

## **DOUBLE JEOPARDY**

### **Convictions of Both Second-Degree Murder and DWI Did Not Violate Double Jeopardy**

*State v. Armstrong*, \_\_\_ N.C. App. \_\_\_, \_\_\_ S.E.2d \_\_\_ (20 April 2010).

The defendant drove while impaired and crashed his vehicle, resulting in the death of his passenger. The court ruled that double jeopardy does not prohibit the convictions of both second-degree murder and DWI; the court relied on *State v. McAllister*, 138 N.C. App. 252 (2000).

### **Double Jeopardy Did Not Bar Second Trial on Indictment of Felony Possession of Stolen Goods After Defendant Initially Had Been Tried Under That Indictment But Judge Had Erroneously Instructed Jury on Felony Possession of Motor Vehicle Under G.S. 20-106, and Appellate Court Had Reversed Conviction of Felony Possession of Motor Vehicle**

*State v. Rahaman*, \_\_\_ N.C. App. \_\_\_, 688 S.E.2d 58 (19 January 2010).

The defendant was indicted for felony possession of stolen goods (Toyota truck) under G.S. 14-71.1. The trial court erroneously instructed the jury on felony possession of a stolen motor vehicle under G.S. 20-106. The defendant appealed his conviction of felony possession of a stolen motor vehicle to the North Carolina Court of Appeals, which arrested judgment on that conviction. The state then prosecuted the defendant on the same indictment for a violation of G.S. 14-71.1, and the defendant was convicted of that offense. The court ruled that double jeopardy did not bar the second trial because the trial court's error at the first trial did not amount to an acquittal of the crime of possession of stolen goods; thus, the defendant could be retried for that offense.

### **Double Jeopardy Does Not Prohibit Convictions of Both Possession With Intent to Sell or Deliver Marijuana and Felony Possession of Same Marijuana**

*State v. Springs*, \_\_\_ N.C. App. \_\_\_, 683 S.E.2d 432 (6 October 2009).

The court ruled that double jeopardy does not prohibit convictions of both possession with intent to sell or deliver marijuana and felony possession of the same marijuana. The court relied on the ruling in *State v. Pipkins*, 337 N.C. 431 (1994) (defendant properly convicted of both felony possession of cocaine and trafficking by possessing cocaine), and its explicit overruling of *State v. Williams*, 98 N.C. App. 405 (1990) (defendant may not be convicted of both felonious possession of cocaine and possessing with intent to sell or deliver the same cocaine), and *State v. Oliver*, 73 N.C. App. 118 (1985) (same ruling).

### **Second Degree Murder and Accessory After the Fact to First Degree Murder Are Mutually Exclusive**

*State v. Keller*, \_\_\_ N.C. App. \_\_\_, \_\_\_ S.E.2d \_\_\_ (Aug. 4, 2009).

A defendant may not be convicted of second-degree murder and accessory after the fact to first-degree murder. The offenses are mutually exclusive.

### **Apparent Inconsistency Between Jury's Verdicts of Not Guilty on Some Charges and Inability to Reach Verdicts (Hung Jury) on Other Charges at Same Trial Does Not Affect Not Guiltys' Preclusive Effect Under Double Jeopardy Clause**

*Yeager v. United States*, 129 S. Ct. 2360, 174 L. Ed. 2d 78 (18 June 2009).

A jury at a federal criminal trial acquitted the defendant of fraud charges but failed to reach a verdict (hung jury) on insider-trading and money-laundering charges. The defendant moved to dismiss the insidertrading and money-laundering charges on the ground that the jury, by acquitting him of the fraud charges, had necessarily decided that he did not possess material, nonpublic information, and the issue-preclusion component (commonly known as collateral estoppel) of the Double Jeopardy Clause barred a second trial for the insider-trading and money-laundering charges. (For example, if the possession of insider information was a critical issue of fact in all of the charges against the defendant, a jury verdict that necessarily decided that issue in his favor protects him from prosecution for any charge for which that is an essential element.) The Court ruled, relying on *Ashe v. Swenson*, 397 U.S. 436 (1970), that the apparent inconsistency between the jury's not guilty verdicts and its inability to reach verdicts on other charges did not affect the not guilty's preclusive effect under the Double Jeopardy Clause. The Court remanded the case to allow the government an opportunity to argue in the federal court of appeals that a factual analysis of the evidence and verdicts does not support the defendant's double jeopardy argument. [Author's note: The Court's ruling in this case does not affect the United States Supreme Court ruling in *United States v. Powell*, 469 U.S. 57 (1984) (defendant may not successfully challenge guilty verdicts that may have been inconsistent with not guilty verdicts rendered at same trial).]

### **Double Jeopardy Clause Did Not Bar Ohio Courts From Determining Whether Defendant Was Mentally Retarded That Would Prevent Imposition of Death Penalty**

*Bobby v. Bies*, 129 S. Ct. 2145, 173 L. Ed. 2d 1173 (1 June 2009).

The federal habeas corpus petitioner was convicted of murder in state court and sentenced to death. A federal appellate court reversed the death sentence on double jeopardy grounds concerning the defendant's alleged mental retardation. The Court ruled that the Double Jeopardy Clause did not bar Ohio courts from determining whether the defendant was mentally retarded that would prevent the imposition of the death penalty. [Author's note: See the Court's opinion for its discussion of the facts and law and the federal appellate court's "fundamentally misperceived" (Court's description) application of the Double Jeopardy Clause that the Court reversed.]

### **Double Jeopardy Prohibits Convictions of Both Accessory After Fact of First-Degree Murder and Accessory After Fact of First-Degree Kidnapping When Jury Could Have Found That Accessory After Fact of First-Degree Murder Was Based Solely on Kidnapping Under Felony Murder Rule**

*State v. Best*, \_\_\_ N.C. App. \_\_\_, 674 S.E.2d 467 (3 February 2009).

The defendant was convicted of three counts of accessory after the fact to first-degree murder and three counts of accessory after the fact to first-degree kidnapping, based on assistance to others who had killed three people. The court ruled, relying on *State v. Gardner*, 315 N.C. 444 (1986), that double jeopardy prohibited convictions of both accessory after fact of

first-degree murder and accessory after fact of first-degree kidnapping when the jury could have found that accessory after fact of first-degree murder was based solely on kidnapping under felony murder rule. The jury's verdict did not indicate whether it found the first-degree murder element based on premeditation and deliberation or felony murder based on first-degree kidnapping, or both. The court arrested judgment on the defendant's convictions of accessory after the fact to first-degree kidnapping.

### **(1) Double Jeopardy Did Not Bar Convictions and Punishments for Both Indecent Liberties and Using Minor in Obscenity**

*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.

### **(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: (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.

**(5) 30-Day DWI Civil License Revocation Was Not Punishment Under Double Jeopardy Clause to Bar Later Prosecution of DWI Charge**

*State v. Hinchman*, \_\_\_ N.C. App. \_\_\_, 666 S.E.2d 199 (16 September 2008).

The defendant was convicted of DWI. On June 23, 2004, a trooper arrested the defendant for DWI and transported him to a hospital to obtain a blood sample, which was then sent to the SBI for a chemical analysis. An SBI chemical analyst completed a lab report on August 30, 2004, indicating a BAC of 0.10. On September 16, 2004, the lab report was served on the defendant. The trooper filed an affidavit and revocation report with the district court on November 2, 2004. The district court entered a revocation order on November 5, 2004, revoking the defendant's driver's license for a minimum of 30 days under G.S. 20-16.5. The defendant surrendered his license and did not request an hearing to contest the validity of the revocation order as provided in G.S. 20-16.5(g). A district court judge issued an order dismissing the DWI charge because the 140-day delay in revoking his driver's license was punishment under the Double Jeopardy Clause that prohibited the DWI prosecution. The state appealed the district court judge's order to superior court, which vacated the ruling. The defendant was then convicted of DWI in district court and later in superior court. He then appealed to the North Carolina Court of Appeals. (5) The court ruled, relying on *State v. Evans*, 145 N.C. App. 324 (2001), that the 30-day DWI civil license revocation was not punishment under Double Jeopardy Clause to bar the later prosecution of the DWI charge. The court rejected the defendant's argument that the delay of 135 days between the defendant's arrest and the license revocation in effect was punishment under the Double Jeopardy Clause.

