RECENT CASES AFFECTING CRIMINAL LAW AND PROCEDURE
(October 17, 2000 – June 8, 2001)

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North Carolina Supreme Court

Criminal Offenses and Criminal Procedure

(1) Defendant Was Improperly Convicted of First-Degree Felony Murder Involving Vehicular Homicide When Underlying Felonies, Felonious Assaults of Surviving Occupants, Were Committed Only Through Culpable Negligence
(2) Defendant Was Properly Convicted of Three Counts of Assault with Deadly Weapon Inflicting Serious Injury Involving Surviving Occupants
(3) After Reversing Convictions of First-Degree Felony Murder, Court Remands Case for Sentencing for Underlying Felonies (Felonious Assaults), for Which Judgments Had Been Arrested by Trial Judge
(4) Defendant's Pending DWI Charge Was Properly Admitted to Show Malice Under Second-Degree Murder
(5) Trial Judge Properly Rejected Defendant's Proposed Jury Instruction on Proximate Cause

State v. Jones, 353 N.C. 159, 538 S.E.2d 917 (21 December 2000), *reversing in part and affirming in part*, 133 N.C. App. 448, 516 S.E.2d 405 (15 June 1999). The defendant, driving while impaired by alcohol and drugs, recklessly collided with another vehicle and killed two of its occupants (A and B), seriously injured three occupants, and injured a sixth occupant. The defendant was convicted of two counts of first-degree felony murder (and sentenced to life imprisonment without parole), based on the killings of A and B during the felonies of assault with a deadly weapon inflicting serious injury against three occupants. The defendant was also convicted of three counts of assault with a deadly weapon inflicting serious injury, one count of assault with a deadly weapon, and one count of DWI. The trial judge arrested judgment on the three counts of felonious assault that were the underlying felonies for the two counts of first-degree murder. (1) The court ruled that the defendant was improperly convicted of the two counts of first-degree felony murder because the underlying felonies—felonious assaults—were only committed through culpable negligence. The court stated that a defendant must purposely resolve to commit the underlying felony under the felony murder theory of first-degree murder. (2) The court ruled that the defendant was properly convicted of three counts of assault with a deadly weapon inflicting serious injury. The defendant perpetrated the assault by operating his vehicle, a deadly weapon, in a culpably or criminally negligent manner. His criminal or culpable negligence was established, as a matter of law, when the jury convicted him of DWI; such negligence was also proven by the defendant's driving his vehicle substantially in excess of the posted speed limit and on the wrong side of the road. And the defendant's acts proximately caused serious injury to the victims. (3) After reversing the convictions of first-degree felony murder, the court remanded the case for sentencing for the underlying felonies (felonious assaults), for which judgments had been arrested by the trial judge. (4) The court ruled, citing State v. Byers, 105 N.C. App. 377, 413 S.E.2d 586 (1992), that the trial judge did not err in admitting the defendant's pending DWI charge to prove the element of malice in second-degree murder. (5) The court ruled, citing State v. Hollingsworth, 77 N.C. App. 36, 334 S.E.2d 463 (1985), that the trial judge properly rejected the defendant's proposed jury instruction that, to hold him criminally liable, his acts must have been the sole proximate cause of the collision. His acts need only be one of the proximate causes of the collision.

Court, Per Curiam and Without Opinion, Affirms Court of Appeals Ruling That There Was Insufficient Evidence of Intent to Commit Second-Degree Sexual Offense in First-Degree Burglary Prosecution

State v. Cooper, 353 N.C. 260, 538 S.E.2d 912 (21 December 2000), *affirming*, 138 N.C. App. 495, 530 S.E.2d 73 (20 June 2000). The court, per curiam and without an opinion, affirmed the court of appeals ruling that there was insufficient evidence of intent to commit second-degree sexual offense in a first-degree burglary. The state's evidence showed that a female person heard a noise from her son's bedroom. She discovered a screen window was out and objects spilled onto the floor. As she was trying to shut the window, the defendant reached in from outside and grabbed her arms above her elbows. She screamed and broke the defendant's grip. The defendant backed away and ran off.

Court, Per Curiam and Without Opinion, Affirms Court of Appeals Ruling That There Was Insufficient Evidence of Malice Involving Child Abuse Homicide to Support Second-Degree Murder Conviction, But Remands for Judgment of Involuntary Manslaughter

State v. Blue, 353 N.C. 364, 543 S.E.2d 478 (6 April 2001), *affirming and modifying*, 138 N.C. App. 404, 531 S.E.2d 267 (20 June 2000). The defendant was convicted of second-degree murder involving a child abuse homicide. The North Carolina Court of Appeals, distinguishing State v. Hemphill, 104 N.C. App. 431, 409 S.E.2d 744 (1991) and State v. Qualls, 130 N.C. App. 1, 502 S.E.2d 31 (1998), *aff'd per curiam*, 350 N.C. 56, 510 S.E.2d 376 (1999), had ruled that the evidence of shaken baby syndrome and the other evidence in this case were insufficient to support the element of malice in the second-degree murder conviction. The North Carolina Supreme Court, per curiam and without an opinion, affirmed this ruling but remanded the case to the trial court for the entry of a judgment of involuntary manslaughter (the court of appeals had remanded the case to the trial court for a new trial).

Court, Per Curiam and Without Opinion, Affirms Court of Appeals Ruling That There Was Sufficient Evidence to Support Conviction of Trafficking by Transporting Cocaine When Defendant Ran from Officers with the Cocaine in His Possession

State v. Manning, 353 N.C. 449, 545 S.E.2d 211 (4 May 2001), *affirming*, 139 N.C. App. 454, 534 S.E.2d 219 (15 August 2000). The court, per curiam and without an opinion, affirmed a court of appeals ruling that there was sufficient evidence to support the defendant's conviction of trafficking by transporting cocaine. The evidence showed that the defendant sold 449 grams of cocaine to a law enforcement informant while officers were in the vicinity. The officers then appeared and shouted "police, police. Don't move. Put your hands up." The defendant ran some distance, transporting 109 grams of cocaine that he had not sold to the informant. The defendant did not attempt to dispose of the cocaine as he fled the area in his futile attempt to outrun them. The court of appeals noted in its opinion that a reasonable person could conclude that the defendant's purpose in transporting the cocaine was to use it in a future drug sale. The court of appeals ruled, relying on State v. Outlaw, 96 N.C. App. 192, 385 S.E.2d 165 (1989), State v. McRae, 110 N.C. App. 643, 430 S.E.2d 434 (1993), and State v. Greenidge, 102 N.C. App. 447, 402 S.E.2d 639 (1991), that this evidence constituted substantial movement of the cocaine to support the conviction.

Variance Between Dates Alleged in Sexual Assault Indictment and Evidence Presented at Trial Was Prejudicial To Defendant, Who Had Prepared Alibi Defense for Dates Alleged in Indictment

State v. Stewart, 353 N.C. 516, 546 S.E.2d 568 (8 June 2001), *reversing*, 118 N.C. App. 339, 455 S.E.2d 499 (21 March 1995) (unpublished opinion). The defendant was indicted for first-degree statutory sexual offense with a child under 13. The indictment alleged that the offense occurred between July 1, 1991 and

July 31, 1991. The victim testified that the assaults began in 1989 and continued for two and one-half years. However, the victim did not testify about a specific act occurring in July 1991. An acquaintance of the defendant testified about one offense that occurred "before August 1991," but could not remember whether it occurred during July 1991. The defendant presented evidence of his whereabouts for each day of July 1991. The court noted its prior case law [for example, State v. Everett, 328 N.C. 72, 399 S.E.2d 305 (1991)] that in sexual abuse cases involving young children, some leniency concerning the child's memory of specific dates is allowed. However, the court ruled that under the "unique facts and circumstances of this case," the "dramatic variance" between the dates alleged in the indictment and the state's evidence prejudiced the defendant by depriving him of the opportunity to adequately present his defense. The court reversed the defendant's conviction.

(1) Inoperability of Firearm Is Not Affirmative Defense to Possession of Firearm by Felon Under G.S. 14-415.1
(2) Court Clarifies Scope of Inoperability as Affirmative Defense to Possession of Weapon of Mass Death and Destruction Under G.S. 14-288.8

State v. Jackson, 353 N.C. 495, 546 S.E.2d 570 (8 June 2001), *reversing*, 139 N.C. App. 721, 535 S.E.2d 48 (29 August 2000). (1) The court ruled that inoperability of a firearm is not an affirmative defense to possession of firearm by felon under G.S. 14-415.1. The court stated that to the extent that language in State v. Fennell, 95 N.C. App. 140, 382 S.E.2d 231 (1989) and State v. Baldwin, 34 N.C. App. 307, 237 S.E.2d 881 (1977) conflicts with the ruling in this case, it is disavowed. (2) The court clarified the scope of an affirmative defense to possession of weapon of mass death and destruction under G.S. 14-288.8. Inoperability is generally not an affirmative defense (for example, it is not an affirmative defense to an assembled weapon), except to the extent that the defendant can prove that pieces seized were not "designed or intended for use in converting any device" [G.S. 14-288.8(c)(4)] into a weapon of mass death and destruction.

Prosecutor's Jury Argument Referring to Defendant's Conduct in Courtroom Was Not Impermissible Comment on His Decision Not to Testify

State v. Davis, 353 N.C. 1, 539 S.E.2d 243 (21 December 2000). The defendant was convicted of first-degree murder and sentenced to death for the murder of his aunt. The court ruled, distinguishing State v. McLamb, 235 N.C. 251, 69 S.E.2d 537 (1952), that the prosecutor's jury argument referring to the defendant's conduct in the courtroom was not an impermissible comment on his decision not to testify. The prosecutor noted that the defendant had bowed his head, cried, rolled his eyes, and muttered during the capital sentencing hearing.

Trial Judge Did Not Err in Failing to Submit Second-Degree Murder in First-Degree Murder Prosecution Based on Premeditation and Deliberation

State v. Leazer, 353 N.C. 234, 539 S.E.2d 922 (21 December 2000), *reversing*, 137 N.C. App. 385, 533 S.E.2d 307 (4 April 2000) (unpublished opinion). The defendant was convicted of first-degree murder based on the theory of premeditation and deliberation. The defendant, a prison inmate, killed another prison inmate. The court ruled, reversing an unpublished opinion of the court of appeals, that the trial judge did not err in failing to submit the charge of second-degree murder to the jury. There was positive, uncontradicted evidence of each element of first-degree murder and mere speculation about rationales for the defendant's behavior was not sufficient to negate evidence of premeditation and deliberation (see the discussion of the facts in the court's opinion).

Requirement of Trial by Twelve Jurors Was Violated When Juror Became Disqualified During Deliberations As a Result of Juror Misconduct

State v. Poindexter, 353 N.C. 440, 545 S.E.2d 414 (4 May 2001). The defendant was tried for first-degree murder. The jury returned a verdict of guilty and was ordered to return several days later for the capital sentencing hearing. Before the capital sentencing hearing began, evidence was presented that one of the jurors during the deliberations of the first-degree murder charge told the jurors of reports that the defendant's family may harm them if the defendant was found guilty. The trial judge denied the defendant's motion for a mistrial based on juror misconduct. Instead, the judge replaced that juror with an alternate, the capital sentencing hearing was conducted, and the defendant was sentenced to death. The court ruled, after reviewing all the facts (see the discussion in the opinion), that the requirement of a trial by twelve jurors was violated when this juror became disqualified during deliberations as a result of the juror's misconduct. The court ordered a new trial of the first-degree murder charge.

Trial Judge Did Not Err in Ordering Defense Counsel to Defer to Defendant's Wishes Not to Attempt to Rehabilitate Prospective Juror, Based on Facts in This Case

State v. Mitchell, 353 N.C. 309, 543 S.E.2d 830 (6 April 2001). During jury selection in a capital trial, a prospective juror testified that she would decide the case based on emotional sympathy for the victims and, thus would not be a fair and impartial juror. The trial judge indicated that the juror could be removed for cause, and defense counsel conferred with the defendant. Defense counsel then informed the judge that the defendant, against counsel's advice, wanted to remove the juror without any attempt to rehabilitate. The judge inquired into defense counsel's view that rehabilitation questions might reveal that emotional mitigating evidence would persuade the juror to vote for life imprisonment, and the judge discussed defense counsel's position with the defendant. However, the defendant adamantly insisted that he wanted to remove the juror for cause despite his counsel's advice. The judge then removed the juror for cause without permitting defense counsel an opportunity for rehabilitation. The court ruled, relying on State v. Ali, 329 N.C. 394, 407 S.E.2d 183 (1991) (when absolute impasse over tactical decision, client's wishes must control—trial judge must make appropriate inquiries of defendant), that the judge did not err in honoring the defendant's decision.

Prosecutor's Jury Argument Was Improper Because It Disclosed Trial Judge's Legal Opinion in Hearing Conducted Outside Jury's Presence on Admissibility and Credibility of Hearsay Evidence

State v. Allen, 353 N.C. 504, 546 S.E.2d 372 (8 June 2001). Two defendants were convicted of first-degree murder and sentenced to death. Two state's witnesses were not available to testify at trial. However, the trial judge ruled, in a hearing conducted outside the jury's presence, that their statements were admissible under various hearsay rules. The prosecutor's jury argument during the guilt-innocence phase focused on one of these unavailable witnesses. The prosecutor essentially stated that the state did not have an eyewitness to testify before the jury, but she spoke through the words of an officer who did testify at trial. The prosecutor continued, "And you heard her words through Officer Barros, because the Court let you hear it, because the Court found they were trustworthy and reliable . . . . If there had been anything wrong with that evidence, you would not have heard that." The court ruled that this jury argument was improper because it disclosed the trial judge's legal opinion in a hearing conducted outside the jury's presence on the admissibility and credibility of the hearsay evidence.

Arrest, Search, and Interrogation Issues

Court Defines "Custody" under *Miranda* Ruling and Disavows Inconsistent Statements in Its Prior Cases

State v. Buchanan, 353 N.C. 332, 543 S.E.2d 823 (6 April 2001). The defendant was charged with two counts of first-degree murder. The trial judge granted the defendant's pretrial motion to suppress the defendant's confession on the ground that the defendant was in custody and was not given his *Miranda* warnings. The state appealed the judge's ruling. The essential facts involving the custody issue were that an officer contacted the defendant at his job, the defendant went with him to the police station, interrogation was conducted there, and the defendant eventually confessed. The state argued on appeal that the trial judge had applied, in determining custody under *Miranda*, an incorrect standard (whether a reasonable person in the defendant's position, based on the totality of circumstances, would have felt "free to leave") instead of the correct standard (whether a reasonable person would have believed there was a "formal arrest or restraint on freedom of movement of the degree associated with a formal arrest"). The court ruled that the trial judge applied the incorrect standard and remanded to the trial judge for reconsideration and application of the correct standard.

