RECENT CASES AFFECTING CRIMINAL LAW AND PROCEDURE
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NORTH CAROLINA SUPREME COURT

Evidence

When Testimony Is Offered Under Firmly-Rooted Exception to Hearsay Rule, Confrontation Clause of North Carolina Constitution Is Satisfied

State v. Jackson, 348 N.C. 644, 503 S.E.2d 101 (30 July 1998), *reversing*, 126 N.C. App. 129, 484 S.E.2d 405 (6 May 1997). The defendant was tried for felonious assault. The state was permitted to introduce, by testimony of the victim's mother, evidence of a hearsay statement of the victim under Rule 803(3) (state of mind). The victim was available to testify, but the state did not call him as a witness. The court rejected the defendant's argument that the introduction of the hearsay statement under these circumstances violated the defendant's confrontation rights under the North Carolina Constitution. The court adopted, for purposes of the Confrontation Clause of the North Carolina Constitution (Art. I, § 23), the United States Supreme Court's rulings in White v. Illinois, 502 U.S. 346, 112 S. Ct. 736, 116 L. Ed. 2d 848 (1992) and United States v. Inadi, 475 U.S. 387, 106 S. Ct. 1121, 89 L. Ed. 2d 390 (1986) that hearsay has sufficient guarantees of reliability under the Confrontation Clause of the United States Constitution when it comes within a firmly-rooted exception to the hearsay rule. The court ruled that when the state offers hearsay that comes within a firmly-rooted exception to the hearsay rule [and Rule 803(3) is such an exception], the Confrontation Clause of the North Carolina Constitution is not violated, even though a particularized showing is not made of the necessity for using such hearsay or its reliability or trustworthiness. See also State v. Washington, 131 N.C. App. 156, 506 S.E.2d 283 (20 October 1998) [relying on *Jackson* ruling, court finds no confrontation clause violation in admitting sexual assault victim's statements under firmly-rooted hearsay exceptions, Rule 803(2) (excited utterance) and Rule 803(4) (statement made for medical diagnosis or treatment)].

HGN (Horizontal Gaze Nystagmus) Test Results Are Not Admissible Unless There is Scientific Foundation for Test

State v. Helms, 348 N.C. 578, 504 S.E.2d 293 (9 July 1998), *reversing on other grounds*, 127 N.C. App. 375, 490 S.E.2d 565 (2 September 1997). A HGN (horizontal gaze nystagmus) test purports to measure intoxication based on the involuntary jerking movement of the eyeball while looking at a moving object. The court ruled that HGN is a scientific test that must be presented to the jury by a qualified expert who testifies about the relationship between HGN test results and intoxication and is then subject to cross-examination about the validity and reliability of the HGN test (but compare this statement with the reference to judicial notice, discussed below). The court noted that new scientific methods of proof are admissible at trial if the method is sufficiently reliable. And, in general, when no specific precedent exists, scientifically accepted

reliability justifies the admission of the testimony of qualified witnesses, and such reliability may be found either by judicial notice or from the testimony of scientists who are expert in the subject matter, or by a combination of the two. The court found nothing in the record of the case before it to indicate that the trial judge took judicial notice of the reliability of the HGN test. [The meaning of the court's reference to judicial notice is not clear. Under North Carolina Evidence Rule 201, a court may take judicial notice of a fact only if it is not subject to reasonable dispute; thus, a party requesting a judge to take judicial notice of HGN probably would have to show that the scientific principle on which the test is based is not subject to reasonable dispute in the scientific community.] The court also noted that although the law enforcement officer testified that he had taken a forty-hour training course in the use of the HGN test, the state did not present any evidence and the judge did not conduct an inquiry concerning the test's reliability. The court concluded that until there is sufficient scientifically reliable evidence about the correlation between intoxication and nystagmus, it is improper to permit a lay person to testify about the meaning of HGN test results.

(1) Defendant's Prior Convictions of Assault and Communicating Threats Properly Admitted under Rule 404(b), Based on Facts in This Case
(2) Murder Victim's Statement to Her Mother About Defendant's Threats Was Admissible under Rule 803(3) (Then-Existing State of Mind)

State v. Gary, 348 N.C. 510, 501 S.E.2d 57 (9 July 1998). The defendant was tried for the first-degree murder of his girlfriend. No one witnessed the homicide, which occurred on October 26, 1993. (1) The state offered evidence of the defendant's convictions of assault on a female and communicating threats toward the victim, acts that occurred on May 2, 1993. The evidence showed that the defendant pled guilty to assaulting the victim by throwing a hammer at her and communicating a threat to her by stating, "If you call the police, when I get out I am coming back to kill you." The court ruled that this evidence was admissible under Rule 404(b) to show malice, intent, and premeditation and deliberation. The remoteness in time of the incident affected the weight of the evidence rather than its admissibility. The court also ruled that it was admissible under Rule 404(b) to show identity. The court noted that the medical examiner testified that the victim died as a result of a blow to her head by a hammer or hammer-shaped object. (2) The court ruled that the victim's mother was properly permitted under Rule 803(3) (then-existing state of mind) to testify that the victim told her, "[The defendant] told me he'd kill me if I left him." The court, citing State v. Gray, 347 N.C. 143, 491 S.E.2d 538 (1997), noted that a victim's statement relating factual events that tend to show the victim's state of mind when making the statement is not excluded under Rule 803(3) when the facts serve to demonstrate the basis for the victim's emotions. The court also noted that the statement showed the victim's fear when speaking to her mother and demonstrated the basis of her fear—a threat to her life. The fact that this hearsay statement by the defendant was contained within a hearsay statement by the victim did not bar its admission into evidence because both statements were admissible. See also State v. Hipps, 348 N.C. 377, 501 S.E.2d 625 (9 July 1998) [evidence of murder victim's statements that she was afraid defendant might kill her were admissible under Rule 803(3); court distinguished State v. Hardy, 339 N.C. 207, 451 S.E.2d 600 (1994)].

Murder Committed by Defendant in 1978 Was Properly Admitted Under Rule 404(b) in Trial of Murder Committed in 1995, Based on Facts in This Case; Court Discusses Significance of Time Lapse Between Crimes

State v. Hipps, 348 N.C. 377, 501 S.E.2d 625 (9 July 1998). The court ruled that a murder committed by the defendant in 1978 was properly admitted under Rule 404(b) in the trial of a murder committed in 1995. The court noted that the murders, though separated by seventeen years, were committed within eight-tenths of a mile from one another. Both victims had been stabbed multiple times in the back and neck with a knife. The defendant had in each instance used a piece of lumber or wood to inflict blunt-force injuries to the head and then had thrown the wood in the bushes. In each case the defendant was later seen by the police near the crime scene, and when questioned, he confessed to having killed the victims. In each case, he pointed out the piece of wood he had used. The court stated that the manner in which the prior murder was committed tended to show that the defendant had both knowledge and intent when he committed the murder for which he was being tried. The fact that the defendant had previously killed a person in the same way demonstrated that the defendant knew what he was doing, knew his actions would result in the victim's death, intended to kill the victim, and did not simply lose control. The remoteness in time between the two crimes may be significant when the evidence of the prior crime is introduced to show that both crimes arose out of a common scheme or plan, but remoteness is less significant when the prior crime is used to show intent, motive, knowledge, or lack of accident. In this case, the court concluded that the time lapse affected the weight of the evidence, not its admissibility.

Evidence of Felonious Assault Committed Ten Days After Murders Being Tried Was Admissible under Rule 404(b) and Rule 403

State v. Lemons, 348 N.C. 335, 501 S.E.2d 309 (9 July 1998). The defendant was convicted of two first-degree murders and sentenced to death for each murder. The court ruled that the trial judge did not err in admitting under Rule 404(b) and Rule 403 evidence of a felonious assault committed ten days after the murders. In the two murders being tried, the evidence showed that both victims were taken by surprise, confined in the trunk of a car, and forced to strip. They were then robbed, and each was shot in the head and killed. In the felonious assault committed ten days after the murders, the victim was also taken by surprise, assaulted, and robbed. The court noted that, more importantly, the victim was shot in the back of his head using the same gun that killed one of the murder victims ten days earlier. The evidence was properly admitted under Rule 404(b) to show the identity of the perpetrator in the murder prosecution. The court specifically rejected the defendant's argument that the trial judge erred in admitting (1) the victim's testimony about the felonious assault, (2) the testimony of three officers about the investigation of that assault, and (3) eight photographs of the victim's injuries and the crime scene. The court also ruled that the trial judge did not err in not excluding the evidence under Rule 403, specifically noting the limiting instruction the judge gave to the jury about the evidence admitted under Rule 404(b).

(1) Evidence of Other Similarly-Committed Robberies Was Properly Admitted under Rule 404(b) and Rule 403
(2) Trial Judge Erred in Not Allowing Defense Counsel to Cross-Examine State's Witness About His Pending Charge of Breaking and Entering

State v. Hoffman, 349 N.C. 167, 505 S.E.2d 80 (9 October 1998). (1) The defendant was convicted of a first-degree murder and armed robbery of a jewelry store that occurred on November 27, 1995. The court ruled that the trial judge did not err in admitting evidence of two bank robberies that occurred on October 20, 1995, and September 18, 1995, under Rule 404(b) and Rule 403, to prove the identity of the perpetrator in the case being tried. The court noted that all the robberies occurred in small towns near Charlotte and occurred in daylight hours while the businesses were open. The defendant drove his white Nissan in the bank robberies, while in this case a white Nissan was seen outside the jewelry store on the day of the murder. The defendant's sawed-off shotgun and ski mask were used in the bank robberies, and the perpetrator in this case wore a ski mask and carried a sawed-off shotgun. (2) The court, relying on State v. Prevatte, 346 N.C. 162, 484 S.E.2d 377 (1997), ruled that the trial erred, in violation of the defendant's Sixth Amendment right of confrontation, in not allowing defense counsel to cross-examine a state's witness about his pending charge of breaking and entering to show the witness's bias.

Admission of Declarant's Statement Was Not Hearsay Because It Was Not Offered for Truth of Statement But to Show Defendant's Motive to Commit Murder

State v. Davis, 349 N.C. 1, 506 S.E.2d 455 (9 October 1998). The defendant was convicted of three counts of first-degree murder for killing co-workers after being fired from his job. The state offered a statement of one of the murder victims at the defendant's dismissal conference (held two days before the murders) in which he explained to the defendant that he was being fired from his job. The statement was not hearsay because the state did not offer it to prove the truth of the matter asserted. Rather, that statement was offered to prove the defendant's motive for the murder.

Criminal Offenses

(1) Anus Is Private Part under Indecent Exposure Statute (G.S. 14-190.9), Although Buttocks Are Not Private Parts
(2) Willful Exposure of Entire Bare Buttocks Is Sufficient Evidence of Exposure of Private Parts under Indecent Exposure, Even Though Victim Did Not See Anus or Genitals

State v. Fly, 348 N.C. 556, 501 S.E.2d 656 (9 July 1998), *reversing*, 127 N.C. App. 286, 488 S.E.2d 614 (1997). The victim was walking up the steps of her condominium and looked up to see the defendant, a male, "mooning" her. He was bent over at the waist, with his pants pulled down to his ankles. He was naked from his head to his feet, except for a cap on his head. The victim testified that she saw "his buttocks, the crack of his buttocks." He was convicted of violating the indecent exposure statute G.S. 14-190.9. (1) The court ruled that an anus is a private part under the indecent exposure statute—the statute applies to the external organs of sex and excretion. The court stated that the ruling in State v. Jones, 7 N.C. App. 166, 171 S.E.2d 468 (1969), limiting private parts to genital organs, was too narrow. However, the court also stated

that buttocks are not private parts; thus wearing "thong" or "g-string" bikinis do not violate the statute. (2) The court ruled that the jury could reasonably find that the defendant in this case had willfully exposed his private parts—anus, genitals, or both. The statute does not require that the victim see the private parts, but only that the private parts are exposed "in the presence of" a person of the opposite sex.

