RECENT CASES AFFECTING CRIMINAL LAW AND PROCEDURE
(November 1, 1994 - June 2, 1995)

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NORTH CAROLINA SUPREME COURT

District Attorney's Calendaring Authority

(1) Statutes Authorizing District Attorney's Calendaring Authority Are Not Facially Unconstitutional
(2) Plaintiffs' [Who Were Criminal Defendants] Complaint and Exhibits Raised Genuine Issue of Material Fact that Statutes Authorizing District Attorney's Calendaring Authority Were Being Applied Unconstitutionally in Particular Prosecutorial District

Simeon v. Hardin, 339 N.C. 358, 451 S.E.2d 858 (30 December 1994). Plaintiffs, who were criminal defendants with pending criminal cases in Durham County Superior Court, brought a civil action alleging—among other things—that North Carolina statutes [G.S. 7A-49.3 and a portion of G.S. 7A-61] granting the District Attorney the authority to calendar criminal cases in superior court violated various provisions of the United States and North Carolina constitutions. (1) The court ruled that the statutes granting the District Attorney the authority to calendar criminal cases in superior court were not facially unconstitutional under the United States or North Carolina constitutions. The court found, among other things, that a criminal superior court has wide discretion in managing cases pending before it, and the vesting of calendaring authority with the district attorney does not intrude on the court's authority. The court also distinguished State v. Simpson, 551 So.2d 1303 (La. Sup. Ct. 1989) (judicial district's system that allowed the district attorney to choose the judge to whom particular criminal cases were assigned violated due process) by noting that the parties had stipulated in the Louisiana case that the district attorney did in fact choose the judge to preside over particular criminal cases. There was no such stipulation in this North Carolina case. The court also noted that North Carolina statutes do not authorize a district attorney to choose a particular judge to preside over a particular case. (2) The court ruled that the plaintiffs' complaint and exhibits raised a genuine issue of material fact (precluding summary judgment for the civil defendant district attorney) that the statutes authorizing the district attorney's calendaring authority were being applied unconstitutionally in Durham County Superior Court. Among the allegations were that the district attorney delayed calendaring a case for trial to keep a criminal defendant in jail, delaying a trial at which he was likely to be acquitted, and pressuring the defendant to plead guilty. Plaintiffs also alleged that the district attorney placed a large number of cases on the printed trial calendar knowing that all of theses cases would not be called, thereby providing defendants virtually no notice about which cases were actually going to be called for trial. The court finds that these allegations are sufficient to state a claim that the statutes are being applied unconstitutionally, and the court remands the case to superior court for further proceedings.

Criminal Offenses

Habitual Felon Indictment Need Not Allege Predicate Felony Being Tried

State v. Cheek, 339 N.C. 725, 453 S.E.2d 862 (3 March 1995), *reversing,* 113 N.C. App. 203, 438 S.E.2d 759 (1993). Overruling State v. Moore, 102 N.C. App. 434, 402 S.E.2d 435 (1991) and State v. Hawkins, 110 N.C. App. 837, 431 S.E.2d 503 (1993), the court ruled that an habitual felon indictment need not allege the predicate felony or felonies being tried. [Note: the supreme court previously had ruled in State v. Todd, 313 N.C. 110, 326 S.E.2d 249 (1985) that the indictment for the predicate felony being tried need not refer to the habitual felon indictment.]

Defendant Was Properly Convicted of First-Degree Murder Based on Accessory Before the Fact Although All the Principals Pled Guilty to Second-Degree Murder

State v. Wilson, 338 N.C. 244, 449 S.E.2d 391 (3 November 1994). The defendant was convicted of first-degree murder based on the legal principle that he was an accessory before the fact. All the principals in committing the murder had entered plea bargains with the state and pled guilty to second-degree murder. The court ruled that a plea bargain is not the same as an acquittal, and therefore the defendant properly could be convicted of first-degree murder; see State v. Cassell, 24 N.C. App. 717, 212 S.E.2d 208 (1975). [A person may not be convicted of an offense based on accessory before the fact if all the principals are acquitted; see State v. Robey, 91 N.C. App. 198, 371 S.E.2d 711 (1988).]

Person May Properly Be Convicted of First-Degree Murder As Accessory Before the Fact Even Though the Actual Killer Had Pled Guilty to Second-Degree Murder

State v. Larrimore, 340 N.C. 119, 456 S.E.2d 789 (5 May 1995). The defendant, as an accessory before the fact to first-degree murder, was properly tried for first-degree murder even though the person who actually killed the victim had pled guilty to second-degree murder.

Sufficient Evidence of Serious Injury Existed in Felonious Assault Case

State v. Ramseur, 338 N.C. 502, 450 S.E.2d 467 (9 December 1994). The defendant was convicted of assault with a deadly weapon with intent to kill inflicting serious injury. The court ruled that there was sufficient evidence of serious injury: The victim testified that the defendant beat him on the head with the butt of his gun, knocking him to the floor. The defendant then stood over him and attempted to throw a compressor at his head. The victim managed to move his head, but the compressor struck his shoulder; as a result, he was badly bruised, was unable to move his arm properly for three days, and experienced pain and suffering. The victim was hospitalized for several hours and received treatment for his shoulder injury as well as his head injuries. The court rejects defendant's arguments that the injury was not serious because the victim's skin was not broken by the blow and because he did not experience great pain or lingering disability.

Defendant Was Properly Convicted of First-Degree Felony Murder Based on Felonious Assault of Second Person as Underlying Felony and Acting in Concert With Accomplice

State v. Abraham, 338 N.C. 315, 451 S.E.2d 131 (9 December 1994). The defendant was convicted of first-degree felony murder and two felonious assaults in which the defendant and his accomplice acted in concert in shooting the victims. The court noted that the jury could reasonably infer as follows: The defendant and his accomplice were acting in concert when they accosted four men and began firing their weapons. The other four men (A, B, C, and D) were unarmed and ran when the shooting began. The accomplice shot at and wounded A. The defendant shot at B. Bullets fired during one of these assaults by either the defendant or his accomplice killed C while C was running away. The court ruled that this evidence would support the first-degree felony murder convictions against both the defendant and his accomplice on the theory that the bullets that killed C were fired during the course of one of the felonious assaults so that the assaults and the homicide were part of a continuous transaction. The court stated that since the evidence supports the guilt of both the defendant and his accomplice as to all the felonious assaults, it makes no difference (i) which of the felonious assaults is the underlying felony, or (ii) which person—the defendant or his accomplice—actually fired the fatal shots or whether they intended that C be killed.

Defendant Was Properly Convicted of First-Degree Felony Murder Based on Discharging Firearm into Occupied Property When Murder Victim Came Out of House After Shooting Into House and Was Shot and Killed Outside House

State v. Moore, 339 N.C. 456, 451 S.E.2d 232 (30 December 1994). The defendant fired several shots into a house in which the murder victim and others were located. When the murder victim went outside the house to confront the defendant, the defendant shot him there. The victim went into the house and the defendant continued shooting into the house. The court ruled that the defendant was properly convicted of first-degree felony murder based on discharging a firearm into occupied property because the defendant's actions constituted a series of connected events forming one continuous transaction constituting the discharging firearm felony.

Evidence Was Sufficient to Support Conviction of Kidnapping for the Purpose of Terrorizing Victim

State v. Davis, 340 N.C. 1, 455 S.E.2d 627 (7 April 1995). After shooting victim A during an attempted robbery, the defendant pointed his gun at victim B, ordered her down on the floor, and threatened to kill her. Victim B fell to the floor and began crawling toward the back room of the pawn shop. She testified that the defendant's voice sounded as if it was right behind her, and he kept repeating the words, "Crawl back there." The defendant argued on appeal that his motive for taking victim B into the back room was not to terrorize her. Instead, his words and conduct toward victim B were simply part of the chain of events surrounding the fatal shooting of victim A and were therefore insufficient to support the kidnapping conviction. The court rejected this argument and ruled that this evidence was sufficient to support kidnapping for the purpose of terrorizing victim B.

Court Clarified When Defendant May Assert Self-Defense to Felony Murder

State v. Bell, 338 N.C. 363, 450 S.E.2d 710 (9 December 1994). The defendant was tried for first-degree felony murder based on the killing of an undercover drug officer during an attempted robbery of the officer. The court ruled that the trial judge did not err in instructing the jury that if it concluded that the defendant had killed the officer in the perpetration of a felony (attempted armed robbery), the defendant was not entitled to the defense of self-defense. The evidence in this case showed that the defendant went to a drug transaction with the purpose of committing a robbery. The defendant had his weapon pointed directly at the undercover officer during the attempted robbery. The officer (still in an undercover capacity without identifying himself) reached for his weapon and threatened to shoot the defendant. The defendant then shot and killed the officer. There was no evidence that the dangerous situation had dissipated when the defendant shot the undercover officer, or that the defendant made any effort to declare his intent to withdraw. The court ruled that absent (1) a reasonable basis on which the jury may have disbelieved the state's evidence about the underlying felony, (2) a factual showing that the defendant clearly articulated the intent to withdraw from the situation, or (3) a factual showing that at the time of the killing the dangerous situation no longer existed, the defendant forfeited the right to assert self-defense as a defense to felony murder.

Defendant Was Not Entitled To Instruction on Defense of Accident in Murder Case

State v. Riddick, 340 N.C. 338, 457 S.E.2d 728 (2 June 1995). The defendant was convicted of first-degree murder. The court noted that the undisputed evidence showed that the defendant sought out the victim, intentionally confronted the victim with a loaded firearm, assaulted the victim, and a gun was in the defendant's hand when two bullets, one of which entered the victim's body, were fired from it. The defendant testified that he fired one shot into the air to scare the victim, the gun went off a second time accidentally when he was startled by a loud noise, and he only wanted to scare the victim and did not intend to hurt the victim. The court ruled, citing State v. Lytton, 319 N.C. 422, 355 S.E.2d 485 (1987), that the defendant was not entitled to an instruction of the defense of accident, because the *uncontroverted* evidence was that the defendant was engaged in unlawful conduct and acted with a wrongful purpose when the killing occurred.

Discharging Firearm into Occupied Property Is Not Specific Intent Crime and Therefore Voluntary Intoxication Is Not a Defense

State v. Jones, 339 N.C. 114, 451 S.E.2d 826 (30 December 1994). Discharging a firearm into occupied property does not require the state to prove any specific intent and therefore voluntary intoxication is not a defense.

Jury Instruction on Premeditation and Deliberation Was Not Error

State v. Leach, 340 N.C. 236, 456 S.E.2d 785 (5 May 1995). The trial judge instructed the jury on premeditation and deliberation using N.C.P.I.—Crim. 206.10, which lists circumstances from which the jury may infer premeditation and deliberation. The defendant argued that the instruction

was error because two of the circumstances mentioned in the instruction were not supported by the evidence. The court ruled that the instruction was not error, even if evidence did not support each of the circumstances mentioned in the instruction. The court noted that the instruction tells jurors that they "may" find premeditation and deliberation from certain circumstances, "such as" the circumstances mentioned. More importantly, the instruction does not indicate that the trial judge believes that evidence exists that would support each or any of these circumstances. The court disapproved of State v. Buchanan, 287 N.C. 408, 215 S.E.2d 80 (1975) (evidence did not support two circumstances mentioned in instruction on premeditation and deliberation; new trial ordered), to the extent it may be construed to be inconsistent with the ruling in this case.

(1) Aiding and Abetting Instruction Using "Should Have Known" and "Reasonable Grounds to Believe" Was Error
(2) Using Disjunctive in Jury Instruction for Two Theories of Committing an Offense—Aiding and Abetting "or" Principal—Was Not Error

State v. Allen, 339 N.C. 545, 453 S.E.2d 151 (10 February 1995). (1) The trial judge erred when he instructed the jury that the defendant would be guilty of aiding and abetting if, in addition to other elements, the jury found that when the defendant handed his accomplice the gun "he knew or had reasonable grounds to know that his intention was to kill" the murder victim. Elsewhere in the instruction, the judge used the words "he knew or he should have known" that his accomplice intended to kill the murder victim. The court ruled that the judge's use of the phrases "should have known" and "reasonable grounds to believe" was erroneous, citing State v. Rogers, 316 N.C. 203, 341 S.E.2d 713 (1986) and State v. Blankenship, 337 N.C. 543, 447 S.E.2d 727 (1994). (2) The trial judge's instruction permitted the jury to find the defendant guilty either on the theory of the defendant as the principal or the theory of the defendant aiding and abetting the accomplice, who acted as the principal. Relying on State v. Hartness, 326 N.C. 561, 391 S.E.2d 177 (1990) and State v. Creason, 313 N.C. 122, 326 S.E.2d 24 (1985), the court ruled that the instruction was not fatally ambiguous. It allowed the jury to find the defendant guilty based on either of two underlying facts (theories), both of which separately support a theory of guilt for only one offense. It was distinguishable from an instruction that would allow the jury to find a defendant guilty of two underlying acts, either of which is in itself a separate offense; see State v. Lyons, 330 N.C. 298, 412 S.E.2d 308 (1991).

