RECENT CASES AFFECTING CRIMINAL LAW AND PROCEDURE
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NORTH CAROLINA SUPREME COURT

Evidence

Court Establishes New Guidelines for Admissibility of Evidence under Hearsay Rule 803(4) (Statements for Purposes of Medical Diagnosis or Treatment), Effective for Trials Begun On or After February 24, 2000, or Cases on Direct Appeal

State v. Hinnant, 351 N.C. 277, 523 S.E.2d 663 (4 February 2000). The defendant was convicted of sexual assaults on a five-year-old child. After the alleged sexual assaults, law enforcement officers interviewed the child that same day at the police station. The child described the assaults to the officers. That evening, a doctor at a hospital performed an external genital examination, finding no signs of trauma. About two weeks later, the child was interviewed by state's witness A, a clinical psychologist specializing in child sexual abuse. Witness A testified that she talked with the child about the alleged sexual abuse to obtain information for the examining physician, witness B. Over the defendant's objection, witness A testified what the child told her about the sexual assaults. Witness B then testified about her physical examination of the child, which occurred after the child's interview with witness A. She testified that the physical examination was consistent with the history the child had given witness A.

The issue on appeal was the admissibility of witness A's testimony under Rule 803(4) (statements for purposes of medical diagnosis or treatment). The court stated that to ensure that the inherent reliability of evidence admitted under Rule 803(4), it reaffirms its adherence to the common law rationale underlying the rule—that a patient has a strong motivation to be truthful to obtain appropriate medical treatment. Thus, the proponent of such testimony "must affirmatively establish that the declarant had the requisite intent by demonstrating that the declarant made the statements understanding that they would lead to medical diagnosis or treatment." [To the extent that cases such as State v. Jones, 89 N.C. App. 584, 367 S.E.2d 139 (1988) were inconsistent with the court's ruling, the court overruled them.] The court then stated that it recognized the difficulty of determining whether a declarant understood the purpose of his or her statements (particularly with children). The court than reviewed case law from other jurisdictions concerning what type of objective evidence may be examined to determine whether the declarant had the proper treatment motive, and stated that a trial court should consider all objective evidence on this issue (see the discussion in the opinion).

The court stated that a second inquiry under Rule 803(4) is whether the declarant's statements were reasonably pertinent to diagnosis and treatment. The court stated that if the declarant's statements were not pertinent to medical diagnosis, the declarant had no treatment-based motivation to be truthful. The court noted that a logical inference from its ruling in State v. Smith, 315 N.C. 76, 337 S.E.2d 833 (1985) (victim's statements to rape task force volunteers, when the victim had already received initial diagnosis and treatment, were not reasonably

pertinent to medical diagnosis and treatment), is that Rule 803(4) does not include statements to nonphysicians made after the declarant has already received initial medical treatment and diagnosis. If the declarant is no longer in need of immediate medical attention, the motivation to speak truthfully is no longer present.

The court then examined, under its two-part test, the admissibility of the testimony of witness A and ruled that it was not admissible under Rule 803(4). There was no evidence that the child had a treatment motive when speaking to witness A. Likewise, the child's statements to witness A were not reasonably pertinent to medical diagnosis and treatment. (See the discussion in the opinion that supports these two conclusions.)

The court noted that witness A's testimony may be admissible under the residual exceptions to the hearsay rule, Rules 803(24) and 804(b)(5), but declined to discuss that issue based on the procedural reasons set out in its opinion.

The court stated that its ruling applies only to trials begun on or after its opinion's certification date (February 24, 2000), and to cases on direct appeal.

(1) Child Sexual Abuse Victim's Statement to Witness Was Inadmissible Under Hearsay Rule 803(4) (Statements for Purposes of Medical Diagnosis or Treatment), Based on *State v. Hinnant*
(2) Court Rejects Argument that Finding Child Incompetent to Testify Automatically Renders Child's Out-of-Court Statements Unreliable

State v. Waddell, 351 N.C. 413, 527 S.E.2d 644 (7 April 2000), *modifying and affirming*, 130 N.C. App. 488, 504 S.E.2d 84 (18 August 1998). The defendant was convicted of several sexual acts with his child. (1) The child was interviewed by state's witness A, a clinical psychologist specializing in child sexual abuse. Based on its ruling in State v. Hinnant, 351 N.C. 277, 523 S.E.2d 663 (4 February 2000), the court ruled that witness A's testimony about the child's statements to her during an interview were not admissible under Rule 803(4) (statements for purposes of medical diagnosis or treatment). The court noted that this witness was the same witness involved in *Hinnant*, and the circumstances surrounding her interview of the child were essentially identical to those in *Hinnant*. (2) The court, citing State v. Rogers, 109 N.C. App. 491, 428 S.E.2d 220 (1993), rejected the defendant's argument that a court's finding a child incompetent to testify automatically renders the child's out-of-court statements unreliable.

(1) Officer Was Properly Permitted to Offer Opinion Testimony That Defendant Was Under Influence of Impairing Substance and Unable to Operate Machinery or Equipment, Based on Facts in This Case
(2) Evidence of Defendant's Prior Speeding Convictions Was Properly Admitted under Rule 404(b) to Prove Malice in Second-Degree Vehicle Murder Prosecution

State v. Rich, 351 N.C. 386, 527 S.E.2d 299 (7 April 2000), *affirming*, 132 N.C. App. 440, 512 S.E.2d 441 (2 March 1999). The defendant was convicted of two counts of second-degree murder involving a vehicular homicide. The defendant was going 70 m.p.h. in a 40 m.p.h. zone, passed a car in a marked no-passing zone, and then collided head on with a car in the other lane of traffic at a sharp curve in the road where the speed limit was 35 m.p.h. (1) An officer inspected the accident scene and observed the defendant's behavior there ("giving E.M.S. quite a hard time"). He later interviewed the defendant at a hospital and noted a moderate to strong odor

of alcohol on the defendant's breath, his eyes were bloodshot and watery, and the defendant had difficulty focusing on the officer during the interview. The court ruled that the officer was properly permitted to offer opinion testimony that the "defendant was under the influence of an impairing substance and unfit to operate machinery or equipment of any type." The court stated that the officer's knowledge of the facts in this case (described above) and his extensive experience with investigating nearly 200 impaired driving cases qualified him to give this opinion. This evidence was admissible on the issue of whether the defendant acted with malice. (2) The court ruled, noting the case law [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)] cited in the court of appeals opinion in this case and State v. Grice, 131 N.C. App. 48, 505 S.E.2d 166 (1998), that the state was properly permitted to introduce the following speeding and other traffic convictions under Rule 404(b) to prove malice: 75 m.p.h. in 45 m.p.h. zone in 1988; 76 m.p.h. in 45 m.p.h. zone in 1990; reckless driving and fleeing to elude arrest in 1991; 70 m.p.h. in 55 m.p.h. zone in 1994; and 70 m.p.h. in 35 m.p.h. zone in 1995. Evidence of these traffic violations was relevant to show that the defendant knew and acted with a total disregard of the consequences.

Constitutionality of Short-Form Indictments

Distinguishing *Jones v. United States* and Other Cases, Court Rules That Short-Form Indictments for First-Degree Murder, Rape, and Sexual Offense Are Constitutional

State v. Wallace, 351 N.C. 481, 528 S.E.2d 326 (5 May 2000). Distinguishing Jones v. United States, 526 U.S. 227, 119 S. Ct. 1215, 143 L. Ed. 2d 311 (24 March 1999) and other cases, the court ruled that short-form indictments for first-degree murder, rape, and sexual offense (see G.S. 15-144, -144.1, and -144.2) are constitutional, even though they do not allege all the elements of these offenses.

Motions for Appropriate Relief

Capital Defendant Must File Motion for Discovery under G.S. 15A-1415(f) in Writing and Must File It within Same Time Limits as Filing Motion for Appropriate Relief under G.S. 15A-1415(a)

State v. Williams, 351 N.C. 465, 526 S.E.2d 655 (7 April 2000). The defendant was convicted of first-degree murder and sentenced to death, and his conviction was affirmed on appeal to the North Carolina Supreme Court. On October 2, 1995, the United States Supreme Court denied the defendant's petition for a writ of certiorari. On July 3, 1996, the defendant filed a motion for appropriate relief (MAR) in superior court. On May 22, 1997, a trial judge denied the defendant's MAR because he failed to timely file it under G.S. 15A-1415(a). On February 11, 1999, the defendant filed a motion for discovery under G.S. 15A-1415(f), which a trial judge granted. The state sought review in the supreme court by a writ of certiorari. The court ruled that the defendant was not entitled to discovery because he did not timely file his request for discovery under G.S. 15A-1415(f). The court ruled that a motion for discovery under G.S. 15A-1415(f) must be made in writing and must be made within the time limits for filing a MAR under G.S. 15A-1415(a) (within 120 days of various triggering occurrences). The court noted that one limited exception exists for those capital defendants retroactively entitled to discovery under

State v. Green, 350 N.C. 400, 514 S.E.2d 724 (1999), for which the 120-day deadline for filing motions for discovery runs from the date of certification of *Green*, June 29, 1999. Based on the facts in this case, the defendant was not entitled to file the motion for discovery because it was not filed within 120 days of the denial of certiorari by the United States Supreme Court and was not within the *Green* exception [the defendant's MAR was filed on July 3, 1996, which was after June 21, 1996, the effective date of G.S. 15A-1415(a)].

(1) Trial Judge Had Inherent Authority to Allow State to Discover Information from Trial Counsel Relating to Capital Defendant's Allegation of Ineffective Assistance of Counsel in Motion for Appropriate Relief
(2) Trial Judge Erred in Ordering Defendant's Trial Counsel to Submit to Ex Parte Interview with State, But Judge May Require Counsel to Submit to Questions, Including Deposition in Presence of Both Parties

State v. Buckner, 351 N.C. 401, 527 S.E.2d 307 (7 April 2000). The defendant was convicted of first-degree murder and sentenced to death. The supreme court affirmed the conviction and death sentence. The defendant then filed a motion for appropriate relief (MAR) asserting broad-based allegations of ineffective assistance of counsel by the defendant's trial counsel in both the guilt and sentencing phases. The state then filed a motion for discovery of all notes, documents, communications, or work product concerning the issues enumerated in the MAR. Defendant's counsel for the MAR provided the state with copies of written correspondence between trial counsel and the defendant. The defendant's trial counsel refused to speak to the state and filed an affidavit stating that he was ineffective. Summaries of oral communications between trial counsel and the defendant were not provided to the state. (1) The court noted that, before the enactment of G.S. 15A-1415(e) in 1995, it had addressed the state's right to discovery in State v. Taylor, 327 N.C. 147, 393 S.E.2d 801 (1990), and had recognized a trial judge's inherent authority to order discovery. The court stated that, except as inconsistent with its opinion in this case, *Taylor* remains good law. The court noted that G.S. 15A-1415(e) mandates in explicit language that the defendant is considered to have waived the attorney-client privilege. Nothing in existing law prohibits disclosure to the state of the defendant's oral and written communications, including work-product materials, when the defendant has alleged ineffectiveness of counsel. The court stated that while the language in G.S. 15A-1415(e) ("to the extent the defendant's prior counsel reasonably believes such communications are necessary to defend against the allegations of ineffectiveness") is intended as some limitation on the information that the defendant is required to make available, the statute's clear intent and purpose limit discovery only to relevance, consistent with *Taylor*. The objective and subjective mental processes of trial counsel and the defendant are relevant, as they form the basis of the trial counsel's choices, strategies, and approaches concerning the case. The court rejected the defendant's argument that *Taylor* was superseded by the statute; discovery is not per se limited to merely "oral and written communications." The legislature could not have intended that trial counsel should be the only one to control discovery by determining the extent of discovery or acting as the gatekeeper of discovery. Determining the extent of discovery is ultimately for the court to decide pursuant to its inherent power. The court ordered that on remand of this case, the superior court should take evidence, make findings of fact and conclusions of law, and order review of all files and oral thought patterns of trial counsel and his client that are determined to be relevant to the defendant's allegations of ineffective assistance of counsel. (2) The court ruled that the judge

erred in ordering the defendant's trial counsel to submit to an ex parte interview with the state. However, the court stated that the judge may order trial counsel to answer questions to reveal relevant information concerning the defendant's MAR, order that a deposition of trial counsel could be taken with both parties present, or order any other formal discovery appropriate to reveal relevant information.

Indictment Alleged to Be Invalid on Its Face May Be Challenged at Any Time, Even If It Was Not Challenged in Trial Court

State v. Wallace, 351 N.C. 481, 528 S.E.2d 326 (5 May 2000). While his appeal was pending, the defendant filed a motion for appropriate relief that challenged the constitutionality of short-form indictments alleging first-degree murder, first-degree rape, and first-degree sexual offense. The defendant had not challenged the indictments at trial. The court ruled that when an indictment is alleged to be invalid on its face, thereby depriving the trial court of its jurisdiction, it may be challenged at any time, even if it was not challenged in the trial court. The court stated that although a motion for appropriate relief generally does not allow a defendant to raise an issue that could have been raised on direct appeal [G.S. 15A-1419(a)(3) (1999)], a challenge to a trial court's jurisdiction may be raised in a motion for appropriate relief.

Capital Case Issues

(1) Trial Judge Properly Submitted Both Kidnapping and Armed Robbery as Separate Aggravating Circumstances under G.S. 15A-2000(e)(5) (Murder Committed During Enumerated Felonies)
(2) Sufficient Evidence to Submit Aggravating Circumstance G.S. 15A-2000(e)(9) (Especially Heinous, Atrocious, or Cruel)

State v. Cheek, 351 N.C. 48, 520 S.E.2d 545 (5 November 1999). The defendant was convicted of first-degree murder based on premeditation and deliberation and the felony murder rule. The defendant and his accomplice abducted a taxicab driver in Jacksonville, put her in the taxicab's trunk, and drove the taxicab to Wilmington. The accomplice then shot the victim and set fire to the taxicab, and the victim died. (1) The court ruled, relying on State v. Trull, 349 N.C. 428, 509 S.E.2d 178 (1998), that the trial judge properly submitted both kidnapping and armed robbery as separate aggravating circumstances under G.S. 15A-2000(e)(5) (murder committed during enumerated felonies). (2) The state's pathologist testified that he believed that the victim was alive when her taxicab was set on fire because of the presence of soot in her air passages and nose. He also testified that the cause of death was carbon monoxide poisoning. The evidence was unclear whether she was conscious when the fire began. The court ruled that the evidence, although not conclusive, was sufficient for the jury to find that not only was the victim alive when the taxicab was set on fire, but also that she was aware of her impending death. Thus there was sufficient evidence to submit aggravating circumstance G.S. 15A-2000(e)(9) (especially heinous, atrocious, or cruel).

