

# ADMINISTRATION OF JUSTICE

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## RECENT CRIMINAL CASES (AUGUST 3, 2004 – JANUARY 4, 2005)

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This bulletin discusses selected cases of the United States Supreme Court, North Carolina Supreme Court, and North Carolina Court of Appeals that were decided during the period from August 3, 2004, through January 4, 2005.

### United States Supreme Court

#### Fourth Amendment Issues

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

**Devenpeck v. Alford**, 125 S. Ct. 588, \_\_\_ L. Ed. 2d \_\_\_ (13 December 2004). Based on information that the plaintiff had impersonated a law enforcement officer while using his vehicle to stop a motorist, an officer stopped the plaintiff's vehicle to investigate. The officer's suspicions about the plaintiff's impersonating an officer increased based on information learned after the stop. Another officer joined the stopping officer and discovered that the plaintiff had been taping his conversations with the two officers. The two officers discussed the possible violations to charge the plaintiff—a violation of state law concerning the taping of the conversations, impersonating an officer, and making a false representation to the officer—and arrested the defendant for the state law taping violation. However, a state appellate court ruling at the time of this arrest had clearly established that the plaintiff's taping was not unlawful. The plaintiff sued the officers for making an arrest without probable cause under the Fourth Amendment. A federal appellate court ruled that the officers did not have probable cause to arrest—it rejected the officers' claim that there was probable cause to arrest for impersonating an officer and making a false representation to an officer, because those

offenses were not “closely related” to the offense (illegal taping) identified by the officers when they arrested the plaintiff. The Court reversed the federal appellate court’s ruling. The Court ruled, relying on *Whren v. United States*, 517 U.S. 806 (1996), and *Arkansas v. Sullivan*, 532 U.S. 769 (2001), that the Fourth Amendment requires only that an officer arrest a person based on probable cause that crime was or is being committed. The Court rejected a requirement that an offense establishing probable cause must be closely related to, and based on same conduct as, the offense the arresting officer identified when the arrest occurred. The Court stated that an officer’s subjective reason for making an arrest need not be the criminal offense for which the known facts provide probable cause. [Author’s note: The Court’s ruling effectively overrules the “sufficiently related” analysis in *Glenn-Robinson v. Acker*, 140 N.C. App. 606, 617 (2000).]

### **Officer Was Entitled to Qualified Immunity in Civil Lawsuit Alleging Officer’s Improper Use of Deadly Force Under Fourth Amendment**

**Brosseau v. Haugen**, 125 S. Ct. 596, \_\_\_ L. Ed. 2d \_\_\_ (13 December 2004). The Court ruled that a law enforcement officer was entitled to qualified immunity in the defense of a civil lawsuit alleging the officer’s improper use of deadly force under the Fourth Amendment. The Court stated that the issue in this case involved the officer’s shooting a disturbed felon set on avoiding capture through vehicular flight, when people in the immediate area were at risk from that flight. (See the detailed facts set out in the Court’s opinion.) The Court concluded that the case law at the time of the shooting did not “clearly establish” that the officer’s conduct violated the Fourth Amendment.

### **Sixth Amendment Issues**

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

**Florida v. Nixon**, 125 S. Ct. 551, \_\_\_ L. Ed. 2d \_\_\_ (13 December 2004). The Court ruled that a defense counsel’s strategic decision to concede to the jury, without defendant’s explicit consent, defendant’s guilt of first-degree murder at the guilt/innocence phase of a capital trial and to present evidence and argue for life

imprisonment at the penalty phase, was not per se ineffective assistance of counsel under the Sixth Amendment. Defense counsel had attempted to explain this proposed strategy to the defendant at least three times, but the defendant was generally unresponsive; he never verbally approved or protested the strategy. At trial, defense counsel conceded the defendant’s guilt of first-degree murder during the opening statement, cross-examined some of the state’s witnesses and objected to the introduction of some of the state’s evidence, contested aspects of the jury instructions, and in closing argument conceded the defendant’s guilt but reminded the jury of the importance of the penalty phase. At the penalty phase, the defense counsel presented eight witnesses, including two mental health experts, and argued for life imprisonment. The Court rejected a state appellate court’s ruling that defense counsel’s concession of guilt was per se ineffective assistance of counsel. The Court instead ruled that the issue of ineffective assistance of counsel must be judged under the standard set out in *Strickland v. Washington*, 466 U.S. 668 (1984). The Court stated that a presumption of prejudice is not appropriate based solely on a defendant’s failure to provide express consent to a tenable strategy that counsel has adequately disclosed to and discussed with the defendant. [Author’s note: Compare the Court’s ruling with the legal standard set out in *State v. Harbison*, 315 N.C. 175, 337 S.E.2d 504 (1985) (there is ineffective assistance of counsel per se under the Sixth Amendment when defendant’s counsel admits the defendant’s guilt to the jury without the defendant’s consent).]

### **North Carolina Supreme Court**

#### **Evidence**

- (1) **Statement of Unavailable State’s Witness Made During Interview with Law Enforcement Officer Was Inadmissible Under *Crawford v. Washington* When Defendant Did Not Have Prior Opportunity to Cross-Examine Witness**
- (2) **Evidence in Murder Trial of Prior Similar Assaults on Another Person to Show Identity and Intent to Kill Was Properly Admitted Under Rule 404(b)**

**State v. Morgan**, 359 N.C. 131, 604 S.E.2d 886 (3 December 2004). The defendant was convicted of first-degree murder and sentenced to death. (1) A witness to the murder died before trial for reasons unrelated to the events surrounding the murder. The state offered a

statement of this witness given during an interview with a law enforcement officer. The court ruled that the statement, knowingly given in response to structured law enforcement questioning, was inadmissible under *Crawford v. Washington*, 124 S. Ct. 1354 (2004), because the defendant did not have a prior opportunity to cross-examine the witness. The court ruled, however, that the admission of the statement was harmless error beyond a reasonable doubt. (2) The defendant killed the victim by apparently striking her multiple times with a jagged broken bottle. The state was permitted to introduce testimony of a person who had been assaulted twice by the defendant six years earlier with the use of a bottle in one assault and with the apparent use of a broken bottle in the second assault. The court ruled that this evidence was properly admitted under Rule 404(b) to prove the defendant's identity and the specific intent to kill.

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

**State v. Bell**, 359 N.C. 1, 603 S.E.2d 93 (7 October 2004). The defendant was convicted of first-degree murder. During the capital sentencing hearing, the trial judge allowed the state during its proof of aggravating circumstance G.S. 15A-2000(e)(3) (prior violent felony conviction) to offer a law enforcement officer's testimony concerning what a nontestifying robbery victim told the officer when he questioned the victim about the robbery. The court ruled that the trial judge erred under *Crawford v. Washington*, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004), in admitting the statement. The statement was given in response to structured questioning by the officer and thus was a testimonial statement. The state did not adequately show the unavailability of the victim to testify. In addition, the defendant did not have the opportunity to cross-examine the victim. The court ruled, however, that the admission of the statement was harmless error beyond a reasonable doubt. [Author's note: The Confrontation Clause applies to capital sentencing hearings, see Robert L. Farb, *North Carolina Capital Case Law Handbook*, p. 156 (2d. ed. 2004), but not to non-capital sentencing hearings, see *State v. Phillips*, 325 N.C. 222, 381 S.E.2d 325 (1989).]

**Trial Judge in Second-Degree Vehicular Murder Trial Did Not Err in Allowing State to Prove Malice**

**with Facts from Prior DWI Arrest Resulting in Conviction—Ruling of Court of Appeals Affirmed**

**State v. Locklear**, 359 N.C. 63, 602 S.E.2d 359 (7 October 2004), *affirming per curiam*, 159 N.C. App. 588, 583 S.E.2d 726 (5 August 2003). The court, per curiam and without an opinion, affirmed the ruling of the court of appeals at 159 N.C. App. 588, 583 S.E.2d 726 (5 August 2003). The defendant was convicted of second-degree murder, assault with a deadly weapon inflicting serious injury, DWI, and unsafe movement. The defendant crashed his vehicle into a car in the opposite lane of traffic, killing one passenger in that car and seriously injuring another. The defendant performed poorly on sobriety tests and had a 0.08 alcohol concentration. He did not resist the officer's arrest, however. The trial judge allowed the state to introduce evidence of a prior DWI offense resulting in a conviction that had occurred five years before the offenses being tried, in which the impaired defendant made an unsafe traffic turn that resulted in a collision, performed poorly on sobriety tests, and resisted arrest by twisting the officer's wrist and cursing the officer. The court ruled that the trial judge did not err in admitting this evidence to establish malice. It was sufficiently similar to have probative value.

