RECENT CASES AFFECTING CRIMINAL LAW AND PROCEDURE
(November 19, 1996 - June 6, 1997)

Robert L. Farb
Institute of Government

NORTH CAROLINA SUPREME COURT

Criminal Offenses

Court Overrules *State v. Blankenship* on Instructing Jury About Acting in Concert

State v. Barnes, 345 N.C. 184, 481 S.E.2d 44 (10 February 1997). The defendants were convicted of first-degree murder based on felony murder and premeditation and deliberation. The defendants argued that the trial judge committed prejudicial error in instructing the jury on the doctrine of acting in concert concerning first-degree murder based on premeditation and deliberation. For each of the elements, the instruction started with the language, "the defendant, or someone with whom he was acting in concert . . . ." The defendants argued that this instruction violated State v. Blankenship, 337 N.C. 543, 447 S.E.2d 727 (1994), by allowing the jury to find the defendants guilty of first-degree murder based on premeditation and deliberation without specific findings that they individually possessed the requisite mens rea to commit that crime.

The court overruled *Blankenship* and concluded that the trial judge's instructions were not erroneous. The court stated that the doctrine of acting in concert is correctly set out in State v. Westbrook, 279 N.C. 18, 181 S.E.2d 572 (1971) and State v. Erlewine, 328 N.C. 626, 403 S.E.2d 280 (1991):

> If two persons join in a purpose to commit a crime, each of them, if actually or constructively present, is not only guilty as a principal if the other commits that particular crime, but he [or she] is also guilty of any other crime committed by the other in pursuance of the common purpose . . . or as a natural or probable consequence thereof.

The court also ruled that application of its overruling of *Blankenship* would not act like an ex post facto law in this case because *Blankenship* was certified on September 29, 1994, the crimes in this case occurred on October 29, 1992, and the defendants were sentenced on March 10, 1994. [Although the ex post facto clause applies only to legislative enactments, the due process clause prohibits the retrospective application of unforeseeable judicial modifications of criminal law to a defendant's detriment; see Marks v. United States, 430 U.S. 188 (1977) and State v. Vance, 328 N.C. 613, 403 S.E.2d 495 (1991). The certification date of this opinion, State v. Barnes, is March 3, 1997. Based on the court's discussion, the *Blankenship* ruling would continue to apply to offenses committed on or after September 29, 1994 and before March 3, 1997.]

Solicitation to Commit Murder Is Lesser-Included Offense of Murder Based on Theory of Accessory Before the Fact

State v. Westbrooks, 345 N.C. 43, 478 S.E.2d 483 (6 December 1996). The defendant was convicted of first-degree murder based on the theory of accessory before the fact, solicitation to commit murder, and conspiracy to commit murder. The court ruled that solicitation to commit murder is lesser-included offense of murder based on theory of accessory before the fact and therefore vacated the conviction of solicitation to commit murder. The court reaffirmed prior rulings that conspiracy to commit murder is not a lesser-included offense of first-degree murder based on the theory of accessory before the fact.

Murder Indictment's Language Was Surplusage and Did Not Limit State's Proof of Different Theory of Murder

State v. Westbrooks, 345 N.C. 43, 478 S.E.2d 483 (6 December 1996). The first-degree murder indictment alleged that the defendant unlawfully, willfully, and feloniously did *acting in concert* with named others of malice aforethought kill and murder the victim. At trial the state proved that the defendant was guilty of first-degree murder based on the theory of accessory before the fact. The court ruled that the indictment's acting-in-concert language did not allege an element of first-degree murder and therefore was surplusage. Thus the state was not barred by this language from proving the defendant guilty of first-degree murder based on the theory of accessory before the fact.

Sufficient Evidence of Defendant's Participation in Torture to Support Conviction of First-Degree Murder by Torture

State v. Anderson, 346 N.C. 158, 484 S.E.2d 543 (9 May 1997). A group of people began physically mistreating the victim, who allegedly had molested a daughter of one of them and a son of another. The defendant used a heated soldering iron to burn off a tattoo on the victim's body. Later, the defendant and another used a knife to carve "fag" on the victim's arm. The next day, the defendant used an "aerosol torch" to burn the victim's upper leg and genital area. The defendant then left the area and did not return. The others continued to beat the victim for a few days. The victim thereafter died after being bound, gagged, and locked in a small closet. The cause of death was gagging and positional asphyxia. The defendant was convicted of first-degree murder based on the theory of torture. The court rejected the defendant's argument that there was no causal link between his actions and the death of the victim (which occurred six days after the defendant left the area) to find him guilty of first-degree murder by torture. The court noted the defendant's participation in the tortuous acts committed against the victim, that the defendant and the group had discussed possible ways to kill the victim, and that his actions were part of a course of conduct that resulted in the victim's death.

No Violation of Double Jeopardy To Permit Convictions for Both First-Degree Murder and First-Degree Kidnapping, Based on the Facts in This Case

State v. Fernandez, 346 N.C. 1, 484 S.E.2d 350 (9 May 1997). The defendant was convicted of first-degree murder, based on premeditation and deliberation and felony murder theories, and first-degree kidnapping. The defendant argued on appeal that double jeopardy barred the first-degree kidnapping conviction because the element of failure to release in a safe place was supported by the same evidence of the first-degree murder. The court rejected the defendant's argument, noting that each crime contains an element not required to be proved in the other crime.

Evidence Was Sufficient to Support Conviction of Obtaining Property by False Pretenses When Defendant Wrote Check to Pay for Motorcycle When He Knew Checking Account Was Closed; Court Disavows Prior Contrary Case Law

State v. Rogers, 346 N.C. 262, 485 S.E.2d 619 (6 June 1997), *reversing*, 123 N.C. App. 359, 473 S.E.2d 696 (1996) (unpublished opinion). The defendant paid for a motorcycle with a check written on his checking account that he knew was closed. The court ruled that this evidence was sufficient to support a conviction for obtaining property by false pretenses under G.S. 14-100. The court rejected the argument that an additional misrepresentation beyond the presentation of a worthless check in exchange for property is required for a conviction of G.S. 14-100. The court disavowed any contrary language in State v. Freeman, 308 N.C. 502, 302 S.E.2d 779 (1983), and overruled State v. Freeman, 79 N.C. App. 177, 339 S.E.2d 56 (1986) and State v. Hopkins, 70 N.C. App. 530, 320 S.E.2d 409 (1984), to the extent they required proof of an additional representation beyond the presentation of a worthless check.

Evidence Was Insufficient to Support Conviction of Larceny from the Person When Victim Was Twenty-Five to Thirty Feet Away When Bank Bag Was Taken

State v. Barnes, 345 N.C. 146, 478 S.E.2d 189 (6 December 1996), *affirming*, 121 N.C. App. 503, 466 S.E.2d 294 (6 February 1996). An employee was working alone at a freestanding kiosk in a shopping mall. He left the kiosk unattended as he talked to another person in a neighboring shop about 25 to 30 feet away. When informed that someone was in his kiosk, the employee returned to find the defendant rising from the counter near the cash register. The employee stepped past the defendant, looked under the counter, and saw that a bank bag containing cash was missing. About that time, the defendant left the kiosk. The employee chased the defendant and eventually recovered the bank bag from him. The defendant was convicted of larceny from the person. Citing State v. Buckom, 328 N.C. App. 313, 401 S.E.2d 362 (1991), the court stated that the crime of larceny from the person requires that the property stolen must be in the immediate presence of and under the protection or control of the victim *when the property is taken*. The crime of larceny was completed when the defendant removed the bank bag from below the cash register, and at that time the victim was twenty-five to thirty feet away from the kiosk. Thus the evidence was insufficient to prove larceny from the person because the bank bag was not in the immediate presence of and under the victim's protection or control when it was taken. The court distinguished State v. Buckom, cited above, which upheld a conviction of larceny from the

person, because in that case the defendant took money from a cash register drawer while the clerk was making change for him out of the same drawer. The court also distinguished the crime of armed robbery, where the timing of the use of violence and the taking of property is unimportant as long as there is one continuous transaction.

Court, Per Curiam and Without Opinion, Affirms Court of Appeals' Majority Opinion That North Carolina Controlled Substances Tax Is Not Punishment Under Double Jeopardy Clause

State v. Ballenger, 345 N.C. 626, 481 S.E.2d 84 (7 March 1997), *affirming*, 123 N.C. App. 179, 472 S.E.2d 572 (16 July 1996). The court, per curiam and without an opinion, affirmed the majority opinion of the Court of Appeals. The defendant was charged with felony marijuana offenses. The North Carolina Department of Revenue then issued a controlled substances tax assessment against the defendant for possessing the marijuana that supported the charges. The defendant paid the assessment and then moved to dismiss the felony marijuana charges, asserting that the criminal prosecution was barred under the Double Jeopardy Clause. The majority opinion, distinguishing Montana Department of Revenue v. Kurth, 511 U.S. 767, 114 S. Ct. 1937, 128 L. Ed. 2d 767 (1994), ruled that North Carolina's controlled substances tax is not punishment under the Double Jeopardy Clause. Thus the defendant was not entitled to dismissal of the felony marijuana charges. See also State v. Creason, 346 N.C. 165, 484 S.E.2d 525 (9 May 1997), *affirming*, 123 N.C. App. 495, 473 S.E.2d 771 (1996) (similar ruling).

Impaired Boating Offense Is Not Lesser-Included Offense of Involuntary Manslaughter

State v. Hudson, 345 N.C. 729, 483 S.E.2d 436 (11 April 1997), *reversing*, 123 N.C. App. 336, 473 S.E.2d 415 (6 August 1996). The defendant was convicted of three counts of involuntary manslaughter based on operating his motorboat while impaired. The court ruled that the offense of operating a motorboat while impaired (G.S. 75A-10) was not a lesser-included offense of involuntary manslaughter and therefore the judge did not err in failing to submit that offense to the jury. The court noted that under State v. Weaver, 306 N.C. 629, 295 S.E.2d 375 (1982), the approach in determining whether an offense is a lesser-included offense is definitional, not transactional. The offense of impaired boating, by definition, contains an element that is not an element of involuntary manslaughter: it requires proof of impairment or a specific blood alcohol concentration. It is irrelevant, in determining whether impaired boating is a lesser-included offense, that a finding of impairment could be used to prove the culpable negligence element of involuntary manslaughter.