Additional Sixty-Month Firearm Enhancement under G.S. 15A-1340.16A Was Properly Imposed for Second-Degree Kidnapping

State v. Ruff, 349 N.C. 213, 505 S.E.2d 579 (9 October 1998), *reversing*, 127 N.C. App. 575, 492 S.E.2d 374 (1997). The defendant pointed a gun in the victim's face, transported her in his pickup truck to a field, and raped her. The defendant was convicted of first-degree rape and first-degree kidnapping and was sentenced for first-degree rape and second-degree kidnapping (the judge apparently reduced the kidnapping based on prior appellate case law). The trial judge sentenced the defendant to an additional sixty-months under G.S. 15A 1340.16A for the use of the firearm during the kidnapping. The court rejected the analysis of the Court of Appeals, which had found the enhancement improper based on Fair Sentencing Act case law involving aggravating factors. The court ruled that the enhancement was properly imposed for the second-degree kidnapping conviction because the use or display of a firearm is not an element of that offense. The court stated that it was irrelevant that the use of a firearm was an element of the first-degree rape conviction. [Note: This ruling may cast doubt on the ruling in State v. Brice, 126 N.C. App. 788, 486 S.E.2d 788 (1997) (error to apply firearm enhancement to second-degree kidnapping conviction because evidence of the use of a firearm was needed to prove an element of offense, restraint of victim), although the court in *Ruff* did not discuss *Brice* or the statutory bar on firearm enhancement when evidence of a firearm is needed to prove an element of an offense.]

(1) Trial Judge Has No Authority to Enter PJC for DWI Conviction
(2) Court Condemns State's Use of "Not Guilty, Not Guilty" Procedure

In re Tucker, 348 N.C. 677, 501 S.E.2d 67 (9 July 1998). In a case in which the court rejected the Judicial Standards Commission's recommendation of censure of a judge, the court made two statements on criminal matters. (1) The court stated that a trial judge has no authority to enter a prayer for judgment continued (PJC) for a conviction of impaired driving under G.S. 20-138.1, because the sentencing provisions of G.S. 20-179 are mandatory. (2) A prosecutor developed a practice known as "not guilty, not guilty" to avoid violating office policy that prohibited dismissing a DWI case when the defendant refused to take a chemical test or blew 0.08 or more. The prosecutor and defense attorney, or sometimes just one of them, would approach the judge and state, "This is not guilty, not guilty," meaning that the defendant was pleading not guilty, the state was not presenting evidence, and the judge should enter a verdict of not guilty. The court stated that it "strongly condemn[s]" the practice; each judge and attorney has a duty to uphold the legal process, and neither complacency nor the search for efficiency should obscure that responsibility. The court reaffirmed a statement from In re Nowell, 293 N.C. 235, 237 S.E.2d 246 (1977), that the disposition of any case for reasons other than an honest appraisal of the facts and law as disclosed by the evidence and advocacy of both parties will amount to conduct prejudicial to the administration of justice. The court stated that "we send a clearing warning to

judges, district attorneys, assistant district attorneys, and defense attorneys that such procedures and practices are wholly unacceptable."

(1) Evidence Was Sufficient to Support Theory of Torture in First-Degree Murder Child Homicide, Based on One-Week Period of Severe Physical Abuse of Child
(2) Evidence Was Sufficient to Support First-Degree Sexual Offense, Based on Injuries and Defendant's Exclusive Access to Victim

State v. Lee, 348 N.C. 474, 501 S.E.2d 334 (9 July 1998). (1) The court ruled that the evidence was sufficient to support the theory of torture in a first-degree murder child homicide prosecution. During a one-week period, the defendant inflicted myriad bruises to the child victim's face, neck, and arms. The child victim vomited, had diarrhea, and his eyes were crossed. Medical testimony established that his death was the result of a brain injury, caused by the severe physical abuse, that resulted in massive bleeding in his brain. (2) The autopsy of the child victim determined the he had a tear in his rectum that was about two inches into his anal canal. Skin abrasions adjacent to the anal opening were apparent, and there was mucus and blood around his anus. Medical testimony indicated that the victim was penetrated by an object that was two or three inches long and three-fourths of an inch in diameter sometime before 2:00 A.M. on the Friday morning before his death. Other evidence showed that the defendant had exclusive access to the child during the time period when the injury was likely inflicted. The court ruled that this evidence was sufficient to support the defendant's conviction of first-degree sexual offense.

Trial Judge Did Not Err, When Instructing on Aiding and Abetting, By Including "Friend" Exception to "Mere Presence" Rule

State v. Lemons, 348 N.C. 335, 501 S.E.2d 309 (9 July 1998). The court ruled that, based on the facts in this case and relying on State v. Rankin, 284 N.C. 219, 200 S.E.2d 182 (1973), the trial judge did not err, when instructing on aiding and abetting, by including the "friend" exception to the "mere presence" rule.

Arrest, Search, and Confession Issues

(1) Reasonable Suspicion Supported Investigative Stop for Breaking and Entering Vehicle
(2) Length of Investigative Stop Was Reasonable, and Probable Cause Existed to Arrest Defendant

State v. Fletcher, 348 N.C. 292, 500 S.E.2d 668 (9 July 1998). Defendant was convicted of first-degree murder and sentenced to death. He sought to suppress statements that he made as a result of an investigative stop and arrest for breaking and entering a motor vehicle in front of a beauty salon. (1) Officer A received information from witness A that about the time a car was broken into, a tall black male with dark pants and a white t-shirt had been acting suspiciously nearby (walking back and forth in front of the salon). Officer A also received information from witness B that a black male with a white t-shirt had picked up a cement block and walked toward the beauty salon and then, moments later, had run down an alley. Officer B received a transmission from officer A to be on the lookout for such a person, giving him the description from witnesses

A and B and the location where the suspect had been seen. Officer B saw a person fitting this description just moments later and within two blocks of the location; he stopped him and put him in a patrol car. Fifteen minutes had elapsed since the reporting of the crime. The court ruled that reasonable suspicion supported the investigative stop of the defendant for breaking and entering a motor vehicle, based on the proximity in time and location and the accuracy of the physical description of the race, gender, and clothing of the suspect. The court cited State v. Lovin, 339 N.C. 695, 454 S.E.2d 229 (1995), State v. Rinck, 303 N.C. 551, 280 S.E.2d 912 (1981), and State v. Buie, 297 N.C. 159, 254 S.E.2d 26 (1979). (2) The court noted that the record showed that the defendant sat in the patrol car for a short period of time, "several minutes," while the officers waited for witness A to arrive to attempt to identify him. Witness A identified the defendant as the person who she had seen in front of the beauty shop. The court ruled that her identification, in conjunction with witness B's description, gave the officers probable cause to arrest the defendant for breaking and entering the motor vehicle. The court cited State v. Wrenn, 316 N.C. 141, 340 S.E.2d 443 (1986), State v. Joyner, 301 N.C. 18, 269 S.E.2d 125 (1980), State v. Bright, 301 N.C. 243, 271 S.E.2d 368 (1980), and State v. Tippett, 270 N.C. 588, 155 S.E.2d 269 (1967). The court also ruled that the length of time during the investigative stop had been reasonable under the Fourth Amendment.

(1) Assuming Officer A, Who Was Killed by Defendant, Violated Fourth Amendment When He Entered Defendant's Home to Arrest Defendant, Exclusionary Rule Did Not Bar Testimony by Officer B About Killing
(2) Exigent Circumstances Supported Officer A's Entry into Defendant's Home to Arrest Defendant

State v. Guevara, 349 N.C. 243, 506 S.E.2d 711 (6 November 1998). The defendant was convicted of the first-degree murder of officer A and felonious assault of officer B. Officers A and B went to the defendant's home with information that there were outstanding felony arrest warrants for him. They saw the defendant, accompanied by a young boy, standing outside his mobile home's back door. Although he denied being the person that was the subject of the arrest warrants, the officers believed otherwise. After confirmation from a dispatcher that he was still wanted, officer B stated they would arrest him. The defendant, having heard officer B's words, retreated into his home and slammed the door. Officer A pushed the door open and entered the home, where he was shot and killed by the defendant. Officer B was shot and seriously injured by the defendant while officer B was outside the mobile home. (1) The court, relying on State v. Miller, 282 N.C. 633, 194 S.E.2d 353 (1973), ruled that even if officer A violated the Fourth Amendment in entering the defendant's home to arrest him, the exclusionary rule did not bar the testimony of officer B about the killing of officer A. (2) The court ruled that exigent circumstances supported officer A's entry into the defendant's home to arrest him. The court stated that the defendant's actions—in suddenly withdrawing into his home and slamming the door—created the appearance that he was fleeing or trying to escape, and coupled with the young child's presence, established exigent circumstances to enter the defendant's home to arrest him.

Defendant Was Not in Custody to Require *Miranda* Warnings, Based on Facts in This Case; What Occurred After Incriminating Statement Was Made Was Irrelevant in Determining Custodial Status Before and During Time Statement Was Being Made

State v. Hipps, 348 N.C. 377, 501 S.E.2d 625 (9 July 1998). Officers had been searching all morning for Shelia Wall pursuant to a missing-person report. Later that day, an officer who was involved in the search responded to a disturbance at a store, which was not related to the missing-person report. Before the officer said anything, the defendant came up and put his hands on the police car, saying, "Go ahead and take me. I did it." The officer responded, "What's going on? What are you talking about?" The defendant then said, "I did it. Me and Rock." The officers asked, "What are you talking about?" The officer then heard the defendant mumble something about "Shelia." Wanting to clear up the matter, the officer asked the defendant, "[W]hat about Shelia, where's she at?" The defendant then responded, "[W]e killed her. She's under the bridge." The court ruled, citing State v. Meadows, 272 N.C. 327, 158 S.E.2d 638 (1968), that a reasonable person in the defendant's position would not have thought he was in custody at the time he made the incriminating statement. The court also rejected the defendant's argument that it should consider what occurred after the defendant made the incriminating statement in determining whether the encounter was custodial; the court stated that what occurred afterwards did not affect the noncustodial and voluntary nature of the encounter before and while the statement was being made.

Capital Case Issues

(1) State Was Entitled to Discovery of Defense Expert Witness's Notes of Interviews with Defendant, Based on Facts in this Case
(2) State Did Not Violate Defendant's Sixth Amendment Rights by Using Defendant's Competency Evaluation at Capital Sentencing Hearing
(3) Discovery Statute for Capital Defendant's Motion for Appropriate Relief Applies Only to Cases Following Completion of Direct Appeal to North Carolina Supreme Court
(4) Although State Has No Work Product Protection under Discovery Statute for Capital Defendant's Motion for Appropriate Relief, Judge May Hold In Camera Hearing to Determine If State's Evidence Should Be Disclosed

State v. Atkins, 349 N.C. 62, 505 S.E.2d 97 (9 October 1998). The defendant was convicted of first-degree murder and sentenced to death. (1) At the defendant's competency hearing, the trial judge ordered the defendant's expert witness to supply the state with all of his notes, including those from conversations and interviews with the defendant. The state used these notes later to cross-examine this witness at the sentencing hearing. The court rejected the defendant's argument that this discovery order violated G.S. 15A-905(b), the defense attorney's work-product privilege, and the defendant's right to counsel and privilege against self-incrimination. The court stated, citing State v. McCarver, 341 N.C. 364, 462 S.E.2d 25 (1995), that the issue is not whether the defendant intended to introduce specific tests at trial, but whether the expert relied on or learned of any information from the tests and answers that related to the expert's testimony. The court noted that the expert relied on the challenged discovery material at the competency and sentencing hearings. (2) The court rejected the defendant's argument that the state's substantive use of the defendant's competency evaluation at the capital sentencing

violated the defendant's Sixth Amendment rights under Estelle v. Smith, 451 U.S. 454, 101 S. Ct. 1866, 68 L. Ed. 2d 359 (1981). Distinguishing *Estelle*, the court noted that the competency hearing was performed at the defendant's request; the defense alleged a learning disorder, an adjustment disorder, and disturbances of emotion and conduct; and the defendant introduced expert testimony concerning his mental status. (3) The court ruled that the discovery statute [G.S. 15A 1415(f)] for a capital defendant's motion for appropriate relief applies only to cases following the completion of a direct appeal to the North Carolina Supreme Court. (4) The court ruled that although the state has no work product protection under G.S. 15A 1415(f) in a capital defendant's motion for appropriate relief, a judge may hold an in camera hearing to determine if the state's evidence should be disclosed (the statutory standard is a "reasonable belief that allowing inspection of any portion of the files by counsel for the capital defendant would not be in the interest of justice"). The court upheld the judge's conclusion in this case that certain state documents would not assist the defendant.