**Criminal Law and Procedure**

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

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

- (1) **Trial Judge Did Not Err in Allowing Joinder of Defendants for Trial**
- (2) **Evidence Supported Multiple Conspiracy Convictions**
- (3) **Double Jeopardy Did Not Prohibit Defendants' Convictions of Both Attempted First-Degree Murder and Assault with Deadly Weapon with Intent to Kill Inflicting Serious Injury Based on Same Act**

**State v. Tirado**, 358 N.C. 551, 599 S.E.2d 515 (13 August 2004). Two defendants, Tirado and Queen, were jointly tried and convicted for the first-degree murders of two victims, A and B, and the attempted first-degree murder of a third victim, C. They also were convicted of multiple related offenses. They were sentenced to death for both first-degree murders. The defendants were two of nine members of the Crips gang who undertook these criminal acts as "missions" randomly targeting people in the community. They first targeted victim C as she was leaving a restaurant, drove her away in her car after putting her in the trunk, and later shot her multiple times, seriously injuring but not killing her. They regrouped shortly thereafter and targeted victims A and B in their car, put them in the trunk, robbed them of their jewelry, and later killed them. (1) The court ruled that the trial judge did not err in granting the state's motion to join both defendants for a single trial. The court noted that Queen's redacted statement (eliminating references to Tirado) introduced by the state did not prejudice Queen during the guilt-innocence stage of the trial. Queen only expressed concern that the jury would not be able to consider his full statement for mitigation purposes, which only affected the sentencing phase. Thus, joinder for the guilt-innocence stage did not prejudice Queen. (Queen and Tirado had separate capital sentencing hearings.) (2) The defendants were convicted of conspiracy to commit first-degree murder of victim C. They also were convicted of three conspiracies involving victims A and B: conspiracy to commit first-degree murder, conspiracy to commit armed robbery, and conspiracy to commit first-degree kidnapping. The court reviewed the evidence and ruled that it supported the existence of separate agreements to uphold multiple conspiracy convictions. (3) The court ruled that double jeopardy did not prohibit the defendants' convictions of both attempted first-degree murder and assault with a deadly weapon with intent to kill inflicting serious injury based on the same act of shooting victim C. Each offense has at least one element that is not in the other offense.

**When Trial Judge Before Impanelment of Jury Allowed Counsel to Question Already-Selected Juror About New Information Concerning Juror, Voir Dire Had Necessarily Been Reopened Under G.S. 15A-1214(g) and Trial Judge Erred in Not Allowing Counsel to Exercise a Remaining Peremptory Challenge**

**State v. Boggess**, 358 N.C. 676, 600 S.E.2d 453 (13 August 2004). The defendant was on trial for first-degree murder. During the selection of the jury and before impanelment of the jury, an already-selected juror said that she had learned that the mother of the murder victim (who was also a prosecution witness) was staying with one of the juror's friends during the trial. The judge asked the juror questions and determined that there was not good cause to reopen voir dire. However, the judge allowed counsel to question her, but refused to allow defense counsel to exercise a remaining peremptory challenge. The court ruled, after discussing several of its cases interpreting G.S. 15A-1214, that the trial judge erred in not allowing counsel to exercise a peremptory challenge because voir dire had necessarily been reopened when the judge allowed counsel to question the juror.

**Jury Unanimity Concerning Purpose of Kidnapping Was Not Required**

**State v. Bell**, 359 N.C. 1, 603 S.E.2d 93 (7 October 2004). The trial judge's jury instruction for kidnapping listed four purposes of the kidnapping without requiring the jury to unanimously find one or more of the purposes. The court ruled, relying on *State v. Hartness*, 326 N.C. 561, 391 S.E.2d 177 (1990), that the jury instruction was not erroneous. Jury unanimity on the purpose was not required.

**Prosecutor's Jury Argument Was Proper**

**State v. Bell**, 359 N.C. 1, 603 S.E.2d 93 (7 October 2004). The defendant was convicted of first-degree murder and other offenses in which two accomplices were involved. The court ruled that the prosecutor's jury argument during the guilt/innocence phase was proper. (1) The prosecutor's argument that "he who hunts with the pack is responsible for the kill" properly used an analogy to explain the theory of acting in concert. (2) The prosecutor's argument that "[i]f you are going to try the devil, you have to go to hell to get your witnesses" responded to a direct attack by the defendant on the credibility of the state's principal witness who was an accomplice of the defendant. It was intended merely to illustrate the kind of witness

available in this case. The court noted that neither of these arguments in context were improper characterizations or name calling. The prosecutor, in the zealous representation of the state, simply used vivid analogies to illustrate points to the jury.

## **Arrest, Search, and Confession Issues**

### **Defendant's Reference to Attorney Was Not Clear Request for Counsel Under *Davis v. United States***

**State v. Boggess**, 358 N.C. 676, 600 S.E.2d 453 (13 August 2004). During custodial interrogation about a murder, one of the officers told the defendant that he was a "lying piece of shit." The defendant responded, "I'm not lying. I'm telling you the truth. If y'all going to treat me this way, then I probably would want a lawyer." The court ruled that the defendant's statement was not a clear request for counsel under *Davis v. United States*, 512 U.S. 452, 114 S. Ct. 2350, 129 L. Ed. 2d 362 (1994), to require the officers to stop interrogation. The court stated the defendant's words reflected that he understood perfectly well his right to an attorney and was threatening to exercise it unless the officers improved their behavior.

## **Capital Case Issues**

- (1) **Evidence Was Sufficient to Support Submission of Aggravating Circumstance G.S. 15A-2000(e)(6) (Murder Committed for Pecuniary Gain)**
- (2) **Trial Judge Did Not Err in Submitting Mitigating Circumstance G.S. 15A-2000(f)(1) (No Prior Significant Criminal History) Over Defendant's Objection**

**State v. Bell**, 359 N.C. 1, 603 S.E.2d 93 (7 October 2004). The defendant was convicted of first-degree murder and other offenses. (1) The court ruled that the evidence was sufficient to support the submission of aggravating circumstance G.S. 15A-2000(e)(6) (murder committed for pecuniary gain) based on taking money from the murder victim's purse. The court stated that it was reasonable to infer that the defendant acted for his own pecuniary gain when he kidnapped the victim, stole her car, looked through her purse, and took her money. While obtaining the victim's car to leave town may have been the defendant's primary motivation, it may be reasonably inferred that he was also motivated by the need for money. The court also noted, citing *State v. Oliver*, 302 N.C. 28, 274 S.E.2d

183 (1981), that it was irrelevant that the defendant killed the victim after he had obtained the money from her purse. [Author's note: The trial judge also submitted aggravating circumstance G.S. 15A-2000(e)(5) (murder committed during kidnapping) based on kidnapping the victim to facilitate the larceny of the car.] (2) The court ruled that the trial judge did not err in submitting mitigating circumstance G.S. 15A-2000(f)(1) (no prior significant criminal history) over the defendant's objection. The evidence supported the submission of this mitigating circumstance. Most of the defendant's prior convictions were crimes against property. Although the defendant had been convicted of common law robbery, he had not repeatedly engaged in threatening or violent behavior beside this one conviction.