Arrest, Search, And Confession Issues

(1) Defendant Initiated Communication After Asserting *Miranda* Right to Counsel
(2) When Defendant Initiated Communications With Law Enforcement Officer After Asserting, Twelve Hours Earlier, His *Miranda* Right to Counsel, Officer Was Not Required to Repeat *Miranda* Warnings Before Interrogating Him, Based on the Facts in This Case

State v. Harris, 338 N.C. 129, 449 S.E.2d 371 (3 November 1994). North Carolina law enforcement officers went to Georgia to return the defendant to North Carolina for a first-degree murder charge in North Carolina. After properly being advised of his *Miranda* rights, the defendant asserted his right to counsel. No interrogation was conducted. After his return to North

Carolina twelve hours later, the defendant through his brother—who was visiting the defendant in jail—asked to talk to the sheriff. The court ruled that (1) the defendant initiated communication with the sheriff by telling his brother to inform the sheriff that he wanted to speak with him; and (2) the sheriff was not required to give *Miranda* warnings again before interrogating the defendant, based on the facts in this case; see generally State v. McZorn, 288 N.C. 417, 219 S.E.2d 201 (1975). The court stated that there was no reason to believe that the defendant, having been properly advised of his *Miranda* rights twelve hours earlier, had forgotten them. For example, he should have known of his right to an attorney, because he had exercised that right twelve hours earlier.

Totality of Circumstances Supported Finding That Defendant's Confession Was Voluntary

State v. Hardy, 339 N.C. 207, 451 S.E.2d 600 (30 December 1994). The court examines all the evidence surrounding the defendant's confession to law enforcement officers and ruled that the confession was voluntary, even though one officer lied about a witness having identified the defendant and some of the officer's statements, in isolation, could be interpreted to contain implicit promises or threats. The court concludes, citing State v. Jackson, 308 N.C. 549, 304 S.E.2d 134 (1983), that the defendant's independent will was not overcome by mental or psychological coercion or pressure to induce a confession that he was not otherwise disposed to make.

Mentally-Retarded Defendant Knowingly and Intelligently Waived *Miranda* Rights

State v. Brown, 339 N.C. 606, 453 S.E.2d 165 (10 February 1995). The court affirmed *per curiam* and without an opinion, the opinion of the North Carolina Court of Appeals, 112 N.C. App. 390, 436 S.E.2d 163 (1993), that a mentally retarded fifteen-year-old defendant knowingly and intelligently waived his *Miranda* and juvenile rights. The court of appeals opinion relied on the ruling in State v. Fincher, 309 N.C. 1, 305 S.E.2d 665 (1983).

Defendant's Stepdaughter Had Authority to Consent to Search of House and Bedroom Which She Shared With Defendant

State v. Weathers, 339 N.C. 441, 451 S.E.2d 266 (30 December 1994). The court ruled that the defendant's stepdaughter had the authority to consent to a search of the house and bedroom which she shared with the defendant. [The opinion did not provide the age of the stepdaughter.]

Officers Had Reasonable Suspicion to Make Investigative Stop of Defendant to Investigate Murder

State v. Lovin, 339 N.C. 695, 454 S.E.2d 229 (3 March 1995). The murder victim's body was discovered in the afternoon and his Porsche was reported missing. At 4:00 P.M. a person saw a Porsche that matched the description of the victim's car, and it was being driven by a male with a lot of hair, a gold watch, and large frame glasses. She followed it until it turned toward the airport. She reported this information to a law enforcement agency. Officers went to the airport and found the hood of the Porsche was still warm. A ticket agent reported that the defendant was

acting suspiciously at the ticket counter. She described him as having long brown hair and wearing a gold watch. The court ruled this and other information in the officers' possession provided reasonable suspicion to make an investigative stop of the defendant to investigate the murder.

Evidence

Non-Confidential Out-of-Court Statement By Spouse May Be Used Against Defendant Spouse

State v. Rush, 340 N.C. 174, 456 S.E.2d 819 (5 May 1995). The state was permitted to offer, through a 911 dispatcher, out-of-court statements made by the defendant's spouse to the 911 dispatcher on the night of the murder. (The defendant's spouse had refused to testify for the state at trial.) The court noted that G.S. 8-57(b) (spouse of defendant is competent but not compellable to testify for the state against the defendant) is solely directed to compelled testimony and thus does not address the issue before it. G.S. 8-57(c) also was not in issue because the defendant conceded that the statements were not confidential communications. The court ruled that non-confidential out-of-court statements made by a defendant's spouse to a third party are admissible against the defendant; the admissibility of these statements promotes the administration of justice without infringing on the confidence of the marital relationship. The effect of the court's ruling is to overrule contrary rulings in State v. Dillahunt, 244 N.C. 524, 94 S.E.2d 479 (1956) and State v. Warren, 236 N.C. 358, 72 S.E.2d 763 (1952). Of course, the statements must be relevant and must be offered for a nonhearsay purpose or under an exception to the hearsay rule.

Two Statements of Murder Witness (Who Had Died Before Trial) to Law Enforcement Officer Were Properly Admitted Under Residual Hearsay Exception [Rule 804(b)(5)] and Did Not Violate Confrontation Clause

State v. Brown, 339 N.C. 426, 451 S.E.2d 181 (30 December 1994). One week after the defendant allegedly shot and killed the witness's husband, the witness gave a statement to a law enforcement officer in which she stated that she had broken up with the defendant four months before the shooting; since then the defendant had threatened many times to kill her and her husband. She then described the events surrounding the shooting, including that her husband had placed a knife in his pants. The same officer tape-recorded a second interview with the wife eight months later when the officer learned from the district attorney's office that she was dying of AIDS. The second statement essentially was the same as her first, except she admitted she had dated the defendant for about one year before ending the relationship in an effort to reconcile with her husband. The wife did not die until a month later, which was six months before the defendant's trial began. The officer conceded on cross-examination that he made no effort to contact the defense with the information that the wife was near death. The trial judge made all six findings required by State v. Triplett, 316 N.C. 1, 340 S.E.2d 736 (1986). In particular, the judge found that the wife's statements contained sufficient guarantees of trustworthiness: she observed her husband's reaction to the defendant's presence just before the shooting; she was able to accurately describe the relationship that existed between herself, her husband, and the defendant; she had no relationship to the state other than that of a witness; she described the events

consistently to family members, a doctor, and law enforcement; she was motivated to tell the truth, based on her terminal condition and immediate impending death. The court ruled that the judge's findings were supported by the evidence and the statements were properly admitted under Rule 804(b)(5). The court also ruled, based on Idaho v. Wright, 497 U.S. 805 (1990), that the admission of the statements did not violate the defendant's confrontation rights under the Sixth Amendment.

Jail Inmate's Letter Detailing Defendant's Confession to Murder Was Erroneously Admitted Under Residual Hearsay Rule, Rule 804(b)(5)

State v. Swindler, 339 N.C. 469, 450 S.E.2d 907 (30 December 1994). The court ruled that the trial judge erred in admitting under Rule 804(b)(5) a jail inmate's letter detailing the defendant's confession to murder. The court examines the evidence in this case and determines that the letter did not satisfy the four factors to determine trustworthiness set out in State v. Nichols, 321 N.C. 616, 365 S.E.2d 561 (1988): (1) the inmate did not personally know of the events described in the letter; (2) the inmate was not motivated to tell the truth, but to say what the police wanted to hear; (3) while the inmate never recanted the letter, he refused to acknowledge that he wrote the letter; and (4) the inmate was unavailable because he refused to testify. Also, the letter contained many inaccuracies.

Witness Was Unavailable Under Rule 804(b)(5) So Hearsay Statement Was Admissible

State v. Bowie, 340 N.C. 199, 456 S.E.2d 771 (5 May 1995). The trial judge properly found that the witness, who had moved to Philadelphia, was unavailable so as to allow hearsay evidence to be admitted under Rule 804(b)(5), based on the following evidence. Several weeks before trial, a superior court judge issued an order under G.S. 15A-813 with a recommendation that the witness be taken into custody and delivered to a North Carolina officer to assure her attendance at trial. As a result of this recommendation, rather than attempting to serve the witness well in advance of trial, law enforcement officers went to Philadelphia a few days before the beginning of trial. They went to the address of the witness, but her mother told the officers that she had moved and she did not know her new address or telephone number. The officers searched the house but did not find her.

Defendant's Statements to Psychiatrist, When Offered by the Defendant, Were Not Admissible as Substantive Evidence

State v. Harris, 338 N.C. 211, 449 S.E.2d 462 (3 November 1994). The defendant was on trial for murder and other crimes. The trial judge sustained the state's objection to the defendant's attempt to introduce, as substantive evidence, the defendant's statements made to his psychiatric expert, who offered his opinion that the defendant could not have formed the specific intent to kill. The court ruled that the defendant's statements (1) were not admissible under Rule 803(4) (medical diagnosis or treatment) because they were made to the psychiatrist to prepare for trial; defense counsel arranged the interview with the defendant less than two months before trial and nine months after the killing [for similar ruling, see State v. Jones, 339 N.C. 114, 451 S.E.2d 826 (30 December 1994)]; and (2) were not admissible under Rule 804(b)(3) (declaration against

interest) since the statements served only to reduce the defendant's potential liability (the court also questions whether a defendant may challenge his own unavailability under this hearsay exception).

[Although the court does not decide this issue, the defendant's statements to the psychiatrist may properly have been offered by the defendant for the nonhearsay purpose of supporting the psychiatrist's opinion. See State v. Ward, 338 N.C. 64, 449 S.E.2d 709 (3 November 1994) (trial judge erred in not admitting content of defendant's conversations with psychiatrist to show basis of psychiatrist's diagnosis); State v. Wade, 296 N.C. 454, 251 S.E.2d 407 (1979). If offered for that purpose, however, the court indicated that the state could have used the statements as substantive evidence—an admission under Rule 801(d).]

Mental Health Expert May Testify About Hearsay Information on Which Expert Formed Her Opinion

State v. Davis, 340 N.C. 1, 455 S.E.2d 627 (7 April 1995). Ms. King was part of a medical group that evaluated the defendant's mental health status and Dr. Sultan, the defendant's mental health expert, relied on Ms. King's information in formulating her final diagnosis. During the defendant's direct examination of Dr. Sultan, the trial judge did not permit her to testify about an episode in jail involving the defendant about which Ms. King told Dr. Sultan. The court ruled that the trial judge erred, since an expert may give an opinion based on facts not otherwise admissible in evidence, if that information is reasonably relied on by an expert in forming an opinion (which occurred in this case involving this episode); see Rule 703.

Mental Health Expert May Properly Offer Opinion Whether Defendant Was Lying During Expert's Evaluation of Defendant to Show Reliability of Information on Which Expert Based Opinion

State v. Jones, 339 N.C. 114, 451 S.E.2d 826 (30 December 1994). Defense mental health expert offered opinion that at the time of the killing the defendant was so intoxicated that he was incapable of premeditation and deliberation. Relying on State v. Kennedy, 320 N.C. 20, 357 S.E.2d 359 (1987) and State v. Wise, 326 N.C. 421, 390 S.E.2d 142 (1990), the court ruled that the expert should have been permitted to offer his opinion whether the defendant was lying to him during his evaluation of the defendant to show the reliability of the information on which the expert based his opinion. Such opinion testimony does not violate the rules [Rules 608 and 405(a)] prohibiting expert opinion testimony about the credibility of a witness.

Cross-Examination of Psychologist About Article Was Improper

State v. Lovin, 339 N.C. 695, 454 S.E.2d 229 (3 March 1995). The state cross-examined the defense psychologist about an article (which denigrated psychologists as not making more accurate clinical judgments than lay people). The state did not establish the article as a learned treatise, and thus it was not admissible as substantive evidence under Rule 803(18). The court also ruled that the article was not admissible to impeach the psychologist, who had not read it, and the state had not proved the article's validity.

State's Introduction of Defendant's Statement Did Not Permit Defendant to Introduce Another Defendant's Statement Made Later that Day

State v. Lovin, 339 N.C. 695, 454 S.E.2d 229 (3 March 1995). The state's witness testified about her telephone conversation with the defendant. The defendant on cross-examination was not permitted to elicit the from the state's witness a telephone conversation with the defendant later that day. The court cited State v. Weeks, 322 N.C. 152, 367 S.E.2d 895 (1988) (state introduced defendant's inculpatory oral statements, reduced to writing, that were made to officers in the morning; trial judge properly did not allow the defendant to introduce, during the state's case, a written statement made by the defendant later in the afternoon of the same day).

