RECENT CASES AFFECTING CRIMINAL LAW AND PROCEDURE
(June 15, 1999 – October 19, 1999)

Robert L. Farb
Institute of Government

NORTH CAROLINA SUPREME COURT

Arrest, Search, and Confession Issues

(1) Court Adopts *Whren v. United States* Ruling Under North Carolina Constitution
(2) Court Rules That Officers Had Reasonable Suspicion to Detain Defendant After Traffic Stop
(3) Court Clarifies "Nervousness" Factor in Establishing Reasonable Suspicion As Discussed in *State v. Pearson*
(4) Court Rules That Length of Detention Was Reasonable

State v. McClendon, 350 N.C. 630, 517 S.E.2d 128 (23 July 1999), *affirming*, 130 N.C. App. 368, 502 S.E.2d 902 (1998). Officer A saw the defendant driving a station wagon on I-85 at a speed of about 72 m.p.h. in a 65 m.p.h. zone, and the defendant was following closely behind a mini-van that was going the same speed. The officer believed that the two vehicles were traveling together. With the assistance of officer B, both vehicles were stopped. Officer A questioned the driver of the mini-van and then issued a warning ticket for speeding. Officer B questioned the defendant. The defendant appeared nervous, did not make eye contact, and was breathing heavily. He produced a driver's license and title to the vehicle, but no registration. The defendant told the officer that the station wagon belonged to his girlfriend; however, he could not give the officer her name even though the addresses on the defendant's driver's license and the vehicle's title were the same. As the defendant continued to answer questions, his nervousness increased. He fidgeted, answered evasively, and appeared very uncomfortable. The officer again asked the defendant for his girlfriend's name and for the name on the vehicle's registration. The defendant appeared to say, "Anna." Although that name did not appear on the title, a radio check did not reveal any problems with the registration or the defendant's driver's license. The name on the title was Jema Ramirez. After communication with Officer A, Officer B issued a warning ticket to the defendant for speeding and following too closely. The defendant—sighing deeply, chuckling nervously, and looking down—muttered "No" when asked to consent to a search of his vehicle. Officer A arrived. The defendant was sweating and breathing rapidly, and again refused to consent to a search of his vehicle. Approximately fifteen to twenty minutes elapsed after the issuance of the warning ticket until a drug dog arrived and alerted to the vehicle, resulting in a search and the discovery of drugs. (1) The court adopted under the Constitution of North Carolina the ruling in Whren v. United States, 517 U.S. 806, 116 S. Ct. 1769, 135 L. Ed. 2d 89 (1996), that stopping a vehicle for a traffic violation, when there is probable cause to believe the traffic violation was committed, is constitutional regardless of the officer's motivation for doing so. The court ruled that the officer in this case had probable cause for stopping the defendant's vehicle for speeding and following too closely and therefore was justified in stopping it, regardless of the officer's motivation for doing so. (2) The court ruled that the continued detention of the defendant from the issuance of the warning ticket to the

arrival of the drug dog was supported by reasonable suspicion of criminal activity. The court cited several factors that supported reasonable suspicion under the totality of the circumstances. First, the officer questioned the defendant about who owned the car: the defendant said his girlfriend but initially would not give a name. Then he gave the name "Anna," but that name was not listed on the title. Second, although the defendant appeared unsure of who owned the car, the address of the owner listed on the title and the address on the defendant's driver's license were the same, which indicated that they both lived in the same residence. Third, the defendant was extremely nervous, sweating, breathing rapidly, sighing heavily, and chuckling nervously in response to questions. He also refused to make eye contact when answering questions. The court cited State v. Butler, 331 N.C. 227, 415 S.E.2d 719 (1992) and noted that nervousness was a factor in determining reasonable suspicion in that case. (3) The court distinguished its ruling in this case with the ruling in State v. Pearson, 348 N.C. 272, 498 S.E.2d 599 (1998) (no reasonable suspicion to frisk defendant). The court stated that it would "revisit *Pearson* now in order to clarify its meaning . . . ." The court noted that it said in *Pearson* that "[t]he nervousness of the defendant is not significant. Many people become nervous when stopped by a state trooper." The court stated:

> Although the quoted language from *Pearson* is couched in rather absolute terms, we did not mean to imply there that nervousness can never be significant in determining whether an officer could form a reasonable suspicion that criminal activity is afoot. Nervousness, like all other facts, must be taken in light of the totality of circumstances. It is true that many people do become nervous when stopped by an officer of the law. Nevertheless, nervousness is an appropriate factor to consider when determining whether a basis for reasonable suspicion exists.
>
> In *Pearson*, the nervousness of the defendant was not remarkable. Even when taken together with the inconsistencies in the statements of the defendant and his girlfriend, it did not support a reasonable suspicion. In the case before us, however, defendant exhibited more than ordinary nervousness; defendant was fidgety and breathing rapidly, sweat had formed on his forehead, he would sigh deeply, and he would not make eye contact with the officer. This, taken in the context of the totality of circumstances found to exist by the trial court, give rise to a reasonable suspicion that criminal activity was afoot.

(4) The court ruled that the duration of the detention (fifteen to twenty minutes from the warning ticket to the arrival of the drug dog) was reasonable. The officers acted quickly and diligently to obtain the drug dog, and they promptly put the drug dog to work on its arrival.

Criminal Offenses

Trial Judge Did Not Err in Granting State's Motion to Join for Trial Two Murders Committed Two Months Apart

State v. Moses, 350 N.C. 741, 517 S.E.2d 853 (20 August 1999). The court ruled, relying on State v. Chapman, 342 N.C. 330, 464 S.E.2d 661 (1995), that the trial judge did not err in granting the state's motion to join for trial two murders committed two months apart. The court

noted the following similarities between the murders: (1) both murders involved young men whom the defendant knew and with whom he was associated in the drug trade; (2) both murders occurred after the victims had paged the defendant; (3) both victims were shot in the head with the same gun from about two feet or less; (4) both murders occurred in Winston-Salem; (5) both murders occurred on the premises of the victims; and (6) both murders occurred after the defendant argued with the victims. The court concluded that the two murders "were not so separate in time and place and so distinct in circumstance that joinder was unjust and prejudicial to the defendant" (court's quotation from the *Chapman* case).

Seven Distinct Shots into Occupied Vehicle Supported Seven Convictions of Discharging Firearm into Occupied Property

State v. Nobles, 350 N.C. 483, 515 S.E.2d 885 (25 June 1999). The court ruled, relying on State v. Rambert, 341 N.C. 173, 459 S.E.2d 510 (1995), that the defendant's firing seven distinct shots from a handgun into a occupied vehicle supported seven convictions of discharging a firearm into occupied property (G.S. 14-34.1).

Court Reaffirms Ruling That Burglary Indictment Need Not Allege Name of Felony or Felonies Defendant Intended to Commit When Breaking and Entering Dwelling

State v. Parker, 350 N.C. 411, 516 S.E.2d 106 (25 June 1999). The court reaffirmed its ruling in State v. Worsley, 336 N.C. 268, 443 S.E.2d 68 (1994), that a burglary indictment need not allege the name of the felony or felonies that the defendant intended to comment when breaking and entering the dwelling.

Sufficient Evidence to Support Conviction of Malicious Castration Committed During Continuous Transaction With Murder of Victim, Even Though Victim's Testicles Had Been Cut Off After Death

State v. Parker, 350 N.C. 411, 516 S.E.2d 106 (25 June 1999). The court ruled, relying on State v. Wilkinson, 344 N.C. 198, 474 S.E.2d 375 (1996), that there was sufficient evidence to support the defendant's conviction of malicious castration that was committed during a continuous transaction with the murder of the victim, even though the victim's testicles had been cut off after his death.

Court Adopts, Per Curiam and Without Opinion, Dissenting Opinion in Court of Appeals That Trial Judge Properly Refused to Submit Second-Degree Murder as Verdict in First-Degree Murder Trial

State v. Cintron, 351 N.C. 39, 519 S.E.2d 523 (8 October 1999), *reversing*, 132 N.C. App. 605, 513 S.E.2d 794 (6 April 1999). The court adopted, per curiam and without an opinion, the dissenting opinion in the Court of Appeals that the trial properly refused to submit second-degree murder as a verdict in a first-degree murder trial. The dissenting opinion noted that there was no conflicting evidence from the defendant or anyone else to indicate that the defendant did not commit the murder with premeditation and deliberation. The defendant took his rifle from its normal place in the home, stood, pointed the gun at the victim, inflicted the fatal wound, and

enlisted help in hiding the victim's body and other evidence of the murder. The victim apparently remained seated and was not armed. There was no evidence of provocation by the victim. The fact that the defendant and victim had argued before the killing did not support an instruction on second-degree murder when there was no evidence that the defendant was so enraged as to be unable to reason, premeditate, or deliberate.

Evidence Did Not Support Jury Instruction on Automatism Defense

State v. Morganherring, 350 N.C. 701, 517 S.E.2d 622 (20 August 1999). The defendant was tried for first-degree murder. The trial judge granted the defendant's request for a jury instruction on voluntary intoxication but denied the defendant's request for a jury instruction on automatism. The court noted that the defenses of voluntary intoxication and automatism are fundamentally inconsistent, and referred to a statement in State v. Fisher, 336 N.C. 684, 445 S.E.2d 866 (1994), that unconsciousness as a result of voluntary intoxication of alcohol or drugs will not warrant an instruction for automatism as requested by the defendant in that case. The court also noted that although the defendant in the case before the court claimed not to remember all of his actions during the murders, the evidence did not indicate that the defendant was either unconscious or not conscious of his actions.

