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Felony and Misdemeanor Case Update

2009 Spring Public Defender Attorney and Investigator Conference
(includes cases decided through May 5, 2009)

The following summaries are drawn primarily 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.

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Right to Counsel

Court Remands Case to Trial Court for Consideration Under *Indiana v. Edwards*, 128 S. Ct. 2379 (2008), Whether Trial Judge Should Have Exercised Discretion to Deny Defendant's Request to Represent Himself

State v. Lane, 362 N.C. 667, 669 S.E.2d 321 (12 December 2008). The defendant was convicted of first-degree murder and sentenced to death. The court remanded the case to the trial court for consideration

under *Indiana v. Edwards*, 128 S. Ct. 2379 (2008) (United States Constitution does not prohibit states from requiring counsel to represent defendants competent to stand trial but who suffer from severe mental illness to extent that they are not competent to represent themselves at trial) whether the trial judge should have exercised discretion to deny the defendant's request to represent himself. The court outlined two issues that the trial court must decide on remand of this case.

Defendant's Incriminating Statement to Jailhouse Informant, Assumed to Have Been Obtained in Violation of Defendant's Sixth Amendment Right to Counsel, Was Admissible on Rebuttal to Impeach Defendant's Trial Testimony That Conflicted With Statement

Kansas v. Ventris, ___ S. Ct. ___, ___ L. Ed. 2d ___ (29 April 2009). The Court ruled that the defendant's incriminating statement to a jailhouse informant, assumed to have been obtained in violation of the defendant's Sixth Amendment right to counsel, was admissible on rebuttal to impeach the defendant's trial testimony that conflicted with statement. [Author's note: The statement would not have been admissible during the state's presentation of evidence in its case-in-chief.]

Delay Caused By Appointed Defense Counsel or Public Defender Is Not Attributable To State in Determining Whether Defendant's Sixth Amendment Right to Speedy Trial Was Violated, Unless Delay Resulted From Systemic Breakdown in Public Defender System

Vermont v. Brillon, 129 S. Ct. 1283, 173 L. Ed. 2d 231 (9 March 2009). The Court ruled that delay caused by appointed defense counsel or a public defender is not attributable to the state in determining whether a defendant's Sixth Amendment right to a speedy trial was violated, unless the delay resulted from a systemic breakdown in the public defender system. Assigned counsel are not state actors in determining the speedy trial issue.

Federal Law Authorizes Federally-Appointed Counsel in Federal Habeas Action Related to Defendant's Capital Conviction in State Court to Represent Defendant in State Clemency Proceedings and Entitles Them to Compensation for That Representation

Harbison v. Bell, 129 S. Ct. 1481, ___ L. Ed. 2d ___ (1 April 2009). The Court ruled that federal law (18 U.S.C. § 3599) authorizes federally-appointed counsel in a federal habeas action related to a defendant's capital conviction in state court to represent the defendant in state clemency proceedings and entitles them to compensation for that representation.

Defendant Did Not Make Clear Request for Counsel to Require Officer to Stop Interrogation

State v. Dix, ___ N.C. App. ___, 669 S.E.2d 25 (2 December 2008). Officers arrested the defendant at his residence for various felony sex offenses. Before being transported to the police station, the defendant indicated his willingness to talk to one of the arresting officers (hereafter, detective). The detective told the defendant to wait until they arrived at the jail. The detective told the defendant that at the police station she would first advise the defendant of his rights and then listen to his side of the story. While being transported, the defendant made a brief unsolicited oral confession to another officer, who related this information to the detective. At the police station, the detective gave Miranda warnings to the defendant. The detective asked the defendant if he understood his rights, and the defendant responded, "yeah." The detective then said, "Okay. And will you answer some questions for me?" The defendant said, "I'm probably gonna have to have a lawyer." The officer explained that it was up to him if he wanted to answer questions or not, and the defendant eventually agreed to talk and signed a

Miranda waiver of rights form. The court ruled, relying on *Davis v. United States*, 512 U.S. 452 (1994) (suspect must unambiguously request counsel), and distinguishing *State v. Torres*, 330 N.C. 517 (1992), that the defendant's statement was not a clear request for counsel. The court noted that the defendant's statement must be considered in the context of what had occurred beforehand. The court stated that the defendant's statement was ambiguous because no reasonable officer under the circumstances would have understood the defendant's words as an unambiguous request for a lawyer at that moment, as opposed to a mere comment about the likelihood that the defendant would eventually require an attorney in this matter, which he surely anticipated would involve criminal proceedings.

- (1) Officer Did Not Conduct Interrogation After Defendant Asserted Right to Counsel**
- (2) Violation of Vienna Convention (Requiring Notification to Arrested Foreign National of Right to Have Consul of National's Country Notified of Arrest) Does Not Provide Remedy of Suppression of Confession**

State v. Herrera, ___ N.C. App. ___, 672 S.E.2d 71 (3 February 2009). Officers obtained an arrest warrant charging the defendant with first-degree murder. They notified Virginia authorities of the warrant because it was believed he might be there. A Spanish interpreter called the defendant's grandmother in Honduras to determine if the defendant had returned there. The grandmother expressed concern about the defendant and asked the interpreter to notify her if law enforcement found him. The defendant was eventually arrested in Virginia and taken to Durham. During interrogation, in which the same interpreter was used, the defendant asserted the right to counsel and questioning stopped. The officer then prepared to take the defendant to a magistrate. The interpreter advised the officer of his call to the grandmother in Honduras and her desire to be notified when the defendant was in custody. The officer then allowed the interpreter to place a call on speaker phone to the defendant's grandmother and offered to let the defendant speak with her, to which he assented. He and his grandmother conversed in Spanish over the speaker phone in the presence of the officer and interpreter, with the interpreter translating for the officer. During the call, the grandmother asked the defendant, "Son, did you do this?," and he replied affirmatively. The grandmother told him to tell the truth to the police, and he indicated he would. Thereafter, the defendant re-initiated interrogation with the officer by informing the interpreter that he wanted to tell the truth. (1) The court ruled, relying on *Arizona v. Mauro*, 481 U.S. 520 (1987), that the officer did not conduct interrogation after the defendant had asserted the right to counsel. There was no evidence to show that the phone call to the defendant's grandmother was made to elicit incriminating statements from the defendant or she was acting as an agent of the officer. In addition, a suspect in the defendant's position would not have felt coerced to incriminate himself by being permitted to speak with his grandmother via speaker phone in the presence of the officer and interpreter. (2) The court ruled, relying on *Sanchez-Llamas v. Oregon*, 548 U.S. 331 (2006), that a violation of the Vienna Convention on Consular Relations (requiring notification to arrested foreign national of right to have consul of national's country notified of arrest) does not provide the remedy of suppression of a confession.

Investigation Issues

Warrantless Stops

Court Rules 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

Arizona v. Gant, ___ S. Ct. ___, ___ L. Ed. 2d ___ (21 April 2009). The Court ruled that officers may search a vehicle incident to arrest only if (1) the arrestee is unsecured and within reaching distance of the passenger compartment when the search is conducted; or (2) it is reasonable to believe that evidence relevant to the crime of arrest might be found in the vehicle. For an analysis of this ruling, see the online paper available at www.sog.unc.edu/programs/crimlaw/arizonagantbyfarb.pdf (by Bob Farb) and the commentaries available at sogweb.sog.unc.edu/blogs/ncclaw/ (by Jeff Welty).

- (1) Court Rules That Officers During Routine Traffic Stop May Frisk Driver or Passengers for Whom They Have Reasonable Suspicion To Be Armed and Dangerous; They Need Not Additionally Have Cause to Believe That Any Vehicle Occupant Is Involved in Criminal Activity**
- (2) Officer's Questions Into Matters Unrelated to Justification for Traffic Stop Do Not Convert Encounter Into Unlawful Seizure As Long As Those Questions Do Not Measurably Extend Duration of Stop**

Arizona v. Johnson, 129 S. Ct. 781, 172 L. Ed. 2d 694 (26 January 2009). Three officers, members of a gang task force, were on patrol near a neighborhood associated with the Crips gang. They stopped a vehicle after a license plate check revealed that the vehicle's registration had been suspended for an insurance-related violation, which under Arizona state law was a civil infraction warranting a citation. There were three occupants in the vehicle: the driver, a front-seat passenger, and the defendant, a backseat passenger. When making the stop, the officers had no reason to suspect anyone of criminal activity. Each officer dealt with one of the occupants. The officer involved with the defendant had noticed on the officers' approach to the vehicle that the defendant had looked back and kept his eyes on the officers. She observed that the defendant was wearing clothing that was consistent with Crips membership. She also noticed a scanner in the defendant's back pocket, which she believed that most people would not carry in that manner unless they were involved with criminal activity or trying to evade law enforcement. The defendant answered the officer's questions (he provided his name and date of birth but had no identification; he said that he had served time in prison for burglary) and also volunteered that he was from an Arizona town that the officer knew was home to a Crips gang. The defendant complied with the officer's request to get out of the car. Based on her observations and the defendant's answers to her questions, the officer suspected he might have a weapon and frisked him and discovered a gun. (1) The Court reviewed its case law on stop and frisk beginning with *Terry v. Ohio*, 392 U.S. 1 (1968), particularly noting *Pennsylvania v. Mimms*, 434 U.S. 106 (1977) (officer may automatically order driver out of lawfully stopped vehicle); *Maryland v. Wilson*, 519 U.S. 408 (1997) (applying *Mimms* to passengers); and *Brendlin v. California*, 551 U.S. 249 (2007) (when vehicle is stopped, passengers as well as driver are seized). The Court stated that the combined thrust of these three cases is that an officer who conducts a routine traffic stop may frisk the driver and any passenger for whom they have reasonable suspicion to be armed and dangerous. They need not additionally have cause to believe that any vehicle occupant is involved in criminal activity. (2) An Arizona state appellate court had ruled that while the defendant initially was lawfully seized, before the frisk occurred the detention had evolved into a consensual conversation about his gang affiliation because the officer's questioning was unrelated to the traffic stop. The Arizona court concluded that the officer did not have the right to frisk the defendant—even if she had reasonable suspicion that he was armed and dangerous—absent reasonable suspicion that the defendant had engaged, or was about to engage, in criminal activity. The United States Supreme Court rejected that view and concluded that the seizure of the defendant during this traffic stop was continuous and reasonable from the time the vehicle was

