

## MOTIONS

### **Under A Totality Of Circumstances, The Trial Court Did Not Err By Denying The Defendant's Motion To Withdraw His Plea**

*State v. Chery*, \_\_\_ N.C. App. \_\_\_, \_\_\_ S.E.2d \_\_\_ (April 6, 2010).

The trial court did not err by denying the defendant's motion to withdraw his plea, made before sentencing. The fact that the plea was a no contest or *Alford* plea did not establish an assertion of legal innocence for purposes of the *State v. Handy* analysis that applies to pre-sentencing plea withdrawal requests. Although the defendant testified at a co-defendant's trial that he did not agree to take part in the crime, that testimony was negated by his stipulation to the factual basis for his plea and argument for a mitigated sentence based on acceptance of responsibility. The court also concluded that the State's uncontested proffer of the factual basis at the defendant's plea hearing was strong and that the fact that the co-defendant was acquitted at trial was irrelevant to the analysis. The court held that based on the full colloquy accompanying the plea, it was voluntarily entered. It also rejected the defendant's argument that an alleged misrepresentation by his original retained counsel caused him to enter the plea when such counsel later was discharged and the defendant was represented by new counsel at the time of the plea. Although the defendant sought to withdraw his plea only nine days after its entry, this factor did not weigh in favor of withdrawal where the defendant executed the plea transcript approximately 3½ months before the plea was entered and never waived in this decision.

### **Motion to Suppress Is Untimely If Defendant Had Seven Weeks Of Notice**

*State v. Paige*, \_\_\_ N.C. App. \_\_\_, \_\_\_ S.E.2d \_\_\_ (Feb. 16, 2010).

The defendant's motion to suppress was untimely where the defendant had approximately seven weeks of notice that the State intended to use the evidence, well more than the required 20 working days.

### **(1) Trial Court's Failure to Follow Procedure in G.S. 15A-1022 in Accepting Guilty Plea Did Not Prejudice Defendant's Decision to Enter Plea**

### **(2) "Package Deal" in Which Prosecutor Offered Plea Arrangement to Defendant's Wife Contingent on Defendant's Agreement to Plead Guilty Did Not Violate Defendant's Constitutional Rights**

### **(3) Trial Court Did Not Err in Denying Defendant's Post-Sentencing Motion to Set Aside His Guilty Plea**

*State v. Salvetti*, \_\_\_ N.C. App. \_\_\_, 687 S.E.2d 698 (19 January 2010).

The defendant entered an *Alford* guilty plea to Class E felony child abuse and his wife entered guilty pleas to other child abuse offenses. The defendant was sentenced to a term of imprisonment. Two days after his plea, the defendant filed a motion to withdraw the plea, which the trial court denied. The defendant filed a notice of appeal and a writ of certiorari for review of other issues. (1) The court ruled that the trial court's failure to follow the procedure in G.S. 15A-1022 in accepting the defendant's guilty plea did not prejudice the defendant's decision to enter the plea. (See the court's extensive analysis in its opinion.) (2) The court rejected the defendant's argument that the prosecutor's offer of a "package deal" constituted undue pressure and violated the defendant's constitutional rights. The prosecutor offered the defendant's wife a plea deal contingent on the defendant's agreement to plead guilty. The court noted that other jurisdictions have found

that package deal pleas are not per se involuntary, although they present a greater risk of inducing a false guilty plea by altering the defendant's assessment of the attendant risks. The court ruled that the prosecutor in this case did not use improper pressure to induce the defendant's plea. (3) The court ruled that the trial court did not err in denying the defendant's post-sentencing motion to set aside his guilty plea.

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

*State v. Stitt*, \_\_\_ N.C. App. \_\_\_, 689 S.E.2d 539 (8 December 2009).

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

### **Trial Court Did Not Violate Due Process by Denying Defendant's Motion to Continue Based on Pretrial Publicity**

*State v. Wright*, \_\_\_ N.C. App. \_\_\_, \_\_\_ S.E.2d \_\_\_ (Nov. 3, 2009).

The trial court did not violate the defendant's due process rights by denying the defendant's motion to continue, which had asserted that pretrial publicity had the potential to prejudice the jury pool and deprive the defendant of a fair trial. No evidence regarding pretrial publicity was in the record and even if it had been, the record showed that publicity did not improperly influence the jury.