The court reviewed the history of *Miranda* cases in the United States Supreme Court and the North Carolina Supreme Court. The court then ruled that the "appropriate inquiry in determining whether a defendant is 'in custody' for purposes of *Miranda* is, based on the totality of circumstances, whether there was a 'formal arrest or restraint on freedom of movement of the degree associated with a formal arrest.'" The court noted that the "free to leave" standard is appropriate for determining whether a person has been seized under the Fourth Amendment; it is not the appropriate standard for custody under the *Miranda* ruling, which is based on the Fifth Amendment. The court disavowed statements inconsistent with its ruling that have appeared in its prior cases, and it also specifically cited State v. Jackson, 348 N.C. 52, 497 S.E.2d 409 (1998); State v. Rose, 335 N.C. 301, 439 S.E.2d 518 (1994); State v. Hicks, 333 N.C. 467, 428 S.E.2d 167 (1994); and State v. Smith, 317 N.C. 100, 343 S.E.2d 518 (1986).

The court then noted that the trial judge in his finding of facts referred to the fact that although a law enforcement officer told the defendant that he was not under arrest and was free to leave, the officer subjectively did not intend to let the defendant leave the station after the defendant verbally confessed to the murders. The trial judge's findings also indicated that the reason the officers did not read the defendant his *Miranda* warnings was because they did not want the defendant to invoke his rights and because the interrogation was intended to elicit an incriminating response from the defendant. Although it was unclear to the court whether the trial judge's conclusion that the defendant was in custody was based on these findings of fact, the court decided to clarify the law on these matters.

Relying on Stansbury v. California, 511 U.S. 318, 114 S. Ct. 1526, 128 L. Ed. 2d 293 (1994) and Berkemer v. McCarty, 468 U.S. 420, 104 S. Ct. 3138, 82 L. Ed. 2d 317 (1985), the court stated that the fact that a law enforcement officer "had decided at some point during the interview that he was not going to allow defendant to leave and was going to arrest defendant at the end of the interview is irrelevant to the custody inquiry, unless those intentions were somehow manifested to defendant. The subjective unspoken intent of a law enforcement officer, provided it is not communicated or manifested to the defendant in any way, and subjective interpretation of a defendant are not relevant to the objective determination of whether the totality of the circumstances support the conclusion that defendant was 'in custody.'"

Concerning the officer's intention to obtain a confession without giving *Miranda* warnings because the officer did not want him to invoke his rights and the interrogation was intended to elicit an incriminating response, the court noted, citing Moran v. Burbine, 475 U.S. 412, 106 S. Ct. 1135, 89 L. Ed. 2d 410 (1986), that the purpose of *Miranda* is to protect against coerced confessions, not to suppress voluntary confessions. Thus the fact that the officer intended to elicit incriminating responses from the defendant through means other than coercion is irrelevant to the determination of whether the defendant was in custody.

Anonymous Tip and Officers' Corroboration Did Not Support Reasonable Suspicion to Make Investigative Stop for Drugs, Based on Facts in This Case

State v. Hughes, 353 N.C. 200, 539 S.E.2d 625 (21 December 2000), *reversing*, 136 N.C. App. 286, 524 S.E.2d 70 (4 January 2000). On the morning of March 13, 1998, officer A was sitting in officer B's office when officer B received a phone call. At the call's conclusion, officer B told officer A that he had been talking with a confidential, reliable informant who said that a dark-skinned Jamaican (nicknamed "Markie"), weighing over 300 pounds, about six feet tall, between twenty to thirty years old, with a short haircut, clean cut, and wearing baggy pants, would be arriving with marijuana and powdered cocaine in his possession in Jacksonville on a bus coming from New York City, possibly the 5:30 p.m. bus. The informant also indicated that Markie "sometimes" came to Jacksonville on weekends before it got dark, that he "sometimes" took a taxi from the bus station, that he "sometimes" carried an overnight bag, and that he would be headed to North Topsail Beach (quotations are in the court's opinion).

Later in the day, officer A relayed this information by telephone to officer C and told him to go to the bus station. At the suppression hearing, officer C could not recall whether he had been given a description of the defendant's clothing, nor could he recall whether he had ever been given the suspect's nickname. Officer C also testified at the suppression hearing that he did not know what time the defendant would arrive in Jacksonville or on which bus, only that he was coming in that afternoon.

When officer C and his partner, officer D, reached the bus station, one bus from New York had already arrived, but a bus coming from Rocky Mount was scheduled to arrive around 3:50 p.m. Officer C testified at the suppression hearing that he knew that Rocky Mount was a transfer point between New York and Jacksonville. When the bus arrived, it pulled in with its door facing away from the officers, blocking their view of the arriving passengers so they could not see whether the defendant stepped off the bus. Officer C testified, however, that the defendant was not in the parking lot before the bus arrived and that he had stepped from behind the bus after it arrived. The defendant matched the exact description he had been given and was carrying an overnight bag.

The defendant immediately stepped into a taxi that went on Highway 17 South, toward an area called the Triangle, where Highway 17 splits in two directions—toward Wilmington and Topsail Beach or toward Richlands. One must pass through the Triangle before it can be determined in which direction one is going. However, the officers stopped the defendant's taxi before it reached the Triangle. The officers discovered marijuana and cocaine in the defendant's possession after they stopped the taxi.

The court ruled, distinguishing Alabama v. White, 496 U.S. 325, 110 S. Ct. 2412, 110 L. Ed. 2d 301 (1990) and relying on Florida v. J.L., 529 U.S. 266, 120 S. Ct. 1375, 146 L. Ed. 2d 254 (1999), that this information was insufficient to establish reasonable suspicion to stop the defendant in the taxi to investigate illegal drugs. The court upheld the trial judge's findings of fact and ruling, which had granted the defendant's suppression motion. (1) The court stated that the telephone call from a confidential, reliable informant to officer B that was given to officer A must be treated as anonymous information, because there was no evidence to support officer B's statement that the informant was reliable. The court noted that officer B did not testify at the suppression hearing, and officer A was not given any information by officer B about the informant's reliability. The court also rejected the state's argument that the informant made a statement against penal interest under G.S. 14-225 (see the discussion in the opinion). (2) The court determined that the anonymous information by itself was insufficient to support reasonable suspicion. The information did not contain the range of details required by *White* to sufficiently predict the defendant's future action, but was instead peppered with uncertainties and generalities (see the discussion in the opinion). (3) The court also determined that the officers' corroboration of the information was insufficient to support reasonable suspicion (see the discussion in the opinion). The court, relying on *J.L.*, found that reasonable suspicion did not arise merely from the fact that the person met the description given to the officers. The court noted that the officers stopped the taxi before it could be determined in which direction it was going (note the discussion above of the facts involving the Triangle).

Search Warrant for Blood, Saliva, and Hair Was Proper and State Was Not Required to Obtain Nontestimonial Identification Order So Defendant Would Have Statutory Right to Counsel

State v. Grooms, 353 N.C. 50, 540 S.E.2d 713 (21 December 2000). The court ruled that a search warrant to seize the defendant's blood, saliva, and hair was supported by probable cause and the state was not required to obtain a nontestimonial identification order so the defendant would have the statutory right to counsel under G.S. 15A-279(d). The court noted that a constitutional right to counsel does not apply to Fourth Amendment searches and seizures.

Evidence

Trial Judge Erred in Prohibiting Defendant from Offering Evidence of Guilt of Another, Based on Facts in This Case

State v. Israel, 353 N.C. 211, 539 S.E.2d 633 (21 December 2000). The defendant was convicted of first-degree murder and sentenced to death. The court ruled that the trial judge erred in prohibiting the defendant from offering evidence of the guilt of another. The court stated that the defendant not only proffered evidence that someone other than the defendant had the opportunity to kill the victim, but also proffered the identity of that person and his history of recent violent acts committed against the victim. (See the discussion of the facts in the opinion.)

Trial Judge's Reciprocal Discovery Order Requiring Defense Mental Health Expert to Prepare and to Disclose to State a Written Report of His Findings and His Handwritten Notes of Interviews of Defendant Was Proper and Did Not Violate Attorney-Client Privilege or Privilege Against Self-Incrimination

State v. Davis, 353 N.C. 1, 539 S.E.2d 243 (21 December 2000). The court ruled, citing State v. Atkins, 349 N.C. 62, 505 S.E.2d 97 (1998), the trial judge's reciprocal discovery order requiring the defense mental health expert to prepare and to disclose to the state a written report of his findings and his handwritten notes of interviews of the defendant was proper. The court also ruled that the order did not violate the attorney-client privilege or the defendant's privilege against self-incrimination. The court noted that the defendant's communications with the defense mental health expert were not covered by the attorney-client privilege, and even if the expert was the agent of the defendant's attorneys, he clearly lost such a privilege once he testified.

(1) Parts of Murder Victim's Handwritten Diary Were Properly Admitted Under Rule 803(3) to Show Victim's State of Mind
(2) Statements of Four State's Witnesses Who Had Died Before Trial Were Properly Admitted Under Residual Hearsay Exception, Rule 804(b)(5)

State v. King, 353 N.C. 457, 546 S.E.2d 575 (8 June 2001). The defendant was convicted of first-degree murder of his wife. (1) The court ruled that parts of the murder victim's handwritten diary were properly admitted under Rule 803(3) to show the victim's state of mind. See the court's analysis in its opinion. (2) The court ruled that statements of four state's witnesses who had died before the trial were properly admitted under the residual hearsay exception, Rule 804(b)(5). See the court's analysis in its opinion.

Capital Case Issues

(1) Trial Judge Did Not Err in Declining to Order Psychiatric Evaluation of Defendant's Capacity to Proceed, Based on Facts in This Case
(2) Trial Judge Did Not Err in Ordering Defense Counsel to Defer to Defendant's Wishes Not to Present Mitigating Evidence in Capital Sentencing Hearing, Based on Facts in This Case

State v. Grooms, 353 N.C. 50, 540 S.E.2d 713 (21 December 2000). The defendant was convicted of first-degree murder and sentenced to death. (1) The defense counsel twice raised the issue of the defendant's capacity to proceed based on the defendant's refusal to present mitigating evidence at his capital sentencing hearing. The court ruled that the trial judge did not err in declining to order a psychiatric evaluation of the defendant's capacity to proceed, based on the facts in this case. The court stated that the record disclosed that the defendant was adamant and unequivocal about not wanting a mental health examination; the defendant fully understood the proceedings and his rights; the defendant assisted in his own defense throughout the trial by directing the filing of motions, the questioning of witnesses, and the presentation of evidence; the defendant fully understood the ramifications of his decision not to present mitigating evidence during the sentencing hearing; and the defendant's outbursts during trial occurred during the voir dire of five Rule 404(b) witnesses indicated the defendant's deliberate intent to intimidate these witnesses. In the absence of any evidence suggesting that defendant may have been incapable of proceeding, the court concluded that the trial judge did not err in deciding not to order the evaluation. (2) The court ruled that the trial judge did not err in ordering defense counsel to defer to the defendant's wishes not to present mitigating evidence in his capital sentencing hearing. Citing State v. White, 349 N.C. 535, 508 S.E.2d 253 (1998), the court noted that the Eighth and Fourteenth Amendments do not require a defendant to acquiesce in a trial strategy to present mitigating evidence when the defendant and his counsel reach an absolute impasse. The trial judge had discussed the defense counsel's position with the defendant, and the defendant reiterated that he understood his rights and the consequences of his decision; but the defendant still adamantly refused to present mitigating evidence. The defendant said that he was innocent of the charges and, if found guilty, would rather be dead than spend the rest of his life in prison.

(1) Victim Impact Evidence Was Admissible at Capital Sentencing Hearing
(2) Trial Judge's Jury Instruction (Which Was Not Pattern Jury Instruction) on Aggravating Circumstance G.S. 15A-2000(e)(5) (Murder Committed During Commission of Felony) Was Erroneous
(3) Aggravating Circumstance G.S. 15A-2000(e)(6) (Murder Committed for Pecuniary Gain) May Exist Even When Financial Gain Is Not Defendant's Primary Motivation
(4) Trial Judge Did Not Err in Submitting Both Aggravating Circumstances G.S. 15A-2000(e)(5) (Murder Committed During Commission of Felony of Armed Robbery) and G.S. 15A-2000(e)(6) (Murder Committed for Pecuniary Gain) Because They Were Not Supported by Same Evidence

State v. Davis, 353 N.C. 1, 539 S.E.2d 243 (21 December 2000). The defendant was convicted of first-degree murder and sentenced to death for the murder of his aunt. (1) The court ruled, citing State v. Reeves, 337 N.C. 700, 448 S.E.2d 802 (1994), that victim impact evidence by a long time friend of the victim was properly admitted at the sentencing hearing. The friend testified about the impact of the victim's death on him at his workplace and when he was at home—the victim was constantly on his mind. (2) The court ruled that the trial judge's jury instruction (which was not the pattern jury instruction) on G.S. 15A-2000(e)(5) (murder committed during commission of felony) was erroneous. The instruction did not require that the murder must be committed while the defendant was engaged in the commission of an armed robbery. (See the instruction discussed in the opinion.) (3) The court ruled, relying on State v. Moore, 335 N.C. 567, 440 S.E.2d 797 (1994) and distinguishing State v. Bishop, 343 N.C. 518, 472

S.E.2d 842 (1996), that aggravating circumstance G.S. 15A-2000(e)(6) (murder committed for pecuniary gain) may exist even when financial gain is not the defendant's primary motivation. (4) The court ruled, citing State v. Gay, 334 N.C. 467, 434 S.E.2d 840 (1993) and other cases, that the trial judge did not err in submitting both aggravating circumstances G.S. 15A-2000(e)(5) (murder committed during commission of felony of armed robbery) and G.S. 15A-2000(e)(6) (murder committed for pecuniary gain) because they were not supported by the same evidence. The jury instructions carefully distinguished between the property that was the subject of the armed robbery aggravating circumstance from the different property that was the subject of the pecuniary gain aggravating circumstance.

(1) Effect on Defendant's Friend of Impact of Defendant's Execution (If Sentenced to Death) Is Not Mitigating Circumstance in Capital Sentencing Hearing
(2) Sufficient Evidence of Aggravating Circumstance G.S. 15A-2000(e)(4) (Murder Committed to Avoid or Prevent Arrest)

State v. Hardy, 353 N.C. 122, 540 S.E.2d 334 (21 December 2000). The defendant was convicted of first-degree murder and sentenced to death. (1) The court ruled the effect on the defendant's friend of the impact of the defendant's execution (if sentenced to death) is not a mitigating circumstance. Citing State v. Locklear, 349 N.C. 118, 505 S.E.2d 277 (1998), the court noted that a third party's feelings are irrelevant as a mitigating circumstance. (2) The court ruled that there was sufficient evidence of aggravating circumstance G.S. 15A-2000(e)(4) (murder committed to avoid or prevent arrest) in an armed robbery. The court stated that the defendant's comment to a co-worker that "[the victim] won't be able to tell it" because "I'm going to kill him" could certainly lead a reasonable jury to find that one purpose in killing the victim was to avoid apprehension.