(1) Error to Permit Jury to Include Defendant's Larceny Conviction in Jury's Consideration of G.S. 15A-2000(f)(1) (No Significant Prior Criminal History) Because Larceny Occurred After Murder For Which Defendant Being Sentenced
(2) Prosecutor's Jury Argument at Capital Sentencing Hearing Was Not Improper When Prosecutor Called Each Juror by Name and Informed Juror It Was Time to Impose Death Penalty

State v. Gell, 351 N.C. 192, 524 S.E.2d 332 (4 February 2000). (1) Relying on State v. Coffey, 336 N.C. 412, 444 S.E.2d 431 (1994), the court ruled that it was error to permit the jury to include a defendant's larceny conviction in the jury's consideration of G.S. 15A-2000(f)(1) (no significant prior criminal history) because the larceny occurred after the murder for which the defendant was being sentenced. The court rejected the state's argument that the larceny was properly considered because it was part of a continuous transaction with the murder. (2) The court ruled, relying on State v. Wynne, 329 N.C. 507, 406 S.E.2d 812 (1991) and distinguishing State v. Holden, 321 N.C. 125, 362 S.E.2d 513 (1987), that a prosecutor's jury argument at a capital sentencing hearing was not improper when the prosecutor called each juror by name and informed the juror it was time to impose the death penalty. The court stated that the argument merely sought to remind the jurors that they had affirmed during jury voir dire that they could follow the law if the state proved what was required to impose the death penalty.

Court Suggests Modification of N.C.P.I.—Crim. 150.10 on Meaning of Life Imprisonment

State v. Smith, 351 N.C. 251, 524 S.E.2d 28 (4 February 2000). Although the court did not find error in the jury instruction on the meaning of life imprisonment that is contained in N.C.P.I.—Crim. 150.10, the court suggested that the better practice would be to charge precisely in the words of G.S. 15A-2002: "a sentence of life imprisonment means a sentence of life without parole."

Judge Did Not Err in Failing to Submit Mitigating Circumstance G.S. 15A-2000(f)(1) (No Significant Prior Criminal History), Based on Facts in This Case

State v. Greene, 351 N.C. 562, 528 S.E.2d 575 (5 May 2000). The defendant was convicted of first-degree murder and sentenced to death. He beat his father to death in order to steal money from him. 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 court noted that much of defendant's prior criminal activity was recurrent, recent, and similar to his conduct the day of the robbery and murder of his father, and for these reasons significant. Most of the criminal activity that resulted in the defendant's prior convictions occurred after the defendant was thirty years old and within seven years of the murder of his father. Before robbing his father and beating him to death with a shotgun, the defendant habitually sneaked into his father's house and stole money while his father was outside working. During that same time, defendant would assault his girlfriend. Thus, defendant had a significant history of recurrent and escalating criminal conduct, much of which was close in time to the robbery-murder.

(1) Accomplice's Sentence Is Not Mitigating Circumstance, But It May Be Considered by Jury under "Catchall" Jury Instruction Under G.S. 15A-2000(f)(9)
(2) Trial Judge Did Not Err in Failing to Submit Mitigating Circumstance G.S. 15A-2000(f)(4) (Defendant Was Accomplice to Murder Committed by Another and Defendant's Participation Was Relatively Minor)

State v. Roseboro, 351 N.C. 536, 528 S.E.2d 1 (5 May 2000). The defendant was convicted of first-degree murder, based on premeditation and deliberation and felony murder, and sentenced to death. After the supreme court granted a new sentencing hearing, a hearing was held and the defendant was again sentenced to death. (1) The court noted that an accomplice's sentence is not relevant to a defendant's character or record or to the circumstances of the killing. Thus, such evidence is not relevant to show a mitigating circumstance; the court cited State v. Slidden, 347 N.C. 218, 491 S.E.2d 225 (1997). The court stated, however, that the jury may consider an accomplice's sentence as a mitigating circumstance under the "catchall" jury instruction under G.S. 15A-2000(f)(9); the court cited State v. Williams, 305 N.C. 656, 687, 292 S.E.2d 243, 262 (1982). The court then upheld the state's jury argument, opposing the "catchall" mitigating circumstance, that the jury should not give any mitigating value to the fact that the accomplice was not sentenced to death. (2) The court ruled that the trial judge did not err in failing to submit mitigating circumstance G.S. 15A-2000(f)(4) (defendant was accomplice to murder committed by another and defendant's participation was relatively minor). The court noted that the evidence in this case shows that the jury could not have found the defendant guilty of first-degree murder by premeditation and deliberation without also finding that the defendant actually killed her. The defendant cannot seek, under G.S. 15A-2000(f)(4), to relitigate whether he had a sufficiently culpable state of mind at the time of the murder. The court concluded that the evidence did not support the submission of this mitigating circumstance.

Criminal Offenses and Criminal Procedure

Consent Is Not Defense to G.S. 14-27.7A (Statutory Rape or Sexual Offense of Person Who Is 13, 14, or 15 Years Old)

State v. Anthony, 351 N.C. 611, 528 S.E.2d 321 (5 May 2000), *affirming*, 133 N.C. App. 573, 516 S.E.2d 195 (15 June 1999). The court ruled that consent is not a defense to G.S. 14-27.7A(b) (statutory rape or sexual offense of a person who is 13, 14, or 15 years old by defendant who is more than four but less than six years older than the victim). [Note: This ruling clearly would also apply to G.S. 14-27.7(a).]

(1) Defendant Failed to Establish Prima Facie Case under *Batson*
(2) Malice Is Not Element of First-Degree Murder by Poisoning

State v. Smith, 351 N.C. 251, 524 S.E.2d 28 (4 February 2000). (1) The court ruled that the defendant failed to establish a prima facie case under Batson v. Kentucky, 476 U.S. 79 (1986). The defendant noted that the state exercised six of its eight peremptory challenges to excuse blacks, and that number was disproportionate to the fifty to sixty percent of blacks in Halifax County. The defendant also argued that the trial judge failed to undertake a further inquiry into the other five black prospective jurors whom the state had peremptorily challenged. The court

noted that the defendant did not make his first *Batson* challenge until the state had exercised its eighth peremptory challenge (which was against a prospective black juror). The court stated that the trial judge had no obligation to inquire into the reasons for striking the other five peremptorily challenged black prospective jurors because the defendant had not made any *Batson* challenges to them. The court also noted that the state had accepted the first black to enter the jury box and also had struck whites before striking the prospective black juror in issue. The court also noted that the race of the defendant, victim, and the state's key witnesses was black. The court also concluded that the prosecutor did not make any racially motivated statements or ask any racially motivated questions of prospective black jurors. (2) The court ruled, relying on State v. Crawford, 329 N.C. 466, 406 S.E.2d 579 (1991) (malice is not an element of first-degree murder by torture), that malice is not an element of first-degree murder by poisoning.

(1) Circumstantial Evidence Supported Defendant's Conviction of First-Degree Murder Although Only Victim's Severed Ears Were Recovered
(2) Trial Judge Did Not Err When Denying Defendant's Challenges for Cause of Prospective Jurors Who Knew of Defendant's Prior Murder Conviction

State v. Sokolowski, 351 N.C. 137, 522 S.E.2d 65 (3 December 1999). The defendant was convicted of first-degree murder. (1) The court reviewed the evidence in this case and ruled that there was sufficient circumstantial evidence to support the defendant's first-degree murder conviction although only the victim's severed ears were recovered. (2) The court ruled that the trial judge did not err when denying the defendant's challenges for cause of prospective jurors who knew of the defendant's prior murder conviction [evidence of this murder was later presented at trial as Rule 404(b) evidence]. Each prospective juror said that they could set aside their knowledge of the defendant's prior murder conviction and could decide guilt or innocence based solely on the evidence presented at trial. The court stated that it defers to a trial judge's judgment concerning a prospective juror's ability to follow the law. In addition, the record did not show that any juror based his or her decision on pretrial information, rather than the evidence presented at trial.

(1) Trial Judge's Definition of Malice in Second-Degree Vehicular Murder Was Proper
(2) Evidence of Malice Was Sufficient

State v. Rich, 351 N.C. 386, 527 S.E.2d 299 (7 April 2000), *affirming*, 132 N.C. App. 440, 512 S.E.2d 441 (2 March 1999). The defendant was convicted of two counts of second-degree murder involving a vehicular homicide. The defendant was going 70 m.p.h. in a 40 m.p.h. zone, passed a car in a marked no-passing zone, and then collided head on with a car in the other lane of traffic at a sharp curve in the road where the speed limit was 35 m.p.h. In addition, an officer testified that the defendant had a strong odor of alcohol on his breath when he interviewed him at the hospital about one-and-one-half hours after the accident. There was no evidence of the defendant's alcohol concentration. (1) The judge charged the jury that "any act evidencing wickedness of disposition, hardness of heart, cruelty, recklessness of consequences, and a mind regardless of social duty and deliberately bent on mischief, though there may be no intention to injure a particular person, is sufficient to supply the malice necessary for second-degree murder." After the jury requested additional instructions after beginning its deliberations, the judge said that "you have asked me with regard to wickedness of disposition, hardness of heart, cruelty,

recklessness of consequences, a mind regardless of social duty and deliberately bent on mischief, as to whether all of these must be present. My answer to that is no. One of these, some of these, or all of these may be proved and may be sufficient to supply the malice necessary for second-degree murder." The court ruled that these instructions were proper. The descriptive phrases listed in the instructions for malice serve to help define malice for the jury. They do not constitute elements of malice and thus the state need not prove each and every one of those attitudinal examples of malice for the jury to infer the element of malice. (2) The court ruled that there was sufficient evidence of malice because the defendant drove his vehicle at a high rate of speed while impaired, on the wrong side of the road, in a no-passing zone, and in violation of the right-of-way rules.

Attempted Second-Degree Murder Is Not An Offense

State v. Coble, 351 N.C. 448, 527 S.E.2d 45 (7 April 2000), *reversing*, 134 N.C. App. 607, 518 S.E.2d 251 (7 August 1999). The court ruled the because a specific intent to kill is not an element of second-degree murder and an attempt requires an intent to commit the substantive offense, the crime of attempted second-degree murder is a logical impossibility under North Carolina law. [Note: The court indicated that both attempted first-degree murder and assault with a deadly weapon with intent to kill inflicting serious injury could be charged in factually appropriate cases. The court noted that felonious assault is not a lesser-included offense of attempted first-degree murder.]

Sufficient Evidence of Intent to Kill to Support Conviction of Assault with Deadly Weapon With Intent to Kill Inflicting Serious Injury

State v. Grigsby, 351 N.C. 454, 526 S.E.2d 460 (7 April 2000), *reversing*, 134 N.C. App. 315, 517 S.E.2d 195 (20 July 1999). The court ruled that there was sufficient evidence of intent to kill to support the defendant's conviction of assault with a deadly weapon with intent to kill inflicting serious injury. The defendant possessed a knife and attempted to rob the victim, who worked as an assistant general manager of a restaurant. The court stated that the following facts supported an intent to kill: The defendant leapt onto the victim's back when the victim seized the defendant's knife. The defendant struggled with the victim, causing the victim to be seriously injured. The defendant threatened the victim before and after the scuffle—without appearing to hear the victim's acquiescence to his demands. The defendant had attempted to obtain and had later regretted not being equipped with a gun at the time of the assault. The defendant had instead obtained and chosen to use an assault-type knife with finger-holes, designed to enable an assailant to repeatedly stab a victim without losing his grip.

(1) Sufficient Evidence to Support Convictions of Involuntary Manslaughter and Misdemeanor Child Abuse
(2) Evidence that Department of Social Services Had Substantiated Allegations of Defendant's Neglect of Child Victim Was Admissible to Show Defendant's Intent

State v. Fritsch, 351 N.C. 373, 526 S.E.2d 451 (7 April 2000), *reversing*, 132 N.C. App. 262, 511 S.E.2d 325 (16 February 1999). The defendant was convicted of involuntary manslaughter and misdemeanor child abuse of her seven-year-old daughter. (1) The court ruled, using the

appellate standard of review that views the evidence in the light most favorable to the state, that there was sufficient evidence to support both convictions. The jury could infer that the defendant willfully or through her culpable negligence deprived her daughter of food and nourishment, or that her daughter's death was proximately caused by the defendant's actions or inactions. (2) The court ruled that evidence that the department of social services (DSS) had substantiated allegations of the defendant's neglect of her daughter was admissible to show the defendant's intent. The trial judge had limited this evidence to showing that the defendant had at least some knowledge that DSS had concerns about the level of care the defendant was providing for her daughter.

Prosecutor's Calling Witness a Liar Was Improper Jury Argument

State v. Gell, 351 N.C. 192, 524 S.E.2d 332 (4 February 2000). The court ruled improper a prosecutor's calling a witness a liar during jury argument. While a prosecutor may argue to the jury that it should not believe a witness, it is improper for a lawyer to call a witness a liar. See State v. Locklear, 294 N.C. 210, 241 S.E.2d 65 (1978).

District Court Judge Censured for (1) Finding Defendant Guilty of Reckless Driving in DWI Trial, and (2) Disposing of Criminal Case Outside Courtroom

In re Craig B. Brown, 351 N.C. 601, 527 S.E.2d 651 (5 May 2000). The court censured a district court judge for (1) finding a defendant guilty of reckless driving in a DWI trial [see In re Martin, 333 N.C. 242, 424 S.E.2d 118 (1993)], and (2) disposing of a criminal case outside the courtroom (the judge, in a hallway outside the courtroom, accepted a reckless driving guilty plea in a DWI case and sentenced the defendant). The judge's actions in both cases constituted willful misconduct and were prejudicial to the administration of justice by bringing the judicial office into disrepute.

Collateral Estoppel Barred State in DWI Trial from Introducing Evidence of Defendant's Willful Refusal to Take Intoxilyzer When Superior Court Judge Had Previously Found, in Defendant's Civil Appeal of DMV License Revocation, That Defendant Had Not Willfully Refused

State v. Summers, 351 N.C. 620, 528 S.E.2d 17 (5 May 2000), *affirming*, 132 N.C. App. 636, 513 S.E.2d 575 (6 April 2000). The court ruled that collateral estoppel barred the state in a DWI trial from introducing evidence of the defendant's willful refusal, when a superior court judge had previously found—in the defendant's civil appeal of his DMV license revocation for the willful refusal—that the defendant had not willfully refused to take the Intoxilyzer test. The court concluded that there was privity and commonality of interest in the Attorney General representing the state in the civil superior court action concerning the DMV revocation and the district attorney representing the state in the DWI prosecution. The court noted, citing and approving language in Joyner v. Garrett, 279 N.C. 226, 182 S.E.2d 553 (1971), that this case, unlike *Joyner*, did not involve the use of collateral estoppel to submit the outcome of a DMV administrative hearing, in which the Attorney General did not participate, as determinative of an issue in a judicial proceeding.