### **Trial Court Did Not Abuse Its Discretion In Denying Defendant's Motion to Continue When Defendant Made No Motion for Discovery Or In Allowing A Witness to Testify When Her Name Was Listed Differently On State's Witness List When Defendant Made No Motion For Discovery**

*State v. Flint*, \_\_\_ N.C. App. \_\_\_, \_\_\_ S.E.2d \_\_\_ (Sept. 15, 2009).

The trial court did not abuse its discretion in denying the defendant's motion to continue alleging that the defendant did not receive discovery at a reasonable time prior to trial where the defendant never made a motion for discovery and there was no written discovery agreement and thus the State was not required to provide discovery pursuant to G.S. 15A-903(a)(1). The trial court did not abuse its discretion in allowing a witness named Karen Holman to testify when her name allegedly was listed on the State's witness list as Karen Holbrook where the defendant never made a motion for discovery

and there was no written discovery agreement, even if such a motion had been made, the trial judge had discretion under the statute to permit any undisclosed witness to testify, and the witness's testimony served only to authenticate a videotape.

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

*State v. Smith*, \_\_\_ N.C. App. \_\_\_, 668 S.E.2d 612 (18 November 2008).

The defendant was charged with a drug offense and habitual felon. Two of his pretrial motions were denied: (1) a motion to suppress evidence based on an alleged Fourth Amendment violation; and (2) a motion to dismiss the habitual felon indictment on the ground that the habitual felon law was unconstitutional. The defendant then entered a guilty plea pursuant to a plea agreement in which one of its terms was: "the defendant's pretrial motions shall be preserved for appeal." The court ruled, relying on *State v. Wall*, 348 N.C. 671 (1998), that the defendant's guilty plea must be vacated because the defendant was entitled to receive the benefit of the plea agreement, and the pretrial motion to dismiss the indictment was not subject to appellate review by appeal of right or by writ of certiorari.

### **(2) State's Motion to Appeal District Court Judge's DWI Dismissal to Superior Court Properly Specified Legal Basis of Appeal**

*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. (2) The court ruled that the state's motion to appeal to superior court the district court judge's order dismissing the DWI prosecution properly specified a legal basis of the appeal. The state's motion to appeal asserted there was no competent evidence to support the dismissal order, and the dismissal was contrary to law.

**(1) Magistrate Had Substantial Basis for Concluding There Was Probable Cause to Issue Search Warrant to Search Home for Illegal Drugs; Court Reverses Trial Judge's Grant of Defendant's Pretrial Motion to Suppress**

*State v. Edwards, \_\_\_ N.C. App. \_\_\_, 649 S.E.2d 646 (4 September 2007).*

The trial judge granted the defendant's pretrial motion to suppress evidence on the ground that probable cause did not exist to issue a search warrant to search the defendant's home for illegal drugs. The judge then dismissed the indictments against the defendant. The state appealed. (1) The court ruled that the magistrate had a substantial basis for concluding there was probable cause to issue a search warrant to search the defendant's home for illegal drugs. The officer's affidavit stated that he had received information from a confidential and reliable informant who had seen hydrocodone (without a prescription) inside the defendant's home within the past 48 hours. He had known the informant for nine years, during which time the informant had provided "confidential and reliable" information that had proven true through independent investigations. The informant was familiar with hydrocodone and its uses. The officer had 24 years' experience with his law enforcement agency, including seven years of street level drug interdiction. The court stated that even though the officer did not set out in exact detail the connection between the informant and the prior drug investigations, the magistrate could properly infer that the informant had provided reliable information to the officer in these situations.

## **Defendant Failed to Properly Present Legal Argument in Trial Court During Proceedings on Motion for Appropriate Relief and Thus Did Not Preserve Argument for Appellate Review**

*State v. Moore, \_\_\_ N.C. App. \_\_\_, 648 S.E.2d 288 (7 August 2007).*

The defendant was convicted and then later filed a motion for appropriate relief, seeking a new trial based on newly discovered evidence. At the hearing on the motion, the defendant sought to expand on the legal grounds alleged in his written motion for appropriate relief. However, the defendant failed to file a written amendment to his motion, nor could the defendant's argument be considered a new motion for appropriate relief under G.S. 15A-1420, based on the facts in this case. The court ruled that the defendant failed to properly present the legal argument in the trial court during the proceedings on the motion for appropriate relief and thus did not preserve the argument for appellate review.

