RECENT CASES AFFECTING CRIMINAL LAW AND PROCEDURE
(November 17, 1998 – June 9, 1999)

Robert L. Farb
Institute of Government

NORTH CAROLINA SUPREME COURT

Criminal Offenses and Procedure

(1) G.S. 15A-534.1(b) (Only Judge May Set Pretrial Release Conditions During First 48 Hours After Defendant's Arrest for Certain Domestic Violence Crimes) Is Not Unconstitutional on Its Face Under Due Process and Double Jeopardy Clauses of United States Constitution
(2) G.S. 15A-534.1(b), As Applied to Defendant in This Case, Violated His Federal Constitutional Right to Procedural Due Process, and Court Affirms Dismissal of Criminal Charges

State v. Thompson, 349 N.C. 483, 508 S.E.2d 277 (31 December 1998), *reversing*, 128 N.C. App. 547, 496 S.E.2d 597 (1998). G.S. 15A-534.1(b) essentially provides that if a person is arrested for certain domestic violence crimes, only a judge may set conditions of pretrial release during the first 48 hours after the person's arrest. If the judge has not done so during the first 48 hours, then a magistrate (or clerk) must set conditions of pretrial release. In effect, the person remains in jail for the first 48 hours unless a judge sets conditions of release. In this case, the defendant was arrested about 3:45 p.m. on Saturday, October 28, 1995, and taken before a magistrate. Pursuant to G.S. 15A-534.1(b), the magistrate did not set conditions of release. Instead, the magistrate ordered that the defendant be committed to jail and be brought before a judge or magistrate at 3:45 p.m. on Monday, October 30, 1995, for the setting of conditions of release. The defendant was not brought before a judge until Monday afternoon, October 30, 1995, although district and superior court judges were available that Monday morning since both district and superior courts had convened some time between 9:00 a.m. and 10:00 a.m.

(1) The court ruled that G.S. 15A-534.1(b) did not on its face violate substantive or procedural due process or double jeopardy provisions of the United States Constitution. The court relied on several cases, including United States v. Salerno, 481 U.S. 739 (1987), Schall v. Martin, 467 U.S. 253 (1984), and County of Riverside v. McLaughlin, 500 U.S. 44 (1991). The court declined to discuss the provisions of the North Carolina Constitution because the defendant had not properly raised that issue.

(2) The court ruled that, based on the facts in this case, the failure to provide the defendant with a pretrial release hearing before a judge at the first opportunity on Monday morning, October 30, 1995, and the continued detention of the defendant into the afternoon, was constitutionally unreasonable. The application of G.S. 15A-534.1(b) to the defendant in this case violated his federal procedural due process rights. The court stated that the defendant's fundamental right to liberty was harmed because the unreasonable delay prevented him from receiving a prompt post-detention hearing (concerning the conditions of his pretrial release) before the first available judge. The court affirmed the dismissal of the defendant's criminal charges, citing G.S. 15A-954(a)(4) ("defendant's constitutional rights have been flagrantly

violated and there is such irreparable prejudice to the defendant's preparation of his case that there is no remedy but to dismiss the prosecution").

G.S. 15A-534.1(b) (Only Judge May Set Pretrial Release Conditions During First 48 Hours After Defendant's Arrest for Certain Domestic Violence Crimes) Was Constitutionally Applied to Defendant in This Case

State v. Malette, 350 N.C. 52, 509 S.E.2d 776 (5 February 1999), *affirming on other grounds,* 128 N.C. App. 749, 496 S.E.2d 850 (1998) (unpublished opinion). On Sunday, December 3, 1995, the defendant was arrested for an offense subject to G.S. 15A-534.1 (only judge may set pretrial release conditions during first 48 hours after defendant's arrest for certain domestic violence crimes). The magistrate ordered that he be brought before a judge on the next day, Monday, December 4, 1995. The defendant was brought before a judge that day, who set a $10,000 secured bond, which was later reduced to $1,000. The court stated that there was no evidence that the magistrate arbitrarily set a forty-eight-hour limit as in State v. Thompson, 349 N.C. 483, 508 S.E.2d 277 (31 December 1998), or that the state did not move expeditiously in bringing the defendant before a judge for the setting of conditions of pretrial release. The court ruled that G.S. 15A-534.1 was constitutionally applied to the defendant in this case.