Arrest, Search, and Confessions

(1) Officer Had Reasonable Suspicion to Stop Driver of Vehicle, Based on Totality of Circumstances
(2) Disavowing Contrary Statements by Court of Appeals, Supreme Court States That Officers May Pursue and Stop Drivers of Vehicles That Are Aware of DWI Checkpoint and Turn Away Before Checkpoint

State v. Foreman, 351 N.C. 627, 527 S.E.2d 921 (5 May 2000), *modifying and affirming*, 133 N.C. App. 292, 515 S.E.2d 488 (18 May 1999). Officers set up a DWI checkpoint under G.S. 20-16.3A. Notice of the checkpoint was posted about one-tenth of a mile before the stop. At about 2:00 a.m., an officer saw a vehicle, immediately before the checkpoint's sign, make a "quick left turn" onto a street. The officer followed the vehicle, lost sight of it, but eventually saw it parked in a residential driveway. The officer directed his bright lights onto the vehicle and also turned on his "take-down lights," thereby enabling the officer to see that people were bent or crouched down inside the car. The vehicle's lights and ignition were off, and its doors were closed. Once backup arrived, the officer approached the vehicle and saw that the defendant was sitting in the driver's seat with the key in the ignition. There were several open containers of alcohol in the vehicle, and the vehicle emitted a strong odor of alcohol. In addition, the officer noticed that the defendant had a strong to moderate odor of alcohol about her person after she exited the vehicle, and she was unsteady on her feet. (1) The court noted that the officer had never seized the vehicle at any point, and the defendant was not seized under the Fourth Amendment "until at least" the officer approached the vehicle. Based on the incriminating circumstances that had occurred by then, the court ruled that the officer had reasonable suspicion to stop the driver of the vehicle. (2) Disavowing contrary statements in the court of appeals' opinion in this case, the court stated: "we hold that it is reasonable and permissible for an officer to monitor a checkpoint's entrance for vehicles whose drivers may be attempting to avoid the checkpoint, and it necessarily follows that an officer, in conjunction with the totality of the circumstances or the checkpoint plan, may pursue and stop a vehicle which has turned away from a checkpoint within its perimeters for reasonable inquiry to determine why the vehicle turned away."

(1) Delay of Nineteen Hours in Taking Arrestee to Magistrate Did Not Violate G.S. 15A-501(2), Based on Facts in This Case
(2) There Was No Substantial Violation of G.S. 15A-501 Requiring Suppression of Defendant's Confession
(3) Delay in Giving *Miranda* Warnings Did Not Taint Defendant's Later Confessions
(4) Officer's Promise to Allow Defendant to See His Girlfriend and Daughter Did Not Result in Involuntary Confession

State v. Wallace, 351 N.C. 481, 528 S.E.2d 326 (5 May 2000). The defendant was convicted of nine counts of first-degree murder and sentenced to death for each of them. The defendant was arrested pursuant an outstanding arrest warrant for a larceny, but he also was a suspect in three murders. Before giving *Miranda* warnings, officers spoke with the defendant about three hours, mostly about sports, his employment and military experience, and biographical information. The defendant also voluntarily raised the issue of his drug use. The officers did not interrogate him about the murders for which he was a suspect, and did not ask any questions designed to elicit

incriminating responses. After properly giving *Miranda* warnings, the defendant confessed to the nine murders. He was given opportunities to use the restroom and was fed. At some point during the interrogation, the defendant requested to see his girlfriend and daughter. An officer told the defendant that the police would attempt to contact them, but they had no control over whether either of them would come to see him. He was taken to magistrate nineteen hours after his arrest (he had sleep four hours just before being taken to the magistrate). (1) The court ruled that the officers did not violate G.S. 15A-501(2) by taking him to a magistrate nineteen hours after his arrest. Because of the number of crimes to which the defendant confessed and the amount to time needed to record the details of the crimes, along with the officers' accommodation of the defendant's request to sleep, the delay was not unnecessary under the statute. (2) The court also ruled that there was not a substantial violation of any of the provisions of G.S. 15A-501 that would require the defendant's confession to be suppressed. (3) The court ruled that the three-hour delay in giving the defendant his *Miranda* warnings did not taint his later confessions given after *Miranda* warnings. He did not make any incriminating statement during those three hours that would affect his later confessions. (4) The court ruled that the officer's promise to allow the defendant to see his girlfriend and daughter did not result in an involuntary confession. The court noted that the defendant made the request, and the officers did not use the request to induce his confession.

Sentencing

Original Sentence, Which Violated Structured Sentencing Act, Was Properly Corrected at Later Time

State v. Roberts, 351 N.C. 325, 523 S.E.2d 417 (4 February 2000). The defendant was sentenced to a minimum term of eight months and a maximum term of ten months' imprisonment for a Class E, Level II felony. Later, the North Carolina Department of Correction notified the superior court of the county in which the defendant was sentenced that the sentence did not fall within the sentencing range for a Class E, Level II felony under the Structured Sentencing Act (SSA). A judge then resentenced the defendant, in the absence of the defendant and his attorney, to a minimum of twenty-nine months and a maximum of forty-four months' imprisonment. The defendant then filed a motion for appropriate relief asserting that he was not given notice or an opportunity to be heard and requested that the new sentence be set aside. At a hearing on the motion (in which both the defendant and his attorney was present), a judge ruled that the new sentence had not been entered properly, set aside that sentence, and then resentenced the defendant to a minimum of twenty-nine months and a maximum of forty-four months' imprisonment. The court ruled that the judge had the authority in the hearing on the motion for appropriate relief to resentence the defendant under G.S. 15A-1417(a)(4) (court can grant "[a]ny other appropriate relief" when granting a motion for appropriate relief). Because the original sentence violated the SSA, the judge had properly resentenced the defendant.

NORTH CAROLINA COURT OF APPEALS

Double Jeopardy

Court Rules That, Under Double Jeopardy Clause, Adjudication of Criminal Contempt for Violating Domestic Violence Protective Order Did Not Bar Later Prosecutions of First-Degree Kidnapping, Misdemeanor Breaking or Entering, and Domestic Criminal Trespass, But Adjudication Did Bar Later Prosecution of Assault on Female

State v. Gilley, 135 N.C. App. 519, 522 S.E.2d 111 (16 November 1999). The defendant, after a plenary hearing, was found in criminal contempt for violating a domestic violence protective order (DVPO) that provided that (1) the defendant shall not assault, threaten, abuse, follow, harass, or in any way interfere with a named female or her minor children who are currently in her custody; and (2) the defendant shall stay away from her residence. The adjudication of contempt was based on events that later were the subject of criminal prosecution and convictions of kidnapping, misdemeanor breaking or entering, domestic criminal trespass, and assault on a female (the female named in the DVPO was the victim of all these offenses) There was no transcript of the contempt hearing, and the contempt order simply recited that the defendant willfully failed to comply with the DVPO and was in criminal contempt. The court stated that it must assume, for the purpose of deciding the double jeopardy issues, that all the prohibited conduct in the DVPO was the basis of the adjudication of criminal contempt.

The court discussed and interpreted the double jeopardy ruling in United States v. Dixon, 509 U.S. 688, 113 S. Ct. 2849, 125 L. Ed. 2d 556 (1993). The court determined that the *Dixon* ruling requires that a court must consider the specific offenses at issue in the contempt proceeding and compare the elements of those offenses with the elements of the later-charged criminal offenses.

The court ruled that the finding of criminal contempt barred the later prosecution of assault on a female because the DVPO prohibited the defendant, a male, from assaulting the named female. All the elements in the contempt adjudication were included in the later prosecution of assault on a female. (Note: The court noted that a later prosecution for assault with a deadly weapon might not be barred because the DVPO and the criminal contempt adjudication on which it was based did not include an assault *with a deadly weapon*. See a similar ruling in *Dixon*).

The court ruled that the criminal contempt adjudication did not bar the later prosecutions of first-degree kidnapping, misdemeanor breaking or entering, and domestic criminal trespass. All the elements of these offenses were not included in the criminal contempt adjudication for violating the DVPO. (1) The DVPO prohibited the defendant from interfering with and following the named female. The court ruled that the order's language did not encompass the elements of first-degree kidnapping. For example, the elements of confinement and the purpose to do serious bodily harm or to terrorize were not set out in the DVPO. (2) Misdemeanor breaking or entering requires a wrongful breaking or entering into a building. The court noted that the DVPO simply required that the defendant "stay away from the parties' residence." (3) The DVPO directed the defendant to "stay away" from the marital residence, while domestic criminal trespass prohibits a person from entering after being forbidden to do so or remaining on the premises occupied by a present or former spouse.

Arrest, Search, and Confession Issues

Officers Had Reasonable Suspicion of Drug Activity to Make Investigative Stop of Vehicle

State v. Parker, 137 N.C. App. 590, 530 S.E.2d 297 (2 May 2000). The court reviewed the facts of a long investigation of drug trafficking and a particular apartment and ruled that officers had a reasonable suspicion of drug activity to make an investigative stop of a vehicle leaving that apartment, based on the facts in this case. See the court's opinion for a comprehensive recitation of the facts, including the rational inferences that the officers could draw from these facts based on their training and experience.

(1) Warrantless Entry into Residence to Investigate Possible Break-In Was Reasonable Under Fourth Amendment
(2) Warrantless Search of Chest of Drawers, Chair, and Cabinet Was Unreasonable Under Fourth Amendment, Based on Facts in This Case

State v. Woods, 136 N.C. App. 386, 524 S.E.2d 363 (18 January 2000). Officers were dispatched to investigate an alarm sounding at the defendant's residence. After arriving at the residence, an officer heard the alarm and saw that the rear door of the residence was open. He heard no response from inside the residence after announcing his presence and identity. He conducted a cursory search of the residence for potential victims or suspects. He found no one, but saw evidence of a break-in. He and other officers re-entered the residence to conduct a more thorough search, looking again for victims and suspects. In the master bedroom, they opened a drawer in a standing chest that was about 15 to 20 inches deep, 25 to 30 inches long, and 18 inches wide (they discovered a bag of green vegetable material and then radioed drug officers to come to the scene). In the area containing the kitchen and living room, they saw a cabinet that was about 34 inches tall and 48 inches wide. While attempting to open the doors to the cabinet, an officer moved a chair and heard a noise underneath it. His flashlight revealed a tear on the bottom of the chair and a bag inside appearing to contain money. He opened the cabinet door, but found nothing. Officers later obtained a search warrant and discovered various drugs, money, and drug paraphernalia. (1) Relying on United States v. Dart, 747 F.2d 263 (4th Cir. 1984) and other cases, the court ruled that the officer's warrantless entry into the residence to investigate a possible break-in was justified by exigent circumstances and thus was reasonable under the Fourth Amendment. It was clear that a break-in had occurred and the officers had reason to believe that the intruders or victims could still be in the residence. (2) The court ruled, relying on Mincey v. Arizona, 437 U.S. 385, 98 S. Ct. 2408, 57 L. Ed. 2d 290 (1978), that the officers' search of the chest of drawers, chair, and cabinet exceeded the scope of the permissible search for suspects and victims. It was unreasonable to believe that a small child could have been found in the cabinet, based on the facts in this case. Because the fruits of the illegal searches established probable cause for the search warrant, the evidence seized was inadmissible at trial.

Officers' Interactions with Defendant During Investigative Stop Did Not Exceed Scope of Stop and Convert It to Arrest Requiring Probable Cause

State v. Ray, 137 N.C. App. 326, 527 S.E.2d 675 (4 April 2000). Officers stopped a vehicle because one of its headlights was not working. Before the officers could give the driver a

warning ticket, other officers arrived who had reasonable suspicion that the occupants had been involved in an armed robbery. The officers then received consent to search the vehicle. They ordered all three occupants out of the vehicle and required them to sit on the curb, cross their feet, and put their hands on their knees. The court ruled that the officers' seizure was no longer than necessary, the occupants were not handcuffed, and the officers did not draw their weapons even though they were armed. The elapsed time from the traffic stop until the occupants were handcuffed and transported to police headquarters was at most 20 to 25 minutes. Based on these facts, the seizure was not converted into an arrest requiring probable cause. [Note: Even if the officers had used handcuffs or their weapons, those actions would not necessarily convert an investigative stop into an arrest requiring probable cause. See Robert L. Farb, Arrest, Search, and Investigation in North Carolina, pp. 34 and 286 (2d ed. 1992).]

(1) Assistant Principal's Search of Student's Book Bag Was Reasonable under Fourth Amendment
(2) Evidence Supported Student's Constructive Possession of Pellet Gun under G.S. 14-269.2(d) (Possession of Weapon on Educational Property)

In re Murray, 136 N.C. App. 648, 525 S.E.2d 496 (15 February 2000). A student told an assistant principal (Smith) that Jason Murray had something in his book bag that he should not have at school. Smith found Murray alone in a room. Murray denied having a book bag. However, Smith saw a book bag less than an arm's reach away from Murray and asked if it was his. When Murray responded affirmatively, Smith walked Murray to her office with Murray carrying his book bag. Smith then asked Murray if there was anything in the book bag that should not be there. He said no. Smith then advised him that she needed to search the bag. He responded that he did not want her to search it and asked that his father be called. Smith called in the school's dean of students and a resource officer, a deputy sheriff. They explained to Murray that they needed to search the book bag for safety reasons. When Smith attempted to take possession of the bag from Murray, he held on to it. The deputy grabbed Murray, struggled with him, and handcuffed him so no one would get hurt. Smith then opened the bag and found a pellet gun. (1) The court ruled, relying on cases from other jurisdictions, that this search was conducted by a school official, with only the assistance of the deputy, and thus the reasonable suspicion standard of New Jersey v. T.L.O., 469 U.S. 325, 105 S. Ct. 733, 83 L. Ed. 2d 720 (1985) applied. The court also ruled that the student's tip and Murray's lie about ownership of the bag was sufficient to establish reasonable suspicion. Finally, the court ruled that the search was conducted in a reasonable manner. Smith's search, which was confined to the book bag, was reasonable in scope. The use of handcuffs insured that Smith could safely search the bag without interference and allowed the deputy to prevent harm to those present. (2) The court ruled that the evidence, discussed above, supported Murray's constructive possession of the pellet gun under G.S. 14-269.2(d) (possession of weapons on educational property). There was no evidence that anyone other than Murray possessed the book bag or that there was an opportunity for someone else to put the pellet gun in it. Thus, there was sufficient evidence that Murray knowingly possessed a pellet gun on educational property.

