

Criminal Case Update

Spring Public Defender Conference

May 2005

(includes cases decided through May 5, 2005)

The following summaries are drawn primarily from Bob Farb's criminal case summaries. To view all of the summaries, go to <http://ncinfo.iog.unc.edu/programs/crimlaw/index.html>. To obtain the summaries automatically by e-mail, go to the above site, click on Criminal Law Listserv, and follow the instructions.

Stops and Searches

For additional cases involving warrantless stops and searches, *see* Rubin, Fodor & Hughes, North Carolina Defender Manual, Ch. 15 & Supp. (describing five-step approach for assessing lawfulness of warrantless stops and searches), available online at <http://www.ncids.org>.

Actions after Stop

Walking Drug Dog Around Vehicle While Driver Was Lawfully Detained for Officer's Issuance of Warning Ticket for Speeding Did Not Violate Fourth Amendment

Illinois v. Caballes, 125 S. Ct. 834, 160 L. Ed. 2d 842 (24 January 2005). The defendant was lawfully stopped for speeding. While the stopping officer was writing a warning ticket, another officer arrived and walked a drug detection dog around the defendant's vehicle. The dog alerted to the trunk and a search discovered marijuana. The entire incident lasted less than ten minutes. The Court stated that the issue in this case was a narrow one: whether the Fourth Amendment requires reasonable, articulable suspicion to justify using a drug detection dog to sniff a vehicle during a legitimate traffic stop. The Court noted that a seizure justified solely by the interest in issuing a warning ticket can become unlawful if it is prolonged beyond the time reasonably required to complete that mission. The Court stated that the state court had reviewed the stopping officer's conversations with the defendant and the precise timing of his radio transmissions to the dispatcher to determine whether the officer had improperly extended the duration of the stop to enable the dog sniff to occur. The Court accepted the state court's conclusion that the duration of the stop in this case was entirely justified by the traffic offense and the ordinary inquiries incident to such a stop. The Court noted that the state appellate court had ruled, however, that the use of the drug detection dog converted the encounter from a lawful traffic stop into a drug investigation, and because the shift in purpose was not supported by reasonable suspicion that the defendant possessed illegal drugs, it violated the Fourth Amendment. The Court rejected this analysis and ruling. It stated that conducting a dog sniff would not change the character of a traffic stop that is lawful at its inception and otherwise conducted in a reasonable manner, unless the dog sniff itself violated the defendant's Fourth Amendment right to privacy. The Court ruled that the dog sniff did not do so, relying on *United States v. Jacobsen*, 466 U.S. 109 (1984), *United States v. Place*, 462 U.S. 696 (1983), and *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000), and distinguishing *Kyllo v. United States*, 533 U.S. 27 (2001). The Court stated that a

dog sniff conducted during a lawful traffic stop that reveals no information other than the location of a substance that a person had no right to possess does not violate the Fourth Amendment.

[(1) This ruling may affect the ruling in *State v. Branch*, 162 N.C. App. 707, 591 S.E.2d 923 (17 February 2004) (an officer violated the Fourth Amendment by walking a drug dog around a vehicle whose driver was lawfully detained for an investigation of her driver's license, because the use of the drug dog required reasonable suspicion of criminal activity beyond the reason of investigating the driver's license), *state's petition for discretionary review allowed*, 595 S.E.2d 438 (April 1, 2004), *discretionary review improvidently granted*, 610 S.E.2d 198 (April 7, 2005). (2) The United States Supreme Court in *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000), ruled that a checkpoint whose primary purpose was drug detection violated the Fourth Amendment. The *Caballes* ruling did not change the *Edmond* ruling. For example, if officers walked a drug dog around all vehicles initially stopped at a DWI or license checkpoint (in contrast to walking a drug dog around a car after the driver had been lawfully detained at the checkpoint for further investigation for a valid reason), then a court would likely rule that the primary purpose of the checkpoint was drug detection, not DWI or license checks. (3) The detention in *Caballes* took about ten minutes. Absent the driver's consent to remain at the location of the traffic stop or an officer's reasonable suspicion of criminal activity to justify a further detention, the duration of a typical traffic stop would likely become unconstitutionally long if the driver was detained solely because the officer was waiting for a drug dog to arrive and the officer had already completed the necessary actions related to the traffic stop.]

Actions after Arrest

Ruling in *New York v. Belton*, 453 U.S. 454 (1981), Allows Officer to Search Vehicle's Passenger Compartment Incident to Arrest of Recent Occupant of Vehicle

Thornton v. United States, 541 U.S. 615 (24 May 2004). An officer became suspicious about a vehicle driving near him and ran a check that revealed its license tags had not been issued to that vehicle. Before the officer had an opportunity to stop the vehicle, the defendant drove into a parking lot and got out of the vehicle. The officer pulled into the parking lot and stopped the defendant near his vehicle. He eventually developed probable cause to arrest him for possessing illegal drugs in one of his pockets. The officer handcuffed him and placed him in the back seat of his patrol car. He then searched the defendant's vehicle and found a handgun under the driver's seat. The Court ruled that its ruling in *New York v. Belton*, 453 U.S. 454, 101 S. Ct. 2860, 69 L. Ed. 2d 768 (1981) (officer who has made lawful custodial arrest of occupant of vehicle may search entire passenger compartment incident to arrest), allowed the officer to search the vehicle's passenger compartment incident to the arrest of the defendant, who was a recent occupant of the vehicle.

Four other members of court appear willing to join Justice Scalia, who argued in dissent that *Belton* car searches should be limited to cases where it is reasonable to believe evidence relevant to crime of arrest might be found in car.

***Miranda* Cases**

Failure to Give a Defendant *Miranda* Warnings Did Not Require Suppression of Firearm Obtained as a Result of Defendant's Unwarned But Voluntary Statement

United States v. Patane, 124 S. Ct. 2620, 159 L. Ed. 2d 667 (28 June 2004). An officer arrested the defendant at his residence for violating a restraining order involving his ex-girlfriend. When another officer began to give *Miranda* warnings, the defendant interrupted the officer, asserting he knew his

rights, and neither officer attempted to complete the *Miranda* warnings. Because one of the officers had been previously informed that the defendant, a convicted felon, illegally possessed a Glock pistol, he asked the defendant about it. The defendant, after persistent questioning, told the officer that the pistol was in his bedroom. The officer received consent from the defendant to retrieve the pistol. The pistol was admitted at his trial, and he was convicted of possession of a firearm by a convicted felon. An opinion representing the views of three Justices and announcing the judgment of the Court ruled, distinguishing *Dickerson v. United States*, 530 U.S. 428 (2000) (*Miranda* announced a constitutional rule that Congress may not supersede legislatively), that the Fifth Amendment's self-incrimination privilege is not implicated by the admission into evidence of the physical fruit of a voluntary statement taken in violation of the *Miranda* ruling. An opinion representing the views of two other Justices and concurring in the judgment stated that it agreed with the opinion announcing the judgment of the Court that the nontestimonial physical fruit of the defendant's unwarned statement, the Glock pistol, was admissible—although it did not necessarily agree with all of the statements in the opinion.

“Fruit of Poisonous Tree” Doctrine Did Not Apply to Bar Admission of Physical Evidence Discovered After *Miranda* Violation

State v. Houston, ___ N.C. App. ___, 610 S.E.2d 777 (5 April 2005). Officers arrested the defendant in a parking lot, did not give him *Miranda* warnings, took him to an apartment where he consented to a search, including a safe to which the defendant gave officers the combination. Cocaine, cash, and a handgun were found in the safe. The officers transported the defendant to the police station, where they advised him of his *Miranda* warnings and took a statement. None of the defendant's pre-*Miranda* warning statements were admitted at the defendant's trial. However, the evidence in the safe was admitted into evidence as well as the defendant's statements at the police station. The court ruled, relying on *United States v. Patane*, 124 S. Ct. 2620, 159 L. Ed. 2d 667 (2004), *State v. May*, 334 N.C. 609, 434 S.E.2d 180 (1993), and *State v. Goodman*, ___ N.C. App. ___, 600 S.E.2d 28 (2004), that the “fruit of poisonous tree” doctrine did not apply to bar admission of physical evidence discovered after the *Miranda* violation (that is, questioning the defendant after his arrest and obtaining the combination to the safe without giving *Miranda* warnings). Thus, evidence seized from the safe was admissible at the defendant's trial based on the defendant's valid consent to search it.

When Officer as Part of Interrogation Technique Deliberately Failed to Give Required *Miranda* Warnings and Obtained a Confession, Then Twenty Minutes Later Gave *Miranda* Warnings and Obtained a Confession, Neither the First Nor Second Confessions Were Admissible

Missouri v. Seibert, 124 S. Ct. 2601, 159 L. Ed. 2d 667 (28 June 2004). An officer arrested the defendant for her involvement with a unlawful burning of a mobile home and the resulting death of a person inside. As part of an interrogation technique, the officer deliberately failed to give the defendant *Miranda* warnings, interrogated her for 30 to 40 minutes, and obtained a confession. The defendant was then given a twenty-minute break. The same officer then gave *Miranda* warnings to the defendant, obtained a waiver, interrogated her again (referring in this second interrogation to statements she had made in the first interrogation), and obtained another confession. The trial judge suppressed the first confession but admitted the second confession. The issue before the United States Supreme Court was the admissibility of the second confession. Distinguishing *Oregon v. Elstad*, 470 U.S. 298 (1985) (second voluntary incriminating statement obtained with *Miranda* warnings and waiver at police station was admissible even though it occurred after the defendant had made voluntary incriminating statement at his house that was inadmissible under *Miranda* because warnings had not been given), an opinion announcing the judgment of the Court and representing the views of four Justices (a plurality opinion) ruled that the second confession was inadmissible. The opinion stated that it would have been reasonable for the defendant to regard the two interrogation sessions as a continuum in which it would have been unnatural to refuse to repeat at the second interrogation what had been said before. These circumstances challenged

the comprehensibility and efficacy of the *Miranda* warnings given before the second interrogation such that a reasonable person in the defendant's shoes would not have understood the warnings to convey a message that she retained a choice about continuing to talk. A fifth Justice concurred in the judgment that the second confession was inadmissible, although he disagreed with the reasoning of the plurality opinion. He stated that the admissibility of post-*Miranda* warning statements should continue to be governed by *Oregon v. Elstad* except if the second statement is obtained in the two-step interrogation technique deliberately used in this case to undermine the *Miranda* warning. In such a case, post-*Miranda* warning statements that are related to the substance of the pre-*Miranda* warning statements must be excluded unless curative measures are taken before the post-*Miranda* warning statement is made. The curative measures discussed in his opinion were not taken in this case, so he concluded that the second confession was inadmissible. [When a fifth vote is necessary to support a judgment of the Court, the concurring opinion defines the scope of the ruling if it rests on the narrowest grounds that supports the judgment, which it does in this case. *See, e.g., Chandler v. Florida*, 449 U.S. 560 (1981); *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Marks v. United States*, 430 U.S. 188 (1977).]