(1) Sufficient Evidence of Aggravating Circumstance G.S. 15A-2000(e)(4) (Murder Committed to Avoid or Prevent Lawful Arrest); Court Reiterates That Circumstance May Be Proved by Evidence Showing Murder Was Committed to Prevent Accomplice's Arrest
(2) Death Penalty Was Not Disproportionate Although Two Accomplices Did Not Receive Death Penalty

State v. Lemons, 348 N.C. 335, 501 S.E.2d 309 (9 July 1998). The defendant was convicted of two first-degree murders and sentenced to death for each murder. (1) The court reiterated its ruling in State v. Hunt, 323 N.C. 407, 373 S.E.2d 400 (1988), that aggravating circumstance G.S. 15A-2000(e)(4) (murder committed to avoid or prevent lawful arrest) may be proved by showing that the murder was committed to avoid or prevent a lawful arrest of the defendant's accomplice; it need not be the defendant's arrest. The court ruled that the evidence was sufficient in this case—although the defendant testified that one of his accomplices shot one of the murder victims, he conceded that she was killed to eliminate her as a witness to the earlier murder of the other victim. (2) The court rejected the defendant's argument that his death penalty was disproportionate because his two accomplices both received life sentences. The court distinguished State v. Stokes, 319 N.C. 1, 352 S.E.2d 653 (1987). Unlike the defendant in *Stokes*, the defendant in this case was convicted of two counts of first-degree murder under both premeditation and deliberation and felony murder theories. The defendant was twenty-six years old at the time of the murders, and there was no evidence that he suffered from an impaired capacity to appreciate the criminality of his conduct or that he was under the influence of a mental or emotional disturbance. In addition, five aggravating circumstances were found. The court also stated that the fact that the defendant was not the actual shooter of the victims does not make his participation in the murders any less culpable.

Sufficient Evidence of Aggravating Circumstance G.S. 15A-2000(e)(9) (Especially Heinous, Atrocious, or Cruel)

State v. Hipps, 348 N.C. 377, 501 S.E.2d 625 (9 July 1998). The court ruled that the evidence was sufficient to support aggravating circumstance G.S. 15A-2000(e)(9) (especially heinous, atrocious, or cruel). The defendant stabbed the victim thirty-four times, primarily on her back,

but also on the front of her body and her head. One wound penetrated the aorta and caused extensive bleeding into the chest cavity, indicating that the victim's heart was beating while she was being stabbed. The victim also suffered a fracture at the base of her skull from a blow or blows to the head with a piece of wood. The court noted that even if the trauma to the head rendered the victim unconscious, the evidence suggested that at least some of the stab wounds were inflicted before the blow to the head. The court also noted that the existence of a defensive wound on the victim's hand also suggested that the victim was conscious and aware of what was happening. Death was caused by the stab wounds. The court concluded that this evidence shows that the victim's death was physically agonizing, conscienceless, pitiless, and unnecessarily tortuous, and the victim was aware of, but helpless to prevent, her impending death.

Trial Judge Did Not Err in Submitting Aggravating Circumstance G.S. 15A-2000(e)(8) (Murder of Officer Performing Official Duty) Even Assuming Officer Illegally Entered Defendant's Home, Because Defendant Had No Right to Use Deadly Force under Circumstances

State v. Guevara, 349 N.C. 243, 506 S.E.2d 711 (6 November 1998). The defendant was convicted of the first-degree murder of officer A and felonious assault of officer B. The court ruled that the trial judge did not err in submitting aggravating circumstance G.S. 15A-2000(e)(8) (murder of officer performing official duty) even assuming that the officer illegally entered the defendant's home to arrest him, because the defendant had no right to use deadly force under the circumstances. The court noted that even if the officer in some way improperly performed his official duties, the defendant was still not justified under G.S. 15A-401(f) in using deadly force against the officer, based on the facts in this case.

(1) Trial Judge Did Not Err in Submitting G.S. 15A-2000(e)(9) (Especially Heinous, Atrocious, or Cruel) When Victim Was Young Child, Based on Facts in This Case
(2) At Capital Resentencing Hearing, Defendant Was Not Entitled to Peremptory Jury Instruction for Statutory Mitigating Circumstance Based on State's Stipulation of Its Existence at Prior Capital Sentencing Hearing
(3) Trial Judge Did Not Err in Failing to Require Jury to Make Separate Findings Whether Nonstatutory Mitigating Circumstances Existed and Whether They Had Mitigating Value
(4) Trial Judge Did Not Err in Allowing State to Play Videotape of Murdered Child Victim That Had Been Taken 49 Days before Child's Death

State v. Flippen, 349 N.C. 264, 506 S.E.2d 702 (6 November 1998). At a capital resentencing hearing, the defendant was sentenced to death for the first-degree murder of his two-year-old stepdaughter. (1) The court ruled that the trial judge did not err in submitting G.S. 15A-2000(e)(9) (especially heinous, atrocious, or cruel). The defendant was the victim's primary caregiver on the day he killed her, and she was only two years and four months old. The court stated that she was particularly vulnerable and at the defendant's mercy. The defendant inflicted many blows on her head, neck, and abdomen; the resulting injuries went beyond what would have been necessary to kill her. (2) At the prior capital sentencing hearing, the state had stipulated to the existence of the statutory mitigating circumstance G.S. 15A-2000(f)(1) (no significant prior criminal history). At this capital sentencing hearing, the state offered evidence

that the defendant had twice assaulted his wife. Relying on State v. Adams, 347 N.C. 488, 459 S.E.2d 747 (1997), the court ruled that the prior stipulation did not foreclose the state at a later capital sentencing hearing from offering evidence to rebut the existence of the mitigating circumstance. Thus, the trial judge did not err in failing to give a peremptory instruction on this mitigating circumstance; the existence of the circumstance was not uncontroverted. (3) The court ruled that the trial judge did not err in failing to require the jury to make separate findings whether nonstatutory mitigating circumstances existed and whether they had mitigating value. The judge's pattern jury instructions on nonstatutory mitigating circumstances were sufficient. (4) The court ruled that the trial judge did not err in allowing the state to show a videotape of the murder victim that had been taken 49 days before her death to show the victim's vulnerability and to show why it would be especially heinous, atrocious, and cruel for a man as large and powerful as the defendant to murder her with his hands while she was in his care.

(1) State's Expert Testimony Comparing Severity of Murder Victim's Injuries with Others Was Admissible in Proving Aggravating Circumstance G.S. 15A-2000(e)(9) (Especially Heinous, Atrocious, or Cruel)
(2) Trial Judge Did Not Err in Failing to Submit Mitigating Circumstance G.S. 15A-2000(f)(7) (Defendant's Age at Time of Murder)
(3) Trial Judge Did Not Err in Failing to Submit Mitigating Circumstance G.S. 15A-2000(f)(1) (No Significant Prior Criminal History)
(4) Trial Judge Did Not Err in Allowing Placement of Leg Irons on Defendant During Capital Sentencing Hearing

State v. Atkins, 349 N.C. 62, 505 S.E.2d 97 (9 October 1998). The defendant was convicted of the first-degree murder of his eight-month-old son and sentenced to death. (1) Four state medical experts testified about the severity of the murder victim's injuries in comparison to other injuries occurring to other children that the experts had treated in their respective medical practices. The court ruled that such evidence was admissible in proving aggravating circumstance G.S. 15A-2000(e)(9) (especially heinous, atrocious, or cruel). (2) The court ruled that the trial judge did not err in failing to submit mitigating circumstance G.S. 15A-2000(f)(7) (defendant's age at time of murder). The defendant was twenty-three years old, had an IQ of 107, was functioning in the average to high-average range of intelligence, and had a relatively good understanding of social nuances. The court stated that while the defendant presented evidence that he suffered from conditions or disorders commonly found in adolescents and participated in an activity or activities often enjoyed by some youngsters, its review of the record reveals no evidence that the defendant exhibited decisional skills and understanding equivalent to an adolescent. (3) The court that the trial judge did not err in failing to submit mitigating circumstance G.S. 15A-2000(f)(1) (no significant prior criminal history). The court noted that the defendant had a significant history of violent attacks, including fights in the military and repeated assaults on the victim's mother even while she was pregnant; he also repeatedly and viciously beat his own son, a completely defenseless infant and the victim of the murder in this case. (4) The court ruled that the trial judge did not err in allowing the placement of leg irons on the defendant during the capital sentencing hearing. The judge followed the procedure mandated by G.S. 15A-1031 and was supported by (among other facts) the defendant's possible escape attempt from his jail cell and his propensity toward violence. The judge ensured that the leg irons could not be viewed by the jury.

(1) Defendant in Capital Case Did Not Have Right to be Present When Prosecutor Communicated with Judge, Prior to Trial, About Scheduling Hearing on Arraigning Defendant
(2) Trial Judge Did Not Err in Failing to Submit Mitigating Circumstance G.S. 15A-2000(f)(3) (Victim Was Voluntary Participant in Murder)
(3) Trial Judge Did Not Err in Failing to Submit Proposed Nonstatutory Mitigating Circumstance That Defendant's Family Members Care and Support Him

State v. Locklear, 349 N.C. 118, 505 S.E.2d 277 (9 October 1998). The defendant was convicted of first-degree murder and sentenced to death. (1) The court ruled, relying on State v. Buckner, 342 N.C. 198, 464 S.E.2d 414 (1995), that the defendant did not have an unwaivable right to be present when the prosecutor communicated with the judge, prior to trial, about scheduling a hearing on arraigning the defendant. (2) The court ruled that the trial judge did not err in failing to submit G.S. 15A-2000(f)(3) (victim was voluntary participant in murder). The defendant asserted on appeal that the victim's fighting words, coupled with a prior altercation, satisfied this mitigating circumstance. The court rejected that assertion, noting that the defendant's homicidal conduct consisted of retrieving his shotgun from a mobile home, shooting the victim in the back, and firing at the victim again as he was lying on the ground. (3) The court ruled that the trial judge did not err in failing to submit a proposed nonstatutory mitigating circumstance that the defendant continues to have family members who care and support him. The court stated that the feelings, actions, and conduct of third parties do not have mitigating value as to the defendant and, therefore, are irrelevant in a capital sentencing hearing.