**Court, Per Curiam and Without Opinion, Affirms Court of Appeals Ruling That Defendant's Double Jeopardy Challenge to Convictions of Two Sexual Offenses Arising From Single Transaction Was Not Preserved for Appellate Review, and Even If It Was Preserved, Double Jeopardy Was Not Violated Because Multiple Sex Acts Occurring During Single Transaction Are Separate Offenses**

*State v. Goyal*, 362 N.C. 342, 661 S.E.2d 732 (12 June 2008), affirming, 186 N.C. App. 308, 651 S.E.2d 279 (16 October 2007).

The defendant was convicted of two counts of first-degree sexual offense (cunnilingus and fellatio) and other offenses. All offenses arose from a single transaction involving a child, the child's mother (the defendant),

and a male. The court, per curiam and without an opinion, affirmed the ruling of the North Carolina Court of Appeals that the defendant's double jeopardy challenge to the convictions of two sexual offenses arising from a single transaction was not preserved for appellate review, and even if it was preserved, double jeopardy was not violated because multiple sex acts occurring during a single transaction are separate offenses, citing *State v. James*, 182 N.C. App. 698, 643 S.E.2d 34 (2007), and *State v. Dudley*, 319 N.C. 656 (1987).

### **City Ordinance Prohibiting Registered Sex Offenders from Knowingly Entering Any Public Park Owned, Operated, or Maintained by City Did Not Violate Their Due Process Rights to Intrastate Travel—Ruling of Court of Appeals Is Affirmed**

*Standley v. Town of Woodfin*, 362 N.C. 328, 661 S.E.2d 728 (12 June 2008), affirming, 186 N.C. App. 134, 650 S.E.2d 618 (2 October 2007). The court ruled that a city ordinance prohibiting registered sex offenders from knowingly entering any public park owned, operated, or maintained by the city did not violate their due process right to intrastate travel. The court determined that this right is not fundamental, so the ordinance needed only to meet a rational basis test, which the court concluded it did.

### **Defendant's Federal Drug Convictions Did Not Bar State Prosecution of Drug Charges Under G.S. 90-97**

*State v. Delrosario*, \_\_\_ N.C. App. \_\_\_, 661 S.E.2d 283 (3 June 2008). The court ruled that the defendant's federal drug convictions did not bar the state prosecution of drug charges under G.S. 90-97 (acquittal or conviction under federal law or another state's law of same act bars prosecution in North Carolina state court). The defendant was convicted in state court for offenses that occurred on July 20, 2001. Although the federal court had considered the defendant's offenses on July 20, 2001, for sentencing purposes, the defendant was neither charged nor convicted in federal court for acts committed on that date.

### **Constitutional Law -- Double Jeopardy -- Punishment for both First-Degree Kidnapping and Underlying Sexual Assault**

*State v. Daniels*, 189 NC App 705 (07-1202) (15 April 2008)  
The trial court erred by sentencing defendant for both first-degree kidnapping and first-degree rape where the same sexual assault served as the basis for both convictions, and at the resentencing hearing the trial court may arrest judgment on the first-degree kidnapping conviction and resentence defendant for second-degree kidnapping, or arrest judgment on

the first-degree rape conviction and resentence defendant on the first-degree kidnapping conviction, because: (1) a defendant may not be punished for both the first-degree kidnapping and the underlying sexual assault; (2) where the jury is presented with more than one theory upon which to convict a defendant and does not specify which one it relied upon to reach its verdict, such a verdict is ambiguous and should be construed in favor of defendant; (3) the jury returned a verdict of guilty of first-degree kidnapping but did not specify on which theory it relied in reaching its verdict, and the Court of Appeals was required to assume that the jury relied on defendant's commission of the sexual assault in finding him guilty of first-degree kidnapping; and (4) the State acknowledged the defect.

## **(2) Constitutional Law--Double Jeopardy--Discharging Weapon into Occupied Property -- First-Degree Murder**

*State v. Jackson, 189 NC App 747 (07-695) (15 April 2008)*

(2) Defendant was not convicted of discharging a weapon into occupied property in violation of the double jeopardy clause where he contended that discharging a weapon was an element necessary to establish first-degree murder in this case. The relevant inquiry is into the elements of the crimes, not whether the same fact scenario fulfills the elements of the two distinct crimes. The merger doctrine has been held not to apply in North Carolina.

## **(2) No Double Jeopardy Violation Involving Conviction of Possession of Firearm by Felon**

*State v. Coltrane, 188 N.C. App. 498, 656 S.E.2d 322 (5 February 2008).*

The defendant was convicted of possession of a firearm by felon. (2) The court ruled, relying on *State v. Wood, 185 N.C. App. 227, 647 S.E.2d 679 (2007)*, that there was no double jeopardy violation involving the defendant's conviction. The defendant was not punished twice for the underlying felony conviction; instead, he was punished for the first time for the offense under G.S. 14- 415.1(a).

## **No Double Jeopardy Bar to Prosecute Resisting, Delaying, or Obstructing Public Officer After Acquittal of Assault on Government Officer Based on Same Incident**

*State v. Newman, 186 N.C. App. 382, 651 S.E.2d 584 (16 October 2007).*

The defendant was tried in district court for resisting, delaying, or obstructing a public officer (RDO), second-degree trespass, and assault on a government officer. The defendant was convicted of the RDO and

trespass charges and found not guilty of the assault. The defendant appealed the two convictions for trial de novo in superior court. The superior court judge dismissed the RDO charge, and the state appealed. The court ruled that the state had the right to appeal the dismissal. The court then ruled that there was no double jeopardy bar to prosecute RDO after the acquittal of the assault charge. The court noted North Carolina case law that RDO is neither the same nor a lesser offense of the assault charge. The court noted, however, that there could still be a double jeopardy bar based on the same-evidence test for double jeopardy set out in *State v. Summrell*, 282 N.C. 157 (1982). After examining the evidence, the court ruled there was no double jeopardy violation because there was different evidence to support the RDO and assault charges. [Author's note: The court was bound by the Summrell ruling and thus was required to apply the same-evidence test. However, that test does not appear to be a component of double jeopardy analysis, because the United States Supreme Court applies an elements test—but not an additional same-evidence test. See, for example, *United States v. Dixon*, 509 U.S. 688 (1993).]

### **(3) Possession of Firearm by Felon Does Not Violate Double Jeopardy**

*State v. Wood*, \_\_\_ N.C. App. \_\_\_, 647 S.E.2d 679 (7 August 2007).

(3) The court ruled that possession of a firearm by felon does not violate double jeopardy.

### **Constitutional Law -- Double Jeopardy -- Acting in Concert -- Jury Instructions**

*State v. Graham*, 145 N.C. App. 483 (2001)

The trial court committed plain error in a first-degree rape, first-degree sexual offense, and taking indecent liberties case by its jury instructions on those counts where defendant was convicted on the theory of acting in concert with his co-participant, because: (1) use of the pattern jury instruction without amendments allowed the jury to convict defendant based on acting in concert regardless of whether the jury believed that defendant had acted together with his co-participant as the co-participant committed the offense, or whether defendant committed the offense acting alone; and (2) since defendant was separately convicted for all of the same offenses based on his own actions, the instructions allowed defendant to be convicted twice for the same offense in violation of his right to be free from double jeopardy. U.S. Const. amends. V and XIV; N.C. Const. art. I, § 19.