Sex Offenses

For a discussion of expert testimony in cases involving children, *see* John Rubin, Child Evidence Issues, available online at <http://www.ncids.org> (under Defender Training/Defender Training Materials Index/Evidence/Child Evidence Issues from Defending Child Sexual Abuse Cases, Oct. 2004)

Expert Testimony

- (1) SANE Nurse Was Properly Qualified as Expert to Offer Opinion About Her Examination of Child Sexual Assault Victim**
- (2) SANE Nurse and Doctor Were Properly Permitted to Testify That Physical Findings Concerning Child Sexual Assault Victim Were Consistent With Vaginal Penetration and Someone Kissing Child's Breast**

State v. Fuller, ___ N.C. App. ___, 603 S.E.2d 569 (19 October 2004). The defendant was convicted of rape, sexual offense, and indecent liberties with a female child. The child testified at trial about these offenses, including vaginal penetration and the defendant's kissing her breast. The child was examined at a hospital emergency room by a SANE (sexual assault nurse examiner) nurse and a doctor. They testified that the abrasions on the child's genitalia were consistent with vaginal penetration, and redness on her breast was consistent with having been kissed on the breast. (1) The court ruled, relying on *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 597 S.E.2d 674 (2004), that the SANE nurse was properly qualified as an expert to offer an opinion about her examination of the child victim. (See the nurse's background set out in the court's opinion.) (2) The court ruled, relying on *State v. Stancil*, 355 N.C. 266, 559 S.E.2d 788 (2002), and *State v. Kennedy*, 320 N.C. 20, 357 S.E.2d 359 (1987), that the SANE nurse and doctor were properly permitted to testify that the physical findings concerning the victim were consistent with vaginal penetration and someone kissing the child's breast.

Trial Judge Erred in Child Sexual Abuse Trial in Allowing State's Medical Expert to Testify That Child Probably Suffered Sexual Abuse When There Was No Evidence of Physical Injury; Although Defendant Failed to Object to Testimony at Trial, Plain Error Required New Trial

State v. Ewell, ___ N.C. App. ___, 606 S.E.2d 914 (18 January 2005). The defendant was convicted of multiple sex offenses with a child. The court ruled, relying on *State v. Stancil*, 355 N.C. 266, 559 S.E.2d 788 (2002), *State v. Dixon*, 150 N.C. App. 46, 563 S.E.2d 594 (2002), and other cases, that the trial judge

erred in allowing the state's medical expert to testify that child probably suffered sexual abuse when there was no evidence of physical injury. Because the defendant did not object to this testimony at trial, the court examined the error under plain error review and ordered a new trial.

Trial Judge Erred in Allowing State's Medical Expert to Offer Opinion That Her Diagnosis of Victim Was Probable Sexual Abuse When There Was Insufficient Physical Evidence to Support Opinion

State v. Couser, 163 N.C. App. 727, 594 S.E.2d 420 (20 April 2004). The defendant was convicted of various sex offenses with a thirteen-year-old female. The state's medical expert testified that she performed an examination of the victim and her only abnormal finding was the presence of two abrasions on either side of the introitus. Based on her examination and the history of the victim provided to her, the expert testified that her diagnosis was probable sexual abuse. On cross-examination, the expert testified that the abrasions could be caused by something other than a sexual assault and were not, in themselves, diagnostic or specific to sexual abuse. The court ruled, relying on *State v. Dixon*, 150 N.C. App. 46, 563 S.E.2d 594, affirmed, 356 N.C. 428, 571 S.E.2d 584 (2002), that the trial judge erred in allowing the expert to offer an opinion that her diagnosis of victim was probable sexual abuse because there was insufficient physical evidence to support the expert's opinion. Because the defendant had not objected to the testimony at trial, the court then determined whether the error amounted to plain error. The court examined the facts in this case and ruled that the trial judge committed plain error requiring a new trial.

Proof

(1) Pre-Indictment Delay Did Not Violate Due Process

(2) Insufficient Evidence to Support Conviction of Taking Indecent Liberties

State v. Stanford, ___ N.C. App. ___, 609 S.E.2d 468 (15 March 2005). (1) The defendant was convicted of various sex offenses committed in 1987 with his niece when she was thirteen and fourteen years old. She did not report the offenses until September 2002. He was charged with the offenses in October 2002. The court ruled that the defendant's due process rights were not violated by the delay in the bringing of charges. The fifteen-year time period between the commission of the crimes and their later reporting to law enforcement was not delay attributable to the state under the due process clause. The state did not know about the crimes until the victim reported them to law enforcement in 2002. (2) The court ruled, relying on *State v. Brown*, 162 N.C. App. 333, 590 S.E.2d 433 (2004), that there was insufficient evidence to support the defendant's conviction of taking indecent liberties. The state's evidence consisted of the defendant's hand brushing against the victim's breast for only a couple of seconds, for which he apologized. The court stated that this was insufficient evidence that the defendant committed this act for the purpose of arousing sexual desire.

Sentencing

Probation Condition ("Not Reside in a Household With Any Minor Child") for Defendant Convicted of Sex Offenses With Minor Was Constitutional Based on Facts in This Case

State v. Strickland, ___ N.C. App. ___, 609 S.E.2d 253 (15 March 2005). The defendant was living with his wife and young son in the home of the defendant's mother-in-law. Also residing in that home was the minor sister of the defendant's wife. The defendant was convicted of various sex offenses with the minor sister. The defendant was placed on probation with the special condition under G.S. 15A-1343(b)(4): "Not reside in a household with any minor child" if the offense is one in which there is evidence of sexual abuse of a minor. The court rejected the defendant's arguments that this probation condition (1) was

overbroad and as applied to him constituted an impermissible deprivation without due process of his constitutional right to care and custody of his young son, and (2) was unconstitutional as applied to him because he represented no threat to his young son. The court ruled that the probation condition was valid based on the facts in this case and did not violate the defendant's due process rights.

Lawrence v. Texas Cases

Statutory Rape Prosecution under G.S. 14-27.7A Is Not Barred by *Lawrence v. Texas*

State v. Clark, 161 N.C. App. 316, 588 S.E.2d 66 (18 November 2003). The defendant was convicted under G.S. 14-27.7A(a) of statutory rape of a victim who was thirteen years old. The court ruled that the United States Supreme Court ruling in *Lawrence v. Texas*, 123 S. Ct. 2472, 156 L. Ed. 2d 508 (2003) (state statute prohibiting two people of same sex to engage in consensual sex act violated privacy interest in Due Process Clause of Fourteenth Amendment when consensual sex act occurred between two adults in private residence), did not bar this prosecution. The court stated that the U.S. Supreme Court noted in *Lawrence* that the case did not involve minors or those "persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused."

Evidence of Photographs of Other Young Males Found in Defendant's Home in Trial For Violation of G.S. 14-27.7(a) Was Admissible and Did Not Violate *Lawrence v. Texas*

State v. Oakley, ___ N.C. App. ___, 605 S.E.2d 215 (7 December 2004). The defendant was convicted of two counts of sexual activity by a substitute parent under G.S. 14-27.7(a). The defendant, a male, had sexual relations with a sixteen year old male. The state was permitted to introduce fifteen photographs found in the defendant's home that depicted a number of unidentified males to corroborate the victim's testimony concerning his sexual relationship with the defendant. Relying on *State v. Creech*, 128 N.C. App. 592, 495 S.E.2d 752 (1998), the court ruled that this evidence was properly admitted for this purpose. The court also rejected the defendant's argument that the ruling in *Lawrence v. Texas*, 539 U.S. 558 (2003), established constitutional protection for homosexual relationships and therefore the admission of this evidence showing the defendant to be a homosexual was grossly prejudicial. The court noted that *Lawrence* indicated that the ruling does not provide constitutional protection to sexual activity with minors, as existed in this case.

Prosecution for Solicitation of Crime Against Nature Was Not Unconstitutional Under *Lawrence v. Texas*

State v. Pope, ___ N.C. App. ___, 608 S.E.2d 114 (15 February 2005). The court ruled that a prosecution for solicitation of crime against nature based on the defendant's encounters with undercover law enforcement officers in which she indicated she would perform oral sex in exchange for money was not unconstitutional under *Lawrence v. Texas*, 539 U.S. 558 (2003) (state statute prohibiting two people of same sex to engage in consensual sex act violated privacy interest in Due Process Clause of Fourteenth Amendment when consensual sex act occurred between two adults in private residence). The court noted that because *Lawrence* expressly excluded prostitution and public conduct from its ruling, the state may properly criminalize the solicitation of a sexual act under crime against nature under those circumstances.