stopped to when the frisk occurred. A traffic stop of a vehicle communicates to a reasonable passenger that he or she is not free to terminate the encounter with law enforcement and move about at will. Nothing occurred in this case that would have conveyed to the defendant that before the frisk, the traffic stop had ended or that he was otherwise free to depart without the officer's permission. The officer was not constitutionally required to give the defendant an opportunity to depart the scene after he exited the vehicle without first ensuring that, in so doing, she was not permitting a dangerous person to get behind her. Citing *Muehler v. Mena*, 544 U.S. 93 (2005) (questioning of the plaintiff about her immigration status did not violate the Fourth Amendment because the plaintiff's detention during the execution of the search warrant was not prolonged by the questioning), the Court stated that an officer's questions about matters unrelated to the justification for a traffic stop do not convert the encounter into an unlawful seizure, as long as the questions do not measurably extend the duration of the stop.

- (1) Court Rules That Reasonable Suspicion Is Standard for Stops of Vehicles for All Traffic Violations; Court Disavows Statements in Prior Court Opinions and Cases of North Carolina Court of Appeals That Probable Cause Is Standard for Stop of Vehicle for Readily Observed Traffic Violation**
- (2) Court Rules That Officer Had Reasonable Suspicion to Stop Vehicle for Changing Lanes Without Signaling**

State v. Styles, 362 N.C. 412 (27 August 2008), *affirming*, 185 N.C. App. 271 (7 August 2007). The defendant, who was operating a vehicle moving in the same direction and in front of an officer's vehicle, changed lanes without signaling. An officer stopped the defendant for that violation. (1) The court ruled, relying on the rulings of several federal courts of appeal, that reasonable suspicion is the standard for stops of vehicles for all traffic violations. The court disavowed statements in prior court opinions and in cases of the North Carolina Court of Appeals that probable cause is the standard for the stop of a vehicle for a readily observed traffic violation. These cases include: *State v. Ivey*, 360 N.C. 562 (2006); *State v. McClendon*, 350 N.C. 630 (1999); *State v. Young*, 148 N.C. App. 462 (2002), and *State v. Wilson*, 155 N.C. App. 89 (2003). (2) The court ruled that the officer had reasonable suspicion to stop the vehicle for changing lanes without signaling under G.S. 20-154(a). The defendant's failure to signal violated the statute because changing lanes immediately in front of another vehicle may affect the operation of the trailing vehicle (in this case, the officer's vehicle).

Officer Did Not Have Reasonable Suspicion to Stop Vehicle When Sole Indicator of Impaired Driving Was Vehicle's Weaving Within Lane

State v. Fields, ___ N.C. App. ___, 673 S.E.2d 765 (17 March 2009). Around 4:00 p.m., an officer followed the defendant's vehicle for about one and a half miles. On three separate occasions, the officer saw the defendant's vehicle swerve to the white line on the right side of the traffic lane. The officer stopped the vehicle for impaired driving. The court ruled that the officer did not have reasonable suspicion to stop the vehicle. The vehicle's weaving within its lane, standing alone, was insufficient to support reasonable suspicion. The court noted that the facts in this case were clearly distinguishable from the circumstances in *State v. Jacobs*, 162 N.C. App. 251 (2004) (reasonable suspicion of impaired driving existed when defendant's vehicle was weaving within lane at 1:43 a.m. in area near bars), and *State v. Watson*, 122 N.C. App. 596 (1996) (reasonable suspicion of impaired driving existed when defendant's vehicle was weaving within lane and driving on dividing line of highway at 2:30 a.m. near nightclub). In this case, the officer did not see the defendant violating any laws such as driving above or significantly below the speed limit. Furthermore, the defendant's vehicle was stopped about 4:00 p.m., which is not an unusual hour, and there was no evidence that the defendant was near any places to

purchase alcohol.

Officer Did Not Have Reasonable Suspicion to Stop Vehicle for Reckless or Impaired Driving Based on Content of Uncorroborated Anonymous Telephone Call to Dispatcher and Officer's Observation of Weaving Within Lane

State v. Peele, ___ N.C. App. ___, ___ S.E.2d ___ (5 May 2009). At approximately 7:50 p.m. on April 7, 2007, an officer responded to a dispatch concerning “a possible careless and reckless, D.W.I., headed towards the Holiday Inn intersection.” The vehicle was described as a burgundy Chevrolet pickup truck. The officer immediately arrived at the intersection and saw a burgundy Chevrolet pickup truck. After following the truck for about a tenth of a mile and seeing the truck weave within its lane once, the officer stopped the truck. The court ruled that the officer did not have reasonable suspicion to stop the truck. The court noted that there was no information identifying the caller, what the caller had seen, or where the caller was located. The officer's observation of the truck's weaving with a lane once did not corroborate the caller's assertion of careless or reckless driving.

Officers Had Reasonable Suspicion to Make Investigatory Stop of Vehicle—Ruling of Court of Appeals Is Reversed

State v. Maready, 362 N.C. 614, 669 S.E.2d 564 (12 December 2008), *reversing*, 188 N.C. App. 169, 654 S.E.2d 769 (15 January 2008). The defendant was convicted of second-degree murder and other charges involving a vehicle crash in which the defendant was driving impaired. Two officers were on patrol and saw an apparently intoxicated man walking along a road. The man was staggering near the roadway, so the officers began driving toward him. As they did so, the officers saw in the opposite lane a minivan being driven at a slow speed with its hazard lights activated. Behind the minivan was a Honda Civic. The intoxicated man ran across the roadway and got into the Honda. After passing the minivan, which had stopped, the Honda continued down the road. The officers turned around, and as they pulled alongside the minivan, its driver signaled them to get their attention. The minivan driver appeared distraught and told the officers that they needed to check on the Honda's driver because he had been driving erratically, running stop signs and stop lights. The officers conducted an investigatory stop of the Honda, which the defendant was found to be driving. The court ruled that the officers had reasonable suspicion of criminal activity to make the stop: (1) The driver of the minivan was in a position to view the alleged traffic violations; a firsthand eyewitness report is an indicator of reliability. Her cautious driving and apparent distress were consistent with a driver having witnessed another motorist driving erratically. (2) The court gave significant weight to the minivan driver's approaching the officers in person and providing information at a time and place near the scene of the alleged traffic violations. She had little time to fabricate her allegations. She was not a completely anonymous informant because she provided the tip through a face-to-face encounter with the officers. It is inconsequential that the officers did not pause to record her license plate number or other identifying information. Not knowing whether the officers would do so, the minivan driver willingly placed her anonymity at risk. Reviewing all the evidence, including the officers' observations, the court concluded that there was reasonable suspicion to make an investigative stop of the defendant's vehicle.

Officer Had Reasonable Suspicion of Criminal Activity to Stop Vehicle

State v. Hudgins, ___ N.C. App. ___, 672 S.E.2d 717 (17 February 2009). An officer received a call from dispatch at approximately 2:55 a.m. informing him that a man (hereafter, caller) was driving his car and being followed by another vehicle. The caller did not identify himself but stated he was being followed

by a man armed with a gun in the vicinity of a specified intersection in Greensboro. The caller described the vehicle by make, model, and color, and provided updates on the location. The officer advised the dispatcher to direct the caller to Market Street so he could intercept them. The officer arrived there and saw the two vehicles at a red light. The officer activated his lights and siren, which caused both vehicles to stop, and approached the vehicle that was following the caller. The caller did not identify himself but exited his vehicle and identified the driver of the other vehicle as the man who had been following him. The officer removed the defendant from his car. The court ruled, relying on *State v. Maready*, 362 N.C. 614 (2008), that the officer had reasonable suspicion of criminal activity to stop the defendant's vehicle: (1) the caller telephoned police and remained on the telephone for about eight minutes; (2) the caller provided specific information about the vehicle following him and the location; (3) the caller carefully followed the instructions of the dispatcher, which allowed the officer to intercept the vehicles; (4) the defendant followed the caller over a peculiar and circuitous route that doubled back on itself, going in and out of residential areas between 2:00 a.m. and 3:00 a.m.; (5) the caller remained on the scene long enough to identify the defendant to the officer; and (6) by calling on a cell phone and remaining at the scene, the caller placed his anonymity at risk.

