interrogators and in the totality of circumstances was not voluntary; murder conviction and life without parole sentence reversed**

**State v. Lynch, \_\_\_ N.C. App. \_\_\_, 843 S.E.2d 346 (May 19, 2020)**

The defendant was convicted of first-degree murder, robbery with a dangerous weapon, and assault with a deadly weapon with the intent to kill inflicting serious injury. He was sentenced to life without parole for the murder conviction and to shorter terms for the other convictions. The case arose out of the robbery of a bar by two masked individuals, during which the owner of the bar was shot and killed and the perpetrators fled with the cash register. The 18-year-old defendant was arrested and waived his *Miranda* rights. The defendant adamantly denied his involvement throughout much of the three-hour, recorded interrogation but toward the end confessed his involvement. The defendant’s motion to suppress his confession was denied by the trial judge, and at trial the State introduced his confession and the testimony of others involved in the robbery implicating the defendant. The defendant argued on appeal that his confession was not voluntary because it was induced by hope of a sentence of life

imprisonment instilled by the statements and actions of the officers who interrogated him. The Court of Appeals reviewed the transcript of the confession and concluded that in the totality of the circumstances the defendant's confession was involuntary. The Court found that the defendant was predisposed to deny involvement and believed he would receive a life sentence whether he confessed or not. The Court also found that without being prompted by the defendant, the interrogators introduced the idea that they had ample evidence against the defendant, that they knew he was lying, that the judge could be influenced to show leniency if he confessed, and that they would be willing to testify on his behalf. The Court further found that the State failed to meet its burden to show that admission of the confession, which was constitutional error, was harmless beyond a reasonable doubt. The Court observed that there was sufficient evidence to convict the defendant without the confession in light of testimony from others involved in the robbery and video surveillance footage showing the masked perpetrators; however, no physical evidence linked the defendant to the crime and no one at the bar could identify the defendant as one of the perpetrators. The Court stated that it could not conclude beyond a reasonable doubt that all twelve jurors would have voted to convict without the confession.

## Criminal Offenses

### Assaults

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**(1) The defendant could not be separately convicted and punished for both habitual misdemeanor assault and felony assault inflicting serious bodily injury based on the same act; (2) the court must arrest judgment on one of the convictions**

#### **State v. Fields, 374 N.C. 629 (June 5, 2020)**

The defendant was convicted after a jury trial of habitual misdemeanor assault and felony assault inflicting serious bodily injury for the same assaultive act. The trial court imposed consecutive sentences. The defendant appealed, arguing that the trial court erred by sentencing him for both habitual misdemeanor assault and the felony assault. The Court of Appeals vacated the habitual misdemeanor assault conviction, holding over a dissent that the defendant could not be sentenced for both crimes when the offenses arose from the same act. *State v. Fields, \_\_\_ N.C. App. \_\_\_, 827 S.E.2d 120 (2019)*. The State appealed to the Supreme Court of North Carolina based on the dissent, and also sought discretionary review on the issue of whether, even if it was impermissible for the trial judge to sentence the defendant for both convictions, the Court of Appeals erred by *vacating* one of the convictions instead of *arresting judgment* on it. (1) On the first issue, the Supreme Court affirmed the Court of Appeals, concluding that the defendant could not be sentenced for both convictions that arose out of the same assaultive act. The misdemeanor assault statute, G.S. 14-33, includes prefatory language saying the law applies “[u]nless the conduct is covered under some other provision of law providing greater punishment”—language the appellate courts have generally interpreted to bar simultaneous punishments for the same act. Though the habitual misdemeanor assault statute, G.S. 14-33.2, does not include that language, the Supreme Court concluded that the principle still applies, as the misdemeanor assault is necessarily a part of the “upgraded”

habitual misdemeanor assault conviction. The felony assault conviction based on the same assaultive act was a “provision of law providing greater punishment” that invoked the prefatory language of the misdemeanor assault statute, which in turn meant that the defendant could not be punished for habitual misdemeanor assault. (2) On the second issue, the Court concluded that the proper remedy when such prefatory language bars double punishment for the same act is to arrest judgment on one of the judgments, not to vacate it.

## **Abuse Offenses**

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**(1) Trial court did not commit plain error in instructing the jury regarding the charges of felonious child abuse by sexual act based on the pattern jury instruction providing a broader definition of sexual act than applies to offenses under Article 7B of Chapter 14; (2) Trial court did not commit plain error by failing to strike testimony from forensic interviewer that child made a tentative rather than a full disclosure**

**State v. Wohlers, \_\_\_ N.C. App. \_\_\_, \_\_\_ S.E.2d \_\_\_ (Aug. 4, 2020)**

The defendant was convicted of indecent liberties with a child and felony child abuse by sexual act based on crimes committed against his daughter and stepdaughter.

(1) The court of appeals determined that the trial court did not plainly err in instructing the jury on felonious child abuse by sexual act. G.S. 14-318.4(a2) provides that any parent or legal guardian of a child under 16 who “commits or allows the commission of any sexual act upon the child is guilty of a Class D felony.” The trial court instructed the jury in accordance with NC Pattern Jury Instruction – Criminal 239-55B that a “sexual act is an immoral, improper or indecent touching or act by the defendant upon the child.” On appeal, the defendant argued that the definition of “sexual act” in G.S. 14-27.20(4) should apply. The term is therein defined as “[c]unninglingus, fellatio, analingus, or anal intercourse, but does not include vaginal intercourse.” It also includes “the penetration, however slight, by any object into the genital or anal opening of another person’s body.”