Other Criminal Offenses

Assaults

Under G.S. 14-34.7, State Need Only Prove That Assault on Law Enforcement Inflicted Serious Injury, Not Serious Bodily Injury

State v. Crawford, ___ N.C. App. ___, 606 S.E.2d 375 (4 January 2005). The defendant was indicted for a violation of G.S. 14-34.7, and the indictment alleged that the assault on the law enforcement officer inflicted “serious injury.” The court noted that the title of the statute uses “serious injury,” while the statute’s text uses “serious bodily injury.” Relying on the ruling in *State v. Jones*, 358 N.C. 473, 598 S.E.2d 125 (2004) (possession of any amount of cocaine is a felony), the court ruled that the legislature’s “manifest purpose” (a term from the *Jones* ruling) in enacting G.S. 14-34.7 was to make an assault inflicting “serious injury” or “serious bodily injury” a felony. The court noted that if G.S. 14-34.7 is interpreted to require proof of “serious bodily injury,” it then would be a repetition of G.S. 14-32.4 and would create no additional punishment for assaulting a law enforcement officer, which was the legislature’s intent in enacting a law enforcement specific statute. However, if G.S. 14-34.7 is interpreted to require proof of “serious injury,” then the statute would aggravate the punishment for assault on a law enforcement officer from a misdemeanor to a Class F felony, which was the legislature’s “manifest purpose.” Thus, the indictment was not erroneous in alleging “serious injury.”

Proof of Defendant’s Being in “Custody” of Officer, Element in Malicious Conduct by Prisoner Under G.S. 14-258.4, Is Satisfied by Showing That Reasonable Person in Defendant’s Position Would Have Believed He or She Was Not Free to Leave

State v. Ellis, ___ N.C. App. ___, 608 S.E.2d 803 (1 March 2005). The defendant was convicted of malicious conduct by prisoner under G.S. 14-258.4. After an officer’s long chase of the defendant during which the officer told the defendant he was under arrest, the officer trapped the defendant in a canal. The officer again told him he was under arrest and was going to handcuff him. As the officer approached the defendant with handcuffs, he smeared the officer with feces. The court ruled that proof of a defendant’s being in “custody” of an officer under G.S. 14-258.4 is satisfied by showing that a reasonable person in the defendant’s position would have believed he or she was not free to leave. [The court utilized the Fourth Amendment standard for a seizure of a person set out in *United States v. Mendenhall*, 446 U.S. 544 (1980); which was later modified in *California v. Hodari D.*, discussed on page 273 of Robert L. Farb, *Arrest, Search, and Investigation in North Carolina* (3d ed. 2003)]. The court ruled that the defendant was in custody of the officer in this case.

- (1) Stalking Statute (G.S. 14-277.3) Is Not Unconstitutionally Vague**
- (2) “Person” in Definition of “Harasses” and “Harassment” in Stalking Statute Refers to Reasonable Person**

State v. Watson, ___ N.C. App. ___, 610 S.E.2d 472 (5 April 2005). The defendant was convicted of felony stalking (apparently based on the fact that she had been previously convicted of stalking). (1) The court ruled that the stalking statute is not unconstitutionally vague. (2) The court ruled that “person” (the person who is the object of harassment) in the definition of “harasses” and “harassment” in the stalking statute refers to a reasonable person.

Drug Offenses

(1) Sufficient Evidence of Constructive Possession of Cocaine

(2) Insufficient Evidence of Possessing Cocaine with Intent to Sell

(3) Insufficient Evidence of Maintaining Dwelling for Purpose of Selling Cocaine

State v. Battle, ___ N.C. App. ___, 606 S.E.2d 418 (4 January 2005). The defendant was convicted of possessing cocaine with intent to sell and intentionally maintaining a dwelling for the purpose of selling cocaine. (1) The court ruled that there was sufficient evidence of the defendant's constructive possession of cocaine. The state's evidence showed that the defendant was found in a motel room where marijuana and cocaine were located, playing video games and sleeping on the bed. Although the room was rented to another person, it contained a number of the defendant's effects, including clothing and personal papers. Also, the defendant's car was parked in the motel parking lot. (2) The court ruled that there was insufficient evidence of the defendant's possessing cocaine with intent to sell. Only 1.9 grams of compressed cocaine power was found, which according to the state's expert was small enough to have been for personal use. Officers did not find any implement with which to cut the cocaine, scales to weigh cocaine doses, and containers for selling cocaine doses. No drugs or paraphernalia were found in the defendant's car. The court remanded the case for the trial court to sentence the defendant for possession of cocaine. (3) The court ruled that there was insufficient evidence of maintaining a dwelling for the purpose of selling cocaine for the same reasons the court found insufficient evidence of possessing cocaine with the intent to sell.

(1) Sufficient Evidence of Constructive Possession of Cocaine

(2) Insufficient Evidence of Possessing Cocaine with Intent to Sell or Deliver

State v. Turner, ___ N.C. App. ___, 607 S.E.2d 19 (18 January 2005). The defendant was convicted of possessing cocaine with the intent to sell and deliver. Law enforcement officers entered a residence to serve an arrest warrant. They found two people in the kitchen, one of whom was the subject of the arrest warrant. Seated on a loveseat in the adjoining living room were the defendant and another person. A tube containing approximately ten rocks of crack cocaine was found concealed under a blanket draped over the loveseat between them. The defendant appeared agitated and his hands were jumbling around nervously. He and the other person appeared to be passing the tube back and forth under the blanket. (1) The court ruled, relying on *State v. Butler*, 356 N.C. 141, 567 S.E.2d 137 (2002), and *State v. Harrison*, 14 N.C. App. 450, 188 S.E.2d 541 (1972), and other cases, that this evidence was sufficient to establish the defendant's constructive possession of the cocaine. (2) The court ruled that there was insufficient evidence of the defendant's possessing the cocaine with the intent to sell or deliver. The court noted that the state did not present evidence of statements by the defendant concerning his intent; no money was found on the defendant; no paraphernalia or equipment used in drug sales was found; there was no drug packaging indicating an intent to sell the cocaine; and there was no behavior or other circumstances associated with drug transactions. An officer's testimony about the amount of the crack cocaine, its street value, and quantities carried for personal use was insufficient by itself to show the intent to sell and deliver. The court remanded the case for the trial court to sentence the defendant for possession of cocaine.

(1) Sufficient Evidence of Constructive Possession of Cocaine

(2) Insufficient Evidence of Possessing Cocaine with Intent to Sell or Deliver

State v. Nettles, ___ N.C. App. ___, ___ S.E.2d ___ (3 May 2005). The defendant was convicted of possessing cocaine with the intent to sell or deliver. Officers executing a search warrant at the defendant's home, jointly owned by the defendant and his siblings, seized a safety pin in the living room which

contained a residual amount of cocaine. The officers also seized a certificate of title to a Mercedes Benz, registered to the defendant's deceased nephew, an expired insurance policy for that vehicle insured in the defendant's name, and \$411.00 from the defendant's pocket. The defendant consented to a search of four vehicles in the yard, including the Mercedes Benz for which the defendant had the key. Officers found in the Mercedes Benz 1.2 grams of cocaine under the floor mat rolled in a napkin. Based on these and other facts, the court ruled that there was: (1) sufficient evidence of the defendant's constructive possession of the cocaine in the Mercedes Benz; and (2) insufficient evidence of possessing cocaine with the intent to sell or deliver. The court remanded the case for sentencing for the lesser offense of possessing cocaine.

Habitual Offenses

For a discussion of habitual offender laws, see Robert L. Farb, *Habitual Offender Laws*, available online at <http://ncinfo.iog.unc.edu/programs/crimlaw/habitual.pdf>; Rubin, Fodor & Hughes, *North Carolina Defender Manual* § 8.5E, at 22–24, available online at <http://www.ncids.org>.

Trial Judge Did Not Err in Not Dismissing Superseding Habitual Felon Indictment That Changed Allegations Involving Felony Convictions Set Out in Original Habitual Felon Indictment, When Superseding Indictment Was Brought After Defendant Had Been Arraigned on Substantive Felony Indictments and Original Habitual Felon Indictment, But Before Defendant's Trial on Substantive Felonies; Court Distinguishes *State v. Little*, 126 N.C. App. 262 (1997)

State v. Cogdell, 165 N.C. App. 368, 599 S.E.2d 570 (20 July 2004). On January 14, 2002, the defendant was indicted for several felony offenses. On January 22, 2002, the defendant was indicted as an habitual felon. The defendant was arraigned on these indictments on May 29, 2002. A superseding habitual felon indictment was issued on September 3, 2002, which changed the allegations involving the three felony convictions set out in the original habitual felon indictment. The defendant was arraigned on this indictment on September 6, 2002. The defendant's trial began on December 9, 2002. Distinguishing *State v. Little*, 126 N.C. App. 262, 484 S.E.2d 835 (1997), the court ruled that the trial judge did not err in not dismissing the superseding indictment. In *Little*, the state obtained an habitual felon indictment before the defendant pled to the substantive felonies. However, after obtaining convictions on those substantive felonies, the state obtained a superseding habitual felon indictment, deleting one of the felonies alleged in a prior habitual felon indictment and replacing it with another. The court in *Little* ruled that it was error to adjudicate and sentence the defendant on the superseding habitual felon indictment because the defendant was entitled to rely, when he entered his plea to the substantive felonies, on the allegations in the habitual felon indictment in evaluating the state's likelihood of success on the habitual felon indictment. The court distinguished *Little* on the following grounds: (1) unlike the present case, the superseding habitual felon indictment in *Little* occurred *after* (court's emphasis) the defendant was convicted of the substantive felonies; (2) there was no indication in *Little* that the pleas to the substantive felonies actually occurred at an arraignment—the court stated that the critical event that forecloses substantive changes in an habitual felon indictment is the plea entered before the actual trial, not at an earlier arraignment; (3) the court stated that the most important distinction between this case and *Little* involves notice; although the superseding habitual felon indictment in this case was brought after the defendant's first arraignment, it was brought three months before the defendant's trial and thus the defendant received sufficient notice that he was being prosecuted as a habitual felon for the three felony convictions alleged in the superseding indictment.