(1) Trial Judge Erred in Not Submitting Mitigating Circumstance G.S. 15A-2000(f)(1) (No Significant Prior Criminal History)
(2) Trial Judge Erred in Not Submitting Mitigating Circumstance G.S. 15A-2000(f)(2) (Defendant Under Influence of Mental or Emotional Disturbance)

State v. Fletcher, 348 N.C. 292, 500 S.E.2d 668 (9 July 1998). The defendant was convicted of first-degree murder and sentenced to death. (1) The court ruled that the trial judge erred in not submitting mitigating circumstance G.S. 15A-2000(f)(1) (no significant prior criminal history). The court stated that its analysis in State v. Jones, 346 N.C. 704, 487 S.E.2d 714 (1997) (in which the court ruled that the judge erred in not submitting this mitigating circumstance), emphasized that the defendant's prior convictions in that case consisted of property crimes rather than violent crimes, and a common theme in the cases in which the court ruled that G.S. 15A-2000(f)(1) should have been submitted is the predominantly nonviolent nature of the defendants' prior criminal histories. The court noted that while the defendant's prior criminal history showed that he stole from others for most of his life and he appeared in recent years to have largely supported himself by stealing and occasionally selling drugs, his breaking and enterings and larcenies were not connected to any violent behavior. (2) The court ruled the trial judge erred in not submitting mitigating circumstance G.S. 15A-2000(f)(2) (defendant under influence of mental or emotional disturbance). The defendant's psychologist testified that under times of stress, the defendant might not perceive reality correctly and that it was likely that the defendant had been in a stress-overload situation for a very long time based on his environment and psychological problems. He also testified that—given the defendant's lack of any violent

history—the defendant would have had to have been "in a very psychotic state or really out of it on drugs" to attack and kill in the manner in which the victim was killed.

(1) Evidence Was Not Sufficient to Submit Mitigating Circumstance G.S. 15A-2000(f)(1) (No Significant Prior Criminal History)
(2) Evidence Was Not Sufficient to Submit Mitigating Circumstance G.S. 15A-2000(f)(2) (Defendant Under Influence of Mental or Emotional Disturbance)
(3) Evidence Was Not Sufficient to Submit Mitigating Circumstance G.S. 15A-2000(f)(7) (Defendant's Age At Time of Murder)
(4) Judge Did Not Err in Not Giving Peremptory Instruction on Mitigating Circumstance G.S. 15A-2000(f)(4) (Defendant's Participation Was Relatively Minor)
(5) Death Penalty Was Not Disproportionate Although Three Co-Defendants Did Not Receive Death Penalty

State v. Bonnett, 348 N.C. 417, 502 S.E.2d 563 (9 July 1998). The defendant was convicted of first-degree murder and sentenced to death. (1) The court ruled that the trial judge did not err in failing to submit mitigating circumstance G.S. 15A-2000(f)(1) (no significant prior criminal history). The defendant's prior criminal convictions included accessory after the fact of murder, two counts of accessory after the fact of felonious assault, several drug convictions, and larceny of an automobile. Distinguishing State v. Jones, 346 N.C. 704, 487 S.E.2d 714 (1997), the court noted that the defendant in *Jones* had not been convicted of any violent crimes. (2) The court ruled that the trial judge did not err in failing to submit mitigating circumstance G.S. 15A-2000(f)(2) (defendant under influence of mental or emotional disturbance). The court noted that one of the defendant's experts testified that testing showed the defendant to be disturbed psychologically and to be socially alienated with a poor self-image, insecurity, and feelings of inadequacy. However, neither of the defendant's experts' testimony suggested any nexus between the defendant's personality characteristics and the crimes he committed, or any mental or emotional disturbance at the time of the killing. (3) The court ruled that the trial judge did not err in failing to submit mitigating circumstance G.S. 15A-2000(f)(7) (defendant's age at time of murder). The defendant had introduced evidence that he was twenty-six years old at the time of the murder, was abandoned at birth by his mother, grew up in a dysfunctional family, and had an IQ of 86 and a learning disability. The court noted that chronological age is not determinative of this mitigating circumstance, citing State v. Daughtry, 340 N.C. 488, 459 S.E.2d 747 (1995). The court stated that the defendant did not introduce substantial evidence of his immaturity, youthfulness, or lack of emotional or intellectual development at the time of the murder, and the evidence showed that the defendant had only slightly below-normal intelligence, with no major disturbance of mood or thinking. (4) The court ruled that the trial judge did not err in not giving a peremptory instruction on mitigating circumstance G.S. 15A-2000(f)(4) (defendant's participation was relatively minor). The evidence was not uncontroverted. The court noted that the evidence tended to show that the defendant supplied the murder weapon and took the money box during the robbery and murder. (5) The court rejected the defendant's argument that the death penalty was disproportionate because two codefendants had been convicted of first-degree murder and received life imprisonment, and the other codefendant pleaded guilty to second-degree murder pursuant to a plea agreement. The court noted, among other facts, that the jury in the defendant's trial found three aggravating circumstances, whereas the jury in the two codefendants' trial found only one aggravating circumstance. And, unlike the two codefendants

who were convicted of first-degree murder, the defendant had previously been convicted of violent felonies.

(1) Trial Judge Did Not Err in Submitting Both Aggravating Circumstances G.S. 15A-2000(e)(10) (Use of Weapon Normally Hazardous to More Than One Person) and G.S. 15A-2000(e)(11) (Course of Conduct Involving Violent Crimes Against Others)
(2) Court Urges Caution in Prosecutor's Use of Biblical References in Closing Argument

State v. Davis, 349 N.C. 1, 506 S.E.2d 455 (9 October 1998). The defendant, using a .30 caliber M1 carbine rifle, killed three people and injured two others. He was convicted of three counts of first-degree murder and sentenced to death for each. (1) The court ruled that the trial judge did not err in submitting both aggravating circumstances G.S. 15A-2000(e)(10) (use of weapon normally hazardous to more than one person) and G.S. 15A-2000(e)(11) (course of conduct involving violent crimes against others). There was independent evidence to support both aggravating circumstances, even though some of the evidence may have overlapped. (2)The court urged caution in using Biblical phrases and allusions in closing argument in a capital sentencing hearing. The court stated that it is the prosecutor's duty to convince the jury that the facts and circumstances of the crime warrant the death penalty, not to preach to the jury.

Trial Judge Did Not Err in Submitting Aggravating Circumstance G.S. 15A-2000(e)(11) (Course of Conduct Involving Violent Crimes Against Others)

State v. Hoffman, 349 N.C. 167, 505 S.E.2d 80 (9 October 1998). The defendant was convicted of a first-degree murder and armed robbery of a jewelry store that occurred on November 27, 1995. In support of aggravating circumstance G.S. 15A-2000(e)(11) (course of conduct involving violent crimes against others), the state offered evidence of two bank robberies that occurred on October 20, 1995, and September 18, 1995. The court ruled that the trial judge did not err in submitting this aggravating circumstance. The court noted that the time span between the robberies was sufficiently close to be considered part of the same course of conduct. Also, there was a similar modus operandi: all the robberies occurred in small towns near Charlotte, occurred in daylight hours while the businesses were open, shared the same motive (pecuniary gain), and the same sawed-off shotgun, green bag, ski mask, and white Nissan were used.

Miscellaneous

(1) Procedures by Which District Court Judges Transfer Cases to Superior Court for Trial as Adults Do Not Violate Due Process
(2) Mandatory Life Imprisonment for First-Degree Sexual Offense Imposed on Thirteen-Year-Old Did Not Constitute Cruel or Unusual Punishment under United States or North Carolina Constitutions

State v. Green, 348 N.C. 588, 502 S.E.2d 819 (30 July 1998), *affirming*, 124 N.C. App. 269, 477 S.E.2d 182 (5 November 1996). A district court judge transferred first-degree sexual offense and other offenses against a thirteen-year-old to superior court . The judge's order of transfer offered several reasons why the case should be transferred to superior court. The defendant was convicted of those offenses in superior court and, for the first-degree sexual offense, he was

sentenced to a mandatory life imprisonment. (1) The court ruled that the procedures by which district court judges transfer cases to superior court for trial as adults do not violate the due process clauses of the United States and North Carolina constitutions. The court rejected the defendant's argument that G.S. 7A-610 is unconstitutionally vague because it provides no meaningful guidance to judges, resulting in arbitrary and discriminatory decisions concerning which juveniles should be transferred to superior court. The court also ruled that the judge's stated reasons sufficiently supported the transfer order in this case. (2) The court ruled that the defendant's mandatory life sentence for first-degree sexual offense did not violate the cruel and unusual punishment provisions of the United States and North Carolina constitutions.

(1) Court Reiterates Rule Explaining When Step One of *Batson* Becomes Moot and Trial Judge Must Determine Whether Reasons for Peremptory Challenges Were Race Neutral
(2) Trial Judge Erred in Failing to Find That Defendant Had Established Prima Face Showing of Racial Discrimination in State's Exercise of Peremptory Jury Challenges under *Batson*
(3) Court Requires Remand for *Batson* Hearing Even Though State Had Offered Reasons for Peremptory Challenges, Based on Facts in This Case

State v. Hoffman, 348 N.C. 548, 500 S.E.2d 718 (9 July 1998). The defendant, who is black, was on trial for the first-degree murder of a white person. (1) The state was allowed to excuse the first black prospective juror for cause based on her death penalty views. The state exercised a peremptory challenge to the second black prospective juror. The trial judge ruled that the defendant had not yet established a prima facie showing of racial discrimination under Batson v. Kentucky, 476 U.S. 79 (1986). (The judge then asked the state to articulate its reasons for excusing this prospective juror.) The court ruled that the judge did not err, based on the facts in this case. The court, citing State v. Williams, 343 N.C. 345, 471 S.E.2d 379 (1996), rejected the defendant's argument that because the trial judge had asked the state to articulate its reasons for excusing this prospective juror, step one (that is, establishing a prima facie showing) of *Batson* became moot, and the trial judge was required to determine whether the reasons offered by the state were race neutral. The trial judge is required to make such a determination only if (i) the state volunteers its reasons *before* the trial judge rules whether the defendant has made a prima facie showing, or (ii) the trial judge requires the state to give its reasons without ruling on the prima facie issue.

(2) The state, after accepting the third prospective black juror, was allowed the next day to excuse this juror for cause based on her death penalty views that had been revealed that next day. The state exercised a peremptory challenge to the fourth black prospective juror, who twice had been represented by defendant's trial counsel. The court ruled that the trial judge did not err in ruling that the defendant had not yet established a prima facie case. Eleven white jurors had been seated when the state then exercised a peremptory challenge against another prospective black juror. The trial judge again ruled that the defendant had not yet established a prima facie case. The court ruled that this ruling was error. It noted that the state had peremptorily challenged every black prospective juror who was not excused for cause, a total of three peremptory challenges against prospective black jurors, or one-quarter of the total number of jury seats. The court stated that step one of *Batson* was not intended to be a high hurdle for defendants to cross. Later, during the selection of the alternate jurors, the state peremptorily challenged the next

prospective black juror. The court ruled that the trial judge again erred in his ruling that the defendant had not yet established a prima facie case. Compare with State v. Fletcher, 348 N.C. 292, 500 S.E.2d 668 (9 July 1998) (when two of five prospective black jurors had been seated on the jury, trial judge did not commit error in finding that defendant had not yet established prima facie case, based on the facts in this case).

(3) The court ruled that the case must be remanded for a *Batson* hearing even though the state had offered reasons for its peremptory challenges to facilitate appellate review. First, the court noted that the trial judge is accorded great deference in ruling on whether the state had a discriminatory motive and is best able to determine this question of fact. Second, the court does not proceed to step two of *Batson* (whether the state's proffered reasons for the peremptory are race-neutral) when the trial judge has not done so. Third, although the state had been given the opportunity to articulate its reasons, the defendant had not been given an opportunity to respond.