Defendant's Testimony From His First Trial Was Properly Admitted at His Second Trial

State v. Hunt, 339 N.C. 622, 457 S.E.2d 276 (2 March 1995). The defendant testified at his trial and was convicted of first-degree murder, but was awarded a new trial by the supreme court. At the retrial, the state was permitted to introduce the defendant's testimony from his first trial (it was read by the court reporter). The defendant again was convicted of first-degree murder. The defendant argued on appeal, based on Harrison v. United States, 392 U.S. 219 (1968), that the state's introduction of the defendant's first trial testimony was error because the improper introduction of a state witness's prior statements in the first trial induced the defendant to testify during the first trial, thus violating his Fifth Amendment privilege against self-incrimination. Distinguishing the *Harrison* ruling and relying on State v. Wills, 293 N.C. 546, 240 S.E.2d 328 (1977) and State v. Farrell, 223 N.C. 804, 28 S.E.2d 560 (1944), the court ruled that the admission of the defendant's prior testimony was proper. Unlike the facts in *Harrison*, the defendant in this case was not induced to testify in the first trial because *unconstitutionally-obtained* evidence had been introduced during state's case. Here, evidence was admitted solely in violation of state evidence rules.

Defendant's Statement Within Another Person's Statement Was Admissible

State v. Larrimore, 340 N.C. 119, 456 S.E.2d 789 (5 May 1995). A defense witness (McPherson) testified at trial that a window of a truck that the defendant had borrowed had not been broken. On rebuttal, a detective testified that McPherson had previously told him that when he called the defendant to ask the defendant to return the truck, the defendant advised McPherson that the window had been broken out and the truck was being repaired. The court ruled that the detective's testimony was admissible. McPherson's statement was admissible as a prior inconsistent statement, and the defendant's statement within McPherson's statement was admissible as an admission, Rule 801(d). The court cited State v. Connley, 295 N.C. 327, 245 S.E.2d 663 (1978).

Witness's Testimony at First Trial Was Properly Admitted Under Rule 804(b)(1) When He Asserted His Fifth Amendment Privilege at Second Trial

State v. Hunt, 339 N.C. 622, 457 S.E.2d 276 (2 March 1995). At the defendant's first murder trial, a witness testified for the defendant. Before the second trial, the witness was indicted for his

involvement in the murder. The state called the witness to testify at the defendant's second trial, but the witness asserted his Fifth Amendment privilege and refused to testify. The trial judge then permitted the state to introduce the witness's testimony from the first trial because the witness was unavailable under Rule 804(b)(1). The court rejects the defendant's argument that the defendant did not have the same motive in examining the witness at the first trial that he would have had at the second trial, based on the facts in this case.

Factual Findings in City Manager's Report that Reviewed Police Department's Investigation of Murder Were Not Admissible for Defendant Under Rule 803(8)(C)

State v. Hunt, 339 N.C. 622, 457 S.E.2d 276 (2 March 1995). Distinguishing State v. Acklin, 317 N.C. 677, 346 S.E.2d 481 (1986), the court ruled that factual findings in a city manager's report that reviewed police department's investigation of the murder for which the defendant was being tried were not admissible for the defendant under Rule 803(8)(C) (makes admissible against the state in criminal cases, "factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness"). The report was prepared by interviewing people within the police department and others, including private citizens, and considering information from a report prepared by a local minister. The court stated that the city manager's report "was not the result of 'authority granted by law' to conduct an investigation into the . . . murder, there was no assurance that the report contained factual findings that would be admissible, and the report was not prepared for the purpose of being introduced against the State in a criminal case."

Similar Assault Committed Two Months Earlier Than Offense Being Tried Was Admissible Under Rule 404(b)

State v. Abraham, 338 N.C. 315, 451 S.E.2d 131 (9 December 1994). The defendant and his accomplice were convicted of first-degree murder and two felonious assaults. The court ruled that the trial judge properly admitted under Rule 404(b) (to prove the identities of the assailants) evidence of a similar shooting by the defendant and his accomplice that occurred two months before the offenses being tried. Several common factors existed between the two separate crimes: The casings recovered from the earlier shooting matched those fired from a gun used in the offense being tried. One of the guns used in both incidents was in the control of the defendant or his accomplice. On both occasions, witnesses identified the defendant and his accomplice as being in a blue Cadillac on a Charlotte street before they began the assaults.

Commission of Assault in Strikingly Similar Manner to Commission of Murder Was Admissible Under Rule 404(b) Although Assault Was Committed Eight Years Before Murder

State v. Carter, 338 N.C. 569, 451 S.E.2d 157 (30 December 1994). The defendant was tried for a 1989 murder in which he used a brick to strike the victim's head. The state offered, under Rule 404(b), evidence that the defendant eight years earlier in 1981 (when he was thirteen years old) had assaulted an elderly man with a piece of cinder block that was roughly the same size and dimensions of a brick used in the murder. The wound on the murder victim was above her right

eye, and the defendant was right-handed. In the 1981 assault, the wound on the victim was also above the victim's right eye. The court ruled that the evidence was properly admitted under the rule to prove identity of the perpetrator of the murder. The court noted that there are "unusual facts and strikingly similar acts in both crimes." The passage of time between the 1981 assault and the murder affected the weight of the evidence rather than its admissibility. The court also ruled that the evidence was properly admitted under the balancing test of Rule 403.

Evidence of Defendant's Involvement in Soliciting Murder of Husband Nineteen Years After Murder Being Tried Was Admissible Under Rule 404(b), Based on Facts in This Case

State v. White, 340 N.C. 264, 457 S.E.2d 841 (2 June 1995). The defendant was being tried for the murder of her four-year-old stepson that occurred in 1973. The defendant's defense was that the child accidentally choked to death by swallowing a plastic bag. The state offered evidence that beginning in 1991 and through the next ten months the defendant solicited a person (Taylor) to kill her husband. When Taylor told the defendant that he could not kill someone, the defendant encouraged him to commit the murder by telling him, "[I]t's not that hard to do. I had a stepchild. I put a bag over it until it stopped breathing. It was better off." The court ruled that the evidence of the solicitation to murder her husband was properly admitted under Rule 404(b) to explain the context of the defendant's admission that she killed her stepson and to refute the defense of accident.

Defendant's Proffered Evidence of Guilt of Another Was Not Admissible

State v. Moseley, 338 N.C. 1, 449 S.E.2d 412 (3 November 1994). A state's witness testified that he saw the defendant with the victim at a club on the night she was murdered. During cross-examination, the defense counsel attempted to elicit testimony that a black-haired man had also approached the victim at the club that night, pushed her, and told her, "You better stop or I'm going to get you." The witness also testified (at a hearing on an offer of proof) that the victim indicated to him that the black-haired man was the boyfriend of her cousin and that the man thought the victim was trying to break up his relationship with her cousin; the witness indicated that the victim was frightened. None of the testimony in the preceding two sentences was admitted. The pathologist's testimony (that was admitted at trial) showed that a dark hair was found under the chipped fingernail of the victim's left index finger. The court ruled that the excluded testimony was mere speculation and conjecture of another's guilt; it failed to point directly to another person as the perpetrator of the murder. The defendant never developed any connection between the dark hair found under the victim's fingernail and the unnamed black-haired man at the club. Additionally, the excluded testimony was not inconsistent with the guilt of the defendant, based on the facts in this case. The court rejects defendant's argument that State v. Cotton, 318 N.C. 663, 351 S.E.2d 277 (1987) required that the excluded testimony be admitted.

State's Cross-Examination of Defendant's Witnesses Was Permissible Under Rule 611(b), Even If It Was Impermissible Under Rule 608(b)

State v. Bell, 338 N.C. 363, 450 S.E.2d 710 (9 December 1994). The defendant was being tried for first-degree murder of an undercover officer during a drug transaction in which the defendant

was allegedly purchasing marijuana from the undercover officer and the officer's informant. The defendant contended throughout the trial that he went to the place where the transaction was to occur not to buy or steal marijuana but merely to confront the officer's informant concerning his repeated attempts to lure the defendant's son into using drugs. To contradict this assertion, the state wanted to show that the defendant's son was already involved in the drug culture and the defendant was aware of that involvement. The trial judge allowed the state on cross-examination to question the son and the defendant's wife concerning the son's use of marijuana, and the wife concerning her knowledge of her son's involvement with illegal drugs. The court stated that this cross-examination was not conducted for the impermissible purpose under Rule 608(b) of attacking these witnesses' credibility. Instead, it was permissible under Rule 611(b) to shed light on the defendant's true intent in meeting the undercover officer and the officer's informant. The fact that the son, with his parent's knowledge, had been using and selling illegal drugs for years cast doubt on the defendant's contention that his purpose in going to the place where the murder occurred was merely to confront the informant for attempting to lure the son into illegal drugs.

Murder Victim's Diary Entry Was Not Admissible Under Rule 803(3) Because Statements in Entry Merely Recited Facts That Described Events; They Were Not Statements Relating to Victim's State Of Mind

State v. Hardy, 339 N.C. 207, 451 S.E.2d 600 (30 December 1994). The state introduced the 27 February 1992 diary entry by the murder victim in which she described an incident with the defendant, her husband. She described his assaulting her in the morning. At night, he threw various items at her and screamed that he was going to kill her. She described filing an harassment charge. The court ruled that the statements in the diary were not admissible under Rule 803(3) because they merely recited facts that described events; they did not reflect the victim's state of mind. The diary entry was at best speculative concerning the victim's state of mind. The court noted that while the diary entry described two attacks by the defendant and while that may infer a victim who is attacked will fear her attacker, there were also indications in the diary (described by the court) that the victim was not intimidated by the defendant.

The court stated that the policy behind Rule 803(3) is a necessity to admit into evidence a person's own contemporary statements of his or her mental or physical condition, and such statements are more trustworthy than the declarant's in-court testimony. Mere statements of fact, however, are provable by other means and are not inherently trustworthy. In this case, the facts in the diary, which portray attacks on the victim and a threat against her, were admissible through the testimony of other people who witnessed these events. These facts lack the trustworthiness of statements such as "I'm frightened" and are the type of evidence the hearsay rule is designed to exclude.

Murder Victim's Statement Was Admissible Under Rule 803(3) Because It Concerned the Victim's State of Mind and Emotional Condition

State v. Corbett, 339 N.C. 313, 451 S.E.2d 252 (30 December 1994). Shortly before the victim was murdered, she tearfully told her minister that the defendant was the father of her child and she feared for her life if she went to court in an effort to obtain child support from the defendant. The court ruled that her statement was admissible under Rule 803(3) because it related directly to the

victim's state of mind and emotional condition. And, her state of mind was relevant because it related directly to circumstances surrounding the confrontation with the defendant on the day she was murdered. The probative value of the statement was not outweighed by unfair prejudice under Rule 403.

Capital Case Issues

(1) Separate Aggravating Circumstances Were Properly Found for Two Prior Violent Felony Convictions [15A-2000(e)(3)]
(2) Separate Aggravating Circumstances Were Properly Found for Each Felony Committed During Murder [15A-2000(e)(5)]

State v. Moseley, 338 N.C. 1, 449 S.E.2d 412 (3 November 1994). The defendant was convicted of first-degree murder. (1) The court ruled that the jury properly found separate statutory aggravating circumstances under G.S. 15A-2000(e)(3) for two prior violent felony convictions based on offenses committed against the same victim—assault with a deadly weapon inflicting serious injury and attempted second-degree sexual offense. (2) The court ruled that the jury properly found separate statutory aggravating circumstances under G.S. 15A-2000(e)(5) that the murder was committed while the defendant was engaged in the commission of (a) first-degree sexual offense, and (b) first-degree rape.

Attempted Second-Degree Rape Is a Prior Violent Felony Under G.S. 15A-2000(e)(3)

State v. Holden, 338 N.C. 394, 450 S.E.2d 878 (9 December 1994). The defendant's conviction of attempted second-degree rape under North Carolina law was automatically a prior violent felony conviction under G.S. 15A-2000(e)(3) without the necessity to present evidence that the facts underlying the conviction showed that violence was used.