(1) Judge in Trial of Motor Vehicle Offenses Erred in Allowing into Evidence Part of State's Exhibit Containing Defendant's Convictions

(2) Felony of Eluding Arrest Is Predicate Substantive Felony Subject to Habitual Felon Law

State v. Scott, ___ N.C. App. ___, 607 S.E.2d 10 (4 January 2005). The defendant was convicted of driving while license revoked, reckless driving, and felony operating a motor vehicle to elude arrest. He was found to be an habitual felon for the felony operating charge. (1) The court ruled that the trial judge erred in allowing into evidence part of a state's exhibit that contained the defendant's prior convictions for which defendant's license was revoked, when the convictions were inadmissible under Rule 404(b). The multiple letters to the defendant in the exhibit containing notices of his license revocation were properly admitted, but the prior convictions should have been redacted. (2) The court ruled that the felony of operating a motor vehicle to elude arrest under G.S. 20-141.5 is a proper predicate substantive felony whose punishment is subject to be elevated as a Class C felony under the habitual felon law.

(1) Two DWI Convictions Consolidated for Judgment Count as Two Convictions in Prosecution of Habitual DWI

(2) Evidence Was Sufficient to Support Impaired Driving in Habitual DWI Prosecution

State v. Allen, 164 N.C. App. 665, 596 S.E.2d 261 (1 June 2004). (1) The court ruled, distinguishing habitual felon law, that two DWI convictions consolidated for judgment count as two convictions in the prosecution of habitual DWI. (2) The court ruled that the following evidence was sufficient to support impaired driving in an habitual DWI prosecution: An officer, informed by a dispatcher that an impaired driver was driving an older model white Toyota pickup truck, saw a truck matching that description cross the centerline of a road. The officer stopped the vehicle. The officer noticed a very strong odor of alcohol emanating from the truck while he spoke with the defendant-driver. The defendant had difficulty getting out of the truck, was unsteady on his feet, and had to hold onto the side of the truck to walk. While the defendant was cooperative, he seemed sleepy, his speech was slurred, and he was difficult to understand. The officer did not ask the defendant to perform psychophysical tests because he believed the defendant was incapable of performing the tests without risk of physical harm from a potential fall. The officer opined that the defendant was impaired. Also, the defendant refused to take the Intoxilyzer test, which the court noted as a significant fact.

Prior Convictions That Had Occurred on Same Date Were Properly Admitted to Prove Habitual Misdemeanor Assault

State v. Forrest, ___ N.C. App. ___, 609 S.E.2d 241 (1 March 2005). The defendant was convicted of habitual misdemeanor assault under G.S. 14-33.2. The court ruled that prior convictions that had occurred on the same date were properly admitted to prove the offense. The statute does not require that the prior convictions must have occurred on separate dates.

Defendant's Conviction of Possessing Firearm by Felon Did Not Violate Ex Post Facto Clause and Other Constitutional Provisions When He Was Convicted of a Felony in 1983, His Right to Possess a Firearm Was Restored Before a 1995 Amendment to G.S. 14-415.1 Again Barred Him From Possessing a Handgun, and He Possessed a Handgun in 2001

State v. Johnson, ___ N.C. App. ___, 610 S.E.2d 739 (5 April 2005). The defendant was convicted of felonious sale and delivery of cocaine in 1983. He was unconditionally discharged from that conviction in 1985. Under the version of G.S. 14-415.1 (possession of firearm by felon) in effect then, the bar against his possession of a handgun expired in 1990, five years from the unconditional discharge. In 1995, the statute was amended to bar the possession of a handgun if a person was convicted of a felony before, on, or after December 1, 1995. During a traffic stop on December 15, 2001, an officer found a handgun in the

defendant's possession, and the defendant was convicted of violating G.S. 14-415.1. The court reviewed case law from various federal and state jurisdictions and ruled that the defendant's conviction did not violate the ex post facto provisions of the United States and North Carolina constitutions, did not constitute a bill of attainder under the United States and North Carolina constitutions, and did not violate the defendant's right to due process.

Evidence

Generally

Court Declines to Adopt United States Supreme Court Ruling in *Daubert v. Merrell Dow Pharmaceuticals* Concerning Admissibility of Expert Testimony—Ruling of Court of Appeals Reversed

Howerton v. Arai Helmet, Ltd., 358 N.C. 440, 597 S.E.2d 674 (25 June 2004), *reversing*, 158 N.C. App. 316, 581 S.E.2d 816 (17 June 2003). The court, reversing the ruling of the court of appeals in this case, declined to adopt the ruling in *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993), on the admissibility of expert testimony under Rule 702. Instead, the court reaffirmed the standard set out in *State v. Goode*, 341 N.C. 513, 461 S.E.2d 631 (1995), and other cases: (1) Is the expert's proffered method of proof scientifically reliable as an area for expert testimony? (2) Is the witness testifying at trial qualified as an expert in that area of testimony? (3) Is the expert's testimony relevant?

Trial Judge Did Not Err in Ruling Under Rule 403 That Defense Mental Health Expert Could Not Testify She Based Her Opinion Partly on Defendant's Statements to Her and to His Family Members

State v. Smith, 359 N.C. 199, 607 S.E.2d 607 (4 February 2005). The defendant was convicted of first-degree murder and sentenced to death. The court ruled, relying on *State v. Workman*, 344 N.C. 482, 476 S.E.2d 301 (1996), and *State v. Baldwin*, 330 N.C. 446, 412 S.E.2d 31 (1992), that the trial judge did not err in ruling under Rule 403 that a defense mental health expert could not testify that she based her opinion partly on the defendant's statements to her and to his family members. The court concluded that the trial judge properly applied Rule 403 to find that although relevant, the danger of these statements prejudicing, confusing, or misleading the jury outweighed their probative value.

When Defendant on Direct Examination in Homicide Trial Testified That He Had Never Injured Anyone, State Was Properly Permitted to Cross-Examine Him About Prior Violent Acts

State v. Ammons, ___ N.C. App. ___, 606 S.E.2d 400 (4 January 2005). The defendant was convicted of voluntary manslaughter in a trial in which he asserted self-defense. The court ruled, distinguishing *State v. Morgan*, 315 N.C. 626, 340 S.E.2d 84 (1986), and *State v. Mills*, 83 N.C. App. 606, 351 S.E.2d 130 (1986), and relying on *State v. Syriani*, 333 N.C. 350, 428 S.E.2d 118 (1993), that when the defendant on direct examination testified that he had never injured anyone, the state was properly permitted to cross-examine him about prior violent acts. The state's questioning was relevant to the defendant's credibility once he placed his character for non-violence in issue.

Trial Judge Erred in Allowing State to Cross-Examine Defense Character Witness About Defendant's Prior Convictions When Witness Had Only Testified About Reputation of State's Witnesses for Truthfulness

State v. Thaggard, ___ N.C. App. ___, 608 S.E.2d 774 (1 February 2005). The defendant was on trial for sexual offenses with two minors. The defendant offered a character witness who testified to the poor reputation of the two minors for truthfulness. This witness did not testify about the defendant's character. The court ruled that the trial judge erred in allowing the state to ask the witness if she knew that the defendant had been convicted of two counts of indecent liberties. The defendant's character had not been placed in issue by the witness's testimony.

State Was Improperly Permitted to Offer Extrinsic Evidence (Testimony by State's Witnesses in Rebuttal) to Impeach Defense Witnesses' Denials That They Had Previously Made Certain Statements

State v. Mitchell, ___ N.C. App. ___, 610 S.E.2d 260 (5 April 2005). The defendant was on trial for various sexual offenses involving his two minor granddaughters. The defendant offered testimony by his son and two daughters. During the state's cross-examination, the son denied making a statement to a social services department case manager that he once observed his father on top of one of his sisters. During rebuttal, the state was permitted to call the case manager to testify to his conversation with the son. During the state's cross-examination, a daughter denied making statements to a detective that the defendant had sexually abused her and her sister. During rebuttal, the state was permitted to call the detective to testify about her conversation with the daughter. The court ruled that the trial judge erred in permitting the state's rebuttal testimony. The defense witnesses' denials of having made the prior statements were conclusive for impeachment purposes, and the testimony of the state's witnesses on rebuttal was collateral and could not be used to impeach the defense witnesses.

***Crawford* Cases from North Carolina**

For cases from other jurisdictions applying *Crawford v. Washington*, see Jessica Smith, Confrontation after *Crawford v. Washington*, available online at <http://ncinfo.iog.unc.edu/programs/crimlaw/crawfordsmith.pdf>. For a discussion of *Crawford* and its impact on the admissibility of a chemical analyst's affidavit in district court, see Robert L. Farb, Chemical Analyst's Affidavit and *Crawford v. Washington*, available online at <http://ncinfo.iog.unc.edu/programs/crimlaw/crawford.pdf>.

Admission in Defendant's Trial of Confession of Accomplice Made to Law Enforcement Officers During Interrogation Violated Confrontation Clause Under *Crawford v. Washington* Ruling When Accomplice Did Not Testify At Trial and Defendant Did Not Have Prior Opportunity to Cross-Examine Accomplice

State v. Pullen, 163 N.C. App. 696, 594 S.E.2d 248 (20 April 2004). The court ruled that the admission in the defendant's trial of a confession of an accomplice made to law enforcement officers during interrogation violated the Confrontation Clause under the ruling in *Crawford v. Washington*, 541 U.S. 36 (8 March 2004), when the accomplice did not testify at trial and defendant did not have a prior opportunity to cross-examine the accomplice.