Criminal Procedure

(1) Trial Judge Did Not Properly Exercise Discretion When Denying Jury's Request for Transcripts of Witnesses' Testimony
(2) Trial Judge Erred in Not Giving Acting-in-Concert Instruction Required by *Blankenship* Ruling, Based on Date of Murders Being Tried

State v. Barrow, 350 N.C. 640, 517 S.E.2d 374 (23 July 1999). The defendant was tried and convicted of three first-degree murders and two felonious assaults. (1) During jury deliberations, the jury requested that the trial judge provide them with transcripts of the testimony of four witnesses. The judge told the jury that the "court doesn't have the ability to now present to you the transcription of what was said during the course of the trial." The court stated that the trial judge effectively indicated in that statement that he did not have the *ability* (italics in court's opinion) to present the transcript to the jury, reflecting the judge's failure to exercise discretion as required by G.S. 15A-1233(a); see also State v. Johnson, 346 N.C. 119, 484 S.E.2d 372 (1997). The jury's interest in reviewing the testimony of certain witnesses required the trial judge to exercise his discretion about whether to have the court reporter read to the jury the testimony of these witnesses as set out in G.S. 15A-1233(a). (2) The court ruled that the trial judge erred in failing to instruct the jury according to the acting-in-concert rule set out in State v. Blankenship, 337 N.C. 543, 447 S.E.2d 727 (1994), which applied to the date (21 January 1995) of the murders being tried. [Note: The *Blankenship* ruling, which was overruled in State v. Barnes, 345 N.C. 184, 481 S.E.2d 44 (1997), applies to offenses committed on or after September 29, 1994, and before March 3, 1997.]

Trial Judge Did Not Err in Allowing State's Voir Dire of Defense Expert Witness Before Expert's Testimony, If Expert Did Not Produce Written Report

State v. Morganherring, 350 N.C. 701, 517 S.E.2d 622 (20 August 1999). The court ruled that the trial judge did not err in notifying the defendant that if a defense expert witness did not produce a written report, then the state would be able to conduct a voir dire of the expert before the expert presented any evidence to the jury.

Capital Case Issues

Trial Judge Erred in Limiting Number of Defense Jury Arguments in Capital Trial

State v. Barrow, 350 N.C. 640, 517 S.E.2d 374 (23 July 1999). The defendant was tried and convicted of three first-degree murders and two felonious assaults. The defendant did not present evidence during the guilt/innocence stage, and therefore was allowed to present opening and closing jury arguments. He was represented by two lawyers. The lawyers told the trial judge that they wanted to make three closing arguments; an opening argument by one of them before the state's closing argument and two final arguments, one by each lawyer, after the state's closing argument. The court interpreted the trial judge's colloquy with defense lawyers as permitting only one defense lawyer to make an opening jury argument and only one defense lawyer to make the closing jury argument. The court ruled, relying on State v. Eury, 317 N.C. 511, 346 S.E.2d 447 (1986) and State v. Mitchell, 321 N.C. 650, 365 S.E.2d 554 (1988), that the trial judge erred and ordered a new trial for both the capital and noncapital offenses. The court noted that lawyers for a defendant, not exceeding three, may each address the jury as many times as they desire during jury arguments.

G.S. 15A-1415(f), Which Governs Discovery for Motion for Appropriate Relief in Capital Cases, Applies to Motion to Vacate Order Denying Motion for Appropriate Relief That Was Pending on June 21, 1996, Effective Date of G.S. 15A-1415(f)

State v. Basden, 350 N.C. 579, 515 S.E.2d 220 (25 June 1999). The court in State v. Green, 350 N.C. 400, 514 S.E.2d 724 (9 June 1999), ruled that G.S. 15A-1415(f), which governs discovery for a motion for appropriate relief in capital cases and provides for defense access to prosecutorial and law enforcement files involved with the investigation and prosecution of a defendant, did not apply to a motion for appropriate relief that had been denied before June 21, 1996, the effective date of G.S. 15A-1415(f). The court in *Green* also noted that a petition of certiorari to the North Carolina Supreme Court, concerning the denial of the motion for appropriate relief, was not pending on that date. In this case, the defendant's motion for appropriate relief was denied before June 21, 1996, but the defendant's motion to vacate the order denying the motion for appropriate relief was still pending on June 21, 1996. The court ruled that the defendant was entitled to the discovery provisions of G.S. 15A-1415(f) because his motion for appropriate relief was effectively still pending on June 21, 1996.

Indigent Defendant's Right to Counsel Was Not Violated When Lead Counsel Was Absent, With Consent of Defendant and Second Counsel, During Preliminary Jury Matters

State v. Parker, 350 N.C. 411, 516 S.E.2d 106 (25 June 1999). The indigent defendant, charged with capital first-degree murder, was appointed two counsel under G.S. 7A-450(b1). The trial judge, with the consent of the defendant and second counsel, conducted the orientation of new jurors and requests for deferments and excuses in the absence of the defendant's lead counsel, who was ill. The court ruled, relying on State v. Thomas, 350 N.C. 315, 514 S.E.2d 486 (1999), that this procedure did not violate the defendant's right to two counsel.

Trial Judge Did Not Err in Not Submitting Mitigating Circumstance G.S. 15A-2000(f)(7) (Defendant's Age At Time of Murder)

State v. Peterson, 350 N.C. 518, 516 S.E.2d 131 (25 June 1999). The court ruled that the trial judge did not err in not submitting mitigating circumstance G.S. 15A-2000(f)(7) (defendant's age at time of murder). The court noted that while the defendant presented evidence that he led a restrained childhood under a strict guardian and did not make many friends, there was no evidence from which a jury could conclude that the defendant was mentally immature. He had completed his GED, had normal reading skills, a stable marital relationship, handled his own finances, and had a good employment record.

Trial Judge Did Not Err in Failing to Submit Mitigating Circumstance G.S. 15A-2000(f)(1) (No Significant History of Prior Criminal Activity)

State v. Hamilton, 351 N.C. 14, 519 S.E.2d 514 (8 October 1999). The defendant was convicted of a first-degree murder committed in 1994. The court ruled that the trial judge did not err in failing to submit mitigating circumstance G.S. 15A-2000(f)(1) (no significant history of prior criminal activity). The defendant had been convicted in 1988 of two counts of rape of a fifteen year old in which he pulled a knife on the victim; the evidence showed that the defendant raped the victim twice in North Carolina (for which he was convicted) and then raped her twice in South Carolina. The defendant was convicted of second-degree murder in 1974 in which he aimed a shotgun at the victim and said he was going to kill the victim; it was an unprovoked murder. The defendant was also convicted in 1987 of misdemeanor assault on a female and misdemeanor escape. The court noted the defendant's second-degree murder conviction and its ruling in State v. McNeil, 350 N.C. 657, 518 S.E.2d 486 (20 August 1999), that a prior criminal history that included a violent felony death is significant under G.S. 15A-2000(f)(1).

(1) State Did Not Improperly Fail to Present Evidence of Aggravating Circumstance, Based on Facts in This Case
(2) Trial Judge Did Not Err in Failing to Submit Mitigating Circumstance G.S. 15A-2000(f)(1) (No Significant History of Prior Criminal Activity)
(3) Defendant Waived Objection to Jury Instruction on Mitigating Circumstances When Defendant Failed to Make Timely Request at Jury Charge Conference

State v. McNeil, 350 N.C. 657, 518 S.E.2d 486 (20 August 1999). The defendant was indicted for the first-degree murders of victims A, B, and C. A judge granted the state's motion to join for

trial the murders of A and B, but denied the state's motion to also join the murder of victim C. (1) The defendant pleaded guilty to the murders of A and B under a plea agreement that the state would not seek to introduce any evidence concerning the murder of C. The defendant argued on appeal that this agreement violated the ruling in State v. Case, 330 N.C. 161, 410 S.E.2d 57 (1991), because the state improperly failed to present evidence of the murder of C to prove aggravating circumstance G.S. 15A-2000(e)(11) (murder part of course of conduct including violence toward others). The court disagreed. The court ruled that the judge's pretrial ruling barring the joinder of the murder of victim C prevented the state from introducing evidence of that murder in the trial of the murders of victims A and B. The court also stated, citing G.S. 15A-1443(c), that the defendant, by opposing joinder, could not be prejudiced by a ruling it had requested. (2) The court ruled that the trial judge did not err in failing to submit mitigating circumstance G.S. 15A-2000(f)(1) (no significant history of prior criminal activity). Although the court in a prior appeal of this case, 327 N.C. 388, 395 S.E.2d 106 (1990), had stated that there was evidence to support the submission of this mitigating circumstance, the court noted that the state offered in this resentencing hearing new evidence of prior serious criminal activity (burglary, larceny, and hit-and-run) in addition to a voluntary manslaughter conviction. This evidence was more extensive and significant than presented at the first trial and supported the trial judge's ruling not to submit the mitigating circumstance. (3) The trial judge specifically mentioned to defense counsel at the jury charge conference that instructions on mitigating circumstances G.S. 15A-2000(f)(2) and (f)(6) would include references to the defendant's chronic alcoholism and personality disorder, but defense counsel did not request a reference to organic brain damage. After the jury had begun its deliberations, defense counsel contended that organic brain damage should have been included. The trial judge refused to reinstruct the jury. The court ruled that the trial judge did not commit error because Rule 21 of the General Rules of Practice for the Superior and District Courts does not permit the defendant to propose a new evidentiary matter if the defendant had the opportunity to raise that issue at the charge conference. Thus the defendant waived any objection to this instruction on appeal. The court noted that once the jury has been charged, the defendant may only request the trial judge to correct or withdraw an erroneous instruction or to inform the jury on a point of law that should have been covered in the original instructions.