### **Constitutional Law--Double jeopardy--Habitual misdemeanor assault--Recidivist statutes—Sentence enhancers**

*State v Massey 179 NCA 803 (2006)*

Despite numerous appellate rules violations, the Court of Appeals exercised its discretionary authority under N.C. R. App. P. 2 and determined that the **trial court did not violate the Fifth Amendment prohibition against double jeopardy by convicting defendant of habitual misdemeanor assault** even though defendant contends the Apprendi, Blakely, and Allen cases allegedly prohibit the use of sentence enhancers, because: (1) despite challenges to the constitutionality of N.C.G.S. § 14-33.2, the Court of Appeals has conclusively upheld the habitual misdemeanor assault statute in *State v. Carpenter*, 155 N.C. App. 35 (2002), which was two years after the United States Supreme Court's decision in *Apprendi v. New Jersey*, 530 U.S. 466 (2000); (2) recidivist statutes, or repeat-offender statutes, survive constitutional challenges in regard to double jeopardy challenges since they increase the severity of the punishment for the crime being prosecuted and do not punish a previous crime a second time; (3) contrary to defendant's assertion, *Blakely v. Washington*, 542 U.S. 466 (2004), explicitly permits sentence enhancements provided that sentence enhancements, with the exception of prior convictions, are found beyond a reasonable doubt by the jury; (4) our Supreme Court noted in *State v. Allen*, 359 N.C. 425 (2005), that the crux of *Blakely* was to eliminate fact-finding by the court that increased a defendant's sentence beyond the statutory maximum; and (5) *Apprendi* and *Blakely* applied the Sixth Amendment right to a jury trial to sentence enhancements whereas defendant's argument is directed at the Fifth Amendment prohibition against double jeopardy.

### **3. Constitutional Law-Double jeopardy-Multiple counts of keeping motor vehicle for keeping or selling controlled substance-Continuing offense**

*State v Calvino 179 NCA 219 (2006)*

The trial **court violated defendant's right** against double jeopardy by entering judgment on multiple counts of keeping a motor vehicle for the purpose of keeping or selling a controlled substance, because the **offense is a continuing offense**.

### **1. Constitutional Law\_double jeopardy\_possession of firearm by felon\_basis for second conviction\_habitual felon sentence**

*State v Crump 178 NCA 717 (2006)*

Defendant was not subjected to multiple punishments in violation of double jeopardy by the State's use of his 1998 conviction for possession of a firearm by a felon to support his current conviction of possession of a firearm by a felon and his sentence as an habitual felon.

## **2. Constitutional Law\_double jeopardy\_firearms possession by felon\_two offenses\_no violation**

*State v Crump 178 NCA 717 (2006)*

Defendant was not subjected to double jeopardy where he was convicted of a cocaine offense in 1991, possession of a firearm by a felon in 1998, and possession of a firearm by a felon again in 2003. Defendant was convicted and punished in 2003 only for the latest offense and did not receive multiple punishments for the 1991 conviction.

## **4. Criminal Law--Instruction--Aggressor--Collateral estoppel-Double jeopardy**

*State v. Herndon 177 NCA 353 (2006).*

The trial court did not commit plain error in a voluntary manslaughter case by giving the jury an aggressor instruction where an earlier jury in defendant's first trial allegedly previously determined he was not the aggressor, because: (1) the **doctrine of collateral estoppel did not apply, nor did jeopardy attach, when no unanimous verdict was reached by the earlier jury about whether defendant was the aggressor;** and (2) the note from the prior jury stating it had determined that defendant was not the aggressor merely demonstrated a moment in time during the jury deliberations. **See Farb's notes p. 22**

## **12. Constitutional Law\_double jeopardy\_assault and attempted murder**

*State v Reid 175 NCA 613 (2006)*

Convictions for attempted murder and assault with a deadly weapon with intent to kill inflicting serious injury based on the same act are not a violation of double jeopardy. Each offense requires proof of at least one element that the other does not.

## **5. Constitutional Law\_double jeopardy\_convictions for assault with a deadly weapon and attempted voluntary manslaughter**

*State v Yang, 174 NCA 755 (2005)*

**Double jeopardy was violated by convictions for assault with a deadly weapon inflicting serious injury with intent to kill and attempted voluntary manslaughter.** Where a felonious assault offense includes intent to kill as an element, attempted voluntary manslaughter is a **lesser included offense of the assault.**

## **6. Constitutional Law\_double jeopardy\_felony murder and underlying felony**

*State v Oglesby, 174 NCA 658 (2005)*

The trial court violated Double Jeopardy by sentencing defendant for both first-degree kidnapping and attempted robbery where the jury had been instructed that both could be the underlying felony for felony murder. While there is an argument that judgment could be entered on neither underlying felony, prior Court of Appeal decisions require arrest of judgment on one of those felonies.

## **2. Constitutional Law--double jeopardy--malicious conduct by prisoner--misdemeanor assault of government employee**

*State v Artis, 174 NCA 668 (2005)*

The trial **court did not violate defendant's right against double jeopardy** by entering judgment for both malicious conduct by a prisoner and habitual misdemeanor assault even though identical conduct was alleged to establish both malicious conduct by a prisoner and the current misdemeanor assault of a government employee, because: (1) **when it is clear that defendant's conduct is violative of two separate and distinct social norms, the fact that both convictions arise out of the same conduct does not violate the double jeopardy clause;** (2) malicious conduct by a prisoner requires only that a bodily fluid or excrement be thrown at a government official whereas misdemeanor assault on a governmental official requires that the official either be touched by the instrument of assault or reasonably fear such a touching; and (3) the legislature intended to punish two different types of behavior even though defendant's conduct was the same for both offenses.

## **6. Constitutional Law--double jeopardy--assault**

*State v McKoy, 174 NCA 105 (2005)*

The trial **court violated defendant's right to be free of double jeopardy** when it sentenced him in 03 CRS 79519 for both assault with a deadly weapon inflicting serious injury and assault inflicting serious injury, and in 03 CRS 71958 for both assault inflicting serious bodily injury and assault with a deadly weapon inflicting serious injury, because: (1) N.C.G.S. § 14-33(c)(1) provides, just as N.C.G.S. § 14-32.4 does, that the section does not apply if the conduct is covered under some other provision of law providing greater punishment; and (2) although the evidence establishes assaults on two different days, it does not establish that two separate and distinct assaults occurred on each of the dates in question as opposed to multiple injuries arising from a single continuous transaction.

## **5. Constitutional Law\_double jeopardy\_attempted first-degree murder and assault\_no violation**

*State v Bethea, 173 NCA 43 (2005)*

Double jeopardy was not violated by the submission to the jury of both attempted first-degree murder and assault with a deadly weapon inflicting serious injury. The charge of attempted murder does not contain an assault with a deadly weapon or serious injury requirement, and assault with a deadly weapon with intent to kill inflicting serious injury does not require premeditation and deliberation.

### **1. Constitutional Law--double jeopardy-\_deferred prosecution agreement--plea of guilty never entered**

*State v Ross, 172 NCA 569 (2005) Affirmed by Sup Ct. per curiam & w/o opinion 360 NC 355 (2006)*

The trial court did not err in an embezzlement of State property of a value of \$100,000 or more by aiding and abetting case by denying defendant's motion to dismiss on double jeopardy grounds or, in the alternative, by denying his motion to enforce the terms of a deferred prosecution agreement even though defendant contends the deferred prosecution agreement constituted a plea of guilty to the five counts of misdemeanor failure to file or failure to pay withholding tax, because: (1) while defendant acknowledged his guilt in fact in the deferred prosecution agreement, a plea of guilty was neither tendered by defendant nor accepted by the trial court; (2) evidence of defendant's opportunity to plead not guilty upon failing to meet the conditions of the agreement supports the conclusion that the agreement did not comprehend a plea of guilty; (3) the record is devoid of any evidence indicating the trial court made a determination of a factual basis for a guilty plea; and (4) the acknowledgment of guilt contained in the transcript of the agreement, without more, is insufficient to raise the legal inference that a guilty plea was entered and accepted. N.C.G.S. § 15A-1341(a1).