The court of appeals in *Wohlers* found the defendant’s argument foreclosed by *State v. Alonzo*, 373 N.C. 437 (2020). In *Alonzo*, the state supreme court concluded that the definitions in G.S. 14-27.20 applied only within Article 7B of Chapter 14. Thus, the *Alonzo* court held that it was error for the court of appeals below to have concluded that the definition of sexual act in G.S. 14-27.20(4) applied to offenses under G.S. 14-318.4(a2), which is contained in Article 39 of Chapter 14.

(2) The court of appeals determined that even if the trial court erred in failing to strike testimony from a forensic interviewer that arguably vouched for the victim’s credibility, the defendant could not show he was prejudiced by the error. The interviewer testified that the defendant’s stepdaughter’s disclosure was “tentative,” and that “she’s a child who falls into the I want to tell someone so this will stop, but I don’t really want it to go past that, and I just want it to be done.” The defendant did not move to strike the testimony at trial, but argued on appeal that it was impermissible vouching of the victim’s credibility.

The court held that the defendant could not show that the alleged error had a probable impact on the jury's finding that he was guilty, noting that the defendant himself had provided a written statement that was consistent with the victim's testimony and which was introduced as evidence at trial.

**In a neglect of an elder adult case there was sufficient evidence that the defendant was her elderly mother's "caretaker"; the admission of video of a police interview with the mother containing alleged hearsay was not prejudicial**

**State v. Stubbs**, \_\_\_ N.C. App. \_\_\_, 845 S.E.2d 125 (June 2, 2020), *temp. stay granted*, 374 N.C. 749 (June 3, 2020)

In this neglect of an elder adult case, the trial court did not err by denying the defendant's motion to dismiss for insufficient evidence that she was her elderly mother's "caretaker" as that word is defined by G.S. 14-32.3(d)(1), and the trial court did not commit plain error by allowing a video of the defendant's mother to be played for the jury. Despite the defendant's argument that she and her mother, who lived at the defendant's house, did not have a "close relationship" and were "more like roommates" and testimony describing the mother as a "very private person [who] liked to keep to herself," the court found the State's evidence sufficient to send the question of the defendant's caretaker status to the jury. This evidence included that in her mother's final weeks of life the defendant helped her bathe; purchased food and supplies for her; assisted her in paying her bills; helped with "general normal care, daily things;" and purchased life insurance on her behalf and at her request.

The court went on to determine that the trial court did not commit plain error by admitting a video of a police interview with the defendant's mother to be played for the jury. The defendant argued that her mother's statements in that video, which went to the issue of whether the defendant was her caretaker, were inadmissible hearsay. The court found that admission of the video, even if error, was not prejudicial because the State's other evidence was adequate to prove that the defendant was her mother's caretaker.

### **Threats & Related Offenses**

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**The trial court erred by denying the defendant's motion to dismiss a charge of willfully violating a DVPO and instructing the jury on felonious breaking and entering in violation of a valid DVPO where there was no direct or circumstantial evidence that the defendant knew of the DVPO**

**State v. Tucker** , \_\_\_ N.C. App. \_\_\_, \_\_\_ S.E.2d \_\_\_ (Aug. 18, 2020), *temp. stay granted*, \_\_\_ N.C. \_\_\_, 846 S.E.2d 748 (Sept. 4, 2020)

Because there was insufficient evidence that the defendant knew of the terms of a domestic violence protective order, the trial court erred by denying the defendant's motion to dismiss a charge of violating a civil DVPO while in possession of a deadly weapon and the trial court erred

by instructing the jury on breaking and entering in violation of a protective order. After being arrested for assaulting the victim, the defendant was served with an ex parte DVPO and notice of a hearing regarding whether another DVPO would be entered. The defendant did not attend that hearing and, at the time of the incident giving rise to the charges at issue, had not been served with a year-long DVPO that was entered at the hearing in his absence. As there was no direct evidence that the defendant had actual or constructive knowledge of the DVPO that was entered at the hearing he did not attend, the trial court erred by denying his motion to dismiss the charge of willfully violating the order. Further, because the defendant did not have knowledge of the DVPO, it was plain error for the trial court to instruct the jury on felony breaking and entering in violation of a valid DVPO.

Judge Murphy concurred in part and in the judgment but dissented from the majority's discussion of two unpublished cases and also would have sanctioned the State for certain misleading comments included in its brief.

### **Kidnapping & Related Offenses**

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**The State presented sufficient evidence of first-degree kidnapping based upon the defendant terrorizing the victim and also presented sufficient evidence of misdemeanor assault with a deadly weapon**

**State v. English , \_\_\_ N.C. App. \_\_\_, 845 S.E.2d 901 (June 16, 2020)**

In this case involving convictions for first-degree kidnapping and misdemeanor assault with a deadly weapon, among other offenses, the State presented sufficient evidence of the offenses and the trial court did not err by denying the defendant's motion to dismiss on that basis. With regard to the kidnapping conviction, the defendant argued that the State failed to present substantial evidence the defendant's purpose was to terrorize the victim. Recounting evidence that the defendant hid in the backseat of the victim's car holding a knife while he waited for her to get off work, forced her to remain in the car and drive by choking her and threatening her with the knife, and forcefully struck her on the head when she attempted to scream for help, the court rejected this argument and bolstered its position by describing her frantic efforts to escape.