- (1) **When Two Defendants After Joint Trial Had Separate Capital Sentencing Hearings With Same Jury, Trial Judge Erred in Not Polling Jury After It Returned Death Sentence Recommendation for First Defendant Before Beginning Capital Sentencing for Second Defendant**
- (2) **Separate Capital Sentencing Hearings Did Not Violate Constitutional Right to Individualized Sentencing of Defendant Who Had Second Hearing**
- (3) **Indigent Defendant's Statutory Right to Two Counsel Was Not Violated When One of His Lawyers Was Absent During Portion of Other Defendant's Capital Sentencing Hearing**
- (4) **Separate Evidence Supported Finding of Three Aggravating Circumstances and Judge Did Not Err by Failing to Direct Jury Concerning Which Evidence Supported Each Aggravating Circumstance**

**State v. Tirado**, 358 N.C. 551, 599 S.E.2d 515 (13 August 2004). Two defendants, Tirado and Queen, were jointly tried and convicted of two counts of first-degree murder. (1) Because a statement of Queen implicating Tirado was not admissible against Tirado, the court ordered separate capital sentencing hearings before the same trial jury that had return the convictions. After the jury returned a death sentence recommendation for Tirado, the trial judge did not conduct the statutorily-mandated poll of the jury. Instead, the judge conducted a poll of the jury for its death recommendation against Tirado only after the capital sentencing hearing for Queen had been completed. The court ruled that this procedure violated G.S. 15A-2000(b) because the poll concerning Tirado's death sentence recommendation was not

timely, and intervening evidence heard by the jury in Queen's capital sentencing hearing substantially and irreparably prejudiced Tirado. The court ordered a new sentencing hearing for Tirado. (2) The court ruled that the separate capital sentencing hearings for the two defendants did not violate the constitutional rights of defendant Queen who was the subject of the second hearing. The court noted that the trial judge instructed the jury to not consider any evidence in Tirado's sentencing hearing against Queen. (3) The court ruled, relying on *State v. Thomas*, 350 N.C. 315, 514 S.E.2d 486 (1999), that the indigent defendant Queen's statutory right to two counsel was not violated when one of his lawyers was absent during a portion of defendant Tirado's capital sentencing hearing. (4) The court ruled that separate evidence supported three aggravating circumstances: (i) stealing a victim's car and placing the two victims in the trunk and driving them elsewhere, G.S. 15A-2000(e)(5) (murder committed during kidnapping); (ii) theft of the victims' jewelry, G.S. 15A-2000(e)(6) (murder committed for pecuniary gain), and (iii) a double homicide, G.S. 15A-2000(e)(11) (murder committed during course of conduct involving commission of violence against others). The court noted, responding to a defendant's argument, that it has never required that a trial judge's instructions must direct the jury which evidence supported each aggravating circumstance. The court also noted that the judge instructed the jury that the same evidence cannot be used as the basis for more than one aggravating circumstance.

#### **Trial Judge's Instruction Given in Response to Capital Sentencing Jury's Question During Its Deliberations About Meaning of Life Imprisonment Was Erroneous**

**State v. Boggess**, 358 N.C. 676, 600 S.E.2d 453 (13 August 2004). The defendant was convicted of first-degree murder and sentenced to death. The jury during its deliberations in the capital sentencing hearing asked the judge to define life imprisonment. The judge instructed the jury that life imprisonment means imprisonment in the state's prison for life without parole, but also said that "You should decide the question of punishment according to the issues submitted to you by the Court, wholly uninfluenced by consideration of what another arm of the government might or might not do in the future." The court ruled that the quoted language was erroneous because it contained the ineluctable suggestion that life without parole was not the absolute alternative to death that the legislature intended jurors to consider when deciding the appropriate sentence.

- (1) **Defendant's Willingness to Plead Guilty and Accept Life Sentence Was Not a Mitigating Circumstance**
- (2) **Trial Judge Did Not Err in Not Submitting Mitigating Circumstance G.S. 15A-2000(f)(7) (Defendant's Age When Murder Committed)**

**State v. Thompson**, 359 N.C. 77, 604 S.E.2d 850 (3 December 2004). The defendant was convicted of first-degree murder and sentenced to death. (1) The court ruled, relying on *State v. Carroll*, 356 N.C. 526, 573 S.E.2d 899 (2002), that the defendant's willingness to plead guilty to first-degree murder and accept a life sentence was not a mitigating circumstance. The court noted that the defendant chose to plead not guilty and proceed to trial. (2) The court ruled that the trial judge did not err in not submitting mitigating circumstance G.S. 15A-2000(f)(7) (defendant's age when murder committed). Testimony of the defense expert that the defendant was emotionally immature was contradicted by other evidence tending to show that the defendant functioned emotionally as an adult.

## **North Carolina Court of Appeals**

### **Evidence**

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

**State v. Lewis**, \_\_\_ N.C. App. \_\_\_, 603 S.E.2d 559 (19 October 2004) (**Author's note: The North Carolina Supreme Court has granted the state's petition to review this ruling.**). The defendant was convicted of robbery and felonious assault of an elderly victim in her apartment. A law enforcement officer arrived and took a statement from the victim describing how the crimes occurred. Later at the hospital, the victim was presented with a photo lineup and identified the defendant as her assailant. The victim died before trial of causes unrelated to these offenses. The court ruled, relying on *State v. Clark*, \_\_\_ N.C. App. \_\_\_, 598 S.E.2d 213 (6 July 2004), *State v. Pullen*, 163 N.C. App. 696, 594 S.E.2d 248 (20 April 2004), and *Moody v. State*, 594 S.E.2d 350 (Ga. 2004), that the victim's statement to the law enforcement officer and her identification of the

defendant at the photo lineup were testimonial evidence under *Crawford v. Washington*, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004), were offered for the truth of the matter asserted, and their admission at the defendant's trial violated the *Crawford* ruling because the defendant did not have a prior opportunity to cross-examine the victim.

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

**State v. Morton**, \_\_\_ N.C. App. \_\_\_, 601 S.E.2d 873 (21 September 2004). The defendant was convicted of possession of stolen goods. A law enforcement officer interviewed a suspect during an investigation of a break-in and took a written statement from the suspect that incriminated the defendant. The suspect did not testify at trial. The trial judge allowed the state to introduce the suspect's written statement. The court ruled that the suspect's statement was testimonial (a result of police interrogation) under *Crawford v. Washington*, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004), and was inadmissible because the defendant did not have an opportunity to cross-examine the suspect.

**Trial Judge Did Not Err in Ruling That Declarant's Statement Was Inadmissible Under Rule 804(b)(3) (Statement Against Interest)**

**State v. Dewberry**, \_\_\_ N.C. App. \_\_\_, 600 S.E.2d 866 (7 September 2004). The defendant was on trial for first-degree murder and felonious assault. The state's evidence showed that the victims did not have a gun. The defendant's defense was self-defense based on his seeing the murder victim reach for a gun in his car to use against the defendant. The defendant sought to introduce a statement of a witness who was with the defendant during the alleged offenses: the witness had told people that he had removed a gun from the murder victim's car. The court ruled that the trial judge did not err in ruling that the witness's statement was inadmissible under Rule 804(b)(3) (statement against interest). The statement was not so far against the witness's penal interest that a reasonable person in his position would not have made the statement unless he believed it to be true. Also, the defendant failed to meet his burden of showing that there existed independent, nonhearsay indications of trustworthiness

of the statement. (See the court's opinion for its analysis.)

**Trial Judge Did Not Err in Ruling That Defendant's Statement to Nurse Was Inadmissible During Defendant's Defense Under Rule 803(3) (Statement Made for Medical Diagnosis or Treatment)**

**State v. Gattis**, \_\_\_ N.C. App. \_\_\_, 601 S.E.2d 205 (7 September 2004). The defendant was convicted of first-degree murder for the death of his estranged wife, first-degree burglary for breaking into her apartment, and assault with a deadly weapon for shooting at another apartment occupant. The defendant contended that his gun discharged accidentally during a struggle with the murder victim. The defendant was also shot. The court ruled that the trial judge did not err in ruling that the defendant's statement to a nurse was inadmissible during the defendant's defense under Rule 803(3) (statement made for medical diagnosis or treatment). The statement to the nurse included his assertion that the gun accidentally discharged during a struggle with his wife. A statement concerning fault does not ordinarily qualify under the rule. A doctor and the nurse testified at trial that the manner in which the bullet wound occurred was not pertinent to how the defendant's wound was treated.