- (1) Reasonable Suspicion Existed to Support Stop of Vehicle for Failing to Display Proper Registration Tag**
- (2) Odor of Marijuana Emanating from Vehicle Provided Probable Cause to Make Warrantless Search of Vehicle**

State v. Smith, ___ N.C. App. ___, 666 S.E.2d 191 (16 September 2008). The defendant was convicted of possession of firearm by felon. An officer stopped a Ford pick-up truck for failing to display a proper registration tag. After the stop, the officer smelled the odor of marijuana emanating from the vehicle. Two other officers conducted a warrantless search (the defendant refused to give consent) and recovered a handgun in the bed (cargo area) of the vehicle. The bed was fitted with a lift-up cover. The officers did not find any marijuana. (1) The court noted the recent ruling in *State v. Styles*, ___ N.C. ___, 665 S.E.2d 438 (27 August 2008) (reasonable suspicion is standard for all vehicle stops) and ruled the officer had reasonable suspicion to stop the defendant's vehicle for a violation of G.S. 20-79.1(e). The officer's testimony showed that it was dark when the officer saw the vehicle's license tag, the tag was just a piece of paper with "February '07" written on it, and the tag was not like a piece of cardboard that North Carolina auto dealers provide with a car purchase. (Author's note: The tag was issued by the State of Georgia. The court cited a federal case that had ruled a traffic stop based on an officer's incorrect but reasonable assessment of facts does not violate the Fourth Amendment). (2) The court ruled, citing *State v. Greenwood*, 301 N.C. 705 (1981), that the odor of marijuana emanating from the vehicle provided probable cause to make a warrantless search of the vehicle.

- (1) Officer Had Reasonable Suspicion to Make Investigative Stop of Defendant for Armed Robbery and To Frisk Him for Weapons**
- (2) Court Remands to Trial Court to Apply Correct Legal Standard in Determining Whether Officer's Seizure of Cocaine During Frisk Satisfied Plain Feel Doctrine Under Fourth Amendment**

State v. Williams, ___ N.C. App. ___, 673 S.E.2d 394 (3 March 2009). An officer heard a radio report of an armed robbery that had just occurred at an Hispanic store. Due to language barriers between the victims and law enforcement, there were two conflicting descriptions of the robber. The first described him as a white male wearing a hood and gloves and carrying a silver firearm. The second as an African-American male about six feet tall with a medium build, wearing a green hooded jacket with gloves and carrying a silver gun. Just minutes later, the officer saw the defendant—an African-American male

approximately six feet tall with a medium build—a block or two from the robbery location, walking in the same direction that the robber was reportedly traveling, although he was walking down the middle of the street blocking traffic. The defendant was wearing a “blue-green” jacket made of a material that changed colors. He had his hands in his pockets, hood up, and was wearing wrap-around glasses. The officer approached the defendant and asked him to take his hands out of his pockets. The defendant stopped walking, kept his hands in his pockets, and did not say anything. After again ordering the defendant to show his hands, the defendant took them out but also started to empty his pockets. As he was doing so, the officer saw the top of a plastic baggie in one of the pockets. When the officer frisked the defendant, he patted the defendant’s front pocket and felt something hard to the touch, round, and possibly a quarter of an inch thick. Based on its feel, the officer believed the object to be a “crack cookie” and removed it. (1) The court ruled, distinguishing *State v. Cooper*, 186 N.C. App. 100 (2007), that the officer had reasonable suspicion to make an investigative stop of the defendant for armed robbery and to frisk him for weapons. (2) The court remanded to the trial court to apply the correct legal standard in determining whether the officer’s seizure of cocaine during the frisk satisfied the plain feel doctrine under Fourth Amendment. The correct standard is whether the officer had probable cause to believe that the object felt during the frisk was an illegal substance, not reasonable suspicion—the standard applied by the trial court in this case. The court cited *Minnesota v. Dickerson*, 508 U.S. 366 (1993); *State v. Shearin*, 170 N.C. App. 222 (2005); and *State v. Briggs*, 140 N.C. App. 484 (2000).

- (1) Officer Had Reasonable Suspicion of Criminal Activity to Detain Defendant After Vehicle Traffic Stop Had Concluded**
- (2) Length of Detention of Defendant Was Reasonable Under Fourth Amendment**
- (3) Defendant-Driver Lacked Standing to Contest Passenger’s Consent Search and, Alternatively, Evidence of Passenger’s Statement Giving Consent Was Not Inadmissible Hearsay**

State v. Hodges, ___ N.C. App. ___, 672 S.E.2d 724 (17 February 2009). Vice detectives were conducting drug surveillance at a residence and also had information from confidential informants about specific drug sellers and drug sales there. They believed that a vehicle leaving the residence contained a buyer of drugs and followed it to Interstate 40. They saw the vehicle apparently speeding and asked an officer on routine patrol on the interstate to make his own observations about the vehicle’s speed or another traffic violation and make a vehicle stop if a violation occurred. The officer followed the vehicle, saw it speeding, and turned on his lights to stop the vehicle. One of the detectives in their vehicle noticed the passenger look back at the officer’s vehicle and appeared to conceal something underneath the passenger’s seat. He radioed the officer that he believed the passenger was hiding either drugs or a weapon under the seat and warned him to be careful. After stopping the vehicle, the officer spoke with the driver (the defendant) and the passenger. The defendant stated that the passenger was his neighbor and identified his first name, which was inconsistent with the passenger’s driver’s license. The officer issued a verbal warning to the defendant for speeding. The officer further detained both the defendant and passenger and eventually the passenger consented to a search of the vehicle. The court ruled that based on these and other facts set out in its opinion that the officer had reasonable suspicion of criminal activity (specifically, drugs or other contraband in the vehicle) to detain them after the traffic stop had concluded. (2) The court ruled that the five-minute detention after the traffic stop had concluded was reasonable under the Fourth Amendment. (3) When the officer asked the defendant-driver for consent to search the vehicle, the defendant gave the officer a rental contract in the passenger’s name and told the officer that he would have to ask the passenger for consent to search, who then gave a statement that he consented to a search. The defendant argued on appeal that the passenger’s statement was inadmissible hearsay. The court first ruled that the defendant waived any standing he may have had to challenge the passenger’s consent to search the vehicle. The court noted that the defendant-driver did

not assert any ownership interest in the vehicle or in the items inside. Alternatively, the court ruled that the passenger's statement was not hearsay because it was not offered to prove the truth of the matter asserted. Instead, the statement explained why the officer believed he could conduct the search and his subsequent conduct. [Author's note: Hearsay is admissible in a suppression hearing. See Robert L Farb, *Arrest, Search, and Investigation in North Carolina* (3d ed. 2003) at pages 21, 26, and 83. And most courts who have considered the issue have ruled that *Crawford v. Washington*, 541 U.S. 36 (2004), does not apply to suppression or preliminary hearings. See, e.g., *People v. Felder*, 129 P.3d 1072 (Colo. App. 2005); *Gresham v. Edwards*, 644 S.E.2d 122 (Ga. 2007); *Sheriff v. Witzenburg*, 145 P.3d 1002 (Nev. 2006); *State v. Watkins*, 190 P.3d 266 (Kan. App. 2007); *Vanmeter v. State*, 165 S.W. 3d 68 (Tex. App. 2005).]

Defendant's Flight from Officer Who Had Ordered Defendant to Stop and for Whom Officer Had Reasonable Suspicion to Make Investigative Stop Provided Probable Cause to Arrest Defendant for Resisting, Delaying, or Obstructing Officer Under G.S. 14-223

State v. Washington, ___ N.C. App. ___, 668 S.E.2d 622 (18 November 2008). Officers were conducting surveillance of a house. The defendant drove his vehicle to the house and another person got into the vehicle as a passenger. The defendant then drove away. Officer A ran a license check of the vehicle and determined that its registration had expired and the vehicle was not covered by liability insurance. The vehicle stopped in a parking lot. Officer A arrested the passenger, for whom there were outstanding felony arrest warrants. Officer B approached the defendant, who had left the vehicle and was walking toward a gasoline station. The officer identified herself and told the defendant that she needed to speak with him. The defendant asked why, and she replied that they had warrants for the passenger's arrest. The officer told the defendant to stop at least three times, but the defendant ran away. The officer did not have the opportunity to explain to the defendant that she needed to speak to him about the expired registration and insurance. The defendant was eventually stopped and then arrested for resisting, delaying or obstructing an officer under G.S. 14-223 (he was not arrested for the registration and insurance offenses because it was determined before the arrest that the vehicle did not belong to the defendant), and a search incident to arrest discovered illegal drugs. The defendant contended on appeal that the search was unlawful because the arrest was not valid. The court ruled that the officer had reasonable suspicion to make an investigative stop of the defendant for the registration and insurance violations and when the defendant failed to stop when ordered by the officer, there was probable cause to arrest the defendant for a violation of G.S. 14-223; the court relied on the ruling in *State v. Lynch*, 94 N.C. App. 330 (1989). The court rejected the defendant's argument that the officer's failure to identify to the defendant the reason for her lawful investigative stop rendered the stop unlawful. The court noted that reasonable suspicion is determined by the officer's knowledge before the stop, not the defendant's. The court stated, however, that the officer did not have reasonable suspicion to stop the defendant merely because he was in a vehicle with another person for whom the officers had outstanding arrest warrants.

