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District Court Judges 2010 Summer Conference: Felony and Misdemeanor Case Update

(includes cases decided through June 1, 2010)

The following summaries are drawn from Bob Farb's criminal case summaries. To view all of the summaries, go to www.sog.unc.edu/programs/crimlaw/index.html. To obtain the summaries automatically by email, go to the above site and click on Criminal Law Listserv.

Investigation Issues

Miranda

(1) The Defendant Impliedly Waived His *Miranda* Rights
(2) A Defendant Must Make an Unambiguous Assertion of the Right to Remain Silent to Require an Officer to Stop Custodial Interrogation

Berghuis v. Thompkins, ___ U.S. ___ (1 June 2010). Officers were investigating a murder. Before beginning a custodial interrogation, one of the officers presented the defendant with a *Miranda* form.

The form included the four warnings required by *Miranda v. Arizona*, 384 U.S. 436 (1966) (right to remain silent; use of statements in court; right to have lawyer present; right to have appointed lawyer if indigent), and an additional warning not required by *Miranda*: "You have the right to decide at any time before or during questioning to use your right to remain silent and your right to talk with a lawyer while you are being questioned." The officer asked the defendant to read the fifth warning aloud so he could ensure that the defendant understood English, which he did. The officer then read the other four *Miranda* warnings aloud and asked the defendant to sign the form to demonstrate that he understood his rights. The defendant declined to sign the form. There was conflicting evidence whether the officer verbally confirmed that the defendant understood the rights listed on the form. The officer did not discuss or obtain a waiver of *Miranda* rights from the defendant. During the interrogation, the defendant never stated that he wanted to remain silent, did not want to talk with the officers, or wanted a lawyer. About two hours and forty-five minutes into the interrogation, during which the defendant was mostly silent, an officer asked the defendant, "Do you believe in God?" The defendant said "yes." The officer asked, "Do you pray to God?" The defendant said "yes." The officer then asked, "Do you pray to God to forgive you for shooting that boy down?" The defendant said "yes" and looked away, and the interview ended shortly thereafter. At trial, the defendant moved to suppress these statements. The issue before the United States Supreme Court was the admissibility of these statements under *Miranda v. Arizona* and later *Miranda*-related cases.

The Court noted that some language in *Miranda v. Arizona* could be read to indicate that a waiver of *Miranda* rights is difficult to establish absent an explicit written waiver or a formal, explicit oral statement. However, the Court discussed its rulings since *Miranda*, particularly *North Carolina v. Butler*, 441 U.S. 369 (1979) (valid waiver when defendant read *Miranda* rights form, said he understood his rights, refused to sign waiver at bottom of form, but said, "I will talk to you but I am not signing any form"), indicating that its later decisions made clear that a waiver of *Miranda* rights may be implied through the defendant's silence, coupled with an understanding of his or her rights and a course of conduct indicating waiver. The Court in effect disavowed the language in *Miranda* suggesting that it is difficult to establish a *Miranda* waiver without an explicit written waiver or a formal, explicit oral statement. The Court concluded that if the prosecution shows that a defendant was given *Miranda* warnings and understood them, a defendant's uncoerced statements establish an implied waiver of *Miranda* rights. A defendant's explicit waiver need not precede custodial interrogation. Any waiver, explicit or implied, may be withdrawn by a defendant's invocation at any time of the right to counsel or right to remain silent. Turning to the case before it, the Court ruled that the defendant waived his right to remain silent and his statements were admissible at trial. The Court found that there was no basis to conclude that the defendant did not understand his *Miranda* rights, and he chose not to invoke or rely on those rights when he made his uncoerced statements.

The Court also rejected the defendant's argument that he invoked his right to remain silent by not saying anything for a sufficient time period during the interrogation. The Court noted it had ruled in *Davis v. United States*, 512 U.S. 452 (1994), that in the context of invoking the *Miranda* right to counsel, a defendant must do so unambiguously. If a defendant makes a statement concerning the right to counsel that is ambiguous or equivocal or makes no statement, officers are not required to end the interrogation or ask questions whether the defendant wants to invoke his or her *Miranda* rights. The Court concluded that there was no principled reason to adopt different standards for determining when a defendant has invoked the *Miranda* right to remain silent and the *Miranda* right to counsel. The Court noted that the defendant did not say that he wanted to remain silent or that he did not want to talk with the officers, and therefore the Court ruled that he did not invoke the right to remain silent to require the officers to stop their interrogation.

[Author's note: The Court effectively ruled that a court may find a legally sufficient waiver of *Miranda* rights following the giving of warnings without an officer's explicitly discussing a waiver with

the defendant, if other factors show an implied waiver. Although the Court specifically focused on the waiver of the right to remain silent, its broader ruling and rationale applies to the waiver of all *Miranda* rights. In effect, after giving *Miranda* warnings that are understood by the defendant, officers may interrogate a defendant who has neither invoked nor explicitly waived his or her *Miranda* rights. Despite the Court's ruling, cautious officers may want to continue obtaining an explicit waiver of *Miranda* rights as reflected in many existing *Miranda* forms. A properly obtained explicit waiver will increase the likelihood—compared to an implied waiver—that a court will find a valid waiver. And even if there are deficiencies in obtaining an explicit waiver, there still may be sufficient evidence that a court will find a legally sufficient implied waiver. If an officer does not seek to obtain an explicit waiver, it would be beneficial to add to the *Miranda* warning a statement similar to the one given in *Berghuis*: "You have the right to decide at any time before or during questioning to use your right to remain silent and your right to talk with a lawyer while you are being questioned." The Court noted that this warning made the defendant aware that his right to remain silent would not dissipate over time, and the officers would be required to honor that right as well as the right to counsel during the entire interrogation. Some existing *Miranda* forms in North Carolina already contain a similar statement. For example, the Greensboro Police Department form includes the following: "You may decide now or at any later time to exercise these rights and not answer any questions or make any statement."]

(1) When Prisoner Serving Sentence Asserts Right to Counsel At Custodial Interrogation, Officer May Reinitiate Custodial Interrogation After There Has Been Break in Custody for 14 Days or More

(2) Prisoner's Return to General Prison Population After Officer's Custodial Interrogation at Prison Began Running of 14-Day Break in Custody

Maryland v. Shatzer, ___ U.S. ___, 130 S. Ct. 1213 (24 February 2010). In 2003 a detective went to a Maryland prison to question the defendant about his alleged sexual abuse of his son, for which he then was not charged. The defendant was serving a prison sentence for a conviction of a different offense. The defendant asserted his right to counsel under *Miranda*, and the detective terminated the custodial interrogation. The defendant was released back to the general prison population to continue serving his sentence, and the child abuse investigation was closed. Another detective reopened the investigation in 2006 and went to another prison where the defendant was still serving his sentence. The detective gave *Miranda* warnings to the defendant, he waived his *Miranda* rights, and then he gave a statement that was introduced at his child sexual abuse trial. The United States Supreme Court in *Edwards v. Arizona*, 451 U.S. 477 (1981), had ruled that once a defendant has asserted his or her right to counsel at a custodial interrogation, an officer may not conduct custodial interrogation of the defendant until a lawyer is made available for the interrogation or the defendant initiates further communication with the officer. The Court in *Shatzer* ruled that when a break in custody lasting 14 days or more has occurred after a defendant had previously asserted his right to counsel at a custodial interrogation, an officer may reinitiate custodial interrogation after giving *Miranda* warnings and obtaining a waiver of *Miranda* rights. The Court also ruled that although the defendant remained in prison after asserting his right to counsel, there was a break in custody under its ruling. The Court reasoned that when a prisoner is released after an officer's interrogation to return to the general prison population, the prisoner returns to his or her accustomed routine and regains the degree of control over his or her life that existed before the interrogation. Sentenced prisoners, in contrast to defendants being subjected to custodial interrogation under *Miranda*, are not isolated with their accusers (law enforcement officers). They live among other inmates, guards, and workers, and often can receive visitors and communicate with people on the outside by mail or telephone. The "inherently compelling pressures" of custodial interrogation ended when this defendant returned to his normal life in prison.

***Miranda* Warning Concerning Presence of Lawyer During Interrogation Was Sufficient**

Florida v. Powell, ___ U.S. ___, 130 S. Ct. 1195 (23 February 2010). A Florida law enforcement officer, when advising a defendant of his *Miranda* rights, told the defendant: "You have the right to remain silent. If you give up the right to remain silent, anything you say can be used against you in court. You have the right to talk to a lawyer before answering any of our questions. If you cannot afford to hire a lawyer, one will be appointed for you without cost and before any questioning. You have the right to use any of these rights at any time you want during this interview." The Court stated, noting its rulings in *California v. Prysock*, 453 U.S. 355 (1981), and *Duckworth v. Eagan*, 492 U.S. 195 (1989), that it has not dictated the words in which the essential information of a *Miranda* warning must be conveyed. Although the officer's warning concerning the presence of a lawyer during interrogation did not track the language in the *Miranda* ruling, the Court ruled that the warning satisfied the requirement that a defendant must be clearly informed that he has the right to consult with a lawyer and to have the lawyer with him during interrogation. Thus, the warning complied with the *Miranda* ruling.