The court also found sufficient evidence of misdemeanor assault with a deadly weapon under both the show of violence theory of assault and the act or attempt to do injury to another theory of assault. The State's evidence tended to show that after two men scuffled with the defendant in an attempt to aid the victim, the defendant jumped into the driver's seat of the victim's car and attempted to run the men over and nearly did so. This was sufficient evidence of assault under either theory.

## **Robbery**

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**There was no error in the trial court's ruling where the State presented sufficient evidence at the defendant's trial to show that the defendant possessed the requisite felonious intent by using force in an effort to regain money which was the subject of an illegal transaction**

**State v. Cox** , \_\_\_ N.C. \_\_\_, 846 S.E.2d 482 (Aug. 14, 2020)

The defendant, along with two others, went to the home of an individual to whom they paid cash to provide them with controlled substances. The individual neither obtained the illegal drugs nor returned any of the drug purchase money to the defendant. At the home of the individual, the individual was assaulted, accompanied by a demand for the return of the money. While leaving, the defendant fired a shot into the residence. The defendant was arrested and charged with first-degree burglary, conspiracy to commit robbery with a dangerous weapon, and discharging a weapon into an occupied property. At trial, the defendant moved to dismiss the charges against him for insufficiency of the evidence, and the trial court denied the motion. The defendant was found guilty on all charges.

The Court of Appeals reversed the defendant's conviction for conspiracy to commit robbery with a dangerous weapon and felonious breaking or entering. The Court of Appeals relied on *State v. Spratt*, 265 N.C. 524 (1965), and *State v. Lawrence*, 262 N.C. 162 (1964), in concluding that the defendant could not be guilty of conspiracy to commit robbery with a dangerous weapon because the defendant did not have the requisite felonious intent when attempting to take property from the individual, under a bona fide claim of right to the money which had been given on defendant's behalf. The Court of Appeals also held that the lack of felonious intent negated the defendant's ability to be convicted of the offense of felonious breaking or entering, and remanded the matter in order for the trial court to enter judgment against defendant for misdemeanor breaking or entering, which does not require felonious intent.

The Supreme Court held that the case precedent on which the Court of Appeals relied did not apply to the facts at hand. The Court concluded that "neither *Spratt*, nor *Lawrence*, nor any other case in this state has heretofore authorized a party to legally engage in 'self-help' by virtue of the exercise of a bona fide claim of right or title to property which is the subject of an illegal transaction," and therefore held that there was no error in the defendant's convictions of the offense of conspiracy to commit armed robbery with a dangerous weapon and the offense of felonious breaking or entering.

**(1) Evidence was sufficient to show a taking by force from the victim's presence; (2) Any Rule 404(b) error based on testimony that the defendant provided the victim heroin was not prejudicial; (3) Attorney fee order vacated and remanded for hearing where defendant had no notice or opportunity to be heard**

**State v. Young-Kirkpatrick, \_\_\_\_ N.C. App. \_\_\_, 846 S.E.2d 525 (July 7, 2020)**

The defendant in this Davidson County case was tried for common law robbery, habitual misdemeanor assault, and habitual felon. The charges stemmed from an incident between the defendant and his then-girlfriend at her residence, resulting in him assaulting her, damaging her car, and ultimately taking her car after she fled inside the home. The defendant had recently purchased the car for the woman and had been reimbursed by her family for its value, and this was apparently part of the argument. At trial, evidence was also presented that the defendant provided the victim heroin during their relationship. The defendant was convicted on all counts and appealed.

(1) The defendant argued there was insufficient evidence that he used force to take the car or that he took property from the victim's presence. The court rejected the arguments, observing that "even when there is some attenuation between the use of force and the taking, the action can still amount to a continuous transaction." Slip op. at 7. Here, the defendant's acts of assaulting the victim and stealing her car occurred within a 20-minute time period in the victim's front yard, and evidence showed that the argument and assault were related to the car. Viewed in the light most favorable to the State, the victim fled in response to the defendant's assault, and the defendant took her car immediately afterwards. This was sufficient to show a continuous transaction linking the defendant's use of force to the taking of property. The same facts showed that the taking occurred "in the presence of" the victim. In the words of the court:

If the force . . . for the purpose of taking personal property has been used and caused the victim in possession or control to flee the premises and this is followed by the taking of the property in one continuous course of conduct, the taking is from the "presence" of the victim." *Id.* at 8 (citation omitted).

The trial court did not therefore err in denying the motion to dismiss the common law robbery charge for insufficient evidence.

(2) The defendant argued that the testimony about him giving the victim heroin during their relationship was unduly prejudicial and violated N.C. Evid. R. 404(b). Assuming without deciding that the admission of this testimony violated Rule 404(b), any error was harmless in light of "overwhelming evidence" of the defendant's guilt.

(3) The trial court erred by failing to give the defendant notice and an opportunity to be heard on attorney fees. The record contained no colloquy between the trial judge and the defendant on the issue and no other evidence showed that the defendant was given a chance to be heard. Thus, the civil judgement on attorney fees was vacated and the matter remanded for hearing on that issue only. The convictions were otherwise unanimously affirmed.