### **First-degree sexual offense; Indecent liberties; Double Jeopardy**

*State v. Brewer, 171 NC App 686 (2005)*

Using the same underlying act to support convictions for both first-degree sexual offense and indecent liberties does not violate a defendant's constitutional protection against double jeopardy.

### **5. Constitutional Law--rape and indecent liberties--not double jeopardy**

*State v Jones, 172 NCA 308 (2005)*

Defendant was not subjected to double jeopardy by sentences for first-degree rape and indecent liberties

### **1. Constitutional Law\_double jeopardy\_robbery and kidnapping\_standard**

*State v Ripley, 172 NCA 453 (2005)*

In determining whether a movement or restraint during an armed robbery can support an independent charge of kidnapping, so that convictions for both do not violate double jeopardy, the question is whether the defendant's actions exposed the victim to a danger greater than that inherent in the armed robbery and to the kind of danger and abuse the kidnapping statute was designed to prevent.

## **2. Constitutional Law\_double jeopardy\_robbery and kidnapping\_movement during robbery**

*State v Ripley, 172 NCA 453 (2005)*

**Defendant was subjected to double jeopardy** by being convicted of armed robbery and kidnapping arising from a string of hotel robberies, and his second-degree kidnapping convictions were reversed. The victims were moved from hotel parking lots to lobbies, were instructed not to move while others were robbed, or were moved from the front desk to a manager's office or a break room while defendant and his accomplices sought surveillance tapes or access to a safe. The victims were not exposed to harm beyond the threatened use of a firearm inherent in the armed robbery or to the kind of danger the kidnapping statute was designed to represent.

## **1. Motor Vehicles--driving while impaired--motion to dismiss--sufficiency of evidence—double jeopardy**

*State v. Streckfuss 171 NCA 81 (2005)*

The trial **court did not violate defendant's right against double jeopardy** by denying his motion to dismiss the charge of driving while impaired even though the **State confiscated and retained his South Dakota driver's license when defendant refused to take an Intoxilyzer test and imposed a \$50 fee**, because: (1) contrary to defendant's argument, nothing in N.C.G.S. § 20-16.5 indicates that the purpose underlying the statute is different for out-of-state drivers than it is for North Carolina drivers when the threat posed to the citizens of North Carolina by an impaired driver driving on North Carolina highways is the same regardless of what state's license the driver has; (2) it is clear from the plain language of N.C.G.S. § 20-16.5 that it applies equally to a driver who has a North Carolina driver's license and to a driver who has a license from another state; (3) defendant does not argue, and nothing in the record indicates, that defendant was actually deprived of the ability to drive in the State of South Dakota for thirty days, and nothing in the record suggests that defendant could not have applied for or obtained a duplicate license or otherwise sought relief in South Dakota; (4) the State provides statutory remedies for a driver to secure his revoked license, which mitigate any possible punitive effects of the State's confiscation of

a nonresident's license; and (5) the \$50 fee is not a fine, but rather a minimal administrative fee that covers the costs for the action.

## **6. Constitutional Law--double jeopardy--discharging a weapon into occupied property--assault with a deadly weapon**

*State v. Allah* 168 NCA 190 (2005)

'Discharging a weapon into occupied property and assault with a deadly weapon inflicting serious injury are **separate offenses with unique elements which do not place defendant in double jeopardy.**

## **1. Constitutional Law--double jeopardy--convictions for assault with a deadly weapon on a government official and assault with a deadly weapon**

*State v. Spellman* 167 NCA 374 (2004)

The trial **court did not violate defendant's right against double jeopardy** by sentencing him for both assault with a deadly weapon on a government official and assault with a deadly weapon, because: (1) the facts underlying defendant's indictment for assault with a deadly weapon with intent to kill are not the same facts used to indict defendant for assault with a deadly weapon on a government official; (2) the facts underlying the jury's verdict of guilty are not the same for both offenses since one occurred when defendant's vehicle struck an officer and ran over his leg whereas the second instance occurred after defendant reentered the vehicle and drove it toward the officer thereby placing the officer in fear of injury; and (3) the evidence tended to show that defendant employed his thought process prior to committing the second assault which occurred at a distinct and separate time after the first assault was complete.

## **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*, (22 February 2005). *United States Supreme Court*

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.

## **Arson--burning a garage--erroneous grant of motion to dismiss--double jeopardy**

*State v. Teeter 165 NCA 680 (2004)*

The trial **court violated defendant's double jeopardy rights** in a burning a garage in violation of N.C.G.S. § 14-62 case and the **conviction must be vacated based on the trial court's erroneous grant of defendant's motion for dismissal of an arson charge at the first trial**, because: (1) the original indictment charging defendant with first-degree arson was sufficient to support a conviction for burning the garage within the curtilage of the house; (2) dismissal of the original arson charge precludes further prosecution for burning the same outbuilding; and (3) **whether correct or erroneous, the judgment of nonsuit had the force and effect of a verdict of not guilty.**

### **1. Drugs--trafficking in cocaine--federal conviction of unlawful distribution--state prosecution barred**

*State v. Brunson 165 NCA 667 (2004)*

N.C.G.S. § 90-97 **barred the prosecution of defendant in state court for trafficking in cocaine after defendant was convicted in federal court of unlawful distribution of cocaine under federal law for the same transactions** that formed the basis for the trafficking charges. The "same act" as used in N.C.G.S. § 90-97 focuses the relevant analysis on the underlying actions for which defendant is prosecuted at the state and federal levels rather than on the elements of the offenses.

### **2. Drugs--conspiracy to traffic in cocaine--federal conviction of unlawful distribution—state prosecution not barred**

*State v. Brunson 165 NCA 667 (2004)*

N.C.G.S. § 90-97 **does not bar the prosecution of defendant in state court for conspiracy to traffic in cocaine by sale after defendant was convicted in federal court of unlawful distribution of cocaine** because the federal statute under which defendant was convicted only criminalizes the acts of manufacturing, distributing, dispensing or possession with the intent to engage in one of those acts; **conspiracy is separately prohibited by another federal statute; and defendant was not charged in federal court under the conspiracy statute.**

### **1. Constitutional Law--Double Jeopardy--public nuisance action following prostitution conviction**

*State ex rel. Albright v. Arellano 165 NCA 609 (2004)*

The Double **Jeopardy Clause was not violated** by an action by a district attorney seeking the illegal profits from a public nuisance owned by defendants, who had been convicted of maintaining a place for prostitution. The North Carolina statutes on **abatement of nuisances, examined under Hudson v. United States, 522 U.S. 93 (1997), do not reveal clear proof of legislative intent to impose a criminal penalty.**

**1. Constitutional Law–double jeopardy–failure to register as sex offender–prior record–inclusion of underlying rape**

*State v. Harrison 165 NCA 332 (2004)*

Defendant was not subjected to double jeopardy by the inclusion of the underlying second-degree rape conviction in his prior record level during his sentencing for failing to register as a sex offender.

**2. Constitutional Law–double jeopardy–evidence from prior trial**

*State v. Bell 164 NCA 83 (2004)*

Admission of evidence from a prior district court trial for assaulting an officer, in which defendant was acquitted, **did not violate double jeopardy** in defendant's trial for obstructing an officer. Evidence is inadmissible under double jeopardy when it falls within the collateral estoppel rule; a **defendant who can only speculate about the basis for her prior acquittal does not meet that burden.**

**2. Constitutional Law–double jeopardy–kidnapping and assault**

*State v. Romero 164 NCA 169 (2004)*

The trial court did not err by refusing to arrest judgment on double jeopardy grounds on an assault with a deadly weapon conviction where defendant was also convicted of first-degree kidnapping on the same facts. Although defendant argues that the same conduct was used to prove serious bodily harm for kidnapping and serious injury for assault, there was sufficient evidence that defendant dragged his wife inside their home for the purpose of assaulting her and that the crime of kidnapping was complete once he dragged her inside, whether or not the contemplated assault was completed.