Trial Judge Erred in Giving Jury Instruction on Aggravating Circumstance G.S. 15A-2000(e)(10) (Creating Risk of Death to More Than One Person by Weapon Normally Hazardous to Lives of More Than One Person) by Stating That Particular Semi-Automatic Pistol Was Such a Weapon

State v. Nobles, 350 N.C. 483, 515 S.E.2d 885 (25 June 1999). In a capital sentencing hearing, the trial judge instructed the jury that, concerning aggravating circumstance G.S. 15A-2000(e)(10) (creating risk of death to more than one person by weapon normally hazardous to lives of more than one person), "a Lorcin 380 caliber semi-automatic pistol is a weapon which would normally be hazardous to the lives of more than one person." The court ruled that the judge erred in giving this instruction: it relieved the state of its burden to prove this element of the aggravating circumstance in violation of due process principles.

Trial Judge Did Not Err in Submitting Aggravating Circumstance G.S. 15A-2000(e)(11) (Murder Part of Course of Conduct Including Violence Toward Others)

State v. Moses, 350 N.C. 741, 517 S.E.2d 853 (20 August 1999). The defendant was convicted of two first-degree murders that had been committed two months apart. The court ruled the trial judge did not err in submitting aggravating circumstance G.S. 15A-2000(e)(11) (murder part of course of conduct including violence toward others) in the capital sentencing hearing for each first-degree murder conviction. These drug-related murders had a common modus operandi and motivation, based on the facts in this case.

State's Rebuttal Evidence at Capital Sentencing Hearing about Defendant's Prior Violent Acts Was Properly Admitted as Response to Defendant's Evidence of His Good Character

State v. Hedgepeth, 350 N.C. 776, 517 S.E.2d 605 (20 August 1999). At a capital sentencing hearing, the defendant offered a witness's testimony about the defendant being a good father and stepfather and a devoted husband who worked hard, got along with his co-workers, and provided for his family. The defendant also offered testimony of mental health experts that included evidence of prior antisocial behavior in the context of explaining that his ability to appreciate the criminality and consequences of his actions was impaired. The state was permitted on rebuttal to offer evidence of his prior violent acts toward his first wife, former girlfriends, and others. The court ruled that this evidence was properly admitted to rebut the defendant's mitigating evidence.

Evidence

(1) Trial Judge Did Not Err, in Trial of Two Murders, in Admitting Each Murder as Rule 404(b) Evidence of Other Murder
(2) Trial Judge in Capital Sentencing Hearing Did Not Err in Allowing State to Cross-Examine Defense Mental Health Expert about Money Paid to Testify

State v. Moses, 350 N.C. 741, 517 S.E.2d 853 (20 August 1999). (1) The defendant was convicted of two drug-related first-degree murders committed two months apart. Both murders were committed with the same gun. In addition, the court pointed to other similarities and noted that the modus operandi of the two murders was similar enough to make it likely that the same person committed both murders. The court ruled that the trial judge did not err, in the trial of the two murders, in admitting each murder as Rule 404(b) evidence of the other murder to show opportunity and identity. The court acknowledged that there were dissimilarities between the murders, but stated that it was not necessary that the similarities between the two offenses "rise to the level of the unique and bizarre" [court's quotation from State v. Green, 321 N.C. 594, 365 S.E.2d 587 (1988)]. Rather, the similarities must tend to support a reasonable inference that the same person committed both the earlier and later acts. (2) The court ruled that the trial judge in a capital sentencing hearing did not err in allowing the state to cross-examine a defense mental health expert about his fee in the case being tried and prior cases, including how many times he had testified in the past two years and how much money he had been paid to testify in those cases. The cross-examination was proper to allow the jury to assess the expert's credibility in light of his status as a paid defense expert witness.

Defense Proffered Evidence of Accomplice's Knife Threat Seven Years Before Murder Was Inadmissible Because Threat Did Not "Point Directly" to Accomplice's Guilt

State v. Hamilton, 351 N.C. 14, 519 S.E.2d 514 (8 October, 1999). The defendant was convicted of a first-degree murder (committed in 1994) by inflicting multiple knife wounds on the victim. The defendant offered testimony that he was not at the scene of the murder and contended that the alleged accomplice, who testified for the state, was the killer. The court ruled that the trial judge did not err by prohibiting the defendant from cross-examining the accomplice about a 1987 knife threat on a police officer that did not result in a conviction. The court stated, citing State v. Cotton, 318 N.C. 663, 351 S.E.2d 277 (1987), that any answer by the accomplice about the 1987 knife threat would create, at best, a speculative inference that the accomplice killed the victim—an inference that does not "point directly" to the accomplice's guilt.

Court Affirms, Per Curiam and Without Opinion, Court of Appeals Ruling that Trial Judge Did Not Err in Prohibiting Defendant from Cross-Examining Child Victim about Her Prior Juvenile Adjudications

State v. McAllister, 351 N.C. 44, 519 S.E.2d 524 (8 October 1999), *affirming*, 132 N.C. App. 300, 511 S.E.2d 660 (16 February 1999). The court affirmed, per curiam and without an opinion, a court of appeals ruling that the trial judge did not err in prohibiting the defendant from cross-examining the child victim about her prior juvenile adjudications. The defendant was charged with several sexual assaults. The child victim had been adjudicated delinquent for offenses that she committed after she was sexually assaulted by the defendant and after she had initially accused the defendant of these crimes. The court stated that the trial judge's decision to exclude this evidence under the standard set out in Rule 609(d) was reasonable because when she made her initial accusations, she was a thirteen-year-old child with good grades and no history of criminal activity. The court rejected the defendant's constitutional arguments under Davis v. Alaska, 415 U.S. 308, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974). In this case, the defendant was not attempting to show that the state had power over the victim because of the prior adjudications or that the victim was biased against the defendant. The trial judge's finding that the evidence was unnecessary to fairly determine guilt or innocence was essentially a determination that the evidence was not relevant. Because the defendant had no right to elicit irrelevant evidence on cross-examination, the defendant was not denied his constitutional right to confront the witnesses against him.

Lay Opinion Testimony That "I Think He Was Alive When He Went By" Was Properly Admitted under Rule 701

State v. Hedgepeth, 350 N.C. 776, 517 S.E.2d 605 (20 August 1999). A customer at a restaurant who saw a shooting victim being wheeled out of the restaurant was permitted to testify that "I think he was alive when he went by." The court ruled, citing State v. McCain, 6 N.C. App. 558, 170 S.E.2d 531 (1969), that this lay opinion testimony was properly permitted under Rule 701, because it was an inference rationally based on the witness's perception and helped to clarify his testimony.

Miscellaneous

Court Censures District Court Judge for Entering "Not Guilty" Verdict When Defendant Offered Guilty Plea and Not Giving State Opportunity to Participate and Be Heard, Based on Facts in This Case

In re Elton G. Tucker, 350 N.C. 649, 516 S.E.2d 593 (23 July 1999). On June 23, 1997, after the prosecutor called an unrepresented defendant's case for trial in district court, the defendant told the prosecutor that he intended to plead guilty to the two charged offenses. The normal practice in this district court judge's courtroom was that the prosecutor did not participate in the taking of guilty pleas. The defendant and the arresting law enforcement officer approached the bench while the prosecutor worked on other matters in the courtroom. The defendant offered to plead guilty to two offenses. However, after the judge conversed with the officer about the facts of these offenses, he entered a "not guilty" verdict for one of the offenses. The prosecutor did not participate in this matter and was not given an opportunity by the judge to be heard about the entry of the "not guilty" verdict. The court ruled that the judge's actions constituted a violation of Canon 3A(4) of the Code of Judicial Conduct and conduct prejudicial to the administration of justice that brings the judicial office into disrepute. The court stated that the judge's actions, while not *ex parte,* effectively prevented the state from presenting evidence or otherwise being heard. By finding the defendant not guilty without hearing any sworn testimony under these circumstances, the judge did not accord the state its full right to participate and to be heard. The court ordered that the judge be censured.

Court Summarily Affirms, Without Opinion, Court of Appeals Ruling That Rejected News Reporter's Qualified Privilege to Refuse to Testify in Criminal Proceeding Concerning Non-Confidential Information Obtained from Non-Confidential Source

In re Owens, 350 N.C. 656, 517 S.E.2d 605 (23 July 1999), *affirming*, 128 N.C. App. 577, 496 S.E.2d 592 (17 February 1998). The court summarily affirmed, without an opinion, the following ruling of the Court of Appeals: A television reporter was found in criminal contempt for refusing to testify in a criminal case about public statements made by an attorney who was representing a criminal defendant. The court, relying on Branzburg v. Hayes, 408 U.S. 665, 92 S. Ct. 2646, 33 L. Ed. 2d 626 (1972), rejected under both federal and state constitutions a news reporter's qualified privilege to refuse to testify in a criminal proceeding concerning non-confidential information obtained from a non-confidential source. [Note, however, that S.L. 1999-267 (S 1009) effective October 1, 1999, adds new G.S. 8-53.9 that creates a qualified privilege for journalists.]