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

State v. Holman, 353 N.C. 174, 540 S.E.2d 18 (21 December 2000). The defendant was convicted of first-degree murder of his wife and sentenced to death. The court ruled, distinguishing State v. Moose, 310 N.C. 482, 313 S.E.2d 507 (1984), that there was sufficient evidence of aggravating circumstance G.S. 15A-2000(e)(9) (especially heinous, atrocious, or cruel). The victim was in her car being chased by the defendant in his car. He rammed her car with his car. She feared being killed by him. She saw an officer's car in a parking lot and stopped there. The officer told her to wait while other officers arrived, and the officer left to find the defendant. The defendant managed to get to the parking lot before other officers arrived. He approached her and then shot and killed her with a shotgun. The court concluded that the defendant's method in carry out the killing was conscienceless and pitiless, inflicting excessive fear and psychological terror.

Trial Judge Did Not Err in Declining to Admit Evidence and to Submit as Nonstatutory Mitigating Circumstance That Accomplice Receive Life Imprisonment for Same Murders; Court Rejects Argument That *State v. Roseboro* Acknowledged Relevance of Such Evidence

State v. Meyer, 353 N.C. 92, 540 S.E.2d 1 (21 December 2000). The defendant was convicted of two counts of first-degree murder and was sentenced to death for both counts. The court ruled that the trial judge did not err in failing to admit evidence of the accomplice's life sentences for both murders and declining to submit to the jury the nonstatutory mitigating circumstance that the defendant's accomplice received life sentences. The court, citing State v. Smith, 352 N.C. 531, 532 S.E.2d 773 (2000) and State v. Slidden, 347 N.C. 218, 491 S.E.2d 225 (1997), stated that it had repeatedly ruled that an accomplice's sentence for the same murder is irrelevant in a capital sentencing hearing; it is neither an aspect of the defendant's character or record nor a mitigating circumstance. The court rejected the defendant's

argument that State v. Roseboro, 351 N.C. 536, 528 S.E.2d 1(2000) acknowledged the relevance of such evidence.

Trial Judge in Capital Trial Did Not Err in Requiring That Objections During Witness's Testimony Be Made by Only One of Two Appointed Attorneys for Indigent Defendant

State v. Call, 353 N.C. 400, 545 S.E.2d 190 (4 May 2001). The defendant was convicted of first-degree murder and sentenced to death. The court ruled, relying on State v. Frye, 341 N.C. 470, 461 S.E.2d 664 (1995), that the trial judge did not err in requiring that objections during a witness's testimony be made by only one of two appointed attorneys for the indigent defendant. This requirement did not violate the defendant's statutory right to two counsel under G.S. 7A-450(b1).

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

State v. King, 353 N.C. 457, 546 S.E.2d 575 (8 June 2001). The defendant was convicted of first-degree murder of his wife and sentenced to death. The state presented evidence at the capital sentencing hearing that the defendant had previously been convicted of first-degree murder of a former wife (the killing occurred in 1967). The court ruled, relying on State v. McNeil, 350 N.C. 657, 518 S.E.2d 486 (1999), that the trial judge did not err, based on this evidence, in not submitting mitigating circumstance G.S. 15A-2000(f)(1) (no significant history of prior criminal activity).

North Carolina Court of Appeals

Criminal Offenses and Criminal Procedure

(1) No Double Jeopardy Violation When Defendant Was Convicted of Attempted First-Degree Murder and Assault with Deadly Weapon with Intent to Kill Inflicting Serious Injury Based on Same Conduct
(2) Sufficient Evidence of Intent to Kill to Support Both Convictions

State v. Peoples, 141 N.C. App. 115, 539 S.E.2d 25 (19 December 2000). (1) The court ruled that there was no double jeopardy violation when the defendant was convicted of attempted first-degree murder and assault with deadly weapon with intent to kill inflicting serious injury based on the same conduct. Each offense has at least one element that is not contained in the other offense (deadly weapon and serious injury in felonious assault and premeditation and deliberation in attempted first-degree murder). See also State v. Washington, 141 N.C. App. 354, 540 S.E.2d 388 (29 December 2000) (similar ruling). (2) The court ruled that there was sufficient evidence of intent to kill to support both convictions. The victim hit the defendant in the face. About two hours later, the defendant slowly pulled up in a car next to the victim (who was walking), got out of the car, and pointed a gun directly at the victim. The defendant fired and missed. The victim started to run away. The defendant then paused and fired again while the victim was fifteen feet away, hitting the victim in the lower left leg. The defendant approached the victim in an angry manner and retreated only on the urging of another person.

Although Defendant Was Unconstitutionally Detained for Domestic Violence Misdemeanor Assault Charge under *State v. Thompson* Ruling, Defendant Was Not Entitled to Dismissal of Later Charge of Felonious Assault, Based on Facts in This Case

State v. Clegg, 142 N.C. App. 35, 542 S.E.2d 269 (6 February 2001). The defendant was arrested for assault on female about 7:00 p.m. on Saturday, February 28, 1998, and placed in custody by a magistrate

pursuant to G.S. 15A-534.1 (only judge may set conditions of pretrial release within 48 hours of arrest for certain domestic violence offenses). Although both district court and superior court convened in the morning of Monday, March 2, 1998, the defendant was not taken to district court until 2:00 p.m., and bond was set some time between then and 5:00 p.m. The state later determined that the victim's injuries were more serious than originally thought, and on March 25, 1998, the state dismissed the charge of assault on a female and charged him with assault with a deadly weapon inflicting serious injury. The court ruled that although the defendant's constitutional rights were violated under State v. Thompson, 349 N.C. 483, 508 S.E.2d 277 (1998), he was not entitled to the dismissal of the later charge of felonious assault, based on the facts in this case. The court ruled that the defendant failed to prove, as required under G.S. 15A-954(a)(4), that he was irreparably prejudiced in the prosecution of the felonious assault charge.

(1) Attempted Armed Robbery Conviction Did Not Merge with Convictions of First-Degree Felony Murder or First-Degree Burglary, Even Though Attempted Armed Robbery Was Intended Felony of Burglary
(2) Insufficient Evidence to Support First-Degree Burglary Based on Jury Instruction Requiring That State Prove Defendant Personally Committed Breaking
(3) Court Remands First-Degree Felony Murder Based on Burglary for Retrial of First-Degree Felony Murder Based on Felonious Breaking or Entering in Which Deadly Weapon Was Used

State v. Cunningham, 140 N.C. App. 315, 536 S.E.2d 341 (17 October 2000). The defendant was convicted of attempted armed robbery, first-degree burglary, and first-degree felony murder based on first-degree burglary as the underlying felony. (1) The court ruled, relying on State v. Brady, 299 N.C. 547, 264 S.E.2d 66 (1980) and distinguishing State v. Rinck, 303 N.C. 551, 280 S.E.2d 912 (1981), that the attempted armed robbery conviction did not merge with convictions of first-degree felony murder or first-degree burglary, even though attempted armed robbery was the intended felony of burglary. (2) The evidence at trial showed that the defendant committed a burglary with several people. The judge did not instruct the jury on acting in concert or constructive breaking; he only instructed under a theory of an actual breaking. The court ruled that therefore the state was required to prove that the defendant personally committed the breaking. The court then examined the evidence and found that the state's evidence failed to do so. The court reversed the defendant's conviction of first-degree burglary. (3) Having reversed the first-degree burglary conviction, the court then discussed the disposition of the first-degree felony murder conviction that was based on the underlying felony of first-degree burglary. The court ruled, citing State v. Wilson, 345 N.C. 119, 478 S.E.2d 507 (1996), that the Due Process Clause barred it from upholding the first-degree felony murder conviction based on the lesser felony of felonious breaking or entering in which a deadly weapon was used, because that theory was never submitted to the jury. The court set aside the first-degree felony murder conviction and remanded for retrial of first-degree felony murder limited to the theory of felonious breaking or entering in which a deadly weapon was used (that is, the state was precluded at retrial from using the theory of first-degree burglary as the underlying felony).

(1) Testing Evidence Obtained from Search Warrant for Blood and Urine of Arrested Impaired Driver Was Admissible under G.S. 20-16.2(c), Although Driver Had Previously Refused to Give Blood When Requested under Implied Consent Law
(2) State's Expert Was Properly Permitted to Give Extrapolation Testimony Concerning Defendant's Blood Alcohol Level at Time of Defendant's Driving

State v. Davis, 142 N.C. App. 81, 542 S.E.2d 236 (6 February 2001). The defendant drove through a red light and struck another vehicle. He was convicted of DWI and running a red light. (1) An officer arrested the defendant and took him to a hospital for a blood test. A chemical analyst advised him of his rights under North Carolina's implied consent law, but the defendant refused to take a blood test. A search warrant was then obtained, and the defendant submitted to testing of his blood and urine. Evidence of the

test results was admitted at trial. The court ruled, relying on State v. Drdak, 330 N.C. 587, 411 S.E.2d 604 (1992), that the test result evidence was admissible under G.S. 20-16.2(c) (refusal under implied consent law does not preclude testing under "other applicable procedures of law"); see also G.S. 20-139.1(a). The court also rejected the defendant's due process argument that because he was told that he had a right to refuse to be tested, no test can thereafter be given. (2) The court ruled, relying on State v. Catoe, 78 N.C. App. 167, 336 S.E.2d 691 (1985), that the state's expert witness was properly permitted to give extrapolation testimony concerning the defendant's blood alcohol level at the time of the defendant's driving. The witness testified that the defendant's blood alcohol concentration at the time of the accident was in the range of 0.066 to 0.076 (the hospital blood test result was 0.013).

Trial Judge Erred in Failing to Give Voluntary Intoxication Instruction for Felony of Common Law Robbery in First-Degree Felony Murder Charge

State v. Golden, 143 N.C. App. 426, 546 S.E.2d 163 (15 May 2001). The defendant was tried for first-degree murder based on premeditation and deliberation and felony murder, the felony being common law robbery. The jury convicted the defendant solely on the felony murder theory. The trial judge gave a voluntary intoxication instruction for first-degree murder based on premeditation and deliberation but refused to give the instruction for the common law robbery in the first-degree felony murder charge. The court ruled that there was sufficient evidence to support the voluntary intoxication instruction for common law robbery, which is a specific intent crime. The evidence showed the defendant was intoxicated from consuming a number of beers, one-half of a fifth of gin, and two rocks of crack cocaine in about four hours. The defense expert, qualified in the fields of addiction medicine and addiction psychiatry, testified that this amount of alcohol, combined with past alcohol abuse, drug use, and low I.Q., would impair the defendant's ability to form the specific intent to rob.

Unemancipated Minor in Job Corps Program Was In Custody to Sustain Conviction of Sexual Activity by Custodian under G.S. 14-27.7(a)

State v. Jones, 143 N.C. App. 514, 548 S.E.2d 167 (15 May 2001). The defendant, a recreational assistant at a Job Corps Civilian Conservation Center, had consensual sexual relations with an unemancipated minor who was in the Job Corps. The court ruled, after examining the facts involving the operation of the Job Corps and relying on the analysis in State v. Raines, 319 N.C. 258, 354 S.E.2d 486 (1987), that the unemancipated minor was in custody to sustain the defendant's conviction of sexual activity by a custodian under G.S. 14-27.7(a).

(1) Jury Need Not Unanimously Find Same Aggravating Factors to Convict of Felonious Speeding to Elude Arrest (G.S. 20-141.5)
(2) Indictment's Allegation Using Conjunction "And" in Alleging Alternative Theories Constituting One Offense Does Not Require Proof of All Theories

State v. Funchess, 141 N.C. App. 302, 540 S.E.2d 435 (29 December 2000). The defendant was convicted of felonious speeding to elude arrest under G.S. 20-141.5. The judge charged the jury that it may convict the defendant if jury found beyond a reasonable doubt two of the three aggravating factors alleged in the indictment: (i) speeding in excess of 15 miles over the speed limit; (ii) reckless driving; and (iii) driving while license revoked. (1) The court ruled, relying on State v. Hartness, 326 N.C. 561, 391 S.E.2d 177 (1990), that the jury need not unanimously find the same aggravating factors to convict the defendant of this offense. The various aggravating factors are not separate offenses but are merely alternate ways of committing one offense. (2) The court ruled, relying on State v. Moore, 315 N.C. 738, 340 S.E.2d 401 (1986), that an indictment's allegation using the conjunction "and" in alleging alternative theories constituting one offense does not require proof of all theories. Thus, the use of the conjunctive

"and" when alleging the three aggravating factors in this case did not require the state to prove all three factors; only two factors were required to be proved.

(1) Armed Robbery Indictment's Allegation of Two Victims and Jury Instruction Naming One Person Was Not Fatal Variance
(2) Trial Judge Did Not Err in Refusing to Submit Lesser Offense of Second-Degree Kidnapping When There Was No Evidence That Victims Were Released in Safe Place

State v. Parker, 143 N.C. App. 680, 550 S.E.2d 174 (5 June 2001). (1) An armed robbery indictment's allegation of two victims and the jury instruction naming one person was not a fatal variance. The use of a conjunctive in an indictment does not require the state to prove alternative matters alleged; see State v. Montgomery, 331 N.C. 559, 417 S.E.2d 742 (1992). (2) The defendant was charged with first-degree kidnapping. The court ruled that the trial judge did not err in refusing to submit the lesser offense of second-degree kidnapping when there was no evidence that victim was released in safe place. The court noted, citing State v. Jerrett, 309 N.C. 239, 307 S.E.2d 339 (1983), that a defendant's conscious, willful action to assure that his victim is released in a place of safety is necessary to show that the victim was left in a safe place. The facts in this case essentially showed that the defendants fled the crime scene and the victims were left there; this was insufficient evidence of their leaving the victims in a safe place [see also State v. Raynor, 128 N.C. App. 244, 495 S.E.2d 176 (1998) (defendant fled victim's home—victim was not released in safe place)].

