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Criminal Case Update

District Court Judges Conference
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(includes cases decided from September 1, 2004 through June 7, 2005)

The following summaries are drawn primarily from Bob Farb's criminal case summaries.

I. Warrantless Stops and Searches

Seizure

Officers Did Not Seize Defendant Until They Detained Him After High Speed Vehicle Chase

State v. Leach, ___ N.C. App. ___, 603 S.E.2d 831 (2 November 2004). An informant advised law enforcement officers that he was going to make a drug purchase from the defendant at a specific location. When the defendant arrived there in his vehicle, the officers surrounded it. The defendant immediately backed away and led the officers on a high speed chase for nearly thirty miles. The court ruled, relying on California v. Hodari D., 499 U.S. 621 (1991) (person is not seized under Fourth Amendment until he or she submits to an officer's show of authority or physical force is applied by an officer), that the defendant was not seized under the Fourth Amendment until the officers physically restrained him after the chase. Thus, the defendant's abandonment of cocaine during the chase was not the fruit of a seizure.

Grounds for Seizure and Actions after Seizure

Officer Had Probable Cause to Make Investigative Stop of Vehicle for Speeding, a Readily Observed Traffic Violation

State v. Barnhill, 166 N.C. App. 228, 601 S.E.2d 215 (7 September 2004). The trial judge granted the defendant's motion to suppress evidence in a DWI and speeding trial because an officer did not have reasonable suspicion to make an investigative stop of a vehicle for speeding. The state appealed the ruling. The court, relying on State v. Wilson, 155 N.C. App. 89, 574 S.E.2d 93 (2002), noted that the standard for an investigative stop of a vehicle for a readily observed traffic violation, such as speeding, is probable cause, not reasonable suspicion. [Author's note: For a comment on *State v. Wilson*, see Robert L. Farb, *Arrest, Search, and Investigation in North Carolina*, p. 52, n. 103 (3d. ed. 2003).] The court then ruled that the officer had probable cause to stop the defendant's vehicle for speeding. The court rejected, as contrary to the rules of evidence, the trial judge's ruling that an officer must articulate objective criteria to corroborate his opinion of the vehicle's speed. The court stated that an officer's opinion may be based on personal observation. Also, the court stated that an officer need not have specialized training to be able to visually estimate a vehicle's speed. The court then examined the facts in this case and upheld the officer's stop of the vehicle for speeding: the officer had an unobstructed view of the vehicle as it traveled on a street, and his personal observation of its speed, coupled with the sound of the engine racing and the bouncing of the car as it passed through an intersection, established probable cause to believe that the

defendant was exceeding a speed greater than was reasonable and prudent under the existing conditions in violation of G.S. 20-141(a).

(1) Officer Had Probable Cause to Stop Vehicle for Seat Belt Violation, A Readily Observed Traffic Violation
(2) Reasonable Suspicion Supported Detention of Driver After Officer Had Issued Traffic Citation to Him

State v. Hernandez, ___ N.C. App. ___, 612 S.E.2d 420 (17 May 2005). The defendant was convicted of trafficking in cocaine. An officer stopped a vehicle driven by the defendant for a seat belt violation. While in the patrol car with the defendant, the officer ran a license and registration check, questioned the defendant about his travel plans, and issued him a citation. The defendant then gave consent to search the vehicle, and cocaine was found in the vehicle. The consent to search was given within six minutes of the defendant's detention in the vehicle. The court ruled: (1) the officer had probable cause to stop the vehicle for the seat belt violation (the officer saw the defendant remove the seat belt while still driving), a readily-observed traffic violation; and (2) the officer had reasonable suspicion to detain the defendant after issuing the citation, based on the defendant's extreme nervousness, conflicting statements about his travel plans, and air fresheners in the defendant's vehicle emitting a strong odor.