**7. Constitutional Law--double jeopardy--submission of attempted first-degree murder and assault with deadly weapon inflicting serious injury**

*State v. Tirado 358 NC 551 (2004)*

The trial court did not violate defendants' double jeopardy rights by submitting to the jury both attempted first-degree murder and assault with a deadly weapon with intent to kill inflicting serious injury, and by imposing consecutive sentences for these offenses, because: (1) assault

with a deadly weapon with intent to kill inflicting serious injury requires proof of the use of a deadly weapon as well as proof of serious injury, neither of which are elements of attempted first-degree murder; and (2) attempted first-degree murder includes premeditation and deliberation, which are not elements of assault with a deadly weapon with intent to kill inflicting serious injury.

### **3. Constitutional Law--double jeopardy--kidnapping--armed robbery--restraint**

*State v. Escoto 162 NCA 419 (2004)*

The trial court did not violate a defendant's double jeopardy rights by failing to dismiss the kidnapping charges related to two of the victims even though defendant was charged with armed robbery for those two victims as well, because there was sufficient restraint of both victims beyond that inherent in the armed robbery to submit both charges to the jury.

### **3. Constitutional Law--double jeopardy--assault with deadly weapon--assault with firearm on law officer**

*State v. Dickens 162 NCA 632 (2004)*

The trial **court committed plain error** by failing to arrest judgment on the assault with a deadly weapon conviction because this conviction and the conviction for assault with a firearm on a law enforcement officer amounted to double jeopardy.

### **5. Constitutional Law--double jeopardy--felony murder--failure to arrest judgment on armed robbery charges**

*State v. Coleman 161 NCA 224 (2003)*

The trial court **did not violate defendant's double jeopardy rights by arresting judgment on only the conviction for attempted armed robbery and by entering judgment on the three armed robbery convictions in addition to first-degree murder**, because: (1) in this instance where no specific underlying felony was noted in the jury instructions on felony murder, and there are multiple felony convictions which could serve as the underlying felony for purposes of the felony murder conviction, it is in the discretion of the trial court as to which felony will serve as the underlying felony for purposes of sentencing; and (2) armed robbery and attempted armed robbery are both classified as Class D felonies for purposes of sentencing.

### **3. Appeal and Error--preservation of issues--failure to object--double jeopardy**

*State v. Smith 160 NCA 107 (2003)*

Although defendant contends the trial **court erred** by entering **judgment against defendant for both first-degree kidnapping and assault with a deadly weapon with intent to kill inflicting serious injury** based on the fact that his double jeopardy rights were allegedly violated, defendant waived appellate review of this issue because: (1) defendant did not move to dismiss the charge of first-degree kidnapping of the husband victim on double jeopardy grounds; (2) although the State indicated during the charge conference that the serious injury element would apply to both charges, defendant did not object; (3) defendant did not object to the submission of both the first-degree kidnapping and assault of the husband victim to the jury; and (4) even if this issue were properly preserved, double jeopardy does not preclude punishing a defendant for both first-degree kidnapping based on serious injury and assault with a deadly weapon with intent to kill inflicting serious injury when each crime contains elements not required to be proved in the other.

#### **Juveniles - probation violation hearing - assault - motion to dismiss - double jeopardy**

*IN RE O'Neal, 160 N.C. App. 409 (2003)*

The trial court did not violate a juvenile's double jeopardy rights by denying his motion to dismiss the assault charge even though the juvenile had previously admitted to the same offense at the juvenile's probation violation hearing, because: (1) double jeopardy protections do not apply to probation revocation hearings when a probation violation hearing is not a criminal prosecution; (2) the imposition of a new term of probation or possibly confinement in juvenile cases is punishment for the original offense for which the juvenile was adjudicated delinquent and not for any of the offenses that form the basis of the trial court's determination that a probation violation has occurred; and (3) the juvenile was not punished twice for the same offense.

#### **4. Constitutional Law—double jeopardy—possession of stolen property and possession of stolen vehicle—same stolen vehicle**

*State v. Bailey 157 NCA 80 (2003)*

Sentences for possession of stolen goods and possession of a stolen vehicle based on possession of the same stolen Suburban **violated double jeopardy**. Although one requires proof of a fact which the other does not, the Legislature did not intend to punish defendant twice for possession of the same property. While defendant could be indicted and tried for both offenses, he could be convicted only once, and the conviction for possession of stolen goods was vacated.

#### **4. Constitutional Law; Taxes--North Carolina drug tax--double jeopardy not implicated**

*State v. Harris 157 NCA 647 (2003)*

The trial court did not violate defendant's double jeopardy rights in a trafficking in cocaine, possession of cocaine, and knowingly maintaining a place to keep a controlled substance case by failing to grant defendant's motion to dismiss the charges after his payment of \$2,117.74 under the North Carolina drug tax.

#### **2. Constitutional Law--double jeopardy--indictment after hung jury**

*State v. Mays 158 NCA 563 (2003)*

A second indictment for murder **did not violate double jeopardy** where the first resulted in a hung jury. Although defendant argued that the first jury sent a note to the court that indicated unanimous agreement on second-degree murder, that note is open to interpretation and is not equivalent to a verdict.

#### **3. Constitutional Law--double jeopardy--assault**

*State v. Ezell 159 NCA 103 (2003)*

A defendant's conviction for both assault with a deadly weapon inflicting serious injury under N.C.G.S. § 14-32 and assault inflicting serious bodily injury under N.C.G.S. § 14-32.4 violated double jeopardy. N.C.G.S. § 14-32.4 punishes an assault inflicting serious bodily injury as a Class F felony "unless the conduct is covered under some other provision of law providing greater punishment." N.C.G.S. § 14-32 is a Class E felony, which carries a more severe punishment.

#### **8. Constitutional Law--double jeopardy--assault and attempted murder**

*State v. Ramirez 156 NCA 249 (2003)*

Double **jeopardy was not violated** by consecutive sentences for assault and attempted murder. Each offense requires proof of at least one element that the other does not.

#### **7. Constitutional Law--double jeopardy--first-degree murder by acting in concert--solicitation to commit murder--conspiracy to commit murder--not a lesser included offense**

*State v. Kemmerlin 356 NC 446 (2002)*

The trial court did not err in a first-degree capital murder case by failing to vacate the convictions of solicitation to commit murder and conspiracy to commit murder even though defendant asserts that both convictions merge

with the conviction for first-degree murder by acting in concert and that punishment for both crimes allegedly violates double jeopardy, because: (1) the crime of solicitation requires counseling, enticing, or inducing another to commit a crime whereas this element is not required for acting in concert; (2) acting in concert requires actual or constructive presence at the crime which is not an element present in the definition of solicitation; (3) regarding defendant's contention that her conspiracy conviction also merged based on her allegation that her presence at the scene of the murder was incidental and unnecessary, defendant was not only present at the scene of the murder but she also let the coparticipant into her home knowing he was going to kill her husband and she also brought her husband into the room where he would be killed; (4) conspiracy is a separate offense from the substantive offense and therefore does not merge into the substantive offense; and (5) the requirement of an agreement which is an element of conspiracy is not a necessary element for murder by acting in concert.

#### **4. Constitutional Law--double jeopardy--possession of cocaine with intent to sell--trafficking by possession**

*State v. Boyd 154 NCA 302 (2002)*

Convictions for possession of cocaine with intent to sell and distribute and trafficking in the same cocaine by possession did not violate double jeopardy.