NORTH CAROLINA COURT OF APPEALS

Criminal Offenses

New York DWI Conviction Was Substantially Similar to North Carolina DWI Offense to Constitute Prior Conviction That Qualified as Grossly Aggravating Factor in DWI Sentencing

State v. Parisi, 135 N.C. App. 222, 519 S.E.2d 531 (5 October 1999). The defendant pleaded guilty to DWI. The sentencing judge determined that a New York conviction of driving while ability impaired was a prior conviction that constituted a grossly aggravating factor and sentenced the defendant to Level Two punishment. The court ruled that the New York offense was "substantially equivalent" [see definition of "offense involving impaired driving" in G.S. 20-4.01(24a)(d)] to the North Carolina DWI offense and thus was properly considered as a grossly aggravating factor. The court stated that "substantially equivalent" does not require that the New York and North Carolina offenses must be "identical in each and every respect." Both the New York and North Carolina offenses require that a defendant must be impaired to the extent that the driver's ability to operate a vehicle is diminished. The court noted that the North Carolina offense requires "appreciable, or perceptible impairment," citing State v. Harrington, 78 N.C. App. 39, 336 S.E.2d 852 (1985), while the New York offense simply requires "impairment to any extent." Although not identical, the offenses are "substantially equivalent."

Movement of Robbery Victim After Money Taken Was Sufficient to Support Kidnapping Conviction

State v. Little, 133 N.C. App. 601, 515 S.E.2d 752 (15 June 1999). The defendant used a handgun to rob the victim of money he had just withdrawn from an ATM machine. He then required him to withdraw more money from the ATM and give it to the defendant. He then forced the victim to move more than 200 feet across a parking lot, onto a street, and into the victim's car. The court ruled that the movement of the victim was unnecessary to obtain the money from the victim and thus was sufficient evidence to support the defendant's kidnapping conviction.

Variance Between Wording of Kidnapping Indictment and Jury Instruction Was Prejudicial Error Requiring New Trial

State v. Dominie, 134 N.C. App. 445, 518 S.E.2d 32 (3 August 1999). The kidnapping indictment in this case alleged that the defendant kidnapped the victim by "removing" the victim from one place to another. The jury instruction permitted the jury to convict the defendant if he "confined," "restrained," or "removed" the victim from one place to another. Thus, the jury could convict the defendant if he "confined" or "restrained" the victim, even though these words were not alleged in the indictment. The court, relying on State v. Tucker, 317 N.C. 532, 346 S.E.2d 417 (1986), ruled that the defendant could not be convicted on a theory not alleged in the indictment. The court, stating that it is bound by the *Tucker* ruling and not by a contrary ruling in State v. Raynor, 128 N.C. App. 244, 495 S.E.2d 176 (1998), ordered a new trial.

(1) Female Defendant Was Properly Convicted of Rape of Another Female When She Aided and Abetted Male Who Had Vaginal Intercourse with Victim
(2) Defendant Was Properly Convicted of Three Counts of Rape or Attempted Rape Because There Were Three Distinct Acts of Penetration or Attempted Penetration
(3) Court Criticizes Common Law Affirmative Defense of Spousal Coercion, But It Lacks Authority to Overrule Supreme Court Ruling That Recognizes Defense

State v. Owen, 133 N.C. App. 543, 516 S.E.2d 159 (15 June 1999). (1) The court ruled that the female defendant was properly convicted of first-degree statutory rape and two counts of attempted first-degree statutory rape when she aided and abetted a male who had vaginal intercourse or attempted vaginal intercourse with the female victim. (2) The court ruled, relying on State v. Midyette, 87 N.C. App. 199, 360 S.E.2d 507 (1984), that the defendant was properly convicted of three counts of rape or attempted rape because there were three distinct occasions of penetration or attempted penetration of the victim's vagina by the defendant's accomplice. (3) The defendant in this case was the wife of her accomplice who committed the sexual assault offenses. The court criticized the common law affirmative defense of spousal coercion (wife who commits crime in husband's presence is presumed, in absence of contrary evidence, to have committed crime under his coercion) recognized in State v. Seahorn, 166 N.C. 373, 81 S.E. 687 (1914), but noted that it lacks authority to overrule this supreme court ruling; see Cannon v. Miller, 313 N.C. 324, 327 S.E.2d 888 (1985). Thus the defense remains valid.

Defendant Constructively Possessed Cocaine and Drug Paraphernalia in Car, Based on Facts in This Case

State v. Chavis, 134 N.C. App. 546, 518 S.E.2d 241 (17 August 1999). The defendant was convicted of possession of cocaine and drug paraphernalia that were located in a car. The defendant was the driver and owner of the car, which also contained a front seat female passenger. The cocaine was found in a tissue box on the passenger side of the car, which was surrounded by other items belonging to the defendant, including his wallet and sales and insurance documents in his name. A black travel bag located in the back of the car contained the drug paraphernalia, and the bag also contained a number of personal items, including men's underwear and shaving items. The court ruled that this evidence supported the defendant's convictions—based on the defendant's constructive possession of the cocaine and drug paraphernalia.

Defendant Is Not Entitled to Directed Verdict on Insanity Defense Even If State Does Not Rebut Evidence

State v. Dorsey, 135 N.C. App. 116, 519 S.E.2d 71 (21 September 1999). The defendant was on trial for felonious assault, and a mental health expert testified on his behalf in support of an insanity defense. The court rejected the defendant's argument that he was entitled to a directed verdict of not guilty by reason of insanity because he offered expert testimony on the issue and the state did not rebut that testimony. The court noted that the defendant has the burden of proof on the insanity defense, and the credibility of the defendant's evidence of insanity—even if uncontroverted—is for the jury to decide.

Arrest, Search and Seizure, and Confessions

Officer's Warrantless Search of Apartment Dumpster Did Not Violate Defendant's Fourth Amendment Rights

State v. Washington, 134 N.C. App. 479, 518 S.E.2d 14 (3 August 1999). An officer received information from an unknown informant that a person known only as "D" was selling drugs. The informant gave a detailed physical description of "D" and said that he lived in an apartment at 3903-A Marcom Street in Raleigh. The officer began surveillance of the apartment and saw a person matching the informant's description take two white plastic bags, tied with yellow strips, across the parking lot to the communal apartment dumpster. Shortly thereafter, the officer removed the bags from the dumpster and discovered drugs inside them. Relying on State v. Hauser, 342 N.C. 382, 464 S.E.2d 443 (1995), the court ruled that the defendant did not have a reasonable expectation of privacy in his garbage after he placed it in the communal apartment dumpster, and therefore the officer's removal of the garbage did not violate the defendant's Fourth Amendment rights.

Anonymous Information Along with Officer's Information Established Probable Cause to Search Vehicle for Drugs

State v. Earhart, 134 N.C. App. 130, 516 S.E.2d 883 (6 July 1999). The court ruled that the following information established probable cause to search a vehicle for drugs: On April 27, 1999, deputy sheriff A received an anonymous telephone call that a white Trans Am would be traveling to a residence on North Spot Road in Powell's Point sometime between April 27 and April 28 and that it might be accompanied by a blue Suburu. The caller stated that the white Trans Am would be transporting a pound of marijuana. The caller did not identify himself, and the deputy sheriff did not recognize the voice. The caller telephoned the deputy a few minutes later and told him that the suspects in the vehicle had scanners and that information should not be broadcast over police radio. The deputy notified other deputies (deputy sheriff B and deputy sheriff C) of this information. Deputy B told deputy A that he had received information from the SBI about the owner of a white Trans Am who lived on North Spot Road and who was being investigated for drug dealing; also, the suspect was reportedly armed with a Desert Eagle handgun. Deputy C began surveillance along North Spot Road after 6:00 p.m. on April 27, 1997. Deputy B contacted him there and informed him that the white Trans Am would have license number KPA-1083 and would be driven by a person named Earhart who was known to carry weapons. Shortly thereafter, deputy C saw a blue Suburu, matching the description given by the anonymous informant, pull into the driveway of a residence along North Spot Road. The deputy pulled behind the car and learned from the female driver that Earhart drove a white Trans Am and Earhart was the boyfriend of the woman whom she was visiting at this residence. Later that evening, deputy C stopped a white Trans Am driven by the defendant (whose last name is Earhart). A warrantless search of the vehicle resulted in the seizure of cocaine. The court concluded that the informant's information, the SBI's information, and the deputies' independent investigation collectively supported probable cause to search the white Trans Am.