**There was insufficient evidence that an air pistol and a pellet rifle were dangerous weapons for purposes of attempted armed robbery; Any impermissible expression of opinion by the trial court did not prejudice the defendant; The trial court erred by accepting the defendant's stipulation to attaining habitual felon status without conducting a colloquy**

**State v. Williamson**, \_\_\_ N.C. App. \_\_\_, 845 S.E.2d 876 (June 16, 2020)

In this robbery case where the defendant was punished as a habitual felon, (1) the defendant failed to preserve a fatal variance argument; (2) there was insufficient evidence of attempted armed robbery; (3) assuming without deciding that the trial court expressed its opinion in violation of G.S. 15A-1222, the defendant was not prejudiced; and (4) the trial court erred by accepting the defendant's stipulation to having attained habitual felon status.

Noting that a defendant must specifically state at trial that a fatal variance is the basis for a motion to dismiss in order to preserve that argument for appellate review, the court found that the defendant waived his variance argument by basing his motion to dismiss solely on insufficiency of the evidence.

With regard to insufficiency of the evidence of attempted armed robbery, the defendant argued that there was insufficient evidence of the use of a dangerous weapon. The defendant had threatened an associate with a pistol and rifle that appeared to be firearms but turned out to be an air pistol and a pellet rifle. Reviewing the rules from *State v. Allen*, 317 N.C. 119 (1986) and related cases about sufficiency of the evidence in situations involving instruments that appear to be but may not in fact be dangerous weapons, the court said that because the evidence was conclusive that the pistol and rifle were not firearms, the State was required to introduce evidence of the weapons' "capability to inflict death or great bodily injury" to merit submission of the attempted armed robbery charge to the jury. As no such evidence was introduced, the trial court erred in denying the defendant's motion to dismiss for insufficient evidence.

During the testimony of a defense witness, the trial court interjected to admonish the witness not to refer to the pistol and rifle as "airsoft" weapons because, in the trial court's view, that terminology was not an accurate description of the items. Assuming without deciding that this admonishment was an improper expression of opinion and accepting for argument that it may have negatively impacted the jury's view of the witness's testimony, there was not a reasonable probability that the jury would have reached a different verdict absent the admonishment.

Finally, the State conceded and the court agreed that the trial court erred by accepting the defendant's stipulation to having attained habitual felon status without conducting the required guilty plea colloquy.

## **Drug Offenses**

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**In a keeping or maintaining a vehicle drug case, there was insufficient evidence that the defendant kept or maintained a vehicle; assuming evidence of keeping or maintaining the vehicle was sufficient, there was insufficient evidence that the defendant's purpose for doing so was keeping or selling controlled substances**

**State v. Weldy, \_\_\_\_ N.C. App. \_\_\_, 844 S.E.2d 357 (June 2, 2020)**

In this keeping or maintaining a vehicle for the keeping or sale of controlled substances case, there was insufficient evidence that the defendant kept or maintained a vehicle or did so for the keeping or selling of controlled substances. Officers had received information from another agency indicating that the defendant was selling drugs. During a traffic stop and weapons frisk following 20-25 minutes of surveillance of the defendant driving, approximately 56 grams of methamphetamine and 7 grams of heroin were discovered on the defendant's person, and an officer later testified that neither amount was consistent with personal use. The defendant was driving a vehicle registered to his wife and mother-in-law.

Noting that North Carolina courts have defined the words "keep" and "maintain" separately, the court explained that they are similar terms, "often used interchangeably, to establish a singular element of the offense" and that whether a vehicle is "kept or maintained" for the keeping or selling of controlled substances depends on the totality of the circumstances. Finding that the State presented no evidence that the defendant "maintained" the vehicle because there was no evidence that the defendant had title to or owned the vehicle, had a property interest in it, or paid for its purchase or upkeep, the court turned to whether there was sufficient evidence that the defendant "kept" the car within the meaning of G.S. 90-108(a)(7). Reviewing relevant caselaw, which establishes that the "keep or maintain" language of the statute "refers to possessing something at least for a short period of time—or intending to retain possession of something in the future—for a certain use," the court determined that evidence of the defendant's possession of the vehicle for approximately 20-25 minutes, standing alone, was insufficient to prove that the defendant "kept" the vehicle.

The court then turned to whether, assuming there had been sufficient evidence of the defendant's keeping or maintaining the vehicle, the State presented sufficient evidence that the defendant's purpose in doing so was the "keeping or selling" of controlled substances. Again reviewing relevant caselaw, the court determined that the discovery on the defendant's person of single bags containing approximately 56 grams of methamphetamine and 7 grams of heroin was insufficient to prove the purpose of keeping or maintaining the vehicle was the keeping or selling of controlled substances. The court noted that the State presented no evidence that cell phones, cash, scales, baggies or other paraphernalia had been discovered in the vehicle. There also was no evidence that the vehicle had been modified to conceal drugs or that drugs had been discovered in the vehicle itself, hidden or otherwise.

Judge Berger dissented and expressed his view that there was sufficient evidence of the offense and that the majority erroneously conflated "keeping" and "maintaining" in its analysis of whether the defendant kept or maintained the vehicle. In Judge Berger's view there was sufficient evidence that the defendant "kept" the vehicle based on his possession of the vehicle

while engaging in drug activity. He also would have found sufficient evidence that the defendant's purpose in doing so was the keeping or selling of controlled substances based on the defendant's use of the vehicle to transport drugs, the discovery of a purported drug ledger in the vehicle, and other evidence that the defendant was involved in the sale of drugs.