## **Proper Remedy Under Defendant's Motion for Appropriate Relief When Defendant Was Sentenced to Illegal Concurrent Sentence Pursuant to Plea Agreement Was to Allow Defendant to Withdraw Guilty Plea; Judge Had No Authority to Order Sentence to Run Concurrently**

*State v. Ellis, 361 N.C. 200, 639 S.E.2d 425 (26 January 2007), reversing, 167 N.C. App. 276, 605 S.E.2d 168 (7 December 2004).*

The defendant pled guilty to armed robbery in 1992 when the law required the sentence to run consecutively to any sentences being served. However, the state and the defendant in the plea agreement agreed that the sentence would run concurrently with the sentences the defendant was then serving. The judge sentenced the defendant for the armed robbery, but did not indicate whether it was to run concurrently or consecutively. The Department of Correction recorded the sentence as consecutive to the sentence he then was serving. The defendant filed a

motion for appropriate relief requesting that he be allowed to withdraw his guilty plea. The trial court judge hearing the motion for appropriate relief instead ordered the sentence to run concurrently. The court ruled, relying on *State v. Wall*, 348 N.C. 671, 502 S.E.2d 585 (1998), that the proper remedy was to allow the defendant to withdraw his guilty plea, and the defendant could proceed to trial or attempt to negotiate another plea agreement. The judge at the MAR hearing had no authority to order the sentence to run concurrently. The defendant was not entitled to specific performance of the plea agreement that would result in an illegal sentence.

**(1) Trial Judge Did Not Abuse Discretion in Denying Defendant's Motion for Bill of Particulars to Provide Exact Dates and Times of Child Sexual Abuse Charges**

*State v. Whitman*, 179 N.C. App. 657, 635 S.E.2d 906 (17 October 2006)

The defendant was convicted of statutory rape, statutory sexual offense, indecent liberties, and incest. (1) The court ruled that the trial judge did not abuse his discretion in denying the defendant's motion for a bill of particulars providing the exact dates and times of the charges. The court noted that the defendant was provided with open-file discovery. In addition, there was no factual information introduced at trial that had not been provided in discovery and necessary to prepare the defendant's defense. Neither the victim's testimony nor other evidence introduced at trial was more specific concerning dates, times, and places than the information made available in discovery.

**2. Criminal Law; Search and Seizure-Motion to suppress--Drugs--Null and void order entered out of county, out of term, and out of session**

*State v. Branch* 177 NCA 104 (2006).

The trial court erred in a drug case by denying defendant's motion to suppress, and the case is remanded for a new suppression hearing, because the order denying her motion to suppress was null and void since it was entered out of county, out of term, and out of session. Defendant's agreement to the trial court's request to take the motion under advisement is not the same as consenting to the order being entered out of term, and defendant's failure to object does not affect

the nullity of an order entered out of term and out of session.

### **Court Rules That State Prison Inmate Could Bring Federal Habeas Corpus Petition Challenging Conviction Under Actual Innocence Exception to Procedural Bar Rule**

*House v. Bell (12 June 2006). US Sup Ct.*

The Court ruled that a state prison inmate could bring a federal habeas corpus petition challenging his conviction under the actual innocence exception to the procedural bar rule. (See the Court's opinion for a detailed discussion of the facts that supported its ruling.)

### **5. Evidence--recordings of telephone calls--pretrial detainee--wiretapping**

*State v. Price 170 NCA 57 (2005)*

The trial court did not err in a drug case by denying defendant's motion to suppress evidence of recordings of telephone calls made by defendant to his mother that were intercepted while defendant was a pretrial detainee, because: (1) under both our state and federal wiretapping laws, the interception of telephone calls does not violate the statutory prohibitions so long as at least one party to the communication consents; (2) both parties to the conversation heard the recorded warning that the call was subject to monitoring and recording and thus they consented, at least impliedly, by continuing with the conversation in the face of that warning; and (3) defendant's constitutional arguments have not been properly preserved for appeal.

### **Evidence; Judgments--pretrial suppression hearing--decision announced out of term--nullity**

*State v. Trent 359 NC 583 (2005)*

An armed robbery defendant received a new trial where the court announced its denial of defendant's suppression motions 7 months after the suppression hearing and after a new term had begun. The rule is longstanding: the court was required to enter its ruling during the term when the motions were heard. The order was a nullity when it was entered, so that defendant's failure to object was not an implied consent, and prejudicial error review is not reached.