Wildlife Enforcement Officer Had Subject Matter Jurisdiction to Stop Vehicle Driver for Impaired Driving and To Arrest Her for That Offense

Parker v. Hyatt, ___ N.C. App. ___, 675 S.E.2d 109 (21 April 2009). The court ruled that a wildlife enforcement officer had subject matter jurisdiction under G.S. 113-136(d) to stop the plaintiff's vehicle for impaired driving and to arrest her for that offense. Driving while impaired satisfies the statutory language, "a threat to public peace and order which would tend to subvert the authority of the State if ignored."

Other Search and Seizure Issues

Exclusionary Rule Did Not Bar Admission of Evidence Seized Pursuant to an Arrest Based on Officer's Reasonable Belief There Was an Outstanding Arrest Warrant, Although a Law Enforcement Agency Had Negligently Failed to Enter Warrant's Recall in Its Computer Database

Herring v. United States, 129 S. Ct. 695, 172 L. Ed. 2d 496 (14 January 2009). An officer arrested the defendant based on an outstanding arrest warrant listed in a neighboring county sheriff's computer database. A search incident to arrest discovered drugs and a gun, which formed the basis for criminal charges. However, there was a mistake about the arrest warrant. A court had recalled the arrest warrant, but a law enforcement official had negligently failed to record that fact, although the official did not act recklessly or deliberately in doing so. For the purpose of deciding this case, the Court accepted the parties' assumption that a Fourth Amendment violation had occurred. The Court reviewed its prior case law on the Fourth Amendment's exclusionary rule and discussed it in the context of this case as follows: (1) The exclusionary rule is not an individual right and applies only when it results in appreciable deterrence. The benefits of deterrence must outweigh the costs. (2) The extent to which the exclusionary rule is justified by deterrence principles varies with the culpability of law enforcement conduct. The abuses that gave rise to the exclusionary rule featured intentional conduct that was patently unconstitutional. An error that arises from nonrecurring and attenuated negligence is thus far removed from the core concerns that led the Court to initially adopt the rule. And since *United States v. Leon*, 468 U.S. 897 (1984), the Court has never applied the rule to exclude evidence obtained in violation of the Fourth Amendment when law enforcement conduct was no more intentional or culpable than involved in this case. (3) To trigger the exclusionary rule, law enforcement conduct must be sufficiently deliberate that exclusion can meaningfully deter it and sufficiently culpable that such deterrence is worth the price paid by the criminal justice system. The rule serves to deter deliberate, reckless, or grossly negligent conduct or, in some circumstances, recurring or systemic negligence. The error in this case did not rise to that level. The pertinent analysis of deterrence and culpability is objective, not an inquiry into the subjective awareness of law enforcement officers. (4) The Court stated that it did not suggest that all recordkeeping errors by law enforcement are immune from the exclusionary rule. If law enforcement has been reckless in maintaining a warrant system or to have knowingly made false entries to lay the groundwork for future false arrests, exclusion would certainly be justified should such misconduct cause a Fourth Amendment violation. But there was no evidence in this case that errors in the computer database were routine or widespread. (5) The Court, in light of its repeated prior rulings that the deterrent effect of suppression must be substantial and outweigh any harm to the justice system, concluded that when law enforcement mistakes are the result of negligence such as occurred in this case (rather than systemic error or reckless disregard of constitutional requirements), any marginal deterrence does not require application of the exclusionary rule.

Defendant's Consent to Search His Residence Was Voluntarily Given Despite Officer's Untruthful Statement to Defendant

State v. Kuegel, ___ N.C. App. ___, 672 S.E.2d 97 (3 February 2009). After receiving information that the defendant was selling marijuana and cocaine from his apartment, an officer decided to go to the apartment to conduct a knock and talk. Two other officers stationed themselves about three houses away. The officer identified himself, told the defendant that he knew that the defendant had both marijuana and cocaine in the apartment, and wanted his consent to search it without a search warrant. He untruthfully told the defendant that he had conducted surveillance of the apartment, saw a lot of

people coming and going there, stopped their cars after they left the neighborhood, and each time recovered either marijuana or cocaine. The defendant said, "What if I give you what I got?" The officer explained that he needed to find all the drugs inside the apartment and if the defendant did not feel comfortable giving consent to search, the officer would leave two officers at the apartment and apply for a search warrant. The defendant asked, "If I cooperate, what will you do for me?" The officer replied that he could not make any promises, but if he did not have a kilo or dead body in the apartment, he might be able to keep him out of jail for the holiday (it was December 21). The defendant invited the officers in and agreed to show them where everything was. The defendant argued on appeal that his consent to search was not voluntary because it was the product of the officer's deceptive practices. The court ruled, relying on *State v. Sokolowski*, 344 N.C. 428 (1996) (no coercion when eight officers disarmed defendant before asking consent to search), *State v. Fincher*, 309 N.C. 1 (1983) (no coercion when officers told defendant that if he did not consent officers would get search warrant and search anyway), and *State v. Barnes*, 154 N.C. App. 111 (2002) (officer's deception in telling pedophile that victim was pregnant, in effort to elicit confession, was not sufficient to overcome defendant's will and render confession inadmissible), the defendant's consent to search was voluntary based on the totality of circumstances.

Pretrial and Trial Procedure

Pleadings

Rape and Sexual Offense Indictments Were Not Fatally Defective When They Identified Victim Solely By Her Initials, "RTB"

State v. McKoy, ___ N.C. App. ___, ___ S.E.2d ___ (5 May 2009). The court ruled that rape and sexual offense indictments were not fatally defective when they identified the victim solely by her initials, "RTB." The indictments tracked the statutory language of rape and sexual offense statutes and G.S. 15-144.1 and 15-144.2. The court noted that the record on appeal demonstrates that the defendant had notice of the identity of the victim. The arrest warrants served on the defendant listed the victim by her initials, "R.T.B.," with periods after each letter. The defendant admitted to law enforcement that he knew R.T.B. The defendant did not argue on appeal that he had difficulty preparing his case because of the use of "RTB" instead of the victim's full name. Thus, it appears that the defendant was not confused concerning the identity of the victim, and therefore the use of "RTB" in the indictments provided the defendant with sufficient notice to prepare his defense. The defendant did not argue on appeal that the use of "RTB" placed him at risk of being subjected to double jeopardy. In any event, the victim testified at trial and identified herself in court. Thus, the defendant was protected from double jeopardy.

- (1) Trial Court Did Not Err in Not Submitting Assault on Female in Trial of First-Degree Rape Based on Short-Form Indictment Under G.S. 15-144.1; Court Sets Standards for Submitting Assault on Female**
- (2) Sufficient Evidence to Support Second-Degree Kidnapping Conviction Occurring During Commission of Rape**

State v. Thomas, ___ N.C. App. ___, ___ S.E.2d ___ (5 May 2009). The defendant was convicted of first-degree rape under a short-form indictment under G.S. 15-144.1. He was also convicted of second-degree kidnapping. (1) The court ruled that the trial court did not err in not submitting assault on a

female as a lesser offense under the statutory language in G.S. 15-144.1. The court reviewed the case law concerning the submission of this alternative offense and set standards for its submission. (See the court's opinion for its extensive analysis.) (2) The court ruled that there was sufficient evidence to support the defendant's conviction of second-degree kidnapping. The defendant threatened the victim with a gun while she was in his car. When she tried to escape, he pulled her back into the car and sprayed her with mace. He drove her away from her car and children. When she jumped out, he forced her back into the car at gunpoint. He then drove her to a secluded wooded area, where he raped her.

Indictment Charging Larceny of Church Was Fatally Defective Because It Did Not Indicate That Church Was Legal Entity Capable of Owning Property

State v. Patterson, ___ N.C. App. ___, 671 S.E.2d 357 (6 January 2009). The defendant was convicted of felonious breaking or entering of a church, larceny of property pursuant to the breaking or entering, and felonious possession of stolen goods pursuant to the breaking or entering. The trial judge arrested judgment for the conviction of possession of stolen goods. The court ruled, relying on *State v. Thornton*, 251 N.C. 658 (196), and *State v. Cathey*, 162 N.C. App. 350 (2004), that the indictment charging larceny of the church (alleged as "First Baptist Church of Robbinsville") was fatally defective because it did not indicate that the church was a legal entity capable of owning property. The court noted that this ruling did not apply to the offense of possession of stolen goods.

Indictment Charging Injury to Real Property, Which Incorrectly Described Lessee of Real Property As Its Owner, Did Not Create Fatal Variance With Evidence Presented at Trial

State v. Lilly, ___ N.C. App. ___, 673 S.E.2d 718 (17 March 2009). The court ruled that an indictment charging injury to real property, which incorrectly described the lessee of the real property as its owner, did not create a fatal variance with the evidence presented at trial. The court relied on the case law concerning larceny indictments, such as the ruling in *State v. Liddell*, 39 N.C. App. 373 (1979) (no fatal variance when indictment named owner of stolen property and evidence disclosed that person, although not the owner, lawfully possessed the property when the larceny was committed).