**In a drug trafficking case, there was insufficient evidence that the defendant knowingly possessed methamphetamine where the defendant mistakenly believed that the drugs provided to him at a controlled sale were fake and handled them only for the purpose of inspection**

**State v. Campbell**, \_\_\_ N.C. App. \_\_\_, 845 S.E.2d 119 (June 2, 2020)

In this trafficking of methamphetamine case, substantial evidence showed that the defendant believed the white substance handed to him during a controlled drug sale was fake, rather than an impure mixture containing methamphetamine, and therefore there was insufficient evidence that the defendant knowingly possessed the methamphetamine. At a controlled drug sale arranged by law enforcement with the help of an informant, the defendant stated his belief that the substance presented to him as methamphetamine was, contrary to his expectations, "re-rock," a term that was defined by the State's witnesses to describe "fake" drugs. In fact, the substance was a mixture of 1 gram of methamphetamine and at least 28 grams of a cutting agent. As the defendant and an associate inspected the substance, law enforcement officers entered the room and arrested them. Finding the case to be controlled by *State v. Wheeler*, 138 N.C. App. 163 (2000), the court explained that when there is no evidence that a person intends to continue a drug transaction because he or she believes the drugs are fake, handling the drugs for the sole purpose of inspection does not constitute possession.

Judge Berger dissented and expressed his view that there was sufficient evidence that the defendant knowingly possessed the methamphetamine because of his previous dealings in methamphetamine with the informant and because the defendant's use of the term "re-rock" may have been a reference to impure, rather than fake, methamphetamine. Judge Berger also distinguished *Wheeler* on the grounds that the defendant in this case did not affirmatively reject the methamphetamine mixture.

**In possession of a controlled substance on jail premises cases, the State is not required to prove unlawful possession as an element of the offense**

**State v. Palmer**, \_\_\_ N.C. App. \_\_\_, \_\_\_ S.E.2d \_\_\_ (Aug. 18, 2020)

In this possession of a controlled substance on jail premises case involving Oxycodone, the trial court did not err by refusing to instruct the jury that an element of the offense is that the controlled substance be possessed unlawfully. The court explained that a plain reading of the relevant statutes does not require the State to prove unlawful possession of a controlled substance as an element of the offense. Instead, lawful possession is a defense that the defendant carries the burden of proving.

**Where the defendant was convicted of sale of cocaine and delivery of cocaine based on a single transfer, the trial court did not commit plain error by arresting judgment on the delivery conviction and sentencing the defendant on the sale conviction**

**State v. Canady**, \_\_\_ N.C. App. \_\_\_, 844 S.E.2d 353 (June 2, 2020)

In this case involving convictions for, among other offenses, sale of cocaine and delivery of cocaine, the trial court did not commit plain error in its application of G.S. 90-95 and in sentencing the defendant. At sentencing, the trial judge arrested judgment on the conviction of delivering cocaine, a Class H felony, and consolidated other convictions into the single count of selling cocaine, a Class G felony. On appeal the defendant argued that G.S. 90-95, which generally punishes the sale of cocaine more severely than the delivery of cocaine, is ambiguous as to the appropriate punishment for a judgment based on the “sale or delivery” of cocaine and that the rule of lenity requires that the lesser punishment be imposed. Taking note of the North Carolina Supreme Court’s decision in *State v. Moore*, 327 N.C. 378 (1990) establishing that a defendant may not be convicted of both the sale and the delivery of a controlled substance when both offenses arise from a single transfer, the court held that the purpose of *Moore* was accomplished here by the trial judge arresting judgment on the delivery of cocaine conviction and that the defendant did not show that plain error occurred.

## **Defenses**

### **Entrapment and Entrapment by Estoppel**

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**The trial court erred by failing to instruct the jury on entrapment**

**State v. Keller**, 374 N.C. 637 (June 5, 2020)

The defendant was charged with solicitation of a child by computer under G.S. 14-202.3 after he responded to a Craigslist personal advertisement posted by a police detective posing as a 15-year-old. At trial the defendant requested a jury instruction on the defense of entrapment, which the trial court denied. The defendant was convicted and appealed. A divided Court of Appeals affirmed, with the majority concluding that the defendant’s request for an entrapment instruction was properly denied when the evidence showed that he was willing to engage in criminal activity and defendant failed to show that he was not predisposed to commit the act. *State v. Keller*, \_\_\_ N.C. App. \_\_\_, 828 S.E.2d 578 (2019). The dissenting judge would have concluded that the defendant was entitled to the instruction.

The Supreme Court reversed the Court of Appeals and remanded for a new trial. A defendant is entitled to jury instructions on entrapment if he presents “some credible evidence” tending to show that he was a victim of entrapment. Here, viewing the evidence in the light most favorable to the defendant, the Court concluded that he made the requisite showing. The defendant testified that he initially believed the undercover detective to be 18 years old because Craigslist requires age verification to post a personal ad. And once the detective said

via email that he was 15, the defendant repeatedly said they would have to wait to have sex until the detective was of age, at which point the detective steered the conversation back toward sex. Taking those facts as true, the Court concluded that a reasonable juror could have found that the defendant did not have a willingness or predisposition to commit the charged crime, and that he was thus entitled to an instruction on entrapment. The Court also concluded that the trial court erred by finding that the defendant's request for a jury instruction on entrapment was inconsistent with his testimony that he traveled to meet the detective to help him, not to commit a sexual act with him. In general, a defendant cannot simultaneously deny committing an act and also say that he was entrapped into committing it. Here, however, the defendant did not deny the act, but rather only disputed his criminal intentions for the meeting. The entrapment defense therefore remained available. Finally, the Court held that the error was prejudicial and remanded for a new trial.