(1) Officer Had Probable Cause to Stop Vehicle for Seatbelt Violation, A Readily Observed Traffic Violation
(2) Officer Had Reasonable Suspicion to Require Passenger to Remain at Scene of Stopped Vehicle

State v. Brewington, ___ N.C. App. ___, ___ S.E.2d ___ (17 May 2005). The defendant was convicted of the felony of assault on a governmental officer with a deadly weapon, reckless driving, and being an habitual felon. An officer stopped a vehicle for a seatbelt violation by the driver; the defendant was a passenger. While talking to the driver, the officer made several observations of the defendant's suspicious conduct (see the facts set out in the court's opinion) and instructed him to remain in the vehicle. The driver was ordered out of the vehicle, and the officer conducted a consensual frisk and found cocaine on his person. While the officer was arresting the driver, the defendant moved behind the steering wheel and started to drive away. The officer attempted to stop the car by reaching for the key and was dragged by the moving vehicle. The defendant fled the scene and later was arrested in Ohio. The court ruled: (1) the officer had probable cause to stop the vehicle for the seatbelt violation, a readily-observed traffic violation (the officer saw that the driver was not wearing a seat belt); (2) the officer had reasonable suspicion to require the defendant to remain at the scene, based on the facts set out in the court's opinion (the court ruled, alternatively, that the car could be detained based on the discovery of cocaine on the driver, which provided probable cause to search the vehicle).

(1) Officer's Statement Was Admissible At Suppression Hearing Under Rule 801(d)(D) (Admission by Party-Opponent)
(2) Officer Did Not Have Probable Cause to Make Investigative Stop of Vehicle for Readily Observed Traffic Violation, a Seatbelt Violation

State v. Villeda, 165 N.C. App. 431, 599 S.E.2d 62 (20 July 2004). An officer stopped a vehicle driven by an Hispanic male for a seatbelt violation. He was later arrested for DWI and convicted in district court, and he appealed for trial de novo in superior court. The defendant moved to suppress evidence seized as a result of the traffic stop. A suppression hearing was conducted, and the trial judge granted the defendant's motion to suppress evidence related to the traffic stop and dismissed the DWI charge. (1) At the suppression hearing, the defendant presented testimony of three attorneys who had represented defendants in other cases involving this officer to show that the officer had stopped Hispanic males based on impermissible ethnic bias. The trial judge admitted their out-of-court conversations with the officer. The

state argued on appeal that their testimony concerning the officer's statements was inadmissible hearsay. The court ruled, relying on cases from other jurisdictions, that the officer's statements were admissible under Rule 801(d)(D) (statement offered against a party and is made by agent or servant concerning a matter within the scope of agency or employment and during existence of relationship). [Author's note: Rule 104(a) provides, in pertinent part, that preliminary questions concerning the admissibility of evidence shall be determined by the court, and in making its determination the court is not bound by the rules of evidence except those with respect to privileges. Thus hearsay is admissible at suppression hearings. See Robert L. Farb, *Arrest, Search, and Investigation in North Carolina*, pp. 21, 26, 83 (3d. ed. 2003).] (2) The court ruled, citing State v. Wilson, 155 N.C. App. 89, 574 S.E.2d 93 (2002), and other cases, that an officer must have probable cause to make an investigative stop of a vehicle for readily observed traffic violations, such as a seatbelt violation. The court ruled that the officer did not have probable cause to stop the defendant's vehicle for a seatbelt violation. Evidence showed that the officer could not see inside vehicles driving in front of him at night on the stretch of road on which the defendant was stopped, and thus supported the trial judge's finding that the allegation that the defendant was not wearing a seat belt was incredible. [Author's note: For a comment on *State v. Wilson*, see Robert L. Farb, *Arrest, Search, and Investigation in North Carolina*, p. 52, n. 103 (3d. ed. 2003).]