G.S. 15A-256 Did Not Authorize, During Execution of Search Warrant, Search of Person (Not Named in Search Warrant) in Mobile Home Where No Drugs Had Been Found, When Officer Had Already Seized Crack Cocaine in Another Building on Premises

State v. Cutshall, 136 N.C. App. 756, 526 S.E.2d 187 (7 March 2000). Officers executed a search warrant that authorized a search for (1) crack cocaine and other controlled substances at a mobile home and all outbuildings at 5516 Cross Street, and (2) a search of a specific person (who was not the defendant in this case). The officers secured the mobile home and several people there. The officers found crack cocaine in an outbuilding but not in the mobile home. An officer searched the defendant and found crack cocaine and crack pipes in his jacket pocket. G.S. 15A-256 authorizes a search of a person who is not named in a search warrant but is found in private premises when the search warrant is executed, but only after a search of the premises did not reveal the items sought in the search warrant. The court rejected the state's argument that evidence found in outbuildings is not to be considered in the applying G.S. 15A-256—the court stated that the statute does not distinguish between different units on the premises. Thus the search of the outbuilding, in which crack cocaine was found, barred the application of G.S. 15A-256 to permit the search of the defendant. The court also noted that the record in this case did not support probable cause to search the defendant. Thus the seizure of the evidence from the defendant must be suppressed.

Probable Cause and Exigent Circumstances Supported Gunshot Residue Testing of Defendant Without Legal Process, and There Is No Constitutional Right to Counsel at Test

State v. Coplen, 138 N.C. App. 48, 530 S.E.2d 313 (16 May 2000). The defendant was convicted of murder. Shortly after the shooting, a detective informed the defendant that he was going to perform a gunshot residue test on her hands. The defendant initially refused and said "Don't I have the right to counsel?" A few minutes later, the defendant submitted to the test. The court stated that although a gunshot residue test is a nontestimonial identification procedure under G.S. 15A-271, that statute does not set out the exclusive procedures for performing that test. Based on the facts in this case, the court ruled that the detective had probable cause and exigent circumstances to perform the test. The court also ruled, citing State v. Odom, 303 N.C. 163, 277 S.E.2d 352 (1981), that there is no constitutional right to counsel at the test.

DWI Vehicle Seizure and Vehicle Forfeiture Laws Are Constitutional

State v. Chisholm, 135 N.C. App. 578, 521 S.E.2d 487 (16 November 1999). **(Note: There was a dissenting opinion, but it was based solely on the ground that the issues raised in this case were moot.)** The court ruled that the DWI vehicle seizure and vehicle forfeiture laws did not violate the Fourth, Fifth, and Fourteenth Amendments to the United States Constitution or Article I, Section 19, of the North Carolina Constitution.

Prisoner Was Not in Custody To Require *Miranda* Warnings

State v. Briggs, 137 N.C. App. 125, 526 S.E.2d 678 (21 March 2000). The defendant, a prisoner in a North Carolina correctional unit, was placed in segregation lockup pending the investigation of a rule violation: allegedly sending a threatening letter to a person outside the prison. The

defendant was required to come from his cell to a correctional unit manager's office for questioning about the matter. He was escorted by another correctional officer and wore waist chains and handcuffs. Once inside the office, the defendant denied writing the letter. The manager told him that he believed that the defendant had written the letter and would proceed administratively. The defendant stood up and said that he didn't have anything else to say. He then got up to leave the office. When he reached the door (which was open), he asked the manager if he could close it. After the manager said that he could, the defendant closed it and sat back down and admitted that he did write the letter. He then got up and left. An officer escorted him back to his cell. The court ruled, citing United States v. Conley, 779 F.2d 970 (4th Cir. 1985), that an inmate is not, because of his incarceration, automatically in custody under *Miranda*; rather, whether an inmate is in custody must be determined by considering his freedom to depart from the place of his interrogation. Based on these facts, the court ruled that the defendant was not in custody to require *Miranda* warnings. The court noted that the defendant remained free not to talk and could leave the office and return to his cell at any time. (Note: The state had conceded at trial that the defendant's statements were the result of interrogation, so the court did not address that issue.)

Defendant's Confession Was Voluntarily Given

State v. Cabe, 136 N.C. App. 510, 524 S.E.2d 828 (1 February 2000). The defendant confessed to law enforcement officers about his sexual assault of his son. The court upheld the trial judge's ruling that the officers did not make any improper promises to the defendant to induce an involuntary confession. The defendant was not under arrest during the questioning, and he was advised of and knowingly waived his constitutional rights. The interview lasted about 45 minutes, and the defendant was allowed to go home. Any of the officer's statements concerning the defendant's employment, possession of his car, and his rights to visit his son, were in response to specific questions asked by the defendant. For example, an officer's statement that she could not see why the defendant would lose his job cannot be construed as a promise to let him keep his job if he cooperated with the officers. Further, any improper promises that may have been made concerned collateral matters, not the sexual assaults.

(1) Officer's Continued Questioning of Juvenile Was Proper After Juvenile Initially Declined to Answer Questions, Based on Facts in This Case
(2) Officers' Opinions That Juvenile Understood His Rights and Waiver of Rights Were Admissible

State v. Johnson, 136 N.C. App. 683, 525 S.E.2d 830 (7 March 2000). (1) An officer gave juvenile interrogation warnings to a fifteen-year-old juvenile while his mother was present. The juvenile responded affirmatively to the question whether he understood his rights. He then responded, "No," when asked if he wished to answer questions. His mother then turned to him and said, "No, we need to get this straightened out today. We'll talk with him anyway." The juvenile looked at his mother, lowered his head, and appeared to be considering what his mother had said. He then turned to the officer and nodded his head affirmatively. The officer then asked the juvenile if he wished to answer questions without a lawyer present and he answered, "yes." Citing State v. Bragg, 67 N.C. App. 759, 314 S.E.2d 1 (1984) and State v. Crawford, 83 N.C. App. 135, 349 S.E.2d 301 (1986), the court ruled that by nodding affirmatively to the officer, the

defendant communicated with him and thus initiated further communication. Thus the officer properly was permitted to continue the interrogation process and the resulting confession was admissible. [Note: Although the result of the court's ruling is clearly correct, its citation to and reliance on the standard set out in the *Bragg* and *Crawford* rulings rests on an erroneous interpretation of federal constitutional standards. The requirement that a defendant initiate communication applies only after an assertion of the right to counsel, not an assertion of the right to remain silent. See a critique of the *Bragg* and *Crawford* rulings in note 68 on page 234 of Robert L. Farb, Arrest, Search, and Investigation in North Carolina (2d ed. 1992).] (2) The court ruled, relying on State v. Jones, 342 N.C. 523, 467 S.E.2d 12 (1996), that officers' opinions that the juvenile understood his rights and waiver of rights were admissible. Their opinions were based on their personal perceptions at the time of the confession and assisted the trial judge in determining the voluntariness of the juvenile's confession.

Defendant Had No Standing to Object to Statements of Third Party Allegedly Taken in Violation of Third Party's Fifth Amendment Rights When Statements Were Used to Establish Probable Cause to Issue Search Warrant

State v. Miller, 137 N.C. App. 450, 528 S.E.2d 626 (18 April 2000). Officers used statements of a third party in establishing probable cause to issue a search warrant. The defendant argued that the statements were taken in violation the third party's Fifth Amendment rights. The court ruled, relying on State v. Greenwood, 301 N.C. 705, 273 S.E.2d 438 (1981), that the defendant had no standing to object to the use of the third party's statements in establishing probable cause for the search warrant.

State's Use of Defendant-Lawyer's Statements to North Carolina State Bar Investigator and Records He Provided to State Bar Did Not Violate His Fifth Amendment Privilege Against Compelled Self-Incrimination

State v. Linney, 138 N.C. App. 169, 531 S.E.2d 245 (6 June 2000). The defendant, an attorney, was convicted of two counts of embezzlement and two counts of perjury involving his role as a guardian of the person and estate of Georgiana Alexander. Before the state prosecuted the defendant, the North Carolina State Bar had investigated the defendant for possible disbarment. The state during the criminal trial used statements the defendant had made to a state bar investigator. The court ruled, distinguishing Garrity v. New Jersey, 385 U.S. 493, 87 S. Ct. 616, 17 L. Ed. 2d 562 (1967), that the defendant's Fifth Amendment rights were not violated by the admission of these statements. The defendant was not compelled by threat of disbarment if he had failed to give any statements. He could have asserted his Fifth Amendment privilege and not speak to the investigator, but he voluntarily chose not to assert the privilege. The state during the criminal trial used bank records that the defendant had provided to a state bar investigator. The court ruled, citing Shapiro v. United States, 335 U.S. 1, 68 S. Ct. 1375, 92 L. Ed. 1787 (1948) and other cases, that even if the defendant had asserted his Fifth Amendment privilege during bar proceedings, the privilege would not have protected these records. The Fifth Amendment does not apply to the production of records that an attorney is required by law to maintain.

Civil Defendant Had Right to Assert Fifth Amendment Privilege at State Civil Lawsuit Deposition Although He Had Testified at Prior Deposition in Federal Bankruptcy Proceedings

Staton v. Brame, 136 N.C. App. 170, 523 S.E.2d 424 (21 December 1999). Brame allegedly mishandled and misappropriated funds belonging to others. In 1996, he was civilly sued for recovery of these funds in state court. The Internal Revenue Service later informed him that he was the target of an ongoing criminal investigation concerning these funds. On March 27, 1997, Brame asserted his Fifth Amendment privilege not to testify at a deposition in the civil lawsuit. On August 1, 1997, Brame answered questions about these matters in a deposition conducted as part of a pending bankruptcy action (he and his former wife had filed petitions for bankruptcy and the deposition was given in an equitable distribution action that had been removed to federal bankruptcy court). After learning of the August 1, 1997 deposition, the plaintiffs in the civil lawsuit moved to compel Brame's deposition testimony. The court ruled, relying on State v. Pearsall, 38 N.C. App. 600, 248 S.E.2d 436 (1978) and State v. Hart, 66 N.C. App. 702, 311 S.E.2d 630 (1984), that the defendant had not waived the right to assert his Fifth Amendment privilege by testifying in bankruptcy court. The bankruptcy proceeding and the civil lawsuit were separate proceedings.

Criminal Offenses and Criminal Procedure

No Constitutional Violation under 48-Hour Rule in G.S. 15A-534.1 When Domestic Violence Defendant Appeared Before Judge in District Court's Afternoon Session Scheduled for Bond Hearings, Even Though There Had Been Morning Session of District Court

State v. Jenkins, 137 N.C. App. 367, 527 S.E.2d 672 (4 April 2000). The defendant was arrested in the early morning hours of May 8, 1998 for a domestic violence crime subject to the 48-hour rule in G.S. 15A-534.1 (only a judge may set conditions of pretrial release for the first 48 hours after the defendant's arrest). The magistrate ordered the defendant to be held without bond and set the case for a bond hearing in district court at 1:30 p.m. on May 8, 1998. The defendant was received at the detention facility at 6:15 a.m. The defendant argued that his procedural due process rights were violated under State v. Thompson, 349 N.C. 483, 508 S.E.2d 277 (1998), because there was a district court session at 9:30 a.m. on May 8, 1998, but his bond hearing was delayed until 1:30 p.m. The trial judge hearing the defendant's motion to dismiss the charge found that the district court usual practice was to convene at 9:30 a.m. on Friday morning. Bond hearings were usually set at 1:30 p.m. to schedule district court cases in a rational and sufficient manner considering the nature and volume of district court and the need to file papers with the clerk of court so that the matter may be set for a hearing under G.S. 15A-534.1. The court stated that "[a]lthough the defendant was detained for approximately seven hours, we find his bond hearing occurred in a reasonably feasible time and promoted the efficient administration of the court system. In weighing the defendant's private interests and the harm caused by the delay against the governmental interest of processing defendants in a rational, efficient manner, we conclude that, under these facts, defendant's constitutional rights were not violated. Therefore, under the 'flexible demands of procedural due process,' [court's quoting from *Thompson*], N.C. Gen. Stat. § 15A-534.1 was applied constitutionally to this defendant . . . ."

Victim Was In Custody In Youth Home and Defendant Was Employee of Home to Support Conviction of Sexual Activity by Custodian Under G.S. 14-27.7

State v. Crockett, 138 N.C. App. 109, 530 S.E.2d 359 (16 May 2000). The defendant was an employee of a youth home that provides food, shelter, and adult supervision for abused and neglected juveniles. He was convicted under G.S. 14-27.7 (sexual activity by custodian) for having two acts of consensual sex with a sixteen-year-old female resident of the home (one sex act in March 1996 and another sex act on April 23, 1996). Testimony showed that the victim left the home on April 20, 1996 and did not return; she had sex with the defendant at a Holiday Inn on April 23, 1996. However, evidence showed that the defendant had previously told her a month earlier while she was at the youth home that she could call him for help and she did so on April 23, 1996. In addition, employees from the home testified that she was still a participant in the program as of April 23, 1996. Some of her belongings were at the home, and her bed was held open for her until April 26, 1996. The court ruled that this evidence was sufficient to show that she was in the custody of the home on April 23, 1996. The court also ruled that the defendant was still an employee on April 23, 1996—even though he had been terminated as a full time employee on March 27, 1996—because he worked as a temporary "fill in" from late March through May 1996. He was not terminated as a "fill in" employee until August 1996.

Court States That Judge Should Define "Reasonable Fear" Element in Stalking Offense under Objective Standard, Not Subjective Standard

State v. Ferebee, 137 N.C. App. 710, 529 S.E.2d 686 (2 May 2000). The defendant was convicted of stalking as the offense existed before it was substantially revised in 1997, effective for offenses committed on or after December 1, 1997. The court ruled that a stalking conviction under the former statute may be based only on acts committed after a warning has been given to defendant (although acts committed before the warning are still admissible). [Note that the current stalking statute no longer contains a warning requirement, so this ruling applies only to stalking offenses committed before December 1, 1997.] The court then stated that the phrase "reasonable fear" in the former and current stalking offense (the victim reasonably fears death or bodily injury) must be defined under an objective standard, not a subjective standard. That is, the jury instruction should define "reasonable fear" as that which frightens an ordinary, prudent person under the same or similar circumstances.