Sufficient Evidence of Purpose to Terrorize Victim to Support Kidnapping Conviction

State v. Baldwin, 141 N.C. App. 596, 540 S.E.2d 815 (29 December 2000). The defendant was convicted of second-degree kidnapping of his wife, based on restraining, confining, and removing her for the purpose of terrorizing her. The court ruled that there was sufficient evidence of the purpose to terrorize her to support the kidnapping conviction. The defendant, while brandishing a loaded gun, confined her in her apartment against her will for about twenty hours. She was not permitted to leave the apartment, despite her repeated requests to do so. The defendant repeatedly threatened to kill himself, pointing the gun at his own head, and stated that he wanted to kill himself in front of her. The victim testified that she was petrified. See also State v. Guice, 141 N.C. App. 177, 541 S.E.2d 474 (29 December 2000), *reversed on other grounds,* 353 N.C. 731, 551 S.E.2d 112 (2001) (sufficient evidence of purpose to terrorize victim to support kidnapping conviction).

Trial Judge Did Not Err in Giving Instruction on Doctrine of Possession of Recently-Stolen Property

State v. Pickard, 143 N.C. App. 485, 547 S.E.2d 102 (15 May 2001). The defendant was convicted of larceny from the person. The evidence showed that the defendant grabbed the victim's purse from her arm. Among the items in the purse was an address book that listed the victim's family members and friends. The address book was found in the defendant's car three days after the larceny. The court ruled that this was sufficient evidence to support a jury instruction on the doctrine of possession of recently-stolen property. The court also rejected the defendant's argument that the instruction should not have been given because the address book was not listed in the indictment.

Prior Traffic Convictions Were Not Too Remote in Time to Prove Malice in Second-Degree Vehicular Murder Prosecution

State v. Miller, 142 N.C. App. 435, 543 S.E.2d 201 (20 March 2001). The defendant was convicted of second-degree vehicular murder based on his collision with another vehicle in 1998. He was driving while impaired (blood alcohol concentration of 0.22) and collided head on with a vehicle in the other lane of

traffic. The state introduced the defendant's 1982 reckless driving conviction, 1983 DWI conviction, and 1985 DWI and reckless driving convictions to prove malice. The court ruled, relying on State v. Rich, 351 N.C. 386, 527 S.E.2d 299 (2000), State v. McAllister, 138 N.C. 252, 530 S.E.2d 859 (2000), and State v. Grice, 131 N.C. App. 48, 505 S.E.2d 166 (1998), that the defendant's convictions were not too remote in time to be admissible.

No Fatal Variance with False Pretenses Indictment

State v. Walston, 140 N.C. App. 327, 536 S.E.2d 630 (17 October 2000). A false pretenses indictment alleged that the defendant obtained $10,000.00 in United States currency. The court ruled, relying on State v. Wilson, 34 N.C. App. 474, 238 S.E.2d 632 (1977), that there was not a fatal variance between the indictment and evidence at trial when the evidence showed that the defendant improperly deposited a check in the amount of $10,000.00 into a bank account. The court stated that whether the defendant received $10,000.00 in cash or deposited $10,000.00 in a bank account, he obtained something of monetary value that was the crux of the offense.

Forensic Drug Chemist's Sampling Technique Was Sufficient to Prove Weight of Heroin for Drug Trafficking Offenses, and Defendant's Request for Lesser-Included Offense Instruction Was Properly Denied

State v. Holmes, 142 N.C. App. 614, 544 S.E.2d 18 (3 April 2001). The defendant was convicted of two heroin trafficking cases in which the state was required to prove that the heroin weighed 28 grams or more. The state's forensic drug chemist testified that he examined each of the 671 bags that contained an off-white or tan substance. He randomly selected 50 bags that was a larger number than the usual sample size. He then weighed the 50 bags to assure himself that the average weight was within an acceptable range. He determined the average weight of the 50 bags to be .0462 grams per bag, with only a slight variance in the weight of the individual bags. He then calculated the total weight of the heroin to be 31 grams by multiplying .0462 by 671. The court ruled, relying on State v. Myers, 61 N.C. App. 554, 301 S.E.2d 401 (1983), State v. Hayes, 291 N.C. 293, 230 S.E.2d 146 (1976), and State v. Harding, 110 N.C. App. 155, 429 S.E.2d 416 (1993), that this was sufficient evidence to prove that the collective weight of the heroin was 28 grams or more. The court also ruled that the defendant's request for a lesser-included offense instruction (possessing 14 grams or more, but less than 28 grams) was properly denied.

Prisoner Was Not an Employee under Larceny by Employee, G.S. 14-74

State v. Frazier, 142 N.C. App. 207, 541 S.E.2d 800 (6 February 2001). The court ruled that the defendant, a prisoner assigned to work in the prison canteen, was not an employee under the offense of larceny by employee, G.S. 14-74.

Trial Judge Erred in Jury Instruction on First-Degree Burglary by Instructing on Intent to Commit Second-Degree Murder, Which Is Logical Impossibility

State v. Jordan, 140 N.C. App. 594, 537 S.E.2d 843 (21 November 2000). The trial judge instructed the jury on first-degree burglary with the intended felony being second-degree murder. The court ruled, relying on State v. Coble, 351 N.C. 448, 527 S.E.2d 45 (2000) (attempted second-degree murder is not an offense), that the trial judge erred. An intent to commit second-degree murder is a logical impossibility. The court also noted an erroneous statement in N.C.P.I. Crim. 206.30, which uses the term "intent to kill" in discussing the element of the defendant's intentionally and with malice killing the victim with a deadly weapon. The court noted that intent to kill is not an element of second-degree murder.

State's Evidence That Common Law Robbery Victims Were Given Threatening Notes by Defendant Supported Judge's Decision Not to Submit Lesser Offense of Larceny from Person

State v. White, 142 N.C. App. 201, 542 S.E.2d 265 (6 February 2001). The defendant was convicted of three common law robberies that occurred at three different convenience stores during the same night. During each robbery the defendant gave each victim a note that essentially said to give him the money or I'll blow your head off. Each victim testified about being in fear of the defendant. The court ruled that the judge properly refused to submit the lesser offense of larceny from the person because the evidence was unequivocal that fear and compliance with the threat were the natural and actual consequences of the victims' receiving the notes—which clearly threatened to kill them. This evidence satisfied the assault element of common law robbery. The court stated that no rational trier of fact could have found that the victims' fear of immediate bodily harm was unreasonable under the circumstances.

Evidence Supported Two Convictions of Conspiracy to Commit First-Degree Murder

State v. Choppy, 141 N.C. App. 32, 539 S.E.2d 44 (19 December 2000). The defendant was convicted of several counts of felonious assault and attempted first-degree murder and two counts of conspiracy to commit first-degree murder. The defendant and others committed felonious assaults on three victims on the Blue Ridge Parkway; one of the conspiracy convictions was based on these assaults. The defendant and the others then agreed to go home. While driving there, they saw a black person walking on a sidewalk and committed a racially-motivated felonious assault—the other conspiracy conviction was based on this assault. The court ruled that this evidence support the defendant's two conspiracy convictions; the court noted the different objectives of the assaults, the time interval between them, and the agreement to go home after the first attack. There were two separate agreements to support the two conspiracy convictions.

(1) Evidence of Defendant's Fingerprints Found at Crime Scene Was Insufficient to Support Convictions, Based on Facts in This Case
(2) Defendant's Stipulation to Convictions Establishing Habitual Felon Status, In Absence of Judge's Inquiry Establishing Record of Guilty Plea, Was Insufficient to Support Adjudication as Habitual Felon

State v. Gilmore, 142 N.C. App. 465, 542 S.E.2d 694 (20 March 2001). The defendant was convicted of felonious breaking or entering of a store and felonious larceny. He then was adjudicated a habitual felon. (1) Evidence showed that a store window was broken, which was the place of entry to commit the offenses. The defendant's fingerprints were found on a broken piece of glass found outside the store. A store employee testified that he had seen the defendant (lawfully) shopping in the store earlier that day; the court noted that the defendant's fingerprints may have been impressed before the crime was committed. The court ruled, relying on State v. Atkins, 56 N.C. App. 728, 289 S.E.2d 602 (1982) and State v. Bass, 303 N.C. 267, 278 S.E.2d 209 (1981), that the fingerprint evidence was insufficient to support the defendant's convictions. (2) The defendant stipulated to the three prior convictions alleged in the habitual felon indictment and to his habitual felon status. However, the issue was not submitted to the jury, and the defendant did not plead guilty to being a habitual felon. The court ruled that the defendant was improperly adjudicated a habitual felon. There was no court inquiry establishing a record of a guilty plea.

Indictment Properly Alleged Habitual DWI

State v. Lobohe, 143 N.C. App. 555, 547 S.E.2d 107 (15 May 2001). The court ruled that an indictment properly alleged habitual DWI (G.S. 20-138.1) as required by G.S. 15A-928. The first count alleged

impaired driving (using the term "feloniously"). The second count alleged three prior DWI convictions, giving the dates of the convictions and the courts in which the defendant had been convicted.

Fax of Certified Copy of Conviction Was Sufficient to Prove Conviction in Habitual Felon Hearing, Based on Facts in This Case

State v. Wall, 141 N.C. App. 529, 539 S.E.2d 692 (29 December 2000). The court ruled that a fax of a certified copy of a conviction was sufficient to prove a conviction in a habitual felon hearing. The court stated, relying on the reasoning in State v. Jordan, 120 N.C. App. 364, 462 S.E.2d 234 (1995) [faxed copy of prior conviction admissible under former G.S. 15A-1340.4(e) in Fair Sentencing Act hearing] that the methods of proving a conviction in G.S. 14-7.4 are permissive, not mandatory. The court noted that the judge carefully examined the fax, which showed that it represented a document that was stamped with a seal showing it to be a true copy of the original that was signed by the clerk of superior court. The judge found that the fax was a reasonable copy of the seal. The defendant did not contend that the fax was inaccurate or incomplete, but only that its admission did not comply with G.S. 14-7.4.

Trial Judge Erred in Requiring Trial on Same Day Defendant Was Formally Arraigned in County Governed by G.S. 15A-943, Based on Facts in This Case

State v. Cates, 140 N.C. App. 548, 537 S.E.2d 508 (7 November 2000). The defendant was indicted for first-degree kidnapping (which listed the intended felonies as second-degree rape and second-degree sex offense), first-degree rape, and first-degree sex offense. The court calendar, prepared by the district attorney, listed the offenses for trial as first-degree kidnapping, second-degree rape, and second-degree sex offense. Based on the calendar and kidnapping indictment, defense counsel assumed that the defendant would be tried for first-degree kidnapping, second-degree rape, and second-degree sex offense. However, the prosecutor announced that the defendant would be tried for first-degree kidnapping, first-degree rape, and first-degree sex offense. The evidence showed that the defendant had never been arraigned and had never waived arraignment for any of the offenses in the indictment, so the defendant was then formally arraigned. Based on the prosecutor's announcement of the decision to prosecute for the first-degree rape and sex offense, the defense counsel moved for a continuance for one week so counsel could reinitiate plea discussions and prepare for trial on the first-degree charges. The judge denied the continuance. The court noted that Durham County schedules twenty or more weeks of criminal sessions a year as provided in G.S. 15A-943(a) (requiring calendaring of arraignments), thereby making applicable the provision in G.S. 15A-943(b) that a defendant may not be tried without his or her consent in the week in which the defendant is arraigned. The court ruled that the state violated G.S. 15A-943(b) in this case and the defendant was not required to cite the statute to the trial court to preserve appellate review. Based on the ruling in State v. Shook, 293 N.C. 315, 237 S.E.2d 843 (1977), that a violation of this statutory provision constitutes automatic reversible error, the court ordered a new trial. [Note: The court did not discuss the interrelationship, if any, of G.S. 15A-941(d) (requiring defendant to file written request for arraignment) and G.S. 15A-943.]

Admission of Evidence of Robbery Victim's Identification of Defendant at Restaurant Parking Lot Violated Due Process, Based on Facts in This Case

State v. Pinchback, 140 N.C. App. 512, 537 S.E.2d 222 (7 November 2000). The defendant was convicted of armed robbery. The state's evidence showed that the defendant and an accomplice robbed the victim in Yanceyville. A law enforcement officer took the victim to a restaurant parking lot in Virginia, where two suspects had been stopped. The victim viewed the suspects while they were standing next to a vehicle that was surrounded by law enforcement vehicles. The victim said that these two men robbed him, but he could only positively identify the accomplice. This identification procedure took place about an hour after the robbery. The issue on appeal was the admissibility at trial of this pretrial

identification procedure under the Due Process Clause. The court noted, citing State v. Pigott, 320 N.C. 96, 357 S.E.2d 631 (1987), that even when a pretrial identification procedure is suggestive, the pretrial identification is nevertheless admissible unless under the totality of circumstances "there is a substantial likelihood of irreparable misidentification." The court then examined the due process factors set out in *Pigott*, discussed the facts in this case (see the court's opinion), and ruled that the trial judge erred in admitting evidence of the pretrial identification: the victim did not have an opportunity to view the defendant when the robbery occurred, the victim's degree of attention to the defendant's identity was minimal because the victim was unable to view the defendant, and the victim's description of the defendant was unreliable.

Tractor Portion of Tractor-Trailer Was Commercial Motor Vehicle for Commercial DWI Offense, Based on Facts in This Case

State v. Jones, 140 N.C. App. 691, 538 S.E.2d 228 (5 December 2000). The defendant was driving a tractor-trailer loaded with strawberries. He unhooked the trailer portion of the tractor-trailer and drove the tractor portion. While doing so, he was arrested for and later convicted of commercial DWI. The court ruled that there was sufficient evidence to support a finding that the tractor-trailer was a commercial motor vehicle (hereafter, CMV) as defined in G.S. 20-4.01(3d)(a) (Class A motor vehicle, designed or used to transport passengers or property, with combined GVWR of at least 26,001 pounds and includes as part of the combination a towed unit that has GVWR of at least 10,001 pounds). The defendant testified that the typical loaded weight of the tractor-trailer was between 78,000 and 79,000 pounds (well over the required 26,001 pounds). The defendant also testified that the tractor portion of the tractor-trailer weighed between 17,000 and 18,000 pounds; thus the evidence showed that the towed unit weighed at least 10,001 pounds, which is required for a Class A motor vehicle. The court rejected the defendant's argument that because he was driving the tractor for his own private use and had detached the trailer portion of the tractor-trailer, it was no longer a CMV. First, the court noted that the statute defining a CMV or the commercial DWI offense does not exclude from their application the private use of the vehicle. Second, by simply detaching the trailer portion of a tractor-trailer, the defendant did not change the nature of the vehicle or what it was designed or used to transport. Nor did it change the vehicle's GVWR, the maximum loaded weight of the vehicle.