(1) Defendant Was Not in Custody to Require *Miranda* Warnings
(2) Defendant Made Ambiguous Request for Counsel

State v. Little, ___ N.C. App. ___, 692 S.E.2d 451 (4 May 2010). The defendant was convicted of first-degree murder. The defendant voluntarily drove to the police station about six hours after the shooting. There was no warrant for the defendant's arrest and the police had not attempted to contact him or request his presence for an interview. A detective who knew the defendant met him in the public lobby and invited him into a secure area that required a passkey to enter, but anyone could leave the secure area without a key. The detective patted him down for weapons (the defendant did not object to the frisk) and told him a detective wanted to speak with him. The other detective arrived and told the defendant he was not under arrest and was free to leave. The defendant voluntarily accompanied the detective and another officer upstairs. The defendant was later told at two different occasions that he was not under arrest and was free to leave. Unbeknownst to the defendant, the other officer entered an adjacent room and took notes on the interview. Also, a detective stayed in the hallway to keep the defendant from leaving, but the defendant was unaware of the detective's intentions. The detective began to question the defendant about his actions during the day and about the shooting. At one point, the defendant asked if he needed an attorney. The detective replied, "I don't know, I can't answer that for you, are you asking for one?" The defendant did not reply to this question and continued talking with the detective. At another point the defendant stood up and said, "I'm trying to leave, I didn't do it." The detective did not restrain the defendant, who then sat back down and continued talking. The defendant made inculpatory statements that he sought to suppress. (1) The court ruled that the defendant was not in custody to require *Miranda* warnings. The facts did not show the indicia of an arrest. The court relied on State v. Gaines, 345 N.C. 647 (1997), and other cases. Also, the presence of a note-taking officer and an officer's unarticulated determination not to let the defendant leave had no bearing on whether the defendant was in custody because the defendant was unaware of these facts. (2) The defendant argued on appeal, relying on State v. Torres, 330 N.C. 517 (1992) (when defendant makes ambiguous request for counsel, interrogation must stop except for narrow questions designed to clarity the defendant's intent), that he made a sufficiently unambiguous request for counsel to require that questioning be stopped. The court first noted that because the defendant was not in custody when the interview occurred, the defendant was not entitled to *Miranda* protections. (Author's note: That is, the defendant's purported assertion of the right to counsel did not require the officer to stop the noncustodial interrogation because *Miranda* protections were inapplicable.) The court then stated that as a guide to trial courts, it would address the defendant's argument about the request for counsel. The

court noted that *Torres* was decided before Davis v. United States, 512 U.S. 452 (1994) (Court rejected requirement that officer must stop interrogation when defendant makes ambiguous or equivocal request for counsel to ask questions clarifying whether defendant wants a lawyer). The later ruling in State v. Dix, 194 N.C. App. 151 (2008), stated that the trial court's assumption that the officer was required to ask clarifying questions, and its later conclusion that it was required to resolve any ambiguity in the defendant's favor, was error. In *Little*, the defendant did not unambiguously ask for an attorney; rather, he asked for the detective's opinion about the matter. The detective went beyond federal and state case law when he asked a clarifying question, "are you asking for one?"

Officer's Conduct and Statements to Defendant After Arrest Constituted Interrogation to Require *Miranda* Warnings

State v. Hensley, ___ N.C. App. ___, 687 S.E.2d 309 (5 January 2010). The court ruled that an officer's conduct and statements to the defendant after his arrest constituted interrogation to require *Miranda* warnings. The officer should have known that his conduct and statements were reasonably likely to elicit an incriminating response from the defendant; see the definition of interrogation in State v. Golphin, 352 N.C. 364 (2000), and Rhode Island v. Innis, 446 U.S. 291 (1980). The defendant took a drug overdose and was taken to a hospital. The following day the officer arrested the defendant at the hospital when informed that he was about to be released. The officer told the defendant (whom he knew from a prior investigation) that he hoped that the defendant would continue to cooperate even though he had been arrested. The officer inquired whether or not the defendant would agree to talk with him the next day if the officer came to work on overtime to obtain a statement from him. The defendant then made an incriminating statement. (See a detailed recitation of the facts in the court's opinion.)

Defendant's Mother Was Not Acting as Agent of Law Enforcement to Require *Miranda* Warnings to Be Given to Defendant

State v. Clodfelter, ___ N.C. App. ___, 691 S.E.2d 22 (16 March 2010). The defendant was convicted of first-degree murder and other offenses. The court ruled, distinguishing State v. Morrell, 108 N.C. App. 465 (1993), and State v. Hauser, 115 N.C. App. 431 (1994), that the defendant's mother was not acting as an agent of law enforcement to require *Miranda* warnings to be given to the defendant. The mother testified that all the officers asked her to do, and all she in fact did do, was ask her son to tell the truth about his involvement in the murder.

Warrantless Stops and Searches

Officer Did Not Seize Defendant Under Fourth Amendment During Encounter

State v. Williams, ___ N.C. App. ___, 686 S.E.2d 905 (22 December 2009). An officer saw the defendant driving a vehicle displaying a 30-day tag he suspected was expired because it was dirty and torn. Before a computer inquiry about the tag came back, the defendant pulled into a driveway. The officer did not activate his blue lights or siren, nor did he give any other indication for the defendant to stop. The officer stopped his vehicle on the other side of the street and approached the defendant's vehicle. The officer asked the defendant about the status of the 30-day tag, and the defendant said that it was expired. The officer then asked the defendant for his license, and the defendant handed him an expired registration and admitted that he did not have a driver's license. The officer asked the defendant to step out of his vehicle to speak with him. After a brief conversation, the defendant consented to a search of

his person, which resulted in a seizure of cocaine. The court ruled, relying on State v. Isenhour, 194 N.C. App. 539 (16 December 2008), that the officer did not seize the defendant under the Fourth Amendment during the encounter.

(1) Driver's License Checkpoint Was Valid Under Fourth Amendment
(2) Officer Had Reasonable Suspicion to Detain Defendant for Further Investigation

State v. Jarrett, ___ N.C. App. ___, 692 S.E.2d 420 (4 May 2010). The defendant was convicted of DWI. The defendant, accompanied by a passenger, approached a stationary driver's license checkpoint at approximately 11:16 p.m. An officer noticed an aluminum can located between the driver's and passenger's seats. The can was open and a light liquid residue was on the top of the can. The passenger leaned toward the defendant, apparently trying to conceal the can from view. The defendant provided the officer with his license, which revealed that the defendant was eighteen years old, and the vehicle's registration. Before returning these items, the officer asked, "What is in the can?" Neither the defendant nor the passenger responded. When questioned again, the passenger raised the can, revealing that it was a Busch Ice beer. The officer directed the defendant to a nearby parking lot, where he was eventually arrested for DWI. (1) The court ruled that the driver's license checkpoint was valid under the Fourth Amendment. It was conducted under a written department policy. Six officers with flashlights, two in each lane of traffic, stopped every car coming through the checkpoint to determine if drivers possessed a valid driver's license and vehicle registration. A supervisory officer was at the checkpoint. All officers wore uniforms and traffic vests. Their vehicles had activated blue lights. The court discussed the trial court's findings concerning the checkpoint's primary programmatic purpose and the reasonableness of the checkpoint. (2) The court ruled that the officer had reasonable suspicion to detain the defendant for further investigation based on the officer's observation of the beer can and the occupants' behavior involving the beer can.

Court Upholds Trial Court's Ruling That License Checkpoint Was Constitutional

State v. Veazey, ___ N.C. App. ___, 689 S.E.2d 530 (8 December 2009). [Author's note: This case was previously before the court in State v. Veazey, 191 N.C. App. 181 (2008), and the court had remanded the case to the trial court for additional findings of fact and conclusions of law concerning the constitutionality of a checkpoint.] The court upheld the trial court's ruling that the license checkpoint was constitutional. The trial court found that (1) the primary programmatic purpose of the checkpoint was valid (enforcement of state's motor vehicle laws), and (2) the checkpoint was reasonable—the state has a strong interest in enforcing motor vehicle laws, the checkpoint was tailored to meet this purpose, and the checkpoint constituted a minimal intrusion on drivers' liberty.

(1) Anonymous Information Was Insufficient Evidence to Support Reasonable Suspicion to Stop Vehicle
(2) Knowledge That Registered Owner's Driver's License Was Suspended Was Sufficient Evidence to Support Reasonable Suspicion to Stop Vehicle
(3) Ruling in *Arizona v. Gant* Applied to Require Suppression of Evidence Seized Pursuant to Search of Vehicle Incident to Arrest of Driver for Driving While License Suspended

State v. Johnson, ___ N.C. App. ___, ___ S.E.2d ___ (1 June 2010). An anonymous caller at 12:14 p.m. reported that a black male wearing a white t-shirt and blue shorts was selling illegal drugs and guns at the corner of Pitts and Birch streets in the Happy Hill Garden community. The caller said the sales were occurring out of a blue Mitsubishi with a license plate of WT 3456. The caller refused to provide a name,

and officers could not contact the caller. The officers did not know how the caller obtained his or her information. The caller telephoned again at 12:32 p.m. and stated that the suspect had just left the area, but would return shortly. Officers were stationed at the only two entrance points to the community. They saw a blue Mitsubishi with a license plate of WT 3453 being driven by a black male wearing a white t-shirt. An officer entered the license plate information into his computer, which revealed that the vehicle was registered to a Kelvin Johnson, black male, date of birth as August 5, 1964. It also showed that Johnson's driver's license was suspended. Officers stopped the vehicle, arrested the defendant for driving while license revoked, placed him in the back of a patrol car, and searched the defendant's vehicle incident to his arrest. (1) The court ruled, relying on State v. Hughes, 353 N.C. 200 (2000), and State v. Peele, ___ N.C. App. ___, 675 S.E.2d 682 (2009), that the anonymous information was insufficient evidence to support reasonable suspicion to stop the defendant's vehicle. The court stated that when an anonymous tip forms the basis for a traffic stop, the tip itself must exhibit sufficient indices of reliability, or it must be buttressed by sufficient law enforcement corroboration. The court examined the facts and concluded that neither ground was satisfied. (2) The court ruled that even though the anonymous tip did not support the vehicle stop, the officers had reasonable suspicion to stop the vehicle based on their knowledge that the registered owner's driver's license was suspended. [Author's note: Although not cited by the court, see State v. Hess, 185 N.C. App. 530 (2007) (when officer ran vehicle's registration plate and then registered owner's driver's license, which was reported to be suspended, officer had reasonable suspicion to stop vehicle when there was no evidence that owner was not driving vehicle)]. (3) The court ruled that the ruling in Arizona v. Gant, 129 S. Ct. 1710 (2009) (Court ruled that officers may search vehicle incident to arrest only if (i) arrestee is unsecured and within reaching distance of passenger compartment when search is conducted; or (ii) it is reasonable to believe that evidence relevant to crime of arrest might be found in vehicle), applied to the defendant's case because it was on direct appeal and not yet final. And the search incident to arrest of the defendant's vehicle violated the Fourth Amendment because it did not satisfy the *Gant* ruling.