Defendant's Virginia Conviction for First-Degree Murder Was Not Capital Felony Under G.S. 15A-2000(e)(2) Because Death Penalty Did Not Exist at Time of Conviction

State v. Bunning, 338 N.C. 483, 450 S.E.2d 462 (9 December 1994). The defendant pled guilty in a Virginia court to first-degree murder and was sentenced to twenty years' imprisonment. There was no death penalty in Virginia when he plead guilty because the Virginia Supreme Court had previously declared that its death penalty was unconstitutional. The court ruled that the crime to which the defendant pled guilty was not punishable by death and therefore was not a capital felony under G.S. 15A-2000(e)(2). The court ruled that a capital felony is a crime for which the defendant could receive the death penalty; see G.S. 15A-2000(a)(1).

Trial Judge Properly Did Not Instruct on Mitigating Circumstance of No Prior Significant Criminal History [15A-2000(f)(1)]

State v. Jones, 339 N.C. 114, 451 S.E.2d 826 (30 December 1994). The trial judge properly did not instruct on the mitigating circumstance of no prior significant criminal history [15a-2000(f)(1)] when the defendant had three prior violent felony convictions: two counts of assault

with a deadly weapon with intent to kill inflicting serious injury and common law robbery. No rational juror could have found that the defendant had no significant history of prior criminal activity.

(1) Trial Judge Erred in Failing to Peremptorily Instruct on Statutory Mitigating Circumstance [15A-2000(f)(2)], and Error Was Not Harmless Beyond Reasonable Doubt

(2) Trial Judge Erred in Failing to Instruct on Statutory Mitigating Circumstance [15A-2000(f)(7)] Despite Defendant's Withdrawal of Request to Instruct on That Circumstance

State v. Holden, 338 N.C. 394, 450 S.E.2d 878 (9 December 1994). (1) The court ruled that the defendant offered uncontroverted evidence of the mitigating circumstance under G.S. 15A-2000(f)(2) (murder committed while defendant under influence of mental or emotional disturbance), and the trial judge erred in denying the defendant's request for a peremptory instruction. The court also ruled that the error was not harmless beyond a reasonable doubt. Although one or more jurors found that the mitigating circumstance existed, it was not known whether all jurors found that it existed. It is possible that if the peremptory instruction had been given, more jurors or all jurors would have done so. And that could have affected the balancing of mitigating circumstances against aggravating circumstances, thereby affecting the sentencing recommendation. (2) The court ruled that the trial judge erred in failing to instruct on the statutory mitigating circumstance under G.S. 15A-2000(f)(7) (age of the defendant when murder committed) despite the defendant's withdrawal of request to instruct on that circumstance. The evidence supported the submission of this circumstance: Although the defendant was thirty years old at the time of the murder, the defense psychologist testified that the defendant's mental age was ten years and that his problem-solving skills were closer to those of a ten year old.

Jury May Decline to Find Statutory Mitigating Circumstance Although Judge Gave Peremptory Instruction on That Circumstance

State v. Rouse, 339 N.C. 59, 451 S.E.2d 543 (30 December 1994). The court ruled that even when a defendant is entitled to a peremptory instruction on a given mitigating circumstance because the evidence is uncontroverted, the jury is still free to reject the circumstance if it does not find the evidence credible or convincing. The court concluded that the jury could have found that the evidence of the mental health experts was not credible or convincing on the impaired capacity mitigating circumstance [15A-2000(f)(6)]. The court disapproved of language in State v. Kirkley, 308 N.C. 196, 302 S.E.2d 144 (1983) that is inconsistent with this ruling. The court stated, however, that a defendant may be entitled to a directed verdict on a statutory mitigating circumstance if the evidence in support of the circumstance is substantial, manifestly credible, and uncontradicted (but the evidence in this case did not support such an instruction).

Court Reaffirmed Prior Ruling That State's Evidence of Defendant's Bad Character in Capital Sentencing Hearing Can Only Be Offered in Rebuttal; State's Evidence Was Properly Admitted in This Case

State v. Carter, 338 N.C. 569, 451 S.E.2d 157 (30 December 1994). The court reaffirmed its ruling in State v. Silhan, 302 N.C. 223, 275 S.E.2d 450 (1981) that the state in a capital sentencing hearing may offer evidence of the defendant's bad character only in rebuttal to the defendant's offer of good character evidence. The court ruled that the state's evidence (prior criminal behavior) offered in rebuttal in this case was properly admitted. The court noted that while the defendant did not offer "good character" evidence *per se*, his adoptive mother did testify that she felt that the defendant was the "normal Marcus," kind, giving, and helping.

Court Reaffirmed Prior Rulings That Defendant Is Not Entitled to Bill of Particulars From State Disclosing Statutory Aggravating Circumstances on Which It Will Rely in Capital Sentencing Hearing

State v. Baker, 338 N.C. 526, 451 S.E.2d 574 (30 December 1994). The court found no reason to depart from its prior rulings in State v. Taylor, 304 N.C. 249, 283 S.E.2d 761 (1981) and State v. Roper, 328 N.C. 337, 402 S.E.2d 600 (1991) and reaffirmed that a trial judge does not err in denying a defendant's motion for a bill of particulars disclosing statutory aggravating circumstances on which the state intends to rely in a capital sentencing hearing. [Note: The case did not involve the issue whether a trial judge has the authority to require the state to provide such information under Rule 24 of the General Rules of Practice for the Superior and District Courts.]

Defendant Does Not Have Right to Open and Close Final Jury Arguments in Capital Sentencing Hearing

State v. Jones, 339 N.C. 114, 451 S.E.2d 826 (30 December 1994). Relying on State v. Wilson, 313 N.C. 516, 330 S.E.2d 450 (1985), the court ruled that although G.S. 15A-2000(a)(4) gives a defendant the right to make the final argument in a capital sentencing hearing, neither this statute nor any other statute gives the defendant the right to make the first and last jury arguments.

Judge Erred in Failing to Give Special Instruction on Accessory Theory Under G.S. 14-5.2

State v. Larrimore, 340 N.C. 119, 456 S.E.2d 789 (5 May 1995). The defendant was being tried for first-degree murder based on the accessory-before-the-fact principle. One of the state's witnesses was the person the defendant hired to kill the victim. The court ruled that the trial judge erred in failing to instruct the jury on the special question whether the jury based its first-degree murder verdict solely on the uncorroborated testimony of the killer (see G.S. 14-5.2). In this case, the error was harmless because the defendant received a life sentence, and in this case a life sentence for a Class A felony was the same as for a Class B felony (i.e., parole eligibility after serving twenty years). But note that, for offenses committed on or after October 1, 1994, there are significant differences—life imprisonment for a Class A felony is without parole and the punishment for a Class B2 felony in revised G.S. 14-5.2 is not mandatory life imprisonment.

Miscellaneous

Denial of Defense Motion for Funds to Employ Defense Forensic Pathologist Was Not Error

State v. Moseley, 338 N.C. 1, 449 S.E.2d 412 (3 November 1994). The court ruled that the trial judge properly denied a defense motion for funds to employ a forensic pathologist. The court stated that a review of the record, slides, and photographs showed that the similarities between the location and types of wounds of the murder victim in this case and the victim of another murder admitted under Rule 404(b) were obvious and self-explanatory, even to the ordinary lay juror. And there was substantial additional evidence that demonstrated the similarities between the two murders from which the jury could find that they were committed by the same person. The defendant failed to demonstrate that the assistance of a pathologist would have materially aided him in the preparation of his defense or that lack of such an expert deprived him of a fair trial.

Defendant Was Properly Denied Appointment of Eyewitness Identification Expert

State v. Abraham, 338 N.C. 315, 451 S.E.2d 131 (9 December 1994). The court ruled, based on the standard set out in Ake v. Oklahoma, 470 U.S. 68 (1985), that the trial judge in a first-degree murder case did not err in denying the defendant's motion for the appointment of an expert on eyewitness identification. The defendant failed to show how an expert would have materially assisted him. His pretrial motion was based solely on his perceived need to show the unreliability of the identification of the defendants at an earlier shooting offered under Rule 404(b), not the shooting that was being tried. The court also noted that this was not a case involving the uncorroborated identification by a single eyewitness. Victims of an earlier shooting and the shooting being tried knew the defendants. Further, the identification issues for which the defendant sought expert assistance involved matters within the scope of the jury's general capability and understanding.

Judge Properly Denied Defendant's Motion for *Ex Parte* Hearing on Motion for Funds to Hire Investigator

State v. White, 340 N.C. 264, 457 S.E.2d 841 (2 June 1995). Relying on State v. Phipps, 331 N.C. 427, 418 S.E.2d 178 (1992) (no error to deny *ex parte* hearing on motion for fingerprint expert) and distinguishing State v. Ballard, 333 N.C. 515, 428 S.E.2d 178 (1993) and State v. Bates, 333 N.C. 523, 428 S.E.2d 693 (1993) (error to deny *ex parte* hearing on motion for mental health expert), the court ruled that the defendant was not entitled as a matter of right to an *ex parte* hearing on her motion for funds to hire an investigator and the judge did not abuse his discretion in denying that motion for an *ex parte* hearing.

Court Urges Judges and Attorneys to Make Full Record of Issue of Defendant's Consent If There Is a *Harbison* Jury Argument

State v. House, 340 N.C. 187, 456 S.E.2d 292 (5 May 1995). The defendant argued on appeal that his constitutional rights were violated by his lawyer's concession to the jury in closing

argument (in a first-degree murder prosecution) that the defendant was guilty of second-degree murder or involuntary manslaughter, based on the ruling in State v. Harbison, 315 N.C. 175, 337 S.E.2d 504 (1985). However, the record on appeal was silent about whether the defendant consented to his lawyer's concession. The court ruled that it will not presume from a silent record that there was no consent. However, the court noted that the defendant could litigate this issue by filing a motion for appropriate relief based on ineffective assistance of counsel. The court reminded judges and attorneys of the need to make a full record when a *Harbison* issue arises at trial.

Trial Judge Did Not Err in Declining to Question Juror During Trial About Juror's Alleged Relationship With Accomplice, a State's Witness, Based on Facts in This Case

State v. Conaway, 339 N.C. 487, 453 S.E.2d 824 (10 February 1995)**.** The jury returned first-degree murder verdicts on 15 October 1992. On 19 October 1992, at the beginning of the death penalty sentencing hearing, the defendant's counsel advised the trial judge that on 10 October 1992, his secretary had received an anonymous phone call at the office in which the caller indicated that a juror was a cousin of an accomplice who testified for the state in the trial. The defense counsel requested that the trial judge question the juror about his relationship, if any, to the accomplice and implied that the juror might not have been entirely honest in his responses during jury voir dire. The court ruled that given the defendant's critical delay in bringing this alleged phone call to the trial judge's attention and the lack of evidence to substantiate the call, the trial judge did not abuse his discretion in denying the defendant's motion to question the juror.

State's Delegation of Law Enforcement Authority to Campbell University, a Religious Institution, Violated First Amendment's Establishment Clause

State v. Pendleton, 339 N.C. 379, 451 S.E.2d 274 (30 December 1994). The defendant was arrested for DWI on the Campbell University campus by a Campbell University police officer, who exercised law enforcement authority as a commissioned company police officer under former Chapter 74A (now codified as Chapter 74E). The court upheld the trial judge's dismissal of the DWI charge. It ruled that the state's delegation of its law enforcement power to Campbell University, a religious institution (based on the law and factual findings in this case), violated the First Amendment's establishment clause as set out in Larkin v. Grendel's Den, Inc., 459 U.S. 116 (1982). The court stressed that its ruling is based on the unique facts concerning Campbell University that were found by the superior court in this case.

Error to Join Murder Charge with Charge of Willful Failure to Appear for Murder Trial

State v. Weathers, 339 N.C. 441, 451 S.E.2d 266 (30 December 1994). The court ruled that the trial judge erred by joining for trial a 1989 murder charge and a later 1991 charge of willful failure to appear for the murder trial. The charges were not transactionally related under G.S. 15A-926(a). However, the court found the error to be harmless, based on the facts in this case.

Trial Judge Properly Handled Impasse Between Defendant and Defense Counsel About Trial Strategy

State v. Brown, 339 N.C. 426, 451 S.E.2d 181 (30 December 1994). On several occasions, both before and during trial, defense counsel notified the trial judge that the defendant refused to cooperate in the preparation of his defense. The judge, relying on State v. Ali, 329 N.C. 394, 407 S.E.2d 183 (1991), ruled that the defendant's wishes must prevail whenever he and his counsel reached an impasse about trial strategy. The defendant argued on appeal that the judge should have either allowed him to proceed *pro se* or ordered him to abide by his attorney's decisions. The court noted that every time that the trial judge asked the defendant whether he wanted to dismiss his attorney and represent himself, the defendant chose to keep his attorney. Therefore, the judge properly did not allow the defendant to proceed *pro se*. Also, as required by *Ali*, defense counsel notified the judge of his advice to the defendant, the reasons for the advice, the defendant's decision, and the conclusion reached. The court ruled that the trial judge properly ensured that the defendant was fully informed of the consequences of his decision and his attorney's opinions before ordering the attorney to proceed according to the defendant's wishes.