Fourth Amendment Requires Only That Officer Make Arrest Based on Probable Cause That Crime Was or Is Being Committed; Court Rejects Requirement That Offense Establishing Probable Cause Must Be Closely Related To, and Based on Same Conduct as, Offense Officer Identified When Arrest Occurred

Devenpeck v. Alford, 125 S. Ct. 588, 160 L. Ed. 2d 537 (13 December 2004). Based on information that the plaintiff had impersonated a law enforcement officer while using his vehicle to stop a motorist, an officer stopped the plaintiff's vehicle to investigate. The officer's suspicions about the plaintiff's impersonating an officer increased based on information learned after the stop. Another officer joined the stopping officer and discovered that the plaintiff had been taping his conversations with the two officers. The two officers discussed the possible violations to charge the plaintiff—a violation of state law concerning the taping of the conversations, impersonating an officer, and making a false representation to the officer—and arrested the defendant for the state law taping violation. However, a state appellate court ruling at the time of this arrest had clearly established that the plaintiff's taping was not unlawful. The plaintiff sued the officers for making an arrest without probable cause under the Fourth Amendment. A federal appellate court ruled that the officers did not have probable cause to arrest—it rejected the officers' claim that there was probable cause to arrest for impersonating an officer and making a false representation to an officer, because those offenses were not "closely related" to the offense (illegal taping) identified by the officers when they arrested the plaintiff. The Court reversed the federal appellate court's ruling. The Court ruled, relying on Whren v. United States, 517 U.S. 806 (1996), and Arkansas v. Sullivan, 532 U.S. 769 (2001), that the Fourth Amendment requires only that an officer arrest a person based on probable cause that crime was or is being committed. The Court rejected a requirement that an offense establishing probable cause must be closely related to, and based on the same conduct as, the offense the arresting officer identified when the arrest occurred. The Court stated that an officer's subjective reason for making an arrest need not be the criminal offense for which the known facts provide probable cause. [Author's note: The Court's ruling effectively overrules the "sufficiently related" analysis in Glenn-Robinson v. Acker, 140 N.C. App. 606, 617, 538 S.E.2d 601 (2000).]

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.

[Author's note: (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,* 359 N.C. 406, 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.]

(1) Detention of House Occupant in Handcuffs for Two to Three Hours During Execution of Search Warrant Concerning Gang Shooting Was Reasonable Under Fourth Amendment
(2) Questioning Concerning Immigration Status of House Occupant Detained During Execution of Search Warrant Concerning Gang Shooting Did Not Violate Fourth Amendment When Questioning Did Not Prolong Length of Detention

Muehler v. Mena, 125 S. Ct. 1465, 161 L. Ed. 2d 299 (22 March 2005). Officers obtained a search warrant for a house and premises to search for deadly weapons and evidence of gang membership related to an investigation of a gang-related drive-by shooting. A SWAT team and other officers (a total of 18 officers altogether) executed the warrant. Aware that the gang was composed primarily of illegal immigrants, an INS officer accompanied the officers. One or two officers guarded four occupants detained at the scene, who were handcuffed for about two to three hours while the warrant was executed. In addition, an INS officer questioned the occupants about their immigration status while the warrant was

executed. One of the occupants (the plaintiff in this case) sued the officers for allegedly violating her Fourth Amendment rights during the execution of the search warrant. (1) The Court ruled that the detention of the plaintiff in handcuffs was reasonable under the Fourth Amendment. The two to three hour detention in handcuffs in this case did not outweigh the officers' continuing safety interests. (2) The Court ruled that the 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. Mere questioning by law enforcement does not constitute a seizure.

Checkpoints

Court Remands to Trial Court Issues Concerning Constitutionality of Checkpoint

State v. Rose, ___ N.C. App. ___, 612 S.E.2d 336 (17 May 2005). The defendant was convicted of various offenses resulting from evidence seized from a vehicle at a vehicle checkpoint. Four of the five law enforcement officers running the checkpoint were narcotics officers. The trial judge denied the defendant's motion to suppress evidence based on the asserted unconstitutionality of the checkpoint. The court ruled that the case must be remanded to the trial court to determine the primary purpose of the checkpoint under City of Indianapolis v. Edmond, 531 U.S. 32 (2000), and the reasonableness of the checkpoint under Illinois v. Lidster, 540 U.S. 419 (2004).