(1) Insufficient Evidence of Constructive Possession of Trafficking Amount When Officer Intercepted Package Containing Trafficking Amount and Then Delivered Less Than Trafficking Amount
(2) Sufficient Circumstantial Evidence to Support Trafficking Conspiracy Conviction

State v. Clark, 137 N.C. App. 90, 527 S.E.2d 319 (21 March 2000). The defendant was convicted of trafficking by possessing over 10 pounds of marijuana and conspiracy to traffic by possessing over 10 pounds of marijuana. The United Parcel Service contacted an officer to investigate a package. After obtaining a search warrant, the officer found 12.5 pounds of marijuana in the package. He removed all but 0.13 kilograms and resealed the package for a controlled delivery. Acting as a UPS driver, the officer delivered the package to Junne, who was

with the defendant. (See the detailed discussion of the facts in the opinion. For example, the court stated that the defendant and Junne exhibited approach-avoidance behavior with the officer that was consistent with a desire to obtain the package, coupled with knowledge that taking possession could be dangerous.) (1) The court ruled that because there was no evidence that the defendant ever had the capability to exercise dominion and control over the original package, he never had constructive possession of a trafficking amount of marijuana. The court therefore reversed the conviction for trafficking by possessing over 10 pounds of marijuana, and remanded the case to the trial court to enter a judgment for a conviction for attempted trafficking by possession. (2) The court ruled that the defendant's activity with Junne at the time of the delivery was sufficient circumstantial evidence to support the drug trafficking conspiracy conviction, even though there was no direct evidence of a conspiracy. The defendant's actions showed an understanding of the nature of the contents of the original package.

Insufficient Evidence of Trafficking by Possessing Cocaine When Defendant Handled Package of Cocaine Solely to Inspect It, and It Was Later Returned to Undercover Officer Because It Was Not Purchased

State v. Wheeler, 138 N.C. App. 163, 530 S.E.2d 311 (16 May 2000). The defendant was convicted of trafficking by possessing cocaine. During a drug deal in a car, an undercover officer handed the defendant a package of cocaine. The defendant then gave the package to an accomplice, who was sitting in the front seat. After the accomplice tested the cocaine, he handed the package back to the undercover officer and stated that they did not want to purchase the cocaine because the quality was not good. The court ruled, citing State v. Moose, 101 N.C. App. 59, 398 S.E.2d 898 (1990), that the defendant's handling of the package to inspect it did not constitute possession because he did not have the power and intent to control its disposition or use.

Placing Burden of Proof on Defendant to Prove Defense of Automatism (Unconsciousness) Is Constitutional

State v. Jones, 137 N.C. App. 221, 527 S.E.2d 700 (4 April 2000). The court ruled, distinguishing Mullaney v. Wilbur, 421 U.S. 684, 95 S. Ct. 1881, 44 L. Ed. 2d 508 (1975), that it is constitutional to place the burden of proof on a defendant to proved the defense of automatism (unconsciousness).

(1) Prior Conviction under G.S. 20-138.3 (Under 21 Driving with Any Amount of Alcohol) Was Admissible to Prove Malice in Second-Degree Vehicular Murder Trial
(2) Sufficient Evidence to Support Second-Degree Vehicular Murder Conviction

State v. Gray, 137 N.C. App. 345, 528 S.E.2d 46 (4 April 2000). The defendant was convicted of second-degree murder based on a vehicular homicide. (1) The court ruled, relying on State v. Grice, 131 N.C. App. 48, 305 S.E.2d 166 (1998) and other cases, that the defendant's prior conviction under G.S. 20-138.3 (under 21 year old driving with any amount of alcohol) was admissible to prove the element of malice in second-degree murder. (2) The court ruled that the following evidence was sufficient to support the second-degree murder conviction: The defendant crossed the center line and struck the victim's car. The defendant's blood alcohol level

was 0.11 three hours after the accident. At the time of the accident, charges of DWI and driving while license revoked were pending against the defendant.

(1) Sufficient Evidence to Support Second-Degree Vehicular Murder Conviction
(2) No Double Jeopardy Violation When Defendant Was Convicted and Punished for Both Second-Degree Murder and DWI

State v. McAllister, 138 N.C. App. 252, 530 S.E.2d 859 (6 June 2000). The defendant was driving his vehicle on December 25, 1997, when he struck a bicyclist and killed her. He was convicted of second-degree murder, felonious hit and run, driving while his license was permanently revoked, and DWI. (1) The court ruled that there was sufficient evidence to support the defendant's second-degree murder conviction. The defendant drove his vehicle erratically, swerved off the road, and struck the victim's bicycle while he was traveling about 35 to 40 miles per hour. His alcohol concentration was 0.12, and he was driving while his license was permanently revoked. In addition, he was previously convicted of DWI and had a pending DWI charge. (2) The court ruled that there was no double jeopardy violation when the defendant was convicted and punished for both second-degree murder and DWI.

(1) Evidence of Three Shots Fired at Victim Supported Only One Assault Conviction Because State Did Not Prove That Shots Were Separated by Any Significant Length of Time
(2) Insufficient Evidence of Kidnapping When Offense That Was Alleged Purpose of Illegal Restraint Occurred Before Any Illegal Restraint Had Occurred
(3) Evidence of Similar Assault Committed Against First Wife 17 Years Earlier Was Admissible under Rule 404(b); Defendant Had Spent One-Half of Those Years in Prison

State v. Brooks, 138 N.C. App. 185, 530 S.E.2d 849 (6 June 2000). The defendant was convicted of two counts of felonious assault and one count of kidnapping against his second wife. (1) The court ruled that the evidence supported only one assault conviction. Although the defendant fired three shots at the victim, there was no evidence that the shots were separated by any significant length of time. (2) The victim willingly got into the defendant's van to run errands together. She never tried to get away from the defendant until after he shot her, when she then tried to get out of the van. The court stated that the defendant did not kidnap her before he shot her. Thus there was insufficient evidence to support the defendant's kidnapping conviction when the indictment alleged that the assault was the purpose of the illegal restraint. (3) The court ruled, citing State v. Jacobs, 113 N.C. App. 605, 439 S.E.2d 812 (1994) and other cases, that the trial judge did not err in admitting Rule 404(b) evidence of a similar assault committed against his first wife 17 years earlier; the defendant had spent one-half of those years in prison. This prior assault and the assault being tried occurred because the defendant did not want each marriage to end. The trial judge properly admitted the evidence to show motive, intent, preparation, plan, absence of mistake, and modus operandi.

Kidnapping Indictment's Allegation of "Confining, Restraining, and Removing" Victim Required State to Prove Only One of Three Theories, and Judge Did Not Err in Instructing Jury That It May Convict Based on Proof of Only One of Three Theories

State v. Lancaster, 137 N.C. App. 37, 527 S.E.2d 61 (21 March 2000). The kidnapping indictment charged the defendant with "confining, restraining, *and* removing" the victim. The judge instructed the jury that the state must prove that the defendant confined, restrained, *or* removed the victim. Relying on State v. Surrett, 109 N.C. App. 344, 427 S.E.2d 124 (1993), the court ruled that the state must only prove that the defendant confined, restrained, *or* removed the victim. Because an indictment need only allege one statutory theory, an indictment alleging all three theories is sufficient and puts the defendant on notice that the state intends to show that the defendant committed the kidnapping based on any one of the three theories. The jury instruction therefore correctly allowed any one of the three theories to serve as a basis of the kidnapping conviction.

(1) Creek Embankment Adjacent to Backyard of House Was Public Place under Indecent Exposure Statute
(2) Trial Judge Correctly Charged Jury on "Public Place" under Indecent Exposure Statute
(3) Victim's Testimony Is Unnecessary to Support Conviction

State v. Fusco, 136 N.C. App. 268, 523 S.E.2d 741 (30 December 1999). The defendant was convicted of two counts of indecent exposure in the presence of victim A and victim B. Victim A testified at trial, but victim B did not testify. Victim A testified that she and victim B looked out the window of victim A's house and saw the defendant lying on a creek embankment adjacent to her backyard. The defendant had his robe open and was masturbating. (1) The court ruled, relying on the definition of public place in State v. King, 268 N.C. 711, 151 S.E.2d 566 (1966), that the creek embankment was a public place. The court noted that the use of the property, not its ownership, is the key criterion. The evidence in this case established that the creek embankment was being used by the public. Children frequently played on the creek bed, nothing prevented any person from walking through the victim's backyard to get to the creek, and there were no "No Trespassing" signs posted anywhere along the creek. (2) The court upheld the trial judge's jury instruction on public place:

> A public place means a place which in point of fact is public as distinguished from private, but not necessarily a place devoted to the uses of the public. It's a place that is visited by many persons and to which the neighboring public may have resort. A public place is a place which is viewable from any location open to the view of the public at large.

The court noted that the first two sentences derive from the *King* ruling. The third sentence, added by the jury instruction, focuses on viewability while the first two sentences focus on access. The court stated that if a place is open to the public for access, it is also open to the public's view. (3) The court rejected the defendant's argument that the charge involving victim B must be dismissed because she did not testify. The court ruled there is no requirement that a victim testify to sustain a conviction. The court also noted, citing *State v. Fly*, 348 N.C. 556, 501

S.E.2d 656 (1998), that the victim need not actually see what is being exposed. The indecent exposure statute only requires exposing oneself "in the presence of" of a person of the opposite sex.

(1) Fatal Variance Existed in Embezzlement Indictment Alleging Rental Proceeds Belonged to Estate When They Belonged to Decedent's Son
(2) Jury Instruction on Perjury, Given Pursuant to N.C.P.I.—228.10, Was Erroneous Because Materiality of False Statement Is Jury Question

State v. Linney, 138 N.C. App. 169, 531 S.E.2d 245 (6 June 2000). The defendant, an attorney, was convicted of two counts of embezzlement and two counts of perjury in his role as a guardian of the person and estate of Georgiana Alexander. (1) One of the embezzlement indictments alleged that the defendant embezzled the proceeds of a rental unit from the "estate of Georgiana Alexander." The court stated that upon the death of Georgiana Alexander, her home became the property of her son, and any rental proceeds belonged to the son. The court noted that the state's argument that the estate had a special property interest under G.S. 28A-13-3(27), 28-17-1, and 28-17-11 was persuasive, but it was bound by the ruling in State v. Jessup, 279 N.C. 108, 181 S.E.2d 594 (1971) (larceny indictment alleging money in the "estate of W. M. Jessup" was fatally defective). Thus, there was a fatal variance between the indictment and the evidence proved at trial. (2) The court ruled that the jury instruction on perjury, given pursuant to N.C.P.I.—228.10, was erroneous because the materiality of a false statement is a jury question, and the instruction on materiality informed the jury that specified acts were a "significant issue of fact." Although the pattern jury instruction is supported by the ruling in State v. Wilson, 30 N.C. App. 149, 226 S.E.2d 518 (1976), the court ruled that the later case of United States v. Gaudin, 515 U.S. 506, 115 S. Ct. 2310, 132 L. Ed. 2d 444 (1995) (Fifth and Sixth Amendments require that materiality be proven before jury) had changed the law.

Murder Victim's Refusal, Based on Religious Reasons, to Accept Blood Transfusion during Treatment for Stab Wounds Was Not Independent and Intervening Cause of Death to Bar Defendant's Second-Degree Murder Conviction

State v. Welch, 135 N.C. App. 499, 521 S.E.2d 266 (2 November 1999). The defendant was convicted of second-degree murder based on stabbing the victim. The victim refused, for religious reasons, to accept a blood transfusion during surgery to repair her stab wounds. She later died after developing complications after the surgery. The surgeon testified that the complications would have been prevented had the victim received a blood transfusion; however, he could not be certain that she would have survived had she been given the transfusion. The court rejected the defendant's argument that the victim's refusal to accept a blood transfusion was an independent and intervening cause of death. The court stated that it is clear that the victim's act was not "the sole cause of death," citing State v. Holsclaw, 42 N.C. App. 696, 257 S.E.2d 650 (1979). But for the defendant's stabbing the victim, the victim would not have needed a blood transfusion.

Officer Outside Normal Territorial Jurisdiction Had Authority to Act as Officer, Based on Mutual Aid Agreement, and Thus Defendant Was Properly Convicted of Assault with Firearm on Law Enforcement Officer

State v. Locklear, 136 N.C. App. 716, 525 S.E.2d 813 (7 March 2000). A Robeson County deputy sheriff called for assistance in responding to a stabbing at a home three to four miles outside the Red Springs city limits. A Red Springs law enforcement officer responded to the call and was later assaulted by the defendant there. The defendant argued that the officer was outside his territorial jurisdiction (one mile beyond the city limits) when the assault occurred, and thus he could not be convicted of assault with a firearm on a law enforcement officer because he was not acting as an officer then. The court ruled that a mutual aid agreement between the Robeson County Sheriff's Department and the Red Springs Police Department permitted the officer to respond to the request for assistance, based on the agreement's permitting an oral request to be made for an "emergency." The court ruled that an emergency existed: the deputy sheriff was transporting a prisoner when he received the order to investigate the stabbing, and he was the only deputy in the vicinity of the residence.

Insufficient Evidence of Defendant's Age in Statutory Rape Trial When It Was Based Only on Observation of Defendant in Courtroom

In re Jones, 135 N.C. App. 400, 520 S.E.2d 787 (2 November 1999). A juvenile was prosecuted in juvenile court for statutory rape under G.S. 14-27.2(a)(1). The state did not present any evidence to prove the element of the offense that the juvenile was at least twelve years old at the time of the alleged offense. The state argued on appeal that a jury (in this case, a district court judge being the jury) may determine a criminal defendant's age merely by observing the defendant in the courtroom. The court ruled, after reviewing North Carolina appellate cases, that the law of evidence does not allow a jury to determine the age of a criminal defendant beyond a reasonable doubt merely by observing the defendant without the introduction of other evidence, whether circumstantial or direct.