(1) Defendant, a Native American, Had Standing to Contest State's Peremptory Challenges of Prospective Black Jurors
(2) Trial Judge Did Not Err in Issuing Separate *Batson* Rulings Concerning State's Peremptory Challenges of Prospective Black Jurors and Prospective Native American Jurors

State v. Locklear, 349 N.C. 118, 505 S.E.2d 277 (9 October 1998). The defendant was convicted of first-degree murder and sentenced to death. (1) The court ruled that under Powers v. Ohio, 499 U.S. 400, 111 S. Ct. 850, 113 L. Ed. 2d 411 (1991), the defendant, a Native American, had standing to contest the state's peremptory challenges of prospective black jurors under Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986). (2) The court rejected the defendant's argument that it was a violation of the Equal Protection Clause when the trial judge consider his *Batson* motion separately as to challenged Native American and black prospective jurors. The court noted that racial identity between the defendant and some of the challenged jurors in this case was a legitimate factor that the trial judge could consider in ruling on the defendant's motion. Likewise, the fact that the defendant and the challenged black jurors were of different races was also a relevant circumstance that the trial judge could consider.

(1) Defendant Did Not Have Sixth Amendment Right to Have Counsel Present During Competency Evaluation by Forensic Evaluator
(2) State's Use of Defendant's Statements Made at Competency Examination to Cross-Examine Defense Expert Who Had Reviewed Statements Did Not Violate Defendant's Fifth or Sixth Amendment Rights

State v. Davis, 349 N.C. 1, 506 S.E.2d 455 (9 October 1998). The defendant was tried and convicted of first-degree murder and sentenced to death. (1) Based on a motion questioning the defendant's capacity to proceed, a judge ordered a competency evaluation by a forensic evaluator. The court ruled, citing Estelle v. Smith, 451 U.S. 454, 101 S. Ct. 1866, 68 L. Ed. 2d 359 (1981), that the defendant did not have a Sixth Amendment right to have counsel present during the competency evaluation. (2) The defense sought to rely on the defenses of insanity and diminished capacity during trial. The court ruled, relying on Buchanan v. Kentucky, 483 U.S. 402, 107 S. Ct. 2906, 97 L. Ed. 2d 336 (1987), and State v. Huff, 325 N.C. 1, 381 S.E.2d 635 (1989), that the state's use of the defendant's statements made at the competency examination to

cross-examine a defense expert who had reviewed the statements did not violate the defendant's Fifth or Sixth Amendment rights.

(1) Sentencing Judge Erred When Failing to Specify That Sentence Was to Be Served Consecutively to Sentence Currently Being Served When Statute Required Consecutive Sentence
(2) Defendant Was Not Entitled to Specific Enforcement of Plea Agreement That Wrongfully Understood that Sentence Would Be Served Concurrently; Defendant May Withdraw Plea and Proceed to Trial or Attempt to Negotiate Another Agreement

State v. Wall, 348 N.C. 671, 502 S.E.2d 585 (30 July 1998). The defendant, pursuant to a plea agreement with the state, pleaded guilty in 1994 to second-degree burglary and other charges. The agreement did not specify whether the sentence was to be served consecutively or concurrently to a prison sentence he was then serving, but the prosecutor, defense counsel, and defendant understood that the sentence would be served concurrently. The defendant was sentenced to twenty-five years' imprisonment without specifying whether it was consecutive or concurrent to the prison sentence being served (in such a case, the sentence would be served concurrently). However, G.S. 14-52 required at that time that a burglary sentence must be served consecutively to any sentence being served. The state Department of Correction treated the sentence as a consecutive sentence. The court ruled: (1) the sentencing judge erred in failing to specify that the burglary sentence must be served consecutively; and (2) the defendant was not entitled to specific enforcement of this plea agreement that wrongfully understood that the sentence would be served concurrently. However, the defendant may withdraw his plea and proceed to trial or attempt to negotiate another agreement.

No Ex Post Facto Violation in Using Prior Juvenile Adjudication as Aggravating Factor in Structured Sentencing Hearing When Legislature Had Enacted That Aggravating Factor After Date of Prior Juvenile Adjudication

State v. Taylor, 349 N.C. 219, 504 S.E.2d 785 (9 October 1998), *affirming per curiam*, 128 N.C. App. 394, 496 S.E.2d 811 (1998). The court affirmed per curiam the opinion of the North Carolina Court of Appeals, which is summarized as follows: The defendant was convicted of second-degree rape, which was committed on March 19, 1995. The trial judge, in sentencing the defendant under the Structured Sentencing Act, found as an aggravating factor under G.S. 15A-1340.16(d)(18a) that the defendant had been previously adjudicated delinquent for an offense that would be a Class C felony if committed by an adult. The adjudication of delinquency occurred in 1993. The legislature enacted this aggravating factor, effective October 1, 1994. Relying on Collins v. Youngblood, 497 U.S. 37, 110 S. Ct. 2715, 111 L. Ed. 2d 30 (1990), the court ruled that the use of this aggravating factor did not violate the Ex Post Facto Clause.

No Contest Plea and Prayer for Judgment Continued Constituted Conviction under State Administrative Code, Authorizing Revocation of Officer's Certification

Britt v. Sheriffs' Education and Training Standards Comm'n, 348 N.C. 573, 501 S.E.2d 75 (9 July 1998). The North Carolina Administrative Code authorizes the Sheriff's Education and Training Standards Commission to revoke the certification of an officer who has committed or

been convicted of certain offenses. The definition of "convicted" or "conviction" under that code includes entry of a no contest plea. An officer pleaded no contest to an offense, and the judge entered a prayer for judgment continued. The court ruled that the commission had the authority to revoke the officer's certification. The court stated that nothing in the code suggests that "conviction" includes a no contest plea only when the trial judge does not enter a prayer for judgment continued. Further, case law and statutory law have recognized that a plea may constitute a "conviction" in some circumstances even when a prayer for judgment continued is entered—State v. Sidberry, 337 N.C. 779, 448 S.E.2d 798 (1994) and G.S. 15A-1331(b).

NORTH CAROLINA COURT OF APPEALS

Arrest, Search, and Confessions

Officer's Detention of Motorist after Giving Warning Ticket Was Not Supported by Reasonable Suspicion

State v. Falana, 129 N.C. App. 813, 501 S.E.2d 358 (16 June 1998). A trooper stopped the defendant's vehicle because it twice weaved within its own lane and touched the divider lane line once. The defendant presented his driver's license and vehicle registration. The trooper asked the defendant whether he was fatigued or had been drinking. The defendant responded that he had been driving all night and was tired. The trooper did not detect that the defendant was under the influence of any impairing substance. The trooper saw that the defendant was breathing rapidly, and would periodically pause in his speech and swallow. The trooper believed that the defendant was nervous. The trooper also checked the passenger's identification, which was proper. The trooper then radioed for backup assistance. He received no hits on a warrants check of the defendant or the passenger. The trooper then issued a warning ticket to the defendant and returned his license and registration. The defendant, in response to the trooper's inquiry, denied having anything illegal in his vehicle. The trooper became suspicious because the defendant continued to breathe rapidly and appeared to be nervous, and also because the passenger had given the trooper a different statement from the defendant about when they had been in New Jersey. The trooper then asked the defendant if he could search the vehicle. The defendant refused. The trooper asked again for permission to search the vehicle. After the defendant asked the trooper whether he had a search warrant and received a negative response from the trooper, the defendant again refused to consent to a search of his vehicle. The trooper then told the defendant that he was going to have a drug dog walk around his vehicle. The dog alerted, and the defendant's vehicle was searched. The court, assuming without deciding that the stop of the vehicle was proper, ruled that the continued detention of the defendant after the issuance of the warning ticket was not supported by reasonable suspicion and therefore violated the Fourth Amendment. Relying on the reasoning of State v. Pearson, 348 N.C. 272, 498 S.E.2d 599 (8 May 1998), the court ruled that the defendant's nervousness and the differing statements of the defendant and passenger about when they had been in New Jersey did not constitute reasonable suspicion to detain the defendant after the issuance of the warning ticket.

Officer Did Not Have Probable Cause to Believe that Substance Was Controlled Substance, and Therefore Officer's Seizure of Substance Violated Fourth Amendment

State v. Bartlett, 130 N.C. App. 79, 502 S.E.2d 53 (7 July 1998). During a lawful search of a vehicle, an officer searched a book bag within the vehicle and seized a (1) clear plastic bag containing finely-chopped vegetable material with a lot of white specks, and a (2) piece of black, hard, plastic material wrapped in a piece of aluminum foil. Because she did not recognize the plastic material, she asked another officer, who was experienced in drug cases, to examine it. That officer didn't know what it was, so she decided to send it to the SBI laboratory for analysis. The SBI chemist testified at the suppression hearing that he had performed thousands of tests on suspected controlled substances, but had only encountered bufotenine (the object was analyzed as this substance, a Schedule I controlled substance) three or four times in his career. The state argued that the proximity of the plastic-like substance to a clear plastic bag containing finely-chopped vegetable material was sufficient to establish probable cause to seize the plastic-like substance. The court stated, however, that the officers were equally unsure of the identity of the vegetable material (which later laboratory analysis concluded did not contain any controlled substance). The seizing officer testified that the "plastic bag almost looked as it could have possibly contained some sort of very finely-chopped marijuana." The court ruled, citing State v. Beaver, 37 N.C. App. 513, 246 S.E.2d 535 (1978), that the officer had a conjecture, but not probable cause, to seize the plastic material, and therefore the seizure of the plastic material violated the Fourth Amendment.

Affidavit Submitted with Suppression Motion May Be Attested to by Defendant's Attorney on Information and Belief; Defendant Is Not Required to Sign Affidavit

State v. Chance, 130 N.C. App. 107, 502 S.E.2d 22 (7 July 1998). The court ruled that an affidavit submitted with a suppression motion under G.S. 15A-977 may be attested to by the defendant's attorney on information and belief. The defendant is not required to sign the affidavit.

Officer's Statement in Affidavit for Search Warrant Was False and May Not Be Considered in Establishing Probable Cause

State v. Severn, 130 N.C. App. 319, 502 S.E.2d 882 (21 July 1998). In an affidavit for a search warrant to search a residence for drugs, the officer stated that he had "been able to recover both marijuana and cocaine from inside of [the defendant's] residence, using investigative means." In fact, the officer had obtained the drugs from a trash can next to the side of the house. The officer testified at the suppression hearing that he had deduced that the drugs had been used inside the residence. He explained that he "just used common sense" in believing that items in the trash probably came from inside the house, and he did not intend to mislead the magistrate. He used the term "investigative means" because he did not want the defendant to know that a trash pickup was the method used. The court ruled that the officer's statement in the affidavit was false and made in bad faith, and therefore it could not be used in establishing probable cause to issue the search warrant. See Franks v. Delaware, 438 U.S. 154 (1978). The court stated that it was undisputed that no one entered the defendant's residence in obtaining the drugs; the statement to the contrary in the affidavit was false and the officer knew it was false. The officer's use of the

words "investigative means" supported the ruling that the affidavit was prepared in bad faith, because the officer admitted he wanted to conceal from the defendant how the evidence was obtained.