Fingerprint Evidence, Accompanied by Substantial Evidence That Fingerprints Could Only Have Been Impressed When Crime Was Committed, Supplied Sufficient Evidence to Support Convictions

State v. Cross, 345 N.C. 713, 483 S.E.2d 432 (11 April 1997), *reversing*, 121 N.C. App. 788, 467 S.E.2d 911 (1996) (unpublished opinion). The defendant was convicted of first-degree kidnapping, common law robbery, felonious assault, and other offenses. The court reviewed the evidence in this case and ruled that the fingerprint evidence, accompanied by substantial evidence

that the defendant's fingerprint could only have been impressed when the crime was committed, supplied sufficient evidence to support the convictions. The court also noted that corroborative evidence, in addition to the fingerprint evidence, supported the convictions.

(1) Defense Attorney's Admission During Jury Argument That Defendant Was Guilty of Second-Degree Murder Did Not Violate Defendant's Rights, Based on Facts in This Case

(2) Judge Did Not Err in Refusing to Instruct Jury As Requested by Defendant, When Requested Instructions Were Not Submitted To Judge in Writing

State v. McNeill, 346 N.C. 233, 485 S.E.2d 284 (6 June 1997). (1) The defendant was on trial for first-degree murder. Before trial, the defendant, after examination by the judge, had stipulated in writing that he had stabbed the victim and proximately caused her death. The defendant's attorney admitted during jury argument that the defendant was guilty of second-degree murder. The court, distinguishing State v. Harbison, 315 N.C. 175, 337 S.E.2d 504 (1985), ruled that the defendant's right to effective assistance of counsel was not violated by his attorney's admission. The stipulation supported a verdict of second-degree murder, and therefore the defendant's attorney could infer the defendant's consent to admit his guilt of that offense. (2) The defendant's attorneys orally requested that the judge modify the pattern jury instruction on premeditation and deliberation. The court ruled, citing Rule 21 of the General Rules of Practice for the Superior and District Courts and State v. Martin, 322 N.C. 229, 367 S.E.2d 618 (1988), that the judge did not err in refusing to make the requested modification. The rule requires that the request must be in writing.

Court Makes Clear That Actual or Constructive Presence Is Not Required to Prove Crime Under Aiding and Abetting Theory

State v. Gaines, 345 N.C. 647, 483 S.E.2d 396 (11 April 1997). The court, noting G.S. 14-5.2, ruled that to the extent that its cases decided after G.S. 14-5.2 became effective suggested that actual or constructive presence is necessary to prove a crime under the aiding and abetting theory, these cases are no longer authoritative on this issue. See also State v. Bond, 345 N.C. 1, 478 S.E.2d 163 (6 December 1996) (actual or constructive presence not required under aiding and abetting theory).

Proper Aggravating Factor in Sentencing Habitual Felon Under Fair Sentencing Act that Defendant Had Been Previously Adjudicated as Habitual Felon

State v. Kirkpatrick, 345 N.C. 451, 480 S.E.2d 400 (10 February 1997), *affirming,* 123 N.C. App. 86, 472 S.E.2d 371 (2 July 1996). The defendant was sentenced under the Fair Sentencing Act as an habitual felon, and the judge found as an aggravating factor that the defendant had previously been adjudicated as an habitual felon. (The prior adjudication as an habitual felon was based on the same three convictions as the current habitual felon adjudication.) The court ruled that this aggravating factor was properly found, relying on State v. Roper, 328 N.C. 337, 402 S.E.2d 600 (1991) (under Fair Sentencing Act, prior convictions used to establish habitual felon

status may be used as aggravating factors). [Note: It is unclear whether this ruling would apply to sentencing of an habitual felon under the Structured Sentencing Act.]

Arrest, Search, and Confession Issues

Officers' Communications with Defendant, After He Had Asserted His Right to Counsel, Were Not Interrogation

State v. Coffey, 345 N.C. 389, 480 S.E.2d 664 (10 February 1997). The defendant was arrested for murder, and two attorneys were appointed to represent him. The attorneys requested of the district attorney that a polygraph examination be conducted on the defendant. The attorneys did not express any desire to accompany their client to the polygraph site. When the defendant was being removed from his cell to be taken to the polygraph examination, he told a deputy sheriff that he wanted to call his attorney. The deputy declined to allow the defendant to do so, because the policy of the sheriff's office did not permit a prisoner to make a telephone call while being transported from one facility to another. Later when the polygraph operator was explaining the polygraph procedures to the defendant, the defendant stated that he did not tell the investigating officers the truth about the money taken from the murder victim. The operator asked him what he did not tell the truth about. The defendant said that he was handed the money from his accomplice and the accomplice "went off." The operator did not ask any questions; instead he conducted the polygraph examination. After the examination, the operator informed the defendant that he had not passed the polygraph about the murder and robbery. The defendant then made an incriminating statement. The operator then asked the defendant if he would be willing to talk to one of the investigating officers. The defendant named a particular officer and later repeated the same incriminating statement to that officer. The court ruled that the defendant was not being interrogated in violation of Edwards v. Arizona, 451 U.S. 477, 101 S. Ct. 1880, 68 L. Ed. 2d 378 (1981) (interrogation is not permitted after defendant has asserted right to counsel) when he made his statements to the polygraph operator and the investigating officer. These statements were volunteered by the defendant. Thus, neither his Fifth nor Sixth Amendment rights to counsel were violated. The court alternatively ruled, assuming that the defendant was being interrogated, that the defendant initiated the communication with the polygraph operator and investigating officer. See, e.g., Oregon v. Bradshaw, 462 U.S. 1039, 103 S. Ct. 2830, 77 L. Ed. 2d 405 (1983).

Defendants Were Not In Custody and Therefore Were Not Entitled to *Miranda* Warnings

State v. Gaines, 345 N.C. 647, 483 S.E.2d 396 (11 April 1997). A Charlotte police officer, who was working off-duty as a security guard, was murdered by three males. The lead investigator in the case instructed the other investigators that any suspect interviews were to be conducted as noncustodial interviews. Suspects were not to be placed under arrest and would be free to leave, and any contact with suspects would be on a voluntary basis. The court, after reviewing the evidence, ruled that each of the two defendants in this case were not in custody to require *Miranda* warnings. Each of the two suspects voluntarily agreed to come to the law enforcement facility from their respective homes. Each was repeatedly told that he was not under arrest and was free to leave at any time. Each was provided food at the facility and was not handcuffed or restrained.

Court, Per Curiam and Without Opinion, Affirms Court of Appeals' Majority Opinion That Officer Had Reasonable Suspicion To Frisk Vehicle Driver For Weapons

State v. McGirt, 345 N.C. 624, 481 S.E.2d 288 (7 March 1997), *affirming*, 122 N.C. App. 237, 468 S.E.2d 833 (1996). The court, per curiam and without an opinion, affirmed the majority opinion of the Court of Appeals. An officer stopped a vehicle because the defendant-driver was not wearing his seat belt. The officer testified at the suppression hearing that he had been looking for the defendant's vehicle the prior night and was investigating the defendant for cocaine trafficking. The officer knew the defendant had prior felony drug convictions and in his experience knew that cocaine traffickers normally carry weapons. After stopping the vehicle, the defendant complied with the officer's request to exit the vehicle. The officer asked the defendant if he had anything on him. The defendant said, "No," and raised his hands. The officer then frisked the defendant and felt a hard object, which the officer believed was a gun. The officer asked the defendant to identify the object, to which the defendant replied that it was a pistol and handed it to the officer. The majority opinion ruled that the officer, based on this evidence, had reasonable suspicion to frisk the defendant. The majority opinion noted: (1) the defendant was a convicted felon and this was known to the arresting officer; (2) the defendant was under investigation by the officer for cocaine trafficking; and (3) it was the officer's experience that cocaine traffickers normally carry weapons. The majority opinion stated that the totality of circumstances, even in the face of a cooperative defendant who presents no obvious signs of carrying a weapon, supports the legality of the frisk for weapons.

Defendant Did Not Have Sixth Amendment Right to Counsel When Social Services Department Filed Civil Abuse and Neglect Petition Against Her When No Criminal Charge Had Yet Been Brought

State v. Adams, 345 N.C. 745, 483 S.E.2d 156 (11 April 1997), *reversing* 122 N.C. App. 538, 470 S.E.2d 838 (1996). As a result of a medical examination of the defendant's five-month-old daughter, a department of social services filed a civil petition alleging abuse and neglect against the defendant. As provided by G.S. 7A-587, an attorney was appointed to represent her. A sheriff department's detective later contacted the defendant without her attorney being present and obtained an incriminating statement. Criminal charges were then brought. The trial judge ruled that the detective violated the defendant's Sixth Amendment right to counsel when she obtained the incriminating statement, because that right to counsel had begun when the civil petition had been filed against the defendant. The court, relying on Kirby v. Illinois, 406 U.S. 682, 92 S. Ct. 1877, 32 L. Ed. 2d 411 (1972), reversed the trial judge. The Sixth Amendment only applies to criminal cases, and therefore the defendant's Sixth Amendment right to counsel did not begin when the civil petition was filed. The court also ruled, distinguishing In re Maynard, 116 N.C. App. 616, 448 S.E.2d 871 (1994), that the defendant's statutory right to counsel under G.S. 7A-587 was not violated because this statutory right to counsel is not relevant to a criminal prosecution. (The court remanded the case for a determination of Fifth Amendment issues involved in obtaining the statement from the defendant.)

Evidence Was Properly Excluded in *Franks* Hearing Attacking Validity of Search Warrant Because It Did Not Relate to Truthfulness of Affiant

State v. Fernandez, 346 N.C. 1, 484 S.E.2d 350 (9 May 1997). During a *Franks* hearing [Franks v. Delaware, 438 U.S. 154, 98 S. Ct. 2674, 57 L. Ed. 2d 567 (1978)], the trial judge barred evidence (a deposition) of a person who gave information used in the affidavit because the evidence did not show that the witness failed to give the information attributed to him in the affidavit. Instead, the evidence only established contradictions in the facts underlying the affidavit. The court ruled that the trial judge did not err in excluding the evidence, because the relevant issue in a *Franks* hearing is whether the affiant provided information that was knowingly false, or acted in reckless disregard of its falsity. The proffered evidence was not relevant to a *Franks* claim. [Note: To the extent that State v. Montserrate, 125 N.C. App. 22, 479 S.E.2d 494 (1997), is inconsistent with *Fernandez*, it is no longer valid.]