## **9. Sentencing--habitual felon--evidentiary hearing without motion from either party--not an advisory opinion**

*State v. Brewington 170 NCA 264 (2005)*

The trial court did not issue an impermissible advisory opinion or commit plain error by conducting an evidentiary hearing prior to the beginning of the habitual felon phase when no motion for such a hearing had been properly made before the court, because: (1) the trial court has the inherent authority to conduct an evidentiary hearing outside the presence of a jury sua sponte to clarify questions of admissibility and to prevent undue delay in the proceedings; and (2) by conducting the hearing out of the presence of the jury and prior to the presentation of evidence during the habitual felon phase, the trial court was able to resolve any arguments and concerns regarding the evidence and the habitual felon proceedings before the jury proceeded without any delay.

## **2. Appeal and Error--denial of post-conviction DNA testing--writ of certiorari**

*State v. Brown 170 NCA 601 (2005)*

The Court of Appeals had no authority to allow defendant's petition for a writ of certiorari from the denial of post-conviction DNA testing. These motions cannot be treated as motions for appropriate relief, which would allow review by certiorari, because they do not involve the grounds specified by N.C.G.S. §

15A-1415(b). Review under Rule 21 of the Rules of Appellate Procedure is also not available.

## **Evidence--motion to suppress granted pretrial--evidence allowed at trial--motion in limine**

*State v. McNeill 170 NCA 574 (2005)*

The trial court did not err in a drug case by granting defendant's motion to suppress evidence of marijuana, cocaine, and digital scales recovered in the leaves of the shrubbery defendant frequented outside of his house without a written order prior to trial, thereafter allowing the evidence subject to the motion to suppress to be introduced at trial, and after trial entering a written order with findings of fact and conclusions of law supporting admission of the evidence on the basis that it was seized beyond the curtilage of the home, because: (1) motions to suppress are

classified as a type of motion in limine, and ruling on a motion in limine is a preliminary or interlocutory decision that the trial court can change if circumstances develop which make it necessary; (2) any ruling on a motion to suppress prior to trial is not final and the trial court may reverse its decision; (3) although defendant assigned error to the trial court's findings of fact that the evidence was located beyond the curtilage of the home, he did not brief these assignments of error on appeal and this issue is thus deemed abandoned; (4) N.C.G.S. § 15A-977(f) does not require findings to be made concurrent with the decision on the motion, and there was no prejudice to defendant by the court's delayed entry of findings of fact supporting its conclusion to admit the evidence at trial based on a different theory; and (5) the fact that the trial court's ruling in limine is inconsistent with the written order is not legally significant since a decision on a motion in limine is not final, and during trial neither party can rest on an earlier ruling in their favor.

## **2. Criminal Law--motion for appropriate relief--adjudicating defendant mentally retarded--jurisdiction**

*State v. Poindexter 359 NC 287 (2005)*

The superior court did not err by concluding that it lacked jurisdiction in a first-degree murder case to conduct an evidentiary hearing with respect to defendant's motion for appropriate relief (MAR) to adjudicate defendant mentally retarded under N.C.G.S. § 15A-2005, because: (1) the General Assembly did not intend for superior courts to make post-conviction determinations of mental retardation outside the confines of N.C.G.S. § 15A-2006; and (2) the one-year window for post conviction determinations of mental retardation under N.C.G.S. § 15A-2006 has expired, and N.C.G.S. § 15A-2005 allows only for pretrial and sentencing determinations of mental retardation.

## **3. Evidence--motion to suppress--timely and sufficient--other evidence admitted**

*State v. Speight 166 NCA 106 (2004)*

The denial of a DWI and second-degree murder defendant's motion to suppress the results of an SBI analysis of his blood samples was erroneous but not prejudicial. The State was placed on notice that defendant would seek to suppress this evidence by the inclusion of "any and all blood or breath alcohol level tests" in defendant's amended motion to suppress. Moreover, defendant was not required to file a motion to suppress prior to trial because the blood was seized as the result of a warrantless consent search and the State gave notice of its intent to use the evidence only five days prior to trial rather than the 20 days required by

N.C.G.S. § 15A-975(b). However, there was no prejudice because the State introduced evidence of a separate blood analysis performed by the hospital.

**Judges--superior court judge reconsidering order by another superior court judge--motion to suppress heroin**

*State v. Woolridge 357 NC 544 (2003)*

The trial court erred in maintaining a dwelling for keeping or selling controlled substances, trafficking in heroin by possession, trafficking in heroin by manufacturing, and conspiracy to traffic heroin by possession case when one superior court judge reconsidered an order by another superior court judge that originally granted defendant's motion to suppress the heroin and upon reconsideration denied defendant's motion to suppress, because: (1) an order of one superior court judge may be reconsidered by another only if the party seeking to alter the original order makes a sufficient showing of a substantial change in circumstances during the interim which presently warrants a different or new disposition of the matter; and (2) in this case the State did not present evidence of a substantial change of circumstances warranting reconsideration of the order, but instead presented the same or similar evidence based upon the new legal theory of inevitable discovery doctrine that the State could have presented to the first judge.