Court, Per Curiam and Without Opinion, Summarily Affirms Ruling of Court of Appeals That: (1) Description of Weapon in Charge of Carrying Concealed Weapon Was Surplusage, and (2) Even Assuming Trial Court Erred in Instructing on Weapon Not Alleged in Charge, Court Did Not Commit Prejudicial Error

State v. Bollinger, ___ N.C. ___, ___ S.E.2d ___ (1 May 2009), *affirming*, ___ N.C. App. ___, 665 S.E.2d 136 (19 August 2008). The defendant was charged with carrying a concealed weapon, a metallic set of knuckles. The evidence showed that an officer discovered knives on the defendant's person in addition to the metallic knuckles. The trial court instructed the jury concerning the weapon element as follows: "one or more knives." The court, per curiam and without an opinion, summarily affirmed the ruling of the North Carolina Court of Appeals that (1) the language in the charge for a carrying concealed weapon describing the weapon as "a Metallic set of Knuckles" was unnecessary and thus surplusage; and (2) even assuming the trial court erred in instructing on a weapon not alleged in the charge, the trial court did not commit prejudicial error to require a reversal of the defendant's conviction. The court noted that in this case there was evidence of knives concealed on the defendant's person.

Discovery

Court Affirms Trial Judge's Pretrial Dismissal of Charge Under G.S. 15A-954(a)(4) Because Defendant Met His Burden of Proving That State Flagrantly Violated His Constitutional Rights and Irreparably Prejudiced Preparation of His Defense When State Willfully Destroyed Material Evidence Favorable to Defendant—Ruling of Court of Appeals Is Affirmed

State v. Williams, 362 N.C. 628, 669 S.E.2d 290 (12 December 2008), *affirming*, ___ N.C. App. ___, 660 S.E.2d 189 (6 May 2008). The court upheld the trial judge's pretrial dismissal of a charge (felony assault of a government officer) under G.S. 15A-954(a)(4) because the defendant met his burden of proving that the state flagrantly violated the defendant's constitutional rights and irreparably prejudiced the preparation of his defense when the state willfully destroyed material evidence favorable to the defendant. The destroyed evidence consisted of two photographs in the prosecutor's office: one photo showed the uninjured defendant and was captioned "Before suing the District Attorney's office" and the other photo showed the defendant's injuries and was captioned, "After he sued the District Attorney's office." (See the court's analysis why these photos were materially favorable evidence for the defendant and how their willful destruction satisfied the standard under G.S. 15A-954(a)(4) and justified the trial judge's dismissal of the charge.)

Supervisory Prosecutors Were Entitled to Absolute Immunity in § 1983 Lawsuit Claiming Prosecutors Failed to Disclose Impeachment Material Due to (1) Failure to Train Prosecutors, (2) Failure to Supervise Prosecutors, or (3) Failure to Establish Information System Containing Potential Impeachment Material About Informants

Van de Kamp v. Goldstein, 129 S. Ct. 855, 172 L. Ed. 2d 706 (26 January 2009). The plaintiff, convicted of murder that was later reversed, sued prosecutors under § 1983 for various claims involving the alleged suppression of potential impeachment information that the defendant could have used against a state's witness in his murder trial. The conviction was allegedly based in critical part on the testimony of this witness, who was a jailhouse informant and had previously received reduced sentences for providing prosecutors with favorable testimony in other cases. The Court ruled that supervisory prosecutors were entitled to absolute immunity for the plaintiff's claims that the prosecutors failed to disclose impeachment material due to the (1) failure to train prosecutors, (2) failure to supervise prosecutors, or (3) failure to establish an information system in the district attorney's office containing potential impeachment material about informants.

Court Rules That Exculpatory Evidence Suppressed by State Did Not Affect Defendant's Murder Convictions But Remands to Trial Court to Determine If Suppressed Evidence Affected Determination of Death Sentence

Cone v. Bell, ___ S. Ct. ___, ___ L. Ed. 2d ___ (28 April 2009). The defendant was convicted in state court of two counts of murder and sentenced to death. He presented an insanity defense based on his habitual use of an excessive amount of drugs and its affect on his behavior during the commission of the offenses. It was discovered after the trial and sentencing hearing that the state had suppressed exculpatory evidence concerning his use of drugs. The defendant was unsuccessful in obtaining a new trial or sentencing hearing in state postconviction proceedings and federal habeas litigation. The Court ruled: (1) the defendant's federal habeas claim concerning suppressed evidence under *Brady v. Maryland*, 373 U.S. 83 (1963), was not procedurally barred; (2) the suppressed evidence was immaterial

to the jury's finding of guilt and thus did not affect the defendant's conviction; and (3) the suppressed evidence might have persuaded one or more jurors that the defendant's drug addiction was sufficiently serious to justify a decision to recommend a life sentence rather than a death sentence, and thus a full review of the suppressed evidence and its effect was warranted; the Court remanded the case to the federal habeas trial court for a hearing on this issue.

Guilty Pleas

Court Vacates Defendant's Guilty Plea Because Plea Agreement Stated That Defendant's Pretrial Motions Were Preserved for Appeal, But Appellate Review Was Unavailable for One of Defendant's Pretrial Motions

State v. Smith, ___ N.C. App. ___, 668 S.E.2d 612 (18 November 2008). The defendant was charged with a drug offense and habitual felon. Two of his pretrial motions were denied: (1) a motion to suppress evidence based on an alleged Fourth Amendment violation; and (2) a motion to dismiss the habitual felon indictment on the ground that the habitual felon law was unconstitutional. The defendant then entered a guilty plea pursuant to a plea agreement in which one of its terms was: "the defendant's pretrial motions shall be preserved for appeal." The court ruled, relying on *State v. Wall*, 348 N.C. 671 (1998), that the defendant's guilty plea must be vacated because the defendant was entitled to receive the benefit of the plea agreement, and the pretrial motion to dismiss the indictment was not subject to appellate review by appeal of right or by writ of certiorari. *But see* Ch. 13: Motions Practice at , *in* NORTH CAROLINA DEFENDER MANUAL (discussing *Corbett* and *Rinehart*, two cases in which the court of appeals found that defendant's guilty plea waived his right to direct appeal, online at http://www.ncids.org/Def%20Manual%20Info/Defender_Manual/DefManChpt13.pdf.

- (1) Testimony of Defendant's Former Attorney During Hearing on Defendant's Motion to Withdraw Guilty Plea Did Not Violate Attorney-Client Privilege**
- (2) Trial Judge Did Not Err in Denying Defendant's Motion to Withdraw Guilty Plea**

State v. Watkins, ___ N.C. App. ___, 672 S.E.2d 43 (3 February 2009). The defendant filed a motion to withdraw his guilty plea. The defendant's former attorney, who had represented the defendant during the plea negotiations leading to the guilty plea, testified over the defendant's objection about a meeting with the defendant in which the defendant provided the attorney with his proposed testimony to be relayed to the prosecutor (this occurred during the plea negotiation process to show what testimony the defendant could offer at a possible trial of co-defendants). The court ruled, based on the reasoning in *In re Investigation of Death of Eric Miller*, 357 N.C. 316 (2003), that the conversation between the attorney and defendant was not a confidential communication to which the attorney-client privilege attached because the defendant had provided the information to the attorney for the purpose of conveying it to the prosecutor, a third party. [The court noted that the defendant had not raised the issue whether the defendant's proposed testimony was prohibited by Rule 410 (inadmissibility of plea discussions), and therefore the court would not address it.] (2) The court ruled that the trial judge did not err in denying the defendant's motion to withdraw his guilty plea. Based on the factors set out in *State v. Handy*, 326 N.C. 532 (1990), the defendant failed to show a fair and just reason for withdrawing his plea. (See the court's discussion of these factors and the facts in this case.)

Other Procedure Issues

- (1) Joinder of Offenses Was Not Error**
- (2) Judge Did Not Improperly Base Sentence on Defendant's Insistence on Jury Trial**
- (3) Double Jeopardy Did Not Bar Convictions and Punishments for Both Second-Degree and Third-Degree Sexual Exploitation of Minor**

State v. Anderson, ___ N.C. App. ___, 669 S.E.2d 793 (16 December 2008). The defendant surreptitiously placed a camera in his stepdaughter's bedroom. The camera was connected by a cord to the defendant's computer located in another room. After the camera was discovered, the computer was taken to the sheriff's office. Investigation of the computer's hard drive discovered child pornography. The defendant was convicted of misdemeanor peeping and appealed for trial de novo. He was also indicted, based on the child pornography in the computer, for ten counts of third-degree sexual exploitation of a minor and ten counts of second-degree sexual exploitation of a minor. At a conference with the prosecutor and defense counsel before trial, the judge commented that if the two parties were engaged in plea discussions, he would be amenable to a probationary sentence. Defense counsel objected to the judge's comments, stating that it could be inferred that the judge would be less likely to give the defendant probation if he did not plead guilty. The judge stated that he had not meant to make any such implication, but rather to encourage the parties to enter plea negotiations. The defendant at a single trial was convicted of all 21 charges and sentenced to imprisonment. The court ruled: (1) the trial judge did not abuse his discretion in granting the state's motion to join all offenses for a single trial; (2) the defendant failed to show that it can be reasonably inferred that the defendant's sentence was improperly based, even in part, on his insistence on a jury trial [*compare* **State v. Hueto**, ___ N.C. App. ___, 671 S.E.2d 62 (2009) (reasonable inference existed that trial court, in sentencing, considered defendant's exercise of his right to demand a jury trial, and thus remand for resentencing was required)]; and (3) relying on **State v. Davis**, 302 N.C. 370 (1981), double jeopardy did not bar convictions and punishments for both second-degree and third-degree sexual exploitation offenses. The third-degree charges were based on the defendant's possession of the images of minors, and the second-degree charges were based on the defendant's receipt of those images.