Evidence

Trial Judge Properly Excluded Evidence of Prior Violent Acts of State's Witness, Who Was Defendant's Accomplice in Committing Murder, Because Evidence Was Not Admissible Under Rules 608(b) or Rule 404(b)

State v. Dickens, 346 N.C. 26, 484 S.E.2d 553 (9 May 1997). The defendant was tried for the first-degree murder of an eighty-nine-year-old victim who was beaten to death. The defendant's accomplice was a witness for the state. The court ruled that the trial judge properly barred the defendant from asking the accomplice about prior violent acts he had committed, based on the facts in this case. The court ruled that the accomplice's prior violent acts [which had not resulted in convictions and therefore were not admissible under Rule 609(a)] were inadmissible under Rule 608(b) because they were not probative of truthfulness or untruthfulness—see State v. Strickland, 321 N.C. 31, 361 S.E.2d 882 (1987) and State v. Morgan, 315 N.C. 626, 340 S.E.2d 84 (1986). The defendant also argued that the evidence was admissible under Rule 404(b) to show that the accomplice, not the defendant, inflicted the fatal blows. The court examined the accomplice's prior violent acts and ruled that they were not sufficiently similar to the murder being tried to be admissible under Rule 404(b). The prior violent acts involved the accomplice's aggression toward other men when the accomplice had been provoked, while the murder being tried involved the beating to death of an eighty-nine-year old woman. The court stated that it appeared that the defendant attempted to introduce the evidence to show conformity with the accomplice's past violent acts, the only purpose specifically prohibited by Rule 404(b).

Co-Defendant's Statement Was Admissible Under Evidence Rules and Therefore Did Not Violate *Bruton v. United States* At Joint Trial

State v. Barnes, 345 N.C. 184, 481 S.E.2d 44 (10 February 1997). Three defendants were tried jointly for the robbery and murder of two people, one of whom was a law enforcement officer. After the robbery and murders were committed the three defendant went to an apartment with some of the robbery proceeds and asked people there if they would help to dispose of guns used in the robbery and murders. When a person asked one of the defendants where he had gotten the

ring, he replied that "we fucked up a police" and that it was a "three-person secret." Two of the defendants argued that this statement by their co-defendant was inadmissible and therefore violated Bruton v. United States, 391 U.S. 123 (1968). The court ruled that this statement was admissible under the rules of evidence (in fact, two different evidence rules) and therefore did not violate the *Bruton* ruling. (1) The statement was admissible under Rule 804(b)(3) as a statement against penal interest. Without deciding whether the ruling in Williamson v. United States, 512 U.S. 594, 114 S. Ct. 2431, 129 L. Ed. 2d 476 (1994) [Federal Rule 804(b)(3) does not allow the admission of non-self-inculpatory statements, even if they are made within a broader narrative that is generally self-inculpatory] applies to North Carolina Rule 804(b)(3), the *Williamson* test was satisfied. The statement was completely self-inculpatory. (2) The statement was also admissible under Rule 801(d)(E) because it was made by a coconspirator during the course of and in furtherance of the conspiracy to commit robbery. The defendants' actions at the apartment were part of the conspiracy because they were designed to conceal their involvement in their crimes.

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

State v. Westbrooks, 345 N.C. 43, 478 S.E.2d 483 (6 December 1996). The defendant was convicted of the first-degree murder of her husband. The state's evidence showed that the defendant killed the victim to collect life insurance proceeds to help pay her business debts. Several of the murder victim's statements were admitted under Rule 803(3) (declarant's then existing state of mind). The court ruled that the victim's statements to his sister that he was depressed, lonely, and upset about his finances were statements indicating his mental condition when they were made and were not merely a recitation of facts; the court distinguished State v. Hardy, 339 N.C. 207, 451 S.E.2d 600 (1994). The statements bore directly on the victim's relationship with the defendant when he was killed. Similarly, the victim's statements to his father about his feelings toward his marriage to the defendant expressed his state of mind. These statements rebutted the defendant's testimony about the positive state of her marriage. All these statements also corroborate a motive for the murder; the defendant was in debt and could not repay her obligations.

Judge Did Not Err in Finding Murder Victim's Statements to Hospital Nurse Admissible Under Residual Hearsay Exception [Rule 804(b)(5)], But Judge Erred Under Sixth Amendment's Confrontation Clause in Relying on Corroborative Evidence in Admitting Statements at Trial

State v. Tyler, 346 N.C. 187, 485 S.E.2d 599 (6 June 1997). The defendant was convicted of first-degree murder. He poured gasoline on the victim and then set her on fire. The trial judge admitted the murder victim's statements made to a hospital nurse in which she identified the defendant as the perpetrator. The court examined the judge's findings of fact and conclusions of law and ruled that the statements were properly admitted under the residual hearsay exception, Rule 804(b)(5); the statements possessed the necessary circumstantial guarantees of trustworthiness. The court also ruled, citing Idaho v. Wright, 497 U.S. 805, 110 S. Ct. 3139, 111 L. Ed. 2d 638 (1990), that the judge erred under the Sixth Amendment's Confrontation Clause in

relying on corroborative evidence in admitting the victim's statements at trial. However, the court ruled that the error was harmless beyond a reasonable doubt, based on the facts in this case.

Defense Expert's Testimony That Defendant "Snapped" Was Admissible on Issue of Diminished Capacity

State v. Burgess, 345 N.C. 372, 480 S.E.2d 638 (10 February 1997). The defense expert offered an opinion that the defendant "snapped" when he committed two murders, explaining that the defendant had an inability to think things through calmly and clearly, to weigh options or consider alternatives when the shootings occurred. The court ruled that the testimony was admissible to show that the defendant was not in a cool state of blood when he shot the victims and thus did not premeditate and deliberate the killings.

Trial Judge Erred by Refusing to Allow Cross-Examination of State's Witness About State's Possible Promises To Witness About His Pending Charges in Return for His Testimony at Defendant's Trial

State v. Prevatte, 346 N.C. 162, 484 S.E.2d 377 (9 May 1997). At the time of the defendant's trial, the state's principal witness was under indictment for multiple charges in the same prosecutorial district where the defendant was being tried. These charges had been continued for eighteen months. The trial judge refused to allow the defendant to cross-examine the defendant about these charges and whether the witness had been promised or expected anything concerning these charges in exchange for his testimony in this trail. Relying on Davis v. Alaska, 415 U.S. 308, 94 S. Ct. 1105, 39 L. Ed. 2d347 (1974), the court ruled the trial judge erred and ordered a new trial.

Prior Statement of State's Witness Was Not Corroborative of Witness' Trial Testimony and Was Sufficiently Prejudicial to Require New Trial

State v. Frogge, 345 N.C. 614, 481 S.E.2d 278 (7 March 1997). The defendant was tried and convicted of two murders. The state's witness testified that, while incarcerated with the defendant, the defendant told him how he committed the murders. A detective then testified about a pretrial statement given to the detective by the state's witness. The detective's testimony was offered to corroborate the witness' trial testimony. The court examined the inconsistencies between the trial testimony and the pretrial statement and ruled that they were manifestly prejudicial to the defendant; the court ordered a new trial. The pretrial statement tended to show: (1) the defendant was the initial aggressor, while the trial testimony tended to show one of the victims provoked the defendant; (2) the defendant was guilty of felony murder based on robbery, while the trial testimony tended to show that was no continuous transaction between the murders and the robbery; and (3) the defendant had a motive for one of the murders, while the trial testimony did not indicate a motive.

Evidence That Murder Victim Had Reputation for Homosexuality Was Not Admissible as Character Evidence Under Rule 404(a)(2)

State v. Laws, 345 N.C. 585, 481 S.E.2d 641 (7 March 1997). The defendant was tried for first-degree murder. He presented evidence of self-defense, asserting that he defended himself from a sexual assault by the male murder victim. The court noted that a victim's character is admissible for two purposes: to show the defendant's fear or apprehension was reasonable or to show that the victim was the aggressor. The court ruled that the evidence offered by the defendant showing that the victim had a reputation for being a homosexual was not a pertinent character trait under Rule 404(a)(2). A victim's homosexuality has no more tendency to prove he would be likely to sexually assault a male than would a victim's heterosexuality show that he would be likely to sexually assault a female.

Defendant's Right to Represent Oneself

Trial Judge Did Not Err in Allowing Defendant to Represent Himself Without Defendant's Being Evaluated by Mental Health Professional, Based on Facts in This Case

State v. Rich, 346 N.C. 50, 484 S.E.2d 394 (9 May 1997). The defendant was charged with first-degree murder (to be tried capitally) and was appointed counsel to represent him. The defendant requested a judge to remove his appointed counsel because he wanted to represent himself. The judge told the defendant that before he would consider removing appointed counsel, he would want to have the defendant evaluated to determine his competence both to stand trial and to represent himself. The defendant told the judge that there was "nothing wrong with my head" and he would not cooperate with any mental health evaluation. After additional inquiry, the judge granted the defendant's request to represent himself, but also appointed standby counsel.

About two months later at trial, standby counsel made a motion that the trial judge find the defendant was incompetent to waive counsel and requested that the trial judge review the defendant's mental health records. The trial judge questioned the defendant thoroughly about his decision not to cooperate with a mental health evaluation and explained the capital sentencing procedure. The judge ruled that the defendant could represent himself with the help of standby counsel. The next day, the judge thoroughly questioned the defendant about his decision to plead guilty to first-degree murder and accepted his plea. The defendant represented himself at the capital sentencing hearing and received a death sentence.

The defendant argued on appeal that the judge erred in failing to appoint an expert to inquire into the defendant's capacity to waive counsel or to represent himself. The court noted that if a defendant demonstrates or if information before the judge indicates that there is a significant possibility that a defendant is incompetent to waive counsel or to proceed to trial, the judge must appoint an expert or experts to inquire about the defendant's mental health in accord with G.S. 15A-1002(b)(1). However, the court ruled that nothing in the record in the present case tended to indicate that the defendant was incompetent to waive his right to counsel, to plead guilty, or to represent himself. The court also ruled that the trial judge properly granted the defendant's request to represent himself and honored that decision throughout the proceedings.

The court stated that "[w]e take this opportunity to reiterate that so long as a trial court follows these guidelines [referring to inquiry under G.S. 15A-1242; determining defendant

"clearly and unequivocally" waived right to counsel and elected to proceed *pro se*; and defendant knowingly, intelligently, and voluntarily waived right to counsel] in determining the validity of a defendant's waiver of [the] right to counsel, this Court will [respect] that defendant's right to proceed *pro se*."