**State's Expert in DWI Trial Was Properly Permitted to Give Opinion of Defendant's Blood Alcohol Concentration Based on Using Average Elimination Rate of Alcohol in Retrograde Extrapolation Method**

**State v. Taylor**, \_\_\_ N.C. App. \_\_\_, 600 S.E.2d 483 (17 August 2004). The defendant was on trial for habitual DWI. An officer responded to a two-vehicle accident about 1:10 p.m. and arrested the defendant for DWI. The defendant's Intoxilyzer test result at 3:18 p.m. showed an alcohol concentration of 0.05. The state's expert testified at trial that the average elimination rate of alcohol was 0.0165 per hour, and using a retrograde extrapolation method, he opined that the defendant's blood alcohol concentration was 0.08 at the time of the accident (2.1, representing hours between driving and taking the Intoxilyzer test, multiplied by 0.0165 and adding 0.05). The court ruled, using the analysis set out in *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 597 S.E.2d 674 (25 June 2004), that the state's expert was properly permitted to use the average elimination rate of alcohol. The court rejected the defendant's argument that the expert was required to use the defendant's actual elimination rate.

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

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

**Trial Judge Erred in Admitting State's Evidence of Prior Offense Under Rule 404(b) to Attack Defendant's Credibility**

**State v. Cook**, \_\_\_ N.C. App. \_\_\_, 599 S.E.2d 67 (3 August 2004). The defendant was tried for embezzlements on three different dates over a period of six weeks at a restaurant. The trial judge allowed the state to introduce evidence under Rule 404(b) of the defendant's alleged embezzlement at a grocery store about 17 months before the offenses being tried. The judge instructed the jury that it could consider the evidence as it bears on the credibility of the defendant's explanation for the missing money in the offenses being tried. The court ruled that the trial judge erred in admitting this evidence for the purpose of attacking the defendant's credibility. The court noted that the judge's ruling allowed the state to circumvent the strict limitations of Rules 608 and 609. In effect, the evidence was admitted for the sole purpose of

attacking the defendant's character, which is not permitted under Rule 404(b).

**In Prosecution of Kidnapping and Assault on Female, Evidence of Prior Assault of Another Female Was Properly Admitted Under Rule 404(b) and Rule 403 to Show Defendant's Common Plan or Design**

**State v. Petro**, \_\_\_ N.C. App. \_\_\_, \_\_\_ S.E.2d \_\_\_ (4 January 2005). The defendant was convicted of second-degree kidnapping and habitual misdemeanor assault (based on assault on a female). The evidence showed that in 2001 the defendant restrained and assaulted the victim over a period of time. The court ruled that the trial judge did not err under Rule 404(b) and Rule 403 in allowing the state to introduce evidence of an assault of another female in 1999 to show the defendant's common plan or design. The court noted that although the 1999 assault was dissimilar to the 2001 because the 1999 incident involved a sexual assault and the defendant used implements in addition to his hands, there were several similarities: (1) the defendant in each incident isolated and abused the victims, alternated between anger, repentance, and fear of going to jail, and caused an imminent fear of death; (2) the defendant offered to procure medical aid for the victims; and (3) after the assaults, the defendant continued to contact the victims and convinced them to accompany him to a hotel where he again held them against their will.

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

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

**State's Expert Witness Was Properly Qualified to Offer Comparison of Glass Fragments Found at Crime Scene and in Defendant's Boot**

**State v. McVay**, \_\_\_ N.C. App. \_\_\_, \_\_\_ S.E.2d \_\_\_ (21 December 2004). The court ruled that the trial judge did not err under *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 597 S.E.2d 674 (2004), in allowing a state's witness to testify as an expert in comparing glass fragments found at the crime scene with the glass fragments found in the defendant's boot and finding them to be consistent.

## Criminal Law and Procedure

- (1) **Sufficient Evidence of Malice and Proximate Cause Supported Defendant's Conviction of Second-Degree Murder for Death of Law Enforcement Officer During High Speed Pursuit of Defendant**
- (2) **Trial Judge Did Not Err in Jury Instruction on Proximate Cause**

**State v. Bethea**, \_\_\_ N.C. App. \_\_\_, \_\_\_ S.E.2d \_\_\_ (7 December 2004). The defendant was convicted of second-degree murder for the death of a law enforcement officer during a high speed pursuit of the defendant. At about 1:00 a.m., Officer A saw the defendant, who he knew had a revoked license, get into a vehicle and begin driving. The officer activated his blue light to stop the defendant. The defendant responded by driving through a red light and increasing his speed to 75 m.p.h. in a 35 m.p.h. zone. Another patrol car joined the pursuit, with Officer B as the driver and Officer C as a passenger. During the pursuit, the defendant sped through several stop signs, drove at speeds up to 100 m.p.h., crossed into oncoming traffic several times, and turned his car lights off on dark rural roads, decreasing his own visibility and making his car extremely difficult to see, while traveling between 90 m.p.h. and 95 m.p.h. As officers B and C approached a curve, the defendant slowed very quickly. Officer B braked heavily, but the heated brakes were not working effectively and his car struck the defendant's car. Officer B reacted by quickly steering right to avoid another collision with the defendant's car. The officers' car slid off the road and struck a concrete marker and a tree, and Officer C was thrown from the car and killed. (1) The court ruled that there was sufficient evidence of malice and proximate cause to support the defendant's conviction of second-degree murder. The court rejected the defendant's argument that there was insufficient evidence of malice because the defendant was not driving impaired. Malice for second-degree vehicular murder does not require proof of impaired driving. The

court also rejected the defendant's argument that there was insufficient evidence of proximate cause because he did not actually collide with the officers' vehicle and kill the victim with his impact—the court stated that the defendant's reckless flight and wanton violation of traffic laws caused or directly contributed to the collision between the defendant's car and the officers' car, which resulted in the victim's death. (2) The court ruled that the trial judge did not err in the jury instruction on proximate cause by failing to instruct on intervening or superseding causes. The court stated that no reasonable person could conclude that the officers' decisions and actions, viewed separately or collectively, so entirely intervened in or superseded the operation of the defendant's reckless flight and wanton traffic violations to constitute the sole cause of the victim's death.

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

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

## **Sufficient Evidence Supported Convictions of Armed Robbery When Defendant Told Victims That He Had a Gun and Victims Reasonably Believed Defendant Had a Gun**

**State v. Jarrett**, \_\_\_ N.C. App. \_\_\_, \_\_\_ S.E.2d \_\_\_ (7 December 2004). The defendant was convicted of two separate armed robberies of two grocery stores. During each robbery, the defendant told the victim that he had a gun, demanded money, and the victim reasonably believed that the defendant had a gun. The defendant did not display or indicate in any other way that he actually possessed a gun—other than his statement that he had a gun. The court ruled, relying on *State v. Lee*, 128 N.C. App. 506, 495 S.E.2d 373 (1998), and other cases, and distinguishing *State v.*

Faulkner, 5 N.C. App. 113, 168 S.E.2d 9 (1969), that this was sufficient evidence to support the defendant's convictions. The state in an armed robbery trial need only prove that the defendant represented that he had a firearm and circumstances led the victim reasonably to believe that the defendant had a firearm and might use it.

- (1) **BB Gun Was Dangerous Weapon to Support Armed Robbery Convictions**
- (2) **Evidence Supported Convictions of Kidnapping in Addition to Armed Robbery**

**State v. Hall**, \_\_\_ N.C. App. \_\_\_, 599 S.E.2d 104 (3 August 2004). The defendant was convicted of two counts of armed robbery and two counts of second-degree kidnapping involving robberies of the same convenience store on June 2, 2002, and June 16, 2002. (1) A BB gun was used in both armed robberies. The court ruled, relying on *State v. Westall*, 116 N.C. App. 534, 449 S.E.2d 24 (1994), that the evidence was sufficient to prove that the BB gun was a dangerous weapon. An officer testified, based on testing he performed on the gun, that it was capable of denting a quarter-inch piece of cedar plywood at distances of up to two feet. In one robbery, the defendant placed the BB gun directly into the backs of the store clerks. In the other robbery, the defendant pointed the gun directly at the victim's face at a distance of only six to eight inches. (2) The court ruled that the evidence supported convictions of second-degree kidnapping in addition to armed robbery because the defendant's restraint of the victims in both robberies were separate and apart from the restraint necessary to accomplish the robberies. In both robberies, the defendant restrained one employee to coerce another employee to give him the money. The defendant could have accomplished the robberies by directly approaching the employees with access to the money.