Trial Judge Who Is Merely Repeating Instruction to Jury Based on its Request Is Not Required to Give Parties Opportunity to Be Heard Before Reinstructing Jury

State v. Weathers, 339 N.C. 441, 451 S.E.2d 266 (30 December 1994). Agreeing with the ruling in State v. Buchanan, 108 N.C. App. 338, 423 S.E.2d 819 (1990), the court ruled that a trial judge who is merely repeating an instruction to a jury based on its request is not required under G.S. 15A-1234(c) to give parties an opportunity to be heard before reinstructing the jury.

Trial Judge Properly Denied Defendant's Motion to Conduct *In Camera* Inspection of SBI Investigative Report

State v. Hunt, 339 N.C. 622, 457 S.E.2d 276 (2 March 1995). Because the prosecutor in this case provided the defense counsel with prior statements made by the state's witnesses after they testified on direct examination, the court ruled that the trial judge was not required under North Carolina discovery statutes to conduct its own *in camera* review of the SBI investigative report, based on the facts in this case. The court also ruled that because the defendant failed to show that nondisclosed evidence from the SBI report was "material" and what effect, if any, the nondisclosure would have had on the outcome of the trial, no federal constitutional principle required the trial judge to order the state to make the SBI report available to the defendant or the trial judge to conduct an *in camera* inspection of the SBI report.

Trial Judge Erred in Permitting State to Amend Felonious Assault Indictment to Change Name of Victim

State v. Abraham, 338 N.C. 315, 451 S.E.2d 131 (9 December 1994). The trial judge erred in allowing the state to amend a felonious assault indictment by changing the name of the victim from "Carlose Antoine Latter" to "Joice Hardin" because the change in the name of the victim substantially altered the offense.

Cofield Motion Must Be Timely Made Under G.S. 15A-952(c)

State v. Miller, 339 N.C. 663, 455 S.E.2d 137 (3 March 1995). A defendant's *Cofield* motion (alleging racial discrimination in selecting grand jury foreperson) is considered a motion under G.S. 15A-955(1) and therefore must be timely made under G.S. 15A-952(c) (*e.g.*, at arraignment if arraignment was held before court session for which trial was calendared).

Prosecutor's Jury Argument, That Responded to Defense Counsel's Opening Statement, Was Permissible

State v. Harris, 338 N.C. 211, 449 S.E.2d 462 (3 November 1994). Defense counsel in his opening statement stated that the defendant and another originally intended to commit a breaking and entering, not a robbery. Evidence was not admitted during trial to support that contention. The prosecutor during closing argument highlighted the absence of evidence by posing the question, "What witness said that?" The court ruled that the prosecutor's argument was proper, and noted that the question focused on the defendant's general failure to present evidence and did not improperly comment on the defendant's failure to testify.

NORTH CAROLINA COURT OF APPEALS

Arrest, Search, and Confession Issues

Defendant Did Not Satisfy Burden of Showing Reasonable Expectation of Privacy in Briefcase

State v. Cohen, 117 N.C. App. 265, 450 S.E.2d 503 (6 December 1994). Officers obtained the consent of the defendant's wife to search her car. The officers searched its contents, including an unlocked briefcase. The defendant made a motion to suppress the search of the briefcase on the ground that his wife did not have the authority to consent to its search by the officers. The trial judge refused to accept the wife's affidavit at the suppression hearing because she was available as a witness; the defendant declined the judge's offer of additional time to produce his wife as a witness. The court ruled that the judge properly refused to admit the affidavit, based on these facts. The court also ruled that the defendant's suppression motion was properly denied since the defendant failed to present evidence that he had an ownership or possessory interest in the briefcase.

Defendant Did Not Have Fourth Amendment Privacy Interest in Challenging Accomplice's Consent Search of Accomplice's Bag and Accomplice's Testimony Against Defendant, Although Search of Bag Occurred After Cab (In Which Defendant and Accomplice Were Passengers) Was Unconstitutionally Stopped

State v. Smith, 117 N.C. App. 671, 452 S.E.2d 827 (7 February 1995) (Note: there was a dissenting opinion in this case, but the defendant declined to seek further review.) Officers stopped a cab in which the defendant and Campbell were passengers. The defendant consented to

a search of his luggage and Campbell consented to the search of his luggage, in both of which cocaine was found. The defendant was charged with a trafficking offense. A judge granted the defendant's motion to suppress evidence seized from defendant's luggage because the stop of the cab was unconstitutional. The defendant then was charged with a drug trafficking conspiracy offense. The defendant then moved to suppress the cocaine found in Campbell's luggage and to suppress the testimony of Campbell. The court ruled that a judge (who was a different judge who had ruled on the first motion) properly denied that motion because the defendant did not reasonable expectation of privacy in Campbell's luggage and did not have standing to object to the potential testimony of Campbell, even if it was the fruit of the illegal stop of the cab.

Defendant Failed to Show State Action in Obtaining Telephone Records; Thus, a Fourth Amendment Issue Was Not Presented

State v. Suggs, 117 N.C. App. 654, 453 S.E.2d 211 (7 February 1995). Defendant failed to present evidence in the record about how the state obtained the telephone records it offered at trial. The court rejected the defendant's argument that state action was shown because the state called the telephone company's custodian to testify and to produce the records at trial. Absent any other additional evidence in the record, a Fourth Amendment issue was not presented because there was insufficient evidence of state action. [For a discussion of how to obtain telephone records, see Farb, *Arrest, Search, and Investigation in North Carolina*, page 86 (2d ed. 1992).]

(1) Defendant Consented to Search During Bus Boarding
(2) Defendant Was Not Seized During Bus Boarding

State v. James, 118 N.C. App. 221, 454 S.E.2d 858 (21 March 1995). An officer saw the defendant nervously pacing about until reboarding a bus. The defendant moved toward the rear of the bus and picked up a duffel-type bag from a seat and put it in the overhead luggage bin. Officers went through the typical bus boarding procedures used to find illegal drugs. The defendant agreed to allow an officer to look in his bag. The officer removed a portable radio from the bag and noticed that screws on the radio had been unscrewed several times. The officer asked the defendant if he would get off the bus so they could talk privately. The defendant did not respond verbally but left the bus with the officer. They went to a private area of the bus terminal, where the officer again obtained a consent to search. The officer discovered cocaine in the radio. (1) Relying on State v. McDowell, 329 N.C. 363, 407 S.E.2d 200 (1991) and other cases, the court reviewed the facts of the bus boarding and ruled that the defendant's consent to search was voluntarily given, although he had an IQ of 70. (2) Relying on State v. Christie, 96 N.C. App. 178, 385 S.E.2d 181 (1989) and State v. Bromfield, 332 N.C. 24, 418 S.E.2d 491 (1992), the court ruled that the defendant was not seized when he was on the bus or when he left the bus with the officers.

(1) Defendant Was Not Seized Before He Dropped Drugs in Officer's View
(2) Officer Had Reasonable Suspicion to Detain and Then Probable Cause to Arrest Defendant
(3) Officer's Order to Defendant to Spit Items From Mouth Was Valid as Search Incident to Arrest

State v. Taylor, 117 N.C. App. 644, 453 S.E.2d 225 (7 February 1995). Officer A knew that the defendant had been arrested for drugs previously and had a reputation in the community as a drug dealer. Officer A and other officers saw the defendant with others in an area known for drug trafficking. As officers approached in their marked car, the defendant left the area. The officers saw him at a nearby intersection. The defendant stopped as the police car approached him. As officer A got out of the car, the defendant walked toward him and dropped something on the ground. The officer approached the defendant and brought him over to the police car. He determined that the item dropped was marijuana and arrested the defendant. He then noticed that the defendant was talking "funny" and ordered him to spit out whatever was in mouth. The defendant spit out individually-wrapped pieces of crack cocaine. The court ruled: (1) the defendant was not seized until after he dropped the item to the ground, since he had not yielded to a show of authority before then; see California v. Hodari D., 499 U.S. 621 (1991); (2) after the defendant dropped the item, officer A had reasonable suspicion to detain the defendant, considering everything the officer knew; (3) officer A had probable cause to arrest the defendant when he determined the item was marijuana; and (4) even if the defendant did not voluntarily spit out the cocaine, it was admissible as a search incident to arrest.

Officer Did Not Have Probable Cause or Consent to Open Aspirin Bottle That Had Been Given to Him By the Defendant

State v. Wise, 117 N.C. App. 105, 449 S.E.2d 774 (15 November 1994). (Note: there was a dissenting opinion in this case, but the state declined to seek further review.) A SHP trooper stopped a vehicle for speeding. He saw the defendant-passenger grab his midsection between his stomach and his belt line with both hands. The trooper patted down the defendant, reaching from the driver's side of the car, and felt a "round cylinder object" in the area where the defendant had grabbed, but he determined that it was not a weapon. The trooper asked the defendant what he had grabbed, which prompted the defendant to reach inside his jacket and hand the trooper a white, non-transparent Bayer aspirin bottle. The trooper shook the bottle and it "rattled lightly," sounding as if it had "BBs in it." He was suspicious because such a bottle normally has cotton in it so the rattle would not sound the same. The trooper then opened the bottle, shined his flashlight in it, looked inside, and saw what he determined was rock cocaine. The court ruled that the officer unconstitutionally opened the bottle: (1) there was no evidence that the defendant consented to a search of the bottle; and (2) there was no probable cause to believe, based on these facts, that the bottle contained illegal drugs.

(1) Officer's Looking Through Small Opening in Drawn Curtains of Apartment Window Was Unconstitutional Search, Based on Facts in This Case
(2) Consent to Search Apartment Was Tainted By Unlawful Search

State v. Wooding, 117 N.C. App. 109, 449 S.E.2d 760 (15 November 1994). An officer received a radio communication that a person at the Southern Lights Restaurant had seen a black man of a given description get out of a 1980s gray Monte Carlo car and hide behind a dumpster near the restaurant. The person believed that the man lived in one of the apartments at 109 North Cedar Street. While investigating this communication, the officer received another radio communication that a robbery had occurred at the Equinox Restaurant. The description of the robber matched the description of the suspicious person at the Southern Lights Restaurant. The officer want to 109 North Cedar Street. He saw a gray Monte Carlo car parked in front of the building, which contained four apartments, two at ground level and two upstairs. Before leaving his vehicle, the officer saw—through an open window in the side of one of the downstairs apartments—a black male matching the earlier descriptions. After getting out of his vehicle, the officer saw this same person through the open window walking around the apartment and "heard a lot of noise which appeared to [him] to be coins hitting metal." He believed that the noise was definitely change being counted or sifted through. The officer went to the back porch of the apartment in which he had seen the black male (there was a partition that separated the porches of the two lower level apartments). Once on the porch, the officer leaned over a couch next to the window, got close to the window, and looked into the apartment through a three to four inch opening in the window curtains. The officer saw two black males sitting on the floor in the hallway counting money. The officer radioed what he had seen to an officer who was in the front of the apartment with the robbery victim (the victim heard the officer's communication). Shortly thereafter, the defendant came out onto the front porch and was arrested for the robbery. Then the other person came out of the apartment and was identified as the robber by the victim. Both men thereafter consented to a search of the apartment, and the officers found a handgun and money in the apartment. (1) The court, relying on State v. Tarantino, 322 N.C. 386, 368 S.E.2d 588 (1988) (looking through cracks in building violated Fourth Amendment), ruled that the officer's looking into the apartment window was an unlawful search under the Fourth Amendment. (2) The court rejected the state's argument that the later consent search of the apartment (when a handgun and money were found) was based on lawful activity independent of the officer's initial unlawful observation into the apartment window. The court ruled that (i) the arrest of the defendant was based entirely on the officer's unlawful search and was therefore itself unlawful; (ii) the consent to search, given by the defendant after his arrest, was tainted by the unlawful search; and (iii) the victim's identification of the second person in the apartment was made only after the victim learned what the officer had seen, through the back window—two people counting money in the apartment; thus, the identification and the later consent to search were also tainted by the unlawful search.