In Case When Defendant Was Representing Himself, Trial Judge Erred in Granting, Over Defendant's Objection, Standby Counsel's Motion (1) To Appoint Standby Counsel as Counsel to Represent Defendant for Limited Purpose of Litigating Defendant's Capacity to Waive Counsel and Proceed *Pro Se*, and (2) For Authorization to Obtain Mental Health Expert to Evaluate Defendant

State v. Thomas, 346 N.C. 135, 484 S.E.2d 368 (9 May 1997). In 1990, the defendant was tried capitally and sentenced to death. On appeal, the court ordered a new trial. In 1992, the defendant requested that he be allowed to represent himself. A judge questioned the defendant in accordance with G.S. 15A-1242, obtained a written waiver of counsel, granted defendant's motion, and appointed two standby counsel. In 1993, standby counsel, acting without defendant's consent, filed a motion requesting that they be appointed counsel to represent the defendant for the limited purpose of litigating his capacity to knowingly and intelligently waive his right to counsel and proceed *pro se*, and for authorization to obtain a professional evaluation of the defendant's mental health. A judge (who was not the same judge as in 1992) heard the motion *ex parte* and entered an order, over the defendant's objection, granting standby counsel's motion. A hearing was held on the issue of the defendant's mental competence to execute a waiver of counsel. The judge entered an order appointing standby counsel to represent the defendant as his trial counsel. The order did not contain findings or conclusions of law that the defendant was or ever had been unable to properly waive his right to counsel under G.S. 15A-1242. The defendant was tried and convicted of first-degree murder and received a life sentence.

The court noted that at the time the motion was filed, a judge had found that the defendant knowingly and voluntarily waived his right to counsel and was representing himself. The court ruled that when the judge allowed standby counsel to intervene by motion in this case, over the defendant's objection, the filing of the motion exceeded the authority of standby counsel granted under G.S. 15A-1243. The court also stated that allowing standby counsel to advocate any position over a *pro se* defendant's objection also interferes with the exercise of a defendant's federal and state constitutional rights to self-representation. In addition, the judge's appointment of standby counsel for a limited purpose violated the rule against a defendant proceeding both *pro se* and by counsel, citing State v. Thomas, 331 N.C. 671, 417 S.E.2d 473 (1992). Due to this prohibition against hybrid representation, a judge cannot allow a defendant to proceed *pro se* while also appointing counsel to represent the defendant, even for a limited purpose.

Capital Case Issues

Evidence That Principal Who Committed Murder Was Ineligible By Age to Receive Death Penalty Was Inadmissible at Sentencing Hearing Because It Was Not a Mitigating Circumstance

State v. Bond, 345 N.C. 1, 478 S.E.2d 163 (6 December 1996). The defendant was convicted of first-degree murder based on the theory of accessory before the fact and sentenced to death. The principal, who was 16 when he killed the victim, was not eligible for the death penalty under G.S. 14-17. The court ruled that evidence that the principal was ineligible by age to receive the death penalty was inadmissible at the sentencing hearing because it was not a mitigating circumstance. The sentence imposed on an accomplice is not a mitigating circumstance for the defendant being sentenced.

Excuses Heard by District Court Judges for Special Venire Did Not Violate Defendant's State Constitutional Right to Be Present at Capital Trial When All Excuses Were Heard Before Case Was Called for Trial

State v. Geddie, 345 N.C. 73, 478 S.E.2d 146 (6 December 1996). The court ruled that excuses heard by district court judges for a special venire did not violate the defendant's state constitutional right to be present at all stages of a capital trial when all the excuses were heard before the case was called for trial. [Note: Although the court specifically noted that the jury summons for the special venire did not mention the trial for which the prospective jurors were summoned, it does not appear that the ruling would have been different if it had mentioned the trial as long as the excuses were heard before the capital case was called for trial.] See also State v. Rich, 346 N.C. 50, 484 S.E.2d 394 (9 May 1997) (judge's in-court announcement of pretrial ruling in capital case without defendant's presence did not violate unwaivable state constitutional right to be present because announcement occurred before trial).

(1) Judge Erred in Substituting Alternate Juror for Another Juror After Jury Had Begun Deliberating in Capital Sentencing Hearing
(2) Judge Erred in Prohibiting Defense Expert from Testifying That Defendant Would Not Be Danger in Prison to Himself or Other Inmates

State v. Bunning, 346 N.C. 253, 485 S.E.2d 290 (6 June 1997). (1) The trial judge substituted an alternate juror for a juror who was excused after the jury had begun deliberations in a capital sentencing hearing. The court ruled that various statutes in Chapter 15A do not permit a judge to do so (either at trial or at the capital sentencing hearing). The court ordered a new capital sentencing hearing, rejecting the state's argument that harmless error analysis should be undertaken. (2) The court ruled, citing Skipper v. South Carolina, 476 U.S. 1 (1986) and State v. Rouse, 339 N.C. 59, 451 S.E.2d 543 (1994), that the judge erred during the capital sentencing hearing in prohibiting a defense expert from testifying that the defendant would not be a danger in prison to himself or other inmates.

Evidence Supported Submission of Mitigating Circumstance G.S. 15A-2000(f)(1) (No Significant Prior Criminal History)

State v. Geddie, 345 N.C. 73, 478 S.E.2d 146 (6 December 1996). The court ruled that the trial judge did not err in submitting G.S. 15A-2000(f)(1) (no significant prior criminal history) although the defendant had two prior felonious assault convictions that occurred ten and fifteen years before the trial of this case and an attempted robbery conviction that occurred five years before the trial of this case. The court stated that a rational juror could have found the existence of (f)(1).

Evidence Did Not Support Submission of Mitigating Circumstance G.S. 15A-2000(f)(3) (Victim Was Voluntary Participant in Defendant's Murder)

State v. Larry, 345 N.C. 497, 481 S.E.2d 907 (7 March 1997). The defendant robbed a grocery store while an off-duty police officer was there as a customer. The officer chased the defendant as he ran from the store. A struggled ensued, and the defendant killed the officer. The defendant was convicted of first-degree murder. The court ruled that this evidence did not support the submission of mitigating circumstance under G.S. 15A-2000(f)(3) (victim was voluntary participant in defendant's murder).

Court Reaffirms Ruling That a Defendant Is Not Entitled to Directed Verdict for Statutory Mitigating Circumstance

State v. Moody, 345 N.C. 563, 481 S.E.2d 629 (7 March 1997). The court reaffirmed its ruling in State v. Carter, 342 N.C. 312, 464 S.E.2d 272 (1995), that a defendant is not entitled to a directed verdict for a statutory mitigating circumstance. The defendant at most is entitled to a peremptory instruction. [Note: The court did not in this case nor in *Carter* explicitly disavow contrary dicta in State v. Rouse, 339 N.C. 59, 451 S.E.2d 543 (1994), but that contrary dicta has been implicitly disavowed.]

Proper to Submit Aggravating Circumstances G.S. 15A-2000(e)(5) (Murder Committed During Robbery) and -2000(e)(6) (Murder Committed for Pecuniary Gain) Because These Circumstances Were Supported By Separate Evidence

State v. East, 345 N.C. 535, 481 S.E.2d 652 (7 March 1997). The defendant was convicted of two murders. The court ruled that it was proper to submit aggravating circumstances G.S. 15A-2000(e)(5) (murder committed during robbery) and -2000(e)(6) (murder committed for pecuniary gain), because these circumstances were supported by separate evidence. The court noted that the defendant murdered the victims while engaged in two robberies. The defendant committed the murders not only in the course of stealing money from the victims, but also in the course of stealing the keys to the victims' car. While there was evidence of a pecuniary gain motive in stealing the money, there was no evidence that the motive for the theft of the car keys was pecuniary gain. The evidence showed that the defendant stole the keys to use the car as transportation either to visit his girlfriend or to evade law enforcement, not to sell the car and

convert it into cash. Thus, the theft of money supported G.S. 15A-2000(e)(6) and the theft of the keys supported G.S. 15A-2000(e)(5).

Each Prior Violent Felony Conviction Is a Separate Aggravating Circumstance Under G.S. 15A-2000(e)(3)

State v. Larry, 345 N.C. 497, 481 S.E.2d 907 (7 March 1997). The court ruled that each prior violent felony conviction is a separate aggravating circumstance under G.S. 15A-2000(e)(3). Thus, each of the defendant's four prior robbery convictions were properly found as four separate aggravating circumstances under G.S. 15A-2000(e)(3).

Prosecutor's Jury Argument at Capital Sentencing Hearing That Asked Jurors to Put Themselves in Position of Victim Was Improper

State v. Perkins, 345 N.C. 254, 481 S.E.2d 25 (10 February 1997). Relying on State v. McCollum, 334 N.C. 208, 433 S.E.2d 144 (1993), the court ruled that a prosecutor's jury argument at a capital sentencing hearing that asked jurors to put themselves in the position of the victim was improper. The argument asked jurors to put themselves in the position of the victim as she was raped and murdered.

Judge's In-Chambers Conference With Attorneys (in Defendant's Absence) During Jury Selection Violated Defendant's Unwaivable State Constitutional Right to Be Present at All Stages of Capital Trial

State v. Meyer, 345 N.C. 619, 481 S.E.2d 649 (7 March 1997). The court ruled that the judge's in-chambers conference with attorneys (in the defendant's absence) during jury selection for a capital sentencing hearing violated the defendant's unwaivable state constitutional right to be present at all stages of his capital trial. Because there was no record of what occurred during the conference, the court could not determine whether the constitutional error was harmless beyond a reasonable doubt. The court ordered a new sentencing hearing.

Miscellaneous

State's Offer of Second-Degree Murder Plea That Was Rejected by Judge Did Not Bar Later Trial on First-Degree Murder

State v. Wallace, 345 N.C. 462, 480 S.E.2d 673 (10 February 1997). The court ruled that the state's offer of a second-degree murder plea, which was rejected by a judge after hearing evidence of the murder at the plea hearing, did not bar a later trial on first-degree murder. The defendant's double jeopardy rights were not violated because jeopardy does not attach until a plea is accepted by a judge.

(1) Requiring Defense Psychiatrist to Prepare Written Report Was Not Barred by Discovery Statute and Did Not Violate Doctor-Patient Privilege
(2) State Did Not Violate Discovery Statute When It Revealed Substance of Defendant's Oral Statement That Was Substantially Similar to Trial Testimony

State v. East, 345 N.C. 535, 481 S.E.2d 652 (7 March 1997). The defendant was tried and convicted of first-degree murder. (1) The court ruled that G.S. 15A-905(b) does not bar a trial judge from ordering the defendant's psychiatric expert who testified at trial to produce a written report of his examination of the defendant and provide it to the state. The court also ruled that such an order does not violate the physician-patient privilege, because the privilege is not created when a physician examines a defendant to determine a defendant's mental status, as opposed to treating the defendant. (2) Before trial, the state provided the substance of the defendant's oral statement to a state's witness, as required by G.S. 15A-903(a)(2), by stating that the defendant had called the victim a "bitch" and said that he "hated" her. At trial the state's witness testified that the defendant said, "That bitch is back. I hate that bitch. I wish she was dead," or words to that effect. The court ruled that the state complied with the discovery statute because the trial testimony was substantially similar to what in substance was provided during discovery.