Officers Had Reasonable Suspicion to Stop Vehicle Based on Confidential Informant's Information

State v. Crowell, ___ N.C. App. ___, ___ S.E.2d ___ (1 June 2010). A confidential informant phoned an officer that a black male with cocaine would arrive in a few minutes in a black Lexus SUV at a carwash on Highway 301 in Benson. The informant said he had seen the cocaine. The officer had known the informant for thirteen years and knew his mother and other family members. A month before this phone call, the informant had provided the officer with reliable information about illegal drug activity that resulted in an arrest. Fifteen minutes after the phone call, a black Lexus SUV pulled into the carwash and parked. The informant was also at the carwash, and he called the officer to confirm the black Lexus SUV was the correct one and the defendant was the driver. Officers stopped the vehicle after it left the carwash. The court ruled that the officers had reasonable suspicion to stop the vehicle based on the confidential informant's information. The court noted that the informant's basis of knowledge was not an essential factor under the totality of circumstances test for determining reasonable suspicion (or probable cause). The informant's information correctly predicted the defendant's future actions, including his mode of transportation, destination, and time of arrival. This information, corroborated by the officers, sufficiently demonstrated that the informant had inside knowledge about the defendant, giving them a basis for believing that the rest of his information concerning the defendant's transportation of cocaine was also accurate.

Officer Had Reasonable Suspicion to Stop Vehicle

State v. McRae, ___ N.C. App. ___, 691 S.E.2d 56 (6 April 2010). The court ruled that officer A had reasonable suspicion to stop a vehicle for two independent reasons. First, officer A had the authority to stop the vehicle because the officer had reasonable suspicion that the defendant had committed a violation of G.S. 20-154(a) by failing to use his turn signal when he pulled off the highway into a gas station parking lot. There was medium traffic and the defendant's vehicle was a short distance in front of the officer. The court relied on State v. Styles, 362 N.C. 412 (2008), and distinguished State v. Ivey, 360 N.C. 562 (2006). Second, the officer also had the authority to stop the vehicle based on an confidential informant's tip to another officer (officer B) that had been broadcast to officer A and other officers before the stop, as follows: be on the lookout for a black male driving a green Grand Am within Pembroke city limits. The informant had worked with officer B on several occasions and had provided reliable information in the past that led to the arrest of drug offenders. The informant identified the driver by name, a name that officer B recognized as someone associated with the drug trade. The informant also described the specific car (a green Grand Am) and advised the officer that the defendant would be driving the car within the city limits of Pembroke with 60 grams of cocaine in his possession.

Court, Per Curiam and Without Opinion, Reverses Ruling of Court of Appeals for Reasons Stated in Dissenting Opinion, Which Concluded That Officers Had Reasonable Suspicion to Conduct Frisk of Defendant

State v. Morton, 363 N.C. 737 (11 December 2009), *reversing*, ___ N.C. App. ___, 679 S.E.2d 437 (21 July 2009). The court, per curiam and without an opinion, reversed the ruling of the North Carolina Court of Appeals for reasons stated in section I of the dissenting opinion, which concluded that officers had reasonable suspicion to conduct a frisk of the defendant. The dissenting opinion stated that under the totality of circumstances, the officers were aware of the following: (1) at least one confidential informant who had provided information in the past had implicated the defendant in a recent drive-by shooting; (2) several informants and anonymous tipsters had reported that the defendant sold drugs in the area; (3) the defendant was traveling in a path from a food mart to his grandmother's house as the informants and tipsters had claimed he would; (4) the defendant picked up his pace when he saw the officers looking in his direction; (5) the defendant was visibly nervous when the officers attempted to question him; and (6) the defendant was wearing red pants, which indicated to one of the officers, a gang analyst, that the defendant may be affiliated with a local gang. (See the complete analysis of the frisk issue in the dissenting opinion.)

Court Rules That Roadside Strip Search of Vehicle Occupant in Daylight Hours Violated Fourth Amendment

State v. Battle, ___ N.C. App. ___, 688 S.E.2d 805 (16 February 2010). Officers received a tip from a confidential informant that three named people were going to Durham to obtain cocaine and then transport it back to Granville County, exiting at the Linden Avenue exit off Interstate 95. The officers stopped the vehicle shortly after exiting there. It was daylight (a summer day around 5:00 p.m.). Two male passengers were searched and no illegal drugs were found. The third passenger, a female, was strip searched by a female officer between the open doors of the vehicle at the roadside, which included pulling her underwear out from her body and discovering a folded five dollar bill and a crack pipe. (1) The opinion for the court, which was not joined by the two other judges on the three-judge panel, noted that for purposes of this appeal, it was assumed that the officers had probable cause to arrest the defendant and search her incident to arrest. However, the opinion stated that for a roadside strip search

to be constitutional, there must be both probable cause and exigent circumstances to show some significant government or public interest would be endangered were law enforcement officers to wait until they could conduct the search in a more discreet location, usually at a private location within a law enforcement facility. The opinion, which extensively discussed the facts and case law from North Carolina and other jurisdictions, ruled that the strip search violated the defendant's Fourth Amendment rights. The opinion stated that the trial court's order denying the defendant's motion to suppress did not show that there were exigent circumstances justifying any search more intrusive than that allowed incident to any arrest. (2) A second judge on the three-judge panel concurred only in the result (granting the defendant's motion to suppress) without an opinion. (3) A third judge on the three-judge panel concurred with an opinion that noted the North Carolina Supreme Court in State v. Stone, 362 N.C. 50 (2007) (defendant's general consent to search did not include officer's flashlight search of genitals inside defendant's underwear), had ruled that an officer's search with at least questionable consent was not permissible under the Fourth Amendment. And because the search in *Battle* without the defendant's consent was more intrusive than that in *Stone*, it was not permissible under the Fourth Amendment. [Author's note: Although a majority of the three-judge panel agreed that the strip search violated the Fourth Amendment, there was not majority agreement why the search violated the Fourth Amendment.]

Discovery of Odor of Marijuana from Spare Tire in Luggage Area of Chevrolet Suburban Provided Probable Cause to Make Warrantless Search for More Marijuana in Rest of Vehicle, Including Second Spare Tire in Undercarriage of Vehicle

State v. Toledo, ___ N.C. App. ___, ___ S.E.2d ___ (18 May 2010). An officer noted the odor of marijuana from a spare tire in the luggage area of a Chevrolet Suburban after the defendant had validly consented to a search of the vehicle. The officer had conducted a "ping" test, pressing the tire valve to release some of the air, and noted a very strong odor of marijuana. The officer arrested the defendant for possession of marijuana. The officer then warrantlessly searched a second spare tire located in the undercarriage of the vehicle and noted the odor of marijuana after conducting a ping test. Marijuana was found in both spare tires. At issue was the validity of the search of the second spare tire. The court ruled, relying on United States v. Ross, 456 U.S. 798 (1982), that the officer had probable cause to make a warrantless search for more marijuana in the rest of the vehicle, which included the second spare tire. [Author's note: The court in footnote four appeared to suggest a separate justification for the search of the vehicle, including the spare tire in the undercarriage, under Arizona v. Gant, 129 S. Ct. 1710 (2009) (court ruled that officers may search vehicle incident to arrest only if (1) arrestee is unsecured and within reaching distance of passenger compartment when search is conducted; or (2) it is reasonable to believe that evidence relevant to crime of arrest might be found in vehicle), because it was reasonable to believe that the vehicle contained evidence of the crime of arrest, possession of marijuana.]

Defendant's Admission That Grocery Bag in Vehicle Contained "Cigar Guts" Did Not, Without More Information, Establish Probable Cause to Search Bag for Illegal Drugs

State v. Simmons, ___ N.C. App. ___, 688 S.E.2d 28 (5 January 2010). An officer stopped a vehicle to issue the driver a seat belt citation. The officer noticed a white plastic grocery bag sticking out of the storage holder on the passenger side of the defendant's vehicle. He was suspicious that the bag contained illegal contraband because he had found illegal contraband in that sort of container on at least three prior occasions. The officer asked the defendant what was in the bag. The defendant responded that the bag contained "cigar guts." The officer took this response to mean that tobacco had been removed from a cigar. He had previously seized marijuana with cigars. Based on his training, he

had learned that marijuana was sometimes placed in cigars to smoke them. However, the officer could not see inside the bag nor did he smell any illegal contraband. The officer searched the bag. The court ruled that the defendant's response that the grocery bag contained "cigar guts" did not, without more information, establish probable cause to search the bag. The officer's training and experience established a link between the presence of hollowed out cigars and marijuana, not a link between the presence of loose tobacco and marijuana. Furthermore, there was no evidence that the defendant was stopped in a drug area or at an unusual time of day.