(1) Sufficient Evidence of Constructive Breaking to Support First-Degree Burglary Conviction
(2) Sufficient Evidence to Support Kidnapping Conviction Despite Defendant's Armed Robbery Conviction
(3) Sufficient Evidence of Victim Not Released in Safe Place to Support First-Degree Kidnapping Conviction

State v. Thomas, 350 N.C. 315, 514 S.E.2d 486 (7 May 1999). The defendant was convicted of first-degree murder, armed robbery, first-degree burglary, and first-degree kidnapping. There were no eyewitnesses to these offenses, which were committed at the victim's residence. (1) The court ruled that there was sufficient evidence of constructive breaking (accomplished by deception or trick) to support the first-degree burglary conviction. The state offered Rule 404(b) evidence that in an unrelated case another person (Ms. Blue) had been assaulted and robbed by the defendant after he had tricked his way into her house. After comparing the similarities between the evidence in both cases, the court ruled that the evidence permitted an inference that the defendant tricked his way into the murder victim's house in the same manner as he had tricked his way into Ms. Blue's house. (2) The court upheld the defendant's kidnapping conviction, rejecting the defendant's argument that it was precluded by the armed robbery conviction. The court noted, citing State v. Johnson, 337 N.C. 212, 446 S.E.2d 92 (1994), that the key question is whether the victim was exposed to greater danger than that inherent in the armed robbery itself or subjected to the danger and abuse the kidnapping statute was designed to prevent. The defendant was bound and gagged, facts unnecessary to prove armed robbery. He also was repeatedly stabbed and cut while he was restrained, and thus subjected to the kind of danger and abuse the kidnapping statute was designed to prevent. (3) The court ruled that there was sufficient evidence that the victim was not released in a safe place to support the defendant's first-degree kidnapping conviction (even though the victim was murdered in his own house). The court noted that the element of not being released in a safe place applies to kidnapping by

restraint and confinement as well as to kidnapping by removal. The court stated that because the victim was found stabbed to death, with his hands still tied behind his back, he certainly was never released in a safe place from this restraint.

Trial Judge Did Not Abuse Discretion in Keeping Defendant Shackled During Trial

State v. Thomas, 350 N.C. 315, 514 S.E.2d 486 (7 May 1999). Just before the beginning of the defendant's first-degree murder trial, the defendant threatened to tip over a table and refused to come into the courtroom voluntarily. The trial judge ordered the defendant to be handcuffed and shackled. After returning to the courtroom, the defendant became very disruptive and refused to be quiet. The trial judge then directed a bailiff to remove the defendant. At a meeting in a holding cell, the defendant threatened defense counsel with physical violence and also threatened a deputy sheriff. However, throughout the trial, the defendant did not exhibit any more violent behavior or threaten defense counsel. The defendant argued on appeal that the trial judge abused its discretion in refusing to unshackle the defendant before he took the witness stand. (The defendant's shackles were concealed from the jury.) The court rejected the defendant's argument. It ruled that the trial judge did not abuse his discretion in determining that keeping the defendant restrained was the most prudent way to maintain an orderly courtroom and to ensure courtroom security.

(1) Trial Judge Did Not Abuse Discretion in Limiting Opening Statements to Five Minutes
(2) Felonious Assault Indictment Contained Fatal Variance Between Victim's Alleged Name and His Actual Name

State v. Call, 349 N.C. 382, 508 S.E.2d 496 (31 December 1998). The defendant tried for first-degree murder and other offenses. (1) The court ruled that the trial judge did not abuse his discretion in imposing a five-minute time limit on opening statements at the trial. (2) The court on its own motion arrested judgment on the defendant's felonious assault conviction because there was a fatal variance between the victim's name, Gabriel Hernandez Gervacio, alleged in the indictment and his actual name, Gabriel Gonzalez. The court cited State v. Abraham, 338 N.C. 315, 451 S.E.2d 131 (1994).