Trial Judge Did Not Err in Denying Defendant's Motion for Sanctions When State Failed to Produce State Witness' Written Statement under G.S. 15A-903(f), When Failure to Produce Statement Was Not Willful

State v. Fernandez, 346 N.C. 1, 484 S.E.2d 350 (9 May 1997). The court ruled that the trial judge did not err in denying the defendant's motion for sanctions when the state failed to produce a state witness' written statement under G.S. 15A-903(f), when the failure to produce the written statement was not willful. The statement had simply been lost. The court ruled that sanctions provision in G.S. 15A-903(f)(4) applies only when the state willfully fails to produce evidence.

Trial Judge Did Not Abuse Discretion in Allowing State to Reopen Questioning of Prospective Juror, Based on Facts in This Case

State v. Bond, 345 N.C. 1, 478 S.E.2d 163 (6 December 1996). In a capital case, the prosecutor questioned a prospective juror about his capital punishment views and accepted him. The next day, the defense counsel also questioned him about his views in an effort to determine whether he could consider a life sentence. When the juror's responses indicated equivocal views about imposition of the death penalty (the juror indicated that he personally could not support the death penalty), the prosecutor asked the trial judge to allow the state to reopen the questioning. The judge did so, and the prosecutor eventually exercised a peremptory challenge to remove the juror. The court noted its prior rulings that a trial judge has the discretion to reopen voir dire and once the judge does so, the parties have an absolute right to exercise any remaining peremptory challenges. See also G.S. 15A-1214(g). The court ruled, based on the facts in this case, that the judge did not abuse his discretion in allowing the state to reopen voir dire.

Trial Judge Acted Properly When Juror During Deliberations Asked to Be Removed From Jury Service

State v. Julian, 345 N.C. 608, 481 S.E.2d 280 (7 March 1997). During jury deliberations, a juror sent the trial judge a note in which she stated that could not handle someone's fate being in her hands; she had been emotionally distraught and physically ill since deliberations began; and she requested to be removed from jury service. The judge informed the attorneys about this note. The defendant moved for a mistrial. The judge informed the jurors that he had no authority to excuse any juror after the deliberations had begun [see G.S. 15A-1215(a)], and instructed them to decide the case after an impartial consideration of the evidence with their fellow jurors. The defendant renewed the mistrial motion. The court ruled that the judge did not abuse his discretion in denying the motion. There was no indication that the juror's ability to be impartial was impaired.

Trial Judge Properly Denied Defendant's Request for Additional Peremptory Challenge After Reexamination and Excusal for Cause of Juror Who Had Been Accepted by State and Defendant

State v. Dickens, 346 N.C. 26, 484 S.E.2d 553 (9 May 1997). After a juror had been passed by both the state and the defendant, the trial judge allowed reexamination of the juror and then removed the juror for cause. The trial judge then denied the defendant's motion for an additional peremptory challenge. The court ruled that G.S. 15A-1214 does not afford a party an additional peremptory challenge, based on the facts in this case. The court also noted, citing State v. Johnson, 298 N.C. 355, 259 S.E.2d 752 (1979), that a trial judge is precluded from authorizing any party to exercise more peremptory challenges than specified by law.

Trial Judge Erred By Not Exercising Discretion in Responding to Jury's Request to Review Testimony of Witnesses

State v. Johnson, 346 N.C. 119, 484 S.E.2d 372 (9 May 1997), *affirming*, 123 N.C. App. 790, 476 S.E.2d 148 (1996) (unpublished opinion). The jury during deliberations asked the trial judge to review the testimony of two witnesses. The trial judge said, "I'll *need* to instruct you that we *will not* be able to replay or review the testimony for you" (emphasis supplied by court). The court ruled that the trial judge's words clearly indicated that the judge did not exercise discretion in denying the request, in violation of G.S. 15A-1233(a). The court noted that the context of the trial judge's denial indicated that the judge did not believe there was discretion to grant the request, because after the above-mentioned statement, the judge told the jury that it "*can* review further instructions" (emphasis supplied by court). The court stated that the juxtaposition of these two statements—what the judge cannot do and what the judge can do—was telling. The court then examined the evidence in this case and determined that the judge's error was sufficiently prejudicial to require a new trial.

Defendant Lost Right to Make Last Jury Argument When He Was Allowed to Cross-Examine Officer, a State's Witness, by Having Witness Read Notes of Interview of Defendant Made by Other Officers

State v. Macon, 346 N.C. 109, 484 S.E.2d 538 (9 May 1997). An officer was testifying during the state's presentation of evidence, and said that other officers had taken notes of an interview they had had with the defendant. The defendant asked the officer to read the notes to the jury. Overruling the state's objection that the defendant had not testified and the defendant's statements were self-serving, the trial judge allowed the witness to read the notes. The notes were marked as an exhibit but were not offered into evidence. The trial judge later ruled that the defendant had offered evidence and had therefore lost the right to make the last jury argument under Rule 10 of the General Rules of Practice for the Superior and District Courts. The court upheld the judge's ruling, noting that the jury had received the contents of the defendant's statement as substantive evidence without any limiting instruction.

Sheriff's Pretrial Contact With Prospective Jurors, Who Had Not Responded to Jury Summons in Case When Sheriff Was State's Witness, Did Not Prejudice Defendant

State v. Barnard, 346 N.C. 95, 484 S.E.2d 382 (9 May 1997). The sheriff and a deputy sheriff, both of whom later testified at the defendant's trial, were involved in contacting prospective jurors who had not responded to a jury summons. The court noted that their communications were pretrial and simply a clerical one assuring that the prospective jurors had been served with the summons. One prospective juror the sheriff contacted later served at the defendant's trial. The court ruled that that G.S. 9-11(a) did not bar the sheriff's department from undertaking this responsibility and the defendant was not prejudiced by the sheriff's actions.

Statute Providing for Removal of District Attorney Is Constitutional, and Use of Racial Epithet Justified Removal

In re Spivey, 345 N.C. 404, 480 S.E.2d 693 (10 February 1997). The court ruled that G.S. 7A-66, which provides a procedure for removal of a district attorney by a superior court judge, is constitutional. The court also ruled that the district attorney's use of a racial epithet at a bar, along with other facts, justified the superior court judge's removal of the district attorney.

NORTH CAROLINA COURT OF APPEALS

Arrest, Search, and Confession Issues

Search Warrant Failed to Satisfy State Constitutional Requirements As Anticipatory Search Warrant

State v. Smith, 124 N.C. App. 565, 478 S.E.2d 237 (3 December 1996). Officers planned to use a cooperating informant to sell cocaine to the defendant and his accomplice on February 15, 1993. On February 14, 1993, the day before the anticipated sale, they obtained a search warrant to search the defendant's home for cocaine (apparently anticipating that the cocaine would be sold

the next day and would then be located in the defendant's home). The affidavit for the search warrant stated, among other things, that on February 15, 1993 (a date that had not occurred yet), the affiant received information from a confidential informant who, within the past seventy-two hours, has seen cocaine in the defendant's residence. The court ruled that this search warrant was not a valid anticipatory search warrant, based on the requirements for such a warrant as set out in its opinion (see below). The court noted that the search warrant's most glaring deficiency was the absence of any language denoting it as anticipatory.

The court ruled that the Constitution of North Carolina does not require that the object of a search be in the place searched when a search warrant is issued; it only requires probable cause to believe that contraband presently in transit will be at the place to be searched when the search warrant is executed. Thus an anticipatory search warrant is permitted, as long as a judicial official who issues such a warrant carefully eliminates the opportunity for officers to exercise unfettered discretion in executing the warrant. The state constitution requires the following conditions. (1) An anticipatory search warrant must set out explicit, clear, and narrowly drawn triggering events that must occur before execution of the warrant may take place. (2) These triggering events, from which probable cause arises, must be (i) ascertainable, and (ii) preordained (that is, the property is on a sure and irreversible course to its destination; for example, an undercover officer will deliver the cocaine to the house to be searched). (3) A search may not occur unless and until the property does, in fact, arrive at that destination. The court stated that these three conditions ensure that the required nexus between the criminal act, the evidence to be seized, and the identity of the place to be searched is achieved.

[Note: An example of what might be contained in an affidavit for an anticipatory search warrant to search premises, in addition to the statement establishing probable cause, is as follows.

> I request that a search warrant for the premises described above be issued with its execution contingent on the following procedures having occurred: On August 14, 1996, an officer with the Smithville Police Department will pose as a Super Express employee and will deliver the package described above to the premises described above. The package—which is addressed to the premises described above—will contain a powdery substance containing a small amount of cocaine, with most of the cocaine having been removed when the package was previously intercepted as described in this affidavit. After the package is delivered to the above-described premises and is taken inside, this search warrant will be executed.

Federal court decisions have ruled that anticipatory search warrants are sufficient when the affidavit instead of the warrant itself contains the contingency language. See, e.g., United States v. Moetamedi, 46 F.3d 225 (2d Cir. 1995). It is unclear whether North Carolina appellate courts would approve such a procedure. The more cautious approach would be to include the contingency language in the affidavit and add a statement on the face of the warrant, such as "This warrant may be executed only if the contingencies set out in the affidavit to this warrant are satisfied."]

Judge Who Issued Search Warrant Did Not Err in Failing to Recuse Himself from Presiding Over Suppression Hearing Challenging Search Warrant's Validity

State v. Monserrate, 125 N.C. App. 22, 479 S.E.2d 494 (7 January 1997). Relying on State v. Brown, 20 N.C. App. 413, 201 S.E.2d 527 (1974), the court ruled that there is no statutory or

constitutional bar against a judge's presiding at a hearing to review the validity of a search warrant issued by that judge (although the court noted a statement in *Brown* that it is better practice to allow a different judge to preside). The court also ruled that it is not a violation of the Code of Judicial Conduct to preside at the hearing.