Defendant Did Not Introduce Evidence During Cross-Examination of State's Witness by Marking Exhibits, Based on Facts in This Case, and Therefore Did Not Lose Right to Make Closing Jury Argument

State v. Shuler, 135 N.C. App. 449, 520 S.E.2d 585 (2 November 1999). The defendant was on trial for embezzlement. During cross-examination of a state's witness, defense counsel marked two exhibits (but did not introduce them), which were transcripts of interviews conducted by the witness with the defendant and another person, and questioned the witness about the interviews. The court noted that although evidence is not formally offered and accepted into evidence, it is also "introduced" under Rule 10 of the General Rules of Practice for the Superior and District Courts (defendant who introduces evidence does not have closing jury argument), when new matter is presented to the jury during cross-examination and that matter is not relevant to any issue in the case. The court, after examining the cross-examination in this case, ruled that the trial judge erred in ruling that the defendant had introduced evidence and therefore did not have the closing jury argument. The defense counsel did not present new matter during cross-examination that was irrelevant to an issue in the case.

(1) Trial Judge Did Not Err in Denying Ex Parte Hearing Concerning Indigent Defendant's Motion for Appointment of Eyewitness Identification Expert
(2) Trial Judge Did Not Err in Denying Indigent Defendant's Motion for Appointment of Eyewitness Identification Expert

State v. Garner, 136 N.C. App. 1, 523 S.E.2d 689 (21 December 1999). (1) The court ruled that the trial judge did not err in denying an ex parte hearing when deciding the indigent defendant's motion for the appointment of an eyewitness identification expert. The court relied on State v. Phipps, 331 N.C. 427, 418 S.E.2d 178 (1992) (no constitutional right to ex parte hearing when issue of appointing fingerprint expert) and State v. White, 340 N.C. 264, 457 S.E.2d 841 (1995) (no constitutional right to ex parte hearing when issue of appointing investigator) and distinguished State v. Ballard, 333 N.C. 515, 428 S.E.2d 178 (1993) (constitutional right to ex parte hearing when issue of appointing psychiatric expert). (2) Relying on State v. Abraham, 338 N.C. 315, 451 S.E.2d 131 (1994), the court ruled that the trial judge did not err in denying the indigent defendant's motion for the appointment of an eyewitness identification expert. The court ruled that, based on the facts in this case, the defendant failed to make a sufficient showing for an expert based on his assertion that distortions in memories are common with an identification and that cross-racial identification is highly unreliable.

Sufficient Evidence of Nighttime to Support Burglary Conviction

State v. Bowers, 135 N.C. App. 682, 522 S.E.2d 332 (7 December 1999). The court ruled that there was sufficient evidence of nighttime to support the defendant's first-degree burglary conviction. The court noted that the common law definition of nighttime is "when it is so dark that a person's face cannot be identified except by artificial light or moonlight." See State v. Lyszaj, 314 N.C. 256 (1985). The victim testified that her clock displayed 6:50 a.m. just before the assailant entered her room. Even though she saw the assailant, she testified that her night light was on and the room was still dark. The state presented evidence of the official records of the National Climate Data Center showing that sunrise on the day of the burglary occurred at 7:33 a.m.

Log Was Deadly Weapon in Felonious Assault Prosecution

State v. Cody, 135 N.C. App. 722, 522 S.E.2d 777 (7 December 1999). In a felonious assault prosecution, the evidence showed that the defendant struck the victim with a log, and the victim suffered two hematomas near his brain and needed fifteen stitches. The court ruled that, based on the severity of the injuries and the manner in which the log was used, the jury could properly find that the log was a deadly weapon.

Prosecutor Did Not Violate Defendant's Constitutional Rights by Indicting Defendant for First-Degree Sexual Offense After Plea Negotiations Broke Down on Indecent Liberties Charge

State v. Ford, 136 N.C. App. 634, 525 S.E.2d 218 (15 February 2000). The defendant was initially charged with indecent liberties. When plea negotiations broke down, the defendant was

additionally indicted for first-degree sexual offense. The court, relying on United States v. Goodwin, 457 U.S. 368, 102 S. Ct. 2485, 73 L. Ed. 2d 74 (1982), upheld the trial judge's ruling that had denied the defendant's motion to dismiss the charge of first-degree sexual offense based on prosecutorial vindictiveness. See also Bordenkircher v. Hayes, 434 U.S. 357, 98 S. Ct. 663, 54 L. Ed. 2d 604 (1978).

(1) Joinder of Cocaine Sale Offenses Occurring Three Weeks Apart Was Proper
(2) Allegations of Prior Felony Convictions in Habitual Felon Indictment Were Proper

State v. Montford, 137 N.C. App. 495, 529 S.E.2d 247 (18 April 2000). (1) The defendant was charged with a cocaine sale to a police informant on January 23, 1997, and a cocaine sale to the same police informant on February 14, 1997. The court ruled, relying on State v. Styles, 116 N.C. App. 479, 448 S.E.2d 385 (1994) and other cases, that the trial judge did not err in granting the state's motion to join these offenses for trial. (2) The habitual felon indictment alleged the three prior felony convictions to have occurred in Carteret County without specifying that the felonies had been committed against the state of North Carolina, as required by G.S. 14-7.3. The trial judge allowed the state to amend the indictment to include the reference to the state of North Carolina. The court ruled, without addressing the amendment issue, that the habitual felon indictment was not defective. It noted that "State of North Carolina" appeared at the top of the indictment, followed by "Carteret County." Thus, Carteret County was clearly linked with the state name, and the later listing of Carteret County as the place of the prior felony convictions was sufficient to indicate the state against whom the prior felonies were committed.

Prima Facie Evidence Rule in Habitual Felon Statute (G.S. 14-7.4) Is Constitutional and Names Reflected in Conviction Records Were Sufficient to Support Habitual Felon Finding

State v. Hairston, 137 N.C. App. 352, 528 S.E.2d 29 (4 April 2000). The defendant, William Roosevelt Hairston, was convicted of two felonies and then tried on a habitual felon indictment. At the habitual felon hearing, the state introduced certified copies of two prior felony convictions bearing the name "William Roosevelt Hairston, Jr." and one prior felony conviction bearing the name "William Roosevelt Hairston." At the close of the state's evidence, the defendant moved to dismiss the habitual felon indictment for insufficiency of evidence that the person named in the three prior felony convictions was the defendant, arguing that the statutory prima facie case in G.S. 14-7.4 violated the defendant's due process rights. The trial judge denied the motion. The court stated that while two of the convictions had "Jr." in the name, and the other conviction did not, the names on these certified copies were otherwise identical to the defendant and therefore satisfy the "same name" requirement of G.S. 14-7.4. The court ruled that the prima facie evidence rule did not unconstitutionally shift the burden of proof to the defendant on the issue of identity of the defendant. It was not unreasonable or arbitrary to infer from proof of two felony convictions in the name of William Roosevelt Hairston, Jr. and one in the name of William Roosevelt Hairston that the defendant William Roosevelt Hairston was convicted of these three offenses. This evidence was sufficient for the issue to go to the jury, and the defendant, if he wished, could have presented his own evidence on the issue. However, he did not have the burden of proof on the issue.

(1) Photo Lineup Was Not Impermissibly Suggestive Per Se Because Defendant Was Only One Pictured with Freckles
(2) Habitual Felon Indictment Need Not Refer to Substantive Felony Being Tried

State v. Roberts, 135 N.C. App. 690, 522 S.E.2d 130 (7 December 1999). (1) The court ruled, relying on State v. Rogers, 275 N.C. 411, 168 S.E.2d 345 (1969), that a photo lineup was not impermissibly suggestive per se because the defendant was the only one pictured with freckles. A defendant's unique physical appearance is simply an existing fact, and an officer's inability to include others in the lineup with the same unique appearance (after trying to find such photos) cannot be attributed to the officer or be regarded as a rigged suggestiveness. (2) The court ruled, relying on State v. Cheek, 339 N.C. 725, 453 S.E.2d 862 (1995), that a habitual felon indictment need not refer to the substantive felony being tried.

California Sexual Assault Conviction Was Equivalent to Attempted Second-Degree Sexual Offense (Class D Felony under Current North Carolina Law) and Thus Qualified as Violent Felony Conviction for Violent Habitual Felon Status

State v. Stevenson, 136 N.C. App. 235, 523 S.E.2d 734 (30 December 1999). The defendant was convicted of armed robbery and adjudicated a violent habitual felon. In the violent habitual felon hearing, the state proved one of the two violent habitual felony convictions by introducing a certified record of the defendant's 1992 conviction in Los Angeles County, California of "assault with intent to commit a felony, that is, the assault on [female victim] with the intent to commit oral copulation." The court ruled that the California conviction was equivalent to attempted second-degree sexual offense, which presently is classified as a Class D felony. It was irrelevant that attempted second-degree sexual offense was a Class H felony in 1992. Thus, the conviction qualified as a violent felony conviction.

(1) Defendant Had No Right to Appeal to Court of Appeals Superior Court Judge's Granting of State's Motion for Appropriate Relief
(2) Trial Court Has Inherent Authority to Correct Errors in Judgment
(3) District Court's Correction of Errors in Judgment Did Not Constitute New Judgment that Gave Defendant Ten Days to Appeal to Superior Court for Trial De Novo

State v. Linemann, 135 N.C. App. 734, 522 S.E.2d 781 (7 December 1999). (1) The court ruled that the defendant had no right to appeal to the court of appeals the superior court judge's granting of the state's motion for appropriate relief. Instead, the defendant must seek review by a writ of certiorari. (2) On March 10, 1998, a district court judge corrected clerical errors in a judgment entered on September 22, 1997. For example, the judge corrected the erroneous classification of the misdemeanors for which the defendant was convicted. The court ruled, relying on State v. Cannon, 244 N.C. 399, 94 S.E.2d 339 (1956), that a court has the inherent authority to correct errors in a judgment. (3) The district court judge's correction of errors in a judgment did not constitute a new judgment that gave the defendant ten days from March 10, 1998, to appeal to superior court for trial de novo.

Variance in Indictment's Spelling of Victim's Last Name and Evidence at Trial Was Not Fatal

State v. Wilson, 135 N.C. App. 504, 521 S.E.2d 263 (2 November 1999). The court ruled that a variance in an indictment's spelling of the victim's last name ("Peter M. Thompson") and the evidence at trial ("Peter Thomas") was not a fatal variance—based on the doctrine of idem sonans. See, for example, State v. Isom, 65 N.C. App. 223, 309 S.E.2d 283 (1983).

(1) Judge Did Not Err in Allowing State to Amend Indictment to Change Dwelling's Address
(2) Maintaining Dwelling for Use of Controlled Substance Was Continuing Offense in This Case—Only One Conviction Permitted
(3) Appellate Defense Counsel for Indigent Defendant May Not Argue One Assignment of Error and Also Request *Anders* Review

State v. Grady, 136 N.C. App. 394, 524 S.E.2d 75 (18 January 2000). The defendant was convicted of several drug offenses, including two counts of maintaining a dwelling for the use of a controlled substance, G.S. 90-108(a)(7). (1) The court ruled that the trial judge did not err in allowing the state to amend the indictment by changing the dwelling's address from "919 Dollard Town Road" to "929 Dollard Town Road." The amendment did not substantially alter the charge (the court stated that the dwelling's address need not be alleged). (2) The court ruled that maintaining a dwelling for use of a controlled substance was a continuing offense that permitted only one conviction, based on the facts in this case. (The two convictions were based on drugs found in the dwelling on July 22, 1997, and August 22, 1997.) There was no evidence indicating a termination and later resumption of drug trafficking at the dwelling. In fact, the evidence showed that the drugs were readily available there throughout the drug investigation. (3) The court ruled that appellate defense counsel for an indigent defendant may not argue one assignment of error in an appellate brief and then request review by the court under Anders v. California, 386 U.S. 738, 87 S. Ct. 1396, 18 L. Ed. 2d 493 (1967), for any other possible prejudicial error.

Larceny Indictment Was Defective Because It Failed to Allege Property in Proper Person

State v. Salters, 137 N.C. App. 553, 528 S.E.2d 386 (18 April 2000). A grandmother, mother, and the mother's eight-year-old son lived in a house. The defendant broke into the house and stole a suitcase belonging to the son. The larceny indictment alleged that the property was stolen from the grandmother. The court ruled that the larceny indictment was defective because the evidence showed that the suitcase belonged to the grandson. The court rejected the state's argument that the grandmother was in lawful custody and control of the grandson's suitcase because it was in his room in a house rented by her. The court noted that if the grandmother had been raising the grandson alone and his mother had been living elsewhere, then the grandmother would have had lawful possession of the suitcase or had a special custodial interest in the suitcase (acting in loco parentis). In this case, however, the larceny indictment should have named the grandson as general owner or his mother as special owner.

No Speedy Trial Violation, Based on Facts in This Case

State v. Spinks, 136 N.C. App. 153, 523 S.E.2d 129 (21 December 1999). The defendant's murder trial resulted in a mistrial when the jury could not reach a verdict. The case was not calendared again for five years. The court ruled that the trial judge properly denied the defendant's motion to dismiss the murder charge based on a constitutional speedy trial violation. The defendant never made a motion for a speedy trial during the five-year delay. The defendant also failed to show that the delay was due to the state's neglect or willfulness (other trials, particularly capital trials, were tried during that time period). The court rejected the defendant's argument that he could not locate two essential defense witnesses because of the five-year delay; the court noted that the defendant did not attempt to call these witnesses at the first trial. See also State v. Brooks, 136 N.C. App. 124, 523 S.E.2d 704 (21 December 1999) (no speedy trial violation; of the twenty-eight months from indictment to trial, twelve months was attributed to defendant's firing his court-appointed lawyers; court also stated that defendant may not file a pro se motion for a speedy trial when the defendant is represented by a lawyer).

Plea of Guilty or No Contest Waives Later Assertion of Double Jeopardy Violation

State v. Hughes, 136 N.C. App. 92, 524 S.E.2d 63 (21 December 1999). The court ruled, relying on State v. Hopkins, 279 N.C. 473, 183 S.E.2d 657 (1971), that a defendant's plea of guilty or no contest waives a later assertion of a double jeopardy violation. In this case, the defendant filed a motion to arrest judgment, on double jeopardy grounds, of a criminal offense to which he had pleaded no contest. The court ruled that defendant had waived his right to make that motion. [Note: The court did not discuss two United States Supreme Court cases. As a result of Menna v. New York, 423 U.S. 61, 96 S. Ct. 241, 46 L. Ed. 2d 195 (1975)—as modified by United States v. Boce, 488 U.S. 563, 108 S. Ct. 757, 102 L. Ed. 2d 195 (1975)—a guilty plea waives a double jeopardy issue on appeal or collateral attack *except if* the double jeopardy issue can be resolved by examining the face of the criminal pleadings themselves.]