Joinder of Offenses Was Improper

State v. Perry, 142 N.C. App. 177, 541 S.E.2d 746 (6 February 2001). The defendant was charged with and tried in Durham County for (1) several possession of stolen goods offenses relating from an armed robbery that occurred in Chapel Hill in September 1997, (2) three car break-ins that occurred in August and October 1997, and (3) armed robberies and other offenses involving home invasions targeting Hispanic individuals that occurred in Durham on three different dates in mid-October 1997. After the defendant's arrest for offenses under (3) above, law enforcement officers found property in the defendant's home taken from the offenses under (1) and (2) above, as well as the offenses in (3). The court ruled that the transactional connection between the offenses in (1) and (2), compared to the offenses in (3), was insufficient to join all the offenses for trial. The sole common denominator among the offenses was the finding of property from all three groups of offenses in the defendant's home. (See the court's discussion in its opinion.)

Insufficient Evidence to Support Instruction on Defense of Entrapment in Drug Case

State v. Thompson, 141 N.C. App. 698, 543 S.E.2d 160 (16 January 2001). The defendant was convicted of drug offenses involving the sale of cocaine to an undercover officer. An informant had previously purchased cocaine from the defendant and then had introduced the officer to the defendant. (See the discussion of the facts in the opinion.) The court ruled, relying on State v. Martin, 77 N.C. App. 61, 334

S.E.2d 459 (1985) and State v. Booker, 33 N.C. App. 223, 234 S.E.2d 417 (1977), that the defendant did not present sufficient evidence to support an instruction on the defense of entrapment. The court noted that (i) neither the informant nor the undercover officer provided gifts or made promises before asking the defendant to purchase the cocaine; (ii) the defendant's own testimony showed that he required little urging before acquiescing to their requests; and (iii) selling drugs as a favor and not profiting from the transaction does not by itself entitle a defendant to an entrapment instruction.

(1) Fatally Defective Arrest Warrant May Not Be Cured by Amendment, But State Could File Statement of Charges
(2) Two Year Statute of Limitations for Misdemeanors Is Not Tolled By Issuance of Fatally Defective Arrest Warrant

State v. Madry, 140 N.C. App. 600, 537 S.E.2d 827 (21 November 2000). The court examined an arrest warrant charging a misdemeanor wildlife violation and ruled that it was fatally defective. (1) The court noted that the state had amended the arrest warrant before trial in district court under G.S. 15A-922(f). However, the court stated, citing State v. Bohannon, 26 N.C. App. 486, 216 S.E.2d 424 (1975), that it would not consider this amendment because a fatally defective arrest warrant may not be cured by an amendment. The court noted that the state should have filed a statement of charges under G.S. 15A-922(b), thus indicating that a statement of charges is a valid process to substitute for a fatally defective arrest warrant. (2) The court ruled that although the two year statute of limitations for misdemeanors in G.S. 15-1 is tolled by the issuance of a valid arrest warrant, it is not tolled by a fatally defective arrest warrant. Thus the state could not recharge the wildlife violation because two years had already run from the date of the alleged violation. The court noted that the provision in G.S. 15-1 that permits the state to recharge a misdemeanor within one year after a charge has been found to be defective is limited to defective indictments.

Social Services Department's Records Contained Materially Exculpatory Evidence; New Trial Ordered

State v. McGill, 141 N.C. App. 98, 539 S.E.2d 351 (19 December 2000). Based on the defendant's pretrial motion, the judge conducted an in camera review of the records of two county social services departments. The judge ruled that the records of one department did not contain exculpatory information. The court, after examining the records, ruled that the records contained materially exculpatory information concerning the credibility of the state's witnesses and ordered a new trial. (See the discussion of the facts in the court's opinion.)

Defendant Established Prima Facie Case under *Batson v. Kentucky* to Require State to Give Reasons for Exercising Peremptory Challenges of Prospective Black Jurors

State v. McCord, 140 N.C. App. 634, 538 S.E.2d 633 (5 December 2000). The defendant was convicted of first-degree murder and other offenses. The defendant was black and the victim was white. The initial panel of prospective jurors consisted of ten white jurors and two black jurors, A and B. The defendant objected on *Batson* grounds to the state's use of peremptory challenges of A and B. Before ruling on whether the defendant had established a prima facie case to require the state to give reasons for the challenges, the trial judge allowed the state to offer reasons. The judge considered the reasons and ruled that they were non-discriminatory. (The court upheld the trial judge's ruling concerning jurors A and B.) Later during the voir dire, the state exercised peremptory challenges of two additional black jurors, C and D, and the defendant again objected on *Batson* grounds. The trial judge ruled that the defendant had failed to establish a prima facie case and did not require the state to offer reasons (and the state did not do so). The court ruled, relying on State v. Hoffman, 348 N.C. 548, 500 S.E.2d 718 (1998), that the defendant had established a prima facie case concerning jurors C and D. The court noted that the defendant was

black and the victim was white, and the state used its peremptory challenges to excuse four of the six black jurors in the jury pool, and the composition of the jury panel was eleven white jurors and one black juror.

Prosecutor's Jury Argument That Defendant Killed Before and He's Killed Again, When Defendant's Prior Manslaughter Conviction Had Been Admitted at Trial under Rule 609(b), Was Improper

State v. McEachin, 142 N.C. App. 60, 541 S.E.2d 792 (6 February 2001). The defendant was convicted of second-degree murder. The state was permitted to impeach his testimony at trial under Rule 609(b) by asking him if he had previously been convicted of voluntary manslaughter. The court ruled improper the prosecutor's jury argument that the defendant killed before and he's killed again and a later statement that the defendant had killed before; the court stated that this argument suggested to the jury that it could consider evidence of the defendant's prior manslaughter conviction as substantive evidence.

***Blackledge v. Perry* Bars State's Prosecution of Felony After State Tried Defendant for Lesser-Included Misdemeanor in District Court, and Defendant Then Appealed for Trial De Novo in Superior Court**

State v. Bissette, 142 N.C. App. 669, 544 S.E.2d 266 (3 April 2001). The defendant was charged with the felony of larceny by employee. In district court, the state reduced the charge to misdemeanor larceny. The defendant pleaded not guilty, was found guilty, and appealed for a trial de novo in superior court. The state then indicted the defendant for larceny by employee. The court ruled, relying on Blackledge v. Perry, 417 U.S. 21, 94 S. Ct. 2098, 40 L. Ed. 2d 628 (1974) (due process violation to indict defendant for felonious assault after he was convicted of misdemeanor assault arising from same facts and then appealed to superior court for trial de novo), that the state could not try the defendant for larceny by employee. [Note: This ruling does not apply when the state in a felony case in district court plea bargains with a defendant to plead guilty to a lesser-included misdemeanor, and then the defendant appeals for a trial de novo in superior court. See State v. Fox, 34 N.C. App. 576, 239 S.E.2d 471 (1977).]

Defendant Failed to Meet Requirements of G.S. 15A-1432(d) to Appeal Superior Court Judge's Order Reinstating Misdemeanor Charge That Had Been Dismissed by District Court Judge

State v. Nichols, 140 N.C. App. 597, 537 S.E.2d 825 (21 November 2000). A district court judge dismissed a misdemeanor charge because the statute was unconstitutional. The state appealed to a superior court judge, who reversed the district court judge's ruling and ordered the case remanded to district court for trial. The defendant filed an appeal of the superior court judge's order to the court of appeals. The court ruled that the defendant failed to meet the following requirements of G.S. 15A-1432(d) and dismissed the defendant's appeal: (1) the defendant did not certify to the superior court judge that the appeal was not being taken for the purpose of delay; and (2) the superior court judge's order did not determine that the case was appropriately justiciable in the appellate division as an interlocutory matter.

(1) Defendant Must Have Compelling Reasons to Call Prosecutor as Witness
(2) State's Providing Defendant With Transcript of Tape-Recorded Interview of State's Witness Complied with G.S. 15A-903(f)(2); Providing Tape Recording Was Not Required

State v. Ferguson, 140 N.C. App. 699, 538 S.E.2d 217 (5 December 2000). (1) The court ruled, citing State v. Simpson, 314 N.C. 359, 334 S.E.2d 53 (1985), that the trial judge did not abuse his discretion in denying the defendant's request to call the prosecutor as a witness concerning various issues in this case. A defendant must have compelling reasons to call a prosecutor as a witness. The court noted that the defendant was permitted to ascertain the information he sought through other witnesses. (2) The court

ruled that the state's providing the defendant with a transcript of a tape-recorded interview of a state's witness, which was a substantially verbatim copy of the recording, complied with G.S. 15A-903(f)(2). The court noted that the definition of a statement in G.S. 15A-903(f)(5)(b) includes a recording *or* a transcription. Thus, providing the tape recording was not required.

Judge Erred in Closing Hearing to Defendant, Defense Counsel, and Public on Disclosure of Confidential Informant's Identity Without Making Findings Before Closing Hearing

State v. Moctezuma, 141 N.C. App. 90, 539 S.E.2d 52 (19 December 2000). The defendant in a drug prosecution made a motion to disclose the identity of a confidential informant because the informant was a necessary witness in the case. The court stated that the judge erred in closing the hearing on this issue to the defendant, defense counsel, and the public without making findings supporting the need to close the hearing. (The judge apparently closed the hearing to be informed of the identity of the confidential informant.) See the discussion in the court's opinion on how a judge should handle this issue.

Sufficient Evidence Supported Trial Judge's Finding That Defendant Violated Probation Condition That He Have No Contact With Indecent Liberties Victim

State v. Tennant, 141 N.C. App. 524, 540 S.E.2d 807 (29 December 2000). The defendant was convicted of taking indecent liberties and placed on probation, with a condition that he have no contact with the victim. Evidence at the probation revocation hearing showed that the defendant went to the house of the victim's mother while the victim was present. The probation officer testified that he had repeatedly instructed the defendant not to go to the house where the victim was living. The probation officer admitted on cross-examination that he did not know if the defendant had communicated with the victim when he went to the house. The court ruled that this evidence was sufficient to support the judge's revocation order based on violating the "no contact" condition. The court rejected the defendant's argument that "contact" requires physical touching or verbal communication, particularly when the evidence in this case showed that the defendant was repeatedly instructed to stay away from the victim's home and place of employment and to cease all communication with her.

Expungement of Conviction under G.S. 90-96(e) Is Not Authorized for Defendant Who Was Over 21 Years of Age When Offense Committed

In re Expungement for Spencer, 140 N.C. App. 776, 538 S.E.2d 237 (5 December 2000). Spencer was convicted of simple misdemeanor possession of marijuana, an offense she committed when she was 22 years old. The court ruled that she was not authorized to receive an expungement of her conviction under G.S. 90-96(e) because she was over 21 years when she committed the offense [see "not over 21 years of age at the time of the offense" in the third paragraph of G.S. 90-96(e)].

Words "The End Is Near" on Computer's Screen Saver Was Insufficient to Prove "Threat" Element of Communicating Threats

State v. Mortimer, 142 N.C. App. 321, 542 S.E.2d 330 (20 February 2001). The defendant inserted the words, "The end is near," on the computer screen saver of a computer in a high school when rumors were circulating about a bomb in the high school on that day. The court ruled that this evidence, by itself, was insufficient to prove the "threat" element of the crime of communicating threats.

Arrest, Search, and Interrogation Issues

(1) Officer Had Reasonable Suspicion to Conduct Frisk, Based on Facts in This Case
(2) Officer Had Probable Cause to Seize Object Discovered During Frisk under Plain Feel Doctrine of *Minnesota v. Dickerson*

State v. Briggs, 140 N.C. App. 484, 536 S.E.2d 858 (7 November 2000). Officers were conducting a driver's license check in a high crime area. As one officer returned the defendant's license to the defendant, another officer recognized the defendant as someone whom he had previously arrested for cocaine offenses. The officer knew that the defendant was on probation and had been convicted of drug offenses more than once. Although the defendant denied that he had been drinking or taking drugs, the officer noted that the defendant was chewing gum "real hard" and his eyes were glassy and bloodshot. Also, the officer smelled the odor of burned cigar tobacco inside the vehicle coming from the defendant's person. When the officer asked about the smell, the defendant stated that he did not smoke cigars, but a female who was in the vehicle earlier had been smoking a cigar. The officer knew from his experience that drug users often smoked cigars to mask the smell of illegal drugs. The defendant declined the officer's request to search the defendant's vehicle. The officer then required the defendant to get out of the vehicle and frisked him for weapons. The officer was aware from his experience that drug dealers frequently carry weapons. The officer testified that during the frisk, "I felt a hard, cylindrical shape in [defendant's] pocket and it felt like a cigar holder; and I'm familiar with these because folks carry these frequently to keep their controlled substances in. It's like a little plastic test tube with a little cap on it; and there's really nothing else that's shaped exactly like that." The officer asked the defendant what that object was, and defendant stated, "A cigar holder." The officer said, "I thought you didn't smoke cigars," but the defendant did not respond. He then removed the cigar holder from the defendant's pocket and when he shook it, the cigar holder "rattled like it had a number of small hard objects in it." The officer opened the cigar holder, found ten rocks of crack cocaine inside, and arrested the defendant. (1) The court ruled, relying on State v. Butler, 331 N.C. 227, 415 S.E.2d 719 (1992) and State v. McGuirt, 122 N.C. App. 237, 468 S.E.2d 833 (1996), *aff'd per curiam*, 345 N.C. 624, 481 S.E.2d 288 (1997), that the officer had reasonable suspicion to conduct the frisk, based on the facts discussed above. (2) The court ruled that the officer had probable cause to seize the cigar holder under the plain feel doctrine set out in Minnesota v. Dickerson, 508 U.S. 366, 113 S. Ct. 2130, 124 L. Ed. 2d 334 (1993). The court discussed cases from other jurisdictions that have split on the issue whether the plain feel doctrine may satisfied when an officer feels a container whose shape itself does not reveal its identity as contraband. Courts upholding such seizures consider factors in addition to the officer's tactile perception to determine probable cause. Other courts declining to uphold such seizures have determined that touching the containers themselves cannot sustain a probable cause finding. The court adopted the view that it would consider the totality of circumstances in deciding whether an officer had probable cause to seize such a container when the officer felt it, and the court stated that the probable cause determination involves considering the evidence as understood by law enforcement officers. Based on the facts discussed above, the officer in this case had probable cause to seize the cigar holder.

Strip Search of Defendant Who Was Named in Search Warrant as Person to Be Searched for Drugs Did Not Violate Fourth Amendment, Based on Facts in This Case

State v. Johnson, 143 N.C. App. 307, 547 S.E.2d 445 (1 May 2001). Officers executed a search warrant authorizing a search of the defendant and his apartment for illegal drugs, based on information that the defendant was selling crack cocaine in his apartment. During the search, the officers seized two shotguns and a pair of electronic scales. An initial search of the defendant revealed almost $2,000 in small denominations. The officers then asked the defendant to remove his clothing and to bend over at the waist. When he did, they saw a piece of plastic protruding from his anus. The defendant complied with their request to remove the package, which contained 17 individually packaged bags of crack cocaine.