II. *Miranda* Cases

Defendant During Investigative Stop Was Not in Custody Under *Miranda* to Require Officer to Give *Miranda* Warnings When Questioning Defendant During the Investigative Stop

State v. Sutton, ___ N.C. App. ___, 605 S.E.2d 483 (7 December 2004). An officer received information from a pharmacist that he had just filled a prescription for Oxycontin under suspicious circumstances. An officer arrived at the pharmacy's parking lot, conducted surveillance, and observed an apparent drug sale from the defendant to another person. He then made an investigative stop of the defendant, which the court ruled was supported by reasonable suspicion. The defendant then consented to a frisk and told the officer that he had two knives. The officer found two pocket knives but no contraband. When asked if he had any narcotics, the defendant said he had just filled a prescription. The officer took a pill bottle containing tablets from the defendant and asked how many pills were in the bottle. The defendant said he had filled a prescription for 180 tablets. The officer asked again how many pills were in the bottle. The defendant responded that he had given 45 tablets to a person in the parking lot. The court ruled, relying on State v. Benjamin, 124 N.C. App. 734, 478 S.E.2d 651 (1996), the defendant was not in custody under *Miranda* to require the officer to give *Miranda* warnings when questioning the defendant during this investigative stop.

Defendant Was Not in Custody Under *Miranda* When He Spoke with Military Superior About Criminal Charges

State v. Walker, ___ N.C. App. ___, 605 S.E.2d 647 (7 December 2004). The defendant, a U.S. Marine, was given *Miranda* warnings before questioning about a robbery by a deputy sheriff and military investigator. The next day while in the office of the defendant's military superior, a master gunnery sergeant, the sergeant asked the defendant why he had been questioned the prior day, if he had anything to do with "this mess," and if he was carrying a weapon during the incident involving the robbery. There was no evidence that the defendant felt he could not leave or that he had to answer the sergeant's questions. The court ruled that the defendant was not in custody under *Miranda* based on the ruling in

State v. Davis, 158 N.C. App. 1, 582 S.E.2d 289 (2003) (discussing custody standard when military member gives statement to superior).

Defendant Did Not Clearly Invoke Right to Counsel and Right to Remain Silent Under *Miranda*

State v. Ash, ___ N.C. App. ___, 611 S.E.2d 855 (19 April 2005). The defendant was arrested for murder and other offenses. After being advised during an officer's giving of *Miranda* rights of his right to have an attorney present, defendant asked, "Now?" The officer responded affirmatively. Defendant then asked, "Where's my lawyer at? [Inaudible] come down here?" The officer replied that the lawyer who was representing the defendant on a pending, but unrelated, breaking and entering charge had nothing to do "with what [he was] going to talk to [defendant] about." The defendant responded, "Oh, okay," and signed the waiver of rights form. The court ruled that the defendant did not clearly invoke his right to counsel under the ruling in Davis v. United States, 512 U.S. 452, 114 S. Ct. 2350, 129 L. Ed. 2d 362 (1994), and thus his *Miranda* rights were not violated. [Author's note: Concerning the applicability of the *Davis* ruling to the waiver of *Miranda* rights, see page 203 of Robert L. Farb, *Arrest, Search, and Investigation in North Carolina* (3d. ed. 2003).] During the officer's interrogation, the defendant confessed that he and others had planned to commit a robbery, but ended their plan when they drove by the murder victim's mobile home and observed all the interior lights illuminated there. After the officer asked the defendant whether he was "scared" when the gun "went off," defendant stated, "I don't want to talk no more 'cause you're talking some crazy shit now." The officer continued to question the defendant, stating, "You didn't even know how many people was [sic] in the house, did you?" The defendant responded, "That's why the fuck I didn't stop," and the interrogation continued. The defendant continued to deny his involvement in the crime, but admitted his participation after further questioning. The court ruled, relying on State v. Golphin, 352 N.C. 364, 533 S.E.2d 168 (2000), that the defendant did not clearly invoke his right to remain silent under *Miranda*. The court upheld the trial judge's finding that despite the defendant's statement about not talking any more, the defendant continued to talk without significant prompting by the officer.