- (1) **Trial Judge's Jury Instruction in Trial of Assault on Handicapped Person Resulted in Fatal Variance with Indictment**
- (2) **G.S. 14-32.1(e) Does Not Prohibit Convictions for Both Aggravated Assault on Handicapped Person and Armed Robbery**

**State v. Hines**, \_\_\_ N.C. App. \_\_\_, 600 S.E.2d 891 (7 September 2004). The defendant was convicted of aggravated assault on a handicapped person, armed robbery, and other offenses. (1) The court ruled that the trial judge's jury instruction on aggravated assault on a handicapped person resulted in a fatal variance with the indictment. The indictment alleged that the

offense was committed with an unknown blunt force object causing trauma to the victim's head. The jury instruction included an intentionally striking to the head as well as assaulting the victim by pulling off in the car when part of the victim's body was in the car or near enough to be hit by the car as it pulled away. (2) The court ruled, distinguishing *State v. Ezell*, 159 N.C. App. 103, 582 S.E.2d 679 (2003), that the provision in G.S. 14-32.1(e) ("Unless his conduct is covered under some other provision of law providing greater punishment . . .") does not prohibit convictions for both aggravated assault on a handicapped person and armed robbery that occurred during the same transaction.

#### **Trial Judge Erred in Common Law Robbery Trial by Failing to Submit Misdemeanor Larceny as Lesser-Included Offense**

**State v. Boston**, \_\_\_ N.C. App. \_\_\_, 600 S.E.2d 863 (17 August 2004). The defendant was convicted of common law robbery. The trial judge submitted common law robbery and larceny from the person to the jury, but declined to submit misdemeanor larceny. The defendant's evidence showed that he and the victim were in the same room of the victim's house, they were talking, and when the victim turned away the defendant took the victim's wallet from a table in the same room. In addition, the victim did not see the defendant take the wallet. The court ruled, relying on *State v. Barnes*, 345 N.C. 146, 478 S.E.2d 188 (1996), and *State v. Lee*, 88 N.C. App. 478, 363 S.E.2d 656 (1988), and distinguishing *State v. Buckom*, 328 N.C. 313, 401 S.E.2d 362 (1991), that the trial judge erred in not submitting misdemeanor larceny. The defendant's evidence showed that the wallet was not under the eye of, or the protection or control of, the victim when the it was taken.

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

**State v. Crawford**, \_\_\_ N.C. App. \_\_\_, \_\_\_ S.E.2d \_\_\_ (4 January 2005). The defendant was indicted for a violation of G.S. 14-34.7, and the indictment alleged that the assault on the law enforcement officer inflicted "serious injury." The court noted that the title of the statute uses "serious injury," while the statute's text uses "serious bodily injury." Relying on the ruling in *State v. Jones*, 358 N.C. 473, 598 S.E.2d 125 (2004) (possession of any amount of cocaine is a felony), the court ruled that the legislature's "manifest purpose" (a term from the *Jones* ruling) in enacting G.S. 14-34.7

was to make an assault inflicting “serious injury” or “serious bodily injury” a felony. The court noted that if G.S. 14-34.7 is interpreted to require proof of “serious bodily injury,” it then would be a repetition of G.S. 14-32.4 and would create no additional punishment for assaulting a law enforcement officer, which was the legislature’s intent in enacting a law enforcement specific statute. However, if G.S. 14-34.7 is interpreted to require proof of “serious injury,” then the statute would aggravate the punishment for assault on a law enforcement officer from a misdemeanor to a Class F felony, which was the legislature’s “manifest purpose.” Thus, the indictment was not erroneous in alleging “serious injury.”

**Double Jeopardy Did Not Bar Two Assault Convictions Involving Same Victim Because They Were Based on Separate Facts**

**State v. Spellman**, \_\_\_ N.C. App. \_\_\_, \_\_\_ S.E.2d \_\_\_ (21 December 2004). The court ruled that double jeopardy did not bar the defendant’s convictions of assault with a deadly weapon on a government official and assault with a deadly weapon involving the same victim, when separate facts supported the two convictions. One assault conviction was based on the defendant’s driving his vehicle, striking the victim, and running over his leg. The other assault conviction was based on the defendant’s later reentering his vehicle and driving it toward the victim, placing him in fear of injury.

- (1) **Sufficient Evidence Existed That Defendant Assumed Position of Parent Under G.S. 14-27.7(a)**
- (2) **Evidence of Photographs of Other Young Males Found in Defendant’s Home in Trial For Violation of G.S. 14-27.7(a) Was Admissible and Did Not Violate *Lawrence v. Texas***

**State v. Oakley**, \_\_\_ N.C. App. \_\_\_, \_\_\_ S.E.2d \_\_\_ (7 December 2004). The defendant was convicted of two counts of sexual activity by a substitute parent under G.S. 14-27.7(a). The defendant, a male, had sexual relations with a sixteen year old male. (1) The court ruled, distinguishing *State v. Bailey*, 163 N.C. App. 84, 592 S.E.2d 738 (2004), that there was sufficient evidence that the defendant assumed a position of a parent under G.S. 14-27.7(a). The defendant, a law enforcement officer, was initially involved in a sexual relationship with the victim’s mother. The defendant provided clothing for the victim, took him to court when he was required to appear as a defendant, and allowed him to stay at his

house. Following an arrest of the victim, the defendant posted bail for the victim and represented himself as the victim’s temporary custodian and obtained permission from his parole officer so the victim could live with him. The defendant supported the victim financially. The defendant also represented himself as the victim’s temporary custodian in seeking an evaluation of the victim for involuntary commitment for substance abuse. The court stated that the state’s evidence showed the defendant’s emotional trust, disciplinary authority, and supervisory responsibility over the victim. (2) The state was permitted to introduce fifteen photographs found in the defendant’s home that depicted a number of unidentified males to corroborate the victim’s testimony concerning his sexual relationship with the defendant. Relying on *State v. Creech*, 128 N.C. App. 592, 495 S.E.2d 752 (1998), the court ruled that this evidence was properly admitted for this purpose. The court also rejected the defendant’s argument that the ruling in *Lawrence v. Texas*, 539 U.S. 558 (2003), established constitutional protection for homosexual relationships and therefore the admission of this evidence showing the defendant to be a homosexual was grossly prejudicial. The court noted that *Lawrence* indicated that the ruling does not provide constitutional protection to sexually activity with minors, as existed in this case.

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

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

**Court Reviews Jury Instructions and Issue of Unanimity of Verdict Involving Multiple Sex Offenses Involving Three Children of Defendant and Reverses Some Convictions and Upholds Other Convictions**

**State v. Lawrence**, \_\_\_ N.C. App. \_\_\_, 599 S.E.2d 87 (3 August 2004). The defendant was charged with multiple counts of second-degree rape, second-degree sexual offense, and indecent liberties against three of his children. The court reviewed the evidence concerning the charges, the jury instructions, and the

issue of unanimity of verdict involving these offenses and reversed some convictions and upheld other convictions. Because of the complexity of the evidence, charges, and jury instructions, the court's analysis and rulings will not be summarized here. See the court's extensive discussion of the issues in its opinion.

### **Court Finds Sufficient Evidence to Support Three Convictions of Indecent Liberties with Child**

**State v. Fuller**, \_\_\_ N.C. App. \_\_\_, 603 S.E.2d 569 (19 October 2004). The court ruled that there was sufficient evidence to convict the defendant of three counts of indecent liberties: (1) the defendant lifted the child's shirt and kissed her breasts; (2) he kissed her private parts with his lips; and (3) he penetrated her vagina with his fingers. Following these acts, the defendant obtained a washcloth from the bathroom and "wiped something off the bed." The court stated that these acts were sufficient for the jury to infer that the defendant committed them "for the purpose of arousing or gratifying sexual desire."

### **Multiple Acts of Incest Supported Multiple Incest Convictions**

**State v. Shelton**, \_\_\_ N.C. App. \_\_\_, \_\_\_ S.E.2d \_\_\_ (7 December 2004). The defendant was convicted of four counts of incest with one daughter and three counts of incest with another daughter. The court ruled, distinguishing *State v. Vincent*, 278 N.C. 63, 178 S.E.2d 608 (1971), that the multiple acts of incest supported multiple incest convictions. The court rejected the defendant's argument that a pattern of recurrent incestuous behavior constituted only one offense.