The court ruled that this strip search was reasonable under the totality of circumstances. The court stated that the strip search was not unreasonable simply because the officer did not articulate specific reasons in the search warrant application why a strip search was necessary [the court noted a case that ruled that reasons were not necessary, State v. Colin, 61 Wash. App. 111, 809 P.2d 228 (1991)]. Controlled substances could readily be concealed on a person so they would not be found without a strip search, and an officer testified at the suppression hearing that there is a trend toward hiding controlled substances in body cavities. The court also noted the approval of a strip search in State v. Smith, 342 N.C. 407, 464 S.E.2d 45 (1995) (pulling down defendant's pants far enough that officers could see the corner of a towel underneath the defendant's scrotum). The court also ruled that the search was conducted in a reasonable manner. Two male officers searched the defendant in his bedroom, and they did not touch him.

Information from Anonymous Phone Call Was Insufficient to Support Officer's Stop and Frisk, Based on Facts in This Case

State v. Brown, 142 N.C. App. 332, 542 S.E.2d 357 (20 February 2001). A detective received a call from his agency's 911 center stating that a "concerned citizen" had telephoned to complain that two black males were rolling marijuana cigarettes and selling crack cocaine on the porch of a vacant house under construction at a specified street corner. The citizen said that one of the black males was wearing a gray t-shirt and jeans while the other was wearing a black t-shirt and jeans. Two officers went to that house but did not see any black males on the porch. However, they saw three black males and a black female sitting on the porch of a house next door. Two of the males wore clothing fitting the description given by the caller. The defendant, the third male, was wearing a black pullover shirt and camouflage pants. The three men denied having any drugs. One officer frisked the defendant and, while doing so, the defendant attempted to pull away from the officer. He was then arrested for resisting an officer, and cocaine was found incident to the arrest. The court, relying on Florida v. J. L., 529 U.S. 266, 120 S. Ct. 1375, 146 L. Ed. 2d 254 (2000) (anonymous phone call describing black male with plaid shirt at bus stop was insufficient to support stop and frisk of that male), ruled that the information from the anonymous phone call was insufficient to support the officer's stop and frisk of the defendant. Because the cocaine was discovered as a fruit of the officer's illegal stop and frisk, the evidence must be suppressed. [Note: Based on Florida v. J. L., the information also was insufficient to support the stop and frisk of the two black males who matched the anonymous caller's description.]

Reasonable Suspicion Justified Forty-Five Minute Detention of Defendant During Traffic Stop, Based on Facts in This Case

State v. Munoz, 141 N.C. App. 675, 541 S.E.2d 218 (16 January 2001). The defendant was driving a tractor trailer truck with a car carrier on I-85 and was transporting a Ford Aerostar and a Nissan Sentra. A trooper stopped him for traffic violations, and later another trooper arrived. The defendant handed one of the troopers his license, registration, a notebook containing his log book, and a clipboard holding shipping documents and bills of lading. The troopers found inconsistencies in the defendant's log book and in the shipping documentation. The clipboard contained documents entitled "bill of lading" for the Aerostar and for other vehicles that were no longer on the carrier. There was no bill of lading for the Sentra. The defendant produced a fax that listed the Sentra's destination as Junior City, New Jersey, a contract number, and Miguel Angel as the contact person; there was no other documentation concerning the Sentra. The defendant told the troopers that he did not know Angel. The troopers also noted that the defendant smelled strongly of grease or fuel. The defendant told the troopers that he was receiving $200 per vehicle to transport (from Texas) the van to Delaware and the Sentra to New Jersey. One trooper sent the defendant back to his truck while checking the tags of the cars on the carrier and the other cars listed on the clipboard. After the checks were completed and the trooper received notice that the license and registration were valid, the trooper issued the defendant a warning citation for two motor vehicle violations and returned all the documentation to the defendant. About forty-five minutes elapsed between

the time the defendant was stopped until he was issued the citation. (The defendant then consented to a search of the vehicles, one of which contained cocaine.) Relying on State v. McClendon, 350 N.C. 630, 517 S.E.2d 128 (1999), the court ruled that the forty-five minute detention of the defendant was supported by reasonable suspicion of criminal activity: (1) the log book was not properly filled out and there were discrepancies in it; (2) the defendant did not have a bill of lading or an inspection for the Sentra but did have proper documentation for the van and other cars he had previously transported; (3) the defendant smelled like grease; and (4) the economics of traveling from Texas to Delaware and New Jersey for $200 per car appeared suspicious.

(1) Because Defendant Was Not Arrested, Search of Vehicle Could Not Be Justified as Search Incident to Arrest
(2) Canine Sniff of Exterior of Vehicle Was Not Search under Fourth Amendment
(3) Reasonable Suspicion Did Not Justify Detention Beyond Initial Traffic Stop and Thus Dog Sniff Occurring During Illegal Detention Was Unconstitutional

State v. Fisher, 141 N.C. App. 448, 539 S.E.2d 677 (29 December 2000). The state appealed a pretrial motion to suppress evidence that had been granted by the trial judge. Officer A radioed officer B to stop a vehicle because the driver was driving with a revoked driver's license. The evidence showed that the driver had a limited driving privilege that allowed the driver to drive until 8:00 p.m. The time of the stop was 8:20 p.m. Officer B took the defendant (the driver) back to his patrol car and prepared to write a citation for the DWLR offense (but the evidence at the suppression hearing indicated that the citation was not written until 8:54 p.m., over twenty minutes after the marijuana was seized). Meanwhile, officer A called a K-9 unit to the scene, and a drug dog alerted to the vehicle's front end. (The court's opinion does not specifically indicate the time that it took to bring the drug dog to the scene, but it may have been about ten minutes.) The officers searched under the hood and found marijuana inside the vehicle's firewall. The defendant was charged with several drug offenses. A magistrate set bond for these offenses, and the defendant made bond and was released. However, the defendant's citation for DWLR was never sworn before the magistrate to convert it to a magistrate's order under G.S. 15A-511(c). (1) The court, after examining many factual inconsistencies between the documentary evidence and the officers' testimony, ruled that the defendant was never arrested for DWLR. [Note: In effect, the court found that the officers had not in fact arrested the defendant for DWLR before the marijuana was found—that is, they only intended to issue a citation—and then arrested him for the drug offenses after the marijuana was found in the vehicle.] The court ruled, relying on Knowles v. Iowa, 525 U.S. 113, 119 S. Ct. 484, 142 L. Ed. 2d 492 (1998), that because the defendant had not been arrested (that is, only a citation had intended to be issued), the search of the vehicle could not be justified as a search incident to arrest. [Note: In any event, a search under the hood of a vehicle could not be justified as a search incident to arrest of the vehicle occupant because such a search is limited to the interior of the vehicle. See New York v. Belton, 453 U.S. 454, 101 S. Ct. 2860, 69 L. Ed. 2d 768 (1981).] (2) The court stated that a dog sniff of a vehicle's exterior is not a search under the Fourth Amendment, citing prior state appellate cases finding that the dog sniffs of the following objects were not searches: a passenger's luggage [State v. Odum, 119 N.C. App. 676, 459 S.E.2d 826 (1995)], a briefcase [State v. McDaniels, 103 N.C. App. 175, 405 S.E.2d 358 (1991)], an airplane [State v. Darack, 66 N.C. App. 608, 312 S.E.2d 202 (1984)], and a safety deposit box [State v. Rogers, 43 N.C. App. 475, 259 S.E.2d 572 (1979)]. The court also noted similar statements in United States v. Place, 462 U.S. 696, 103 S. Ct. 2637, 77 L. Ed. 2d 110 (1983) and City of Indianapolis v. Edmond, 531 U.S. 32, 121 S. Ct. 477, 148 L. Ed. 2d 333 (2000). (3) The court ruled, citing State v. Falana, 129 N.C. App. 813, 501 S.E.2d 358 (1998) and State v. McClendon, 130 N.C. App. 368, 502 S.E.2d 902 (1998), affirmed, 350 N.C. 630, 517 S.E.2d 128 (1999), that the officers in this case lacked reasonable suspicion to detain the defendant beyond the scope of the stop for the DWLR charge; thus the dog sniff occurred during an illegal detention and violated the Fourth Amendment. There was nothing to indicate any illegal conduct by the defendant. The court rejected the state's argument that officer A's

knowledge that the area of the traffic stop was notorious for its drug trade and that the defendant had been previously involved in drug-related activity was sufficient to detain the defendant beyond the initial stop.

When Officer Arrested Person For Violation That Was Infraction (For Which There Is No Authority to Arrest), Officer's Arrest May Be Still Be Justified If There Was Probable Cause for Related Misdemeanor

Glenn-Robinson v. Acker, 140 N.C. App. 606, 538 S.E.2d 601 (5 December 2000). This case involved a civil lawsuit in which the plaintiff sued a law enforcement officer and the officer's governmental unit for various torts related to the officer's alleged unconstitutional seizure and arrest of the plaintiff. The trial judge granted summary judgment for the civil defendants, and the plaintiff appealed. The plaintiff was a school bus driver whose bus was stopped in the traveled portion of a street, awaiting students to be dismissed from school. The officer was off-duty in private employment driving a tractor-trailer. The officer ordered the plaintiff to move the school bus. The officer eventually told the plaintiff that she was under arrest for violating a section of the city code (obstructing flow of vehicular traffic by stopping or parking a vehicle in the traveled portion of a street) that the court determined was an infraction under G.S. 14-4(b). The court noted that an officer has no authority to arrest for an infraction.

On appeal, the officer contended that he had probable cause to arrest the plaintiff for a violation of G.S. 20-114.1(a) (violating order of law enforcement officer related to traffic control), which is a misdemeanor. The court ruled that officer may seek to justify his arrest of the plaintiff under G.S. 20-114.l(a)—this statutory violation was based on the plaintiff's alleged refusal to move her bus from the travel lane, and thus was related to the infraction, which was parking the bus in the travel lane. The court relied on Trejo v. Perez, 693 F.2d 482 (5th Cir. 1982) (when officer arrested a person for offense A for which there was no probable cause, officer could still justify arrest for related offense B for which there was probable cause) and Graham v. Connor, 490 U.S. 386, 109 S. Ct. 1865, 104 L. Ed. 2d 443 (1989) (question is whether officer's actions are objectively reasonable).

Probable Cause and Exigent Circumstances Supported Officer's Following Defendant as He Entered Bathroom of Motel Room

State v. Frazier, 142 N.C. App. 361, 542 S.E.2d 682 (6 March 2001). The defendant and his girlfriend were staying long term in a motel room. The motel owners received an anonymous letter indicating that drugs were being sold in that motel room. They informed the defendant of the letter; the defendant neither denied nor confirmed that he was selling drugs. After speaking with the motel owners, an officer decided to do a "knock and talk." The girlfriend allowed the officer to enter the motel room. As the officer entered, he saw the defendant lying on a bed. The defendant got off the bed and walked toward the bathroom. The officer asked the defendant if the defendant had a problem with the officer coming in and talking with them. The defendant did not respond, but continued walking toward the bathroom. The officer repeated what he had said, and the defendant told the officer that he could come into the room. As the defendant continued to walk away from the officer, the defendant looked back in what the officer felt was "a suspicious sort of look." The officer asked the defendant to stop. Instead the defendant continued walking and made a "lunge" behind a wall and shut the bathroom door. The officer feared for his safety and the officers with him. The officer forced the bathroom door open and found the defendant between the door and the tub, with his hands in the ceiling tiles (where the officer later found crack cocaine and other items). The court ruled that, based on this evidence, the officer had probable cause and exigent circumstances to follow the defendant into the bathroom to search for illegal drugs. The court noted the following factors, among others, in determining probable cause: the defendant's suspicious behavior; flight from the officers; and the officer's knowledge of the defendant's past criminal conduct (the court noted that the anonymous letter in this case would have been insufficient by itself to establish probable cause). The court noted the following factors, among others, in determining exigent circumstances: a

defendant's fleeing or seeking to escape; the possible destruction of illegal drugs; and the degree of probable cause to believe the defendant committed the crime.

Evidence Was Sufficient to Show That Application for Search Warrant Was Sworn To Despite Absence of Statement on Application

State v. McCord, 140 N.C. App. 634, 538 S.E.2d 633 (5 December 2000). The application for a search warrant did not state on its face that it was sworn. However, the applicant attached a sworn affidavit to her application, and she testified that she signed the application in the issuing judicial official's presence after being sworn by the judicial official. The court ruled that this evidence was sufficient to show that the application was sworn to in compliance with G.S. 15A-244.

Court Upholds Officer's Juvenile Interrogation Rights Warning, But Urges Literal Compliance with G.S. 7B-2101

State v. McKeithan, 140 N.C. App. 422, 537 S.E.2d 526 (7 November 2000). An officer gave a juvenile an interrogation rights warning that included the statement, "If you cannot afford a lawyer one will be appointed for you before questioning if you wish." The defendant argued that the warning was deficient because it was contrary to statutory law that a juvenile is always entitled to an attorney regardless of financial resources. The court rejected this argument, citing rulings in State v. Flowers, 128 N.C. App. 697, 497 S.E.2d 94 (1998) and State v. Miller, 344 N.C. 658, 477 S.E.2d 915 (1996). However, the court stated that it urged law enforcement officers to comply literally with the provisions of G.S. 7B-2101, which in pertinent part provides that an officer must advise a juvenile that "the juvenile has a right to consult with an attorney and that one will be appointed for the juvenile if the juvenile is not represented and wants representation."

Officer's Testimony That Defendant, Who Had Given Oral Statement to Officer, Had Refused to Provide Written Statement Did Not Violate *Miranda* Right to Remain Silent

State v. Hanton, 140 N.C. App. 679, 540 S.E.2d 376 (5 December 2000). The defendant was arrested and given *Miranda* warnings, which he waived. He then gave an oral statement to an officer, but refused to provide a written a statement. The officer testified at trial the defendant told him "that he was no dummy and that he was not going to put anything in writing [and] don't try to trick me into your little games." The court ruled, relying on Connecticut v. Barrett, 479 U.S. 523, 107 S. Ct. 828, 93 L. Ed. 2d 920 (1987), that the defendant's refusal to put his oral statement into writing was not an assertion of the right to remain silent, and thus the officer's testimony was not improper.