(1) "Fruit of Poisonous Tree" Doctrine Did Not Apply to Bar Admission of Physical Evidence Discovered After *Miranda* Violation
(2) Officers' Statements to Defendant About His Cooperation Did Not Make Defendant's Statements Involuntary

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. (1) 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, 165 N.C. App. 865, 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. [Author's note: An officer's request for a consent search is not interrogation. See page 203 of Robert L. Farb, *Arrest, Search, and Investigation in North Carolina* (3d ed. 2003).] (2) The court ruled that the defendant's statements at the police station were not involuntary. The court noted that the officers made general statements that they would advise the district attorney and judge of the defendant's cooperation and did not make any representations concerning what, if any, benefit the defendant's cooperation would bring.

III. Evidence

Crawford Cases

(1) Victim's Statements Concerning Her Kidnapping and Assault Made Immediately After Her Rescue by Officers Were Not in Response to "Police Interrogation" and Were Not Testimonial Under *Crawford v. Washington*, and Their Admission Did Not Violate Defendant's Sixth Amendment Right to Confrontation—Ruling of Court of Appeals Is Affirmed
(2) Victim's Statements Were Properly Admitted as Excited Utterances Under Rule 803(2)—Ruling of Court of Appeals Is Affirmed

State v. Forrest, 164 N.C. App. 272, 596 S.E.2d 22 (18 May 2004), *affirmed per curiam*, ___ N.C. ___, 611 S.E.2d 833 (5 May 2005). The court affirmed, per curiam and without an opinion, the ruling of the court of appeals. The defendant was convicted of first-degree kidnapping, assault with a deadly weapon, and assault on a law enforcement officer involving the defendant's holding the victim at knife point and officers' rescuing the victim and subduing the defendant. The victim did not testify at trial. (1) The court of appeals ruled that the victim's statements concerning her kidnapping and assault made immediately after her rescue by officers were not in response to "police interrogation" and were not testimonial under *Crawford v. Washington*, 541 U.S. 36 (2004), and their admission did not violate the defendant's Sixth Amendment right to confrontation. The court stated that the victim had no time for reflection or thought. The detective to whom she made the statements testified that she did not have to ask questions because the victim "immediately abruptly started talking." The victim was nervous, shaking, and crying. Her demeanor never changed during her conversation with the detective. Although the detective was at the scene specifically to respond to the victim and later asked some questions, the detective did not question the victim until after she "abruptly started talking." The court stated that the conversation was not the result of "police interrogation" under *Crawford*. In addition, the victim 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. (2) The court of appeals ruled, relying on State v. Guice, 141 N.C. App. 177, 541 S.E.2d 474 (2000), that the victim's statements were properly admitted as excited utterances under Rule 803(2).

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, 166 N.C. App. 477, 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. [Author's note: 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) **(Author's note: The North Carolina Supreme Court has granted the state's petition to review this ruling.)**. 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).