(1) Officer Did Not Have Probable Cause to Seize and Search Wads of Paper That Had Fallen from Defendant's Clothing While Defendant Was on Stretcher
(2) Statements Obtained as Result of Illegal Search Must Be Suppressed

State v. Graves, 135 N.C. App. 216, 519 S.E.2d 770 (5 October 1999). The defendant was shot in an area known for high drug activity. An officer went to the hospital to learn about the shooting. While speaking to the defendant, who was on a stretcher, the officer noticed wads of brown paper falling from the defendant's shoe or pant leg as a nurse began to remove the defendant's shoes and clothing. The officer picked up the paper wads and unraveled them. He found a crack pipe and crack cocaine. He continued to interview the defendant without making an arrest or mentioning what he had found. He later mentioned what he had found, and the defendant thereafter made a further statement. (1) The court ruled that the evidence presented at the suppression hearing failed to show that the officer had probable cause (the equivalent of "immediate apparent" under the plain view doctrine) to believe that the contents of the wads of brown paper contained illegal drugs. The court noted, citing State v. Sanders, 112 N.C. App. 477, 435 S.E.2d 842 (1993), that the officer was not asked, nor did he testify, about what he suspected was contained in the paper wads before he unwrapped them. (2) The court noted that statements obtained as a result of an illegal search must be suppressed. However, the officer in this case obtained statements from the defendant without mentioning his discovery of the illegal drugs and drug paraphernalia. Thus, the defendant's statements that must be suppressed are only those statements obtained after the officer told the defendant about what he had found.

Defendant Reinitiated Conversation with Detective After Previously Asserting His Right to Counsel under *Miranda*

State v. Little, 133 N.C. App. 601, 515 S.E.2d 752 (15 June 1999). The defendant asserted his right to counsel after his arrest. A detective, who did not know of this assertion, approached the defendant and began to read *Miranda* rights to the defendant. [Note: A defendant's assertion of the right to counsel is imputed to all officers regardless of their knowledge of the defendant's assertion. See Arizona v. Roberson, 486 U.S. 675, 108 S. Ct. 2093, 100 L. Ed. 2d 704 (1988).] The defendant interrupted the detective and informed him that although he had told another officer that he wanted an attorney, he had changed his mind and now wanted to talk about the criminal charges. The detective properly gave *Miranda* warnings and obtained a waiver of rights, and then the defendant gave a statement to the detective. The court ruled, relying on State v. Underwood, 84 N.C. App. 408, 352 S.E.2d 898 (1987) and other cases, that the defendant reinitiated conversation with the detective after asserting his right to counsel. Thus, the defendant's statement was admissible at trial. [Note: The ruling in this case does not appear to be consistent with *Arizona v. Roberson*, cited above, and statements in Minnick v. Mississippi, 498 U.S. 146, 111 S. Ct. 486, 112 L. Ed. 2d 489 (1990) ("we now hold that when counsel is requested, interrogation must cease, and officials may not reinitiate interrogation without counsel present, whether or not the accused has consulted with his attorney"). Although an officer's reading of *Miranda* rights may not constitute "interrogation," it is a part of the process of *reinitiating* interrogation that is prohibited once a defendant has asserted the right to counsel.]

Evidence of Defendant's Refusal to Provide Handwriting Samples Was Admissible at Trial and Did Not Violate Defendant's Fifth Amendment Rights

State v. Teague, 134 N.C. App. 702, 518 S.E.2d 573 (7 September 1999). The court ruled, relying on State v. McNeil, 99 N.C. App. 235, 393 S.E.2d 123 (1990), that the trial judge did not err in admitting evidence at trial of the defendant's refusal to provide handwriting samples pursuant to a search warrant. The admission of this evidence was relevant to the trial and did not violate the defendant's Fifth Amendment rights.

Criminal Procedure

Defendant Failed to Satisfy Burden of Proving That His *Boykin* Rights Were Violated When He Pleaded Guilty in District Court

State v. Bass, 133 N.C. App. 646, 516 S.E.2d 156 (15 June 1999). The defendant filed a motion for appropriate relief alleging that his guilty plea to DWI in district court in 1991 should be set aside because the judge accepted his plea without informing him, as required by Boykin v. Alabama, 395 U.S. 238, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969), of the constitutional rights he waived by pleading guilty. The DWI judgment showed a finding by the judge that the defendant had "appeared in open court and freely, voluntarily, and understandingly pled guilty." The defendant testified that he could not remember the judge's informing him of his *Boykin* rights, but he also could not remember anything the judge had told him on the day he had pleaded guilty. Three attorneys testified that they could not recall that in 1991 the particular district court judge who had accepted the defendant's guilty plea informed defendants of their *Boykin* rights. However, none of the attorneys testified that they were present in court when the defendant pleaded guilty. The court noted that in Parke v. Raley, 506 U.S. 20, 113 S. Ct. 517, 121 L. Ed. 2d 391 (1992), the United States Supreme Court ruled that the "presumption of regularity" applies to cases in which a final judgment has been entered, and that the defendant must overcome this presumption when no transcript is available. The court upheld the judge's ruling that the defendant had failed to satisfy his burden of proving that his guilty plea should be set aside.

(1) Trial Judge Erred in Failing to Dismiss Entire Jury Panel When Prospective Juror Made Prejudicial Remark in Presence of Jury Panel Members, Based on Facts in This Case
(2) Trial Judge Erred in Ordering Defense Lawyers for Three Defendants to Not Consult with One Another in Courtroom During Jury Selection, Based on Facts in This Case

State v. Howard, 133 N.C. App. 614, 515 S.E.2d 740 (15 June 1999). Three defendants were being tried for various offenses, and each had his own attorney. (1) During jury selection, a prospective juror stated in the presence of the jury panel that she had been a county detention officer and she knew defendant A from that employment. She also said that defendant B looked familiar. After nine jurors had been selected, the trial judge concluded that the jury was tainted by these statements. The judge dismissed eight of the nine jurors and restored some of the peremptory challenges (the court stated that there was some indication that the juror who was not dismissed may not have heard the prejudicial comments, but no hearing was held on this issue). The juror who was not dismissed served on the trial jury as its foreman. The court ruled, relying

on State v. Mobley, 86 N.C. App. 528, 358 S.E.2d 689 (1987), that the trial judge erred. The court stated that when inappropriate answers or comments are made by a prospective juror during jury selection, the trial judge should inquire of all jurors (both accepted and prospective) whether they heard the statements, the effect of such statements on them, and whether they could clear their minds of the harmful effects of the prejudicial comments. Unless the trial judge determines that the statements were so minimally prejudicial that jury members might reasonably be expected to disregard them and render a fair and impartial verdict, the "far more prudent course" is to dismiss the panel, restore all peremptory challenges to both the state and defendant, and restart the jury selection process. (2) During jury selection, the trial judge ordered that the lawyers for the three defendants could not consult with one another in the courtroom during jury selection. The court stated that the record in this case did not support the judge's order, which effectively prohibited the lawyers from coordinating jury selection strategy. The court emphasized that such an order should be used only if necessary to maintain order in the courtroom, and a record should be made of the reasons for implementing such a procedure.

Trial Judge Did Not Err in Granting State's Motion to Amend Defendant's Last Name in Indictment

State v. Grigsby, 134 N.C. App. 315, 517 S.E.2d 195 (20 July 1999), *reversed on other grounds*, 351 N.C. 454, 526 S.E.2d 460 (7 April 2000). The court ruled, distinguishing State v. Abraham, 338 N.C. 315, 451 S.E.2d 131 (1994) (amending victim's name in indictment was error, based on facts in case), that the trial judge did not err in granting the state's motion to amend the defendant's last name from "Grisby" to "Grigsby" in an indictment. The change was a mere clerical correction.

Trial Judge Did Not Err in Granting State's Motion to Amend Offense Dates Alleged in Indictments

State v. Campbell, 133 N.C. App. 531, 515 S.E.2d 732 (15 June 1999). The defendant was convicted of first-degree burglary and first-degree rape. The court ruled that the trial judge did not err in granting the state's motion to amend the offense dates (from June 2, 1997 to May 27, 1997) in burglary and rape indictments. The court stated that while a variance about offense dates is material when it deprives a defendant of an opportunity to adequately present a defense, the record in this case indicated that there was no evidence of an alibi or other defense in which the offense dates would be material.

(1) Judge Need Not Make Specific Findings of Improper Conduct When Issuing Show Cause Order for Criminal Contempt
(2) In Criminal Contempt Hearing Concerning Juror Misconduct, Testimony from Other Jurors about Jury Deliberations Was Admissible

State v. Pierce, 134 N.C. App. 148, 516 S.E.2d 916 (6 July 1999). A juror was convicted of criminal contempt for disobeying the trial judge's order "not to discuss the case with anyone outside the courtroom and . . . not to do any research or investigation on their own." During jury deliberations in a DWI trial, the juror spoke to outside sources about the operation of the Breathalyzer and revealed that information to the other jurors. (1) The court ruled that the judge,

when issuing the show cause order for criminal contempt, was not required to make specific findings of improper conduct under G.S. 5A-15(a). The court noted that such findings are required with a civil contempt show cause order under G.S. 5A-23(a). (2) The court ruled that in a criminal contempt hearing concerning juror misconduct, testimony from other jurors about jury deliberations was admissible. The court noted that even though Rule 606 did not apply in this criminal contempt trial because there was no effort to impeach the jury verdict, it would have permitted the jurors' testimony in any event.