Defendant's Reference to a Lawyer Before *Miranda* Warnings Had Been Given Was Admissible, Based on Facts in This Case

State v. Salmon, 140 N.C. App. 567, 537 S.E.2d 829 (21 November 2000). An officer arrested the defendant (who was fifteen but was tried as an adult) for murder and placed him in a patrol car. He was not given *Miranda* warnings. During the ride to the police station, the defendant voluntarily stated, "I didn't mean to do it." The defendant called the officer during the presentation of his defense to introduce this statement to support his primary defense that he did not intend to kill the victim because he did not believe the gun was loaded. During the state's cross-examination of the officer, he testified that after this voluntary statement, the defendant was informed that a youth detective would be speaking with him on his arrival at the station. The defendant then responded, "Not without my lawyer." The trial judge permitted the state to use this statement to rebut the defendant's mistake-of-fact defense. The state argued to the jury that, if the killing was truly a mistake, the defendant would not have needed to speak with a lawyer. The court ruled that the admission of the defendant's statement about his lawyer did not

unconstitutionally violate his exercise of the right to counsel. The court reasoned, relying on the analysis in Fletcher v. Weir, 455 U.S. 603, 102 S. Ct. 1309, 71 L. Ed. 2d 490 (1982), that the prohibition against using evidence of a defendant's invocation of the right to counsel after *Miranda* warnings have been given [see State v. Ladd, 308 N.C. 272, 302 S.E.2d 164 (1983)] does not apply to such an invocation before a defendant had been given those warnings.

Assertion of Fifth Amendment Privilege in Board of Adjustment Hearing Permitted Inference That Video Store Was Adult Establishment, Based on Facts in This Case

Davis v. Town of Stallings Board of Adjustment, 141 N.C. App. 489, 541 S.E.2d 183 (29 December 2000). The Town of Stallings Board of Adjustment held a hearing to determine whether petitioner Davis was operating an unauthorized adult establishment. At the hearing Davis and his wife both invoked their Fifth Amendment privilege against self-incrimination and refused to testify. The court ruled, relying on Gray v. Hoover, 94 N.C. App. 724, 381 S.E.2d 472 (1989) and other cases, that the Board of Adjustment properly could use their assertions of the privilege to infer that Davis was running an unauthorized adult establishment, based on the facts in this case.

Evidence

Court Sets Out Required Procedures When District Attorney Petitions Ex Parte to Superior Court Judge for Release of Confidential Internal Affairs and Personnel Files

In re Brooks, 143 N.C. App. 601, 548 S.E.2d 748 (5 June 2001). A district attorney petitioned a superior court judge for the release of the internal affairs and personnel files of two city police officers for use in an SBI investigation of an alleged assault of Brooks by the officers. There was no pending criminal or civil action when the district attorney filed the petitions. The court: (1) ruled, relying on In re Mental Health Center, 42 N.C. App. 292, 256 S.E.2d 818 (1979), that the language in G.S. 160A-168(c)(4) authorized the superior court judge to allow inspection of the officers' personnel files; the court noted that the legislature's failure to provide a procedure for doing so did not negate a judge's authority to order the inspection; (2) ruled that the district attorney in this case failed to follow the appropriate methods in petitioning the judge (see the analysis in the court's opinion); (3) ruled, relying on In re Superior Court Order, 315 N.C. 378, 338 S.E.2d 307 (1986), that the state must present to a superior court judge an affidavit or similar evidence setting forth facts or circumstances sufficient to show reasonable grounds to suspect that a crime has been committed and that the records sought are likely to bear on the investigation of that crime; (4) ruled that the judge, with the evidence presented by the district attorney, must decide whether the interests of justice require the issuance of an order; (5) stated that the superior court should docket petitions and orders under G.S. 160A-168(a)(4) per its rules for docketing "special proceedings" and a petition should state the statutory grounds that allow disclosure; and (6) stated that the judge could limit dissemination and use of disclosed materials to certain people, order an in camera inspection, or redact certain information from the files before they are disclosed.

(1) Witness's Prior Trial Testimony Was Admissible under Rule 804(b)(5) After Witness Asserted Fifth Amendment at Defendant's Trial
(2) Defendant's Prior Testimony at Accomplice's Trial Was Admissible at Defendant's Trial

State v. McNeill, 140 N.C. App. 450, 537 S.E.2d 518 (7 November 2000). The defendant was convicted of two counts of first-degree murder and other offenses. The evidence showed that he committed these murders with an accomplice. The accomplice and the defendant were tried separately, with the accomplice being tried before the defendant. At the accomplice's trial, the defendant voluntarily testified that the accomplice did not commit the murders. The accomplice testified and denied committing the murders. (1) The accomplice refused to testify at the defendant's trial, and the trial judge allowed the state

to introduce statements made by the accomplice at his own trial. The court ruled that the trial judge properly found that the accomplice was unavailable under Rule 804(a)(2) (refusal to testify). The court then applied the test [see State v. Smith, 315 N.C. 76, 337 S.E.2d 833 (1985)] for admitting evidence under Rule 804(b)(5) (residual hearsay exception), to the facts in this case (see the discussion in the opinion), and ruled that the accomplice's statements at his own trial were admissible in the defendant's trial under Rule 804(b)(5). The court also ruled that the admission of this evidence did not violate the defendant's constitutional confrontation rights. (2) The court ruled, citing State v. Farrell, 223 N.C. 804, 28 S.E.2d 560 (1944), that the defendant's testimony at the accomplice's trial was freely and voluntarily given and the defendant's Fifth Amendment privilege against self-incrimination did not apply to that testimony. Thus, the trial judge did not err in admitting that testimony at the defendant's trial.

(1) Videotapes Were Not Properly Authenticated
(2) Date on Videotape Was Inadmissible Hearsay When Offered as Substantive Evidence
(3) Statements on Videotape Were Inadmissible as Adopted Admissions

State v. Sibley, 140 N.C. App. 584, 537 S.E.2d 835 (21 November 2000). The defendant was convicted of possession of a firearm by a convicted felon and possession of cocaine. Officers executed a search warrant to search a residence neither owned nor occupied by the defendant. They found cocaine under the bed where the defendant was sitting. They found several guns in a hallway, about 10 feet from the entrance to the room in which the defendant and another person were located. They seized two videotapes from the living room. Tape A showed a date, "1/6/98," at the beginning of the tape. It also showed people in a room that the officers identified as the residence searched, and the defendant holding money and talking on a cell phone. Tape B showed the date, "1/10/98," throughout the tape. The defendant is shown handling guns similar to those seized. There were comments made by other people about the defendant's holding the guns—one person refers to "Mike's big old gun." (The defendant's first name is Mike.) The videotapes were admitted as substantive evidence for the state at the defendant's trial. (1) The court ruled that the videotapes were not properly authenticated under the rules set out in State v. Cannon, 92 N.C. App. 246, 254 S.E.2d 604 (1988). The only testimony purporting to authenticate the tapes was evidence that the chain of custody had not been broken. There was no evidence that the camera was operating properly or that the information depicted on the tapes was an accurate representation of the events as they were taped. (2) The court ruled that the date, "1/10/98," appearing on tape B was hearsay and inadmissible as substantive evidence to prove that the defendant possessed a gun after the date of his prior felony conviction. (3) The court rejected the state's argument that statements of other people on tape B were admissible as adopted admissions by the defendant. The court reviewed the statements on the tape and determined that (i) the statements were not made under circumstances when a denial by the defendant would naturally be expected, and (ii) the statements were not adopted by the defendant.

(1) State Failed to Properly Authenticate Videotape of Convenience Store Robbery
(2) Trial Judge Properly Exercised Discretion in Prohibiting Defendant from Playing Audiotape of 911 Call During Cross-Examination of State's Witness

State v. Mason, 144 N.C. App. 20, 550 S.E.2d 10 (5 June 2001). The defendant was convicted of armed robbery of a convenience store. (1) The court ruled that the state failed to properly authenticate a videotape of the robbery, based on the facts in this case, under the standards set out in State v. Cannon, 92 N.C. App. 246, 254 S.E.2d 604 (1988). (See the court's analysis in its opinion.) (2) The court ruled that the trial judge properly exercised his discretion under Rule 611 in prohibiting the defendant from playing an audiotape of a 911 call during the cross-examination of a state's witness. The court noted that the defendant could have questioned the witness from a transcript of the call. Further, the judge had stated that the defendant could introduce the audiotape during the presentation of the defendant's evidence.

SBI DNA Expert Was Properly Permitted to Offer Opinion on DNA Evidence Based on Review of Results of DNA Testing by SBI Staff Member

State v. McCord, 140 N.C. App. 634, 538 S.E.2d 633 (5 December 2000). The court ruled, relying on State v. Daughtry, 340 N.C. 488, 459 S.E.2d 747 (1995), that a SBI DNA expert was properly permitted to offer his opinion on DNA evidence based on a review of the results of DNA testing by a SBI staff member. The expert testified about the procedure used by the SBI to conduct DNA tests and that the tests in this case were performed by the SBI staff member. The expert worked with the SBI staff member, and he reviewed the file in this case by conducting a technical review of the member's work. The court concluded that the expert was properly permitted to testify concerning the contents of the report and his opinion of the test results based on the report.

Expert's Opinion That Child Had Been Abused Lacked Proper Foundation To Be Admissible

State v. Bates, 140 N.C. App. 743, 538 S.E.2d 597 (5 December 2000). The court ruled, relying on State v. Trent, 320 N.C. 610, 359 S.E.2d 463 (1987) and State v. Parker, 111 N.C. App. 359, 432 S.E.2d 705 (1993), that an expert's opinion that a child had been abused lacked a proper foundation to be admissible. The expert performed a thorough physical examination of the child and tested her for a variety of sexually transmitted diseases. The child's body showed no signs of abuse—no scars, no enlarged vaginal opening, no missing or torn hymen, etc.—and the tests for disease were all negative. The court noted that the expert's opinion of child abuse was based entirely on the child's statements to a psychologist who had interviewed the child in preparation for the expert's examination.

Expert's Opinion That Child Sexual Abuse Victim Suffered from Major Depressive Disorder Partly as a Result of Sexual Abuse Was Admissible, Based on Facts in this Case

State v. Youngs, 141 N.C. App. 220, 540 S.E.2d 794 (29 December 2000). The defendant was convicted of several sex offenses involving one of his daughters, who was in kindergarten or first grade when the offenses occurred. The state's psychological expert treated the victim extensively before trial. The expert diagnosed her with dysthymic disorder and major depressive order and determined that she exhibited symptoms typical of post-traumatic stress syndrome. The expert opined that the victim had been sexually abused. (1) The court rejected the defendant's argument that the expert's diagnosis of the victim's psychological disorder was improperly admitted to prove that she had been abused by the defendant. The court stated that the record showed that the expert described the victim's condition and the resulting diagnosis. Relying on State v. Rogers, 109 N.C. App. 491, 428 S.E.2d 220 (1993), State v. Aguallo, 318 N.C. 590, 350 S.E.2d 76 (1986), and other cases, the court ruled that the victim's statements to the expert identifying her father as her assailant were admissible because the information was pertinent to the victim's diagnosis and treatment. (2) The court rejected the defendant's argument that the expert improperly testified that the victim had been sexually abused. The court ruled that the expert's opinions were based on adequate data, which included statements by the victim, obtained during and for the purposes of treating the victim and were admissible as expert testimony under Rule 702. The court relied on State v. Figured, 116 N.C. App. 1, 446 S.E.2d 838 (1994), and other cases.

Although Expert May Testify That Sexual Assault Victim Suffers from Post Traumatic Stress Disorder (PTSD) for Corroborative Purposes, Expert May Not Indicate That PTSD Was Caused By Defendant's Actions

State v. Chavis, 141 N.C. App. 553, 540 S.E.2d 404 (29 December 2000). The defendant was convicted of statutory sexual offense and attempted statutory rape involving a young female victim. The court noted, citing State v. Hall, 330 N.C. 808, 412 S.E.2d 883 (1992), that an expert may testify that a prosecuting witness is suffering from post traumatic stress disorder (PTSD) for corroborative purposes to

assist the jury in understanding the behavioral patterns of sexual assault victims. However, the court ruled, citing State v. Hensley, 120 N.C. App. 313, 462 S.E.2d 550 (1995), that an expert witness may not explicitly or implicitly indicate that PTSD was caused or contributed to by the defendant's actions. Thus, the trial judge erred in this case by permitting the expert to testify that the defendant triggered the PTSD.

Expert Was Improperly Permitted to Offer Opinion Testimony on Comparing Barefoot Impressions in Two Pairs of Shoes and Determining That Both Pairs Were "Likely" Worn By Same Person

State v. Berry, 143 N.C. App. 307, 546 S.E.2d 145 (1 May 2001). Tennis shoes were found near the murder victim's body. An expert witness compared these shoes with shoes that were regularly worn by the defendant. He examined the impressions made by the heel, ball of the foot, and the upper portion of each shoe. He concluded that it was "likely" that the shoes found at the crime scene and the defendant's shoes were regularly worn by the same person. However, the expert testified that he was still in the process of collecting data concerning "barefoot impression" analysis and his research was not yet complete. The court ruled that, based on the expert's testimony, barefoot impression evidence does not yet meet the requirements of admissibility.

In Prosecution of Defendant's Drug Possession at Grocery Store Parking Lot, Evidence of Drugs Found in Trailer Defendant Shared with Others Was Inadmissible under Rule 404(b) When There Was Insufficient Evidence of Defendant's Knowledge of Drugs in Trailer

State v. Moctezuma, 141 N.C. App. 90, 539 S.E.2d 52 (19 December 2000). The defendant was tried for possessing drugs in a van at a grocery store parking lot. The court ruled that evidence of drugs found in a trailer that the defendant shared with others was inadmissible under Rule 404(b) (the state offered the evidence on the issue of defendant's knowledge of drugs in the van) when there was insufficient evidence of the defendant's knowledge of the drugs in the trailer. The court noted that there was no evidence to directly link the defendant to the drugs at the trailer, the defendant was not charged with possession of the drugs there, and the defendant consistently denied knowledge of the drugs.

Trial Judge Did Not Err in Excluding Defense Proffered Evidence that Third Parties Had Motive for Killing Victim, Based on Facts in This Case

State v. Floyd, 143 N.C. App. 128, 545 S.E.2d 238 (17 April 2001). The defendant was convicted of first-degree murder of his wife. The court ruled, relying on State v. Hester, 343 N.C. 266, 470 S.E.2d 25 (1996) and State v. Rose, 339 N.C. 172, 451 S.E.2d 211 (1994), that the trial judge did not err in excluding defense proffered evidence that third parties had a motive for killing the victim, based on the facts in this case. Evidence that two young males, sons of the defendant's girlfriend, were hostile toward the victim and were not in school on the day of the murder, did not directly link them to the murder. Nor did the evidence exculpate the defendant.