(1) Probable Cause Existed to Support Search Warrant
(2) Independent Source Exception to Exclusionary Rule Made Admissible Evidence Seized Under Proper Search Warrant Despite Allegedly Initial Illegal Entry

State v. Waterfield, 117 N.C. App. 295, 450 S.E.2d 524 (6 December 1994). On 13 May 1993 officers went to the defendant's residence without a search warrant. The defendant refused to give

his consent to a search of his residence. One officer told the defendant that he would stay with the defendant while the other officers obtained a search warrant. When the officers insisted that the defendant remain in their view at all times, the defendant shut and locked the door. One officer kicked the door down and forced the defendant to sit in a chair. About one-and-one-half hours later, officers returned with a search warrant and conducted a search. No information obtained during the initial entry was used in the affidavit for the search warrant. (1) The affidavit stated that on 1 April 1993 three people gave an officer about three grams of marijuana they said the defendant had given them. They stated that the defendant had shown them marijuana kept in a padlocked cabinet in his bedroom at his residence. On 2 April 1993 a confidential informant told an officer he had seen marijuana in the defendant's residence and stated that the defendant kept the marijuana in a padlocked cabinet in his bedroom. On 5 April 1993 officers visited the defendant's residence and confirmed that he lived there. On 12 May 1993 another confidential informant reported to an officer that within the last 24 hours the informant had seen about a half pound of marijuana at the defendant's residence and had seen the defendant sell marijuana from his home; the informant also stated that the defendant kept marijuana in a padlocked cabinet in his bedroom. The court ruled that the affidavit supplied probable cause to support the search warrant. Although the affidavit did not mention the reliability of the officers' sources of information, it did provide information about the presence and sale of marijuana at the defendant's residence within 24 hours of the warrant application. It further described the location and manner of the defendant's storage of the marijuana that matched information supplied by other sources. (2) Relying on Segura v. United States, 468 U.S. 796 (1984), the court ruled that the search pursuant to the search warrant was valid because the information used to obtain the search warrant was obtained entirely independent of the allegedly illegal initial entry to secure the residence.

Officer Had Probable Cause to Believe Person Had Committed Impaired Driving Offense, Based on Facts in This Case, Which Included Alco-Sensor Test Result

Moore v. Hodges, 116 N.C. App. 727, 449 S.E.2d 218 (1 November 1994). A trooper arrived at the scene of a one-car accident and saw Moore's vehicle in the ditch on the side of the road. Moore was lying down in the back of a rescue squad vehicle while being treated for injuries. She told the trooper at the hospital that she was driving the vehicle and it went off the road. She admitted that she had some liquor earlier in the day. The trooper noticed her mumbled speech and detected a faint odor of alcohol about her. He administered an alcohol screening test [authorized for probable cause determinations under G.S. 20-16.3(d)] with an Alco-Sensor [approved under N.C. Administrative Code Title 15A, rule 19B.0503(a)]. The test registered a result higher than 0.10. The court ruled that, based on these facts, the trooper had probable cause to believe that Moore had committed impaired driving.

Plaintiff's Evidence, Taken in the Light Most Favorable to the Plaintiff on Defendant's Motion for Summary Judgment, Was Sufficient to Allege Fourth Amendment Violation

Davis v. Town of Southern Pines, 116 N.C. App. 663, 449 S.E.2d 240 (1 November 1994). Plaintiff civilly sued law enforcement officers and town for violating her Fourth Amendment rights by taking her to jail for allegedly being intoxicated in public. The evidence, taken in the light most

favorable to the plaintiff on defendant's motion for summary judgment, showed that the plaintiff was publicly intoxicated at 1:30 A.M., and she tripped and fell while walking to a phone booth to call a cab. The plaintiff told the law enforcement officers that she was not bothering anybody and that she was going to call a cab to take her home. Plaintiff's sister offered to call a cab for the plaintiff and take care of her. The officers then took the plaintiff to jail against her will, which the court ruled constituted an arrest under the Fourth Amendment. The court ruled, based on these proffered facts, the officers did not have probable cause to believe the plaintiff was in need of assistance under G.S. 122C-303 [which authorizes officers to take a publicly intoxicated person to jail if the person is apparently in need of and apparently unable to provide for oneself food, clothing, or shelter, but is not apparently in need of immediate medical care and if no other facility is readily available to receive the person].

Criminal Offenses

Defendant, Charged with Attempted Rape, Was Not Entitled to Dismissal When Evidence at Trial Showed Completed Rape

State v. Canup, 117 N.C. App. 424, 451 S.E.2d 9 (20 December 1994). The defendant was charged with attempted second-degree rape. The evidence at trial showed a completed act of rape. The defendant argued that there was a fatal variance between the proof and indictment that required a dismissal of the charge. Relying on State v. Wade, 49 N.C. App. 257, 271 S.E.2d 77 (1980), the court ruled there was no error. The court noted that the completed commission of a crime must include an attempt to commit a crime and the evidence in this case supported the defendant's being charged with either second-degree rape or attempted second-degree rape and being convicted of either offense. And if there was any error in submitting attempted second-degree rape, it was harmless. The court distinguished State v. Jeffries, 57 N.C. App. 416, 291 S.E.2d 859 (1982) and State v. Green, 95 N.C. App. 558, 383 S.E.2d 419 (1989) by noting that the issue in those cases was whether the trial judge was required to instruct the jury on lesser offenses of the charged offense.

(1) Indictment for Second-Degree Rape Would Support Verdict of Attempted Second-Degree Rape or Assault on a Female, Based on G.S. 15-144.1
(2) Trial Judge's Decision at First Trial (Which Resulted in Hung Jury on Second-Degree Rape) Not to Submit Any Lesser Offenses of Second-Degree Rape Did Not Constitute "Acquittal" of Lesser Offenses of Attempted Second-Degree Rape and Assault on a Female

State v. Hatcher, 117 N.C. App. 78, 450 S.E.2d 19 (15 November 1994). The defendant was indicted for second-degree rape. At the jury instruction conference, neither the state nor the defendant requested instructions on any lesser-included offenses. The judge instructed on second-degree rape only. There was a hung jury and a mistrial was declared. Before the second trial, the judge ruled on double jeopardy grounds that the state was barred from trying the defendant on lesser offenses of attempted second-degree rape and assault on a female (the state had brought indictments for these offenses after the new trial). (1) The court noted that the indictment for second-degree rape would support a verdict for attempted second-degree rape or assault on a

female, based on G.S. 15-144.1. (2) Relying on State v. Thomas, 325 N.C. 583, 386 S.E.2d 555 (1989) (court ruled, after ordering retrial because the judge erred in not submitting involuntary manslaughter, that defendant could be retried for first-degree murder on both premeditation and deliberation and felony murder theory and all lesser-included offenses, even though at first trial only first-degree murder felony murder theory had been submitted to jury and no lesser-included offenses had been submitted), the court ruled that defendant may properly be tried at the second trial for second-degree rape, attempted second-degree rape, and assault on a female. The defendant was not acquitted of these lesser offenses of second-degree rape because the judge at the first trial did not submit them to the jury.

(1) Indictment Sufficiently Charged Felony Habitual Impaired Driving
(2) Habitual Impaired Driving Under G.S. 20-138.5 Is a Felony Offense for Which the Superior Court Has Original Jurisdiction
(3) Felony Habitual Impaired Driving Conviction May Be Used to Establish Habitual Felon Status

State v. Baldwin, 117 N.C. App. 713, 453 S.E.2d 193 (7 February 1995). The defendant was indicted for felony habitual impaired driving and as an habitual felon. The court ruled that: (1) the felony habitual impaired driving indictment was sufficient when it alleged that the defendant had been convicted of impaired driving on 13 November 1989 and twice on 12 December 1989; (2) habitual impaired driving under G.S. 20-138.5 is a felony offense for which the superior court has original jurisdiction [see similar ruling in State v. Priddy, 115 N.C. App. 547, 445 S.E.2d 610 (1994)] and (3) a prior felony habitual impaired driving conviction is a substantive felony conviction that may constitute a felony conviction to establish habitual felon status.

(1) Failure to Properly Arraign Habitual Impaired Driving Defendant under G.S. 15A-928(c) Was Not Reversible Error
(2) Defense Counsel's Stipulation to Defendant's Prior Convictions Was Proper

State v. Jernigan, 118 N.C. App. 240, 455 S.E.2d 163 (21 March 1995). The defendant was charged with habitual impaired driving. (1) The trial judge did not formally arraign the defendant concerning the prior convictions and did not advise the defendant that he could admit the prior convictions, deny them, or remain silent, as required by G.S. 15A-928(c). However, since the defendant stipulated to the convictions before trial and the case was submitted to the jury without reference to these convictions, the trial judge did not commit reversible error. The defendant on appeal did not contend that he was unaware of the charges against him, that he did not understand his rights, or that he did not understand the effect of the stipulation. (2) The court, relying on State v. Watson, 303 N.C. 533, 279 S.E.2d 580 (1981), rejected the defendant's argument that his attorney's stipulation was ineffective because the defendant was not advised of his rights by the trial judge concerning the stipulation; the judge was not required to do so. And the defendant did not contend that his attorney was acting contrary to his wishes.

Evidence in Habitual Felon Hearing Was Insufficient to Prove that Prior Conviction Was a Felony

State v. Lindsey, 118 N.C. App. 549, 455 S.E.2d 909 (18 April 1995). The court ruled that the following evidence in an habitual felon hearing was insufficient to prove that a prior New Jersey conviction was a felony. The defendant pled guilty to an indictment alleging that the defendant unlawfully received or possessed goods worth more than $200 and less than $500 that had been feloniously stolen, the defendant knowing the goods to have been feloniously stolen. The court noted that the indictment did not charge the defendant with felonious possession of stolen property. The judgment did not recite that the defendant pled guilty to a felony or was sentenced as a felon. There was no official certification that the offense was a felony in New Jersey in 1975.

Insufficient Evidence of Solicitation to Commit Felonious Assault with Deadly Weapon When There Was No Evidence How Injury Was to Be Inflicted

State v. Suggs, 117 N.C. App. 713, 453 S.E.2d 211 (7 February 1995). The defendant solicited Bateman to "break [the victim's] face" or break the victim's legs or arms for $2,500. The court ruled that this was insufficient evidence for a conviction of solicitation to commit assault with a deadly weapon inflicting serious injury, when there was no evidence how Bateman was to inflict the injuries on the victim. The mere fact that the defendant asked Bateman to inflict serious injury on the victim does not necessarily imply the use of a deadly weapon.

Defendant's Shooting of Victim Was Proximate Cause of Death, Even Though Victim Later Chose Surgery Against Medical Advice

State v. Gilreath, 118 N.C. App. 200, 454 S.E.2d 871 (21 March 1995). The defendant shot the victim in the chest on 4 July 1990. The victim had several operations and remained in the hospital over one year. Against medical advice, the victim in August 1992 underwent colostomy removal surgery because he stated that he would rather be dead than to endure his physical condition. He died shortly after the surgery. A pathologist testified that the victim died of complications from the bullet wound to his chest. The court rejected the defendant's argument that the cause of death was the victim's decision to undergo surgery against medical advice. The bullet wound caused or directly contributed to the victim's death.

Jury Instruction on "Willful" Element Was Error

State v. Whittle, 118 N.C. App. 130, 454 S.E.2d 688 (7 March 1995). The court ruled that the following jury instruction on "willful" was error because it was incomplete: "willful means intentionally. An act is done willfully when it is done intentionally." The instruction should also have stated that to be willful, the act or inaction must also be "purposely and designedly in violation of law." *Cf.* Ratzlaf v. United States, 510 U.S. 135, 114 S.Ct. 655, 126 L.Ed.2d 615 (1994) (when willful violation of federal statute required for conviction, government must prove defendant acted with knowledge of illegality of conduct).

Grand Jury Presentment for Misdemeanor That Was Returned Within Two Years of Act Constituting Misdemeanor Was Not Barred by Statute of Limitations

State v. Whittle, 118 N.C. App. 130, 454 S.E.2d 688 (7 March 1995). The grand jury returned a presentment for two misdemeanors within two years of the acts constituting the misdemeanors, but the grand jury returned indictments for these misdemeanors after two years of the acts constituting the misdemeanors. The court ruled that the prosecution for these misdemeanors was not barred by the statute of limitations, G.S. 15-1.

Defendant's Convictions for Trafficking by Possessing Cocaine and Failure to Pay Drug Tax on Cocaine Did Not Violate Double Jeopardy

State v. Morgan, 118 N.C. App. 461, 455 S.E.2d 490 (4 April 1995). The court ruled that the defendant's convictions for trafficking by possessing cocaine and failure to pay excise taxes on the same cocaine (G.S. 105-113.110) did not violate the double jeopardy clause. Each offense required proof of different elements; neither was a lesser-included offense of the other.