#### **5. Constitutional Law--double jeopardy--assault with a firearm on a law enforcement officer--discharging a firearm into occupied property**

*State v. Sellers 155 NCA 51 (2002)*

The trial court did not violate double jeopardy by sentencing defendant to consecutive terms for the crimes of assault with a firearm on a law enforcement officer and discharging a firearm into occupied property, because: (1) the fact that each crime requires proof of an element which the other does not demonstrates the intent to allow multiple punishments to be imposed for the separate crimes; and (2) one crime requires proof of a law enforcement officer then performing his duties while the other requires proof of willful and wanton discharging of a firearm into occupied property.

#### **10. Assault---habitual misdemeanor assault convictions--ex post facto laws--double jeopardy**

*State v. Carpenter 155 NCA 35 (2002)*

The trial court did not err by failing to vacate defendant's habitual misdemeanor assault convictions even though defendant contends N.C.G.S. § 14-33.2 is unconstitutional on its face and as applied to

defendant, because: (1) defendant's argument that habitual misdemeanor assault convictions violate ex post facto prohibitions has already been rejected by our Court of Appeals; and (2) the statute does not violate the United States Constitution or the North Carolina Constitution provisions against double jeopardy since the statute is a substantive offense and a punishment enhancement offense rather than a statute imposing punishment for previous crimes.

## **2. Constitutional Law--double jeopardy--possession of cocaine--sale**

*State v. Dickerson 152 NCA 714 (2002)*

Double jeopardy was not violated where defendant was sentenced for both the sale and delivery of cocaine and possession of cocaine with intent to sell or deliver.

## **1. Constitutional Law--double jeopardy--misdemeanor larceny--civil versus criminal penalty**

*State v. Beckham 148 NCA 282 (2002)*

The trial court did not err by denying defendant's motion to dismiss the charge of misdemeanor larceny on double jeopardy grounds even though defendant paid money to the merchant owner of the property in response to a demand made under N.C.G.S. § 1-538.2, because: (1) the effect of N.C.G.S. § 1-538.2 does not transform what was intended as a civil remedy into a criminal penalty; (2) the mere presence of a deterrent quality is insufficient to render a sanction criminal; and (3) the sanction allowed by N.C.G.S. § 1-538.2 is not excessive in relation to the remedial purpose since the damages are limited to between \$150 and \$1,000, and the statute's purpose is to restore to the victims of theft, embezzlement, and fraud the value of their loss caused by the misconduct of others.

## **2. Criminal Law--collateral estoppel--attempted murder--assault with a deadly weapon with intent to kill inflicting serious injury--issue of intent**

*State v. Tew 149 NCA 456 (2002)*

The State was not collaterally estopped from prosecuting defendant for assault with a deadly weapon with intent to kill inflicting serious injury because defendant was originally convicted of attempted second degree murder in a prosecution for attempted first-degree murder and that conviction was vacated. Although defendant argued that this verdict resolved the issue of intent to kill in his favor, a rational jury could have grounded its verdict on the absence of premeditation and deliberation.

### **3. Constitutional Law—double jeopardy—attempted murder and assault with a deadly weapon with intent to kill inflicting serious injury**

*State v. Tew* 149 NCA 456 (2002)

Defendant was not subjected to double jeopardy where he was originally prosecuted for attempted first degree murder, convicted of attempted second-degree murder, that judgment was vacated on appeal pursuant to a ruling that attempted second-degree murder is not a crime, and defendant was then prosecuted for assault with a deadly weapon with intent to kill inflicting serious injury. The assault charge requires proof of use of a deadly weapon, an element not required for attempted murder, while malice, premeditation, and deliberation are required for attempted first-degree murder but not for assault with a deadly weapon with intent to kill inflicting serious injury.

### **2. Constitutional Law—double jeopardy--possession of cocaine—possession of paraphernalia—pipe containing residue**

*State v. Williams* 149 NCA 795 (2002)

Double jeopardy was not violated by convictions for possession of drug paraphernalia and possession of cocaine based on possession of a pipe containing cocaine residue. Each conviction requires proof of a fact or element that the other does not.

### **3. Constitutional Law--double jeopardy--attempted first-degree murder--assault on an officer**

*State v. Haynesworth* 146 NCA 523 (2001)

The **trial court did not err by sentencing defendant separately** for the crimes of attempted first-degree murder and assault with a firearm on a law enforcement officer; each offense requires proof of specific and distinct elements not required for conviction of the other.

### **1. Constitutional Law--double jeopardy--appeal by State from dismissal after verdict**

*State v. Scott*, 146 N.C. App. 283 (2001)

The State was authorized by N.C.G.S. § 15A-1445(a)(1) to bring an appeal from the dismissal of an impaired driving charge for insufficient evidence after the jury returned a verdict of guilty. Even though defendant argued that the dismissal had the force and effect of a not guilty verdict and that reversal on appeal would violate double jeopardy, a reversal on appeal would only serve to reinstate the verdict. Defendant's double jeopardy rights have not been violated as long as he would not be subjected to a new trial on the issues.

### **Constitutional Law--double jeopardy--robbery and kidnapping--victim's greater danger**

*State v. Muhammad, 146 N.C. App. 292 (2001)*

The trial court did not err in a prosecution for common law robbery and second-degree kidnapping by denying defendant's motion to vacate the second-degree kidnapping conviction on the ground of double jeopardy where defendant placed the victim in a choke hold, hit him in the side three times, wrestled with him on the floor, grabbed him around the throat, and marched him to the front of the store with a gun to his head. Defendant did substantially more than force the victim to walk from one part of the restaurant to another and there was sufficient evidence of restraint and removal separate and apart from that which is inherent in common law robbery.

### **Sentencing--double jeopardy--Habitual Felons Act--structured sentencing**

*State v. Brown, 146 N.C. App. 299 (2001)*

The use of the Habitual Felons Act under N.C.G.S. § 14-7.1 et. seq. in combination with structured sentencing under N.C.G.S. § 15A-1340.10 et. seq. to enhance defendant's sentence for possession with intent to sell and deliver marijuana as a result of his being an habitual felon does not violate double jeopardy because: (1) the statutory scheme of these statutes ensures that a defendant's prior convictions will not be used to simultaneously enhance punishment; and (2) the North Carolina Supreme Court has already concluded that our state's Habitual Felons Act conforms with the constitutional strictures dealing with double jeopardy.

### **Constitutional Law--double jeopardy--felony child abuse--dismissal after mistrial and end of session**

*State v. Allen, 144 N.C. App. 386 (2001)*

The State's appeal in a felony child abuse case of the trial court's order, entered after the trial ended in a mistrial and court was adjourned sine die, which allowed defendant's N.C.G.S. § 15A- 1227 motion to dismiss based on insufficiency of the evidence and defendant's N.C.G.S. § 15A- 1414 motion for appropriate relief is not barred by the double jeopardy clause because: (1) a dismissal during a pretrial stage of the proceedings does not prohibit further prosecution of defendant under the double jeopardy clause; (2) the § 15A-1227 motion to dismiss was not timely because it was not made before the end of the session; (3) the § 15A-1414 motion for appropriate relief was not proper because it was not made after a verdict; and (4) defendant's motions thus must be treated as "pretrial" motions, and jeopardy had not attached at the time of the court's order. Furthermore, the

trial court was without authority to rule on defendant's motions because they were improper under §§ 15A-1227 and 15A-1414.

### **3. Constitutional Law--double jeopardy--assault with intent to kill--attempted murder**

*State v. Peoples, 141 N.C. App. 115 (2000)*

There was no double jeopardy in the imposition of separate sentences for attempted first-degree murder and assault with a deadly weapon with intent to kill inflicting serious injury. The assault conviction requires proof of the use of a deadly weapon as well as proof of a serious injury, elements not required for attempted first-degree murder, and attempted first-degree murder requires premeditation and deliberation, which goes beyond an intent to kill.