- (1) **Trial Judge Did Not Err in Granting State's Motion to Join Offenses for Trial**
- (2) **Sufficient Evidence of Intent to Permanently Deprive Common Law Robbery Victim of Property**

**State v. Simmons**, \_\_\_ N.C. App. \_\_\_, \_\_\_ S.E.2d \_\_\_ (21 December 2004). (1) The trial judge did not err in granting the state's motion to join for trial offenses occurring five days apart when the earlier offense (common law robbery of a guest in the murder victim's home) was an essential part of the chain of events explaining the defendant's motive for committing an offense (first-degree murder of victim) five days later. (2) The evidence was sufficient concerning the intent to permanently deprive the victim of her property to

support the defendant's conviction of common law robbery. The defendant slapped a cell phone from the victim's hand, declared it to be his new phone, and began dialing on it immediately thereafter. Evidence that the defendant returned the phone within a few days did not bar the jury from determining that the defendant had the intent to permanently deprive the victim of the phone when it was taken from her.

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

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

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

**State v. Robinson**, \_\_\_ N.C. App. \_\_\_, 603 S.E.2d 345 (19 October 2004). The defendant, a store employee selling merchandise (her title was "merchandise associate"), was convicted of embezzlement under G.S. 14-90. The evidence showed that the employee engaged in "underringing," free

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

- (1) **Sufficient Evidence of Constructive Possession of Cocaine**
- (2) **Insufficient Evidence of Possessing Cocaine with Intent to Sell**
- (3) **Insufficient Evidence of Maintaining Dwelling for Purpose of Selling Cocaine**

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

trial court to sentence the defendant for possession of cocaine. (3) The court ruled that there was insufficient evidence of maintaining a dwelling for the purpose of selling cocaine for the same reasons the court found insufficient evidence of possessing cocaine with the intent to sell.

- (1) **When State Drug Charges Were Brought After Federal Prosecution of Defendant Based on Same Acts as State Charges, Some State Drug Prosecutions Were Barred Under G.S. 90-97 While Other Prosecutions Were Not Barred**
- (2) **Evidence Did Not Support Multiple Drug Conspiracy Convictions Because Only One Conspiracy Existed**

**State v. Brunson**, \_\_\_ N.C. App. \_\_\_, 599 S.E.2d 576 (3 August 2004). An undercover law enforcement officer made three separate purchases of cocaine from the defendant over a one month period; at least one other person was involved with the defendant. The defendant was charged in federal court with three counts of unlawful distribution of cocaine for the three transactions. He pled guilty in federal court on one count. The state then brought charges based on the same acts. The defendant was convicted of nine counts of trafficking cocaine and three counts of trafficking conspiracy. The court ruled that G.S. 90-97 (if state drug law is violation of federal law, conviction or acquittal under federal law for the “same act” is bar to state prosecution) barred the state prosecution of the nine counts of trafficking cocaine. The court rejected the state’s argument that an elemental analysis of federal and state offenses should be used to determine whether the state prosecution is barred. The court instead focused on the underlying actions for which the defendant is prosecuted at the federal and state level. The court also ruled, however, that G.S. 90-97 did not bar the prosecution of the trafficking conspiracy charges because the defendant was not charged with conspiracy in federal court. (2) The court ruled, relying on *State v. Griffin*, 112 N.C. App. 838, 437 S.E.2d 390 (1993), and other cases, that the state’s evidence did not support multiple drug conspiracy convictions because only one conspiracy existed. The three drug transactions involved the same principal participants engaging in virtually identical conduct for each transaction, and the same objective existed over a short interval of one month.

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

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

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

- (1) Judge in Trial of Motor Vehicle Offenses Erred in Allowing into Evidence Part of State's Exhibit Containing Defendant's Convictions**
- (2) Felony of Eluding Arrest Is Predicate Substantive Felony Subject to Habitual Felon Law**
- (3) Charging Language for Driving While License Revoked Need Not Allege Defendant Had Received Notice That License Was Revoked**

**State v. Scott**, \_\_\_ N.C. App. \_\_\_, \_\_\_ S.E.2d \_\_\_ (4 January 2005). The defendant was convicted of driving while license revoked, reckless driving, and felony operating a motor vehicle to elude arrest. He was found to be an habitual felon for the felony operating charge. (1) The court ruled that the trial judge erred in allowing into evidence part of a state's exhibit that contained the defendant's prior convictions for which defendant's license was revoked, when the convictions were inadmissible under Rule 404(b). The multiple letters to the defendant in the exhibit containing notices of his license revocation were properly admitted, but the prior convictions should have been redacted. (2) The court ruled that the felony of operating a motor vehicle to elude arrest under G.S. 20-141.5 is a proper predicate substantive felony whose punishment is subject to be elevated as a Class C felony under the habitual felon law. (3) The court ruled that the charging language for the offense of driving while license revoked need not allege that the defendant had received notice of his revocation.

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

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

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

**State v. Randle**, \_\_\_ N.C. App. \_\_\_, \_\_\_ S.E.2d \_\_\_ (21 December 2004). No error occurred under the ruling in *State v. Harbison*, 315 N.C. 175, 337 S.E.2d 337 S.E.2d 504 (1985) (per se ineffective assistance of counsel when defendant's counsel admits defendant's guilt to jury without defendant's consent), when defense counsel during jury argument stated that the defendant was not guilty of first-degree rape and sexual offense in a trial in which the judge instructed the jury on lesser-included offenses of these offenses. Defense counsel never actually admitted the defendant's guilt of any offense, nor did counsel assert that the defendant should be found guilty of some offense. [Author's note: The *Harbison* ruling has been effectively modified by the United States Supreme Court ruling in *Florida v. Nixon*, 125 S. Ct. \_\_\_, \_\_\_ L. Ed. 2d \_\_\_ (13 December 2004), but the modification has no effect on the court of appeals ruling in this case.]

**Prejudice Is Not Presumed When Defense Counsel Fails to Request That Jury Selection Be Recorded**

**State v. Moore**, \_\_\_ N.C. App. \_\_\_, \_\_\_ S.E.2d \_\_\_ (21 December 2004). Under the standard for ineffective assistance of counsel set out in *Strickland v. Washington*, 466 U.S. 668 (1984), prejudice is not

presumed when defense counsel fails to request that jury selection be recorded.

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

**State v. Walker**, \_\_\_ N.C. App. \_\_\_, \_\_\_ S.E.2d \_\_\_ (7 December 2004). While in jail, the defendant sent seven letters to the prosecutor concerning the disposition of the charges against him. The court ruled, distinguishing *State v. Flowers*, 347 N.C. 1, 489 S.E.2d 391 (1997), that the defendant's letters constituted a "plea discussion" under G.S. 15A-1025 and Rule 410, and thus the state impermissibly cross-examined the defendant about them at trial. While the defendant's letters indicated an admission of guilt, plea bargaining implies an offer to plead guilty upon condition. The letters stated that he was willing to confess and help in any way to obtain probation, which articulated the plea arrangement he sought. Even though the prosecutor did not initially respond to the defendant's letters, the letters ultimately led to the prosecutor entering into plea discussions with the defendant. This resulted in the defendant's entering a guilty plea, which was later withdrawn.

**No Due Process Violation When State Filed Felonious Assault Juvenile Petition after Juvenile Had Been Charged with Misdemeanor Assault and Denied Allegations in Court**

**In re N. B.**, \_\_\_ N.C. App. \_\_\_, \_\_\_ S.E.2d \_\_\_ (7 December 2004). The juvenile was charged in a juvenile petition with misdemeanor assault and appeared in court and denied the allegations. Before a hearing was held on this petition, the state brought a petition charging the juvenile with felonious assault based on the same incident that was the basis of the misdemeanor assault petition. The state then tried the juvenile for felonious assault and later dismissed the misdemeanor assault petition. The court ruled, distinguishing *State v. Bissette*, 142 N.C. App. 669, 544 S.E.2d 266 (2001), that the juvenile's due process rights were not violated. The court noted that there was no evidence in the record that the filing of the felonious assault petition was in retaliation for the juvenile's denial of the allegations in the misdemeanor assault petition.