Officer Violated Defendant's Right to Have Witness at Breathalyzer Test When He Told Defendant, After He Requested His Wife To Be at Test, That It Might Not Be a Good Idea

State v. Myers, 118 N.C. App. 452, 455 S.E.2d 492 (4 April 1995). At DWI trial, the defendant made a motion to suppress Breathalyzer results because he was denied his right to have a witness of his choice present when the test was administered. The evidence showed that the defendant told the arresting officer that he wanted his wife to come into the Breathalyzer room with him, and the officer said that might not be a good idea because she had been drinking also. The wife left to check on her children. Later during the reading of the right to have a witness present, the defendant said the only person he wanted was his wife, but she was gone. The court ruled, based on these facts, that the defendant's right to have a witness present during the test was violated and the Breathalyzer results must be suppressed. The court stated that the officer's remark was tantamount to a refusal of the defendant's request to have his wife present, and it also noted that there was no evidence that the wife would have disrupted the testing procedures.

Privately-Maintained Paved Road within Mobile Home Park Was Public Vehicular Area to Support DWI Conviction

State v. Turner, 117 N.C. App. 457, 451 S.E.2d 19 (20 December 1994). The defendant was convicted of DWI when she drove on a privately-maintained paved road within a privately-owned mobile home park. The court ruled that the road was a public vehicular area to support the DWI conviction. The mobile home park was owned by one individual who had divided the property into lots for lease; therefore, it met the definition of "subdivision" within the definition of "public vehicular area" in G.S. 20-4.01(32). The streets within the subdivision were not marked by signs indicating the roads were private or by signs prohibiting trespassing. And the streets were available for use by residents, their guests, and other visitors.

Anti-Noise County Ordinance Is Constitutional in Part and Unconstitutional in Part

State v. Garren, 117 N.C. App. 393, 451 S.E.2d 315 (20 December 1994). A county anti-noise ordinance defined "loud, raucous and disturbing" noise as any sound that "annoys, disturbs, injures or endangers the comfort, health, peace or safety of reasonable persons of ordinary sensibilities." The court ruled that because this was an objective standard for measuring what noise was prohibited, this section of the ordinance was not unconstitutionally overbroad or vague. The court noted that there must be some evidence at trial—based on this objective standard—to support a conviction; examples would include testimony that a person could not hear a person standing next to him or her or that furniture or windows were rattling from vibrations created by the noise. The court approvingly cited State v. Dorsett, 3 N.C. App. 331, 164 S.E.2d 607 (1968).

The court ruled as unconstitutionally overbroad a section of the ordinance that bans any singing, yelling, or the playing of any radio, amplifier, musical instrument, phonograph, loudspeakers, or other device producing sound regardless of their level of sound or actual impact on a person.

Video Poker Machines at Issue in this Case Were Illegal Slot Machines under G.S. 14-306

Collins Coin Music Co. v. N.C. Alcohol Beverage Control Comm'n, 117 N.C. App. 405, 451 S.E.2d 306 (20 December 1994). The court ruled that video poker machines at issue in this case did not fit within the authorized exceptions for illegal slot machines under G.S. 14-306, and therefore the video poker machines were illegal. The element of chance dominates the element of skill in operating the machine and therefore the machine does not fit within the "skill or dexterity" exception. Since a player can receive up to $500.00 of merchandise in a single hand in exchange for paper coupons won, the machine does not fit within the exception that allows a person to win paper coupons that may be exchanged for merchandise with a value not exceeding $10.00.

Amending Indictments

Embezzlement Indictments Were Improperly Amended to Change Owner of Property

State v. Hughes, 118 N.C. App. 573, 455 S.E.2d 912 (18 April 1995). Embezzlement indictments alleged that the gasoline belonged to "Mike Frost, President of Petroleum World, Incorporated, a North Carolina Corporation having [its] principal place of business in Cliffside, North Carolina." Evidence at trial showed that the gasoline was actually owned by Petroleum World, Incorporated, a corporation. The trial judge permitted the state to amend the indictments to delete the words "Mike Frost, President." The court ruled that the amendment, changing ownership from an individual to a corporation, substantially altered the offense and therefore was improper.

Habitual Felon Indictment Was Properly Amended to Change Date of Commission of Felony

State v. Locklear, 117 N.C. App. 255, 450 S.E.2d 516 (6 December 1994). The court ruled, relying on State v. Price, 310 N.C. 596, 313 S.E.2d 556 (1984), that the trial judge properly

permitted the state to amend an habitual felon indictment to change the date of the commission of a felony alleged in the indictment.

Constitutional and Statutory Discovery

Trial Judge's Failure to Conduct In Camera Review of State's Files Was Error, Based on Facts in This Case

State v. Kelly, 118 N.C. App. 589, 456 S.E.2d 861 (2 May 1995). The defendant was charged with multiple counts of child sexual assaults at day care center. The North Carolina Supreme Court during pretrial appellate review affirmed that part of a superior court judge's pretrial order that required the state to turn over for in camera inspection medical and therapy notes in its possession relating to the children named as victims. The trial judge (who was a different judge than the judge who had issued the pretrial order) failed to conduct the in camera review. The court ruled that the trial judge was bound by the pretrial order as affirmed by the supreme court, and the failure to conduct the review was error under Pennsylvania v. Ritchie, 480 U.S. 39, 107 S.Ct. 989, 94 L.Ed.2d 40 (1987).

State Did Not Violate Constitutional Discovery Obligation Because State Provided Favorable Evidence to Defendant at Trial

State v. Wilson, 118 N.C. App. 616, 456 S.E.2d 870 (2 May 1995). The state did not violate its constitutional duty to provide favorable evidence to the defendant when it provided the information after jury selection.

(1) State Did Not Violate Constitutional Discovery Rulings Because Evidence Was Disclosed to Defendant at Trial
(2) State Did Not Violate Statutory Discovery Because State's Witness Did Not Make a "Statement" as Defined in G.S. 15A-903(f)(5)

State v. Shedd, 117 N.C. App. 122, 450 S.E.2d 13 (15 November 1994). The trial judge during trial dismissed first-degree murder charges against the defendant for two discovery violations by the state. (1) The trial judge ruled that the state failed to produce evidence of an officer's log entry that indicated that a key state's witness was too intoxicated to give a statement to the officer on the night of the murder. The trial judge also ruled that the log entry was relevant to the witness's credibility, and the state's failure to provide this information to the defense violated Brady v. Maryland, 373 U.S. 83 (1963). However, the court ruled that since this evidence was disclosed at trial, there was no *Brady* violation—the court cited State v. Abernathy, 295 N.C. 147, 244 S.E.2d 373 (1978) and State v. Lineberger, 100 N.C. App. 307, 395 S.E.2d 716 (1990). (2) The trial judge ruled that the state violated discovery ruled by failing to provide to the defense a pretrial statement made by a key state's witness. At trial, the witness testified about the events of the murder. The trial judge found that the witness had given a statement to an officer about these events, and the state therefore violated discovery statutes in failing to give a copy of this statement to the defense. The court noted that the definition of a "statement" in G.S. 15A-903(f)(5)a. includes "[a] written statement made by the witness and signed or otherwise adopted

or approved by [the witness]." The evidence, however, showed that the witness made a statement but did not sign, read, or have it read to her. She neither received a copy of it nor ever saw it. Thus, the court concluded that there is no evidence that the witness signed, adopted, or otherwise approved of the statement. Since there was no "statement" as defined by the discovery statute, the trial judge was not authorized to impose sanctions since the statute was not violated.

The court reversed the trial judge's order of dismissal since there was neither a *Brady* violation nor a statutory discovery violation.

State's Failure to Disclose That Fingerprint Analysis Had Been Performed on Bottle Was Not Error, Based on Facts in This Case

State v. Hodge, 118 N.C. App. 655, 456 S.E.2d 855 (2 May 1995). The defendant was charged with drug offenses. A state's witness revealed at trial that a medicine bottle in which cocaine had been found had been submitted for fingerprint analysis, but no fingerprint comparisons could be made due to smudges. The defendant, alleging that the state had committed a constitutional violation by failing to disclose exculpatory evidence, moved for a mistrial or continuance. The trial judge denied the motions. The court ruled that since no meaningful analysis could be conducted, the state did not suppress any exculpatory evidence. The court also rejected the defendant's argument that he could have employed his own fingerprint expert to examine the bottle had he known of the state's analysis, since the defendant knew the bottle existed and was free to conduct his own tests.

Police Destruction of Evidence Did Not Constitute Due Process Violation, Based on Facts in This Case

State v. Graham, 118 N.C. App. 231, 454 S.E.2d 878 (21 March 1995). The defendant was convicted of second-degree rape. The defendant's defense was consent. The police department inadvertently destroyed the rape kit and the victim's clothing. The defendant objected to testimony by the state's experts about their analysis of body fluids and hairs contained in the rape kit with those of the defendant. The court ruled: (1) the evidence was not favorable to the defendant since the defendant did not deny having sexual relations with the victim, and (2) there was no due process violation, citing Arizona v. Youngblood, 488 U.S. 51, 109 S.Ct. 333, 102 L.Ed.2d 281 (1988).

Evidence

Collateral Estoppel Did Not Bar Felony Cocaine Possession Prosecution After District Court Acquittal of Marijuana and Drug Paraphernalia Possession Charges, Although All Offenses Were Based on Items Found in Defendant's Pocketbook

State v. Solomon, 117 N.C. App. 701, 453 S.E.2d 201 (7 February 1995). A search of a cigarette case incident to the defendant's arrest resulted in the seizure of rolling papers, marijuana, and cocaine. On 29 March 1993, the defendant was found not guilty in district court of possession of marijuana and possession of drug paraphernalia. On 30 June 1993, the defendant was convicted of felony possession of cocaine. The court rejected the defendant's argument that the district

court acquittals barred the later cocaine prosecution. The defendant asserted that the acquittals were based on a reasonable doubt that she knew of the contents of the cigarette case. The court noted that since there was no transcript of the district court prosecution, the basis of the acquittals was speculative and therefore insufficient to support the application of the collateral estoppel doctrine.

Trial Judge Properly Found Four-Year-Old Sexual Assault Victim Was Competent to Testify

State v. Ward, 118 N.C. App. 389, 455 S.E.2d 666 (4 April 1995). The court ruled that, based on the facts in this case, a four-year-old sexual assault victim was competent to testify. The sexual assault occurred when the victim was two years old.

Expert Improperly Testified About Sexual Assault Victim's Truthfulness and Although Defendant Did Not Object to Testimony at Trial, New Trial Is Ordered Based on Plain Error

State v. Hannon, 118 N.C. App. 448, 455 S.E.2d 494 (4 April 1995). The alleged victim of a sexual assault was a mentally-handicapped high school student. Although the state's witness testified about the victim's truthfulness (in effect, the victim is telling the truth about having sex with the defendant, and this is how I know she is telling the truth) before she was qualified as an expert in the behavior of mentally-retarded children, the court ruled that the trial judge implicitly accepted her as an expert before she stated her opinion and the judge conveyed that impression to the jury. Therefore, the expert testimony about the victim's truthfulness was improper; see State v. Kim, 318 N.C. 618, 350 S.E.2d 347 (1986); State v. Teeter, 85 N.C. App. 624, 355 S.E.2d 804 (1987). Although the defendant did not object to this improper testimony at trial, the court found plain error and ordered a new trial. In this case there was no evidence of sexual intercourse other than the victim's testimony, and the state's case depended largely on the victim's credibility.

Parents Were Improperly Permitted to Offer Testimony About Their Allegedly Sexually-Abused Children That Could Only Have Been Offered Through Expert Testimony

State v. Kelly, 118 N.C. App. 589, 456 S.E.2d 861 (2 May 1995). The court reviewed the testimony of parents of allegedly sexually-abused children and ruled that their testimony was improperly permitted. Explanations of the symptoms and characteristics of sexually-abused children are admissible only by expert testimony for the limited purpose of assisting the jury in understanding the behavior patterns of abused children. Evidence of a particular child's symptoms, and their consistency with established characteristics of abused children, may only be offered by an expert. The court noted, however, that parental observations and perceptions are admissible—testimony that a child seemed embarrassed, frightened, or displayed other emotions, and testimony about a child's statements and complaints.

Defendant's Reputation as Drug Dealer Was Inadmissible When His Character Was Not in Issue

State v. Taylor, 117 N.C. App. 644, 453 S.E.2d 225 (7 February 1995). The trial judge erred in permitting the state to offer evidence that the defendant had a reputation as a drug dealer when defendant had not offered any evidence and had not put his character in issue.