Under Former G.S. 7A-666, Juvenile Had No Right to Immediate Appeal to North Carolina Court of Appeals of Finding of Probable Cause in Hearing to Transfer Case to Superior Court for Trial as Adult

In re K.R.B., 134 N.C. App. 328, 517 S.E.2d 200 (20 July 1999). The court ruled that under former G.S. 7A-666, a juvenile had no right to an immediate appeal to the North Carolina Court of Appeals of a finding of probable cause in a hearing to transfer the case to superior court for trial as an adult. [Note: Under former G.S. 7A-666, a juvenile had a right to an immediate appeal to the North Carolina Court of Appeals of the transfer order; see State v. T.D.R., 347 N.C. 489, 459 S.E.2d 700 (1998). Under new G.S. 7B-2603, effective for delinquent acts committed on or after July 1, 1999, there is no right to an immediate appeal to the North Carolina Court of Appeals of either the probable cause finding or the transfer order. However, there is a right to appeal the transfer order to the superior court for its review, but an appeal to the North Carolina Court of Appeals of the superior court review is not permitted unless and until the juvenile is convicted of an offense in superior court.]

Evidence

(1) Expert Testimony Concerning Mitocondrial DNA Testing Was Scientifically Reliable
(2) Evidence of Defendant's Commission of Another Murder Was Properly Admitted under Rule 404(b)

State v. Underwood, 134 N.C. App. 533, 518 S.E.2d 231 (17 August 1999). The defendant was convicted of the murder of a man who was dating the defendant's girlfriend. The murder occurred shortly after the girlfriend had ended her relationship with the defendant. (1) A state's expert witness testified that, by using mitocondrial DNA testing (hereafter, mtDNA) and examining hairs found in the trunk of the defendant's car and a blood sample of the murder victim, the murder victim could not be excluded as a source of the hairs. The court ruled, citing with approval a similar ruling in State v. Council, 335 S.C. 1, 515 S.E.2d 508 (1999), that mtDNA evidence was scientifically reliable and was properly admitted in this case. The court also rejected the defendant's argument that the expert's population database used in the testing was too small to draw meaningful conclusions about the significance of a match. (2) The trial judge allowed the state to offer evidence of the defendant's murder of the mother of his former girlfriend that occurred within days of the murder being tried. The defendant had told his former girlfriend that her mother had ruined their relationship and that he wished something would happen to her mother so his former girlfriend would know how the defendant felt. The court, relying on State v. Stager, 329 N.C. 278, 406 S.E.2d 876 (1991), ruled that evidence of the defendant's commission of another murder was properly admitted under Rule 404(b) to show

that the defendant had a common scheme to hurt his former girlfriend for her refusal to continue their relationship. To carry out this scheme, he killed a man she dated and her mother.

(1) DuPont ACA Star Analyzer That Determined Defendant's Plasma-Alcohol Concentration Was Scientifically Reliable
(2) Ratio of 1 to 1.18 to Convert Plasma-Alcohol Content to Blood-Alcohol Content Was Reliable

State v. Cardwell, 133 N.C. App. 496, 516 S.E.2d 388 (15 June 1999). The defendant was convicted of DWI. A hospital tested her blood sample by using a DuPont ACA Star Analyzer, which revealed that her plasma-alcohol concentration was 127 milligrams per deciliter. A hospital medical doctor testified for the state that the Analyzer was a reliable instrument, and the defendant's medical condition (she had elevated LDH levels) would not have caused a false high alcohol reading. An SBI chemist testified for the state that the SBI uses a ratio of 1 to 1.18 to convert the alcohol concentration of plasma into whole blood results (testing plasma rather than whole blood provides higher readings), and thus the defendant's blood-alcohol concentration would be equivalent to 0.107. A defense expert controverted the state's expert witnesses. (1) The court ruled that the trial judge did not abuse his discretion in determining that the Analyzer was a reliable scientific method of determining alcohol concentration and that the defendant's medical condition did not cause a false high alcohol reading. (2) The court ruled that the trial judge did not abuse his discretion in finding that the 1 to 1.18 conversion ratio was reliable.

(1) Eyewitness's Testimony Identifying Defendant as Perpetrator Was Admissible, Even Though Eyewitness Had Been Hypnotized Before Trial, Based on Facts in This Case
(2) Evidence of Other Armed Robberies Committed by Defendant Was Properly Admitted Under Rule 404(b), Based on Facts in This Case

State v. Hall, 134 N.C. App. 417, 517 S.E.2d 907 (3 August 1999). The defendant was convicted of first-degree murder and armed robbery. The offenses were committed on January 25, 1994, against an employee of a video rental store just after it had closed. (1) An eyewitness to the armed robbery and murder, who had been hypnotized before trial, testified at trial and identified the defendant as the perpetrator. The defendant contended that this identification testimony was inadmissible under State v. Peoples, 311 N.C. 515, 319 S.E.2d 177 (1984). The court, rejecting the defendant's argument, upheld the trial judge's findings that the identification was based on the eyewitness's observations on the night of the offenses that had been told to law enforcement before the hypnosis, and it was not tainted by her later hypnosis. The court noted that the eyewitness's in-court testimony about additional description details (small eyes, flat nose, and well-defined lips) that were based on revelations during hypnosis were improper under the *Peoples* ruling. The court also noted, however, the trial judge's finding that her identification remained "essentially the same" before and after hypnosis, and the court stated that any error in admitting these details was harmless. (2) The court ruled that trial judge did not err in admitting testimony of the defendant's robbing fast food restaurants on February 22, 1994, and May 14, 1994. The evidence was admissible under Rule 404(b) to show the defendant's intent, motive, and plan to commit the armed robbery and murder being tried. The trial judge had found that all these armed robberies were similar: (a) each occurred in the early morning hours when the businesses were closed; (b) the defendant waited in the darkness and, armed with a firearm,

forced or attempted to force an employee into the business to rob it; (c) all the robberies occurred in Wake County within a four-month period; (d) the businesses closed late or opened early, and (e) all were robbed pursuant to a plan.

State's Expert Did Not Improperly Comment on Credibility of Child Sexual Assault Victim

State v. Marine, 135 N.C. App. 279, 520 S.E.2d 65 (19 October 1999). The defendant was on trial for the rape of a twelve-year-old girl. The state's expert witness, the child's family counselor, testified that the child suffered from post traumatic stress syndrome disorder (PTSSD). In explaining why she felt the child had experienced a traumatic event (one of the indicators of PTSSD), she testified in effect that the child was honest with her in describing the event. The court ruled—relying on State v. Wise, 326 N.C. 421, 390 S.E.2d 142 (1990), State v. Kennedy, 320 N.C. 20, 357 S.E.2d 359 (1987), and State v. Jenkins, 83 N.C. App. 616, 351 S.E.2d 299 (1986)—that the expert's testimony related to the reliability of her diagnosis, not the child's credibility. Therefore the judge did not err in admitting the testimony.

State's Rule 404(b) Evidence of Sexual Assault Committed Against Another Victim Was Inadmissible Because of Dissimilarity Between Two Sexual Assaults

State v. White, 135 N.C. App. 349, 520 S.E.2d 70 (19 October 1999). The defendant was on trial for the May 12, 1997, forcible sexual assault of a nine-year-old girl that was committed with a knife in the victim's home when they were alone together. The state was permitted to introduce as Rule 404(b) evidence the defendant's September 28, 1997, act of cunnilingus with a four-year-old girl in her home that was committed while the child's foster mother was also there (but not a witness to the incident). The court ruled that the facts of the two incidents were not sufficiently similar to allow the admission of the Rule 404(b) evidence, citing the standard set out in State v. Stager, 329 N.C. 278, 406 S.E.2d 876 (1991). The incident being tried was forcibly committed after the defendant had broken into the house in the daytime; the sexual act included vaginal intercourse; and the victim was upset and crying hysterically after the incident. The September 28, 1997, incident occurred at night when the child's foster mother was also at home; the defendant was in the child's home with permission; there was no evidence of the use of a deadly weapon or threats to the victim; the sexual act was cunnilingus; and the child did not mention the act after it occurred and was apparently laughing and happy when her foster mother saw her after the alleged incident. The court stated that there were not unusual features involving the two incidents that pointed to the defendant's identity as the perpetrator of the crime being tried.

Child Sexual Assault Victim's Hearsay Statements Contained Circumstantial Guarantees of Trustworthiness and Was Admissible Under Residual Hearsay Exception, Even Though Victim Was Found Incompetent to Testify at Trial

State v. Pretty, 134 N.C. App. 379, 517 S.E.2d 677 (3 August 1999). The defendant was tried for sexual offenses with a five-year-old victim. The trial judge ruled that the victim was not competent to testify at trial. The judge later admitted the victim's statements to a school counselor, police detective, and social worker under the residual hearsay exception, Rule 804(b)(5). The court ruled that the statements were properly admitted under Rule 804(b)(5),

based on the facts of this case, and it also ruled that the victim's hearsay statements contained circumstantial guarantees of trustworthiness under the federal and state constitutions: the victim personally knew of the facts underlying the offenses, did not have a motive to lie, and had never recanted her statements. Relying on State v. Rogers, 109 N.C. App. 491, 428 S.E.2d 220 (1993), the court also ruled that the trial judge's finding of the victim's incompetence to testify under these circumstances did not, as a matter of law, make these statements inadmissible.