Spontaneous Statements by Victim to Officer Were Not Testimonial under *Crawford v. Washington*

State v. Forrest, 164 N.C. App. 272, 596 S.E.2d 22 (18 May 2004), *aff'd per curiam*, ___ N.C. ___, ___ S.E.2d ___ (5 May 2005). Law enforcement officers rescued Cynthia Moore from defendant, her

kidnapper. Moore suffered lacerations and bruises, including one very deep laceration, which was bleeding profusely. Moore was shaking, crying, and very nervous after the incident, at which time she told Detective Melanie Blalock what defendant had done to her. Moore did not testify at trial. The court held that because Moore's statements to Blalock were non-testimonial, the trial court did not err in admitting them into evidence. The court found instructive a post-*Crawford* New York case holding that a 911 call was non-testimonial. Concluding that Moore's conversation with Blalock was not a testimonial "police interrogation" under *Crawford*, the court stated:

Just as with a 911 call, a spontaneous statement made to police immediately after a rescue can be considered "part of the criminal incident itself, rather than as part of the prosecution that follows." Further, a spontaneous statement made immediately after a rescue from a kidnapping at knife point is typically not initiated by the police. Moore made spontaneous statements to the police immediately following a traumatic incident. She was not providing a formal statement, deposition, or affidavit, was not aware that she was bearing witness, and was not aware that her utterances might impact further legal proceedings. *Crawford* protects defendants from an absent witness's statements introduced after formal police interrogations in which the police are gathering additional information to further the prosecution of a defendant. *Crawford* does not prohibit spontaneous statements from an unavailable witness like those at bar.

In dissent, Judge Wynn argued that the 911 analogy was inapt. Wynn contended that Blalock's sole purpose was to obtain Moore's statement for use in prosecution of defendant. When the statement was taken, the scene was secure, defendant was absent, and Moore was no longer in peril. Blalock was not the first police officer Moore encountered at the scene but was the officer designated to get Moore's statement. Moore did not speak to Blalock to get assistance but because she knew that the police were there to gather evidence concerning the crime. Thus, he disagreed with the majority's statement that the witness "was not aware that she was bearing witness, and was not aware that her utterances might impact further legal proceedings."

- (1) Murder Victim's Statements to Wife and Daughter Concerning Robbery and Shooting Were Not Testimonial Under *Crawford v. Washington***
- (2) Court States That *Ohio v. Roberts* Ruling Remains Applicable to Admissibility of Nontestimonial Statements**
- (3) Murder Victim's Statements to Wife and Daughter Concerning Robbery and Shooting Were Not Admissible Under Rule 803(3) (Declarant's Then Existing State of Mind) or Rule 804(b)(5) (Residual Hearsay Exception)**

State v. Blackstock, 165 N.C. App. 50, 598 S.E.2d 412 (6 July 2004). The defendant was convicted of first-degree murder and armed robbery in the robbery and shooting of the owner of a convenience store. The victim was shot in the chest and treated at a hospital, where his condition improved over the four days after the robbery. On the fifth day, he developed an infection and died. The trial judge admitted statements about the robbery and shooting made by the victim to his wife and daughter a few days after the crimes had occurred. (1) The court ruled that the murder victim's statements to his wife and daughter concerning the robbery and shooting were not testimonial under *Crawford v. Washington*, 541 U.S. 36 (2004). The court stated that it was unlikely that the victim made the statements under a reasonable belief that they would later be used prosecutorially. In addition, the fact that the victim made the statements to his wife and daughter mitigates against the possibility that he understood he was "bearing witness" against the defendant. (2) The court stated in footnote 2 that the ruling in *Ohio v. Roberts*, 448 U.S. 56 (1980) (setting out test for admissibility of statements under the Confrontation Clause) remains applicable to the admissibility of nontestimonial statements after *Crawford*. (3) The court ruled that the murder victim's statements to his wife and daughter concerning the robbery and shooting were not admissible

under Rule 803(3) (declarant's then existing state of mind) or Rule 804(b)(5) (residual hearsay exception). The statements, made several days after the robbery, were inadmissible under Rule 803(3) because they simply recited the victim's memory of the events that took place and his emotional condition at the time; the court cited *In re Hayden*, 96 N.C. App. 77, 384 S.E.2d 558 (1989). The statements were inadmissible under Rule 804(b)(5) because they were not trustworthy; they fundamentally contradicted a statement the victim made to a law enforcement officer immediately after the robbery and shooting.

(1) Confrontation Clause Did Not Bar Prior Trial Testimony of Unavailable State's Witness
(2) Notarized Statement of Unavailable State's Witness and Statements Made to Law Enforcement Officer by Unavailable State's Witness Were Testimonial Statements Under *Crawford v. Washington* and Were Inadmissible Because Defendant Did Not Have Opportunity to Cross-Examine Witness

State v. Clark, 165 N.C. App. 279, 598 S.E.2d 213 (6 July 2004). The defendant was convicted of armed robbery and second-degree kidnapping. The state's evidence showed that the defendant met the victim at a bus station and offered to walk her to a hotel. Several blocks away, they met Moore, with whom the defendant had a brief conversation. The defendant continued walking with the victim and eventually robbed her. In an attempt to determine the identity of the robber, a law enforcement officer interviewed Moore, who also prepared a notarized statement. Moore did not testify at the trial in which the defendant was convicted, but she testified at a prior trial against the defendant on these charges. (1) The court ruled that Moore's prior trial testimony was a testimonial statement under *Crawford v. Washington*, 541 U.S. 36 (2004), but the state met its burden of showing that she was unavailable to testify and the defendant had had the opportunity to cross-examine her at that prior trial. Thus the trial judge did not err in admitting Moore's prior trial testimony under *Crawford* and Rule 804. (2) The court ruled that Moore's notarized statement and the statements she made to the officer during his investigation of these offenses were testimonial statements under *Crawford* and, for purposes of appellate review, were considered to have been offered to prove the truth of the matters asserted. Because the defendant did not have an opportunity to cross-examine Moore about these statements, they were inadmissible under *Crawford*.

Written Statement Given to Law Enforcement Officer by Unavailable State's Witness Was Testimonial Statement Under *Crawford v. Washington* and Was Inadmissible Because Defendant Did Not Have Opportunity to Cross-Examine Witness

State v. Morton, ___ N.C. App. ___, 601 S.E.2d 873 (21 September 2004). The defendant was convicted of possession of stolen goods. A law enforcement officer interviewed a suspect during an investigation of a break-in and took a written statement from the suspect that incriminated the defendant. The suspect did not testify at trial. The trial judge allowed the state to introduce the suspect's written statement. The court ruled that the suspect's statement was testimonial (a result of police interrogation) under *Crawford v. Washington*, 541 U.S. 36 (2004), and was inadmissible because the defendant did not have an opportunity to cross-examine the suspect.

Trial Judge in Capital Sentencing Hearing Erred Under *Crawford v. Washington* in Admitting Statements Made By Nontestifying Victim to Officer When State Did Not Show Victim Was Unavailable and Defendant Did Not Have Opportunity to Cross-Examine Victim

State v. Bell, 359 N.C. 1, 603 S.E.2d 93 (7 October 2004). The defendant was convicted of first-degree murder. During the capital sentencing hearing, the trial judge allowed the state during its proof of aggravating circumstance G.S. 15A-2000(e)(3) (prior violent felony conviction) to offer a law enforcement officer's testimony concerning what a nontestifying robbery victim told the officer when he questioned the victim about the robbery. The court ruled that the trial judge erred under *Crawford v. Washington*, 541 U.S. 36 (2004), in admitting the statement. The statement was given in response to

structured questioning by the officer and thus was a testimonial statement. The state did not adequately show the unavailability of the victim to testify. In addition, the defendant did not have the opportunity to cross-examine the victim. The court ruled, however, that the admission of the statement was harmless error beyond a reasonable doubt. [The Confrontation Clause applies to capital sentencing hearings, see Robert L. Farb, *North Carolina Capital Case Law Handbook*, p. 156 (2d. ed. 2004), but not to non-capital sentencing hearings, see *State v. Phillips*, 325 N.C. 222, 381 S.E.2d 325 (1989).]

Statement Given by Nontestifying Crime Victim to Law Enforcement Officer During Investigation and Victim's Photo Identification of Defendant Were Testimonial Evidence Under *Crawford v. Washington* and Were Inadmissible Because Defendant Did Not Have Prior Opportunity to Cross-Examine Victim

State v. Lewis, ___ N.C. App. ___, 603 S.E.2d 559 (19 October 2004), *rev. granted*, 359 N.C. 195, 608 S.E.2d 60 (Dec. 2, 2004). The defendant was convicted of robbery and felonious assault of an elderly victim in her apartment. A law enforcement officer arrived and took a statement from the victim describing how the crimes occurred. Later at the hospital, the victim was presented with a photo lineup and identified the defendant as her assailant. The victim died before trial of causes unrelated to these offenses. The court ruled, relying on *State v. Clark*, 165 N.C. App. 279, 598 S.E.2d 213 (6 July 2004), *State v. Pullen*, 163 N.C. App. 696, 594 S.E.2d 248 (20 April 2004), and *Moody v. State*, 594 S.E.2d 350 (Ga. 2004), that the victim's statement to the law enforcement officer and her identification of the defendant at the photo lineup were testimonial evidence under *Crawford v. Washington*, 541 U.S. 36 (2004), were offered for the truth of the matter asserted, and their admission at the defendant's trial violated the *Crawford* ruling because the defendant did not have a prior opportunity to cross-examine the victim.

Statement of Unavailable State's Witness Made During Interview with Law Enforcement Officer Was Inadmissible Under *Crawford v. Washington* When Defendant Did Not Have Prior Opportunity to Cross-Examine Witness

State v. Morgan, 359 N.C. 131, 604 S.E.2d 886 (3 December 2004). The defendant was convicted of first-degree murder and sentenced to death. A witness to the murder died before trial for reasons unrelated to the events surrounding the murder. The state offered a statement of this witness given during an interview with a law enforcement officer. The court ruled that the statement, knowingly given in response to structured law enforcement questioning, was inadmissible under *Crawford v. Washington*, 541 U.S. 36 (2004), because the defendant did not have a prior opportunity to cross-examine the witness. The court ruled, however, that the admission of the statement was harmless error beyond a reasonable doubt.