Justice Newby dissented, joined by Justice Morgan, stating his view that the entrapment defense is not available to a defendant who does not admit to all the elements of the charged offense, and that the defendant's continued pursuit of the undercover detective even after learning that he was underage showed a predisposition to commit criminal acts that barred an entrapment defense.

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### **Self-Defense**

#### **The defendant presented sufficient evidence at trial to support the defendant's requested instructions to the jury on self-defense and the defense of habitation**

**State v. Coley** , \_\_\_ N.C. \_\_\_, 846 S.E.2d 455 (Aug. 14, 2020)

The defendant was indicted for attempted first-degree murder, assault with a deadly weapon with intent to kill inflicting serious injury, and possession of a firearm by a felon. On June 7, 2016, the defendant was sitting outside of a neighbor's house with a group of friends when the defendant's house guest, Garris, approached defendant and punched him. The defendant got up and began walking home, followed by Garris. When the defendant arrived at his residence, he was thrown against the door and hurled over two chairs by Garris. Garris left the residence and returned with a friend, at which time he continued to strike the defendant. Garris left the home a second time and returned shortly thereafter. At that time, the defendant retrieved a gun and shot Garris, injuring him.

At trial, the defendant gave notice of his intent to rely on self-defense. The trial court denied the defendant's requested instruction to the jury on self-defense and the defense of habitation. The jury found the defendant guilty of assault with a deadly weapon inflicting serious injury and possession of a firearm by a felon. On appeal, the defendant argued that the trial court erred by (1) denying his request to instruct the jury on self-defense, (2) failing to instruct the jury on the "stand-your-ground" provision, and (3) denying his request to instruct the jury on the defense of habitation. The Court of Appeals agreed, concluding that there was a reasonable possibility

that the jury would have reached a different result if the defendant's requested jury instruction had been given to the jury.

The Supreme Court upheld the decision of the Court of Appeals, concluding that, viewing the evidence at trial in the light most favorable to the defendant, the defendant was entitled to both instructions. The Court recognized that "the right to use deadly force to defend oneself is provided both by statute and case law." The defendant relied on both the self-defense statute, G.S. 14-51.3, and the defense of habitation statute, G.S. 14-51.2. The Court reviewed both, as well as the right not to retreat when defending against an aggressor. The Court determined that the defendant in the instant case presented competent and sufficient evidence to warrant the self-defense instruction.

The dissenting Court of Appeals judge focused primarily on the defendant's testimony at trial about the firing of a warning shot, concluding that the warning shot rebutted the statutory presumption of "reasonable fear of imminent death or serious bodily harm" and thereby precluding a jury instruction on self-defense and defense of habitation. The Court noted that the dissenting Court of Appeals judge's perspective ignored the principle that although there may be contradictory evidence from the State or discrepancies in the defendant's evidence, the trial court must nonetheless charge the jury on self-defense where there is evidence that the defendant acted in self-defense.

## **Capital Law**

### **Racial Justice Act**

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**The North Carolina Constitution does not allow for the repeal of the Racial Justice Act (RJA) to be retroactive because to do so would violate double jeopardy**

**State v. Robinson, \_\_\_ N.C. \_\_\_, 846 S.E.2d 711 (Aug. 14, 2020)**

The defendant was convicted of first-degree murder and sentenced to death in 1994. The defendant filed a timely motion for appropriate relief pursuant to the RJA in 2010. After an evidentiary hearing, the trial court resentenced the defendant to life imprisonment without the possibility of parole. Following resentencing of three other defendants under the RJA, the General Assembly repealed the RJA. The repeal stated that it was retroactive and voided all pending motions for appropriate relief but did not apply to a trial court order resentencing a defendant to life without parole if that order was affirmed on appellate review.

A joint hearing was thereafter held by a different trial judge on the motions for appropriate relief by the four defendants, to consider whether the defendant's claims were rendered void by the RJA repeal. While the trial court found that the defendant's rights had not vested and that the RJA repeal was not an ex post facto law, the Supreme Court held that the trial court erred by failing to consider the defendant's double jeopardy argument.

The Supreme Court held that the initial trial court's order resentencing the defendant to life in prison was an acquittal for purposes of double jeopardy. The Court reasoned that once the trial court found that the defendant had proven all of the essential elements under the RJA to bar

the imposition of the death penalty, he was acquitted of that capital sentence, jeopardy terminated, and any attempt by the State to reimpose the death penalty would be a violation of the state constitution. One justice, concurring, agreed with the three-member majority that the judgment and commitment order in which the defendant was sentenced to life imprisonment without the possibility of parole was a final judgment, for which appellate review was neither sought nor obtained, and that double jeopardy barred further review.

Justice Newby, in dissent, argued that the majority opinion presented three grounds for its ruling, only one of which garnered four votes, resulting in the narrow holding that the State failed to appeal the amended judgment and commitment order so that order is final. Justice Ervin, in dissent, concluded that based on the Court's holding in *State v. Ramseur*, 843 S.E.2d 106 (N.C. 2020), the case should be remanded to the trial court for a full hearing on the merits of the defendant's RJA claim at a proceeding where the State has a further opportunity to respond.