**Indictment and Information--motion to suppress before indictment--no jurisdiction**

*State v. Wolfe 158 NCA 539 (2003)*

The denial of a motion to suppress was void where the motion was filed and heard before defendant was indicted or waived indictment. Both the State Constitution and the Criminal Procedure Act require an indictment or waiver for a superior court to have jurisdiction in a criminal case. The fact that defendant filed the motion and participated in the suppression hearing did not give the court jurisdiction.

**4. Criminal Law--pro se motion for appropriate relief--failure to show entitlement to hearing**

*State v. Rhue 150 NCA 280 (2002)*

The trial court did not err in a second-degree murder case by denying, without a hearing, defendant's pro se motion for appropriate relief, because: (1) defendant's alleged newly discovered evidence, even if true, would not have the necessary

bearing on his trial to warrant the grant of a new trial; and (2) defendant failed to file any affidavits or other evidence to support his assertions that his counsel was ineffective.

## **Evidence--motion to suppress--cocaine**

*State v. Smith 150 NCA 317 (2002)*

The trial court did not err in an intent to sell and deliver cocaine case under N.C.G.S. § 90-95 by denying defendant's motion to suppress evidence of cocaine seized in a non-consensual search that went beyond a pat-down of defendant's clothing after the stop of a vehicle in which defendant was a passenger, because the officer's action in lifting defendant's shirt under the specific circumstances of this case was reasonably related to the events that took place when: (1) the officer recognized defendant from multiple court proceedings, including a shooting; (2) the officer recognized defendant from photographs in police safety bulletins; (3) defendant consistently covered his pants pocket with his hand as if attempting to hide something; (4) defendant appeared uneasy and became more nervous when the officer asked for permission to search the car; (5) once defendant's hand was moved, the officer saw a bulge in defendant's pants that was slightly smaller than a tennis ball; (6) once the officer moved defendant's hand

and saw the bulge, defendant appeared anxious and moved his feet and shifted as if he were sizing up the situation; and (7) the officer was concerned that defendant might have a weapon in his pocket.

## **2. Evidence--crack cocaine--motion to suppress--excessive force**

*State v. Summey 150 NCA 662 (2002)*

The trial court did not err in a felony possession of cocaine case by denying defendant's motion to suppress evidence of crack cocaine seized after the stop of a truck in which defendant was a passenger even though defendant alleges an officer used excessive force in opening her hand, because: (1) the officer's use of force to pressure open defendant's hand was justifiable in view of the officer's need to ensure that defendant was not in possession of a weapon capable of inflicting injury or that defendant would destroy evidence; and (2) there is no evidence indicating that the officer's use of pressure was overly intrusive as to render the seizure of the crack cocaine unreasonable.

### **3. Evidence--drugs--motion to suppress--probable cause for arrest warrant--protective sweep of residence**

*State v. Bullin 150 NCA 631 (2002)*

The trial court did not err in a trafficking in drugs, conspiracy to traffic in drugs, and possession of controlled substances case by denying defendant's motion to suppress evidence seized at defendant's residence pursuant to his arrest, because: (1) the totality of circumstances reveals that there was probable cause to issue the arrest warrant against defendant including the chain of events, along with the information regarding defendant's reputation and previous involvement with drugs; (2) the officers legally entered defendant's residence pursuant to a valid arrest warrant, and given defendant's actions and his previous involvement with drugs, as well as the dangerous and unpredictable nature of drug trafficking, a prudent officer could reasonably believe that a protective sweep of defendant's home was necessary to make certain that no one else was hiding in the residence; and (3) the search was limited in scope and duration and aimed at ensuring the officers' safety.