Statement of Unavailable State's Witness Made During Questioning by Law Enforcement Officer Was Inadmissible Under *Crawford v. Washington* When Defendant Did Not Have Prior Opportunity to Cross-Examine Witness

State v. Sutton, ___ N.C. App. ___, 609 S.E.2d 270 (15 March 2005). The defendant was convicted of the first-degree murder of victim A, felonious assault of victim B, and attempted armed robbery. Victim B did not testify at trial, and the state was permitted to introduce her statement to a law enforcement officer as an excited utterance under Rule 803(2). The defendant had not had a prior opportunity to cross-examine victim B. The court noted that a law enforcement officer approached victim B at the crime scene and questioned her. Her statement was neither spontaneous nor unsolicited. It was, in fact, the second statement that she gave to law enforcement after the crimes had been committed. An objective witness would reasonably believe that the statement would be available for use at trial. The court ruled that the statement was made as a result of law enforcement interrogation and was testimonial; thus, it was inadmissible under *Crawford v. Washington*, 541 U.S. 36 (2004).

Trial Judge Erred in Admitting Videotaped Deposition of State’s Witness Because Judge Failed to Find That Witness Was Unavailable To Testify at Trial

State v. Ash, ___ N.C. App. ___, ___ S.E.2d ___ (19 April 2005). Before the defendant’s murder trial, a videotaped deposition was taken of the state’s medical expert who testified about the cause of death of the victim. The defendant had the opportunity, which he availed himself of, to cross-examine the medical expert during the deposition. The deposition was introduced at trial. The trial judge made no finding concerning the medical expert’s unavailability to testify at trial. The court ruled, relying on *State v. Clark*, 165 N.C. App. 279, 598 S.E.2d 213 (2004) [citing *Crawford v. Washington*, 541 U.S. 36 (2004)], and *State v. Nobles*, 357 N.C. 433, 584 S.E.2d 765 (2003), that the admission of the deposition violated the defendant’s Sixth Amendment right to confrontation. The judge’s statement to the jury that the videotape was being used for the convenience of the medical expert was insufficient to establish unavailability.

Criminal Pleadings

For a discussion of challenging criminal pleadings, Rubin, Fodor & Hughes, North Carolina Defender Manual, Chapter 8, available online at <http://www.ncids.org>.

Trial Judge Erred in Allowing State to Amend the Allegation of the Felony Intended to Be Committed in Indictment for Felonious Breaking or Entering

State v. Silas, ___ N.C. App. ___, 609 S.E.2d 400 (1 March 2005). The defendant was indicted for felonious breaking or entering, alleging that the defendant entered the residence with the intent to commit the felony of murder. The court ruled that the trial judge erred in allowing the state to amend the indictment to change the allegation of murder to the felonies of assault with a deadly weapon inflicting serious injury and assault with a deadly weapon with intent to kill inflicting serious injury. The court’s ruling relied on *State v. Vick*, 70 N.C. App. 338, 319 S.E.2d 327 (1984), and *State v. Jones*, 264 N.C. 134, 141 S.E.2d 27 (1965), which ruled that the felony intended to be committed must be alleged in an indictment for felonious breaking or entering. The court reasoned that changing the alleged intended felony constituted a substantial alteration of the indictment and therefore was not permitted under G.S. 15A-923(e). [The court’s ruling appears to be inconsistent with cases decided since the *Vick* and *Jones* rulings. In *State v. Worsley*, 336 N.C. 268, 443 S.E.2d 68 (1994), the court ruled that an indictment for burglary is not required to allege the felony intended to be committed. The court, relying on G.S. 15A-924(a)(5), overruled prior contrary cases. The reasoning for the ruling in *Worsley* clearly would apply to an indictment for felonious breaking or entering. In *State v. Roten*, 115 N.C. App. 118, 443 S.E.2d 794 (1994), a burglary indictment alleged first-degree sexual offense as the felony intended to be committed, but the trial judge charged the jury on second-degree sexual offense. The court ruled that the trial judge did not err in giving the jury instruction. The court stated, based on the *Worsley* ruling, any language in an indictment that states with specificity the felony the defendant intended to commit is surplusage that may properly be disregarded. Thus, it appears in the *Silas* case that the felony alleged in the indictment was surplusage and the trial judge did not err in instructing on other felonies—whether or not the indictment had been amended.]

Indictment for Attempted First-Degree Murder Must Allege Element of Specific Intent to Kill; Indictment Is Insufficient If It Alleges Attempt By Using Language in G.S. 15-144

State v. Watkins, ___ N.C. App. ___, 610 S.E.2d 746 (5 April 2005). The court ruled that an indictment alleging the offense of attempted first-degree murder was invalid because it used the short-form indictment language in G.S. 15-144. The indictment alleged: “unlawfully, willfully and feloniously did or

malice and aforethought attempt to kill and murder Walter Bigelow.” The court ruled that “specific intent to kill” must be alleged in an indictment for attempted first-degree murder.

Indictment in This Case Was Not Correct Because Crime of Attempted Common Law Murder Is Not Recognized by General Statutes

State v. Jones, 165 N.C. App. 540, 598 S.E.2d 694 (20 July 2004), *review allowed*, 359 N.C. 73, 604 S.E.2d 924 (Oct. 6, 2004). The court’s opinion stated that the defendant was charged with and convicted of “attempted common law murder.” The court held that this indictment is not correct because the crime of attempted common law murder is not recognized by our General Statutes. [The court stated in dicta that the short-form murder indictment under G.S. 15-144 will support a conviction for attempted murder, but *Watkins*, discussed immediately above, supersedes that language.

Superior Court Did Not Have Jurisdiction for Trial of Misdemeanors Charged in Arrest Warrants That Were Transactionally Related to Felonies When There Was No Indictment, Information, or Presentment for Those Misdemeanors or Trial in District Court and Appeal for Trial De Novo

State v. Price, ___ N.C. App. ___, ___ S.E.2d ___ (3 May 2005). The defendant was charged in arrest warrants for felony drug offenses and transactionally-related misdemeanors. In district court, he waived his probable cause hearing on all offenses, and the judge issued orders transferring the misdemeanor charges to superior court with the felonies. However, the state did not obtain an indictment, information, or presentment for the misdemeanors. The court ruled that superior court had no jurisdiction over the misdemeanors under G.S. 7A-271.

Defenses

- (1) Trial Judge Erred in Habitual DWI Trial in Not Submitting Necessity Defense**
- (2) Trial Judge Erred Under G.S. 15A-928 in Allowing State in Habitual DWI Trial to Introduce Evidence of Prior DWI Convictions Before Arraigning Defendant to Determine Whether He Would Admit to the Convictions**

State v. Hudgins, ___ N.C. App. ___, 606 S.E.2d 443 (4 January 2005). The defendant was convicted of habitual DWI. (1) The court ruled that the trial judge erred in not submitting the necessity defense based on the defendant’s evidence that he jumped into a truck that was rolling down a steep hill in the wrong lane of a public road, creating a substantial risk of physical harm to other drivers or the occupants of a nearby house. The defendant jumped into the truck in an attempt to prevent it from hitting another car or the house. The court ruled that a defendant must prove three elements to establish the necessity defense: (i) reasonable action; (ii) taken to protect life, limb, or health of a person; and (iii) no other acceptable choices available. The court remanded the case for a new trial. (2) The court ruled that the trial judge erred under G.S. 15A-928(c)(1) in the habitual DWI trial in allowing the state to introduce evidence of the defendant’s prior DWI convictions before arraigning the defendant to determine whether he would admit to the convictions (if the defendant admitted to the convictions, the statutory provision would then bar the state from introducing evidence of the convictions).

Trial Judge Erred in Not Submitting Defense of Entrapment to DWI Charge

State v. Redmon, 164 N.C. App. 658, 596 S.E.2d 854 (1 June 2004). The court ruled that the trial judge erred in not submitting the defense of entrapment to a DWI charge. The court stated that the defendant’s evidence, if believed, would tend to show that the officer induced the defendant to drive his truck and that

the defendant was not predisposed to drive while impaired (see the detailed facts on inducement and predisposition set out in the court's opinion.)

For a discussion of the entrapment defense, *see* Rubin, *The Entrapment Defense in North Carolina* (2001), available from the Institute of Government.

Officer's Payments to State's Principal Witness Did Not Require Dismissal of Drug Charges

State v. Brice, ___ N.C. App. ___, 604 S.E.2d 356 (16 November 2004). The defendant was convicted of cocaine trafficking offenses. The state's principal witness, a cocaine user, worked closely with the police that resulted in the arrest of and charges against the defendant. Several weeks after the defendant's arrest and before his trial, an officer gave the witness a total of \$350.00 in two payments so the witness could pay her bills. The defendant argued that this payment required the dismissal of the charges, arguing in effect that the state's witness was paid for her testimony. The court ruled, distinguishing *United States v. Bernal-Obeso*, 989 F.2d 331 (9th Cir. 1992), that this evidence did not support dismissal of the charges. The court noted that the state's witness and the officer were subjected to vigorous cross-examination on the issue of payment to the witness. Also, the payments were not made to secure her cooperation in the defendant's arrest or her testimony at trial.

(1) Trial Judge Did Not Err in Not Giving Special Jury Instruction When Defendant Failed to Submit Request for Instruction in Writing

(2) Defendant Was Not Entitled to Jury Instruction on Justification as Defense to Possession of Firearm by Felon

State v. Craig, ___ N.C. App. ___, 606 S.E.2d 387 (4 January 2005). The defendant was convicted of possession of firearm by felon. At trial the defendant orally requested that N.C.P.I. Crim. 310.10 (compulsion, duress, or coercion) be given. (1) The court ruled that the trial judge did not err in not giving the special jury instruction when the defendant failed to submit the request for the instruction in writing as required by G.S. 1-181 and Rule 21 of the General Rules of Practice for the Superior and District Courts. (2) The court ruled, relying on *State v. Napier*, 149 N.C. App. 462, 560 S.E.2d 867 (2002), that the defendant was not entitled to the jury instruction. The court noted that the uncontroverted evidence showed that the defendant continued to possess the firearm when he was no longer under any imminent threat of harm.