Child Sexual Assault Victim's Statements to Social Workers Were Admissible under Rule 803(4) (Statements Made for Medical Diagnosis or Treatment) Because Statements Resulted in Child Receiving Medical Treatment

State v. Crumbley, 135 N.C. App. 59, 519 S.E.2d 94 (21 September 1999). The defendant was on trial for sexual assaults against a child victim. The court ruled, relying on State v. Smith, 315 N.C. 76, 337 S.E.2d 833 (1985), State v. Figured, 116 N.C. App. 1, 446 S.E.2d 838 (1994) and State v. Jones, 89 N.C. App. 584, 367 S.E.2d 139 (1988), that the victim's statements to two social workers were properly admitted under Rule 803(4) (statements made for medical diagnosis or treatment) because the statements resulted in the child receiving medical treatment and the application of the four-factor test set out in the *Jones* case supported the admission of the statements, based on the facts in this case.

Trial Judge Erred in Prohibiting Proposed Testimony by Defense Witness That Contradicted Testimony of State's Witness About Possible Plea Bargain with State

State v. Rankins, 133 N.C. App. 607, 515 S.E.2d 748 (15 June 1999). The defendant was tried for armed robbery. A state's witness, who participated in the armed robbery, denied on cross-examination that he had discussed a deal with the state that would allow him to plead guilty to a reduced charge in exchange for his testimony against the defendant. The court ruled, relying on State v. Murray, 27 N.C. App. 130, 218 S.E.2d 189 (1975), that the trial judge erred in prohibiting the proposed testimony of a defense witness that the state's witness had told him that he had made a deal with the state (one year in prison for all his pending charges). The cross-examination concerned the motive and interest of the state's witness in testifying against the defendant, and the defendant therefore was not bound by the answer of the state's witness.

Evidence That State Did Not Provide to Defendant Was Not Materially Exculpatory and Thus Did Not Require New Trial

State v. Campbell, 133 N.C. App. 531, 515 S.E.2d 732 (15 June 1999). The defendant was convicted of first-degree burglary and first-degree rape. The rape occurred in the bedroom of the victim's home. The state did not provide the defendant with hair samples taken from the crime scene or photographs of the victim's bathroom window. The court noted that the prosecutor did not have DNA analysis performed on the hair samples, and therefore their inculpatory or exculpatory status was unknown. Even assuming that the hair samples did not come from the defendant, they were not materially exculpatory under United States v. Bagley, 473 U.S. 667, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985) ("a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different"), in light of the defendant's confession and the overwhelming evidence establishing his guilt. While the

photographs of the bathroom window showed that the perpetrator's point of entry may have been different than stated in the defendant's confession, evidence implicating the bathroom window was presented at trial. Thus, the nondisclosed evidence was not material.

Recorded Recollection Hearsay Exception under Rule 803(5) Is Firmly-Rooted and Thus Does Not Violate Confrontation Clause

State v. Leggett, 135 N.C. App. 168, 519 S.E.2d 328 (5 October 1999). The court ruled, in a case of first impression and relying on cases from other jurisdictions, that the recorded recollection hearsay exception under Rule 803(5) is firmly-rooted and thus does not violate the Confrontation Clause. See generally State v. Jackson, 348 N.C. 644, 503 S.E.2d 101 (1998) [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].

(1) Cross-Examination of Witness about Witness's Prior Violent Conduct Is Not Permitted under Rule 608(b) Because Such Conduct Is Irrelevant to Person's Truthfulness
(2) Trial Judge's Findings Supported Impeachment of Defendant under Rule 609(b) Concerning Over-Ten-Year-Old Conviction of Attempted Robbery
(3) Assuming Defense Attorney's Written Summary of Medical Evaluation Was Work Product, It Was Waived When Attorney Gave It to Defense Expert, Who Relied on It in Giving Opinion Testimony at Trial

State v. Holston, 134 N.C. App. 599, 518 S.E.2d 216 (17 August 1999). The defendant was convicted of first-degree murder. (1) The court ruled that the trial judge did not err under Rule 608(b) in prohibiting cross-examination of a state's witness about the witness's prior violent conduct, because such conduct is irrelevant to a person's truthfulness. (2) The court ruled that the trial judge's findings supported the state's impeachment of the defendant under Rule 609(b) concerning an attempted robbery conviction that was over ten years old (the findings included that the defendant's credibility was central to the trial and the prior conviction was more probative than prejudicial). The court cited State v. Lynch, 337 N.C. 415 (1994) [robbery is crime of dishonesty and prior conviction is admissible under Rule 609(b)]. (3) A defense mental health expert testified that, in forming his opinion that the defendant's mental illness precluded him from acting with premeditation and deliberation, he had relied on the defense attorney's handwritten summary of another psychologist's evaluation. This summary had been prepared by the attorney after reviewing the defendant's medical records, including the evaluation. The trial judge ordered that this written summary be provided to the state. The court ruled, relying on State v. Hardy, 293 N.C. 105, 235 S.E.2d 828 (1977), that assuming, without deciding, that the defense attorney's written summary was qualifiedly privileged as work product, the privilege was waived when the defense attorney provided the defense expert with the written summary, and the expert relied on the summary in his testimony.

Trial Judge Did Not Abuse Discretion in Prohibiting, Under Rule 608(b), Cross-Examination About Witness's Being Fired for Stealing Ribs

State v. Grigsby, 134 N.C. App. 315, 517 S.E.2d 195 (20 July 1999), *reversed on other grounds*, 351 N.C. 454, 526 S.E.2d 460 (7 April 2000). The defendant was tried for attempted armed robbery and a felonious assault that occurred in a TGI Friday's restaurant. The defendant was allowed to cross-examine a state's witness, a restaurant employee, to show that he waited four months before admitting he knew about the robbery, experienced a messy break-up with the defendant's sister, and had "bad blood" with the defendant. However, the trial judge prohibited cross-examination about the witness's being fired for stealing ribs at the restaurant. The court ruled that the trial judge did not abuse his discretion in doing so. The court noted the ruling in State v. Bell, 338 N.C. 363, 450 S.E.2d 710 (1994), that questions under Rule 608(b) about alleged larceny and conspiracy to commit larceny, without more, are not necessarily probative of the witness's propensity for truthfulness or untruthfulness.

District Court Judges Had Jurisdiction to Issue Orders to Produce Defendant's Medical Records for State When Charges Had Not Been Bound Over to Superior Court and Defendant Had Not Yet Been Indicted

State v. Jones, 133 N.C. App. 448, 516 S.E.2d 405 (15 June 1999), *affirmed and reversed on other grounds*, ___ N.C. ___, ___ S.E.2d ___ (21 December 2000). The defendant was charged with first-degree murder and other charges, which were based on the defendant's driving impaired and colliding with another vehicle, killing two of its occupants and seriously injuring other occupants. Before the charges had been bound over to superior court and before the defendant had been indicted, district court judges issued orders to produce the defendant's medical records for the state. The court ruled, relying on G.S. 7A-272(b), that the district court judges had jurisdiction to issue the orders.

State Did Not Violate Defendant's Due Process Rights by Challenging Credibility of Defense Witnesses at Prior Trial of Codefendant But Using Them as State's Witnesses at Defendant's Trial

State v. Leggett, 135 N.C. App. 168, 519 S.E.2d 328 (5 October 1999). The defendant was charged, with two others, with two murders. The three alleged perpetrators were tried separately. At a prior trial of a codefendant, the state cross-examined two defense witnesses and attacked their credibility. At the later trial of the defendant, the state used these same two witnesses as state's witnesses (to show that the defendant admitted to them that he had shot the victims). The court noted that the evidence presented through these witnesses was not mutually contradictory, nor did it change from the codefendant's trial to the defendant's trial. Also, there were no indication that this evidence was objectively false or that any knowing misrepresentations were made to the jury. Relying on State v. Flowers, 347 N.C. 1, 489 S.E.2d 391 (1997) and Parker v. Singletary, 974 F.2d 1562 (11th Cir. 1992), the court ruled that the state did not violate the defendant's due process rights. The court noted that the evidence was essentially the same at both trials, and the state, contending that both the codefendant and defendant were guilty, proceeded under theories of premeditation and deliberation and felony murder. The court stated that because only the three perpetrators know who actually fired the fatal shots at each victim,

the state could appropriately argue alternative but not mutually inconsistent theories at different trials and to argue the credibility of the witnesses to different juries.

Evidence Was Sufficient to Establish Chain of Custody Despite Incomplete Testimony by Officer in Chain of Custody

State v. Smith, 134 N.C. App. 123, 516 S.E.2d 902 (6 July 1999). Undercover officer A, who testified that she purchased drugs from the defendant, also testified that she carried the rocks of cocaine in her bare hand until she gave them to officer B. She did not mention that the rocks of cocaine were in a cellophane plastic wrapper. However, officer B testified that when he received the rocks of cocaine from undercover officer A, they were in a cellophane plastic wrapper. The trial judge ruled that the state had shown sufficient evidence of a chain of custody to admit a bag containing the rocks of cocaine and the cellophane plastic wrapper. The court, relying on State v. Stinnet, 129 N.C. App. 192, 497 S.E.2d 696 (1998), ruled that trial judge properly exercised his discretion in admitting the evidence. The court noted that admission of such evidence is in the trial judge's discretion, and the identification of such evidence need not be unequivocal.