Judge Did Not Abuse Discretion in Granting State's Motion to Change Venue of Trial

State v. Griffin, 136 N.C. App. 531, 525 S.E.2d 793 (15 February 2000). The court ruled that the trial judge did not abuse his discretion in granting the state's motion to change the venue of the trial, based on the physical limitations of the county courthouse and the number of pending murder cases in the county. The court noted, citing State v. Barfield, 298 N.C. 306, 259 S.E.2d 510 (1979), that a judge has the inherent authority in the interests of justice to order a change of venue on the state's motion. The court stated that although there is no requirement that the trial judge must make findings of fact in support of an order to change venue (none were made in this case), it would be the better practice to do so. The court relied, in upholding the judge's order, on the judge's detailed statements in the record about the factors he was considering in determining the state's motion for a change of venue.

State Violated Spirit of Plea Agreement by Using Felony DWI to Prove Another Felony under Felony Murder Theory When State Had Promised Not to Use Felony DWI Itself to Prove Felony Murder Theory

State v. Blackwell, 135 N.C. App. 729, 522 S.E.2d 313 (7 December 1999), *reversed on other grounds*, 353 N.C. 259, 538 S.E.2d 929 (21 December 2000), *on remand*, ___ N.C. App. ___, ___ S.E.2d ___ (6 March 2001). The state accepted the defendant's guilty plea to felony DWI and other offenses in return for its promise not to use the felony DWI as the felony in a first-degree felony murder prosecution. The state later used the felony DWI to prove another felony (felonious assault) in the first-degree felony murder prosecution. The court ruled that the state violated the spirit of the plea agreement by doing so. The court remanded to the trial court for its determination, based on factors set out in the opinion, whether the trial court should order specific performance of the agreement or a recession of the plea agreement.

Trial Judge Failed to Make Proper Inquiry under G.S. 15A-1242 Before Allowing Defendant to Represent Himself

State v. Stanback, 137 N.C. App. 583, 529 S.E.2d 229 (18 April 2000). The defendant was charged with several felonies and was appointed a lawyer to represent him. On the day the case was called for trial, the defendant told the trial judge that he wanted to represent himself. After the judge cautioned the defendant about the problems with representing himself, the judge took a recess to allow the defendant to consult with his appointed counsel. After the recess, the defendant's counsel informed the judge that the defendant was adamant about representing himself. When the judge asked him if he wanted to represent himself, the defendant answered affirmatively. The judge then appointed his appointed counsel as standby counsel, and, without further inquiry, the trial began. The court ruled, relying on State v. Dunlap, 318 N.C. 384, 348 S.E.2d 801 (1986) and other cases, that the trial judge erred in failing to make the proper inquiry under G.S. 15A-1242 before allowing the defendant to represent himself. In this case, the judge failed to inquire and to be satisfied that the defendant comprehended the nature of the charges and proceedings and the range of permissible punishments. See G.S. 15A-1242(3).

Defendant Has No Right to Appeal Superior Court Order Denying Writ of Habeas Corpus under Chapter 17 of General Statutes

State v. Wambach, 136 N.C. App. 842, 526 S.E.2d 212 (7 March 2000). The court ruled, relying on State v. Niccum, 293 N.C. 276, 238 S.E.2d 141 (1977), that a defendant has no right to appeal a superior court order denying a writ of habeas corpus under Chapter 17 of General Statutes. The defendant may seek review by a petition for a writ of certiorari.

Evidence

Defendant's Prior DWI Conviction and Pending DWI Charge Were Admissible under Rule 404(b) to Prove Malice in Second-Degree Vehicular Murder Trial

State v. McAllister, 138 N.C. App. 252, 530 S.E.2d 859 (6 June 2000). The defendant was driving his vehicle on December 25, 1997, when he struck a bicyclist and killed her. He was

convicted of second-degree murder, felonious hit and run, driving while his license was permanently revoked, and DWI. The court ruled that the trial judge did not err in admitting Rule 404(b) evidence of the defendant's prior DWI conviction in 1991; it was properly admitted to prove malice and was not too remote in time from the offenses being tried. The court also ruled that the trial judge did not err in admitting Rule 404(b) evidence of the defendant's pending DWI charge that was on appeal for trial de novo in superior court when the offenses were being tried. The court, citing State v. Byers, 105 N.C. App. 377, 413 S.E.2d 586 (1992), stated that pending charges are admissible to show malice. The court noted that the trial judge had instructed the jury that this DWI charge was pending and was not a conviction.

Distinguishing *State v. Hinnant*, Court States That Child Sexual Assault Victim's Statements to Her Mother and Doctor Would Have Been Admissible under Rule 803(4) (Statement for Purpose of Medical Diagnosis or Treatment)

In re Clapp, 137 N.C. App. 14, 526 S.E.2d 689 (21 March 2000). An eleven-year-old male juvenile was adjudicated delinquent for committing second-degree sexual offense with a three-year-old female victim. The victim, who was four years old when the adjudicatory hearing was held, was found competent to testify and described what happened. The court rejected the juvenile's argument that the trial judge erred in finding the victim competent to testify. The court then stated, distinguishing State v. Hinnant, 351 N.C. 277, 523 S.E.2d 663 (4 February 2000), that even if the juvenile had been found incompetent to testify, her statements to her mother and doctor would have been admissible under Rule 803(4) (statement for purpose of medical diagnosis and treatment). The court noted that the child victim came out of the bedroom pulling at her crouch or pulling at her panties and stated that the juvenile had made her take off her clothes and licked her private parts. Later that same day, her mother took the victim to the hospital emergency room, where the mother and the victim informed the examining doctor that the juvenile had licked the victim's private parts.

Child Sexual Assault Victim's Statements to Her Mother Were Not Admissible under Rule 803(4) (Statement for Purpose of Medical Diagnosis or Treatment), Based on *State v. Hinnant*, But Court States That Statements Were Admissible under Rule 803(2) (Excited Utterance) and Mother's Testimony about Statements Were Also Admissible for Corroborative Purposes (Child Testified at Trial)

State v. McGraw, 137 N.C. App. 726, 529 S.E.2d 493 (2 May 2000). The child sexual assault victim testified at trial about the assault. Her mother then testified about her child's statements about the assault that were related to her about thirty minutes after the assault. The court ruled that, based on State v. Hinnant, 351 N.C. 277, 523 S.E.2d 663 (4 February 2000), that the trial judge erred in admitting the mother's testimony under Rule 803(4) (statement for purpose of medical diagnosis and treatment). The court noted that the first requirement under *Hinnant* is a showing that the declarant made the statements understanding that they would lead to medical diagnosis or treatment; the purpose underlying this requirement is to assure the trustworthiness of the declarant's statements. The court stated that there was no evidence to show that the child in this case made the statements to her mother with the understanding that they would lead to medical treatment. The mother did not reveal how the discussion with her child was initiated, and there was no evidence that the child understood her mother to be asking her about the

incident to provide medical diagnosis or treatment. The court ruled that the first requirement under *Hinnant* was not satisfied and thus the child's statements were inadmissible under Rule 804(4). However, the court stated, citing State v. Thomas, 119 N.C. 708, 460 S.E.2d 349 (1995) and State v. Jones, 89 N.C. App. 584, 367 S.E.2d 139 (1988), that the child's statements were admissible under Rule 803(2) (excited utterance), and the mother's testimony about the statements was also admissible to corroborate the child's testimony at trial.

(1) Trial Judge Erred in Allowing Joinder for Trial of Sex Offenses Against Three of His Daughters, Based on Time Span of Offenses and Their Dissimilarities
(2) Erroneous Joinder of Sex Offenses Against Three Victims Was Not Prejudicial Because Evidence of All Sex Offenses Would Have Been Admissible under Rule 404(b) at Separate Trials
(3) Testimony of Fourth Daughter about Defendant's Sexual Offense Against Her Was Admissible under Rule 404(b)

State v. Owens, 135 N.C. App. 456, 520 S.E.2d 590 (2 November 1999). The defendant was convicted at a single trial of sex offenses against three of his daughters. All offenses were joined for trial over the defendant's objection. The defendant's offenses against daughter A occurred in July 1990, August 1996, and April 1997; against daughter B in June 1994; and against daughter C in late 1994 and in August 1996. (1) The court examined the charged offenses in this case and ruled, distinguishing State v. Street, 45 N.C. App. 1, 262 S.E.2d 365 (1980), that the trial judge erred in allowing joinder of all the offenses against the three daughters. The court stated that the length of time between the offenses, along with the differing nature of most of the individual acts, indicated that the defendant did not have a "single scheme or plan" as required by G.S. 15A-926(a). (2) The court ruled that the erroneous joinder of these sex offenses was not prejudicial because evidence of all the sex offenses would have been admissible under Rule 404(b) at separate trials. The term "single scheme or plan" in G.S. 15A-926(a) is more exacting than the term "plan" under Rule 404(b). The court cited several cases, including State v. Effler, 309 N.C. 742, 309 S.E.2d 203 (1983) and State v. Frazier, 344 N.C. 611, 476 S.E.2d 297 (1996), to support its ruling that evidence of all the sex offenses would be admissible under Rule 404(b). (3) The court ruled, relying on State v. Frazier, 344 N.C. 611, 476 S.E.2d 297 (1996), that the testimony of a fourth daughter of the defendant about his sexual offense with her (an uncharged offense), committed between thirteen and seventeen years before trial, was properly admitted under Rule 404(b). The evidence showed how the defendant gained access to his daughters.

State's Evidence of Other Robbery Was Improperly Admitted under Rule 404(b) When State Failed to Present Sufficient Facts to Support Its Admissibility

State v. Willis, 136 N.C. App. 820, 526 S.E.2d 191 (7 March 2000). The defendant was on trial for a common law robbery committed on October 13, 1997, in Winston-Salem. The state was permitted to offer Rule 404(b) evidence of another robbery committed on October 21, 1997, in Guilford County which consisted entirely of certified court records showing an indictment for common law robbery, a transcript of a guilty plea to that offense, and a judgment and commitment. No facts about the common law robbery were offered into evidence. The trial judge admitted this Rule 404(b) evidence to show the defendant's identity, modus operandi, motive,

and the existence of a common plan or scheme. The court ruled that the state's paucity of factual evidence did not support any of the grounds for which it was admitted.

(1) Trial Judge Did Not Err in Prohibiting Defendant's Cross-Examination of State's Witness About Prior Juvenile Adjudication, Based on Facts in This Case
(2) Trial Judge Did Not Err in Prohibiting Defendant's Cross-Examination About Prior Assault by State's Witness

State v. Deese, 136 N.C. App. 413, 524 S.E.2d 381 (18 January 2000). The defendant was convicted of murder. The defendant, accomplices, the murder victim, and the state's witness were in a car. The defendant and his accomplices tried to have sex with the victim, took her out of the car, and eventually killed her. The state's witness remained in the car while these events occurred and testified about them at trial. (1) The court ruled that the trial judge did not err in prohibiting the defendant's cross-examination of the state's witness about her prior juvenile adjudication of involuntary manslaughter. Such cross-examination was unnecessary to a fair determination of the defendant's guilt or innocence under Rule 609(d), based on the facts in this case. (2) The court ruled that the trial judge did not err in prohibiting the defendant's cross-examination of the state's witness about an incident in which she and her brother had cut a person with a broken bottle. The defendant argued that this evidence was offered to show that someone other than the defendant, perhaps the state's witness, had committed the murder. The court noted that evidence offered to show the guilt of another must—to be relevant—point directly to the guilt of the other person. The court stated that there were no similarities between the prior assault by the state's witness and the murder being tried to make the evidence of the prior assault admissible. Moreover, the defendant's own statements acknowledged his presence at the crime scene and corroborated the testimony of the state's witness that she remained in the car and was not involved in the murder.

Expert Witnesses Were Improperly Allowed to Give Legal Opinions About Defendant's Actions

State v. Linney, 138 N.C. App. 169, 531 S.E.2d 245 (6 June 2000). The defendant, an attorney, was convicted of two counts of embezzlement and two counts of perjury involving his role as a guardian of the person and estate of Georgiana Alexander. The court ruled, relying on HAJMM v. House of Raeford Farms, 328 N.C. 578, 403 S.E.2d 483 (1991), that two expert witnesses were improperly allowed to give legal opinions about the defendant's actions. A superior court clerk was improperly allowed to give his opinions (1) whether an undocumented loan out of a ward's estate met the reasonable and prudent standard under G.S. 35A-1251, and (2) the failure to list such a loan as an asset on the guardian's report would constitute a breach of fiduciary duty. An assistant superior court clerk was improperly allowed to give her opinions that (1) it would violate the law for an administrator of an estate to rent property belonging to the estate without first obtaining permission from the clerk of court, and (2) it would be illegal for an administrator to deposit the proceeds from such rentals into the administrator's personal account.

State Was Properly Permitted to Impeach Its Own Witnesses By Introducing Their Prior Inconsistent Statements Because Witnesses Had Admitted Giving Prior Statements to Law Enforcement

State v. Wilson, 135 N.C. App. 504, 521 S.E.2d 263 (2 November 1999). Two state's witnesses testified at an assault trial that they essentially did not witness the assault. They both admitted giving prior statements (which contradicted their testimony) to a law enforcement officer who had investigated the assault. The court ruled—relying on State v. Whitley, 311 N.C. 656, 319 S.E.2d 584 (1984) and State v. Minter, 111 N.C. App. 40, 432 S.E.2d 146 (1993) and distinguishing State v. Hunt, 324 N.C. 343, 378 S.E.2d 754 (1989) and other cases—that the state was properly permitted to impeach its own witnesses by introducing their prior inconsistent statements because the witnesses had admitted giving prior statements to a law enforcement officer. Because neither witness had denied making the prior statements, the introduction of the statements was not collateral.

(1) Evidence Was Inadmissible under Hearsay Rule 803(3) (Then Existing Mental, Emotional, or Physical Condition) Because No Emotion Accompanied Statement of Fact
(2) Witness's Testimony That "It Looked Like [The Defendant] Was Trying to Shoot [The Victim] in the Head" Was Admissible as Shorthand Statement of Fact

State v. Lesane, 137 N.C. App. 234, 528 S.E.2d 37 (4 April 2000). The defendant was being tried for first-degree murder. (1) The court ruled, relying on State v. Maracek, 130 N.C. App. 303, 502 S.E.2d 634 (1998), that the testimony of the murder victim's wife that her husband said, "I know [the defendant] has stabbed this guy seventeen times" was inadmissible under hearsay Rule 803(3) (then existing mental, emotional, or physical condition). The court noted that this testimony was offered to show the murder victim's fear in going to a place that he knew the defendant would be. However, the court stated that the testimony was a recitation of facts without any actual statement of emotion by the murder victim. It was not admissible simply because the wife testified that her husband looked afraid. (2) An eyewitness to the shooting testified that the defendant was standing over the victim, pointing the gun at him, and "it looked like he was trying to shoot him in the head." The court rejected the defendant's argument that this testimony was improper lay opinion. It was a permissible opinion in the form of a shorthand statement of fact.