(1) Officer Did Not Make False Statement in Affidavit for Search Warrant
(2) Evidence Supported Officers' Forcible Entry to Execute Search Warrant After Announcing Their Identity and Purpose
(3) Inevitable Discovery Supported Seizure of Cocaine in Refrigerator
(4) Officers Violated G.S. 15A-252 by Failing to Give Defendant Copy of Search Warrant and Affidavit Before Executing Warrant, But Violation Was Not Substantial to Require Exclusion of Seized Evidence

State v. Vick, 130 N.C. App. 207, 502 S.E.2d 871 (21 July 1998). (1) Officers saw the defendant leave his apartment in his vehicle and make a sale of $1,500.00 of cocaine to an informant working for the officers and under their surveillance. An officer in an affidavit for a search warrant to search the defendant's apartment for drugs stated, "After [the defendant] left his residence he drove directly to the location and met the informant *therefore the cocaine came out of [the defendant's apartment]*." The defendant argued that the italicized part of this statement was false and should be excluded from the search warrant in determining probable cause. The court disagreed, stating that the statement makes clear that the officer inferred from the surrounding circumstances that the cocaine was in the defendant's apartment. Therefore the officer's statement was not false and did not mislead the magistrate. (2) Officers executing the search warrant for drugs were aware the defendant was inside his apartment. They were aware that the defendant had sold large amounts of cocaine to informants on at least two prior occasions, and they believed that he was dangerous. They knocked loudly on the door and announced their purpose and identity, waited at least two to three seconds, and then knocked and announced a second time. Approximately ten to fifteen seconds elapsed between the first knock-and-announcement and the officers' forcible entry. Before their entry, they did not hear any sound from inside the apartment and assumed that entry was being denied or unreasonably delayed. The court ruled that their assumption was reasonable, and the forced entry was proper. (3) The trial judge ruled that an officer violated the defendant's *Miranda* rights after entering the apartment by asking where the cocaine was located (and thus defendant's response that it was in the refrigerator was inadmissible), but the cocaine seized in the refrigerator was admissible under the inevitable discovery doctrine [see State v. Garner, 331 N.C. 491, 417 S.E.2d 502 (1992)] because they would have inevitably found it when executing the search warrant. The court affirmed the trial judge's ruling. [Note: physical evidence seized as a result of a *Miranda* violation is admissible, State v. May, 334 N.C. 609, 434 S.E.2d 180 (1993), so the court's analysis of the inevitable discovery rule was unnecessary.] (4) The court ruled that the officers violated G.S. 15A-252 by failing to give the defendant a copy of the search warrant and affidavit before executing the warrant (they left it in the apartment at the conclusion of their search), but the violation was not substantial under G.S. 15A-974 to require exclusion of the seized evidence.

When Search Warrant for Bank Records was Served and Returned Within Forty-Eight-Hour Statutory Period But Records Were Not Received Within That Time, There Was No Substantial Statutory Violation to Require Suppression of Evidence

State v. Davidson, 131 N.C. App. 276, 506 S.E.2d 743 (3 November 1998). A search warrant for bank records was served and returned within the forty-eight-hour statutory period, but a delay (beyond forty-eight hours) in receiving the records resulted from the need to locate those records to be seized. The court ruled, relying on State v. Dobbins, 306 N.C. 342, 293 S.E.2d 162 (1982) and State v. Fruitt, 35 N.C. App. 177, 241 S.E.2d 125 (1978), that this delay was not a substantial violation within G.S. 15A-974 to require that the records be suppressed.

(1) Defendant's Failure to File Affidavit with Motion to Suppress Chemical Test Result in DWI Trial, Based on Allegation of Substantial Statutory Violation, Was Ground to Deny Motion
(2) Even Assuming Officer's Taking DWI Arrestee Outside Officer's Territorial Jurisdiction for Chemical Test Was Statutory Violation, It Was Not Substantial Violation to Require Suppression under G.S. 15A-974

State v. Pearson, 131 N.C. App. 315, 507 S.E.2d 301 (3 November 1998). An officer arrested the defendant for DWI. When an Intoxilyzer malfunctioned, he took the defendant outside the officer's territorial jurisdiction to take the Intoxilyzer test there. (1) The court ruled, relying on State v. Satterfield, 300 N.C. 621, 268 S.E.2d 510 (1980), that the defendant's failure to file an affidavit for with his motion to suppress the chemical test result, based on an allegation of a substantial statutory violation, was a ground to deny the motion. (2) The court ruled, relying on State v. Afflerback, 46 N.C. App. 344, 264 S.E.2d 784 (1980), that even if the officer's actions were a statutory violation (which it did not believe to be true), it was not a substantial violation to require suppression of the chemical test result under G.S. 15A-974.

(1) Any Person or Entity May Apply for Search Warrant, Not Just Law Enforcement Officer (But Only Law Enforcement Officer May Execute Search Warrant)
(2) Town Had No Authority to Petition for Order of Forfeiture of Vehicle under G.S. 14-86.1; Only Prosecutor May Do So

In re 1990 Red Cherokee Jeep, 131 N.C. App. 108, 505 S.E.2d 588 (6 October 1998). (1) The court ruled that any person or entity may apply for a search warrant, not just a law enforcement officer (but only a law enforcement officer may execute a search warrant). In this case, the court ruled that a town could apply for a search warrant to seize a vehicle for forfeiture. (2) The court ruled that a town had no authority to petition for an order of forfeiture of a vehicle under G.S. 14 86.1; only a prosecutor has authority to do so.

Criminal Offenses

(1) Sufficient Evidence of Attempted First-Degree Murder
(2) Trial Judge Did Not Err in Not Submitting Attempted Second-Degree Murder
(3) Felonious Assault Is Not Lesser-Included Offense of Attempted First-Degree Murder

State v. Cozart, 131 N.C. App. 199, 505 S.E.2d 906 (20 October 1998). (1) The court stated that a person commits the crime of attempted first-degree murder if the person (i) specifically intends to kill another person unlawfully; (ii) does an overt act calculated to carry out that intent, beyond mere preparation; (iii) acts with malice, premeditation and deliberation; and (iv) falls short of committing the murder. The court found the following evidence sufficient to support a conviction: The defendant's intent to kill the victim with malice can be inferred from his shooting at the porch where the victim was located about 25 yards away and his ordering others to shoot at the porch, particularly after telling the victim, "This is for you, punk . . . ." Premeditation and deliberation can be inferred from the defendant's assault of the victim in his car just before the shooting; the defendant sought out the victim and brought guns in his car to the scene of the shooting; and the defendant snapped his fingers and ordered his companions to get the guns and open fire. Defendant's firing a gun at the victim was an overt act. (2) The court ruled that the trial judge did not err in not submitting attempted second-degree murder. There was no evidence to negate the elements of attempted first-degree murder other than the defendant's denial that he committed the offense. (3) The court, relying on State v. Westbrooks, 345 N.C. 43, 478 S.E.2d 483 (1996), ruled that felonious assault is not a lesser-included offense of attempted first-degree murder.

Sufficient Evidence of Possession of Stolen Goods

State v. Vaughn, 130 N.C. App. 456, 503 S.E.2d 110 (4 August 1998). A day after a car was reported stolen (a spare ignition key had been left in the glove compartment), an officer saw it parked in the parking lot of a store that was closed. The defendant was sitting in the front seat with a key in its ignition. The officer awakened the defendant, who gave the officer a false name. The defendant also said that the car belonged to his friend or girlfriend, which also was false. A search of the car revealed many items that did not belong to its owner, who did not know the defendant and had never given him permission to use her car. Several items belonging to the car owner that were in the car before it had been stolen were later found in a dumpster. The court ruled that this evidence was sufficient to support the defendant's conviction of possessing stolen goods under G.S. 14-71.1.

(1) Felony Death by Vehicle Is Not Lesser-Included Offense of Second-Degree (Vehicular) Murder
(2) Prior DWI Convictions Were Admissible under Rule 404(b) to Show Malice in Second-Degree (Vehicular) Murder Prosecution

State v. Grice, 131 N.C. App. 48, 505 S.E.2d 166 (6 October 1998). The defendant was convicted of second-degree (vehicular) murder committed on October 17, 1995. (1) Relying on State v. Williams, 90 N.C. App. 614, 369 S.E.2d 832 (1988), the court ruled that felony death by vehicle is not a lesser-included offense of second-degree (vehicular) murder. Thus the trial judge

did not err in failing to instruct on that offense when the defendant was charged with second-degree murder. (2) The court ruled, relying on State v. McBride, 109 N.C. App. 64, 425 S.E.2d 731 (1993) and State v. Byers, 105 N.C. App. 377, 413 S.E.2d 586 (1992), that the trial judge did not err in admitting the defendant's three prior July 14, 1980, DWI convictions to show malice.

(1) Assuming Without Deciding That Magistrate in DWI Case Failed to Follow Pretrial Release Provisions, Defendant Failed to Show Irreparable Prejudice in Motion to Dismiss DWI Charge
(2) Magistrate Did Not Err in Setting $500 Secured Bond for DWI Defendant Who Was Resident of Another County
(3) Evidence Supported Finding That Person Was Extremely Intoxicated and Therefore Was Not Sober Adult, Responsible to Whom Defendant Could Be Released under G.S. 15A-534.2

State v. Haas, 131 N.C. App. 113, 505 S.E.2d 311 (6 October 1998). The defendant was convicted of DWI. He argued on appeal that the trial judge erred in denying his motion to dismiss because his constitutional and statutory rights were violated during the setting of pretrial release conditions. (1) The court ruled that, even assuming that the magistrate failed to properly tell the defendant of his right to communicate with counsel or friends, his motion to dismiss was properly denied because he failed to show irreparable prejudice to the preparation of his case; the court cited State v. Gilbert, 85 N.C. App. 594, 355 S.E.2d 261 (1987). The facts in this case showed that the defendant was informed of his unlimited access to the telephone and visitors, which he utilized. (2) The court, relying on State v. Eliason, 100 N.C. App. 313, 395 S.E.2d 702 (1990), ruled that the defendant failed to show prejudice from the magistrate's failure to consider every individual factor set forth in G.S. 15A-534(c) in setting a $500 secured bond for the DWI charge. The magistrate had set that bond based partly on the defendant's residence in another county. The court stated that even if the magistrate had inquired into every factor in the G.S. 15A-534(c) and found them all in the defendant's favor, such findings would not have mandated any departure from that bond. The court also stated that the magistrate was justified in setting a $500 secured bond simply because the defendant resided in another county. (3) The court ruled that the evidence showed that the defendant's friend was extremely intoxicated and therefore was not a sober, responsible adult to whom the defendant could be released under G.S. 15A-534.2.

Joinder of Ten Separate Armed Robberies Committed by One Person Over Seven-Week Period in Alamance County Was Proper, Based on Facts in This Case

State v. Breeze, 130 N.C. App. 344, 503 S.E.2d 141 (4 August 1998). The court ruled that the trial judge did not err in allowing the state to join for trial ten separate one-man armed robberies committed at business premises during a seven-week period in Alamance County. The robberies appeared to be based on the same act or transaction and constituted parts of a single scheme or plan. The nature of the charged offenses was consistent. The victims described his dress in similar terms: blue jeans or other dark pants, a tee shirt, and a ball cap or sunglasses, or both. The defendant was always alone and most of the victims were female. The defendant consistently threatened his victim with a handgun or a knife and all but two of the robberies occurred during daylight hours.

Felonious Child Abuse Indictment Was Valid Because Erroneous Factual Averments Were Not Required and Therefore Surplusage

State v. Qualls, 130 N.C. App. 1, 502 S.E.2d 31 (7 July 1998). [Note: The defendant appealed other issues in this case to the North Carolina Supreme Court, which affirmed his conviction at 350 N.C. 56, 510 S.E.2d 376 (5 February 1999).] A felonious child abuse indictment alleged that the serious injury committed on or about the offense date was a subdural hematoma, but the evidence showed it was a epidural hematoma. The court ruled that because the indictment only must allege serious injury and need not describe the serious injury, the factual error was surplusage that did not affect the indictment's validity.