- (1) Double Jeopardy Did Not Bar Convictions and Punishments for Both Indecent Liberties and Using Minor in Obscenity**
- (2) No Due Process Violation Involving Lengthy Delay From Commission of Offenses to Issuance of Indictments**

State v. Martin, ___ N.C. App. ___, 671 S.E.2d 53 (20 January 2009). The defendant was convicted of two counts of indecent liberties with a child and using a minor in obscenity. (1) The court ruled that there was no double jeopardy violation when the defendant was convicted and punished for one count of indecent liberties and one count of using a minor in obscenity based on the same photograph of the child and defendant; each offense has at least one element that is not included in the other offense. (2) The court ruled that there was no due process violation involving the lengthy delay from the commission of the offenses to the issuance of the indictments. The offenses occurred in 2000. In 2001, the department of social services possessed the incriminating photos and instituted an action to terminate parental rights. The department did not then share the photos or report evidence of abuse to law enforcement or the district attorney. Law enforcement was not informed about the photos until 2007, the year in which the defendant was indicted. The court ruled that the department's purported delay was not attributable to the state in determining whether a due process violation had occurred.

Trial Judge Erred by Failing to Grant Defendant's Request to Remove Juror With Remaining Peremptory Challenge After Judge Had Reopened Jury Voir Dire

State v. Thomas, ___ N.C. App. ___, 673 S.E.2d 372 (3 March 2009). After the jury was impaneled and the trial had begun, the trial judge learned that one of the seated jurors had attempted to contact an employee in the district attorney's office before impanelment. Voir dire was reopened, the trial judge questioned the juror, and allowed the parties to do so as well. The judge did not allow the defendant to remove the juror with a remaining peremptory challenge. The court ruled that the judge erred under *State v. Holden*, 346 N.C. 404 (1997) (once trial judge reopens examination of a juror, each party has absolute right to exercise any remaining peremptory challenges to excuse juror), and ordered a new trial.

Court Committed Good-Faith Error in Denying Defendant's Peremptory Challenge of Juror and All Jurors Seated in Trial Were Qualified and Unbiased

Rivera v. Illinois, 129 S. Ct. 1446, ___ L. Ed. 2d ___ (31 March 2009). During the defendant's state murder trial, the defendant was denied the opportunity to exercise a peremptory challenge against a female juror because the trial judge erroneously, but in good faith, believed that the defendant's use of a peremptory challenge violated *Batson v. Kentucky*, 476 U.S. 79 (1986), and later cases. The Court ruled that the Due Process Clause does not require an automatic reversal of a conviction when a state trial court committed a good-faith error in denying the defendant's peremptory challenge of a juror and all jurors seated in the trial were qualified and unbiased.

Trial Judge Erred in Denying Defendant Final Jury Argument Because Defendant Did Not Introduce Evidence When Cross-Examining State's Witness

State v. English, ___ N.C. App. ___, 669 S.E.2d 869 (16 December 2008). The court ruled, distinguishing *State v. Macon*, 346 N.C. 109 (1997), that the trial judge erred in denying the defendant the final jury argument because the defendant did not introduce evidence under Rule 10 of the General Rules of Practice for the Superior and District Courts when cross-examining a state's witness. Defense counsel referred to the contents of an officer's report when cross examining the officer. However, the officer's testimony on cross-examination did not present "new matter" to the jury when considered with the state's direct examination of the officer. Thus, the defendant did not introduce evidence under Rule 10. (Author's note: This opinion contains a useful summary of case law on this issue that judges and lawyers may want to read if this issue arises at a future trial.)

Trial Judge Erred in Not Exercising Discretion When Denying Jury's Request for Transcripts of Testimony of Victim and Defendant

State v. Long, ___ N.C. App. ___, 674 S.E.2d 696 (7 April 2009). The court ruled that the trial judge erred in not exercising discretion when denying the jury's request for transcripts of testimony of the victim and the defendant. The court also ruled that the error was prejudicial and ordered a new trial.

Evidence

404(b) and Character Evidence

Court Rejects Bright Line Rule That Admission Under Rule 404(b) of Traffic-Related Convictions That Occurred More Than Sixteen Years Before Date of Second-Degree Vehicular Murder Being Tried Is Plain Error Per Se—Ruling of Court of Appeals Is Reversed

State v. Maready, 362 N.C. 614, 669 S.E.2d 564 (12 December 2008), *reversing*, ___ N.C. App. ___, 654 S.E.2d 769 (15 January 2008). The defendant was convicted of second-degree murder and other charges involving a vehicle crash in which the defendant was driving impaired. The issue before the court was whether the trial judge's admission under Rule 404(b) of prior traffic related convictions of the defendant that were more than sixteen years old was plain error (the defendant had failed to object at trial to the admission of his prior traffic record). The court rejected the implication that its per curiam ruling in *State v. Goodman*, 357 N.C. 43 (2003), *reversing for reasons stated in dissenting opinion*, 149 N.C. App. 57 (2002), had adopted a bright line rule that the admission under Rule 404(b) of traffic-related convictions that occurred more than sixteen years before the date of a second-degree vehicular murder being tried is plain error per se. The relevance of a temporally remote traffic-related conviction to the malice issue does not depend solely on the length of time that has passed since the conviction occurred. Instead, the extent of its probative value depends largely on intervening circumstances. In this case, in which the defendant was convicted of DWI four times in the sixteen years before the events on trial, his older convictions did not only show that the defendant has the propensity to commit the offense being tried. Instead, those convictions constituted a part of a clear and consistent pattern of criminality that is highly probative of his mental state for the offense being tried. The probative value and thus admissibility of Rule 404(b) evidence must be determined on a case-by-case basis rather than through applying a fixed temporal maximum. The court ruled that the trial judge did not commit plain error in the admission of the defendant's entire driving record.

Evidence of Assault Committed by Defendant That Occurred Two Days Before Murder Being Tried Was Admissible Under Rule 404(b) to Show Identity When Same Weapon Was Used in Both Murder and Assault

State v. Dean, ___ N.C. App. ___, 674 S.E.2d 543 (7 April 2009). The defendant was convicted of first-degree murder. The court ruled that evidence of an assault committed by the defendant that occurred two days before the murder being tried was admissible under Rule 404(b) to show identity when the state's ballistics evidence showed that the same weapon was used in both the murder and the assault.

- (1) Trial Judge Erred Under Rule 404(a)(2) in Allowing State to Offer Good Character Evidence Concerning Sexual Assault Victim When Defendant Had Not Offered Bad Character Evidence, Although Defense Counsel Had Forecast Evidence of Female's Bad Character in Opening Statement**
- (2) Trial Judge Erred in Allowing Detective To Offer Lay Opinion Testimony That Surveillance Videotapes of Events Involving Criminal Offenses Were Consistent With Victim's Trial Testimony**

State v. Buie, ___ N.C. App. ___, 671 S.E.2d 351 (6 January 2009). The defendant was convicted of first-degree sexual offense and rape, armed robbery, and second-degree kidnapping. The victim was kidnapped in a hospital parking lot, forced to withdraw money from her ATM, and later was sexually

assaulted. (1) The court ruled, relying on *State v. Faison*, 330 N.C. 347 (1991) [opening statement is not evidence under Rule 404(a)(2)], that the trial judge erred under Rule 404(a)(2) in allowing the state to offer good character evidence concerning the victim when defendant had not offered bad character evidence, although defense counsel had forecast evidence of the female's bad character in an opening statement. (2) The state introduced surveillance tapes from the hospital and bank that had recorded some of the events involving the crimes being tried. The court ruled that the trial judge erred in allowing a detective to offer lay opinion testimony of what the videotapes depicted. For example, the detective was impermissibly allowed to testify that the videotapes were consistent with the victim's trial testimony. The court distinguished other appellate cases that have upheld the admission of testimony by officers concerning surveillance videotapes, because their interpretations of those videotapes were based in part on their firsthand observations.

- (1) Trial Judge Did Not Err Under Rule 412 in Excluding Evidence of Child Sexual Assault Victim's Prior Sexual Activity With Others**
- (2) Trial Judge Did Not Err Under Rule 403 in Excluding Evidence of Victim's Alleged False Accusation That Another Person Had Raped Her**
- (3) Trial Judge Did Not Err in Permitting Officer to Offer Corroborative Testimony Even Though It Included Incident of Digital Penetration Not Mentioned in Victim's Testimony**

State v. Cook, ___ N.C. App. ___, 672 S.E.2d 25 (3 February 2009). The defendant was convicted of first-degree statutory rape and other sex offenses involving a child victim. There was medical evidence of two scars on the victim's hymen that appeared to be healed lacerations. (1) The court ruled, relying on *State v. Black*, 111 N.C. App. 284 (1993), that the trial judge did not err under Rule 412 in excluding evidence of the victim's prior sexual activity with others. The defendant sought to introduce testimony of a boy indicating that he had sex with the victim during the week the victim accused the defendant of committing the offenses. However, the defendant failed to offer the boy's testimony during the Rule 412 in camera hearing and also failed to call him as a witness at trial to show its relevance. Thus, the only evidence was the victim's denial of having sex with the boy. Based on *Black*, the judge did not err in excluding this testimony (the court also ruled that the defendant failed to show the relevance of the testimony). Concerning another person, who allegedly inserted his finger into the victim's vagina, the court ruled that the defendant failed to present evidence during the in camera hearing that the digital penetration could have caused the victim's internal scarring. (2) The court ruled, relying on *State v. Harris*, 189 N.C. App. 49 (2008), and distinguishing *State v. Ginyard*, 122 N.C. App. 25 (1996), that the trial judge did not err under Rule 403 in excluding evidence of the victim's alleged false accusation that another person had raped her, because there were different circumstances between the false accusation and the events being tried. The trial judge could have reasonably determined that the proposed testimony was not highly probative when compared to the potential for unfair prejudice if the jury perceived the victim as promiscuous. (3) The court ruled, relying on *State v. Ramey*, 318 N.C. 457 (1986), that the trial judge did not err in permitting an officer to offer corroborative testimony even though it included an incident of digital penetration not mentioned in the victim's testimony. Because the officer's testimony about digital penetration was within the defendant's course of conduct and did not directly contradict the victim's testimony, the officer's testimony strengthened the victim's testimony to warrant its admission as corroborative evidence.