(1) Defendant During Investigative Stop Was Not Entitled To *Miranda* Warnings Before Officer Asked Question
(2) Officer Conducting Frisk Had Probable Cause, Based on "Plain Feel" Theory and Defendant's Response to Question, That Object Contained Illegal Drugs

State v. Benjamin, 124 N.C. App. 734, 478 S.E.2d 651 (17 December 1996). Officer conducted a frisk of the defendant after an investigative stop for a traffic violation. As the officer was patting the defendant, he felt two hard plastic containers in a breast pocket of the defendant's winter jacket. Based on his narcotics training, it was immediately apparent that these containers were vials of the type that is customarily used to hold illegal drugs. When the officer felt the container through the jacket, he asked the defendant, "What is that?" The defendant responded that it was "crack." The officer removed two vials from the coat pocket and found cocaine. (1) The court ruled that the defendant was not in "custody" to require *Miranda* warnings when the officer asked the question while conducting the frisk. The court noted that the fact that a defendant is not free to leave does not necessarily constitute custody under *Miranda*. Instead, the inquiry is whether a reasonable person in the defendant's position would believe that he or she was under arrest or the functional equivalent of arrest; the court cited and discussed Stansbury v. California, 511 U.S. 318, 114 S. Ct. 1526, 128 L. Ed. 2d 293 (1994) and Berkemer v. McCarty, 468 U.S. 420, 104 S. Ct. 3138, 82 L. Ed. 2d 317 (1984). The court concluded that a reasonable person would not have believed he was in custody, based on these facts. (2) The court ruled that the seizure of the cocaine was proper under the "plain feel" theory set out in Minnesota v. Dickerson, 508 U.S. 366, 113 S. Ct. 2130, 124 L. Ed. 2d 334 (1993). The court stated that the officer had probable cause to believe (or to state a different way, it became immediately apparent to the officer) that the object was contraband based on the officer's experience, narcotics training, the size, shape, and mass of the objects, and the defendant's response to the officer's question. The court also ruled that an officer may ask a suspect the nature of an object in the suspect's pocket during a lawful frisk even after the officer has determined that the object is not a weapon.

(1) Investigative Stop of Defendant For Illegal Drugs Was Supported by Reasonable Suspicion
(2) Search of Defendant's Jacket Pocket During Frisk Was Proper

State v. Willis, 125 N.C. App. 537, 481 S.E.2d 407 (4 March 1997). Officers were conducting surveillance of a residence while a search warrant was being sought to search it for drugs. The defendant, whom the officers did not recognize, left the residence on foot. Concerned that he might be involved in drug activity occurring in the residence, they decided to follow him. When the defendant realized that he was being followed, he took evasive action by cutting through a parking lot. A detective then asked a uniformed officer to stop the defendant and ask him for identification. That officer approached him on foot, told him he was conducting an investigative stop, and asked the defendant for identification and for consent to a pat down for drugs and

weapons. The defendant consented to the pat down. The officer began to pat down the exterior and then interior of the defendant's leather jacket. Just as the officer began to check the jacket's interior pocket, the defendant lunged into the jacket with his hand. The officer, believing that the defendant might be reaching for a weapon and fearing for his safety, immediately locked his hands around the defendant's jacket, effectively locking the defendant's hand inside the pocket. Another officer arrived and assisted the first officer. When the two officers managed to get the defendant's hand out of his pocket, they put the defendant's hands behind him, and reached into the defendant's interior jacket pocket and emptied it, revealing several baggies of crack cocaine. (1) Relying on State v. Butler, 331 N.C. 227, 415 S.E.2d 719 (1992), the court ruled that the officer's investigative stop was supported by reasonable suspicion. The court noted that the defendant left a suspected drug house just before the search warrant was to be executed. He took evasive action when he knew that he was being followed, and he exhibited nervous behavior. (2) The court also ruled that the frisk and resulting search of the defendant's jacket pocket was proper. The court noted that the officers reasonably feared for their personal safety based on (i) their knowledge that people involved with drugs often carry weapons; (ii) defendant's exit from the suspected drug house; (iii) defendant's later furtive, evasive behavior; and (iv) defendant's sudden lunge of his hand into the interior of his jacket.

(1) Drug Officer Properly Stopped Driver and Passenger of Vehicle for Seat Belt Violations; Court Recognizes that Prior North Carolina Case on Pretextual Stop Is No Longer Valid After *Whren v. United States*
(2) Frisk Was Justified When Defendant's Hand Began to Reach Toward His Left Side Just Before Leaving Vehicle

State v. Hamilton, 125 N.C. App. 396, 481 S.E.2d 98 (18 February 1997). (1) An officer involved in drug surveillance stopped a vehicle because the driver and front seat passenger were not wearing seat belts as required by law. The court ruled, based on Whren v. United States, 517 U.S. 806, 116 S. Ct. 1769, 135 L. Ed. 2d. 89 (1996), that because the officer had probable cause to believe that the seat belt law had been violated, the stop was consistent with the Fourth Amendment even though a reasonable officer may not have made the stop. The court recognized that the *Whren* case had effectively overruled State v. Morocco, 99 N.C. App. 421, 393 S.E.2d 545 (1990), which had ruled that the test for determining whether a stop is pretextual is what a reasonable officer *would* do, rather than what an officer legally *could* do. (2) As the officer approached the front passenger side of the vehicle and informed the defendant (the front seat passenger) that he was a police officer, the defendant's hand began to reach toward his left side. The officer believed that the defendant was reaching for a weapon. The officer then asked the defendant to step outside the vehicle and told him he was going to frisk him. The court ruled that, based on this evidence, the officer was justified in conducting the frisk.

Evidence Supplied Probable Cause to Arrest Defendant for Impaired Driving

State v. Crawford, 125 N.C. App. 279, 480 S.E.2d 422 (4 February 1997). Responding to a call from a department dispatcher about a suspicious vehicle on the side of a road in a rural area, a deputy sheriff responded and saw a car parked there with its engine off. The driver's door was open and the defendant was sitting in the driver's seat with one leg hanging out of the car. The

defendant was in a semi-conscious state. His knee and shirt were wet with drool and his pants were undone. The deputy asked the defendant if he was okay. He was initially unresponsive and appeared to have trouble speaking. As the deputy looked for a medical alert bracelet, he detected a strong odor of alcohol on the defendant's breath. He then felt the hood of the car and, although the outdoor temperature was twenty-six degrees, the hood was warm. When the defendant finally spoke, he had a slight slur in his speech. The deputy asked him if he had been drinking, to which the defendant responded, "yes." When asked how much he had to drink, the defendant replied, "some." The deputy then asked the defendant several times to step out of the car. The defendant failed to respond to the deputy's first request to get out of the car and answered "no" to the second request. After the third request, the defendant replied, "I'm not going anywhere with you." The defendant then started to put a key into the ignition. The deputy removed the defendant from the car and arrested him for impaired driving. The court noted that the degree of certainty necessary for probable cause is a "fair probability," and ruled that this evidence supplied probable cause to arrest the defendant for impaired driving.

The court also ruled, relying on In re Pinyatello, 36 N.C. App. 542, 245 S.E.2d 185 (1978), that this evidence supported, under G.S. 15A-401(b)(2), the officer's warrantless arrest for the misdemeanor of impaired driving committed outside the officer's presence, because the defendant presented a danger to himself and others if not immediately arrested. [Note: Although not applicable to the date on which the offense in this case occurred, G.S. 15A-401(b)(2)(c) now authorizes an officer to make a warrantless impaired-driving arrest without any additional justification (such as danger to the defendant or others), even if the offense was committed outside the officer's presence.]

Driver's License Check Roadblock Was Constitutional

State v. Grooms, 126 N.C. App. 88, 483 S.E.2d 445 (15 April 1997). Six deputy sheriffs, with approval from the sheriff, established a roadblock at an intersection to check for driver's licenses, stolen vehicles, and individuals for whom they had outstanding arrest warrants. They stopped every vehicle going through the intersection. The defendant's vehicle was stopped and he eventually was charged with DWI. The court ruled, distinguishing Delaware v. Prouse, 440 U.S. 648 (1979), that the roadblock was constitutional. It was not a random stop and did not involve an unconstrained exercise of discretion.

Defendant's Statement to Officer That Attorney Had Told Him Not To Turn Himself In Was Not Assertion of Right To Counsel

State v. Marion, 126 N.C. App. 58, 483 S.E.2d 447 (15 April 1997). As a law enforcement officer was transporting the defendant to a law enforcement facility for questioning, the defendant told the officer that his attorney told him not to turn himself in. Later, after about thirty minutes of interrogation, the defendant requested the presence of an attorney and interrogation stopped. The court ruled that the defendant's statement that his attorney told him not to turn himself in was not an assertion of the right to counsel.

Evidence

(1) Expert Testimony That Child Had Been Abused Was Proper
(2) Expert Testimony Explaining Why Child Delayed Reporting Abuse Was Proper

State v. Dick, 126 N.C. App. 312, 485 S.E.2d 88 (20 May 1997). The defendant was charged with several sexual crimes against his nine-year-old stepdaughter that occurred around November 1992. The child had first made the accusations that led to these charges about two years after the incident, while living in Ohio with her biological father. (1) A pediatric expert testified that based on the child's statements and her clinical findings that the child's hymen appeared thickened and rolled, "it was very likely that the child had been sexually mistreated." The court upheld this testimony, noting that the expert on cross-examination testified that she would have reached the same opinion even without the child's statements. Thus, the testimony was based on her examination of the child and her expert knowledge about abused children generally, not on her personal belief that the child was telling the truth. The court distinguished State v. Trent, 320 N.C. 610, 359 S.E.2d 463 (1987), and State v. Parker, 111 N.C. App. 359, 432 S.E.2d 705 (1993). (2) During a clinical social work expert's initial evaluation of the child in April 1993, the child did not indicate that she had been sexually abused. Nevertheless, the expert testified that she saw behavior patterns in the child that sometimes show up in children believed to have been sexually abused—for example, the child would curl up in a fetal position and refuse to talk whenever the expert tried to discuss the defendant with her. The expert was allowed to testify why the child did not make her accusations for about two years: "I predicted that . . . [w]hen she got to a safe place, if she was going to disclose, she would disclose when she felt safe." The court, relying on State v. Bowman, 84 N.C. App. 238, 352 S.E.2d 437 (1987), rejected the defendant's argument that this was inadmissible testimony by an expert witness on the child's credibility.

Blood Spatter Experiments Conducted by Expert Were Admissible

State v. Clifton, 125 N.C. App. 471, 481 S.E.2d 393 (4 March 1997). The defendant was convicted of voluntary manslaughter. The trial judge allowed the state's expert to offer evidence of blood spatter experiments. The experiments were conducted by firing revolvers through blood soaked sponges and by slapping a blood source by hand. White paper and a tee shirt were placed in close proximity to the sources of blood to record the blood spray patterns. The state's expert testified that these methods of experimentation were standard procedure conducted by his agency, that the results obtained were indicative of or similar to blood patterns observed in other actual shootings, and that the results seen in the experiments were consistent with the stains actually found on the defendant's blouse. The court ruled that evidence of the experiments was properly admitted because there was substantial similarity between the experiments and the actual shooting, and the expert acknowledged any dissimilarities. The evidence was also relevant, based on the facts in this case.