### **1. Constitutional Law – due process—felony conviction following appeal of misdemeanor conviction**

*State v. Bisette, 142 NC App. 669 (2001)*

Defendant's felony larceny conviction in superior court was a violation of her due process rights and was vacated where she was **tried and convicted of misdemeanor larceny in district court** based on the alleged theft of a copy machine from her employer, she exercised her right to a trial de novo in superior court, and she was **then indicted, prosecuted and convicted of felony larceny based on the same alleged occurrence.**

### **2. Robbery--attempted armed--no merger with burglary conviction**

*State v. Cunningham, 140 NC App 315 (2000)*

Although defendant contends his conviction for attempted armed robbery must be arrested since it allegedly merged with his burglary conviction when robbery was submitted as the intended felony for purposes of burglary, the conviction is upheld because: (1) the attempted robbery offense was not committed until defendant took some further action apart from the alleged burglary; and (2) the crimes did not merge since they were separate offenses.

### **1. Constitutional Law--double jeopardy--convictions for second-degree murder and impaired driving--no violation**

*State v. McAllister, 138 N.C. App. 252 (2000)*

The trial court did not violate defendant's double jeopardy rights by sentencing him for second-degree murder under N.C.G.S. § 14-17 and impaired driving under N.C.G.S. § 20-138.1 because: (1) the legislature intended to create two separate offenses, as evidenced by the fact that

second-degree murder is controlled by structured sentencing while punishment for driving while impaired is not; (2) the Court of Appeals has previously allowed upheld convictions for second-degree murder and driving while impaired in the same trial; and (3) driving while impaired is not a lesser included offense of second-degree murder, and malice is not equated with driving while impaired.

### **Constitutional Law--double jeopardy--domestic criminal trespass--criminal contempt**

*State v. Dye, 139 N.C. App. 148 (2000)*

The trial court erred by denying defendant's motion to dismiss the charge of domestic criminal trespass after she was already convicted of criminal contempt because: (1) the double jeopardy clause prohibits subsequent prosecution of a substantive criminal offense following an adjudication of criminal contempt based upon violation of a court order forbidding commission of acts constituting such substantive offense; and (2) the elements of the offense actually deemed to have been violated in the contempt proceeding, defendant's "coming to" the residence of her ex-husband in violation of a court order, met the essential legal elements of domestic criminal trespass under N.C.G.S. § 14-134.3(a).

### **1. Constitutional Law--double jeopardy--drug tax--trafficking convictions**

*State v. Manning, 139 N.C. App. 454 (2000)*

The trial court did not err by denying defendant's motion to dismiss trafficking in cocaine offenses on double jeopardy grounds because he had previously been assessed a controlled substance tax. It has recently been held that double jeopardy does not preclude criminal prosecution for violations of the Controlled Substances Act, despite prior entry of judgment for unpaid taxes on seized drugs. Additionally, defendant in this case was convicted on charges arising from the transportation, sale, and delivery of cocaine, while the tax levied involved the possession of cocaine.

### **2. Constitutional Law--state--domestic violence--kidnapping--bail and pretrial release--due process--double jeopardy**

*State v. Gilbert, 139 N.C. App. 657 (2000)*

N.C.G.S. § 15A-534.1 which relates to bail and pretrial release in domestic violence situations is not facially violative of the North Carolina Constitution's protections relating to due process and double jeopardy because: (1) the North Carolina Supreme Court has previously found this statute did not violate the Fifth and Fourteenth Amendments to the United States Constitution, and the North Carolina Constitution's law of the land clause has been held equivalent to the Fourteenth Amendment's Due

Process Clause; and (2) the double jeopardy guarantees in the United States and North Carolina Constitutions are equivalent, and our Supreme Court has already held that this statute survives a facial constitutional challenge on double jeopardy grounds under the United States Constitution.

## **5. Constitutional Law--double jeopardy--bail and pretrial release--domestic violence--kidnapping**

*State v. Gilbert, 139 N.C. App. 657 (2000)*

The trial court did not violate defendant's right to be free from double jeopardy when it applied N.C.G.S. § 15A-534.1 which relates to bail and pretrial release in domestic violence situations to defendant's kidnapping case, because: (1) defendant's detention was only to await hearing before the first available judge; and (2) the judge's order requiring defendant to remain in custody until 2:00 p.m. was merely a condition of defendant's release.

## **2. Criminal Law - controlled substances - keeping and maintaining a dwelling - continuous offense -separate convictions**

*State v. Grady, 136 N.C. App. 394 (2000)*

Although assignment of error may not be argued and then supplemented with a request for "partial" Anders review, the Court of Appeals exercised its discretionary power pursuant to Rule 2 to consider defendant's pro se argument concerning undercover purchases of drugs made by the same officer at the same dwelling and concluded this case must be remanded because **two convictions of keeping and maintaining a dwelling for purposes related, to use, storage, or sale of controlled substances under N.C.G.S. & sec; 90-108(a) (7) violates the constitutional prohibition against double jeopardy since the offense is a continuing offense.**

## **Constitutional Law 1 184 (NCI4th) possession of cocaine - trafficking in cocaine - same act –not double jeopardy**

*State v. Pipkins, 337 N.C. 431 (1994)*

### **1. Assault and Battery 1 80 (NCI4th); Constitutional Law 1 177 (NCI4th) discharging firearm into occupied vehicle three shots three convictions no double jeopardy violation**

*State v. Rambert, 341 N.C. 173 (1995)*

### **4. Constitutional Law 1 189 (NCI4th) armed robbery and larceny separate takings sentences not double jeopardy**

*State v. Robinson, 342 N.C. 74 (1995)*

The armed robbery of a murder victim and larceny of the victim's automobile were separate takings rather than a continuous taking, and defendant's right against double jeopardy was not violated by sentences for both armed robbery and larceny,

**8. Narcotics, Controlled Substances, and Paraphernalia § 220 (NCI4th) trafficking by sale and trafficking by delivery consecutive sentences no double jeopardy**

*State v. Holmes, 120 N.C. App. 54 (1995)*

**10. Constitutional Law § 189 (NCI4th) double jeopardy armed robbery and larceny**

*State v. Jaynes, 342 N.C. 249 (1995)*

The trial court violated defendant's federal and state constitutional rights to be free of double jeopardy by sentencing him both for armed robbery and for larceny of the victim's two vehicles where the evidence tended to show that defendant and his accomplice loaded items of the victim's personal property into the victim's vehicles and drove them away; the takings of the vehicles and the other items occurred simultaneously and were linked together in a continuous act or transaction; and there was thus only one taking, and the larcenies were lesser-included offenses of the armed robbery.

**Narcotics, Controlled Substances, and Paraphernalia § 207 (NCI4th) possession of two pounds of marijuana tax assessment not double jeopardy**

*State v. Ballenger, 123 N.C. App. 179 (1996)*

**23. Constitutional Law § 216.1 (NCI4th) first-degree murder and felony child abuse no double jeopardy violation**

*State v. Elliott, 344 N.C. 242 (1996)*

Assuming the issue had been preserved for appeal, double jeopardy did not preclude punishing defendant for felony child abuse and first-degree murder arising from the same conduct. A trial court in a single trial may impose cumulative punishments under the statutes where a legislature clearly expresses its intent to proscribe and punish exactly the same conduct under two separate statutes. Here the legislature expressly stated that felony child abuse is an offense additional to other criminal provisions and that it is not intended to preclude other sanctions. Moreover, felony child abuse is not a lesser included offense of murder; it requires the State to prove facts not required to prove murder and it addresses a distinct evil.