Sexual Acts With Person That Defendant Knows Is Mentally Defective May Constitute Forcible Sexual Assault

State v. Washington, 131 N.C. App. 156, 506 S.E.2d 283 (20 October 1998). The state indicted the defendant for second-degree forcible rape [G.S. 14-27.3(a)(1)] and second-degree rape with a mentally-defective person [G.S. 14-27.3(a)(2)]; both charges were based on the same act of vaginal intercourse. The state indicted the defendant for second-degree forcible sexual offense [G.S. 14-27.5(a)(1)] and second-degree sexual offense with a mentally-defective person [G.S. 14-27.5(a)(2)]; both charges were based on the same sexual act. All four charges were submitted to the jury, and the jury convicted the defendant of all the charges. The trial judge arrested judgment on the two forcible charges and sentenced the defendant on the two charges involving the element of a mentally-defective person. The court ruled, relying on State v. Holden, 338 N.C. 394, 450 S.E.2d 878 (1994), that there was sufficient evidence to submit the two forcible charges to the jury. The court stated that if there is substantial evidence that a person has engaged in prohibited sexual conduct, the victim was mentally defective, and the person performing the act knew or reasonably should have known that the victim was mentally defective, then there is substantial evidence that the person has engaged in such conduct "by force and against the will" of the victim.

Biting Ear Without Severing Any Part of Ear Is Insufficient Evidence to Support Conviction of Maiming Without Malice, G.S. 14- 29

State v. Foy, 130 N.C. App. 466, 503 S.E.2d 399 (4 August 1998). The defendant bit the victim's ear, requiring thirteen stitches. However, no part of the ear was actually severed. The court ruled that biting a person's ear without severing any part of the ear is insufficient evidence to support a conviction of maiming without malice, G.S. 14-29. The court concluded that the phrase, "bit or cut off the nose, or a lip or an ear," does not include merely biting the nose, lip, or ear. [Note: An attempt to violate G.S. 14-29 could be charged in such a case, however.]

Trial Judge Erred in Sentencing Defendant for Both Larceny After Breaking and Entering and Larceny of Firearm, When Larceny After Breaking and Entering Included Larceny of Firearm

State v. Suggs, 130 N.C. App. 140, 502 S.E.2d 383 (7 July 1998). The court ruled, relying on State v. Boykin, 78 N.C. App. 572, 337 S.E.2d 678 (1985), that the trial judge erred in

sentencing the defendant for both (i) larceny after breaking and entering, and (ii) larceny of a firearm, when the larceny after breaking and entering included the larceny of the firearm. A single larceny offense is committed when, as part of a continuous act or transaction, a perpetrator steals several items at the same place and time.

North Carolina Had Jurisdiction to Prosecute Homicide Allegedly Committed in Federal National Forest

State v. Rice, 129 N.C. App. 715, 501 S.E.2d 665 (16 June 1998). Relying on 16 U.S.C. § 480, United States v. County of Fresno, 429 U.S. 452 (1977), G.S. 104-32, and State v. DeBerry, 224 N.C. 834, 32 S.E.2d 617 (1945), the court ruled that the State of North Carolina had jurisdiction to prosecute a homicide allegedly committed in a federal national forest. The federal and state governments have concurrent criminal jurisdiction over offenses committed in a federal national forest.

Evidence

Admission of Codefendant's Redacted Confession at Joint Trial Violated *Gray v. Maryland*

State v. Roope, 130 N.C. App. 356, 503 S.E.2d 118 (4 August 1998). Five people committed burglary, robbery, felonious assault, and other offenses. One of the alleged perpetrators testified for the state. Three of the remaining four alleged perpetrators were tried jointly: codefendants A, B, and C. The state introduced a redacted confession of codefendant A as follows. "I think James (the alleged fifth perpetrator who was not tried at this trial) and 'blank' went in there and stabbed them and cut them up. It looked like somebody just went in there with a knife and just started hacking at a piece of meat . . . . 'Blank' cut the phone [cords] . . . so they wouldn't work . . . . And I think 'blank' came up with a total of six hundred dollars and the young lady, she, came up with I think close to a thousand dollars cash . . . . " The redacted confession corroborated the testimony of the alleged perpetrator who testified for the state at trial. None of the codefendants testified. The court ruled that the redacted confession violated the ruling in Gray v. Maryland, 118 S. Ct. 1151, 140 L. Ed. 2d 294, 62 Crim. L. Rep. 2119 (9 March 1998) [Court ruled that use of redacted confession using the term "deleted" violated Bruton v. United States, 391 U.S. 123, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968)]. The redacted confession in this case directly linked codefendant B to the commission of the offenses.

Expert Testimony About Results of Test Using "Phadebas Methodology," Which Indicated Presence of Saliva on Vaginal Swabs, Was Properly Admitted

State v. Dennis, 129 N.C. App. 686, 500 S.E.2d 765 (16 June 1998). The court ruled that expert testimony about the results of a test using "Phadebas Methodology," which indicated the presence of saliva on vaginal swabs, was properly admitted. The evidence presented at trial showed that the test possessed sufficient indices of reliability.

Trial Judge Erroneously Admitted Alco-Sensor Test Result in DWI Trial

State v. Bartlett, 130 N.C. App. 79, 502 S.E.2d 53 (7 July 1998). The court ruled that the trial judge erroneously admitted an Alco-Sensor test result as substantive evidence during a DWI trial. [Note: With one limited exception not applicable to this trial, an Alco-Sensor test result is inadmissible as substantive evidence in a DWI trial; see G.S. 20-16.3(d). An Alco-Sensor test result is admissible as substantive evidence in a trial of an offense under G.S. 20-138.3 (driving by person under 21 after consuming any amount of alcohol) and G.S. 20-138.7 (transporting open container of alcoholic beverage after consuming alcohol), if the officer administering the test complies with the state rules governing its administration.]

Evidence of Death of Defendant's Second Wife That Occurred in Similar Manner to Death of First Wife Was Admissible in Trial of Murder of First Wife under Rule 404(b) and Rule 403

State v. Boczkowski, 130 N.C. App. 702, 504 S.E.2d 796 (15 September 1998). The defendant was on trial for the murder of his first wife, allegedly committed on November 4, 1990. The trial judge allowed the state to introduce evidence of the alleged murder of his second wife on November 7, 1994. Relying on State v. Stager, 329 N.C. 278, 406 S.E.2d 876 (1991), the court ruled that the trial judge did not err in admitting the evidence under Rule 404(b) and Rule 403. The court noted that the trial judge found nine similarities between the two deaths: (1) both victims were women and were married to the defendant when they died; (2) both died at the home they shared with the defendant and the defendant was present when each woman died; (3) the defendant was last person to see each woman alive and was performing CPR on each when emergency personnel arrived; (4) the victim in the case being tried died in or around a bath tub and other victim died in or around a hot tub; (5) the defendant in both cases stated that his wife had accidentally drowned; (6) the defendant in both cases stated that his wife had a drinking problem that contributed to her death; (7) the ages and sizes of both victims were similar; (8) both women died on a Sunday; and (9) insurance money was involved in both incidents. The trial judge admitted the second wife's death to show absence of accident, to explain the delay in charging the defendant with the first wife's murder, and to give context to some of the witnesses' testimony.

Evidence of Prior Break-In of Victim's House By Defendant Was Admissible under Rule 404(b) in Armed Robbery Case

State v. McDonald, 130 N.C. App. 263, 502 S.E.2d 409 (21 July 1998). The defendant was tried and convicted of armed robbery that occurred in the victim's house. The court ruled that evidence of a break-in of the victim's house by the defendant, which occurred within four months of the armed robbery, was admissible under Rule 404(b). Shortly after the break-in, the victim had reported to the police that the defendant was one of the people who had committed the break-in, and the defendant threatened her when he learned that she had done so. The court ruled that the evidence was properly offered to show the victim's fear of the defendant during the armed robbery offense.

(1) Statements Made When Child Sexual Assault Victim Was Two Years and Eight Months Old Was Admissible Under Residual Hearsay Exception and Confrontation Clause, Although She Was Found Not Competent To Testify at Trial When She Was Four Years Old

(2) Trial Judge Did Not Err in Excluding Defense Expert Testimony That Defendant Had No Mental Illness or Substance Abuse Problems and He Was Not High Risk Sexual Offender; Evidence of Defendant's General Psychological Traits Is Not Pertinent to Commission of Sexual Assault Under Rule 404(a)(1)

State v. Wagoner, 131 N.C. App. 285, 506 S.E.2d 738 (3 November 1998). (1) The defendant was tried for sexually assaulting his niece when she was two years and eight months old. By the time of trial, the child was four years old and was found incompetent to testify because she could not then remember the events of the sexual assault, could not express herself in court, and did not understand the obligation of the oath or the duty to tell the truth. The trial judge admitted, under the residual hearsay exception [Rule 804(b)(5)], statements made by the child to a social worker and a detective in which she identified the defendant as the perpetrator. The court ruled that, based on the facts in this case, the statements possessed sufficient guarantees of trustworthiness (the issue contested in this case) to be admitted under Rule 804(b)(5) and the confrontation clauses of the United States and North Carolina constitutions. The court stated that there was no evidence that the child was incapable of telling the truth or distinguishing reality from imagination when the sexual assault occurred; therefore her incompetence to testify at trial did not disqualify her out-of-court statements. The court noted that the trial judge had found that the child was not unavailable to testify at trial because of an inability to tell truth from fantasy. The court noted the rulings in State v. Holden, 106 N.C. App. 244, 416 S.E.2d 415 (1992) and State v. Stutts, 105 N.C. App. 557, 414 S.E.2d 61 (1992). (2) The court ruled that the trial judge did not err in excluding proposed defense expert testimony that the defendant had no mental illness or substance abuse problems, and he was not a high risk sexual offender. Evidence of a defendant's general psychological traits is not "pertinent" under Rule 404(a)(1) to the commission of a sexual assault. The court stated what while evidence of a sexual pathology would have been relevant to show motive, evidence of the lack of several mental problems does not qualify as a "pertinent" character trait. The court also stated that even if the defendant had offered pertinent expert testimony based on acceptable scientific methods, specifically concerning the defendant's lack of sexual attraction to children, it would not have been admissible. Any relevancy of such evidence would be substantially outweighed by its prejudicial effect. The court cited State v. Spencer, 119 N.C. App. 662, 459 S.E.2d 812 (1995) (no error to exclude expert opinion testimony based on penile plethysmograph test) and United States v. Powers, 59 F.3d 1460 (4th Cir. 1995) (absent supporting evidence that those who are not fixated pedophiles are less likely to commit incest abuse, evidence of a "non-proclivity for pedophilia" is irrelevant).

Declarations by Nine-Year-Old Child Made Hours After Mother's Death Were Admissible under Rule 803(2) (Excited Utterance)

State v. Boczkowski, 130 N.C. App. 702, 504 S.E.2d 796 (15 September 1998). After a nine-year-old child's mother was murdered in the early morning hours, a family friend arrived about seven hours later to take care of the child and her siblings. The child told the family friend that

earlier that morning that she had heard her parents arguing and her mother telling the defendant, "No, Tim, no; stop." Later that same day, the child repeated that statement while passing the bathroom where her mother had died. The court ruled that both statements were admissible under Rule 803(2) (excited utterance). The court, relying on State v. Smith, 315 N.C. 76, 337 S.E.2d 833 (1985), noted that there is more flexibility concerning the length of time between the startling event and the making of the statements when considering the spontaneity of statements made by young children. The court, relying on State v. Thomas, 119 N.C. 708, 460 S.E.2d 349 (1987), rejected the defendant's argument that the child's statements were inadmissible under Rule 803(2) because the statements were merely answers to questions by the family friend. The court also rejected the defendant's argument that the statements were inadmissible because the child testified at trial that she did not make the statements; that testimony affects the weight the jury should give to the statements, not their admissibility.