(1) Defense Cross-Examination of Interrogating Detective About Use of Deception in Unrelated Investigation Was Proper, Based on Facts in This Case
(2) Defense Psychiatric Expert Testimony About Defendant's Susceptibility to Making False Confession Was Not Inadmissible Character Evidence, Based on Facts in This Case

State v. Baldwin, 125 N.C. App. 530, 482 S.E.2d 1 (4 March 1997). The defendant, who was fifteen years old, was tried for committing a murder during a robbery. The defendant's defense was alibi. A detective testified that the defendant had confessed to the crime. The defendant testified that the detective during the interrogation told him that (i) there was an eyewitness to the murder and (ii) the defendant's fingerprints had been found at the crime scene (both of which were false). During the defense cross-examination of the detective, the trial judge prohibited the defense from cross-examining the detective about whether two years earlier he had falsely told another defendant in an unrelated murder investigation that the defendant's hair and fingerprints had been found on the victim's body. (1) The court ruled that the trial judge erred in not allowing the cross-examination under Rule 608(b) about the detective's alleged use of false information during an earlier unrelated interrogation. Evidence that a witness has attempted to deceive others is indicative of one's character for truthfulness or untruthfulness. The court noted that whether the detective lied to the young defendant was an issue that the jury had to evaluate in determining the weight and credibility of the confession. (2) The trial judge also prohibited the defendant from introducing expert psychiatric testimony about the defendant's psychological characteristics that would make him more prone to making a false confession during interrogation. The court noted that even if a trial judge determines that a confession was not coerced (as in this case), the defendant may introduce evidence of coercion because it is relevant to the jury's determination of the weight to give the confession. The court noted that Rule 405(a) bars expert testimony on character. However, the court also noted that expert testimony about conditions affecting a person's mental condition is not character evidence, citing State v. Kennedy, 320 N.C. 20, 357 S.E.2d 359 (1987) and other cases. The court ruled that the proffered expert testimony in this case was related to the psychological factors affecting the defendant's mental condition and the trial judge erred in excluding the testimony on the ground that it was prohibited character evidence. However, the court specifically stated that it did not address whether the testimony was otherwise admissible, citing State v. Heath, 316 N.C. 337, 341 S.E.2d 565 (1986) (expert may not testify about credibility of witness) and State v. Huang, 99 N.C. App. 658, 394 S.E.2d 279 (1990) (setting out rules for admissibility of expert testimony).

Criminal Offenses

Error to Allow Defendant to be Adjudicated Habitual Felon Based on Superseding Habitual Felon Indictment Obtained After Defendant Was Convicted of Underlying Criminal Offenses, Based on Facts in This Case

State v. Little, 126 N.C. App. 262, 484 S.E.2d 835 (20 May 1997). The defendant was indicted for various felonies and with being an habitual felon. The habitual felon indictment alleged three prior felony convictions. The defendant pleaded guilty to various felonies. The state then moved for a continuance so it could obtain a new habitual felon indictment. The continuance was granted

over the defendant's objection. The new habitual felon indictment listed three felony convictions; however, it replaced one of the felony convictions alleged in the prior habitual felon indictment with a different felony conviction. The court ruled that the new habitual felon indictment was improperly brought and vacated the sentence based on the habitual felon adjudication. The court noted, distinguishing State v. Oaks, 113 N.C. App. 332, 438 S.E.2d 477 (1994) (state properly permitted to obtain new habitual indictment after judge dismissed prior habitual felon indictment, after conviction but before sentencing, because of technical defect in indictment), that the new habitual felon indictment in this case made a substantive change by substituting one felony conviction for another. The court ruled that a defendant is entitled to rely, when entering a plea to the substantive felonies (or, presumably, when going to trial), on the allegations contained in the habitual felon indictment in evaluating the state's likelihood of success on the habitual felon indictment. Therefore, because the defendant did not have notice before his guilty plea on the substantive felonies, that the state was seeking to have him declared an habitual felon based on the three felony convictions in the original habitual felon indictment, the adjudication and sentencing based on habitual felon status was erroneous. [Note: The court's opinion clearly indicated that the state on remand of this case may not seek another habitual felon indictment.]

State Was Properly Permitted to Amend Habitual Felon Indictment to Allege That All But One of the Prior Felony Convictions Were Committed After Defendant Became Eighteen

State v. Hicks, 125 N.C. App. 158, 479 S.E.2d 250 (7 January 1997). The habitual felon indictment alleged that all of the prior felony convictions were committed after the defendant became eighteen. The state was permitted to amend the indictment to allege that all but one of the prior felony convictions were committed after the defendant became eighteen. The court ruled, relying on State v. Snyder, 343 N.C. 61, 468 S.E.2d 221 (1996), that the amendment did not substantially alter the charge of habitual felon and therefore was proper.

(1) Violent Habitual Offender Indictment Was Not Defective
(2) Reclassification of Felony Offenses After They Were Committed So They Became Violent Felonies Under Violent Habitual Offender Statute Did Not Violate Ex Post Facto

State v. Mason, 126 N.C. App. 318, 484 S.E.2d 818 (20 May 1997). The defendant was convicted of assault with a deadly weapon with intent to kill inflicting serious injury. Based on the defendant's prior felony convictions of assault with a deadly weapon inflicting serious injury in 1987 and voluntary manslaughter in 1992, he was adjudicated a violent habitual felon and sentenced to life imprisonment without parole. (1) The court, relying on rulings involving the habitual felon statute, rejected several challenges to the violent habitual felon indictment: (a) the substantive felony indictment was not required to allege the defendant's violent habitual felon status; (b) the violent habitual felon indictment was not required to allege the substantive felony charged in the other indictment; and (c) the violent habitual felon indictment was not subject to dismissal when it failed to name the state in which a violent felony conviction occurred, because the allegation stated that in "Wake County, North Carolina" the defendant was convicted in Wake County Superior Court of the specified violent felony offense. (2) The court, relying on State v. Todd, 313 N.C. 110, 326 S.E.2d 249 (1985), rejected the defendant's argument that because the

crimes of assault with a deadly weapon inflicting serious injury and voluntary manslaughter were Class H and F felonies, respectively, when they were committed, treating them as Class E felonies (as reclassified by Structured Sentencing Act) for establishing violent habitual offender status violated ex post facto provisions.

Convictions and Punishments for Both Secret Assault and Felonious Assault Did Not Violate Double Jeopardy, Although Convictions Were Based on Same Assault

State v. Woodberry, 126 N.C. App. 78, 485 S.E.2d 59 (15 April 1997). The defendant was convicted of both secret assault and assault with a deadly weapon with intent to kill inflicting serious injury and the judge imposed consecutive sentences. The two convictions were based on the same assaultive act, shooting at the victim. Relying on State v. Hill, 287 N.C. 207, 214 S.E.2d 67 (1975), the court ruled that the convictions and punishments for both crimes did not violate double jeopardy.

Felonious Assault Indictment Was Valid Although Words "Serious Injury" Not Alleged

State v. Crisp, 126 N.C. App. 30, 483 S.E.2d 462 (15 April 1997). The defendant was indicted for assault with a deadly weapon with intent to kill inflicting serious injury. The court noted that although the indictment did not allege the words, "serious injury," it did allege that the victim received a gunshot wound to the left arm that required medical treatment and hospitalization. The court ruled that the indictment, when read as a whole, sufficiently stated facts that supported every element of the crime and apprised the defendant of the specific charge against him.

Transferred Intent Doctrine Applied to Offense of Discharging Firearm Into Occupied Property When Defendant Shot At Person and Bullet Went Into Occupied House

State v. Fletcher, 125 N.C. App. 505, 481 S.E.2d 418 (4 March 1997). When the sexual assault victim ran from the defendant, the defendant fired multiple shots at her as she ran to a house in an attempt to escape from him. When she found no one there, she ran to a second house as the defendant keep shooting at her. The second house was occupied. Investigating officers later found bullet holes in the side of this house, and the occupant said he thought that a bullet had come through his house during the shooting. The defendant was convicted of discharging a firearm into occupied property. In the jury instructions, the trial judge applied the doctrine of transferred intent in shooting at the victim to the offense of discharging a firearm into occupied property. The court ruled that the trial judge's instructions were proper. The court noted that reasonable grounds to believe that a building might be occupied can exist when a defendant has shot into a residence during evening hours, as homeowners are often there then. In addition, the offense of discharging a firearm into occupied property is, like assault, an offense against the person, not property.

(1) Defendant Was Not Entitled to Dismissal On Ground He Was Entrapped As A Matter of Law
(2) No Double Jeopardy Violation in Prosecuting Defendant for Drug Offense After Expulsion From School

State v. Davis, 126 N.C. App. 415, 485 S.E.2d 329 (3 June 1997). The defendant, a high school student, sold marijuana to an undercover law enforcement officer. He was expelled from school and then prosecuted and convicted of the marijuana offense. (1) The court ruled that the defendant was not entitled to a dismissal of the charge because he was entrapped as a matter of law. The state's evidence showed the defendant's predisposition to sell marijuana. He knew that the substance he delivered was marijuana, told the officer that he had a "dime," and knew that the amount of "weed" cost ten dollars. (2) The court also ruled, citing State v. Oliver, 343 N.C. 202, 470 S.E.2d 16 (1996), that there was no double jeopardy violation in prosecuting the defendant for the drug offense after he had been expelled from school for selling marijuana there. The school expulsion served primarily remedial goals.

Defendant's Acquittal of Possession With Intent to Sell or Deliver Cocaine, Even Though Convicted of Possessing Cocaine, Barred Forfeiture Under G.S. 90-112 of Money in His Possession When He Was Arrested, Based on Facts in This Case

State v. Johnson, 124 N.C. App. 462, 478 S.E.2d 16 (19 November 1996). The defendant was convicted of possession of cocaine and acquitted of possession with intent to sell or deliver cocaine. The trial judge ordered the forfeiture of money found in the defendant's front left pocket when he was arrested (when there also was 2.1 grams of cocaine in his front right pants pocket). The defendant testified that some of the money was given to him by his mother for safekeeping in the hours before his arrest and some of the money came from his janitor's job. The court noted that G.S. 90-112 is a criminal forfeiture statute and therefore must follow a conviction. It then ruled that because the defendant was found not guilty of possessing cocaine with the intent to sell or deliver, the trial judge was precluded from ordering the forfeiture of money found on his possession when he was arrested.