**(1) Repeal of the Racial Justice Act violated the state and federal constitutional prohibitions on ex post facto laws; (2) the 2013 amendments to the RJA changing the evidentiary standards applicable to RJA claims violated the constitutional prohibition on ex post facto laws; (3) the trial court erred by dismissing the defendant's RJA motions without an evidentiary hearing and discovery**

**State v. Ramseur**, 374 N.C. 658 (June 5, 2020)

The defendant was convicted of two counts of first-degree murder based on offenses committed in 2007. He was sentenced to death in 2010. That same year he filed a motion for appropriate relief under the North Carolina Racial Justice Act (RJA), but the trial court did not rule on it until after the General Assembly amended the RJA in 2012 and then repealed it in 2013. The repeal was made retroactively applicable to all pending MARs filed before the effective date of the repeal. The trial court therefore determined that the repeal rendered the defendant's MAR void and dismissed it. The trial court also ruled in the alternative that the defendant's RJA claims were without merit and that no evidentiary hearing was necessary to resolve them.

The Supreme Court granted the defendant's petition for writ of certiorari. (1) The Court agreed with the defendant that retroactive application of the RJA repeal violated the prohibitions against ex post facto laws in the state and federal constitutions. The Court reasoned that this was the type of ex post facto law that inflicts a greater punishment for an offense than the law applicable when it was committed. Though the RJA did not exist when the defendant committed his crimes, the effective date coverage of the *original* RJA—which did include the defendant's offense date—made the RJA applicable to crimes committed at that time. The Court concluded that the legislature's repeal of a prior, retroactively-applicable ameliorative law like the RJA violated ex post facto principles. The Court rejected the State's argument that the RJA was a mere procedural overlay that did not substantively change the law governing the death penalty. Through the RJA, the 2009 General Assembly affirmatively sought to allow the review of statistical evidence that the Supreme Court had not allowed in *McCleskey v. Kemp*,

481 U.S. 279 (1987), and to create a new claim for relief not otherwise available. The Court also acknowledged that the RJA repeal happened shortly after four defendants had obtained relief under the original Act, making relevant one of the policy purposes of the Ex Post Facto Clause: to restrain “arbitrary and potentially vindictive legislation.” Slip op. at 29.

(2) The Court next considered whether retroactive application of the 2012 RJA amendments to the defendant also violated the prohibition against ex post facto laws. The 2012 amendments made three significant changes to the law. And because the 2012 legislation included a severability clause, the Court analyzed each of them separately. The first change was to eliminate the mandatory requirement for an evidentiary hearing upon the filing of an RJA claim. The Court concluded that this was a procedural change that—despite working to the disadvantage of some defendants, including Mr. Ramseur—did not implicate the prohibition on ex post facto laws. The second change altered the evidentiary requirements for establishing racial discrimination in an RJA claim in several ways, including shrinking the relevant geographic region from the entire state to the specific county or prosecutorial district, limiting the relevant time for consideration, and mandating that statistical evidence alone is insufficient to establish a meritorious claim. The Court concluded that this second set of changes implemented a more stringent standard of proof for establishing discrimination that cannot permissibly apply retroactively. The third change added a waiver provision, saying that a defendant must waive any objection to imposition of a sentence of life without parole as a prerequisite for asserting an RJA claim. The Court declined to address the constitutionality of that change because it was not at issue in Mr. Ramseur’s case. In summary, the 2012 amendment eliminating the mandatory hearing requirement could permissibly apply to an RJA claim asserted before the amendments became law, but the other evidentiary changes could not. Therefore, the evidentiary rules of the original RJA must apply to pre-amendment filings like Mr. Ramseur’s.

Finally, the Court concluded that the trial court erred by concluding without an evidentiary hearing that the defendant’s RJA MARs were without merit. The defendant’s motions included extensive evidence, stated with particularity, tending to show race was a significant factor in imposition of death sentences within the meaning of the RJA. The Court said the motions also established that the defendant was entitled to discovery of State files under G.S. 15A-1415(f). The Court remanded the case for proceedings not inconsistent with its opinion.

Justice Newby dissented, concluding primarily that the RJA amendments and repeal did not violate ex post facto principles because they left the defendant no worse off than he was when he committed his offense in 2007, before the RJA was enacted.

**(1) Repeal of the Racial Justice Act was unconstitutional as applied to the defendant; (2) the defendant’s motion for appropriate relief was not procedurally barred; and (3) the trial court erred by denying the defendant’s motion for appropriate relief without an evidentiary hearing in light of the evidence in his motion**

**State v. Burke**, 374 N.C. 617 (June 5, 2020)

The defendant was sentenced to death for first-degree murder in 1993. He filed a first motion for appropriate relief in 1997, which was denied in 2011. He filed a new MAR under the North