### **1. Evidence; Motor Vehicles--driving while impaired--blood test--motion in limine--motion to suppress**

*State v. McDonald 151 NCA 236 (2002)*

The trial court did not abuse its discretion in a second-degree murder, assault with a deadly weapon inflicting serious injury, driving while impaired, failure to stop at a stop sign, driving left of center, and consumption of alcohol by an individual less than twenty-one years of age case by denying defendant's motion in limine and motion to suppress the results of a blood test even though defendant's blood sample was left in a box in an officer's patrol car for three days before being tested, because: (1) the accuracy of the analysis is what is at issue as opposed to the status of the blood sample itself; (2) the evidence presented at trial showed the State followed the guidelines set forth in N.C.G.S. § 20-139.1; (3) there was no question of a mistake or an incorrect administration of the blood testing of the sample of defendant's blood; (4) there was evidence that the effect of the blood being left in the car for three days, if any, was that the alcohol content would evaporate and actually lower the alcohol concentration, which would be to defendant's benefit; and (5) the uncertainty regarding the effect of leaving the

samples in the patrol car for three days goes to the weight of the evidence.

### **1. Evidence--SBI Lab Report--cocaine--motion in limine--notice**

*State v. Carr, 145 NC App 335 (2001)*

The trial court did not err in a possession of cocaine with intent to sell and deliver and sale of cocaine case by denying defendant's motion in limine and allowing the State to introduce an SBI Lab Report regarding the chemical contents of the substance received from defendant into evidence without further authentication under N.C.G.S. § 90-95(g), because: (1) defense counsel's admission that he had received a copy of the SBI Lab Report, coupled with the contentions of the State's attorney that defendant's former attorney had been sent notice of the State's intention to introduce the report into evidence without further authentication, are sufficient to support the factual finding that defendant received notice under N.C.G.S. § 90-95(g); and (2) having received notice, defendant failed to notify the State at least five days prior to trial that defendant objected to introduction of the report into evidence.

### **1.Evidence--motion to suppress--grounds--other than stated in motion**

*State v. Colbert 146 NCA 506 (2001)*

The trial court did not err by granting defendant's motion to suppress evidence obtained during an impaired driving checkpoint on grounds other than those stated in the motion. N.C.G.S. § 15A-977(c) provides that the judge may summarily deny a motion that does not allege a legal basis; the decision is vested in the discretion of the trial court and, once the court decides not to dismiss the motion but to have a hearing, it may base its conclusion on grounds other than those set forth in the motion.

### **10.Evidence--blood, hair, and saliva samples--motion to suppress**

*State v. Grooms, 353 N.C. 50 (2000)*

The trial court did not err in a capital prosecution for first-degree murder by failing to suppress evidence of blood, hair, and saliva samples taken from defendant pursuant to a search warrant authorizing the State to seize blood, hair,

and saliva samples, because: (1) probable cause existed to support issuance of the search warrant, including evidence of the victim's severed hand, a hacksaw frame located near the severed hand, hacksaw blades consistent in size with the hacksaw frame seized from the residence of defendant's parents where defendant occasionally resided, a medical examiner opined that the victim's hand was severed by a tool consistent with a hacksaw, witnesses saw defendant outside the victim's home on the night of the murder and later saw him running away from the area where the severed hand and hacksaw were discovered, a medical examiner found semen in the victim's body, there was evidence that the victim had struggled, defendant had numerous scratches and cuts on his body, and defendant had a history of committing sexual offenses; and (2) the State was not required to obtain a nontestimonial identification order or to provide defendant with the right to counsel during the execution of the search warrant.

#### **11.Evidence--motion in limine--DNA testing--other individuals**

*State v. Grooms, 353 N.C. 50 (2000)*

The trial court did not err in a capital prosecution for first-degree murder by allowing the State's motion in limine to preclude defendant from eliciting from the State's expert witness testimony about DNA testing performed on other individuals in this case, because: (1) the DNA testing results excluded the other individuals as perpetrators of the crime; and (2) the evidence would have only highlighted the DNA match between defendant and the sample collected from the victim's body.

#### **6.Kidnapping--motion to dismiss--no written findings of fact required**

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

The trial court did not err by denying defendant's motion to dismiss a kidnapping charge even though the trial court did not make any written findings of fact concerning defendant's pretrial release, because while a judge is permitted to make certain determinations under N.C.G.S. § 15A-534.1, there is no requirement that there be any written record of those determinations.

#### **7.Criminal Law--motion for a mistrial--kidnapping--verdict sheet--caption in name of a different defendant**

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

The trial court did not commit plain error by denying defendant's motion for a mistrial in a kidnapping case after discovering that the jury had returned a verdict on a verdict sheet that was captioned in the name of a different defendant, because: (1) the verdict sheet lists the proper file number for the case; (2) the proper charges listed are consistent with the evidence presented at trial and with the trial court's instructions; (3) the transcript and exhibits are replete with reference to defendant by his proper name; and (4) after the verdict was returned, the jury was polled and each juror affirmed his or her vote that defendant was guilty.