Trial Judge in Child Sexual Assault Trial Properly Excluded Under Rule 412(b)(2) Defense Proffered Evidence of Third Person's Sexual Abuse of Victim

State v. Adu, ___ N.C. App. ___, 672 S.E.2d 84 (3 February 2009). The defendant was convicted of first-

degree statutory rape and indecent liberties with a child. A doctor testified that a genital examination of the child victim revealed a notch or healed tear to her hymen, which was consistent with genital penetration. The defendant proffered evidence of a third person's sexual abuse of the victim as an alternative explanation for the physical trauma. The court ruled that the trial judge properly excluded this evidence under Rule 412(b)(2). The court reviewed the defendant's evidence and concluded that it did not show that the third person's abuse involved penetration and thus an alternative explanation for the trauma to the victim's vaginal area.

Opinion Testimony

Court, Per Curiam and Without Opinion, Reverses Ruling of North Carolina Court of Appeals for Reasons Stated in Dissenting Opinion That Trial Judge Erred in Allowing Detective to Offer Lay Opinion That White Powder Was Cocaine

State v. Llamas-Hernandez, 363 N.C. 8, 673 S.E.2d 658 (6 February 2009), *reversing for reasons stated in dissenting opinion*, ___ N.C. App. ___, 659 S.E.2d 79 (15 April 2008). The court, per curiam and without an opinion, reversed the ruling of the North Carolina Court of Appeals for the reasons stated in the dissenting opinion that the trial judge erred in allowing a detective to offer a lay opinion that 55 grams of a white powder seized by officers was cocaine. The substance was not subject to preliminary testing. The identification of the powder was based solely on the detective's visual observations. There was no testimony why he believed that the white powder was cocaine other than his extensive experience in handling drug cases. There also was no testimony about any distinguishing characteristics of the white powder, such as its taste or texture.

Rule 702(a1) Obviates State's Need to Prove HGN Testing Method Is Sufficiently Reliable

State v. Smart, ___ N.C. App. ___, 674 S.E.2d 684 (17 March 2009). An officer stopped a vehicle for impaired driving. She noticed a "very strong" odor of alcohol on the driver and other signs of impairment. She administered the horizontal gaze (HGN) nystagmus test and observed several indicators that the defendant was under the influence of an impairing substance. The court rejected the defendant's argument that the state failed to show that HGN is sufficiently reliable as a basis for expert testimony. The court ruled that Rule 702(a1) obviates the state's need to prove that the HGN testing method is sufficiently reliable.

Other Evidence Issues

Wife's Conversations With Husband in Public Visiting Areas of State Correctional Facilities Were Not Protected by Marital Communications Privilege Under G.S. 8-57(c)—Ruling of Court of Appeals Is Reversed

State v. Rollins, ___ N.C. ___, ___ S.E.2d ___ (1 May 2009), *reversing*, 189 N.C. App. 248 (2008). The defendant was a suspect in a murder investigation and was incarcerated for an unrelated offense in various state correctional facilities. An officer placed a recording device on the defendant's wife (with her consent) when she visited him. The contents of those conversations were admitted at the defendant's murder trial. The court ruled that the wife's conversations in the public visiting areas of

these facilities were not protected by the marital communications privilege under G.S. 8-57(c). The holder of the privilege must possess a reasonable expectation of privacy where the communication takes place and the intent that the communication be kept secret. Relevant factors necessarily include the physical location where the communication was made and whether other people were present.

Crimes

Offenses

Male Juvenile's Entry into School's Female Locker Room With Door Marked "Girl's Locker Room" Was Sufficient Evidence to Support Adjudication of Second-Degree Trespass

In re S.M.S., ___ N.C. App. ___, 675 S.E.2d 44 (7 April 2009). The court ruled that a male juvenile's entry into a school's female locker room with the door marked "Girl's Locker Room" was sufficient evidence to support the juvenile's adjudication of second-degree trespass. The court noted that the door's sign was reasonably likely to give the juvenile notice that he was not authorized to go into the girls' locker room [see G.S. 14-159.13(a)(2)].

Assault Is Not Lesser-Included Offense of Sexual Battery

State v. Corbett, ___ N.C. App. ___, 675 S.E.2d 150 (21 April 2009). The court ruled that assault is not a lesser-included offense of sexual battery. The crime of assault has elements that are not elements of sexual battery.

- (1) Sufficient Evidence to Support Conviction of Possessing Cocaine**
- (2) Sufficient Evidence to Support Conviction of Possession of Firearm by Felon**
- (3) Insufficient Evidence to Support Conviction of Maintaining Dwelling for Purpose of Keeping or Selling Cocaine**

State v. Fuller, ___ N.C. App. ___, 674 S.E.2d 824 (21 April 2009). The court ruled: (1) there was sufficient evidence to support the defendant's conviction of possessing cocaine by showing the defendant's constructive possession of the cocaine; (2) there was sufficient evidence to support the defendant's conviction of possession of a firearm by felon by linking the defendant to the trailer in which the weapon was found; and (3) there was insufficient evidence to support the defendant's conviction of maintaining a dwelling for the purpose of keeping or selling cocaine; the state failed to show that the defendant "maintained" the dwelling where the cocaine was found.

Temporary Restraining Order Entered Under Rule 65(b) of Rules of Civil Procedure Was Not Valid Domestic Violence Protective Order to Authorize Enhanced Sentence Under G.S. 50B-4.1(d)—Ruling of Court of Appeals Is Reversed

State v. Byrd, ___ N.C. ___, ___ S.E.2d ___ (1 May 2009), *reversing*, 185 N.C. App. 597, 649 S.E.2d 444 (2007). The defendant's wife filed a civil complaint seeking divorce from bed and board. She filed with the complaint a motion for a preliminary injunction under Rule of Civil Procedure 65(a) and also sought a temporary restraining order (TRO) under Rule 65(b). Her complaint and affidavit alleged that the defendant had assaulted her on many occasions. A district court judge on March 11, 2004, issued an ex

parte order granting her request for a TRO (ordering the defendant not to assault his wife) and set a hearing date for March 15, 2004. The TRO was properly served on the defendant on March 12, 2004. The defendant moved for a continuance on March 15, 2004, and the hearing and TRO were both continued until March 24, 2004. On March 23, 2004, the defendant shot his wife in the head with a rifle, resulting in serious injury. The defendant was convicted of a Class C felony assault for this act. During the sentencing phase for this conviction, the jury found that the defendant knowingly violated a valid protective order in the same course of conduct involving the felony assault. Based on the jury's finding, the conviction was elevated under G.S. 50B-4.1(d) from a Class C felony to a Class B2 felony for sentencing purposes. The court ruled: (1) the TRO was not a valid protective order under the definition in G.S. 50B-1(c) and rejected the state's argument that the TRO was the functional legal equivalent of a valid protective order under G.S. 50B-2; and (2) even if the TRO had been entered under Chapter 50B, it failed to meet the definition in G.S. 50B-1(c) because it was not entered "upon hearing by the court or consent of the parties." Merely putting the defendant on notice that a TRO had been entered against him did not satisfy the hearing requirement to permit the sentence enhancement. The court stated that in addition to the statutory hearing requirement, due process required a hearing at which the defendant had an opportunity to be heard about the allegations of domestic violence against him.

Evidence Was Sufficient to Support Second-Degree Sexual Offense

State v. Thacker, ___ N.C. App. ___, ___ S.E.2d ___ (21 April 2009). The court ruled that there was sufficient evidence that a sex act was committed with force and against the victim's will to support the defendant's conviction of second-degree sexual offense. The state's evidence was that the defendant slapped the victim in the face, pushed her down on the bed, put a pillow over her head, and had anal intercourse with her. The woman was crying and told the defendant she didn't want to do it.

(1) Insufficient Evidence to Support Conviction of First-Degree Sexual Offense When State's Evidence Failed to Satisfy Corpus Delecti Rule—Ruling of Court of Appeals Is Affirmed

(2) Trial Judge Did Not Commit Plain Error in Jury Instruction on Indecent Liberties, and Sufficient Evidence Supported Conviction When State's Evidence Satisfied Corpus Delecti Rule—Ruling of Court of Appeals Is Reversed

State v. Smith, 362 N.C. 583, 669 S.E.2d 299 (12 December 2008), *affirming in part and reversing in part*, ___ N.C. App. ___, 660 S.E.2d 82 (6 May 2008). The defendant was convicted of first-degree sexual offense and indecent liberties. (1) The court ruled, distinguishing *State v. Parker*, 315 N.C. 222 (1985), that there was insufficient evidence to support the defendant's conviction of first-degree sexual offense when the state's evidence failed to satisfy the *corpus delecti rule*. There was not substantial evidence independent of the defendant's confession. (See the court's discussion of the evidence in its opinion.) (2) The court ruled that the trial judge did not commit plain error in the jury instruction on indecent liberties. When instructing on indecent liberties, the trial judge is not required to specifically identify the acts that constitute the charge; the court cited *State v. Hartness*, 326 N.C. 561 (1990). The court also ruled that there was sufficient evidence to support the indecent liberties conviction because there was substantial evidence independent of the defendant's confession. (See the court's discussion of the evidence in its opinion.)