**Defendant Who Successfully Challenged Sentence Under Motion for Appropriate Relief Had Right to Withdraw Guilty Plea Because Error in Original**

**Sentencing Was Not Merely Clerical or Administrative**

**State v. Wall**, \_\_\_ N.C. App. \_\_\_, \_\_\_ S.E.2d \_\_\_ (7 December 2004). The court ruled that the defendant had a right to withdraw his guilty plea under G.S. 15A-1024 after he had successfully challenged in a motion for appropriate relief his original sentence because he had been sentenced under prior record level V, when he should have been sentenced under prior record level IV. The defendant was not limited to being resentenced under level IV, because the error in original sentencing was not merely clerical or administrative.

**Trial Judge Had Authority to Order Department of Correction to Correct Its Records Concerning Prisoner's Sentence, and Department of Correction Must Correct Records When Judge's Judgment Was Voidable, But Not Void Ab Initio**

**State v. Ellis**, \_\_\_ N.C. App. \_\_\_, \_\_\_ S.E.2d \_\_\_ (7 December 2004). The court ruled, relying on *Hamilton v. Freeman*, 147 N.C. App. 195, 554 S.E.2d 856 (2001), that: (1) the trial judge had the authority in a motion for appropriate relief proceeding to order the Department of Correction to correct its records concerning a prisoner's sentence; and (2) the Department of Correction must correct its records concerning a prisoner's sentence as ordered by trial judge, when the trial judge's judgment was voidable (erroneously ordering sentences to be served concurrently), but not void ab initio.

- (1) **Trial Judge Erred at Defendant's First Trial in Granting Defendant's Motion to Dismiss First-Degree Arson Indictment When Indictment Alleged "Dwelling House" and Evidence Showed That Garage Was Burned**
- (2) **When Trial Judge Incorrectly Granted Defendant's Motion to Dismiss First-Degree Arson Indictment Because of Fatal Variance Between Indictment and Evidence at First Trial, Double Jeopardy Barred Second Trial Based on New Indictment Alleging Burning of Same Building Under G.S. 14-62**

**State v. Teeter**, \_\_\_ N.C. App. \_\_\_, 599 S.E.2d 435 (3 August 2004). The defendant was indicted for first-degree arson based on an indictment alleging he burned the "dwelling house" of the victims while they were in the dwelling house. The evidence at trial showed that the defendant burned a garage that was approximately ten to fifteen yards from the house while the victims were in the house. The garage

contained household items, including a freezer filled with food. At the close of the state's evidence, the defendant moved for a dismissal on the ground that there was a fatal variance between the allegation of "dwelling house" in the indictment and the evidence that the garage was burned. The judge granted a dismissal of the first-degree arson on that ground. The defendant was later re-indicted and convicted under G.S. 14-62 (burning uninhabited building) for burning the same garage. The case before the court of appeals was the defendant's appeal of his conviction under G.S. 14-62. (1) The court ruled that the trial judge at the first trial had erred in granting the defendant's motion to dismiss the first-degree arson charge. Under the common law definition of arson, a defendant may be properly charged with arson when he or she burns an outbuilding within the curtilage of an inhabited house. The indictment was not invalid because it did not specify the particular outbuilding within the curtilage that the defendant burned. The absence of a specific reference to the garage neither impaired the defendant's ability to present a defense nor exposed him to the possibility of successive prosecutions. (2) The court ruled, relying on *State v. Ballard*, 280 N.C. 479, 186 S.E.2d 372 (1972) (court ruled that trial judge at first armed robbery erred in granting defendant's motion to dismiss because of fatal variance and second armed robbery trial was barred because same evidence was used at second armed robbery trial), that when trial judge incorrectly granted the defendant's motion to dismiss the first-degree arson indictment because of fatal variance between indictment and evidence at trial, double jeopardy barred a retrial based on a new indictment alleging burning of same building under G.S. 14-62 and when the state's evidence at the retrial was the same as the first trial.

[Author's note: The North Carolina Supreme Court ruling in *Ballard*, relied on by the court of appeals in this case, is now questionable based on United States Supreme Court cases decided after *Ballard*, such as *Lee v. United States*, 432 U.S. 23 (1977) (dismissal at defendant's request of indictment for defect in alleging crime after double jeopardy had attached did not bar retrial of crime), and *United States v. Scott*, 437 U.S. 82 (1978) [no double jeopardy bar to government's appeal (and thus retrial) when defendant's motion resulted in termination of his trial on a ground unrelated to factual guilt or innocence]. See also *United States v. Akpi*, 26 F.3d 24 (4th Cir. 1994); *United States v. Thurston*, 362 F.3d 1319 (11th Cir. 2004); *United States v. Davis*, 873 F.2d 900 (6th Cir. 1989). In addition, the crime under G.S. 14-62 is not the "same" offense as first-degree arson under *Blockburger v. United States*, 284 U.S. 299 (1932),

and thus it does not appear that double jeopardy barred the second trial. See also *State v. Johnson*, 9 N.C. App. 253, 175 S.E.2d 711 (1970) (double jeopardy did not bar second trial after judge at first trial had dismissed charge for a fatal variance; different offense was charged at second trial); *State v. Stinson*, 263 N.C. 283, 139 S.E.2d 558 (1965) (similar ruling).]

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

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

#### **Trial Judge in Statutory Sexual Offense Case Erred in Conducting In Camera Review of County Department of Social Services File Concerning Alleged Victim by Failing to Disclose Materially Exculpatory Evidence to Defendant**

*State v. Johnson*, \_\_\_ N.C. App. \_\_\_, 599 S.E.2d 599 (17 August 2004). The defendant was convicted of first-degree statutory sexual offense. Before trial, the trial judge conducted an in camera review of county department of social services file concerning the alleged minor victim and provided a portion of the file to the defendant. The court examined the file and ruled that the trial judge erred in not providing other information in the file to the defendant because it contained materially exculpatory evidence: an alternative explanation for the abuse of the alleged victim. (See the court's opinion for a discussion of the evidence in the file.)

#### **(1) When Indictment Alleged Conjunctively Several Means By Which Crime Was**

**Committed, There Was Not a Fatal Variance When State Offered Evidence Supporting Only One of the Alleged Means**

- (2) **Taking, Obtaining, or Withholding Two Credit Cards Belonging to Same Person Were Separate Offenses under G.S. 14-113.9 (Financial Transaction Card Theft)**
- (3) **Three Separate Credit Card Purchases Supported Three Convictions of Obtaining Property by False Pretenses**
- (4) **Trial Judge Did Not Err in Instructing Jury on Prima Facie Evidence Provision in G.S. 14-113.10**

**State v. Rawlins**, \_\_\_ N.C. App. \_\_\_, 601 S.E.2d 267 (7 September 2004). The defendant was convicted of three counts of financial transaction card theft and three counts of obtaining property by false pretenses. The defendant used two credit cards of victim A and one credit card of victim B to make three separate purchases at a Wal-Mart store on June 7, 2002. He made a purchase with victim A's credit card, then a purchase with victim B's credit card, and then a purchase with a different credit card of victim A. (1) The defendant argued on appeal that there was a fatal variance between the indictment and evidence at trial because the indictment alleged that the defendant possessed the three credit cards with the intent to use, sell, and transfer them, and the state did not prove that he did so with intent to transfer them. The court ruled, relying on *State v. Gray*, 292 N.C. 270, 233 S.E.2d 905 (1977), and *State v. Williams*, 210 N.C. 159, 185 S.E.2d 661 (1936), that there was not a fatal variance because the state is only required to prove one of the means to commit an offense when the various means of committing the offense are alleged conjunctively. (2) The court ruled that taking, obtaining, or withholding two credit cards belonging to the same person were separate offenses under G.S. 14-113.9 (financial transaction card theft) (3) The court ruled that the three separate purchases with the credit cards supported three convictions of obtaining property by false pretenses. (4) The court ruled that the trial judge did not err in instructing the jury on the meaning of the prima facie evidence provision in G.S. 14-113.10. (See the court's discussion of this issue in its opinion.)