Trial Judge Did Not Err in Denying Motion for Expert Psychiatric Assistance

State v. Anderson, 350 N.C. 152, 513 S.E.2d 296 (9 April 1999). The defendant was prosecuted for murder and sentenced to death. The court ruled that the trial judge did not err in denying the defendant's motion for expert psychiatric assistance at trial or sentencing hearing. The court noted that defense counsel's request for assistance was based on mere speculation of what trial tactic that the state would employ rather than the requisite showing of specific need. In addition, the defense counsel conceded that the defendant was not asserting an insanity defense.

Evidence of Statistical Disparity Between County's Black Population and Representation of Blacks in Jury Pool Was Insufficient By Itself to Show Racial Discrimination

State v. Bowman, 349 N.C. 459, 509 S.E.2d 428 (31 December 1998). The court ruled that evidence of a disparity of 16.7% between a county's black population (39.17%) and

representation of blacks in the jury pool (23%) was insufficient evidence by itself to show racial discrimination. Relying on State v. Price, 301 N.C. 437, 272 S.E.2d 103 (1980), the court ruled that the statistical disparity was insufficient to show that black representation was unfair or unreasonable, the second prong of a three-prong test established under Duren v. Missouri, 439 U.S. 357 (1979). In addition, the defendant offered no evidence of the third prong: that the jury selection process was tainted by the systematic exclusion of blacks from the jury pool.

Trial Judge Did Not Err in Denying Defendant State-Funded Forensic Crime Scene Expert

State v. McNeill, 349 N.C. 634, 509 S.E.2d 415 (31 December 1998). The defendant was convicted of two first-degree murders and sentenced to death for each murder. The trial judge granted the defendant's motion for a state-funded private investigator, firearms expert, fingerprint expert, and audiologist. However, the judge denied the defendant's motion for a state-funded forensic crime scene expert. The court upheld the judge's ruling: the defendant did not adequately show a particularized necessity to require the state to provide funds for this type of expert.

Court Affirms, Without Opinion, Court of Appeals Ruling That In Determining Prior Record Level Under Structured Sentencing Act, Prior Conviction of Felonious Breaking or Entering Is Considered a Class H Felony for Determining Points, Even Though Defendant Was Sentenced as Class C Felon for Being Habitual Felon

State v. Vaughn, 350 N.C. 88, 511 S.E.2d 638 (4 March 1999), *affirming per curiam*, 130 N.C. App. 456, 503 S.E.2d 110 (4 August 1998). The court affirmed, without an opinion, the ruling of the North Carolina Court of Appeals, which is summarized as follows: The defendant was sentenced for a felony under the Structured Sentencing Act. He had a prior felonious breaking and entering conviction in 1984, for which he was sentenced as a habitual felon. The trial judge treated this 1984 conviction as a Class C felony (the punishment for habitual felon), rather than a Class H felony, the punishment for felonious breaking and entering. The court ruled that the trial judge erred. Being an habitual felon is not a felony; it is a status that provides for increased punishment on conviction of a felony. The term "prior felony . . . conviction" in G.S. 15A-1340.14(b) (number of points for prior felony conviction) refers to the adjudication of guilt or entry of a guilty or no contest plea, not the sentence for the conviction.