Other Search and Seizure Issues

Officer's Warrantless Entry Into House Did Not Violate Fourth Amendment

Michigan v. Fisher, ___ U.S. ___, 130 S. Ct. 546 (7 December 2009). Officers responded to a disturbance call. A couple directed them to a house where a man was "going crazy." Officers saw a pickup truck in the driveway with its front smashed, damaged fence posts along the side of the property, and three broken windows, the glass still on the ground outside. The officers also saw blood on the pickup's hood and on clothes inside the pickup, as well as on one of the doors to the house. Through a window to the house, they could see the defendant screaming and throwing things. The back door was locked, and a couch had been placed to block the front door. The officers knocked, but the defendant refused to answer. They saw that he had a cut on his hand, and they asked him whether he needed medical attention. The defendant ignored these questions and demanded, with accompanying profanity, that the officers get a search warrant. One of the officers pushed the front door and entered the house. The Court ruled that a straightforward application of the emergency aid exception, as in Brigham City v. Stuart, 547 U.S. 398 (2006) (law enforcement officers may enter a home without a search warrant when they have an objectively reasonable basis for believing that an occupant is seriously injured or imminently threatened with such injury), dictates that the officer's entry into the house was reasonable under the Fourth Amendment. The court stated that the state appellate court in this case erred in replacing the objective injury under *Brigham City* into what appeared to the officers with its hindsight determination that there was in fact no emergency. "It does not meet the needs of law enforcement or the demands of public safety to require officers to walk away from a situation like the one they encountered here. Only when an apparent threat has become an actual harm can officers rule out innocuous explanations for ominous circumstances. . . . It sufficed to invoke the emergency aid exception that it was reasonable to believe that [the defendant] had hurt himself (albeit nonfatally) and needed treatment that in his rage he was unable to provide, or that [the defendant] was about to hurt, or had already hurt, someone else."

Defendant's Consent to Search Included Outbuilding Located Within Curtilage of Mobile Home

State v. Hagin, ___ N.C. App. ___, 691 S.E.2d 429 (20 April 2010). The defendant was convicted of manufacture of methamphetamine. The defendant and his wife executed a written consent to search that permitted a search of the personal or real property located at an address in Wadesboro and described a single wide mobile home. The officer informed them that they could withdraw their consent at any time. The defendant accompanied the officer and another officer as they searched the mobile home. They then went outside to the rear of the mobile home and one of the officers saw a small outbuilding located about 15-20 feet from the home's back porch. The officers searched the outbuilding, and neither the defendant nor his wife withdrew their consent to search their real property. The court ruled, relying on State v. Williams, 67 N.C. App. 519 (1984), and other cases, that the search of the

outbuilding was within the scope of the consent given. A reasonable person who believed that his consent did not include the outbuilding would have objected to the search. The defendant's silence was some evidence that he believed the outbuilding to be within the scope of his consent. [Author's note: In preparing a written consent involving a residence, an officer may want to include a specific reference to "all outbuildings on the property, wherever located." A person giving consent would have a better understanding of the scope of the proposed search, and a reviewing court would more likely find that an outbuilding was included in the consent to search.]

Use of Drug Dog in Common Area of Storage Facility to Sniff Defendant's Storage Unit Did Not Violate Defendant's Fourth Amendment Rights

State v. Washburn, ___ N.C. App. ___, 685 S.E.2d 555 (17 November 2009). An informant told an officer that the defendant kept a large quantity of drugs in a toolbox in his garage and rented a climate-controlled storage unit somewhere within the Kearnersville town limits. The informant provided additional details about the defendant, his vehicle, etc. Another officer, provided with this information, went to the only climate-controlled storage facility in Kearnersville. The officer had confirmed that the defendant rented a unit there as well as other details provided by the informant. With the consent of the facility's manager, a drug dog was permitted to walk the hallway within one of the buildings containing the defendant's unit. The dog alerted to the defendant's unit, and officers then obtained a search warrant and searched it. Cocaine and drug paraphernalia were discovered, and officers then obtained a search warrant for the defendant's residence and searched it. The court ruled, relying on United States v. Place, 462 U.S. 696 (1983), and other cases, that the use of the dog to sweep the common area of the storage facility did not violate the defendant's Fourth Amendment rights. The dog sniff revealed only the presence of illegal drugs that does not compromise any legitimate privacy interest. In addition, the officers were legally in the common hallway of the building with the consent of the facility's manager. The defendant did not possess a reasonable expectation of privacy in the common hallway. The court also rejected the defendant's argument that there was no nexus between the presence of cocaine in the storage unit and the existence of illegal drugs at the defendant's residence to provide probable cause to issue a search warrant for the residence. The court discussed in its opinion the informant's reliability and basis of knowledge.

Trial Court Properly Denied Defendant's Motion to Suppress Cellular Telephone Records Obtained by State

State v. Stitt, ___ N.C. App. ___, 689 S.E.2d 539 (8 December 2009). The defendant was convicted of first-degree murder of one victim, second-degree murder of another victim, and armed robbery. After the killings, the defendant used two cell phones of one of the victims. The cell phones were seized from the defendant when he was arrested in New York. The defendant made a motion to suppress cellular telephone records obtained by the state. The court affirmed the trial court's ruling that the defendant failed to meet his burden to show that he had a Fourth Amendment privacy interest in the cell phones to contest the records obtained by the state. [Author's note: In any event, a person does not have a Fourth Amendment right to privacy in his or her telephone records. Smith v. Maryland, 442 U.S. 735 (1979).] The court also ruled, assuming arguendo that the state did not fully comply with federal law [18 U.S.C. § 2703(d)] in obtaining the telephone records, federal law does not authorize the suppression of evidence as a remedy for a violation of this federal law. It only provides civil remedies and criminal punishment. The court cited United States v. Ferguson, 508 F.Supp. 2d 7 (D.D.C. 2007), and United States v. Smith, 155 F.3d 1051 (9th Cir. 1998).

Even Assuming Defendant Was Arrested Without Probable Cause Under Fourth Amendment, Exclusionary Rule Does Not Bar Evidence of Defendant's False Statements to Officer After Arrest That Supported Identity Theft Conviction

State v. Barron, ___ N.C. App. ___, 690 S.E.2d 22 (2 March 2010). The defendant was convicted of identity theft. Upon arrest, the defendant falsely gave his brother's name and birth date as his, and falsely confirmed in response to an officer's question about the last four digits of the defendant's social security number (which were his brother's). The court ruled that the defendant's false confirmation of the last four digits of his social security number was sufficient evidence to convict him of identity theft. It was "identifying information" under G.S. 14-113.20(b)(1). The court rejected the defendant's argument that the trial court erred in denying his motion to suppress his post-arrest statements concerning his false name, date of birth, and social security number. The court ruled, even assuming the defendant was arrested without probable cause under the Fourth Amendment, the exclusionary rule does not bar evidence of the defendant's false statements that supported his identity theft conviction. Relying on State v. Miller, 282 N.C. 633 (1973), and In re J.L.B.M., 176 N.C. App. 613 (2006), the court stated that the exclusionary ruled does not exclude evidence of crimes committed after an illegal search or seizure. The false statements were not fruits of the poisonous tree.

Pretrial and Trial Procedure

Right to Counsel

Court Rules That Defense Counsel's Advice About Conviction's Immigration Consequences to Defendant Pleading Guilty Was Not Objectively Reasonable Under Sixth Amendment and Remands to State Court to Determine Prejudice

Padilla v. Kentucky, ___ U.S. ___, 130 S. Ct. 1473 (31 March 2010). The defendant, a native of Honduras who was a lawful permanent resident of the United States, pled guilty in a Kentucky state court to transportation of a large amount of marijuana. He later sought to set aside his guilty plea, asserting that his lawyer not only failed to advise him of the deportation consequence of his guilty plea, but also told him that he need not worry about his immigration status because he had been in the United States so long (over 40 years). The lawyer's advice was erroneous because his guilty plea made his deportation virtually mandatory. The defendant also alleged that he would have insisted on a trial if he had not received this erroneous advice. The Court ruled that the defendant sufficiently alleged constitutionally deficient counsel because when the deportation consequence was truly clear, as it was in this case, the duty to give correct advice was equally clear. The Court remanded the case to state court to determine prejudice under *Washington v. Strickland*, 466 U.S. 668 (1984).

Defendant Was Mentally Competent to Represent Himself

State v. Reid, ___ N.C. App. ___, ___ S.E.2d ___ (18 May 2010). The court ruled, after considering evidence of the defendant's mental capacity, that the trial court did not err under Indiana v. Edwards, 554 U.S. 164 (2008), in allowing the defendant to represent himself. The court also noted that the trial court complied with G.S. 15A-1242 before allowing the defendant to represent himself.

When Defendant and Defense Counsel Reached Absolute Impasse Whether to Exercise Peremptory Challenge of Prospective Juror, Trial Court Erred in Not Permitting Defendant to Make Decision Instead of Defense Counsel

State v. Freeman, ___ N.C. App. ___, 690 S.E.2d 17 (2 March 2010). The court ruled, relying on State v. Ali, 329 N.C. 394 (1991), that when the defendant and defense counsel reached an absolute impasse whether to exercise a peremptory challenge of a prospective juror, the trial court erred in not permitting the defendant to make the decision instead of defense counsel.