### **8.Criminal Law--motion for a mistrial--kidnapping--juror's post-conviction doubts about accuracy of verdict**

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

The trial court did not commit plain error by denying defendant's motion for a mistrial in a kidnapping case when a juror raised doubts about the accuracy of the verdict, because: (1) a juror's post conviction doubts about a verdict are insufficient to impeach a defendant's verdict; (2) when the jury was polled upon the original return of the verdict, all jurors assented the guilty verdict against defendant; and (3) the trial court could have amended the verdict without reconvening the jury to make the verdict sheet conform to the intentions of the jury.

### **Evidence and Witnesses 623 (NCI4th) - pretrial motion to suppress - necessity for writing and affidavit**

*State v. Talley, 110 N.C. App. 180 (1993) .*

The trial court did not err in the denial of defendant's motion to suppress seized evidence on the ground that defendant failed to comply with the requirements of N.C.G.S. 15A-977 where the motion to suppress was oral and was not accompanied by an affidavit containing facts supporting the motion.

### **11. Criminal Law 319 (NCI4th) first-degree murder and assault - two defendants -motion to sever -denied**

*State v. Abraham, 338 N.C. 315 (1994)*

The trial court did not err by denying an assault and murder defendant's motion to sever where defendants were charged with the same offenses, all of which the evidence tended to show arose out of a common scheme and were part of the same transaction, and their defenses were not antagonistic.

**16. Constitutional Law 252 (NCI4th) furnishing of medical and psychological records motion properly denied**

*State v. Burr, 341 N.C. 263 (1995)*

Defendant's motion for an order requiring that all medical and psychological records of an infant murder victim's mother be made available to defendant by five entities and any other persons providing medical and psychological services to the mother amounted to a fishing expedition and was properly denied by the trial court where defendant contended that DSS files indicated that the mother suffered from depression and her records might reveal abuse toward her children, but the DSS records contained no evidence that the mother physically abused or acted violently toward her children.

**1. Evidence and Witnesses 649 (NCI4th) motion to suppress evidence of underlying facts of prior convictions failure to rule on motion right to testify on own behalf not affected**

*State v. Barber, 120 N.C. App. 505 (1995)*

The trial court did not impermissibly chill defendant's right to testify on his own behalf when it declined to rule on his motion in limine to suppress Rule 404(b) evidence of the underlying facts of prior convictions, since the trial court did not issue a bold denial of defendant's motion but instead deferred his decision on the matter until such time as the facts and context would allow him to make a well reasoned decision; it did not appear that defendant's decision to testify hinged on the court's ruling; and even if the court did err, such error would not be fatal, as there was other competent evidence of his guilt.

**Evidence and Witnesses 627 (NCI4th) motion to suppress subsequent guilty plea review on appeal notice of intention to appeal denial of motion required**

*State v. McBride, 120 N.C. App. 623 (1995)*

N.C.G.S. 15A-979(b) (1988) allows review of an order finally denying a motion to suppress evidence on appeal from a judgment of conviction, including a judgment entered on a guilty plea; however, pursuant to this statute, a defendant bears the burden of notifying the State and the trial court during plea negotiations of the intention to appeal the denial of a motion to suppress, or the right to do so is waived after of plea of guilty.

#### **10. Criminal Law 610 (NCI4th) first-degree murder motion to dismiss erroneously admitted evidence**

*State v. Jones, 342 N.C. 523 (1996)*

The trial court did not err in a first-degree murder prosecution by denying defendant's motions to

dismiss for insufficient evidence where defendant argued that the evidence would have been insufficient

but for evidentiary errors. The trial court should consider all evidence favorable to the State which is

actually admitted when ruling on a motion to dismiss for insufficient evidence; the fact that some of the

evidence was erroneously admitted by the trial court is not a sufficient basis for granting the motion.

#### **1. Criminal Law § 962 (NCI4th Rev.) - motion for appropriate relief - attorney - conflict of interest -entitlement to evidentiary hearing**

*State v. Hardison, 126 N.C. App. 52 (1997)*

The trial court erred in summarily denying defendant's motion for appropriate relief without conducting an evidentiary hearing to address the issues of fact surrounding counsel's alleged conflict of interest where defendant had indicated to the trial court that he was satisfied with his counsel's representation but defendant's counsel revealed the existence of a potential conflict of interest.