Court Affirms, Without Opinion, Court of Appeals Ruling That Defendant Willfully Violated Special Condition of Probation By Being in Child's Presence

State v. White, 350 N.C. 302, 512 S.E.2d 424 (9 April 1999), *affirming per curiam*, 129 N.C. App. 52, 496 S.E.2d 842 (17 March 1998). The court affirmed, without an opinion, the ruling of the Court of Appeals that there was sufficient evidence that the defendant willfully violated a special condition of probation that the defendant "shall not be in the presence of any child, male or female, under the age of 16 years, at any time." (The defendant was on probation for three sexual assault convictions. This special probation condition had been added to the original probation conditions after the defendant had sexually abused his stepson.) The evidence at the probation revocation hearing showed that the defendant was a passenger in a car driven by his nineteen year old niece. The car was driven into a driveway, where an adult there called

defendant's stepson over to the car. The stepson walked over to the passenger side car door. The adult asked the stepson if he knew "this fellow." The defendant stated, "Of course he does. He is my own." The stepson then returned to playing football in the yard with other people under sixteen years old. The defendant left the car and visited his aunt in a house next door. Later, as he was leaving his aunt's house, he said "Bye" to the children playing football. The court ruled that this conduct was a willful violation of the special probation condition. The defendant did not leave the premises or take another action to avoid being in his stepson's presence. [The court of appeals also ruled in this case that the term "presence" in the special probation condition was not unconstitutionally vague, although the supreme court's affirmance did not involve that issue.]

Arrest, Search, and Confession Issues

Court Affirms, Without Opinion, Court of Appeals Ruling That Defendant Was Not in "Custody" to Require *Miranda* Warnings During Seven Hours of Interrogation

State v. Green, 350 N.C. 59, 510 S.E.2d 375 (5 February 1999), *affirming*, 129 N.C. App. 539, 500 S.E.2d 452 (1998). The court affirmed, without an opinion, the ruling of the Court of Appeals that upheld the admissibility of the defendant's confession. The following is a summary of the Court of Appeals opinion: The defendant voluntarily left his home and came with several officers to the sheriff's department to be interrogated about a murder. The officers told him that he was not under arrest. The court noted that during seven hours of interrogation, the defendant was allowed breaks, used the restroom without being accompanied by an officer, was not handcuffed or restrained in any way, was provided or offered food several times, and was allowed to call his mother. On the other hand, the officers conducted a vigorous interrogation, including telling him that he was lying to them. The court, distinguishing State v. Jackson, 348 N.C. 52, 497 S.E.2d 409 (1998), ruled that the defendant was not in "custody" to require that *Miranda* warnings must be given during the interrogation.

Court Affirms, Without Opinion, Court of Appeals Ruling That Defendant Was Not in "Custody" to Require *Miranda* Warnings During Less Than Two Hours of Interrogation

State v. Hall, 350 N.C. 303, 513 S.E.2d 561 (9 April 1999), *affirming*, 131 N.C. App. 427, 508 S.E.2d 8 (1 December 1998). The court affirmed, without an opinion, the ruling of the Court of Appeals that upheld the admissibility of the defendant's inculpatory statements to law enforcement officers that were made without officers' giving *Miranda* warnings. The following is summary of the Court of Appeals opinion: The defendant voluntarily accompanied detectives to the police station after they had asked him if he would come there to talk about a robbery. Although the detectives never specifically indicated to the defendant that he was not under arrest, they did advise him that he didn't have to stay there—just that they needed him to talk to them. The court noted that it appears that the defendant was free to leave at any time he desired. The court, citing a statement in Stansbury v. California, 511 U.S. 318, 114 S. Ct. 1526, 128 L. Ed. 2d 293 (1994) (even a clear statement by officer that person under interrogation is prime suspect is not, by itself, dispositive of custody issue, because some suspects are free to come and to go until officers decide to make an arrest), rejected the defendant's argument that a reasonable person in the defendant's position would not feel free to leave when the detectives confronted him with a statement by a witness implicating him in the robbery. The court, citing and discussing

statements from Oregon v. Mathiason, 429 U.S. 492, 97 S. Ct. 711, 50 L. Ed. 2d 714 (1977), also rejected the defendant's argument that he was in custody because he was interrogated in a coercive, police-dominated atmosphere. The court stated that undoubtedly, any time an officer interviews a suspect, there will be coercive aspects present. The court noted that the interrogation lasted between one and two hours. The defendant was alert and sober. He was not restrained in any way, the door to the interrogation room was left open, and there were no threats or shows of violence or promises of leniency. The court concluded that the defendant was not in custody, and therefore *Miranda* warnings were not required.