State Firearms Expert's Opinion Testimony at Trial and Introduction of Lab Report Prepared by Another Expert Did Not Violate *Crawford v. Washington*

State v. Walker, ___ N.C. App. ___, ___ S.E.2d ___ (7 June 2005). The defendant was convicted of first-degree murder. A SBI agent (Santora), a firearms identification examiner, examined the evidence (two bullets retrieved from the victim's body and the defendant's gun), including test firings, and prepared a report that the bullets were fired from the defendant's gun. The agent did not testify at the defendant's trial. Another SBI agent (Ware), the supervisor of that agent, testified at the defendant's trial as a firearms identification expert, and he opined that the two bullets retrieved from the victim's body were fired from the defendant's gun. He testified that he reviewed the notes and report of the other agent, independently examined the firearms evidence, and his conclusions accorded with the other agent's report. The report was admitted into evidence. The court ruled the evidence was properly admitted for non-testimonial purposes under *Crawford v. Washington*, 541 U.S. 36 (2004), because it was corroborative of the testifying agent's testimony and helped form the basis of the testifying expert's opinion (the testifying agent was entitled to use the report to form his opinion). The court noted that under *Crawford* when evidence is admitted for a purpose other than the truth of the matter asserted, the protection afforded by the Confrontation Clause against testimonial statements is not at issue. And the defendant was afforded the opportunity to cross-examine the testifying agent about the basis of his expert opinion. The court ruled that there was no *Crawford* violation.

Expert Testimony in Child Sex Cases

(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 the 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.

Impeachment

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.

IV. Criminal Offenses

Assaults and Related Offenses

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.

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. [Author's note : 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.

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."

(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. (Author's note: Although the court ruled that the felony stalking statute is not unconstitutionally vague, its ruling clearly applies to both felony and misdemeanor stalking because the statutory language to which the court referred applies to both offenses.) (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.

Sufficient Evidence to Support Conviction of Felony Stalking

State v. Snipes, ___ N.C. App. ___, 608 S.E.2d 381 (15 February 2005). The defendant was indicted for felony stalking under G.S. 14-277.3, which makes stalking a Class H felony if the offense is committed when there is a court order in effect prohibiting stalking behavior. The state's evidence showed that during the nine-month period alleged in the indictment, there was a court order in effect that required the defendant to refrain from contacting the stalking victim. During those nine months, about 50 different times the defendant followed the victim a short distance away on his bicycle as she walked to her cousin's house. On the night he assaulted her, he approached her with a knife, causing her to immediately begin knocking on the door of a nearby residence, and she feared for her life.

Trial Judge Did Not Err in Not Submitting Lesser Offense in Trial of Assault with Deadly Weapon on Government Official Because Defendant's Driving His Vehicle at High Speed Toward Officers Constituted Deadly Weapon As Matter of Law

State v. Batchelor, ___ N.C. App. ___, 606 S.E.2d 422 (4 January 2005). The defendant was convicted of multiple charges, including four counts of assault with a deadly weapon on a government official. The defendant drove his vehicle directly at an officer standing near a driveway and later during a chase drove his vehicle directly toward three law enforcement vehicles, crashing into one of them. The court ruled that the trial judge did not err in not submitting assault on a government official as a lesser offense because the defendant's driving his vehicle at a high speed toward the officers constituted a deadly weapon as a matter of law.

Court, Per Curiam and Without an Opinion, Affirms Ruling of Court of Appeals That Dog Used By Defendant To Attack Law Enforcement Officers Was Sufficient Evidence Of Deadly Weapon To Support Defendant's Convictions of Assault With a Deadly Weapon on a Governmental Official

State v. Cook, 359 N.C. 185, 606 S.E.2d 118 (17 December 2004), affirming, 164 N.C. App. 139, 594 S.E.2d 819 (4 May 2004). The court, per curiam and without an opinion, affirmed a ruling of the North Carolina Court of Appeals, 164 N.C. App. 139, 594 S.E.2d 819 (4 May 2004), that a dog used by the defendant to attack two law enforcement officers was sufficient evidence of a deadly weapon to support the defendant's convictions of assault with a deadly weapon on a governmental official. The court stated that a dog may be considered a deadly weapon when ordered to attack another person, as occurred in this case.

Sexual Offenses

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, 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), 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."

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.