**Constitutional Law § 193 (NCI4th) - assaults - violations of two statutes - consecutive sentences – not double jeopardy**

*State v. Woodberry, 126 N.C. App. 78 (1997)*

The trial court's imposition of consecutive sentences on defendant for malicious assault and battery in a secret manner with a deadly weapon with intent to kill (N.C.G.S. § 14-31) and assault with a deadly weapon with intent to kill inflicting serious injury (N.C.G.S. § 14-32(a)) did not violate the Double Jeopardy Clause of the U.S. Constitution where both convictions stemmed from a single incident. While the statutes have three common elements, each contains specific additional elements not contained in the other, and the plain language of the statutes indicates that the General Assembly intended that consecutive sentences could be imposed against a defendant who contemporaneously violated both statutes.

**2. Constitutional Law § 172 (NCI4th) - school expulsion - criminal conviction - not double jeopardy**

*State v. Davis, 126 N.C. App. 415 (1997)*

Defendant's expulsion from school for selling marijuana, pursuant to N.C.G.S. § 115C-391(d), was an administrative discipline and intended to protect the student body and not a judicial punishment; therefore, defendant's subsequent criminal conviction for selling marijuana was not a double jeopardy violation.

**Constitutional Law § 172 (NCI4th) - selling alcoholic beverage to underage person - civil penalty -criminal conviction - not double jeopardy**

*State v. Wilson, 127 N.C. App. 129 (1997)*

The trial court erred in dismissing criminal charges against defendant for selling an alcoholic beverage to a person under the statutory age in violation of N.C.G.S. § 18B-302 (a) where defendant's \$400.00 civil penalty resulting from an administrative proceeding against defendant before the ABC Commission and arising from the same offense did not constitute punishment for the purpose of the Double Jeopardy Clause.

**8. Constitutional Law § 202 (NCI4th) - conviction of murder - elevation of kidnapping based on murder - not double jeopardy**

*State v. Fernandez, 346 N.C. 1 (1997)*

Defendant did not receive multiple punishments for the same offense in violation of the prohibition against double jeopardy when he was convicted and sentenced for two murders and his convictions for kidnapping the same victims were elevated to first-degree based on his

failure to release the victims in a safe place because they were murdered since each crime required proof of an element not required to be proved in the other crime.

**1. Constitutional Law § 172 (NCI4th) - school suspension - subsequent larceny prosecution – not double jeopardy**

*IN RE Phillips, 128 N.C. App. 732 (1998)*

The trial court did not err by denying a juvenile's motion to dismiss a summons and petition alleging that she had stolen money belonging to her school based upon double jeopardy where she had been suspended from school for ten days after being found in possession of the money at school. Under North Carolina law, suspension and expulsion from school for violation of school policies are not punishment invoking the protection of constitutional double jeopardy restrictions.

**7. Constitutional Law § 171.1 (NCI4th) - double jeopardy - former prosecution - voluntary dismissal**

*State v. Jacobs, 128 N.C. App. 559 (1998)*

Defendant was not subjected to double jeopardy where a former prosecution for sexual offenses was voluntarily dismissed by the State before a jury had been empaneled.

**21. Constitutional Law, Federal - double jeopardy - first-degree kidnapping - felony murder – failure to release in safe place - not murder element**

*State v. Thomas, 350 N.C. 315 (1999)*

Defendant's convictions and sentencing for both first-degree kidnapping and felony murder did not subject him to double jeopardy where his first-degree kidnapping conviction was based on the element that he did not "release the victim in a safe place" and not on the element of "serious injury." Furthermore, since defendant's first-degree murder conviction was based not only on the felony murder rule but also on premeditation and deliberation, proof of the underlying felony was not an essential element of the State's homicide case, and defendant could be sentenced for both the murder and the felony.

**1. Appeal and Error - dismissal of criminal charge - appeal by State - defendant's failure to raise double jeopardy - jurisdictional review**

*State v. Vestal, 131 N.C. App. 756 (1998)*

Defendant's failure to assert the double jeopardy issue on appeal did not preclude the appellate court from reviewing whether the State was barred under N.C.G.S. § 15A-1445(a) from appealing an order dismissing a

criminal charge against defendant because the rule against double jeopardy prohibits further prosecution of the case.

**2. Constitutional Law, Federal - double jeopardy - police misconduct - jury empaneled and sworn – sua sponte dismissal of charge**

*State v. Vestal, 131 N.C. App. 756 (1998)*

The rule against double jeopardy bars a retrial of defendant on a charge of conspiracy to deliver marijuana where the trial court dismissed the charge with prejudice after a jury had been duly empaneled and sworn on the ground that the police department used in an undercover operation drugs which had been ordered destroyed in a prior case; defendant took no active role in the dismissal; and the trial court indicated that its primary concern was the effect its order would have on future police investigations.

**2. Constitutional Law, Federal - double jeopardy - deadly weapon - assault upon officer - assault with intent to kill**

*State v. Coria, 131 N.C. App. 449 (1998)*

Defendant's constitutional right against double jeopardy was not violated by the imposition of separate sentences for the offenses of assault with a deadly weapon upon a law enforcement officer and assault with a deadly weapon with intent to kill, both of which arose from the same act of shooting at a deputy sheriff, since each offense requires proof of specific elements not required by the other. U.S. Const. amend. V; N.C. Const. art. I, § 19.

**1. Constitutional Law, Federal - double jeopardy - probation revocation hearing**

*State v. Monk, 132 N.C. App. 248 (1999)*

Defendant was neither subjected to successive criminal prosecutions for the same offense nor subjected to multiple punishments for the same offense where he was on probation for an unrelated drug offense when he was charged with first-degree statutory rape, taking indecent liberties with a minor, attempted murder, and assault with a deadly weapon; defendant's probation officer filed a probation violation report; and a probation violation hearing was held but continued and judgment on the alleged violation was not entered prior to trial. It has been held that the double jeopardy clause of the Fifth Amendment to the U.S. Constitution does not prevent the prosecution of a defendant for the substantive offense used as the basis of revocation of probation.

**2. Constitutional Law - double jeopardy - heroin trafficking - prior conviction in federal court – not raised at trial**

*State v. White, 134 N.C. App. 338 (1999)*

A heroin trafficking defendant's contention that prosecution in North Carolina following a federal conviction constituted double jeopardy was waived where not raised in the trial court.

**1. Constitutional Law - double jeopardy - solicitation to commit murder - first-degree murder as accessory**

*State v. Brown, 350 N.C. 193 (1999)*

Defendant's right to be free from double jeopardy was violated when she was convicted and punished for both solicitation to commit murder and first-degree murder under an accessory before the fact theory since solicitation to commit murder is a lesser-included offense of murder as an accessory before the fact. Accordingly, defendant's solicitation conviction must be vacated.

**1. Constitutional Law - double jeopardy - violation of domestic violence protective order – criminal contempt - convictions for substantive offenses**

*State v. Gilley, 135 N.C. App. 519 (1999)*

In a case where defendant was prosecuted for the substantive criminal offenses of first-degree kidnapping, domestic criminal trespass, communicating threats, assault on a female, and first-degree burglary following an adjudication of criminal contempt based upon violation of a domestic violence protective order, defendant's conviction of assault on a female violated defendant's Fifth Amendment double jeopardy rights because a comparison of the offense actually deemed to have been violated in the contempt proceeding versus the elements of the substantive criminal offenses reveal the prohibition in the protective order that defendant not assault his estranged wife met the same legal elements necessary for assault on a female under N.C.G.S. § 14-33(b) (2). However, defendant's convictions of first-degree kidnapping, domestic criminal trespass, communicating threats, and non-felonious breaking or entering did not violate defendant's double jeopardy rights because these crimes contained elements not present in the domestic violence protective order.

**1. Constitutional Law - double jeopardy - waiver - pleas of guilty and no contest**

*State v. Hughes, 136 N.C. App. 92 (1999)*

Defendant waived his right to assert a double jeopardy violation for the crime of accessing computers when he pled guilty to the felony of obtaining property by false pretense and pled no contest to the felony of accessing computers because a plea of guilty or no contest waives all defenses other than the sufficiency of the indictment.