Prosecutor's Jury Argument On Insanity Was Improper; New Trial Ordered

State v. Millsaps, ___ N.C. App. ___, 610 S.E.2d 437 (5 April 2005). The defendant was on trial for first-degree murder and other offenses. His defense was insanity. In commenting on the mental commitment process if the defendant was found not guilty of insanity, the prosecutor stated during jury argument that it was "99 percent certain" that a judge in a mental commitment hearing would find the murder irrelevant and release him from commitment. The court ruled that there was no evidence to support the prosecutor's statement, which also was impermissibly prejudicial because it indicated to the jury that the defendant, if found not guilty by reason of insanity, would likely be released shortly. The court also ruled that the trial judge's failure to sustain defense counsel's objection to the argument was an abuse of discretion. The prosecutor in jury argument also suggested a comparison of the defendant's acts to the terrorist attacks in New York and Washington, D.C. on September 11, 2001. The court ruled that the prosecutor's remark was improper and prejudicial, and the defendant's objections to the remark should have been sustained. Based on a review of the evidence in this case and the standard for ordering a new trial, the court ruled that the defendant was entitled to a new trial.

Criminal Procedure

Harbison Error

Defense Counsel's Strategic Decision to Concede to Jury, Without Defendant's Explicit Consent, Defendant's Guilt of First-Degree Murder at Guilt/Innocence Phase of Capital Trial and to Present Evidence and Argue for Life Imprisonment at Penalty Phase, Was Not Per Se Ineffective Assistance of Counsel on Facts of Case

Florida v. Nixon, 125 S. Ct. 551, 160 L. Ed. 2d 565 (13 December 2004). The Court ruled that a defense counsel's strategic decision to concede to the jury, without defendant's explicit consent, defendant's guilt of first-degree murder at the guilt/innocence phase of a capital trial and to present evidence and argue for life imprisonment at the penalty phase, was not per se ineffective assistance of counsel under the Sixth Amendment on facts of case. Defense counsel had attempted to explain this proposed strategy to the defendant at least three times, but the defendant was generally unresponsive, and he never verbally approved or protested the strategy. At trial, defense counsel cross-examined some of the state's witnesses and objected to the introduction of some of the state's evidence, contested aspects of the jury instructions, and in closing argument conceded the defendant's guilt but reminded the jury of the importance of the penalty phase. At the penalty phase, the defense counsel presented eight witnesses, including two mental health experts, and argued for life imprisonment. The Court rejected a state appellate court's ruling that defense counsel's concession of guilt was per se ineffective assistance of counsel without the defendant's explicit consent. The defendant's characteristic silence each time information was conveyed to him did not suffice to render unreasonable counsel's decision to concede guilt and to home in, instead, on the life or death penalty issue.

Defense Attorney's Jury Argument Did Not Concede Defendant's Guilt and Thus Did Not Constitute Ineffective Assistance of Counsel

State v. Randle, ___ N.C. App. ___, 605 S.E.2d 692 (21 December 2004). No error occurred under the ruling in *State v. Harbison*, 315 N.C. 175, 337 S.E.2d 337 S.E.2d 504 (1985) (per se ineffective assistance of counsel when defendant's counsel admits defendant's guilt to jury without defendant's consent), when defense counsel during jury argument stated that the defendant was not guilty of first-degree rape and sexual offense in a trial in which the judge instructed the jury on lesser-included offenses of these offenses. Defense counsel never actually admitted the defendant's guilt of any offense, nor did counsel assert that the defendant should be found guilty of some offense.

Double Jeopardy

After State Had Rested, Trial Judge's Entry of Judgment of Acquittal With No Reservation of Right to Reconsider Ruling or Indication That Ruling Was Not Final, and Once Trial Proceeded With Defendant's Introduction of Evidence, Trial Judge Under Double Jeopardy Clause Was Barred from Reconsidering Ruling After Defendant Had Rested

Smith v. Massachusetts, 125 S. Ct. 1129, 160 L. Ed. 2d 914 (22 February 2005). The Court ruled that after the state had rested, the trial judge's entry of a judgment of acquittal with no reservation of the right to reconsider the ruling or an indication that the ruling was not final, and once the trial proceeded with the defendant's introduction of evidence, the trial judge under Double Jeopardy Clause was barred from reconsidering the ruling after the defendant had rested.

- (1) District Court Judge’s Rescheduling Trial Before Another Judge After Trial Had Begun Was Functional Equivalent of Mistrial**
- (2) Mistrial Was Proper When District Court Judge Determined During Trial That He Was Familiar with Case**
- (3) Defendant’s Failure to Object to Mistrial (Rescheduling of Trial) in District Court Waived Appellate Review of Propriety of Mistrial**
- (4) District Court Judge May Not Overrule Order of Another District Court Judge**

State v. Cummings, ___ N.C. App. ___, 609 S.E.2d 423 (15 March 2005). After the state began presenting evidence in a DWI and reckless driving trial, the presiding district court judge (judge A) rescheduled the trial to begin anew before another district court judge because he discovered through the testimony of a state’s witness that he was familiar with certain aspects of the case. The defendant did not object to the judge’s order to reschedule the trial. At a hearing before judge B to whom the trial was rescheduled, the defendant’s motion to dismiss the charges on double jeopardy grounds was denied and the trial was rescheduled again. Before judge C, the defendant submitted another motion to dismiss the charges on double jeopardy grounds. Judge C granted the motion. The court ruled: (1) the district court judge’s (judge A) rescheduling the trial before another judge (judge B) after the trial had begun was the functional equivalent of a mistrial; (2) the declaration of a mistrial was proper when district court judge A determined during the trial that he was familiar with the case; (3) the defendant’s failure to object to the mistrial (rescheduling of the trial) in district court waived appellate review of the propriety of the mistrial; and (4) the rule that prohibits one superior court judge from modifying, overruling, or changing the judgment or order of another superior court judge also applies to district court judges; judge C had no authority to hear the defendant’s second motion to dismiss the charges on double jeopardy grounds and thus had no authority to overrule judge B’s order denying the defendant’s motion to dismiss on the same ground.

Other Procedural Issues

Defendant in Capital Case Who Had Retained Counsel But Was Otherwise Indigent Was Entitled to Appointment of Assistant Counsel Under G.S. 7A-450

State v. Davis, ___ N.C. App. ___, 608 S.E.2d 74 (1 February 2005). The court ruled that the trial judge erred in failing to appoint assistant counsel to the defendant’s retained counsel when the defendant was otherwise indigent and the state was seeking the death penalty. Assistant counsel that the defendant cannot afford to retain in a capital case is a “necessary expense” under G.S. 7A-450 that the state must provide or the defendant must waive.

For a discussion of the right to counsel in general, *see* Rubin, Fodor & Hughes, North Carolina Defender Manual, Ch. 12, available online at <http://www.ncids.org>.

Defendant’s Letters To Prosecutor While in Jail Constituted “Plea Discussion” Under G.S. 15A-1025 and Rule 410, and Thus the State Impermissibly Cross-Examined Defendant About Them at Trial

State v. Walker, ___ N.C. App. ___, 605 S.E.2d 647 (7 December 2004). While in jail, the defendant sent seven letters to the prosecutor concerning the disposition of the charges against him. The court ruled, distinguishing *State v. Flowers*, 347 N.C. 1, 489 S.E.2d 391 (1997), that the defendant’s letters constituted a “plea discussion” under G.S. 15A-1025 and Evidence Rule 410, and thus the state impermissibly cross-examined the defendant about them at trial. While the defendant’s letters indicated an admission of guilt, plea bargaining implies an offer to plead guilty upon condition. The letters stated that he was willing to confess and help in any way to obtain probation, which articulated the plea

arrangement he sought. Even though the prosecutor did not initially respond to the defendant's letters, the letters ultimately led to the prosecutor entering into plea discussions with the defendant. This resulted in the defendant's entering a guilty plea, which was later withdrawn.

Sentencing

Capital

Eighth Amendment Prohibits Death Sentence for Defendant Who Is Convicted of Capital Offense That Defendant Committed Before His or Her Eighteenth Birthday

Roper v. Simmons, 125 S. Ct. 1183, ___ L. Ed. 2d ___ (1 March 2005). The Court ruled that the Eighth Amendment prohibits a death sentence for a defendant who is convicted of a capital offense that the defendant committed before his or her eighteenth birthday. [This ruling affects G.S. 14-17 by barring a death sentence for a defendant who is convicted of first-degree murder that the defendant committed before his or her eighteenth birthday. The only authorized punishment for such a defendant is life imprisonment without parole.]

***Apprendi* and *Blakely* Issues**

For a discussion of *Blakely* and its impact on North Carolina's sentencing laws, see Robert L. Farb, *Blakely v. Washington* and Its Impact on North Carolina's Sentencing Laws, available online at <http://www.iog.unc.edu/programs/crimlaw/blakelyfarbmemo.pdf>; Rubin, Fodor & Hughes, North Carolina Defender Manual § 8.8, at pp. 38–40, available online at <http://www.ncids.org>.

Will U.S. Supreme Court Apply *Apprendi* and *Blakely* to Prior Convictions?