State May Not Ask Defense Witness About Pending Charge to Show Witness's Bias

State v. Graham, 118 N.C. App. 231, 454 S.E.2d 878 (21 March 1995). Although a defendant may ask a state's witness about pending criminal charges to show the witness may be testifying to receive a lighter sentence, see State v. Evans, 40 N.C. App. 623, 253 S.E.2d 333 (1979), the court ruled that the state may not ask a defense witness about a pending charge to show the witness's bias. Therefore, the trial judge erred in allowing the state to elicit from the defense witness that he was currently in jail awaiting trial.

Prosecutor's Questions to Defendant About Her Prior Drug Use Were Improper Under Both Rule 608(b) and Rule 611(b)

State v. Wilson, 118 N.C. App. 616, 456 S.E.2d 870 (2 May 1995). A prosecutor's questions to the defendant about her prior drug use were improper under Rule 608(b) because they were not related to truthfulness; see State v. Morgan, 315 N.C. 626, 340 S.E.2d 84 (1986). The court rejected the state's contention that the questions were proper under Rule 611(b) based on State v. Williams, 330 N.C. 711, 412 S.E.2d 359 (1992) [cross-examination of key state's witness about prior drug use and mental instability was permissible under Rule 611(b)].

Trial Judge Did Not Err in Ordering Defendant to Speak in Court So Witness Could Make Voice Identification

State v. Locklear, 117 N.C. App. 255, 450 S.E.2d 516 (6 December 1994). The court ruled, relying on State v. Perry, 291 N.C. 284, 230 S.E.2d 141 (1976) and cases from other states, that the defendant's Fifth Amendment privilege against compelled self-incrimination was not violated when the trial judge ordered the defendant to speak the exact words of the robber in the jury's presence so the state's witness could make a voice identification.

Miscellaneous

State Could Appeal Midtrial Dismissal of Criminal Charges Because Dismissal Was Unrelated to Factual Finding of Guilt or Innocence

State v. Shedd, 117 N.C. App. 122, 450 S.E.2d 13 (15 November 1994). The trial judge during trial dismissed first-degree murder charges against the defendant for two discovery violations by the state. The court ruled that the state was authorized to appeal the midtrial dismissal without violating the double jeopardy clause because the dismissal was unrelated to a finding of the

defendant's factual guilt or innocence; the court cited State v. Priddy, 115 N.C. App. 547, 445 S.E.2d 610 (1994); United States v. Scott, 437 U.S. 82 (1978).

Defendant Had No Right To Appeal Activation of Probationary Sentence When He Voluntarily Elected to Serve His Sentence

State v. Ikard, 117 N.C. App. 460, 450 S.E.2d 927 (20 December 1994). After being convicted of second-degree murder and sentenced to twenty-five years in prison, the defendant voluntarily elected to serve a probationary sentence that had previously been imposed for a cocaine conviction. The trial judge activated the suspended sentence imposed under that probation and ordered the sentence to be served consecutively to the sentence for the murder conviction. The defendant appealed and argued that the sentence should run concurrently to the murder conviction because he elected to serve the prison sentence. The court dismissed the appeal, ruling that G.S. 15A-1347 does not authorize an appeal when a defendant voluntarily elects to serve a probationary sentence, since the judge did not activate the sentence "as a result of a finding of a violation of probation."

Defendant Was Not Entitled to Continuance When State Filed Statement of Charges in Superior Court, Based on Facts in This Case

State v. Chase, 117 N.C. App. 686, 453 S.E.2d 195 (7 February 1995). The defendant was convicted of misdemeanor gambling charges in district court and appealed for trial de novo. In superior court, the trial judge allowed the state to file misdemeanor statements of charges after granting the defendant's motion to dismiss the warrants because they were insufficient to charge the gambling offenses [see G.S. 15A-922(e)]. The court ruled that the trial judge did not err in failing to allow a continuance to the defendant under G.S. 15A-922(b)(2) because the statement of charges did not materially change the pleadings and additional time was unnecessary.

Presence of Alternate Juror in Jury Room Was Not Reversible Error, Based on Facts in This Case

State v. Jernigan, 118 N.C. App. 240, 455 S.E.2d 163 (21 March 1995). The trial judge sent the jurors, including the alternate juror, to the jury room to select a foreperson and return to the court for further instructions. The judge instructed them not to talk about the case itself. The jurors returned to the courtroom, after having selected a foreperson, and were reinstructed on the charge. The judge then excused the alternate juror. The court stated that it must presume that the jurors followed the judge's instructions and did not discuss the case. Because the jury had not deliberated in this case, the court—distinguishing State v. Bindyke, 288 N.C. 608, 220 S.E.2d 521 (1975)—ruled there was no prejudicial error.

Defense Challenge of Prospective Juror for Cause Should Have Been Granted

State v. Shope, 118 N.C. App. 270, 454 S.E.2d 716 (21 March 1995). The court examined the voir dire of a prospective juror and ruled that the trial judge erred in denying the defendant's challenge for cause. The juror clearly stated that she believed that the defendant was guilty, and he

would have to prove his innocence. Although she ultimately agreed to be fair and impartial and discard her preconceptions, she still adhered to her prior statements, which showed that she could not be fair and impartial.

Prosecutor's Jury Argument Improperly Commented on Defendant's Right to Jury Trial

State v. Thompson, 118 N.C. App. 33, 454 S.E.2d 271 (21 February 1995). The court ruled that the prosecutor's jury argument that in effect complained that the defendant had failed to plead guilty and thereby put the state to its burden of proof violated the defendant's Sixth Amendment right to a jury trial. However, the court found the error to be harmless beyond a reasonable doubt.

Prosecutor's Jury Argument Improperly Recited Evidence Prosecutor Knew Was Inadmissible, and Trial Judge Erred By Not Correcting Argument Even Though Defendant Did Not Object

State v. Wilson, 118 N.C. App. 616, 456 S.E.2d 870 (2 May 1995). The defendant at trial denied on cross-examination that she had committed a theft. During the jury argument, the prosecutor explained that the state could not impeach a witness on a collateral matter. The prosecutor then explained that he could not call three specifically-named witnesses, who were ready to testify, to contradict her. The court ruled that this jury argument was so grossly improper that the trial judge erred in failing to correct the argument, even though the defendant did not object to it.

Trial Judge Erred in Failing to Give No-Duty-To-Retreat Instruction in Self-Defense Case

State v. Nixon, 117 N.C. App. 141, 450 S.E.2d 562 (6 December 1994). The court reviewed the evidence in this case and ruled that the trial judge erred in refusing the defendant's request that the judge give a jury instruction that the defendant had no duty to retreat before using deadly force against a felonious assault. The trial judge erroneously believed that this instruction applied only when the defendant was in a home or business.

(1) Trial Judge Erred in Failing to Give No-Duty-To-Retreat Instruction in Self-Defense Case
(2) Trial Judge's Error in Failing to Give No-Duty-To-Retreat Instruction in Self-Defense Case Was Constitutional Error, Requiring State to Prove Error Was Harmless Beyond Reasonable Doubt

State v. Brown, 117 N.C. App. 239, 450 S.E.2d 538 (6 December 1994) **(Note: there was a dissenting opinion on the issue in (2) below, so the Supreme Court may review this case.)** (1) The court reviewed the evidence in this case and ruled that the trial judge erred in refusing the defendant's request that the judge give a jury instruction that the defendant had no duty to retreat before using deadly force. The use of deadly force occurred in the home where the defendant and the victim (her husband) resided. (2) The court also ruled that the trial judge's error in failing to give a no-duty-to-retreat instruction in a self-defense case was constitutional error under the due process clause, requiring the state to prove that the error was harmless beyond a reasonable doubt.

Prosecutor May Sign a Juvenile Delinquency Petition as a Complainant

In re Stowe, 118 N.C. App. 662, 456 S.E.2d 336 (2 May 1995). As long as the intake counselor follows the statutory procedures before the signing of a petition alleging delinquency, and a prosecutor does not encroach on the important role of the intake counselor, the prosecutor may sign the petition as the complainant.

Sentencing

Statutory Aggravating Factor That Defendant Knowingly Created Great Risk of Death to More Than One Person by Hazardous Device Was Properly Found for Second-Degree Murder Conviction Based on Impaired Driving

State v. McBride, 118 N.C. App. 316, 454 S.E.2d 840 (21 March 1995). The defendant was convicted of second-degree murder based on impaired driving and crossing over into oncoming lane and striking a car, killing one passenger and seriously injuring two others. The court ruled that the sentencing judge properly found the statutory aggravating factor [G.S. 15A-1340.4(a)(1)g; now codified as G.S. 15A-1340.16(d)(8)] 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.

Statutory Aggravating Factor That Defendant Took Advantage of Position of Trust Was Improperly Found When Defendant and Sexual Assault Victim Were Merely Acquaintances at Work

State v. Hammond, 118 N.C. App. 257, 454 S.E.2d 709 (21 March 1995). The defendant was convicted of sexually assaulting and kidnapping a person who was a social worker at a mental health center. The defendant was a driver for the center. The only relationship between them was having worked at the center. The court ruled that the trial judge erred in finding the statutory aggravating factor [now codified in G.S. 15A-1340.16(d)(15)] that the defendant took advantage of a position of trust, based on the evidence in this case.

Conviction That Occurred After Original Sentencing and Was Final Before Resentencing Was "Prior Conviction" Statutory Aggravating Factor Under Fair Sentencing Act

State v. Mixion, 118 N.C. App. 559, 455 S.E.2d 904 (18 April 1995). A conviction that was obtained after original sentencing and was final at the time of resentencing (i.e., after the time for appeal had expired or the conviction had been finally upheld on direct appeal) was a prior conviction statutory aggravating factor under the Fair Sentencing Act [see G.S. 15A-1340.4(1)(o) and 15A-1340.2(1)]. [Note: For what constitutes a prior conviction under the Structured Sentencing Act, see G.S. 15A-1340.11(7).]

Non-Statutory Aggravating Factor that Defendant Knowingly Provided False Alibi to Investigating Officer Was Properly Found

State v. Harrington, 118 N.C. App. 306, 454 S.E.2d 713 (21 March 1995). The defendant was convicted of second-degree murder. The trial judge found as a non-statutory aggravating factor that the defendant knowingly provided a false alibi for the murder to law enforcement officers. Relying on the reasoning in Roberts v. United States, 445 U.S. 552 (1980) and United States v. Ruminer, 786 F.2d 381 (10th Cir. 1986), the court ruled that it was proper factor to consider in sentencing. The court distinguished State v. Blackwood, 60 N.C. App. 150, 298 S.E.2d 196 (1982) (defendant's not offering assistance to law enforcement officers was improper non-statutory aggravating factor) because in this case the defendant actively proffered a false alibi and was not simply exercising his right to remain silent or plead not guilty. The court also distinguished State v. Vandiver, 321 N.C. 570, 364 S.E.2d 373 (1988) (defendant's committing perjury may not be non-statutory aggravating factor) since the trial judge in this case, unlike *Vandiver*, was not required to exercise any "subjective evaluation" in determining that the defendant had given a false alibi. The court, however, cautioned trial judges against the unwarranted use of this non-statutory factor.

URESA Issues

Judge's Order that Conditioned Mother's Right to Receive URESA Child Support Payments on Her Compliance With Child Visitation Rights Was Void

Vanburen County DSS ex rel. Swearengin v. Swearengin, 118 N.C. App. 324, 455 S.E.2d 161 (21 March 1995). The plaintiff sought to enforce a Florida child support order in North Carolina under URESA. The court ruled, following Pifer v. Pifer, 31 N.C. App. 486, 229 S.E.2d 700 (1976), that a trial judge in a URESA action only has jurisdiction to enforce the father's obligation of child support. Thus, the judge's order in this case that conditioned the mother's right to receive child support on her compliance with child visitation rights was void.

URESA: Mother Is Not Equitably Estopped to Collect Child Support Arrearages Due under Child Support Order When She Agreed to Forgive Arrearages in Exchange for Obligor Father's Consent to Allow Mother's New Husband to Adopt Child Who Is Subject of Child Support Order

State ex rel. Raines v. Gilbert, 117 N.C. App. 129, 450 S.E.2d 1 (15 November 1994). Alabama mother brought URESA action against former husband (living in North Carolina) for past due child support payments for their child (living with mother in Alabama). The father went to Alabama to settle the action with the mother. They agreed that the mother would drop the action and accept $2,000, instead of the actual higher amount, in exchange for the father's consent to the child's adoption by the mother's new husband. The father signed the necessary consent forms, and the child was adopted by the mother's new husband. The court ruled that the mother is not equitably estopped to collect all child support arrearages due under child support order, because the public policy of North Carolina would be violated if the father is allowed to release his parental interest in his child in exchange for a waiver of past due child support

payments. The court noted that the agreement violates G.S. 48-37 because the mother and father gave and received consideration for placing the child for adoption.