Rape Victim Who Was Fifteen Years, Eleven Months of Age at Time of Offense Was "15 Years Old" Under G.S. 14-27.7A (Statutory Rape or Sexual Offense of Person Who Is 13, 14, or 15 Years Old)

State v. Roberts, ___ N.C. App. ___, 603 S.E.2d 373 (19 October 2004). The court ruled, distinguishing State v. McGaha, 306 N.C. 699, 295 S.E.2d 449 (1982), that a rape victim who was fifteen years, eleven months of age at time of offense was "15 years old" under G.S. 14-27.7A (statutory rape or sexual offense of person who is 13, 14, or 15 years old).

Weapons Offenses

Defendant's Conviction of Possessing Firearm by Felon Did Not Violate Ex Post Factor 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.

Property Offenses

Insufficient Evidence of Embezzlement When Employee Took Corporate Signature Stamp Without Permission and Wrote Unauthorized Checks—Ruling of Court of Appeals Is Affirmed

(1) Store Employee Qualified as "Clerk" For Embezzlement Under G.S. 14-90
(2) Sufficient Evidence of Embezzlement Under G.S. 14-90 When Store Employee Engaged in "Underringing," "Free Bagging," and "Markdown Fraud"

State v. Robinson, ___ N.C. App. ___, 603 S.E.2d 345 (19 October 2004). The defendant, a store employee selling merchandise (her title was "merchandise associate"), was convicted of embezzlement under G.S. 14-90. The evidence showed that the employee engaged in "underringing," free bagging," and "markdown fraud," described by the court as follows. "Underringing" occurs when an employee receives merchandise from a customer for purchase, and the employee keys in a price on the cash register lower than the price stated on the price tag. "Free bagging" occurs when a customer presents multiple items for purchase at a cash register and the employee rings up fewer than all of the items, but places all of the items in a bag for the customer to take from the store. "Markdown fraud" occurs when an employee takes an item from the sales floor to a markdown machine, creates a price tag for the item that is lower than the true price of the item, and then purchases the item at the lower price. (1) The court ruled that the store employee qualified as a "clerk" for embezzlement under G.S. 14-90. A "merchandise associate" is the same as a "clerk." (2) The court ruled that there was sufficient evidence to support the defendant's conviction under G.S. 14-90 for the acts of "underringing," "free bagging," and "markdown fraud." Testimony also showed that all store employees, including the defendant, were entrusted with the store's merchandise.

Insufficient Evidence of Embezzlement When Employee Took Corporate Signature Stamp Without Permission and Wrote Unauthorized Checks—Ruling of Court of Appeals Is Affirmed

State v. Weaver, 359 N.C. 246, 607 S.E.2d 599 (4 February 2005), affirming, 160 N.C. App. 613, 586 S.E.2d 841 (21 October 2003). The court ruled, affirming the ruling of the court of appeals, 160 N.C. App. 613, 586 S.E.2d 841 (21 October 2003), that there was insufficient evidence of embezzlement when

an employee took a corporate signature stamp without permission and wrote unauthorized checks, thereby misappropriating corporate funds from her employer. The court concluded that the employee did not lawfully possess or control the misappropriated funds, and therefore the crime of embezzlement did not occur. The court reversed the defendant's convictions for aiding and abetting the employee to commit embezzlement and conspiracy to commit embezzlement. The court stated that the appropriate charges against the defendant should have been aiding and abetting larceny and conspiracy to commit larceny.