Trial Court Did Not Err in Not Ruling on Defendant's Pro Se Motion When He Was Represented by Counsel

State v. Williams, 363 N.C. 689 (11 December 2009). The court ruled that the trial court did not err in not ruling on the defendant's pro se motion to dismiss based on speedy trial grounds when he was represented by counsel. The court stated that defense counsel's statement to the trial court that the pro se motion needed to be ruled on did not represent counsel's adoption of the defendant's motion.

Trial Court Did Not Err by Prohibiting Defendant to Proceed Pro Se

State v. Wheeler, ___ N.C. App. ___, 688 S.E.2d 51 (19 January 2010). The defendant before trial requested and was granted the right to proceed pro se. The trial court appointed standby counsel. During jury selection, the defendant informed the trial court that he wanted standby counsel to select the jury. After a colloquy with the defendant, the defendant agreed to allow standby counsel to represent him and no longer proceed pro se. The day after jury selection, the defendant sought to discharge counsel and proceed pro se. The defendant admitted to the trial court that he had already discharged four or five attorneys before trial. The trial court denied the defendant's motion to discharge counsel and proceed pro se. The court upheld the trial court's ruling. The defendant waived his right to proceed pro se when he told the trial court that he wanted counsel to take over and select the jury.

Pleadings

Errors in Indictment and Judgment Concerning Discharging Firearm into Occupied Property Did Not Require Entry of New Judgment and New Sentencing Hearing

State v. Curry, ___ N.C. App. ___, 692 S.E.2d 129 (20 April 2010). The defendant was indicted for discharging a firearm into occupied property. The language erroneously alleged that the defendant discharged the weapon into a "residence," while the correct statutory term is "dwelling." The indictment also alleged the violation as a Class E felony, when the offense is a Class D felony under G.S. 14-34.1(b). The court ruled that the indictment sufficiently alleged the offense as the Class D felony because the terms "residence" and "dwelling" are synonymous. The indictment errors concerning "residence" and class of felony, which were repeated in part in the jury instructions, verdict sheet, the trial court's statements during sentencing, and the judgment did not require the entry of a new judgment and a new sentencing hearing.

Controlled Substances Indictments Alleging Substance as Schedule IV Benzodiazepene Were Fatally Defective

State v. Lepage, ___ N.C. App. ___, ___ S.E.2d ___ (18 May 2010). The defendant was convicted of first-degree statutory sexual offense, various controlled substance offenses, and indecent liberties. The indictments charging controlled substance offenses alleged the substance as "benzodiazepines" and as a Schedule IV controlled substance. The evidence at trial showed that the drug was Clonazepam, which is specifically listed in Schedule IV and is a benzodiazepine (the indictment, however, did not allege "Clonazepam"). Benzodiazepine itself is not listed in Schedule IV. Not all benzodiazepines are Clonazepam and not all benzodiazepines are listed in Schedule IV. The court ruled, relying on State v. Ledwell, 171 N.C. App. 328 (2005), and State v. Ahmadi-Turshizi, 175 N.C. App. 783 (2006), the indictments were fatally flawed because (i) they incorrectly stated that benzodiazepine is listed in Schedule IV; and (ii) they charged the defendant with a category of substances, some of which are not regulated under Schedule IV.

No Fatal Variance Between Allegation in Warrant and Evidence Introduced at Trial

State v. Roman, ___ N.C. App. ___, 692 S.E.2d 431 (4 May 2010). The defendant was charged with assault on a government officer (a police officer), the duty being discharged was arresting the defendant for communicating threats to the officer. The officer testified at trial that he was arresting the defendant for being intoxicated and disruptive in public. The court ruled that there was not a fatal variance. The official duty was arresting the defendant. Whether the arrest was for communicating threats or for being intoxicated and disruptive in public was immaterial.

Guilty Pleas

(1) Trial Court's Failure to Follow Procedure in G.S. 15A-1022 in Accepting Guilty Plea Did Not Prejudice Defendant's Decision to Enter Plea
(2) "Package Deal" in Which Prosecutor Offered Plea Arrangement to Defendant's Wife Contingent on Defendant's Agreement to Plead Guilty Did Not Violate Defendant's Constitutional Rights
(3) Trial Court Did Not Err in Denying Defendant's Post-Sentencing Motion to Set Aside His Guilty Plea

State v. Salvetti, ___ N.C. App. ___, 687 S.E.2d 698 (19 January 2010). The defendant entered an *Alford* guilty plea to Class E felony child abuse and his wife entered guilty pleas to other child abuse offenses. The defendant was sentenced to a term of imprisonment. Two days after his plea, the defendant filed a motion to withdraw the plea, which the trial court denied. The defendant filed a notice of appeal and a writ of certiorari for review of other issues. (1) The court ruled that the trial court's failure to follow the procedure in G.S. 15A-1022 in accepting the defendant's guilty plea did not prejudice the defendant's decision to enter the plea. (See the court's extensive analysis in its opinion.) (2) The court rejected the defendant's argument that the prosecutor's offer of a "package deal" constituted undue pressure and violated the defendant's constitutional rights. The prosecutor offered the defendant's wife a plea deal contingent on the defendant's agreement to plead guilty. The court noted that other jurisdictions have found that package deal pleas are not per se involuntary, although they present a greater risk of inducing a false guilty plea by altering the defendant's assessment of the attendant risks. The court ruled that the prosecutor in this case did not use improper pressure to induce the defendant's plea. (3) The court ruled that the trial court did not err in denying the defendant's post-sentencing motion to set aside his guilty plea.

Other Procedure Issues

Defendant's Sixth Amendment Right to Public Trial Was Violated When Trial Court Closed Jury Voir Dire to Public

Presley v. Georgia, ___ U.S. ___, 130 S. Ct. 721 (19 January 2010). The Court ruled that the trial court violated the defendant's Sixth Amendment right to a public trial when the court excluded the public from the voir dire of prospective jurors. The trial court must consider reasonable alternatives to closure even if none are offered by the parties.

Evidence

Confrontation Clause

Defendant's Right to Confrontation Under Sixth Amendment Was Violated When State's Expert Testified to Analysis Performed by Non-Testifying Expert, Based on Facts in This Case

State v. Brewington, ___ N.C. App. ___, ___ S.E.2d ___ (18 May 2010). The court ruled, relying on Melendez-Diaz v. Massachusetts, 129 S. Ct. 2527 (2009) , State v. Locklear, 363 N.C. 438 (2009), State v. Brennan, ___ N.C. App. ___, 692 S.E.2d 427 (4 May 2010), and other cases, and distinguishing State v. Mobley, ___ N.C. App. ___, 684 S.E.2d 508 (3 November 2009), and State v. Hough, ___ N.C. App. ___, 690 S.E.2d 285 (2 March 2010), that the defendant's right to confrontation under the Sixth Amendment was violated when the trial court allowed a state's expert to testify to the identity of a substance as cocaine when the analysis of the substance was performed by a non-testifying expert. The court stated that it was clear that the testifying expert was not involved in testing the substance, nor did she conduct any independent analysis of the substance. The court rejected the state's argument that the expert's testimony was admissible as peer review under *Hough*.

Defendant's Right to Confrontation Under Sixth Amendment Was Violated When State's Expert Testified to Analysis Performed by Non-Testifying Expert, Based on Facts in This Case

State v. Brennan, ___ N.C. App. ___, 692 S.E.2d 427 (4 May 2010). The court ruled, relying on State v. Locklear, 363 N.C. 438 (2009), and distinguishing State v. Mobley, ___ N.C. App. ___, 684 S.E.2d 508 (3 November 2009), that the defendant's right to confrontation under the Sixth Amendment was violated when the trial court allowed a state's expert to testify to the identity of a substance as cocaine base when the analysis of the substance was performed by a non-testifying expert. The court stated that it was obvious from the testifying expert's testimony that she was merely reporting the results of the non-testifying expert.

Defendant's Right to Confrontation Under Sixth Amendment Was Not Violated When State's Expert Testified to Analysis Performed by Non-Testifying Expert, Based on Facts in This Case

State v. Hough, ___ N.C. App. ___, 690 S.E.2d 285 (2 March 2009). The court ruled, relying on State v. Mobley, ___ N.C. App. ___, 684 S.E.2d 508 (3 November 2009), and other cases, that the defendant's right to confrontation under the Sixth Amendment was not violated when the trial court allowed a state's expert to testify to an analysis that provided the composition and weight of the controlled

substances found in the defendant's residence when the analysis was performed by someone other than the testifying expert. The expert's opinion was based on her independent review and confirmation of the test results. The court stated that it is was not its position that every peer review will suffice to establish the testifying expert is testifying to his or her expert opinion; however, in this case, the testifying expert's testimony was sufficient to establish that her expert opinion was based on her own analysis of the lab reports.

Admission of Drug Lab Report Under G.S. 95-90(g) When Defendant Failed to Object Under Statute Did Not Violate Defendant's Sixth Amendment Right to Confrontation

State v. Steele, ___ N.C. App. ___, 689 S.E.2d 155 (5 January 2010). The court ruled that the admission of a drug lab report under G.S. 95-90(g) when the defendant failed to object under the statute did not violate the defendant's Sixth Amendment right to confrontation. The court noted that Melendez-Diaz v. Massachusetts, 129 S. Ct. 2527 (2009), explicitly approved as constitutional notice-and-demand statutes and G.S. 95-90(g) qualifies as such a statute.