(1) Evidence Was Admissible under Hearsay Rule 803(3) (Then Existing Mental, Emotional, or Physical Condition) Because It Showed Victim's State of Mind About Her Marriage
(2) Evidence of Telephone Call Conversations Was Inadmissible Because of Insufficient Authentication of Caller

State v. Jones, 137 N.C. App. 221, 527 S.E.2d 700 (4 April 2000). The defendant was being tried for first-degree murder of his wife. (1) The court ruled, relying on State v. Brown, 350 N.C. 193, 513 S.E.2d 57 (1999), that statements by the wife concerning the defendant's alleged jealousy and his threats to kill her were admissible under hearsay Rule 803(3) (then existing mental, emotional, or physical condition). Although her statements were arguably no more than

recitations of fact, the facts that she recited tended to show her state of mind about her marriage. (2) The state presented evidence showing that a man who identified himself as Stephen Jones (the defendant) repeatedly made telephone calls to the murder victim at work during the six weeks before her death. The court ruled that this evidence was inadmissible because the state failed to properly authenticate these phone calls—see State v. Richards, 294 N.C. 474, 242 S.E.2d 844 (1978)—because the witnesses who testified about these phone calls did not recognize his voice; instead, they simply accepted the caller's self-identification.

(1) Written Statement Was Not Admissible under Hearsay Rule 803(5) (Recorded Recollection)
(2) State Was Improperly Permitted to Impeach Its Witness with Prior Written Statement, Based on Facts in This Case

State v. Spinks, 136 N.C. App. 153, 523 S.E.2d 129 (21 December 1999). A state's witness did not have a clear memory of the events surrounding the murder being tried. The state asked her to read a written statement, which was an oral statement reduced to writing by a law enforcement officer who had interviewed her. She said that she "remembered some of this" but it was apparent that the statement had not refreshed her memory ("I can't tell you exactly who said what"). She took issue with the prosecutor about matters set forth in the statement. She also said that she did not read the statement before she signed it. (1) The state was permitted to read the statement into evidence under Rule 803(5) (recorded recollection). The court ruled that the statement was not admissible under the rule because the state did not show that the statement was made or adopted by the witness when the matter was fresh in her memory and reflected that knowledge correctly. Her trial testimony clearly showed that she not only did not recall the matters in the statement, but also disagreed with some of the matters in the statement. (2) Distinguishing State v. Demery, 113 N.C. App. 58, 437 S.E.2d 704 (1993), the court ruled that the state was improperly permitted to impeach the witness with the prior written statement. The court stated that there was no evidence that the witness made the statements in the written statement with which the state sought to impeach her; the court noted that the state never offered the testimony of the officer who took the written statement.

Statements of Witnesses Were Not Discoverable under G.S. 15A-903(f)

State v. Griffin, 136 N.C. App. 531, 525 S.E.2d 793 (15 February 2000). The court ruled that the trial judge did not err in failing to order the disclosure of two state's witnesses' statements after the witnesses had testified, as provided in G.S. 15A-903(f) (defendant entitled to statements that have been "signed or otherwise adopted or approved by" witness who testifies as state's witness). After voir dire examinations of the witnesses, the trial judge concluded that neither witness had signed or otherwise adopted the statements that were taken by the investigating officers.

Statement That Was a Directive to Another Person Was Not Hearsay Because It Was Not Offered to Prove the Truth of the Matter Asserted in the Statement

State v. Mitchell, 135 N.C. App. 617, 522 S.E.2d 94 (16 November 1999). The defendant was tried for providing drugs to an inmate at a jail. Jail personnel observed a possible transaction

between an inmate and the defendant, a visitor to the jail. When a jailer and deputy sheriff immediately questioned the inmate about what was in his hand, the inmate told the defendant to "hurry" or "leave." The state offered the inmate's statement into evidence at trial. The court ruled, relying on State v. Hood, 294 N.C. 30, 239 S.E.2d 802 (1978), that the inmate's statement to the defendant was not hearsay because it was offered simply to prove that a directive by the inmate to the defendant had been made, not to prove the truth of any matter asserted therein.

In Trial of Two Defendants in Which Evidence Admitted Against Defendant A Was Inadmissible Against Defendant B, Trial Judge Erred in Failing to Give Limiting Jury Instruction When Defendant B Made General Objection to Admissibility of Evidence

State v. Robinson, 136 N.C. App. 520, 524 S.E.2d 805 (1 February 2000). In a trial of two defendants for armed robbery in which the evidence admitted against defendant A was inadmissible against defendant B, the court ruled—citing State v. Franklin, 248 N.C. 695, 104 S.E.2d 837 (1958)—that the trial judge erred in failing to give a limiting jury instruction when defendant B made a general objection to the admissibility of the evidence. In this case, the state impeached defendant A (who had testified at trial that defendant B was not involved with the armed robbery) with a prior inconsistent statement to law enforcement officers that defendant B was involved in the robbery. The limiting jury instruction must distinguish the defendant against whom the evidence is admissible from the defendant against whom it is inadmissible. And based on the *Franklin* ruling, a general objection is sufficient to require such an instruction when the evidence is inadmissible for any purpose.

Judge in Child Abuse and Neglect Hearing Erred in Finding Children Incompetent to Testify Based on Possible Harm to Them in Testifying, Based on Facts in This Case

In re Faircloth, 137 N.C. App. 311, 527 S.E.2d 679 (4 April 2000). A county department of social services (DSS) filed a petition alleging that four named children were abused and neglected. At the adjudicatory hearing, the DSS presented evidence from a social worker, two physicians, and a psychologist. Their testimony included hearsay evidence of statements by the children, to which the respondent father did not object. After the DSS concluded its evidence, the respondent father sought to call the three older children as witnesses and forecast that they would testify that the abuse was perpetrated by someone other than the defendant. The DSS objected to their being called as witnesses. After hearing evidence from experts on the issue of these children testifying, the trial judge ruled that the children were unavailable and unable to testify because of their existing mental health and the detriment to them that would result if forced to testify. The court ruled that the judge used an incorrect standard in deciding the competency of these proposed witnesses under Rule 601. The correct standard is their ability to understand their obligation to tell the truth and to relate events that they may have seen, heard, or experienced. The court noted that the trial judge's use of the term "unavailability" [see Rule 804(a)(4)] was inappropriate in this case because it relates to the admissibility of hearsay testimony, which was not in issue. The court stated that although it is possible that a child's presently existing mental condition resulting from abuse could so profoundly affect the child's ability to relate events and to understand the obligation to tell the truth to render the child incompetent to testify, such evidence had not been elicited from the experts in this case. The court noted that various mechanisms have been developed to protect the mental health of children and the due process

rights of those against whom children might testify. See In re Barkley, 61 N.C. App. 267, 300 S.E.2d 713 (1983) (respondent mother removed from courtroom during child's testimony in parental termination hearing, but her counsel remained to conduct cross-examination); In re Stradford, 119 N.C. App. 654, 460 S.E.2d 173 (1995) (testimony by sexual assault victims by closed-circuit television in juvenile delinquency hearing).

Jury Instruction on Flight Is Inapplicable to Flight of Witness

State v. Jackson, 137 N.C. App. 570, 529 S.E.2d 253 (18 April 2000). The defendant was on trial for drug trafficking based on drugs found in a motel room in which the defendant, a state's witness, and a third party were present when law enforcement officers discovered the drugs. The state's witness had run into the motel room when the officers had first arrived at the motel. The defendant's defense asserted that the state's witness possessed the drugs, and argued that a jury instruction on flight should have been given based on the flight of the state's witness into the motel room on seeing the officers arrive at the motel. The court rejected this argument; it stated that an instruction on flight is sui generis to the flight of a defendant and does not apply to any alleged flight of a witness.

Capital Case Issues

Defendant Was Properly Denied Right of Allocution During Capital Sentencing Hearing

State v. Ray, 137 N.C. App. 326, 527 S.E.2d 675 (4 April 2000). The defendant was convicted of three counts of first-degree murder. At a capital sentencing hearing, the jury recommended life sentences for all three counts. The court ruled, relying on State v. Green, 336 N.C. 142, 443 S.E.2d 14 (1994), that the trial judge properly denied the defendant's motion for allocution that requested that (1) the defendant be permitted to make an unsworn statement to the jury without being subject to cross-examination, and (2) defendant's counsel be permitted to read a written statement from the defendant to the jury.

Sentencing

(1) Plea of No Contest with PJC Is Conviction under Structured Sentencing Act (SSA)
(2) Judge Properly Found Aggravating Factor under SSA that Offense Was Committed Against Victims Because of Their Nationality [G.S. 15A-1340.16(d)(17)]

State v. Hatcher, 136 N.C. App. 524, 524 S.E.2d 815 (1 February 2000). The defendant was convicted of two counts of armed robbery. (1) The court ruled that the trial judge did not err—in determining the defendant's prior record level under the Structured Sentencing Act (SSA)—by including an offense to which he had pleaded no contest and for which prayer for judgment was continued. The court noted that G.S. 15A-1340.11(7) provides that a defendant "has a prior conviction when, on the date a criminal judgment is entered, the person being sentenced has been previously convicted of a crime . . . ," and G.S. 15A-1331(b) provides that "[f]or the purpose of imposing sentence, a person has been convicted when he had been adjudged guilty or entered a plea of guilty or no contest." (2) The court ruled that the trial judge did not err in finding the aggravating factor under SSA that the armed robbery offenses were committed against the

Hispanic victims because of their nationality. See G.S. 15A-1340.16(d)(17). The accomplice had testified that he and the defendant had selected the victims because they thought Hispanics carried large sums of cash and were less likely to report crimes committed against them. The court rejected the defendant's argument that this aggravating factor required evidence that the defendant had some animus against the victim because of the victim's nationality.

(1) Trial Judge Erred in Ordering Restitution When Imposing Active Sentence (But Note Later Legislation)
(2) Trial Judge Did Not Err in Failing to Find Mitigating Circumstance That Defendant Made Substantial Restitution, Based on Facts in This Case
(3) Length of Probation Was Improper When Findings Not Made

State v. Hughes, 136 N.C. App. 92, 524 S.E.2d 63 (21 December 1999). (1) The court ruled that the trial judge erred in ordering restitution when imposing an active sentence. [Note: The Crimes Victims' Rights Act, which was not applicable to the case before the court because it applies to offenses committed on or after December 1, 1998, apparently requires restitution in some cases in which an active sentence is imposed and authorizes restitution in other cases. See, for example, G.S. 15A-1340.34(b) and discussion in John Rubin, *1998 Legislation Affecting Criminal Law and Procedure*, Administration of Justice Bulletin 98/05 (Institute of Government, Dec. 1998) at pages 4-6. This bulletin is available at **http://www.iog.unc.edu/programs/crimlaw/aoj.htm**.] (2) The court ruled, relying on State v. McDonald, 94 N.C. App. 371, 380 S.E.2d 406 (1989), that the trial judge did not err in failing to find as a mitigating circumstance that the defendant made substantial restitution [G.S. 15A-1340.16(e)(5)]. The court noted that the victim had to bring a civil lawsuit and employ an investigator to recover monies and property from the defendant. (3) The court ruled that the trial judge erred in placing the defendant on supervised probation for a period of sixty months without making findings, as required by G.S. 15A-1343.2(d), that a period longer than thirty-six months was necessary.

Trial Judge Erred, in Sentencing for Indecent Liberties Conviction in Which Victim Was Seven Years Old, by Finding Statutory Aggravating Factor That Victim Was "Very Young" [G.S. 15A-1340.16(d)(11)], Based on Facts in This Case

State v. Rudisill, 137 N.C. App. 379, 527 S.E.2d 727 (4 April 2000). The court ruled, relying on State v. Sumpter, 318 N.C. 102, 347 S.E.2d 396 (1986), that the trial judge erred, in sentencing a defendant for an indecent liberties conviction in which the victim was seven years old, by finding the statutory aggravating factor that the victim was "very young" [G.S. 15A-1340.16(d)(11)]. Like *Sumpter*, the victim's age alone did not demonstrate that he was more vulnerable to the assault in this case than an older child would have been. There was no finding that this victim was more vulnerable simply because of his age. The court noted that this statutory aggravating factor may be found without a special showing that the victim was vulnerable when the victim is especially young, such as the two-year-old victim in State v. Ahearn, 307 N.C. 584, 300 S.E.2d 689 (1983).

Court Rejects Defendant's Federal and State Constitutional Arguments That Her Sentence Was Disproportionate to Accomplices' Sentences

State v. Parker, 137 N.C. App. 590, 530 S.E.2d 297 (2 May 2000). The defendant was tried and convicted of two drug trafficking offenses and received consecutive sentences. Two accomplices received lesser sentences under a plea agreement. Another accomplice received the same sentence as the defendant (under a plea agreement). The court, relying on State v. Shane, 309 N.C. 438, 306 S.E.2d 765 (1983) and other cases, rejected the defendant's federal and state constitutional arguments that her sentence was disproportionate to the crimes because her more culpable accomplices received lesser or equivalent sentences.

Miscellaneous

North Carolina Drug Tax Is Not Criminal Penalty

Milligan v. State of North Carolina, 135 N.C. App. 781, 522 S.E.2d 330 (7 December 1999). The court, following its prior rulings and not following the ruling in Lynn v. West, 134 F.3d 582 (4th Cir. 1998), ruled that the state drug tax is not a criminal penalty and thus its assessment and collection is not required to comply with the procedural safeguards of a criminal proceeding.

Court Lacks Subject Matter Jurisdiction to Review DMV's Permanent Revocation of Driver's License for Habitual Impaired Driving Conviction

Cooke v. Faulkner, 137 N.C. App. 755, 529 S.E.2d 512 (2 May 2000). The court ruled that a court lacks subject matter jurisdiction to review the Division of Motor Vehicles' permanent revocation of a driver's license that resulted from a defendant's habitual impaired driving conviction [see G.S. 20-138.5(d)]. The court rejected the argument that G.S. 20-25 permitted court review of the revocation. The court noted that the legislature has not provided a mechanism for the restoration of a driver's license under these circumstances.