(1) Officer's Testimony about Experience with Trauma Victims Was Admissible and Was Not Impermissible Opinion Testimony about Witness's Credibility
(2) Trial Judge Did Not Err in Barring Defendant from Calling Witness Who Would Invoke Fifth Amendment Privilege Not to Testify, Based on Facts in This Case

State v. Stanfield, 134 N.C. App. 685, 518 S.E.2d 541 (7 September 1999). (1) Two robbery victims' trial testimony included some detail not included in their written statements to the investigating detective. After defense counsel elicited these differences on cross-examination of the detective, the state asked the detective about his experience with trauma victims. The detective testified that trauma victims often recollect facts several hours or several days after the crime has been committed and they have calmed down. The detective also said that he gives victims his card with his telephone number and tells them to call him if they remember something later that they didn't tell him at the initial interview. The court rejected the defendant's arguments that the detective's testimony (i) was expert testimony concerning the recollection process of trauma victims, and the trial judge erred in admitting this testimony because the detective had not been qualified as an expert; and (ii) was an impermissible opinion about the credibility of another witness. The ruled that even assuming the detective was testifying as an expert, he was not stating an opinion, but was instead relating his experience. The detective did not suggest any reason why such belated recollection occurs, nor did he vouch for the accuracy of such recollection. His testimony did offer an opinion about a witness's credibility. Thus the testimony was properly admitted. (2) The court ruled, relying on State v. Pickens, 346 N.C. 628, 488 S.E.2d 162 (1997), that the trial judge did not err in barring the defendant from calling an accomplice who would have invoked his Fifth Amendment privilege not to testify. The court noted that the defendant simply wanted the jury to speculate why the accomplice had asserted the privilege in the hope that the speculation might benefit the defendant. The trial judge properly conducted the balancing test set out in *Pickens* and did not err in barring the defendant from calling the accomplice as a witness.

Proffered Defense Evidence about Child Victim's Prior Sex Acts Was Inadmissible under Rule 412 (Rape Evidence Shield Rule)

State v. Trogden, 135 N.C. App. 85, 519 S.E.2d 64 (21 September 1999). The defendant was on trial for sexual acts with a child. The trial judge prohibited the defendant from offering a witness who would have testified that six weeks before the crimes being tried, the victim performed fellatio on a young boy and forced the child to reciprocate. The court ruled, citing State v. Bass, 121 N.C. App. 306, 465 S.E.2d 334 (1996), that the proposed testimony was not admissible under Rule 412(b)(2) (evidence of specific instances of sexual behavior offered for the purpose of showing that the act charged was not committed by the defendant). The court noted that the trial judge told defense counsel that because the victim testified at trial that the defendant showed him how to perform sexual acts, defense counsel was not prohibited from cross-examining the victim concerning the way in which he learned to do such acts, as long as the cross-examination did not refer to specific acts. The court also rejected defendant's argument that the evidence was relevant (beyond the four categories permitted under Rule 412) to show the victim had prior knowledge of sexual matters and thus the victim had the ability to fabricate testimony concerning abuse by the defendant. The court quoted from the *Bass* case that the admission of this evidence would substantially restrict the effect of Rule 412.

Sentencing

Trial Judge under Structured Sentencing Act Must Make Written Findings in Imposing Sentence in Other Than Presumptive Range Even If Plea Agreement Gave Trial Judge Discretion in Sentencing

State v. Bright, 135 N.C. App. 381, 520 S.E.2d 138 (19 October 1999). The defendant pleaded guilty pursuant to a plea agreement that provided that the defendant would receive a Class E, Level I, sentence "in the court's discretion." The trial judge sentenced the defendant in the aggravated range for Class E, Level I, but without making written findings of aggravating factor(s) and mitigating factor(s) and that the aggravating factor(s) outweighed the mitigating factor(s). The court ruled that the trial judge erred in failing to make the proper findings [see G.S. 15A-1340.16(b) and (c)] when sentencing the defendant in the aggravated range. The court noted that the Structured Sentencing Act, unlike the Fair Sentencing Act, does not contain a specific statutory exception to required findings when deviating from the presumptive range if a sentence is imposed pursuant to a plea agreement.

Impaired Driving Convictions Used to Prove Offense of Habitual Impaired Driving May Not Be Used to Calculate Defendant's Prior Record Level

State v. Gentry, 135 N.C. App. 107, 519 S.E.2d 68 (21 September 1999). The defendant was convicted of habitual impaired driving (G.S. 20-138.5). When calculating the defendant's prior record level at sentencing, the judge included points for the three DWI convictions that were used at trial to prove the offense. The court ruled that the judge erred. The court noted the specific statutory restriction in G.S. 14-7.6 that prohibits the use of convictions in establishing habitual felon status to calculate a defendant's prior record level, and concluded that the

legislature intended that impaired driving convictions used to prove habitual impaired driving may not also be used to calculate a defendant's prior record level.

(1) Judge May Not Consolidate for Judgment Sentences Arising from Both Fair Sentencing Act and Structured Sentencing Act
(2) State Did Not Violate Plea Bargain When Defendant Was Resentenced Due to Illegal Sentence
(3) Judge Had Authority to Correct Illegal Sentence After Term of Court Had Ended

State v. Branch, 134 N.C. App. 637, 518 S.E.2d 213 (17 August 1999). The defendant pleaded guilty to four offenses, two of which occurred under the Fair Sentencing Act (FSA) and two of which occurred under the Structured Sentencing Act (SSA). The judge consolidated the sentences for one judgment and imposed an active sentence. The Department of Correction informed the court that consolidated judgment was unauthorized. As a result, a judge resentenced the defendant by imposing separate sentences under FSA and SSA, respectively. (1) The court ruled that a judge may not consolidate for judgment sentences for offenses arising from both the Fair Sentencing Act and the Structured Sentencing Act. (2) The defendant's pleas were the result of a plea bargain in which the state agreed to dismiss two other charges. The court ruled that the state did not violate the plea bargain as a result of the resentencing, because it kept its bargain and did not reinstate the two other charges. The court noted that the judge's consolidation of the sentences had occurred after the plea bargain had been entered. (3) The court ruled that the judge had the authority to correct the illegal sentence, even if the term of court had ended in which the illegal sentence had been imposed.

Defendant's Guilty Plea to Felony Cocaine Offense under G.S. 90-96(a) and His Still Being on Probation under G.S. 90-96(a) at Time of Sentencing for Armed Robbery Offenses, Constituted a Conviction under Structured Sentencing Act

State v. Hasty, 133 N.C. App. 563, 516 S.E.2d 428 (15 June 1999). In June 1997, the defendant pleaded guilty to a felony cocaine offense and was placed on probation under G.S. 90-96(a). In September 1997, he committed two armed robberies and was later convicted of these offenses. At the time of sentencing for the armed robberies, the defendant was still on probation under G.S. 90-96(a) for the felony cocaine offense. The court ruled that the trial judge properly considered the felony cocaine offense as a prior conviction under the Structured Sentencing Act. The court noted the definition of "prior conviction" in G.S. 15A-1340.11(7) and that G.S. 15A-1331(b) provides that "a person has been convicted when he has been adjudged guilty or has entered a plea of guilty or no contest." Even though G.S. 90-96(a) provides for a dismissal of the offense if the defendant complies with the conditions of probation, the defendant was still on probation when he was being sentenced for the armed robbery convictions. Thus the defendant's plea of guilty to the felony cocaine offense constituted a prior conviction. The court relied on State v. Sidberry, 337 N.C. 779, 448 S.E.2d 798 (1994) and Britt v. Sheriffs' Education and Training Standards Comm'n, 348 N.C. 573, 501 S.E.2d 75 (1998).

Trial Judge Erred in Sentencing Defendant to Consecutive Terms of Imprisonment in Defendant's Absence

State v. Crumbley, 135 N.C. App. 59, 519 S.E.2d 94 (21 September 1999). Although the defendant was present in court when the judge imposed a sentence that provided for concurrent sentences, the defendant was not present when the written judgment imposed consecutive sentences. The court ruled, relying on State v. Beasley, 118 N.C. App. 508, 455 S.E.2d 880 (1995) and State v. Pope, 257 N.C. 326, 126 S.E.2d 126 (1962), that the change in the defendant's sentence could only be made in the defendant's presence.

Trial Judge Properly Found Statutory Aggravating Factor That Child Victim Was Very Young [G.S. 15A-1340.16(d)(11)] in Sentencing for Felonious Child Abuse Conviction

State v. Burgess, 134 N.C. App. 632, 518 S.E.2d 209 (17 August 1999). The court ruled, relying on State v. Ahearn, 307 N.C. 584, 300 S.E.2d 689 (1983), that the trial judge properly found the statutory aggravating factor that child victim was very young [G.S. 15A-1340.16(d)(11)] in sentencing the defendant for a felonious child abuse conviction. The victim's age, while it is an element of the offense and normally disqualifying as an aggravating factor by G.S. 15A-1340.16(d), may span sixteen years from birth to adolescence. The fact that the victim, who was three weeks old, was *very young* was not an element necessary to prove the offense. An abused child may be vulnerable due to his or her tender age, and vulnerability is clearly the concern addressed by this factor.

Miscellaneous

There Is No Statute of Limitations to Bar Petition to Seek Remission of Bond Forfeiture for "Extraordinary Cause" under G.S. 15A-544(h)

State v. Harkness, 133 N.C. App. 641, 516 S.E.2d 166 (15 June 1999). The court ruled that there is no statute of limitations to bar a petition to seek remission of a bond forfeiture for "extraordinary cause" under G.S. 15A-544(h). The court stated that the statute of limitations in G.S. 1-52(7) (three-year statute of limitations in action against bail) was inapplicable to a petition under G.S. 15A-544(h).