**Superior Court Had Jurisdiction Over Felony Even Though It Had Not Been Transferred from Juvenile Court to Superior Court Under G.S. 7B-2200, Because It Was Transactionally Related Under G.S. 7B-2203(c) to Felony That Had Been Transferred from Juvenile Court to Superior Court**

**State v. Jackson**, \_\_\_ N.C. App. \_\_\_, 600 S.E.2d 16 (17 August 2004). A fifteen year old juvenile was involved with others in committing an attempted armed robbery and murder. Two juvenile petitions, one alleging first-degree murder and the other alleging attempted armed robbery, were filed in juvenile court against him. The juvenile court judge found probable cause and ordered that these offenses be transferred to superior court for trial as an adult. The juvenile was then indicted for first-degree murder, attempted armed robbery, and conspiracy to commit armed robbery. He was convicted in superior court of all three offenses. The court ruled that the superior court had jurisdiction over the felony of conspiracy to commit armed robbery even though this offense was not transferred from juvenile court to superior court under G.S. 7B-2200 (setting out probable cause hearing and transfer to superior court), because it was transactionally related under G.S. 7B-2203(c) to the felony of attempted armed robbery that had been transferred from juvenile court to superior court.

**Superior Court Judge Has Authority to Set Conditions of Release Pending Defendant's Appeal to Court of Appeals of Conviction in Which Defendant Received Probationary Sentence**

**State v. Howell**, \_\_\_ N.C. App. \_\_\_, 603 S.E.2d 901 (2 November 2004). The court ruled that a superior court judge has the authority to set conditions of release pending the defendant's appeal to the court of appeals of a conviction in which the defendant received a probationary sentence. The court rejected the defendant's argument that because G.S. 15A-1451(a)(4) stays his probationary sentence pending appeal and thus he is not in custody, a superior court judge has no authority to set conditions of release.

**Trial Judge Did Not Err in Denying Indigent Defendant Funds to Hire Accident Reconstruction Expert for Vehicular Homicide Trial**

**State v. Speight**, \_\_\_ N.C. App. \_\_\_, 602 S.E.2d 4 (7 September 2004). The court ruled that the trial judge did not err in denying the indigent defendant funds to hire an accident reconstruction expert for a vehicular homicide trial. (See the court's analysis in its opinion.)

- (1) **Double Jeopardy Did Not Bar District Attorney's Civil Nuisance Action under Chapter 19 of General Statutes Based on Defendants' Prostitution Business After Defendants Had Previously Been Convicted of Prostitution Offenses**

**(2) Trial Judge Erred in Entering Summary Judgment for Plaintiff District Attorney on Issue of Damages**

**State ex rel. Albright v. Arellano**, \_\_\_ N.C. App. \_\_\_, 599 S.E.2d 415 (3 August 2004). (1) The court ruled, based on *Hudson v. United States*, 522 U.S. 93 (1997), that double jeopardy did not bar a district attorney's civil nuisance action under Chapter 19 of General Statutes based on the defendants' prostitution business after the defendants had been previously convicted of prostitution offenses. (2) The court ruled that the trial judge erred in entering summary judgment for the plaintiff (district attorney) on the issue of damages. See the court's discussion of the facts involving this issue.

**Arrest, Search, and Confession Issues**

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

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

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

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

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

**Defendant's Motion to Suppress Made During Trial Was Timely Filed**

**State v. Speight**, \_\_\_ N.C. App. \_\_\_, 602 S.E.2d 4 (7 September 2004). The defendant filed a motion to suppress during trial, alleging that evidence was improperly seized as a result of a consent search. The court ruled, relying on *State v. Fisher*, 321 N.C. 19, 361 S.E.2d 551 (1987), that the motion was timely filed during trial because the state failed to give proper notice under G.S. 15A-975(b) (state must notify defense counsel twenty working days before trial of intention to use certain evidence) that would have otherwise required the motion to be made before trial.

**Jail Personnel's Seizure and Reading of Letters That Were Outgoing Mail to Non-Attorney Did Not Violate Fourth Amendment, and Letters to Wife Were Not Inadmissible Under Marital Communications Privilege**

**State v. Fuller**, \_\_\_ N.C. App. \_\_\_, 603 S.E.2d 569 (19 October 2004). Jail personnel seized and read the defendant's letters that were not marked "legal," were given to them to be mailed with the outgoing mail, and were not addressed to an attorney. The court ruled, relying on *State v. Wiley*, 355 N.C. 592, 565 S.E.2d 22 (2002), that the defendant did not have a reasonable expectation of privacy in the letters and his Fourth Amendment rights were not violated. The court also

ruled, relying on *State v. Wallace*, 162 N.C. 623, 78 S.E. 1 (1913), that these letters to his wife were not inadmissible under the marital communications privilege when a third party—jail personnel lawfully having them in their possession and authorized to read them—was effectively a party to the communication.

**Physical Evidence Found As Result of Non-Coerced Statement Obtained from Defendant After *Miranda* Violation Was Admissible**

**State v. Goodman**, \_\_\_ N.C. App. \_\_\_, 600 S.E.2d 28 (17 August 2004). The defendant, after waiving his *Miranda* rights, talked to officers but later asserted his right to counsel. Five days later, officers went to the jail and told the defendant that they were not going to question him about the murder, but that they had information that he had killed someone and might know where the body was. The defendant made some incriminating statements and took the officers to the body. The trial judge ordered the statements suppressed based on the officers' *Miranda* violation. [Author's note: See the discussion of *Arizona v. Roberson*, 486 U.S. 675 (1988), on p. 205 of Robert L. Farb, *Arrest, Search, and Investigation in North Carolina* (3d. ed. 2003).] However, the trial judge did not suppress the physical evidence, the body and items found near the body, that had been obtained as a result of the *Miranda* violation. The court ruled, relying on *State v. May*, 334 N.C. 609, 434 S.E.2d 180 (1993), and *United States v. Patane*, 124 S. Ct. 2620 (2004), that the physical evidence found as result of the non-coerced statement obtained from the defendant after the *Miranda* violation was admissible, and upheld the trial judge's ruling on that ground.

**When In-Custody Juvenile Volunteered Statements to Officers After Attending Court Hearing, Officer's Response and Request for Clarification Were Not Interrogation Under *Miranda* and Also Did Not Violate His Sixth Amendment Right to Counsel**

**State v. Jackson**, \_\_\_ N.C. App. \_\_\_, 600 S.E.2d 16 (17 August 2004). The fifteen year old juvenile-defendant was charge with felonies. Two officers were with him during a juvenile court hearing. After the hearing, the defendant was being talkative. When the defendant saw a cap that had been introduced into evidence, he spontaneously stated that he knew where the cap came from. One of the officers responded, "so do I." The defendant then talked about a robbery. The officer never initiated a conversation at any point other than to ask him sometimes for clarification. The court

ruled that the officer's response and request for clarification were not interrogation under *Miranda* and also did not violate his Sixth Amendment right to counsel.

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

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

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

**State v. Walker**, \_\_\_ N.C. App. \_\_\_, \_\_\_ S.E.2d \_\_\_ (7 December 2004). The defendant, a U.S. Marine, was given *Miranda* warnings before questioning about a robbery by a deputy sheriff and military investigator. The next day while in the office of the defendant's military superior, a master gunnery sergeant, the sergeant asked the defendant why he had been questioned the prior day, if he had anything to do with "this mess," and if he was carrying a weapon during the incident involving the robbery. There was no evidence that the defendant felt he could not leave or that he had to answer the sergeant's questions. The court ruled that the defendant was not in custody under *Miranda* based on the ruling in *State v. Davis*, 158

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

## Sentencing

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

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

see "*Blakely v. Washington* and North Carolina's Sentencing Laws," at <http://ncinfo.iog.unc.edu/programs/crimlaw/faculty.htm>.]

See also **State v. Speight**, \_\_\_ N.C. App. \_\_\_, 602 S.E.2d 4 (7 September 2004) (Author's note: **the North Carolina Supreme Court has granted the state's petition to review this ruling and the state's petition for a writ of supersedeas, which stays the ruling until the court issues its ruling.**) [court remands for resentencing under *Blakely* the defendant's sentences for involuntary manslaughter in the aggravated range and a DWI sentence in Level Two, with a finding of the "serious injury" grossly aggravating factor under G.S. 20-179(c)(3) and a non-statutory aggravating factor of using a motor vehicle in the commission of a felony leading to the death of two people—the court rejected the state's argument that the court should determine whether the constitutional error in sentencing the defendant was harmless beyond a reasonable doubt (Author's note: some of the information about the DWI sentence comes from the record on appeal in this case)].

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

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

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