DMV's Cancellation of Conditional Restoration Agreement Upheld

Brunson v. Tatum, ___ N.C. App. ___, 675 S.E.2d 97 (21 April 2009). The court affirmed the superior court's ruling upholding the decision of the Division of Motor Vehicles cancelling the petitioner's

conditional restoration agreement that had conditionally restored his driving privileges. This case involved evidence that the petitioner unsuccessfully blew into an ignition interlock device on his vehicle.

Dismissal of DWI Did Not Collaterally Estop State in Administrative License Revocation Hearing

Powers v. Tatum, ___ N.C. App. ___, ___ S.E.2d ___ (5 May 2009). The court ruled that a district court judge's dismissal of a DWI based on a violation of the driver's right to have a witness present did not collaterally estop the state from proving that the driver willfully refused to submit to an Intoxilyzer test in a later administrative license revocation hearing conducted by the Division of Motor Vehicles. The court also ruled that there was sufficient evidence of willful refusal.

Defenses

Trial Judge Did Not Err in Not Instructing on Entrapment Defense in Trial of Soliciting Child By Computer Under G.S. 14-202.3

State v. Morse, ___ N.C. App. ___, 671 S.E.2d 538 (6 January 2009). The defendant was convicted under G.S. 14-202.3 of soliciting a child by computer with intent to commit an unlawful sex act. The "child" was a law enforcement officer pretending to be a 14 year old in an adults-only Yahoo chat room. The court ruled that the trial judge did not err in not instructing on the entrapment defense. The defendant failed to meet his burden of production to justify a jury instruction. The court reviewed the evidence and concluded that officers merely provided the defendant with the opportunity to commit the offense and, when presented with that opportunity, the defendant pursued it with little hesitation.

Evidence Did Not Support Jury Instruction on Defense of Justification for Possession of Firearm by Felon

State v. McNeil, ___ N.C. App. ___, 674 S.E.2d 813 (21 April 2009). The court ruled: (1) the defendant was not entitled to a jury instruction on the defense of justification for possessing a firearm in a trial of possession of firearm by a felon (the court did not decide whether the defense is available for this offense); and (2) the trial court did not commit plain error by failing to include "not guilty by reason of self-defense" as a possible verdict in its final mandate.

Sentencing and Other Consequences

Generally

Defendant's Stipulation That Out-of-State Conviction Was Substantially Similar to North Carolina Offense Was Ineffective Because Judge Must Make Finding

State v. Lee, ___ N.C. App. ___, 668 S.E.2d 393 (18 November 2008). The defendant stipulated during the sentencing hearing that a New Jersey conviction was substantially similar to a North Carolina offense for the prior record level points allocation. The court ruled, relying on *State v. Palmateer*, 179 N.C. App. 579 (2006), that the stipulation was ineffective because the "substantially similar" issue is a question of law that the judge must decide.

Sentencing Worksheet and Statements by Counsel Constituted Stipulation to Prior Convictions

State v. Hinton, ___ N.C. App. ___, ___ S.E.2d ___ (5 May 2009). The court ruled, relying on *State v. Morgan*, 164 N.C. App. 298 (2004), that the sentencing worksheet and statements by counsel constituted a stipulation to the existence of the prior convictions listed on the worksheet. The court also stated that when the state classifies out-of-state felony convictions as Class I felonies (the default classification), it is not required to prove that the convictions are substantially similar to corresponding North Carolina felonies.

Stipulation Signed by Prosecutor and Defense Counsel in Section III of AOC-CR-600 Supported Judge's Finding of Defendant's Prior Record Level

State v. Hussey, ___ N.C. App. ___, 669 S.E.2d 864 (16 December 2008). The court ruled that a stipulation signed by the prosecutor and defense counsel in Section III of AOC-CR-600 (worksheet on prior record level) supported the judge's finding of the defendant's prior record level. The court distinguished *State v. Jeffery*, 167 N.C. App. 575 (2004) (presentation of worksheet to judge is insufficient to support judge's finding of prior record level), because AOC-CR-600 in that case did not contain a stipulation. [Author's note: The worksheet in *Hussey* apparently did not contain out-of-state convictions that would require an appropriate judicial finding; see *State v. Palmateer*, 179 N.C. App. 579 (2006).]

Trial Judge Properly Found One Point Under G.S. 15A-1340.16(b)(6) in Determining Defendant's Prior Record Level in Sentencing for Habitual Felon

State v. Ford, ___ N.C. App. ___, 672 S.E.2d 689 (3 February 2009). The defendant was convicted of attempted felony larceny and then pled guilty to being an habitual felon. The defendant had previously been convicted of felony larceny. The court ruled, relying on *State v. Bethea*, 122 N.C. App. 623 (1996), that the judge properly found one point under G.S. 15A-1340.16(b)(6) (all elements of current offense are included in offense for which defendant was previously convicted) in calculating the defendant's prior record level; G.S. 15A-1340.16(b)(6) is not contrary to the provisions of G.S. 14-7.6. Attempted felony larceny is a lesser-included offense of felony larceny regardless of the theory of felony larceny. It was irrelevant that the defendant's prior felony larceny convictions did not include the element that the defendant took property valued over \$1,000.

No Ex Post Facto Violation When Defendant's Points for Prior Record Level Were Increased Under G.S. 15A-1340.14(c) Because of Change in Classification of Prior Conviction

State v. Watkins, ___ N.C. App. ___, 672 S.E.2d 43 (3 February 2009). When the defendant committed the offenses for which he was being sentenced, the punishment for the sale of cocaine was a Class G felony. When the defendant was convicted in 1997 of sale of cocaine, the punishment was a Class H felony. As required by G.S. 15A-1340.14(c), the prior conviction was treated as a Class G felony in determining the defendant's prior record level. The court ruled, relying on *State v. Mason*, 126 N.C. App. 318 (1997), and *State v. Wolfe*, 157 N.C. App. 22 (2003), that there was no ex post facto violation in determining the defendant's prior record level.

Defendant Who Pled Guilty to Habitual Felon Status Must Be Sentenced As Class C Felon

State v. Wells, ___ N.C. App. ___, 675 S.E.2d 85 (21 April 2009). The court ruled that when a defendant pled guilty to habitual felon status, the trial court was required to sentence the defendant as an habitual felon on

the charge of assault with a deadly weapon with the intent to kill inflicting serious injury, a Class C felony.

***Apprendi v. New Jersey* and Later Rulings Do Not Provide Sixth Amendment Right to Jury Trial Under Oregon Law That Requires Findings of Fact to Support Judge’s Decision to Impose Consecutive Sentences**

Oregon v. Ice, 129 S. Ct. 711, 172 L. Ed. 2d 517 (14 January 2009). The Court ruled that *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and later rulings do not provide a Sixth Amendment right to jury trial under an Oregon law that requires findings of fact to support a judge’s decision to impose consecutive sentences.

Sex Offender Registration and Monitoring

Court Affirms Trial Court’s Order at Hearing Conducted Under G.S. 14-208.40B That Defendant When Released From Prison Will Be Subject to Satellite-Based Monitoring for His Natural Life

State v. Wooten, ___ N.C. App. ___, 669 S.E.2d 749 (16 December 2008). The court affirmed the trial court’s order at a hearing conducted under G.S. 14-208.40B that the defendant when released from prison will be subject to satellite-based monitoring for his natural life. The defendant on October 23, 2006, had pled no contest to taking indecent liberties, which occurred on October 31, 2001. He was sentenced to prison, and the trial court conducted the hearing on the satellite-based monitoring issue just before his release from prison. The defendant had been previously convicted on April 25, 1989, of taking indecent liberties. The court ruled: (1) the trial court had subject matter jurisdiction to conduct the hearing (see the court’s discussion of this issue); (2) the trial court correctly determined that the defendant was a “recidivist” as a result of the 1989 conviction, based on the statutory language in G.S. 14-208.6(2b) [prior conviction for an offense that is “described in” G.S. 14-208.6(4)], even though the 1989 conviction was not a “reportable conviction” because it predated the sex offender registration law; and (3) the issue whether satellite-based monitoring violates ex post facto was not properly preserved for appellate review.

Capital Case Issues

North Carolina Medical Board’s Position Statement on Physician Participation in Executions Is Inconsistent With G.S. 15-190

N.C. Department of Correction v. N.C. Medical Board, ___ N.C. ___, ___ S.E.2d ___ (1 May 2009). The court ruled that the North Carolina Medical Board’s (Board’s) position statement on physician participation in executions is inconsistent with G.S. 15-190. The court concluded: (1) the plain language of G.S. 15-190 envisions physician participation in executions in some professional capacity; and (2) the Board’s position statement exceeds its authority under Chapter 90 of the General Statutes because the statement directly contravenes the specific requirement of physician presence in G.S. 15-190.