Carolina Racial Justice Act (the RJA MAR) in 2010, amending it twice after the General Assembly amended the RJA in 2012 and then repealed it in 2013. In 2014, the trial court dismissed the defendant's amended RJA MAR as procedurally barred and, in the alternative, as being without merit. On appeal, the Supreme Court vacated the trial court's orders and remanded for proceedings not inconsistent with the Court's opinion in *State v. Ramseur*, \_\_\_ N.C. \_\_\_ (2020), summarized above. (1) The General Assembly's 2013 repeal of the RJA was unconstitutional as applied to the defendant under the state and federal constitutions, and the 2012 amendment can only be applied insofar as it affects procedural aspects of his claim. (2) The Court held that the trial court erred by concluding that the defendant's RJA MAR was procedurally barred, as the original version of the RJA included language, then codified in G.S. 15A-2012(b), allowing defendants to seek relief “[n]otwithstanding any other provision or time limitation” in the MAR article. (3) The Court also concluded that the trial court abused its discretion by dismissing the defendant's claims without an evidentiary hearing in light of the evidence presented in his motion, including evidence that race was a factor in jury selection, sentencing, and capital charging decisions in the relevant jurisdictions; statistical evidence from Michigan State University College of Law; expert testimony and evidence from another RJA case; and evidence of race-based juror strikes in his own case. The Court remanded for proceedings not inconsistent with its opinion. Justice Newby dissented for the reasons stated in his dissent in *Ramseur*.

## **Post-Conviction Proceedings**

### **Clerical Errors/Error Correction**

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**Case was remanded to trial judge to correct clerical error in written judgment (community punishment) to be consistent with actual sentence (intermediate punishment)**

**State v. Hauser**, \_\_\_ N.C. App. \_\_\_, 844 S.E.2d 319 (May. 19, 2020)

The defendant was convicted of obtaining property by false pretenses for selling boxes purportedly containing iPhones that contained only lug nuts. The defendant argued that the sentence of 36 months supervised probation was erroneous because the trial judge imposed a community punishment, which has a limit of 30 months probation. The Court of Appeals found that the trial judge imposed an intermediate punishment; the only indication to the contrary was a checkmark in the box for community punishment at the top of the judgment. Considering the sentencing hearing, the conditions imposed by the trial judge in the defendant's presence, and the written judgment, the Court concluded that the mark in the community punishment box was a clerical error and remanded the case for correction.

## Judicial Administration

### Contempt

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**There is no statutory right to counsel under G.S. 7A-451(a)(1) in summary proceedings for direct criminal contempt**

**State v. Land**, \_\_\_ N.C. App. \_\_\_, \_\_\_ S.E.2d \_\_\_ (Sept. 1, 2020), *temp. stay granted*, \_\_\_ N.C. \_\_\_, \_\_\_ S.E.2d \_\_\_ (Sept. 16, 2020)

In this direct criminal contempt case involving summary proceedings where the defendant was sentenced for two instances of contempt, the Court of Appeals determined as a matter of first impression that the defendant did not have a statutory right to appointed counsel under G.S. 7A-451(a)(1). The court explained that precedent from the United States Supreme Court and the North Carolina Supreme Court establishes that there is no Sixth Amendment right to counsel in summary proceedings for direct criminal contempt. The court further explained that discussion in *Jolly v. Wright*, 300 N.C. 83 (1980), *overruled on other grounds by McBride v. McBride*, 334 N.C. 124 (1993), suggested that the language in G.S. 7A-451(a)(1) entitling an indigent defendant to appointed counsel in “any case” in which imprisonment or a fine of \$500 or more is likely to be adjudged should be construed to refer to “any criminal case to which Sixth Amendment protections apply.” The court went on to point out that the contemporaneous nature of summary proceedings for direct criminal contempt where the trial court acts on its own first-hand observations supported the conclusion that the statutory right to counsel does not apply, but cautioned trial courts to exercise restraint in such proceedings.

The court remanded the matter to the trial court to correct a clerical error regarding the length of one of the defendant’s contempt sentences. The court also found that the trial court’s written judgment ordering that one of the sentences run consecutive to the other violated the defendant’s right to be present at sentencing because the trial court did not specify the consecutive nature of the sentence when rendering it orally while the defendant was present in the courtroom, and remanded for the entry of a new judgment in the defendant’s presence.

**Trial judge erred by finding the defendant in direct contempt for an unintelligible remark he made after sentencing without giving the defendant notice and an opportunity to be heard**

**State v. Perkinson**, \_\_\_ N.C. App. \_\_\_, 844 S.E.2d 336 (May 19, 2020)

The defendant entered into a plea agreement with the State in superior court, after he appealed for a trial de novo, under which he would plead guilty to misdemeanor larceny and first-degree trespassing and receive a suspended sentence of 180 days, with a split sentence of 30 days. The arrangement also stated that “[u]ltimate sentencing shall be in the discretion of the court[.]” The defendant pled guilty, and the superior court judge imposed an active sentence of imprisonment of 120 days for the larceny and 60 days for the trespass, to run consecutively. The defendant made an unintelligible remark after sentencing, and the judge held him in direct criminal contempt and imposed an additional 30 days in jail. Thereafter, the superior court entered a consent order allowing the defendant to withdraw his plea, vacating the judgment for misdemeanor larceny and first-degree trespass, and allowing the State to

proceed on the original plea offer. The appeal concerned the contempt judgment only. The Court of Appeals reversed the contempt judgment, holding that the trial judge failed to give the defendant summary notice and an opportunity to be heard before entering judgment in accordance with G.S. 5A-14(b). Although the findings and order signed by the trial judge contain a preprinted finding that “the contemnor was given summary notice of the charges and summary opportunity to respond,” the Court found that the record directly contradicted the form language and that no notice or opportunity to be heard was given. The Court rejected the State’s argument that because the defendant had already served the contempt sentence, the defendant’s appeal was moot. That argument, if accepted, would allow a defendant to be criminally confined without judicial review so long as the sentence was completed.