Opinion Testimony

Trial Court Erred in Allowing SBI Drug Chemist to Identify Pills by Visual Inspection Without Performing Chemical Analysis

State v. Brunson, ___ N.C. App. ___, ___ S.E.2d ___ (1 June 2010). The defendant was convicted of trafficking in hydrocodone by possession and transportation. The court ruled, relying on its ruling in State v. Ward, ___ N.C. App. ___, 681 S.E.2d 354 (18 August 2009), the trial court erred in allowing the state's witness, a SBI drug chemist, to identify pills as hydrocodone, an opium derivative, by visual identification and the use of a Micromedics database. [Author's note: The North Carolina Supreme Court on October 8, 2009, granted the state's petition to review the *Ward* ruling. Thus, the supreme court's future ruling in *Ward* may have a direct impact on the precedential impact of the *Brunson* ruling.]

NarTest Machine Used by Officer to Determine Substance Was Cocaine Was Not Shown to Be Reliable to Allow Test Result to Be Admitted at Trial

State v. Meadows, ___ N.C. App. ___, 687 S.E.2d 305 (5 January 2010). The court ruled that the NarTest machine used by an officer to determine that a substance was cocaine was not shown to be reliable to allow a test result to be admitted at trial. The state did not present any evidence to indicate the machine uses an established technique to analyze controlled substances or that the machine has been recognized by experts in the field of chemical analysis of controlled substances as a reliable testing method. The court stated that it was unaware of any cases in which the machine had been recognized as an accepted method of analysis or identification of controlled substances in North Carolina or in any other jurisdiction in the United States.

Trial Court Abused Discretion by Allowing Law Enforcement Officer to Testify That Defendant Was Person Depicted in Surveillance Video Tape

State v. Belk, ___ N.C. App. ___, 689 S.E.2d 439 (8 December 2009). The court ruled that the trial court abused its discretion by allowing a law enforcement officer to testify that the defendant was the person

depicted in a surveillance video tape, based on its analysis of the facts in this case and the factors set out in United States v. Dixon, 413 F.3d 540 (6th Cir. 2005).

Officer Was Properly Allowed to Give Lay Opinion Testimony About Drug Transactions

In re D.L.D., ___ N.C. App. ___, ___ S.E.2d ___ (20 April 2010). The juvenile was adjudicated delinquent of possession of marijuana with the intent to sell or deliver. An officer was assigned to a high school as a resource officer and had made many arrests for controlled substances at one of the school's bathrooms. The officer and an assistant principal (hereafter, principal) noticed on monitoring cameras that two male juveniles were entering the bathroom and one was standing outside. The principal told the officer that the situation "looked kind of fishy," and suggested they check it. As they approached the bathroom, they saw one male student outside the men's bathroom and another male student outside the women's bathroom, and both stared at the officer and principal. They then saw the juvenile and two other male students leave the bathroom. When the juvenile saw them, he ran back into the bathroom, followed by the officer and principal. When the officer said that he saw the juvenile put something in his pants, the principal replied, "we need to check it." The officer frisked the juvenile and found a container used to hold BB gun pellets. Inside the container were three individually-wrapped bags of marijuana worth $20.00 each. The officer handcuffed the juvenile and took him to a school office. The principal told the officer that they needed to check the juvenile to make sure that he did not have anything else. The officer searched the juvenile and discovered $59.00 in his pocket. The juvenile immediately stated, "the money was not from selling drugs," but was his mother's rent money. The officer testified at the juvenile's trial that based on the officer's six years as a drug investigator, it was traditional for a person selling drugs to have in his possession both money and drugs. Also, if the person hasn't started selling yet, he will have more inventory than money. If he is selling well, he will have more money than inventory. The court ruled, citing State v. Hargrave, ___ N.C. App. ___, 680 S.E.2d 254 (2009), and other cases, that the trial court did not err in allowing the officer to give this lay opinion testimony. See opinion for rulings upholding search and admission of juvenile's statement.

(1) Evidence That Defendant Abused Her Other Children Was Admissible Under Rule 404(b) and Rule 403

(2) Expert Was Properly Permitted to Testify That Victim and Other Children Were Subjected to Ritualistic Child Abuse, Sadistic Child Abuse, and Torture

State v. Paddock, ___ N.C. App. ___, ___ S.E.2d ___ (1 June 2010). The defendant was convicted of first-degree murder (based on torture) and felonious child abuse inflicting serious bodily injury involving the death of one of her children. (1) The defendant's other children were allowed to testify how the defendant physically abused them in an effort to control their behavior in a similar manner to the defendant's abuse of her son, the murder victim. The court ruled, relying on State v. Anderson, 350 N.C. 152 (1999), that the trial court did not err under Rule 404(b) and Rule 403 in admitting this testimony to show the defendant's intent, plan, scheme, system or design to inflict cruel suffering, as well as malice and lack of accident. (2) The court ruled that the trial court did not err in permitting the state's witness, an expert in developmental and forensic pediatrics, to testify that the victim and other children were subjected to ritualistic child abuse, sadistic child abuse, and torture. The court rejected the defendant's argument that the testimony improperly opined on the testifying children's credibility, and the expert's use of the word "torture" was potentially misleading because it differed from the legal definition. The expert testified that she used the term "torture" based on her medical expertise, not its legal meaning.

Other Evidence Issues

Trial Court Did Not Commit Plain Error in Evidentiary Rulings in Child Sexual Abuse Trial

State v. Espinoza-Valenzuela, ___ N.C. App. ___, 692 S.E.2d 145 (20 April 2010). The defendant was convicted of multiple charges involving child sexual abuse involving two children. The court ruled that the trial court did not commit plain error by: (1) admitting evidence that the defendant had struck the victims' mother in the victims' presence; and (2) allowing a child protective services employee to testify that the victims' mother had been a victim of sexual abuse as a child.

Crimes

Generally

Insufficient Evidence of Secret Assault

State v. Holcombe , ___ N.C. App. ___, 691 S.E.2d 740 (20 April 2010). The defendants were convicted of secret assault under G.S. 14-31 and other offenses. The court reversed the secret assault convictions because it found insufficient evidence of the "secret manner" element of the offense. The state failed to present evidence that the victims were surprised, that they had no opportunity to defend themselves, or that the defendants took steps to make the assault secretive. (See the court's opinion for a discussion of the facts in this case.)

(1) Sufficient Evidence to Support Conviction of Malicious Conduct by Prisoner When Officer Testified That Handcuffed Defendant Spit on His Leg
(2) Indictments Alleging Malicious Conduct by Prisoner and Assault on Governmental Official Need Not Allege Duty Officer Was Performing

State v. Noel, ___ N.C. App. ___, 690 S.E.2d 10 (2 March 2010). The defendant was convicted of malicious conduct by a prisoner and assault on a governmental official. After stopping a vehicle that had attempted to evade law enforcement and from which plastic bags had been thrown, officers removed the defendant-passenger, placed him on the curb, and handcuffed him. As an officer approached the defendant to question him, the defendant yelled at the officer and spit on the officer's right leg. (1) The court ruled that the state presented sufficient evidence to support the defendant's conviction of malicious conduct by prisoner, G.S. 14-258.4(a). (2) The court ruled, distinguishing State v. Ellis, 168 N.C. App. 651 (2005) (charge of resisting an officer under G.S. 14-223 must allege duty officer was discharging), that indictments alleging malicious conduct by a prisoner and assault on a governmental official need not allege the duty the officer was performing. Thus, the indictments' allegations of the duty the officer was performing were surplusage, and there was not a fatal variance between the allegations and the proof of the duty at trial.

(1) Scar Resulting from Deep Cut Over Left Eye Was Permanent Disfigurement to Support Conviction of Assault Inflicting Serious Bodily Injury
(2) No Fatal Variance Between Allegations in Assault by Strangulation Indictment Concerning Method of Strangulation and Evidence at Trial
(3) Sufficient Evidence to Support Conviction of Assault by Strangulation

(4) Punishment Was Not Permitted for Convictions of Both Assault Inflicting Serious Bodily Injury and Assault by Strangulation for Same Conduct
(5) Punishment Was Permitted for Convictions of Assault Inflicting Serious Bodily Injury and First-Degree Kidnapping
(6) Punishment Was Not Permitted for Convictions of Both Assault With A Deadly Weapon Inflicting Serious Injury and Assault Inflicting Serious Bodily Injury Based on Single Assault
(7) Insufficient Evidence of Serious Bodily Injury to Support Conviction of Assault Inflicting Serious Bodily Injury
(8) Convictions of Two Counts of First-Degree Sexual Offense Were Permitted Based on Defendant's Insertion of Fingers into Victim's Vagina and Rectum at Same Time
(9) Convictions of Both First-Degree Kidnapping and First-Degree Sexual Offense Were Permitted Based on Jury Instruction
(10) Sufficient Evidence of Serious Bodily Injury to Support Conviction of Assault Inflicting Serious Bodily Injury