#### **4. Evidence and Witnesses § 657 (NCI4th) - search warrant - motion to suppress - knowing falsehoods in affidavit - deposition inadmissible**

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

In a hearing on a motion to suppress evidence seized pursuant to a search warrant on the ground that the affidavit contained known falsehoods, the trial court properly refused to admit the deposition of a witness to illustrate contradictions between the affidavit and his deposition testimony where defendant conceded that the deposition did not state that the witness did not make the statements attributed to him in the affidavit, and the deposition did not tend to establish knowing falsehoods or reckless disregard for the truth by the affiant. Even if the trial court erred by excluding the deposition, such error was harmless where the affidavit was sufficient to establish probable cause for issuance of the search warrant even if the portions of the affidavit that defendant claims are inconsistent with the deposition are stricken.

#### **1. Criminal Law - motion to suppress statements - accompanying affidavit**

*State v. Chance, 130 N.C. App. 107 (1998)*

There was no prejudicial error in a prosecution for trafficking in cocaine by possession in the trial court's denial of defendant's pretrial motion to suppress inculpatory statements based on the affidavit accompanying the motion being attested by defendant's attorney rather than by defendant personally. It has previously been held that a defendant is not compelled to file her own affidavit and N.C.G.S. § 15A-977 does not expressly require that the affidavit submitted in support of a motion to suppress be that of the defendant. However, the incriminating information was admitted through other unchallenged testimony and it appears likely that defendant would in any event have been convicted of drug trafficking.

#### **1. Criminal Law § 969 (NCI4th Rev.) - first-degree murder - post-conviction - motion for appropriate relief - right to hearing and presentation of evidence - Constitutional issues**

*State v. McHone, 348 N.C. 254 (1998)*

A defendant in a capital first-degree murder post-conviction proceeding was not entitled to a hearing and to present evidence on his motion for appropriate relief

simply because his motion was based in part upon asserted denials of his rights under the Constitution of the United States. N.C.G.S. § 15A-1420(c)(1) provides that any party is entitled to a hearing on questions of law or fact unless the court determines that the motion is without merit, and N.C.G.S. § 15A-1420(c)(7) provides that a defendant is entitled to have the trial court make conclusions of law and state its reasons before denying the motion when defendant asserts with specificity in his motion that his conviction was obtained in violation of the Constitution of the United States. However, (c)(7) is not an expansion of defendant's right to be heard or to present evidence; it is merely a directive to the trial court to make written conclusions of law and to give its legal reasoning for meaningful appellate review. Moreover, (c)(7) must be read in para materia with (c)(3), so that the trial court must determine the motion without an evidentiary hearing when the motion presents only questions of law, including constitutional law. Finally, the court may deny the motion without any hearing either on questions of law or fact if it determines from the motion and any supporting or opposing information that the motion is without merit.

## **2. Criminal Law - guilty plea - informed and voluntary choice**

*State v. Wilkins, 131 N.C. App. 220 (1998)*

At a hearing on a motion for appropriate relief following defendant's guilty plea, there was adequate evidence to support the court's conclusion that defendant had made an informed choice and entered her plea freely, voluntarily, and with an understanding of the consequences where the judge had questioned defendant concerning her plea before she signed the plea transcript.

## **3. Constitutional Law, Federal - effective representation of counsel - guilty plea**

*State v. Wilkins, 131 N.C. App. 220 (1998)*

At a hearing on a motion for appropriate relief following defendant's guilty plea, there was ample evidence to support the trial court's findings and conclusion that defendant was represented by competent counsel who was not ineffective in representing defendant.

## **1. Evidence - motion to suppress - required affidavit**

*State v. Pearson, 131 N.C. App. 315 (1998)*

The trial court erred in a prosecution for driving while impaired by allowing defendant's motion to suppress Intoxilyzer results obtained by an officer outside his jurisdiction. The motion to suppress was not accompanied by the affidavit required by N.C.G.S. § 15A-977(a).

### **1. Search and Seizure - defective motion to suppress - right to appeal**

*State v. Minor, 132 N.C. App. 478 (1999)*

A motion by the State to dismiss an appeal involving cocaine and a weapon seized from an automobile was denied where the State contended that the motion to suppress was defective in that it requested suppression of "statements" while the supporting affidavit referred to "items." The trial judge has discretion to rule on a defective motion and a defendant's failure to comply with N.C.G.S. § 15A-977 does not defeat his right to appeal such a ruling.