State Was Properly Permitted to Impeach Its Own Witnesses with Their Prior Inconsistent Statements, Based on Facts in This Case

State v. Riccard, 142 N.C. App. 298, 542 S.E.2d 320 (20 February 2001). The defendant was convicted of armed robbery and felonious assault. The victim testified and identified the defendant as one of the perpetrators. Two people who were with the defendant testified as state's witnesses. Each testified about the events surrounding the crimes, but their trial testimony was significantly inconsistent with statements given to the investigating detective. They both testified that they had given statements to the detective, but they disputed what they had in fact said to him and, in addition, one of them said he did not remember making certain parts of his statement. The trial judge permitted the state to impeach both witnesses (as

hostile witnesses) with their respective statements. The judge also allowed the detective to testify about the statements, which implicated the defendant in the robbery and assault; the trial judge limited this testimony for the purposes of corroboration or lack of corroboration of the testimony of these two witnesses. The court ruled, relying on State v. Wilson, 135 N.C. App. 504, 521 S.E.2d 263 (1999), 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), that the trial judge properly permitted the state's impeachment of its own witnesses in this case. The witnesses' testimony concerned matters that were pertinent and material, thus permitting extrinsic evidence. The court also noted the state's good faith and absence of subterfuge to get evidence before the jury that was otherwise inadmissible. The witnesses' testimony was vital to show the events leading up to the crimes. There also was no indication that the state anticipated that these witnesses would contradict the statements given to the detective. The court distinguished contrary rulings in State v. Williams, 322 N.C. 452, 368 S.E.2d 624 (1988), State v. Hunt, 324 N.C. 343, 378 S.E.2d 754 (1989), and State v. Jerrells, 98 N.C. App. 318, 390 S.E.2d 722 (1990); the witnesses in these cases were improperly impeached because they had denied making the prior inconsistent statements, and thus the prior statements concerned only a collateral matter—that is, whether the statements were ever made.

Cross-Examination about Burglary Was Improper under Rule 608(b)

State v. McEachin, 142 N.C. App. 60, 541 S.E.2d 792 (6 February 2001). The state cross-examined a defense witness concerning a pending burglary, purportedly to impeach his credibility under Rule 608(b). The court ruled, relying on State v. Bell, 338 N.C. 363, 450 S.E.2d 710 (1994), that this cross-examination was improper because the commission of a burglary is not probative of truthfulness or untruthfulness.

(1) Officer Was Properly Permitted to Offer Opinion about Victim's Cause of Death
(2) Attorney's Billing Records Do Not Automatically Fall Within Attorney-Client Privilege

State v. Cherry, 141 N.C. App. 642, 541 S.E.2d 205 (29 December 2000). The defendant was convicted of first-degree murder. (1) The state did not offer medical testimony about the victim's cause of death. The court ruled, citing State v. Starnes, 16 N.C. App. 357, 192 S.E.2d 89 (1972), that the trial judge did not err in allowing a law enforcement officer to testify that, in his opinion, the victim died from gunshot wounds to the back of his head. The officer testified that he had often seen bullet wounds in human bodies. He illustrated the nature and extent of the victim's wounds with a photograph of the victim's body, pointing out the bullet holes in the victim's head. The court concluded that the victim's wounds were obviously lethal to a sufficient degree to render expert medical testimony about the cause of death unnecessary. (2) The defendant argued that the prosecutor engaged in prosecutorial misconduct requiring a mistrial when he read some of the defense counsel's billing records that had been inadvertently placed in open court files. The court noted, citing In re Grand Jury Proceedings, 33 F.3d 342 (4th Cir. 1994) and Chaudhry v. Gallerizzo, 174 F.3d 394 (4th Cir. 1999), that an attorney's billing records do not automatically fall within the attorney-client privilege. The billing records in this case did not, among other things, mention specific research or litigation strategy, and thus did not contain any confidential communications within the attorney-client privilege.

Sentencing

Finding of Criminal Contempt When Punishment Is Maximum of 30 Days' Imprisonment Is Not Prior Conviction for Misdemeanor Sentencing under Structured Sentencing Act

State v. Reaves, 142 N.C. App. 629, 544 S.E.2d 253 (3 April 2001). The court ruled that a finding of criminal contempt when the punishment is a maximum of 30 days' imprisonment is not a prior conviction for misdemeanor sentencing under the Structured Sentencing Act.

(1) Aggravating Factors Were Properly Found in Second-Degree Vehicular Murder Conviction
(2) Conducting Sentencing Hearing in Defendant's Absence Was Not Error, Based on Facts in This Case

State v. Miller, 142 N.C. App. 435, 543 S.E.2d 201 (20 March 2001). The defendant was convicted of second-degree vehicular murder based on his collision with another vehicle. He was driving while impaired (blood alcohol concentration of 0.22) and collided head on with a vehicle in the other lane of traffic. Before the collision, the defendant had caused another vehicle to leave the road. While the jury was deliberating, the defendant absconded from the courthouse. The trial judge waited for his return to resume court, but the defendant could not be located. The judge resumed the proceedings, the jury returned its verdicts, and the judge conducted the sentencing hearing in the defendant's absence. (1) The court ruled that the judge properly found (i) the statutory aggravating factor that the defendant knowingly created a great risk of death to more than one person by means of a weapon or device that would normally be hazardous to the lives of more than one person [G.S. 15A-1340.16(d)(8)]; and (ii) the non-statutory aggravating factor that the defendant refused to participate in the proceedings and fled the courthouse while being a convicted felon subject to an active prison sentence. (2) The court ruled that the trial judge did not err in conducting the sentencing hearing in the defendant's absence. The court noted that the defense counsel never requested the judge to continue the sentencing hearing and did not offer any evidence constituting good cause to support continuing the hearing. The court stated that, in any event, the defendant's flight and refusal to participate in the proceedings despite being a convicted felon did not constitute good cause.

(1) Trial Judge Properly Found Aggravating Factor in Second-Degree Murder Case That Victim Suffered Serious Injuries That Were Permanent and Debilitating
(2) Court Orders Reduction in Maximum Sentence under G.S. 15A-1335 (No Greater Sentence After Appeal)

State v. Holt, 144 N.C. App. 112, 547 S.E.2d 148 (5 June 2001). The defendant was convicted of second-degree murder involving a child abuse homicide. On July 7, 1994, the child suffered a severe head trauma as well as significant brain damage. After this initial injury, the child lived for about 22 months until she died; during that time, she was in a vegetative state with various debilitating injuries. The acts resulting in the child's death occurred when the Fair Sentencing Act (FSA) was effective and the child died when the Structured Sentencing Act (SSA) was effective. The trial judge sentenced the defendant under the SSA as a Class B2 felon and to a term of imprisonment of 196 to 245 months. On a prior appeal in this case, the court ruled that the defendant should have been sentenced under the FSA because the acts resulting in death occurred then. On resentencing, the judge sentenced the defendant under the FSA as a Class C felon and to a term of life imprisonment (the punishment for a Class C felon under FSA was a presumptive sentence of 15 years and up to 50 years or life imprisonment). (1) The court ruled that the trial judge properly found the nonstatutory aggravating factor under the FSA that the victim suffered serious injuries that were permanent and debilitating. The court rejected the defendant's argument that these injuries were used to prove malice, an element of second-degree murder, and thus constituted an improper aggravating factor. The court noted that this nonstatutory aggravating factor was based on the injuries over the 22-month period before the child died, not the severe head trauma she suffered on July 7, 1994. (Note that this nonstatutory aggravating factor under FSA is a statutory factor under SSA.). (2) The court ruled that because G.S. 15A-1335 bars a greater sentence after appeal (except, the court noted, when a mandatory sentence must be imposed), the court ruled that the life sentence was improper and remanded for resentencing in which the maximum sentence may not exceed 245 months.

Defense Counsel's Stipulation Moots Appellate Issue under G.S. 15A-1444(a2), But It Was Unclear in This Case That Defense Counsel Was Stipulating That Out-of State Convictions Were Substantially Similar to Felony Offenses under North Carolina Law

State v. Hanton, 140 N.C. App. 679, 540 S.E.2d 376 (5 December 2000). The defendant was convicted after a jury trial, and a sentencing hearing was held. The prosecutor at the sentencing hearing presented an SSA points worksheet and computer printout showing 18 points, which included out-of-state convictions counting for points as similar felonies in North Carolina that were higher class felonies than Class I [note that Class I is the presumptive class set out in G.S. 15A-1340.14(e) for an out-of-state felony conviction unless the state proves by a preponderance of evidence that the offense should be classified as a higher class]. Defense counsel denied that he had been convicted of a New York kidnapping offense that appeared on the state's worksheet. The prosecutor then removed it. When the trial judge asked defense counsel whether, "with the exception of the kidnapping charge, is there any disagreement with other convictions on there?", defense counsel answered, "No." The court first ruled that, whether sentencing occurs after a plea bargain or after a conviction, a defense counsel's stipulation moots an appellate sentencing issue under G.S. 15A-1444(a2) [thus extending a ruling in State v. Hamby, 129 N.C. 366, 499 S.E.2d 195 (1998) that involved sentencing after a plea bargain]. The court then ruled that although defense counsel's statement in this case might reasonably be construed as an admission that the defendant had been convicted of the offenses on the worksheet, it is not clear that the defendant was stipulating that the out-of-state convictions were substantially similar to felony offenses under North Carolina law that were higher than Class I felonies. The court remanded the case to superior court for a resentencing hearing.

Length of Maximum Term Set Out in Structured Sentencing Act Is Not Subject to Judge's Discretion

State v. Parker, 143 N.C. App. 680, 550 S.E.2d 174 (5 June 2001). The court ruled that the length of a maximum term set out in the Structured Sentencing Act is not subject to a judge's discretion. It is mandatory.

Defendant Convicted of Class C Felony with Prior Record Level IV Was Not Eligible for Finding of Extraordinary Mitigation

State v. Messer, 142 N.C. App. 515, 543 S.E.2d 195 (20 March 2001). The court ruled that the defendant, who was convicted of a Class C felony with a Prior Record Level IV, was not eligible for a finding of extraordinary mitigation under G.S. 15A-1340.13(g) because G.S. 15A-1340.15(h)(3) bars a finding of extraordinary mitigation when the defendant has five or more points. The court also noted that extraordinary mitigation, when authorized and found, does not allow a judge to impose a shorter minimum term of imprisonment than required for the class of offense and prior record level—it only authorizes the imposition of intermediate punishment instead of an active punishment.

(1) Juvenile's Equal Protection Rights Were Not Violated When Length of Commitment to Training School Exceeded Maximum That Adult Could Have Received for Same Offense
(2) Trial Judge Did Not Err in Upgrading from Level 2 to Level 3 Dispositional Limit Based on Prior Training School Commitment That Was Imposed Under Repealed Juvenile Code

In re Allison, 143 N.C. App. 586, 547 S.E.2d 169 (5 June 2001). (1) The juvenile was adjudicated delinquent for unauthorized use of a motor vehicle under G.S. 14-72.2. She was committed to training school for an indefinite term of at least six months, as provided in G.S. 7B-2513(a). Relying on In re Burrus, 275 N.C. 517, 169 S.E.2d 879 (1969) and In re Walker, 282 N.C. 28, 191 S.E.2d 702 (1972), the court ruled that the juvenile's equal protection rights were not violated when the length of her

commitment to training school exceeded the maximum (120 days) that an adult could have received for same offense. (2) The court ruled that the trial judge did not err in upgrading from a Level 2 to a Level 3 dispositional limit based on a prior training school commitment that was imposed under a repealed juvenile code (G.S. Ch. 7A); see the second sentence of G.S. 7B-2508(d). The court reasoned that a training school commitment under the repealed juvenile code was equivalent to a Level 3 disposition under G.S. Ch. 7B.

Juvenile Court Judge Is Not Required to Question Delinquent Juvenile's Parents at Dispositional Hearing

In re Powers, 144 N.C. App. 140, 546 S.E.2d 186 (5 June 2001). At the delinquent juvenile's dispositional hearing, the juvenile's attorney told the judge that he was tendering the juvenile's parents for any questions. The judge did not ask any questions. The court ruled that G.S. 7B-2501(b) does not require a trial judge to question the juvenile's parents. Thus the parents were not denied the right to present evidence and advise the trial judge under G.S. 7B-2501(b).

Juvenile Probation Conditions Were Invalid

In re Schrimpsher, 143 N.C. App. 461, 546 S.E.2d 407 (15 May 2001). The juvenile was adjudicated delinquent of misdemeanor breaking and entering and was placed on supervised probation. The court ruled that the following probation conditions were invalid: (1) requiring the juvenile to submit at any time to urinalysis, blood, or alcohol breath testing if requested by any law enforcement officer; and (2) requiring that the juvenile not reside in a home or be present in a vehicle unless the residents or owners have consented to a search of the home for controlled substances.

FOURTH CIRCUIT COURT OF APPEALS

Federal Habeas Petitioner Is Not Entitled to Relief for Alleged Double Jeopardy Violation Involving Prosecution of Drug Offense After Imposition of Drug Tax Because State Appellate Court Ruling Was Not Contrary to, Or Involved Unreasonable Application of, Clearly Established Law, as Established by United States Supreme Court

Vick v. Williams, 233 F.3d 213 (4th Cir. 2000). The federal habeas petitioner sought relief from drug convictions in a North Carolina state court that the state had obtained after the state's drug tax had been imposed on the controlled substances involved in the convictions. He argued that the state drug tax was a criminal penalty, and thus double jeopardy principles barred the later prosecution of the drug offenses. Based on a prior state court ruling that there was no double jeopardy violation, State v. Ballenger, 123 N.C. App. 179, 472 S.E.2d 572 (1996), *affirmed*, 345 N.C. 626, 481 S.E.2d 84 (1997), his argument had been effectively rejected by both North Carolina appellate courts. On federal habeas, the Fourth Circuit applied 28 U.S.C. § 2254(d)(1) (petitioner must demonstrate that state court's ruling resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as established by the United States Supreme Court), using the standard of review set out in Williams v. Taylor, 529 U.S. 362, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000). The Fourth Circuit ruled that *Ballenger* was not contrary to, or an unreasonable application, of Montana Dept. of Revenue v. Kurth Ranch, 511 U.S. 767, 114 S. Ct. 1937, 128 L. Ed. 2d 767 (1994). Therefore the court affirmed the dismissal of the petition for federal habeas relief. [Note: The fact that the Fourth Circuit in Lynn v. West, 134 F.3d 582 (4th Cir. 1998) had a different view of the double jeopardy issue than the North Carolina state appellate courts in *Ballenger* was essentially irrelevant to the analysis of the governing statute, 28 U.S.C. § 2254(d)(1).]