State v. Williams, ___ N.C. App. ___, 689 S.E.2d 412 (8 December 2009). The defendant was convicted in a single trial of multiple offenses involving five different victims over a time period from 2004 to 2006. The offenses included sexual assault, robbery, assault, and kidnapping. The court ruled: (1) There was sufficient evidence to support a conviction of assault inflicting serious bodily injury when the injury to the victim, L.T., included a scar resulting from a deep cut over her left eye, which was a permanent disfigurement (she had other injuries as well). (2) An indictment alleging assault by strangulation alleged the defendant strangled the victim, L.T., by placing his hands around her throat. The court ruled that even if there was a variance between the allegation concerning the method of strangulation and evidence introduced at trial, the variance was immaterial and not fatal. The method of strangulation alleged in the indictment was surplusage and should be disregarded. (3) There was sufficient evidence to support the defendant's conviction of assault by strangulation of L.T. She stated that she felt that the defendant was trying to crush her throat, he pushed down with his weight on her neck with his foot, she thought he was trying to "chok(e) her out" or make her go unconscious, and she thought she was going to die. The court rejected the defendant's argument that the state must prove that the victim had difficulty breathing. (4) G.S. 14-32.4(b) (unless conduct is covered under some other provision of law providing greater punishment) shows a legislative intent to prohibit a court from sentencing a defendant for the same conduct under both G.S. 14-32.4(b) (assault inflicting serious bodily injury, Class F felony) and G.S. 14-32.4(a) (assault by strangulation, Class H felony). Punishment can only be imposed for the assault inflicting serious bodily injury, which provides for greater punishment than assault by strangulation. (5) Punishment was permitted for convictions of both assault inflicting serious bodily injury and first-degree kidnapping, which was elevated from second-degree to first-degree based on a finding that the victim was seriously injured. Assault inflicting serious bodily injury requires the additional proof of "serious bodily injury" beyond the element of "serious injury" to prove first-degree kidnapping. Also, proof in the kidnapping case that the victim was abducted "for the purpose of doing serious bodily injury" and the act of committing serious bodily injury are two different elements, the latter being more serious than the former. (6) Punishment was not permitted for convictions of both assault with a deadly weapon inflicting serious injury and assault inflicting serious bodily injury based on a single assault. Punishment was only permitted for the more serious offense of assault with a deadly weapon inflicting serious injury. (7) There was insufficient evidence of serious bodily injury of victim M.L.W. to support the defendant's conviction of assault inflicting serious bodily injury. Although the victim received a vicious beating, the evidence did not show that her injuries placed her at a substantial risk of death. Though her ribs were still sore five months after the assault, to satisfy the statutory definition the victim must experience "extreme pain" in addition to the "protracted condition." The

state did not present evidence of extreme pain. (8) Convictions of two counts of first-degree sexual offense were permitted based on the defendant's insertion of his fingers into the victim's vagina and rectum at the same time. The court relied on State v. Gobal, 186 N.C. App. 308 (2008). (9) Convictions of both first-degree kidnapping and first-degree sexual offense were permitted based on the jury instruction for first-degree kidnapping that required proof of serious injury or not released in a safe place, with no reference to the sexual assault. (10) There was sufficient evidence of serious bodily injury to victim K.L.A. to support the defendant's conviction of assault inflicting serious bodily injury. She suffered a puncture wound to the back of her scalp and a parietal scalp hematoma. She also went into premature labor as a result of the assault. This was sufficient evidence of a bodily injury that created a substantial risk of death, which is included in the definition of serious bodily injury.

(1) G.S. 14-269.4 (Possessing Deadly Weapon in Courthouse), As Applied to Defendant, Did Not Violate North Carolina Constitution
(2) G.S. 14-269.4 Does Not Require State to Prove That Defendant Committed Statutory Violation "Knowingly" or "Willfully"

State v. Sullivan, ___ N.C. App. ___, 691 S.E.2d 417 (16 February 2010). The defendant openly displayed a firearm while in the clerk's office in a courthouse. He was convicted of possessing a deadly weapon in a courthouse under G.S. 14-269.4. The court ruled: (1) G.S. 14-269.4, as applied to the defendant, was not an unconstitutional violation of his right to bear arms under Article I, Section 30 of the North Carolina Constitution; and (2) the trial court did not err when it refused the defendant's request to instruct the jury that it must consider whether the defendant "knowingly" or "willfully" violated G.S. 14-269.4 because the defendant's intent was not an element of the offense.

When Two Controlled Substances Are Contained in Same Pill, Defendant May Be Convicted and Sentenced for Possession of Both Substances

State v. Hall, ___ N.C. App. ___, 692 S.E.2d 446 (4 May 2010). The defendant was convicted of possession of a Schedule I controlled substance popularly known as ecstasy and possession of ketamine, a Schedule III controlled substance. The defendant possessed two pills, each determined to contain both ecstasy and ketamine. The court ruled that double jeopardy did not bar the defendant's convictions and sentences for both substances.

Jury Instruction in Eluding Arrest Trial Was Not Erroneous

State v. Graves, ___ N.C. App. ___, 690 S.E.2d 545 (16 March 2010). The defendant was convicted of felony eluding arrest and other offenses. The court ruled that the pattern jury instruction was not erroneous when it required proof that the defendant knew or had reasonable grounds to know that the officer was a law enforcement officer. The court rejected the defendant's argument that the jury should not be allowed to base its verdict on the defendant's having reasonable grounds to know that the officer was a law enforcement officer.

Insufficient Evidence of Possession of Stolen Goods

State v. Wilson, ___ N.C. App. ___, 691 S.E.2d 734 (20 April 2010). The court reversed the defendant's conviction of possession of stolen goods because it ruled that there was insufficient evidence to establish that the defendant knew or had reasonable grounds to believe that gun was stolen.

Impaired Driving

Officer's Warrantless Compelling of DWI Defendant to Give Blood Sample at Hospital for Alcohol Testing After Defendant Had Refused to Take Breath Test Was Lawful Under G.S. 20-139.1(d1) and United States and North Carolina Constitutions

State v. Fletcher, ___ N.C. App. ___, 688 S.E.2d 94 (19 January 2010). The defendant was arrested at a checkpoint for DWI, taken to a police station for Intoximeter breath testing, which the defendant refused. An officer then transported the defendant to a hospital to compel a blood test. The defendant's blood was drawn, and the blood test result was 0.10. The court ruled the officer reasonably believed under G.S. 20-139.1(d1) that the delay necessary to obtain a court order would result in the dissipation of alcohol in the defendant's blood. The officer testified that the entire process of driving to the magistrate's office, standing in line, completing the required forms, returning to the hospital, and having the defendant's blood drawn would have taken from two to three hours. The court also ruled that probable cause and exigent circumstances supported the warrantless compelling of the blood sample and did not violate the Fourth Amendment or various provisions of the Constitution of North Carolina.

Intoxilyzer Test Results From First and Third Breath Samples Were From "Consecutively Administered Tests" Under Former Version of G.S. 20-139.1(b3) When Defendant Failed to Provide Adequate Sample for Second Test

State v. Shockley, ___ N.C. App. ___, 689 S.E.2d 455 (8 December 2009). The defendant was arrested for DWI and requested to take the Intoxilyzer test. The defendant provided a valid breath sample and the result was 0.16. The defendant failed to provide an adequate breath sample for the second test. The defendant provided a valid breath sample for the third test and the result was 0.15. The defendant failed to provide an adequate breath sample for the fourth test. The court ruled that the test results from the first and third breath samples were from "consecutively administered tests" under the former version of G.S. 20-139.1(b3). An insufficient sample does not produce a valid reading. [Author's note: The current version of G.S. 20-139.1(b3) requires "at least duplicate sequential" breath samples. The court's ruling in *Shockley* would likely apply to the current version as well.]

Court Reverses Five Convictions of Felony Serious Injury by Vehicle When Jury at Same Trial Acquitted Defendant of DWI, Which Was Element That State Was Required to Prove for Jury to Convict Defendant of Felony Serious Injury by Vehicle

State v. Mumford, ___ N.C. App. ___, 688 S.E.2d 458 (5 January 2010). The defendant was convicted of five counts of felony serious injury by vehicle in which five people were injured and the defendant was driving impaired. At the same trial, the jury found the defendant not guilty of DWI. The court, relying on State v. Marsh, 187 N.C. App. 235 (2007), and other cases and distinguishing cases in which inconsistent verdicts had been upheld, reversed the convictions of felony serious injury by vehicle because they were inconsistent with and legally contradictory to the verdict of not guilty of DWI, which was an element that the state was required to prove for the jury to convict the defendant of felony serious injury by vehicle.

Convictions of Both Second-Degree Murder and DWI Did Not Violate Double Jeopardy; Use of Alabama DUI Convictions in Sentencing Was Proper

State v. Armstrong, ___ N.C. App. ___, 691 S.E.2d 433 (20 April 2010). The defendant drove while impaired and crashed his vehicle, resulting in the death of his passenger. The court ruled: (1) double jeopardy does not prohibit the convictions of both second-degree murder and DWI; the court relied on State v. McAllister, 138 N.C. App. 252 (2000); (2) for sentencing purposes, the defendant's Alabama convictions of driving under the influence of alcohol were substantially similar to an offense classified as a Class 1 misdemeanor in North Carolina; the court found that DWI was found, albeit in a different context, to be a Class 1 misdemeanor in State v. Gregory, 154 N.C. App. 718 (2002).

Defenses

Trial Court Erred in Denying Defendant's Requested Jury Instructions on Self-Defense and Defense of Family Member—Ruling of Court of Appeals Is Reversed

State v. Moore, 363 N.C. 793 (29 January 2010), *reversing*, 194 N.C. App. 754 (6 January 2009). The defendant was convicted of voluntary manslaughter. The court ruled that the trial court erred in denying the defendant's requested jury instructions on self-defense and defense of a family member. The defendant, his wife, and grandson were working at their produce stand. The couple's cash box was bolted to a folding table located behind the truck containing much of the produce. Harris (the person killed by the defendant) approached the produce stand, walked over to the meat container, and began comparing different pieces of meat, stating he was attempting to find a piece suitable for his mother. Shortly thereafter, a struggle erupted between the defendant's wife and Harris when he attempted to steal the cash box and its contents. The defendant's wife testified she was frightened during the altercation and praying that she would not get hurt. Harris became more aggressive as the attempted robbery progressed, including picking the table off the ground. She testified that when Harris had reached for the cash box and began the struggle, she shouted for her husband, who rushed to her aid and shouted for Harris to back off. Harris backed off, but then came back toward her with his left hand in his pocket and began to pull his hand from his pocket. The defendant then shot and killed him. The defendant testified that he "wasn't going to wait to see no gun," and he feared for his, his grandson's, and his wife's safety. The court concluded that the defendant's evidence was sufficient to show that he believed it was necessary to use force to prevent death or great bodily injury to himself or a family member.