Court Upholds Constitutionality of G.S. 90-95.3(b), Which Allows Trial Judge to Order Restitution of One Hundred Dollars For Expense of Analyzing Controlled Substance

State v. Johnson, 124 N.C. App. 462, 478 S.E.2d 16 (19 November 1996). The court ruled, distinguishing Shore v. Edmisten, 290 N.C. 628, 227 S.E.2d 553 (1976), that G.S. 90-95.3(b) is constitutional. The statute allows a trial judge to order a defendant to pay restitution to the state for the expense of analyzing a controlled substance possessed by the defendant as part of an investigation that led to the defendant's conviction.

No Requirement under G.S. 20-139.1(f) That Refusal to Submit to Chemical Analysis Must Be Willful For Refusal To Be Admissible in Criminal Trial

State v. Pyatt, 125 N.C. App. 147, 479 S.E.2d 218 (7 January 1997). The court ruled that there is no requirement under G.S. 20-139.1(f) that a person's refusal to submit to a chemical analysis

must be willful for the refusal to be admissible in a criminal trial. The court noted that "willful" refusal is used in other subsections of G.S. 20-139.1, but not in subsection (f).

Sentencing

Sixty-Month Firearm Enhancement of Kidnapping Sentence Was Proper

State v. Evans, 125 N.C. App. 301, 480 S.E.2d 435 (4 February 1997). The defendant was convicted of felonious assault, armed robbery, first-degree kidnapping, and possession of cocaine. The court ruled that the trial judge under G.S. 15A-1340.16A properly enhanced the kidnapping sentence by sixty months for using a firearm; the use of a firearm was not necessary to prove an element of the kidnapping conviction. The court also ruled that consecutive sentences for armed robbery and kidnapping did not violate the double jeopardy clause. The two crimes require proof of different elements.

Sixty-Month Firearm Enhancement of Voluntary Manslaughter Sentence Was Improper

State v. Smith, 125 N.C. App. 562, 481 S.E.2d 425 (4 March 1997). The defendant was convicted of voluntary manslaughter in which he killed the victim with a gun. The court ruled that the trial judge improperly imposed a sixty-month sentence enhancement under G.S. 15A-1340.16A because to find the defendant guilty of voluntary manslaughter, the jury had to find the defendant intentionally killed the victim with a deadly weapon. The court rejected the state's argument that the enhancement was proper because use of a firearm was not an element of the offense. The court noted that the pertinent issue was whether the use of a firearm was necessary to prove an element, which it was in this case.

Proper to Find Aggravating Factor at Resentencing Hearing That Was Based on New Evidence Although Insufficient Evidence Was Offered at Earlier Sentencing Hearing

State v. Mason, 125 N.C. App. 216, 480 S.E.2d 708 (4 February 1997). The defendant was convicted of second-degree murder, and the judge found the aggravating factor of "especially heinous, atrocious, or cruel" under the Fair Sentencing Act. On appeal, the court of appeals ruled that the evidence of this aggravating factor was insufficient. At the resentencing hearing, the state presented new evidence related to this aggravating factor and the judge found its existence. The court ruled that this was proper, relying on State v. Jones, 314 N.C. 644, 336 S.E.2d 385 (1985).

One Point Was Properly Assigned for Committing Felony While on Probation for DWI

State v. Leopard, 126 N.C. App. 82, 483 S.E.2d 469 (15 April 1997). The defendant was convicted of a felony that he had committed while on probation for DWI. The court ruled that the defendant was properly assigned one point under G.S. 15A-1340.14(b)(7) (committing felony while on probation, parole, etc.). The court rejected the defendant's argument that because a DWI conviction could not be assigned a point under G.S. 15A-1340.14(b)(5) as a prior misdemeanor conviction, the fact that he was on probation for that same offense should not have been assigned a point.

(1) Pardoned Conviction Does Not Constitute Conviction under Fair Sentencing Act
(2) Judge's Restitution Order for Funeral Expenses Was Not Supported By Evidence

State v. Clifton, 125 N.C. App. 471, 481 S.E.2d 393 (4 March 1997). The defendant was convicted of voluntary manslaughter. (1) In sentencing the defendant under the Fair Sentencing Act, the judge found as an aggravating factor a prior conviction for which the defendant had received a pardon of forgiveness, a conditional pardon that a governor retains the power to revoke if the conditions of the pardon have been violated (the other type of pardon is a pardon of innocence, a full pardon). The court ruled that this prior conviction, for which a governor had granted a pardon of forgiveness that had not been revoked, does not constitute a conviction under the Fair Sentencing Act. (Note: This ruling would likely apply to a conviction under the Structured Sentencing Act.). (2) The judge ordered the defendant to pay the father of the homicide victim $3,000 in restitution for funeral expenses for the victim. The court ruled that there was no evidence in the record to show the cost of the funeral or who paid for it. Therefore, the court ruled that the judge erred in ordering the payment of restitution.

Maximum Length of Sentence for Juvenile in Juvenile Court Is Same as Maximum Sentence Adult Could Receive Under Structured Sentencing Act for Most Serious Prior Record or Conviction Level

In re Carter, 125 N.C. App. 140, 479 S.E.2d 284 (7 January 1997). The court ruled that under G.S. 7A-652(c) the maximum length of sentence for a juvenile adjudicated delinquent in juvenile court is the same as the maximum sentence an adult could receive under the Structured Sentencing Act for the most serious prior record or conviction level. In effect, the court adopted an interpretation consistent with the 1996 amendment to G.S. 7A-652(c), which was applicable to offenses committed on or after December 1, 1996.

Finding of Aggravating and Mitigating Facts Is Not Required When Presumptive Sentence Imposed Under Structured Sentencing Act

State v. Caldwell, 125 N.C. App. 161, 479 S.E.2d 282 (7 January 1997). The court ruled that a finding of aggravating and mitigating facts is not required when a presumptive sentence is imposed under the Structured Sentencing Act.

Miscellaneous

(1) Denial of Defendant's Right to Exercise Intelligent Peremptory Challenges, Based Solely on Juror's Misrepresentation During Voir Dire, Is Not Protected by United States or North Carolina Constitutions
(2) Court Sets Standard for New Trial Based on Juror's Misrepresentation During Voir Dire

State v. Buckom, 126 N.C. App. 368, 485 S.E.2d 319 (3 June 1997). The defendant was convicted of armed robbery. He later filed a motion for appropriate relief alleging that he was

deprived of his right to an impartial jury and to the intelligent exercise of his peremptory challenges because a juror during voir dire materially misrepresented his association with a potential state's witness. The motion was denied. (1) The court ruled that the denial of a defendant's right to exercise intelligent peremptory challenges, based solely on a juror's misrepresentation during voir dire, is not protected by the United States Constitution [citing McDonough Power Equipment, Inc. v. Greenwood, 464 U.S. 548 (1984)] or the North Carolina Constitution. (2) The court ruled that a defendant who moves for a new trial based on a juror's misrepresentation during voir dire must prove that: (i) the juror concealed material information during voir dire; (ii) the defendant exercised due diligence during voir dire to uncover the information; and (iii) the juror demonstrated actual bias or bias implied as a matter of law that prejudiced the defendant. The court examined the facts in this case under these standards and ruled that the judge properly denied the motion.

Police Department's Inadvertent Destruction of Rape Evidence Kit Did Not Violate Due Process

State v. Banks, 125 N.C. App. 681, 482 S.E.2d 41 (18 March 1997), *affirmed per curiam*, 347 N.C. 390, 493 S.E.2d 58 (5 December 1997). The defendant was charged with raping the victim. The police department inadvertently destroyed the rape evidence kit which contained evidence taken from the victim's body. The court ruled, relying on California v. Trombetta, 467 U.S. 479 (1984), that the defendant's due process rights were not violated because the evidence showed that the exculpatory value of possible DNA testing on the collected evidence was highly speculative.

Ten-Day License Revocation Under G.S. 20-16.5 Began When Magistrate Issued Order Revoking License, Even Though DWI Defendant Did Not Have License in His Possession and Magistrate Did Not File Affidavit Concerning Lack of License

Eibergen v. Killens, 124 N.C. App. 534, 477 S.E.2d 684 (19 November 1996). Eibergen was arrested for impaired driving and a chemical analysis of his breath showed a 0.15. The magistrate ordered his license or privilege to drive be revoked under G.S. 20-16.5. Because Eibergen stated that he did not have his driver's license with him, the magistrate marked the box on the order that stated that Eibergen "was validly licensed but unable to locate his license card and filed an affidavit which constituted surrender of the driver's license." However, the magistrate did not file the affidavit (AOC-CVR-8). The court ruled that Eibergen's license revocation began on the date the magistrate issued the order, even though Eibergen did not have his license in his possession and the magistrate did not file the affidavit.

Judge Erred in Not Conducting Evidentiary Hearing on Defendant's Motion for Appropriate Relief, Based on Allegations in Motion

State v. Hardison, 126 N.C. App. 52, 483 S.E.2d 459 (15 April 1997). In 1992 the defendant pleaded guilty to two felonies and was sentenced to life imprisonment plus twenty years. In 1994 the defendant filed a motion for appropriate relief alleging that (1) his attorney who represented him in 1992 had had a conflict of interest; and (2) his guilty plea was invalid because it was not

freely, voluntarily, and understandingly made. A superior court judge denied the defendant's motion without conducting an evidentiary hearing. The court ruled that the motion for appropriate relief raised issues of fact with sufficient particularity to merit an evidentiary hearing. For example, on the conflict-of-interest issue, the record showed that the defendant's attorney stated that he was in an "awkward position" because he was "pinch hitting" for another attorney and he had been personal friends with the victims for fifty years. On the issue of the voluntariness of the guilty plea, the defendant alleged that he was induced by his attorney, the prosecutor, an SBI agent, and a co-defendant's attorney to plead guilty with a promise that he would not be sentenced to more than twenty years' imprisonment. In addition, he alleged that his attorney advised him that he would be sentenced to life imprisonment if he did not plead guilty.

Even If DWI Arrest Did Not Comply with G.S. 15A-401(b)(2), Driver's Refusal to Submit to Chemical Analysis May Be Used to Revoke Driver's License

Quick v. Division of Motor Vehicles, 125 N.C. App. 123, 479 S.E.2d 226 (7 January 1997). The court ruled that even if an arrest for impaired driving did not comply with G.S. 15A-401(b)(2) (which was amended since the facts in this case occurred, and now allows an arrest for impaired driving committed outside the officer's presence whenever there is probable cause to arrest), the driver's refusal to submit to a chemical analysis may be used to revoke his or her driver's license. The court specifically reserved the question whether its ruling would apply if probable cause did not exist to make the arrest.