Murder Victim's Statements Were Admissible Under Rule 803(3) (Declarant's State of Mind)

State v. Hayes, 130 N.C. App. 154, 502 S.E.2d 853 (21 July 1998). The court, relying on State v. Gray, 347 N.C. 143, 491 S.E.2d 538 (1997) and distinguishing State v. Hardy, 339 N.C. 207, 451 S.E.2d 600 (1994), ruled that the murder victim's statements were admissible under Rule 803(3) (declarant's state of mind). The victim told witnesses about (i) the defendant's threats to kill her, (ii) occasions when he told her that she would be the next "Nicole Simpson," and (iii) when the defendant urinated on the kitchen floor and wiped her hair in the urine. These statements shed light on her state of mind, and her emotions and physical condition.

Murder Victim's Statements Were Inadmissible under Rule 803(3) (Declarant's State of Mind) Because Statements Were Mere Recitations of Facts Without Any Emotional Content

State v. Marecek, 130 N.C. App. 303, 502 S.E.2d 634 (21 July 1998). The court, relying on State v. Hardy, 339 N.C. 207, 451 S.E.2d 600 (1994) and distinguishing State v. Gray, 347 N.C. 143, 491 S.E.2d 538 (1997), ruled that the murder victim's statements were inadmissible under Rule 803(3) (declarant's state of mind), because the statements were mere recitations of facts without any emotional content. For example, the statements merely revealed the defendant was having an affair with his cousin, the defendant was spending too much money, and the defendant had purchased an unnecessary life insurance policy.

(1) Child's Statements to Psychologist on Child Sexual Abuse Team Were Admissible under Rule 803(4) (Statements for Purposes of Medical Diagnosis or Treatment); Psychologist's Interview of Child Was Not for Purpose of Litigation
(2) Trial Judge's Ruling That Child Was Incompetent as Witness Does Not Make Out-of Court Statement Presumptively Unreliable under Rule 803(4) (Statements for Purposes of Medical Diagnosis or Treatment)

State v. Waddell, 130 N.C. App. 488, 504 S.E.2d 84 (18 August 1998). **(Note: There was a dissenting opinion, but not on the issues discussed below.)** The defendant was convicted of various sexual offenses with his child. (1) The child's mother reported the sexual offenses to a

social services department employee shortly after learning about them from her child. Eleven days later, the mother took him to a medical center for a medical evaluation. As part of the evaluation by a Child Sexual Abuse Team, a psychologist interviewed the child. The trial was conducted about eleven months later. The child's statements were admitted at trial under Rule 803(4) (statements for purposes of medical diagnosis or treatment). Relying on State v. Jones, 89 N.C. App. 584, 367 S.E.2d 139 (1988) and other cases, the court rejected the defendant's argument that the child's statements were not admissible under the hearsay exception because the psychologist's interview of the child was solely for the purpose of litigation. (2) The trial judge found that the son was unable to express his understanding of truth and falsity and ruled that he was incompetent to testify. The court, relying on State v. Rogers, 109 N.C. App. 491, 428 S.E.2d 220 (1993), rejected the defendant's argument that the trial judge's ruling that the child was incompetent as a witness makes an out-of court statement presumptively unreliable under Rule 803(4) (statements for purposes of medical diagnosis or treatment).

Expert Was Properly Permitted to Testify How Mentally-Retarded Sexual Assault Victim Would Have Reacted to Sexual Advance

State v. Washington, 131 N.C. App. 156, 506 S.E.2d 283 (20 October 1998). The defendant was convicted of rape and sexual offense with a mentally-retarded victim. A person with a doctorate in psychology testified for the state as an expert in the field of working with, counseling, and treating mentally-retarded people. He had known and counseled the victim for a year before the sexual assaults. He was permitted to offer his opinion how the victim would react to a sexual advance made by an adult with whom she was only vaguely familiar. He answered, over the defendant's objection, that she would respond similarly to an individual who corresponds to her intellectual and adaptive behavior age (eight years old). She might consider the person making the advance as someone she was supposed to show respect for because he was a normal functioning adult. The court ruled, relying on State v. Evangelista, 319 N.C. 152, 353 S.E.2d 375 (1987), that this opinion testimony was properly admitted.

(1) Jury Was Properly Permitted to Compare Known Sample of Defendant's Handwriting without Aid of Expert or Lay Testimony
(2) Chain of Custody Was Proper Even Though Lab Examiner Who Analyzed Exhibits Could Not Identify Who in Lab Had Handled Them Before Being Transferred to Examiner for Evaluation

State v. Owen, 130 N.C. App. 505, 503 S.E.2d 426 (18 August 1998). (1) The state offered into evidence a printed note that bore the cursive written signature of the defendant's name. Without having a witness to authenticate the signature as being the defendant's, the state proposed that the note be authenticated by comparing it with another state's exhibit, an advice-of-rights form that bore the defendant's signature and had been previously authenticated and admitted into evidence. The trial judge compared the two signatures and concluded that there was a sufficient similarity between them to enable the jury to determine whether the defendant was the person who signed the printed note. The court, relying on Rule 901(b)(3) and State v. LeDuc, 306 N.C. 62, 291 S.E.2d 607 (1982), ruled that the trial judge conducted the proper review for determining the authenticity of the note and the trial judge did not err in admitting the note into evidence. (2) The court ruled that a chain of custody was proper even though the laboratory examiner who

analyzed the exhibits could not identify the person or persons in the laboratory who had handled them before they were transferred to her for evaluation. The court noted that while the examiner could not identify who possessed the bullets and cartridges before they were transferred to her, she testified that the exhibits came to her in a sealed package and were kept in a sealed room at the lab, and that it was normal procedure that evidence would exchange hands several times before it reached her unit in the lab. She also testified that there was nothing about the package she received in this case that gave her a reason to believe that the evidence contained in it had been tampered with or otherwise altered.

Certified AOC Computer Printout of Prior DWI Conviction Was Admissible to Prove Prior Conviction in Habitual Impaired Driving Prosecution

State v. Ellis, 130 N.C. App. 596, 504 S.E.2d 787 (18 August 1998). The court ruled that a certified AOC computer printout of one of the defendant's prior DWI convictions was admissible to prove a prior DWI conviction in a habitual impaired driving prosecution. The court, while noting the provisions of G.S. 8-35.2, rested its ruling on G.S. 15A-1340.14(f) (but note that this statute permits the use of AOC records to prove convictions under the Structured Sentencing Act, while this case involved proof of a conviction at trial.)

Sentencing Issues

(1) Division of Criminal Information (DCI) Printout Was Admissible Evidence to Prove Convictions under Structured Sentencing Act (SSA)
(2) Copies of Statutes from Other States Were Sufficient to Classify Offense under SSA
(3) No Time Limitation for Prior Convictions in Establishing Prior Record Level under SSA

State v. Rich, 130 N.C. App. 113, 502 S.E.2d 49 (7 July 1998). The defendant was sentenced for felonies under the Structured Sentencing Act (SSA). (1) The court ruled that a Division of Criminal Information (DCI) printout was admissible evidence to prove convictions as provided by G.S. 15A-1340.14(f). The printout contained sufficient identifying information about the defendant to make the printout reliable. (2) The court ruled that copies of New Jersey and New York statutes, and comparison of their provisions to the criminal laws of North Carolina, were sufficient to prove by a preponderance of evidence that the crimes for which the defendant was convicted in those states were substantially similar to classified crimes in North Carolina under G.S. 15A-1340.14(e). (3) The court ruled that the SSA does not place any time limitations on prior convictions used to establish prior record level under the act.

1972 Kidnapping Conviction Was Properly Assigned Four Points as Second-Degree Kidnapping under Structured Sentencing

State v. Rice, 129 N.C. App. 715, 501 S.E.2d 665 (16 June 1998). The defendant pleaded guilty to second-degree murder committed when the Structured Sentencing Act (SSA) was effective. In determining the defendant’s prior record level, a 1972 North Carolina kidnapping conviction was assigned four points under SSA as second-degree kidnapping. The 1972 kidnapping conviction was based on common law kidnapping, which does not have the same elements of second-degree

kidnapping. The court ruled that the 1972 kidnapping offense was "substantially similar" to the second-degree kidnapping offense that existed when the second-degree murder was committed, and therefore the sentencing judge properly assigned four points to the 1972 kidnapping conviction.

Miscellaneous

Trial Judge Erred in Not Allowing Defense Attorney in Jury Argument to Explain Punishment for First-Degree Murder

State v. Cabe, 131 N.C. App. 310, 506 S.E.2d 749 (3 November 1998). The defendant was tried for non-capital first-degree murder. The court ruled, relying on G.S. 7A-97, State v. Buckner, 342 N.C. 198, 464 S.E.2d 414 (1995) and other cases, that the trial judge erred in prohibiting the defense attorney in jury argument from explaining the punishment for first-degree murder was life imprisonment without parole.

(1) Defense Counsel's Erroneous Advice to Defendant about Appealability of Sentence May Constitute Ineffective Assistance of Counsel
(2) Defense Counsel Did Not Render Ineffective Assistance of Counsel When Giving Erroneous Advice to Defendant about Appealability of Sentence, Based on Facts in This Case

State v. Goforth, 130 N.C. App. 603, 503 S.E.2d 676 (18 August 1998). The defendant pleaded guilty to several felonies in district court under the authority of G.S. 7A-272(c). Before entering the plea, the defendant's counsel erroneously advised the defendant that she could appeal her sentence to superior court. [Note: An appeal of a sentence, if permitted, would be to the North Carolina Court of Appeals; see G.S. 7A-272(d).] (1) The court ruled that a defense counsel's erroneous advice to a defendant about the appealability of a sentence may constitute ineffective assistance of counsel. (2) A defendant who alleges that ineffective assistance of counsel caused her to enter a guilty plea must show that the defense counsel's conduct fell below an objective standard of reasonableness under State v. Braswell, 312 N.C. 553, 324 S.E.2d 241 (1985) and Strickland v. Washington, 466 U.S. 668 (1984). The court then ruled, based on the state's strong evidence to support the offenses to which the defendant pleaded guilty, that the defendant failed to show that there was a reasonable probability that, but for the defense counsel's erroneous advice, she would not have entered the guilty pleas. Therefore, the defendant cannot show she was prejudiced by the counsel's erroneous advice.

(1) Fired District Attorney's Employee May Sue District Attorney under State Whistleblower Act
(2) District Attorney Was Not Entitled to Absolute Immunity for Common Law Wrongful Discharge, Based on Facts in This Case

Caudill v. Dellinger, 129 N.C. App. 649, 501 S.E.2d 99 (16 June 1998), *affirmed*, 350 N.C. 89, 511 S.E.2d 304 (4 March 1999). The plaintiff, employed as an administrative assistant in a district attorney's office, sued the district attorney on various legal grounds as a result of being fired by the district attorney. She asserted she had been fired because she had given truthful

information to SBI agents who were investigating the district attorney for allegedly committing criminal offenses. (1) The court ruled that constitutional officers, including the district attorney, may be sued under the Whistleblower Act, Article 14 of Chapter 126 of the General Statutes. (2) The court also ruled that the district attorney did not have absolute immunity against a civil lawsuit for common law wrongful discharge, based on the facts in this case.

Judge's Order Prohibiting Parties to Civil Lawsuit from Speaking to News Media Violated First Amendment Because Judge Did Not Make Findings to Support Order

Sherrill v. Amerada Hess Corporation, 130 N.C. App. 711, 504 S.E.2d 802 (15 September 1998). The court ruled that a judge's order prohibiting parties to a civil lawsuit from speaking to the news media violated the First Amendment because the judge did not make findings to support the order. (Note: Although the judge's order also prohibited the lawyers representing the parties from speaking to the news media, that aspect of the order was not before the court.)