Sex Offender Registration and Satellite-Based Monitoring

Insufficient Evidence to Support Conviction of Registered Sex Offender's Failing to Verify Address

State v. Braswell, ___ N.C. App. ___, 692 S.E.2d 435 (4 May 2010) The court ruled that there was insufficient evidence to support the defendant's conviction of failing as a registered sex offender to verify his address under G.S. 14-208.9A(a). The uncontroverted evidence showed that the defendant did not change his address and the defendant never received the verification form that he was required to return to the sheriff.

Trial Court Improperly Determined That Defendant Must Be Enrolled in Satellite-Based Monitoring for Life

State v. Davison, ___ N.C. App. ___, 689 S.E.2d 510 (8 December 2009). The defendant was convicted of attempted first-degree sexual offense and indecent liberties with a child and sentenced to imprisonment. The trial court ordered enrollment in a satellite-based monitoring program for life after his release from his prison sentence. The court ruled that the trial court erred by failing to follow the statutory procedure under G.S. 14-208.40A when it failed to properly make determinations pursuant to subsection (b), and by doing so prematurely ordered a risk assessment and improperly considered sentencing pursuant to subsections (c) and (d). The court also ruled that the trial court incorrectly found that the defendant had been convicted of an "aggravated offense" because neither offense fits the statutory definition in G.S. 14-208.6(1a). In determining what constitutes an "aggravated offense," a court may only consider the elements of the offense and not the underlying facts of the offense. For other rulings finding error in trial court orders to enroll defendants in satellite-based monitoring, see State v. Smith, ___ N.C. App. ___, 687 S.E.2d 525 (5 January 2010), and State v. Singleton, ___ N.C. App. ___, 689 S.E.2d 562 (5 January 2010).

(1) Definition of "Aggravated Offense" in G.S. 14-208.6(1a) Is Not Unconstitutionally Vague
(2) Second-Degree Rape Is an "Aggravated Offense" to Support Trial Court's Order That Defendant Be Enrolled in Lifetime Satellite-Based Monitoring

State v. McCravey, ___ N.C. App. ___, 692 S.E.2d 409 (4 May 2010). The defendant was convicted of second-degree rape and other offenses, and the trial court ordered that the defendant be enrolled in lifetime satellite-based monitoring (SBM) when his prison sentences were completed. The court ruled: (1) the definition of "aggravated offense" in G.S. 14-208.6(1a) is not unconstitutionally vague; and (2) second-degree rape is an "aggravated offense."

Other Satellite-Based Monitoring Cases

State v. Bowlin, ___ N.C. App. ___, ___ S.E.2d ___ (18 May 2010) The court ruled that the Ex Post Facto Clause did not bar the trial court from ordering the defendant to enroll in lifetime satellite-based monitoring although the defendant committed the reportable offense before the effective date of G.S. 14-208.40B.

State v. Brooks, ___ N.C. App. ___, ___ S.E.2d ___ (18 May 2010). The defendant was convicted of sexual battery and ordered to enroll in lifetime satellite-based monitoring (SBM) on release from prison. The court ruled: (1) it did not have jurisdiction over the defendant's appeal from the trial court's ordering SBM when the defendant gave an oral notice of appeal, although the court granted the defendant's petition for a writ of certiorari; and (2) sexual battery was not an "aggravated offense" under G.S. 14-208.6(1a) to support the court's ground for ordering SBM.

State v. King, ___ N.C. App. ___, ___ S.E.2d ___ (18 May 2010). The defendant was convicted of indecent liberties and ordered to enroll in lifetime satellite-based monitoring (SBM) on release from prison. The court ruled that indecent liberties was not an "aggravated offense" under G.S. 14-208.6(1a) to support the court's ground for ordering SBM. However, the court concluded that there was sufficient evidence presented to the trial court at the original hearing to remand the case to the trial court to determine if the defendant requires the highest possible level of supervision under G.S. 14-208.40B(c) to support an SBM order for a period of time to be specified by the court.

State v. Yow, ___ N.C. App. ___, ___ S.E.2d ___ (18 May 2010). The court noted that the court's order that the defendant be enrolled in satellite-based monitoring for ten years because he was a recidivist was contrary to G.S. 14-208.40B(c), which requires that the period be for life. However, because the state did not cross-appeal on this issue, the court declined to address it.

Sentencing

Trial Court Had Discretion Whether to Make Sentences for Two Drug Trafficking Convictions at Same Trial to Run Concurrently With or Consecutively To Each Other

State v. Nunez, ___ N.C. App. ___, ___ S.E.2d ___ (18 May 2010). The defendant was convicted of trafficking by possessing marijuana and trafficking by transporting marijuana. The court ruled that the trial court had the discretion whether to make the sentences for the two drug trafficking convictions run concurrently with or consecutively to each other. In this case, the trial court erroneously believed that it had to make the sentences run consecutively.

Sentence Enhancement Under G.S. 14-3(c) (Misdemeanor Committed Because of Victim's Race) Was Properly Applied When White Defendant Committed Misdemeanor Assault Against White Victim Because Victim Had Interracial Relationship With Black Person

State v. Brown, ___ N.C. App. ___, 689 S.E.2d 210 (16 February 2010). The defendant was convicted of assault with a deadly weapon, a Class A1 misdemeanor. He was sentenced as a Class H felon under G.S. 14-3(c) (offense was committed because of the victim's race). The evidence showed that the white defendant assaulted the white victim because the victim had an interracial relationship with a black person. The court ruled, relying on cases from other jurisdictions, that the sentencing enhancement was properly applied to the defendant.

Sentence Imposed at Re-Sentencing Hearing Violated G.S. 15A-1335

State v. Daniels, ___ N.C. App. ___, 691 S.E.2d 78 (6 April 2010). The defendant was convicted of first-degree rape and first-degree kidnapping. He was sentenced to consecutive terms of imprisonment of 307 to 378 months for the first-degree rape conviction and 133 to 169 months for the first-degree kidnapping conviction. He appealed his sentences to the North Carolina Court of Appeals, which remanded for new sentencing hearing for both convictions, requiring the trial court to either (1) arrest judgment for the first-degree kidnapping conviction and resentence for second-degree kidnapping; or (2) arrest judgment for the first-degree rape conviction and resentence for first-degree kidnapping. The trial court chose the first option, sentencing the defendant from 370 to 453 months for first-degree rape and a consecutive 46 to 65 months for second-degree kidnapping. The court ruled that the trial court's sentence for first-degree rape violated G.S. 15A-1335 because it exceeded the sentence imposed at the first sentencing hearing. The court distinguished State v. Moffitt, 185 N.C. App. 308 (2007) (court may consider whether new sentences in the aggregate are greater than original sentences in the aggregate), noting that the ruling in that case addressed the consolidation of the defendant Moffit's multiple convictions at his resentencing hearing, whereas defendant Daniels' convictions were not consolidated.

(1) Concurrent Habitual Felon Sentences for Convictions at Same Trial Are Authorized
(2) Sentence May Have Been Improperly Based on Defendant's Failure to Accept Pretrial Plea Offer

State v. Haymond, ___ N.C. App. ___, 691 S.E.2d 108 (6 April 2010). The defendant was convicted of multiple offenses involving break-ins, larcenies, and possession of stolen property concerning multiple victims. He received ten consecutive habitual felon sentences. The court ruled: (1) the trial court has the authority to impose concurrent habitual felon sentences for convictions that occur at the same trial; and (2) the trial court's statements at the sentencing hearing raised an inference that the trial court based its sentences at least in part on the defendant's failure to accept the state's plea offer at a pretrial hearing, and thus a new sentencing hearing must be held.

Eighth Amendment Prohibits Sentence of Life Imprisonment Without Parole For Conviction of Non-Homicide Offense Committed When Defendant Had Not Yet Reached His or Her Eighteenth Birthday

Graham v. Florida, ___ U.S. ___, 130 S. Ct. ___ (17 May 2010). The defendant was sentenced in a Florida state court to life imprisonment without parole for a conviction of a non-homicide offense. The defendant was less than eighteen years old when he committed the offense. The Court ruled that the Eighth Amendment (which bars cruel and unusual punishments) prohibits a sentence of life imprisonment without parole for a conviction of a non-homicide offense committed when a defendant had not yet reached his or her eighteenth birthday.

[Author's note: Statutes affected in part by this ruling include: (1) G.S. 15A-1340.16B(a) (life imprisonment without parole for conviction of Class B1 felony when committed against victim who was thirteen years old or younger at time of offense and defendant had one or more prior B1 felony convictions; however, statutory provision is inapplicable if there are mitigating factors under G.S. 15A-1340.16(e)); (2) G.S. 15A-1340.17(c) (life imprisonment without parole for defendant sentenced for Class B1 felony in aggravated range with Prior Record Levels V or VI); (3) G.S. 14-7.12 (sentencing of violent habitual felon to life imprisonment without parole); and (4) G.S. 14-288.22(a) (life imprisonment without parole for injuring another by using nuclear, biological, or chemical weapon of mass destruction). The appendix to the Court's opinion only cites G.S. 15A-1340.16B(a). Slip opinion at 34. It is highly unlikely that a defendant who was under eighteen years old when the offense was committed would qualify to be sentenced to life imprisonment without parole under the statutes discussed in (1), (2), and (3), above.]