Allegation of "City of Asheville Transit and Parking Services" as Owner of Parking Meters Was Not Legal Entity Capable of Owning Property and Thus Convictions of Larceny and Injury to Personal Property Must Be Vacated, But Convictions of Breaking Into Coin-Operated Machine Need Not Be Vacated

State v. Price, ___ N.C. App. ___, ___ S.E.2d ___ (7 June 2005). The court ruled that the allegation of "City of Asheville Transit and Parking Services" as the owner of parking meters was not a legal entity capable of owning property, and thus the defendant's convictions of larceny and injury to personal property must be vacated. The court relied on State v. Strange, 58 N.C. App. 756, 294 S.E.2d 403 (1982) ("Granville County Law Enforcement Association" did not state legal entity capable of owning property), and distinguished State v. Turner, 8 N.C. App. 73, 173 S.E.2d 642 (1970) ("City of Hendersonville" denoted municipal corporation authorized to own personal property). However, the court ruled that the allegation of "City of Asheville Transit and Parking Services" as the owner of the parking meters did not require vacating the defendant's convictions of breaking into a coin-operated machine under G.S. 14-56.1, because an allegation of ownership was not required for that offense. The court relied on an analogous ruling in State v. Norman, 149 N.C. App. 588, 562 S.E.2d 453 (2002) (unnecessary to allege ownership of building for breaking or entering; it is only necessary to identify building with reasonable particularity).

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 powder 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. ___, 612 S.E.2d 172 (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.

V. Defenses

Trial Judge Erred in Habitual DWI Trial in Not Submitting Necessity Defense

State v. Hudgins, ___ N.C. App. ___, 606 S.E.2d 443 (4 January 2005). The defendant was convicted of habitual DWI. 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.

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 requested that N.C.P.I. Crim. 310.10 (compulsion, duress, or coercion) be given. 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.

Defendant Was Not Entitled to Defense of Accident When Gun Allegedly Accidentally Discharged While Defendant Was Engaged in Unlawful Conduct

State v. Gattis, 166 N.C. App. 1, 601 S.E.2d 205 (7 September 2004). The defendant was convicted of first-degree murder for the death of his estranged wife, first-degree burglary for breaking into her apartment, and assault with a deadly weapon for shooting at another apartment occupant. The defendant contended that his gun discharged accidentally during a struggle with the murder victim. The court ruled, relying on State v. Riddick, 340 N.C. 338, 457 S.E.2d 728 (1995), that the defendant was not entitled to the defense of accident when the gun allegedly accidentally discharged while the defendant was engaged in unlawful conduct. The defendant unlawfully entered the murder victim's home with a loaded gun, threatened both the murder and assault victims, unlawfully fired the gun and reloaded it, and struck the murder victim in the head with the gun before the fatal bullet was fired.

VI. Criminal Procedure

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.

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. ___, 611 S.E.2d 891 (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.

Short-Form Murder Indictment Is Not Unconstitutional Under *Blakely v. Washington*

State v. Walker, ___ N.C. App. ___, ___ S.E.2d ___ (7 June 2005). The court ruled that the short-form murder indictment is not unconstitutional under the ruling in Blakely v. Washington, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004).

VII. Sentencing

Apprendi and *Blakely* Cases

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

State v. Allen, 166 N.C. App.139, 601 S.E.2d 299 (7 September 2004). **(Author's note: The North Carolina Supreme Court has granted the state's petition to review this ruling.)** The defendant was convicted of felonious child abuse inflicting serious bodily injury. The trial judge found as an 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. [Author's note: For an analysis of the *Blakely* ruling, see "*Blakely v. Washington* and North Carolina's Sentencing Laws," at http://ncinfo.iog.unc.edu/programs/crimlaw/faculty.htm.]

See also State v. Speight, 166 N.C. App. 106, 602 S.E.2d 4 (7 September 2004) **(Author's note: the North Carolina Supreme Court has granted the state's petition to review this ruling.)** [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 (Author's note: 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), the 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.

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.

Will U.S. Supreme Court Apply *Apprendi* and *Blakely* to Prior Convictions? (summary by Rubin)

Shepard v. United States, 125 S. Ct. 1254, 161 L. Ed. 2d 205 (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 that the Court has extended *Apprendi* to prior convictions, the Court stated 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,* stated 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.

Proof of Prior Convictions

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. ___, 611 S.E.2d 864 (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.

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.

Probation Conditions

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(b2)(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.