Shepard v. United States, 125 S. Ct. 1254, ___ L. Ed. 2d ___ (March 7, 2005). After the defendant pled guilty to being a felon in possession of a firearm, the government sought to increase his sentence based on the Armed Career Criminal Act (ACCA), which applies to felons who have three prior convictions for violent felonies or drug offenses. Defendant's predicate felonies were Massachusetts burglary convictions entered upon guilty pleas. The U.S. Supreme Court had previously held that only "generic burglary"—meaning, among other things, that it was committed in a building or enclosed space—is a violent crime under the ACCA (see *Taylor v. United States*, 495 U.S. 575 (1990)), and that a court sentencing under the ACCA can look to statutory elements, charging documents, and jury instructions to determine whether an earlier conviction after a jury trial was for generic burglary in States (like Massachusetts) with broader burglary definitions. The court in this case holds that inquiry under the ACCA to determine whether a guilty plea to burglary under a broader statute necessarily admitted elements of the generic offense is likewise limited by *Taylor* to judicial record of this information (such as terms of the charging document, terms of plea agreement, or transcript of colloquy between judge and defendant in which the defendant confirmed the factual basis for the plea). The Court rejected the government's argument that the sentencing judge should examine police reports and complaint applications in determining whether the defendant's guilty pleas admitted and supported generic burglary convictions.

The Court also found the rule in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), relevant to this limitation. If the government's view were followed, the sentencing judge considering the ACCA enhancement would make a disputed finding of fact about what the defendant and state judge must have understood as the prior plea's factual basis. This dispute raises the concern underlying *Apprendi*: the Sixth and Fourteenth Amendment's guarantee of a jury finding of any disputed fact essential to increase a

potential sentence's ceiling. The rule of reading statutes to avoid serious risks of unconstitutionality therefore counsels the limit adopted regarding factfinding on the disputed generic character of a prior plea.

In response to the dissent's concerns about that the Court has extended *Apprendi* to prior convictions, the Court states as follows in footnote 5:

The dissent charges that our decision may portend the extension of *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), to proof of prior convictions, a move which (if it should occur) "surely will do no favors for future defendants in Shepard's shoes." According to the dissent, the Government, bearing the burden of proving the defendant's prior burglaries to the jury, would then have the right to introduce evidence of those burglaries at trial, and so threaten severe prejudice to the defendant. It is up to the future to show whether the dissent is good prophesy, but the dissent's apprehensiveness can be resolved right now, for if the dissent turns out to be right that *Apprendi* will reach further, any defendant who feels that the risk of prejudice is too high can waive the right to have a jury decide questions about his prior convictions.

In a concurring opinion, Justice Thomas, who was in the majority in both *Apprendi* and *Blakely*, states that those decisions have eroded the exception for prior convictions in *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), and that the Court in an appropriate case should reconsider the exception.

No Error Under *Blakely v. Washington* When Superior Court Judge in DWI Sentencing Hearing Found Existence of Grossly Aggravating Factors Involving Prior DWI Convictions

State v. Tedder, ___ N.C. App. ___, 610 S.E.2d 774 (5 April 2005). The defendant was convicted of DWI in superior court. The judge at the sentencing hearing found the existence of two grossly aggravating factors consisting of two prior convictions of DWI committed within seven years preceding the offense for which the defendant was being sentenced. The court rejected the defendant's argument that a jury must make the finding of these grossly aggravating factors, noting the exception from the jury requirement in *Blakely v. Washington*, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), for the finding of prior convictions in imposing aggravated sentences.

Court Remands Defendant's Punishment in Aggravated Range for Resentencing Under *Blakely v. Washington*

State v. Allen, ___ N.C. App. ___, 601 S.E.2d 299 (7 September 2004), *rev. granted*, 359 N.C. 70, 603 S.E.2d 799 (Sept. 23, 2004). The defendant was convicted of felonious child abuse inflicting serious bodily injury. The trial judge found as a aggravating factor that the offense was especially, heinous, atrocious, and cruel, and sentenced the defendant in the aggravated range. The court ruled that the reasoning of *Blakely v. Washington*, 124 S. Ct. 2531 (2004) (other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be presented to jury and proved beyond a reasonable doubt; "statutory maximum" is maximum sentence judge may impose solely based on facts reflected in jury verdict or admitted by defendant), applies to the sentence imposed in this case. The court remanded the case to the trial court for resentencing consistent with the *Blakely* ruling. The court, relying on *State v. Ahearn*, 307 N.C. 584, 300 S.E.2d 689 (1983), rejected the state's argument that the court should determine whether the constitutional error in sentencing the defendant was harmless beyond a reasonable doubt.

See also *State v. Speight*, ___ N.C. App. ___, 602 S.E.2d 4 (7 September 2004), *rev. granted*, 359 N.C. 74, 603 S.E.2d 81 (Sept. 23, 2004) [court remands for resentencing under *Blakely* the defendant's sentences for involuntary manslaughter in the aggravated range and a DWI sentence in Level Two, with a

finding of the “serious injury” grossly aggravating factor under G.S. 20-179(c)(3) and a non-statutory aggravating factor of using a motor vehicle in the commission of a felony leading to the death of two people—the court rejected the state’s argument that the court should determine whether the constitutional error in sentencing the defendant was harmless beyond a reasonable doubt (some of the information about the DWI sentence comes from the record on appeal in this case)].

Finding of Aggravating Factor Is Not Required When Defendant Is Sentenced in Presumptive Range With Minimum Sentence That Overlaps With Same Minimum Sentence in Aggravated Range

State v. Allah, ___ N.C. App. ___, 607 S.E.2d 311 (18 January 2005). The court ruled, relying on *State v. Ramirez*, 156 N.C. App. 249, 576 S.E.2d 714 (2003), that a finding of an aggravating factor is not required when a defendant is sentenced in the presumptive range with a minimum sentence that overlaps with the same minimum sentence in the aggravated range.

Other Sentencing Issues

Submission of Sentencing Worksheet in Conjunction with Plea Agreement Was Insufficient Evidence to Support Prior Record Level III

State v. Jeffery, ___ N.C. App. ___, 605 S.E.2d 672 (21 December 2004). Evidence that the state submitted a sentencing worksheet in conjunction with a plea agreement requiring six presumptive consecutive sentences of specified lengths was insufficient to prove prior record level III. There was no implied stipulation to that prior record level based on the plea agreement, and there was no explicit stipulation by defense counsel.

State Failed to Offer Any Evidence of Prior Convictions to Support Defendant’s Sentencing in Prior Record Level III; Court Orders Resentencing

State v. Quick, ___ N.C. App. ___, ___ S.E.2d ___ (3 May 2005). The defendant, pursuant to a plea agreement, pled no contest to possession of cocaine and being an habitual felon. The agreement provided for a specific sentence at the lowest end of the mitigated range in Prior Record Level III. However, the state failed to offer any evidence of the prior convictions to support the defendant’s sentence in Prior Record Level III. Also, there was no stipulation concerning these prior convictions. The court reversed the defendant’s sentence and remanded for resentencing.

- (1) Multiple Convictions of Third-Degree Sexual Exploitation of Minor Are Permitted for Multiple Child Pornography Photographs on Defendant’s Home Computer**
- (2) Six Consecutive Suspended Sentences Within One Five-Year Probationary Term Does Not Violate Statutory Provision That Bars Consecutive Probationary Sentences**

State v. Howell, ___ N.C. App. ___, 609 S.E.2d 417 (15 March 2005). The defendant was convicted of 43 counts of third-degree sexual exploitation of a minor. The defendant was sentenced to six consecutive terms of imprisonment of six to eight years, and these sentences were suspended and the defendant placed on supervised probation for five years. Evidence showed that there were many photographs depicting minors engage in sexual acts on the hard drive of the defendant’s home computer. (1) The court ruled, distinguishing *State v. Smith*, 323 N.C. 439, 373 S.E.2d 435 (1988), that a defendant may be convicted of multiple charges for the 43 child pornography photographs on his computer’s hard drive. (2) The court ruled that the defendant’s six consecutive suspended sentences within one five-year probationary term did

not violate the statutory provision that bars consecutive probationary sentences [see G.S. 15A-1346 and *State v. Canady*, 153 N.C. App. 455, 570 S.E.2d 262 (2002)].

- (1) When Defendant Is Convicted in District Court and Placed on Probation, Probation Is Not Stayed If Defendant Appeals for Trial De Novo in Superior Court**
- (2) Probation Violation Report Was Not Timely Filed Within Period of Probation That Began When Defendant Was Convicted in District Court**

State v. Smith, 165 N.C. App. 256, 598 S.E.2d 408 (6 July 2004), *rev. granted*, 359 N.C. 74, ---- (Oct. 6, 2004). On December 6, 2000, the defendant was convicted of assault on a female in district court and placed on supervised probation for twelve months. The defendant appealed for trial de novo in superior court and was later allowed to withdraw the appeal. The case was remanded to district court for immediate execution of the judgment. On January 24, 2002, the defendant's probation officer filed a probation violation report. (1) The court ruled that when a defendant appeals for trial de novo in superior court, G.S. 15A-1431(f) does not stay probation. (The court noted that probation is stayed under G.S. 15A-1451 when a defendant appeals from superior court to the appellate division.) Thus, the defendant's twelve-month probationary sentence began on December 6, 2000. (2) The court ruled that the probation violation report was not timely filed under G.S. 15A-1344(f)(1) within twelve months of December 6, 2000. Thus, the alleged probation violation must be dismissed.

Judge in Juvenile Disposition Order Did Not Impermissibly Delegate Authority by Allowing Others to Determine Amount of Restitution and Specifics of Residential Treatment Program

In re M.A.B., ___ N.C. App. ___, ___ S.E.2d ___ (3 May 2005). The judge's disposition order for a juvenile adjudicated delinquent of a misdemeanor assault included, among other matters, that the juvenile: (1) pay restitution "in an amount to be determined" for the victim's medical bills; and (2) "cooperate and participate in a residential treatment program as directed by court counselor or mental health agency." The court ruled, distinguishing *In re Hartsock*, 158 N.C. App. 287, 580 S.E.2d 395 (2003), the judge did not impermissibly delegate his authority concerning these two matters.