Capital Case Issues

G.S. 15A-1415(f), Which Governs Discovery for Motion for Appropriate Relief in Capital Cases, Does Not Apply to Motion for Appropriate Relief Denied Before June 21, 1996, Effective Date of G.S. 15A-1415(f)

State v. Green, 350 N.C. 400, 514 S.E.2d 724 (9 June 1999). The court ruled that G.S. 15A-1415(f), which governs discovery for a motion for appropriate relief in capital cases and provides for defense access to prosecutorial and law enforcement files involved with the investigation and prosecution of a defendant, did not apply to a motion for appropriate relief that had been denied before June 21, 1996, the effective date of G.S. 15A-1415(f). The court also noted that in this case a petition of certiorari to the North Carolina Supreme Court, concerning the denial of the motion for appropriate relief, was not pending on that date. The court stated that G.S. 15A-1415(f) applies retroactively only to motions for appropriate relief filed before June 21, 1996, and had been granted or were still pending on that date. The term "pending" means that on June 21, 1996, a motion for appropriate relief had been filed but had not been denied by a trial judge, or the motion for appropriate relief had been denied by a trial judge but the defendant had filed a petition for a writ of certiorari that had been allowed by, or was still before, the North Carolina Supreme Court.

G.S. 7A-450(b1) (Right to Assistant Counsel in Capital Cases) Does Not Require that Both Attorneys Must Be Present at All Times for All Matters

State v. Thomas, 350 N.C. 315, 514 S.E.2d 486 (7 May 1999). The defendant was convicted of first-degree murder and sentenced to death. The defendant's assistant counsel left the courtroom during the questioning of a prospective juror, during the defendant's testimony, during the instructions conference in the guilt and sentencing phases, and during arguments by the prosecutor. The court noted that the longest of these absences was just four minutes, and the defendant's other counsel was present during every absence. The court ruled that G.S. 7A-450(b1) (right to assistant counsel in capital cases) does not require both attorneys to be present at all times for all matters, and the statutory right to assistant counsel was not violated in this case.

Opinion of Murder Victim's Mother Whether Defendant Should Receive Death Penalty Is Inadmissible as Mitigating Circumstance

State v. Bowman, 349 N.C. 459, 509 S.E.2d 428 (31 December 1998). The court ruled that the opinion of the murder victim's mother whether the defendant should receive the death penalty is inadmissible as a mitigating circumstance. The court stated that such evidence has no bearing on the defendant's character, prior record, or the circumstances of his offense.

(1) Trial Judge Did Not Abuse Discretion in Prohibiting Opening Statements at Capital Sentencing Hearing
(2) Trial Judge Erred in Holding Part of Charge Conference in Chambers Without Defendant's Presence
(3) Prosecutor's Jury Voir Dire Question Concerning Death Penalty Was Proper

State v. Call, 349 N.C. 382, 508 S.E.2d 496 (31 December 1998). The defendant was tried and convicted of first-degree murder and sentenced to death. (1) The court ruled that the trial judge did not abuse his discretion in prohibiting opening statements at a capital sentencing hearing. The court noted that there is no authority for an opening statement at such a hearing. (2) The court ruled, citing State v. Exum, 343 N.C. 291, 470 S.E.2d 333 (1996), that the trial judge erred in holding part of the jury charge conference in chambers without the defendant's presence; the defendant's unwaivable state constitutional right to be present was violated. (3) The prosecutor asked prospective jurors during voir dire if they could write the word "death" on the recommendation form and if they could announce their verdict of death in open court. The court ruled, relying on State v. White, 343 N.C. 378, 471 S.E.2d 593 (1996), that the prosecutor's question properly sought to determine the jurors' ability to carry out their duties.

Trial Judge Did Not Err in Allowing Defendant's Wishes to Prevail Over Defense Counsel's Strategy to Present Certain Kind of Mitigating Evidence, Based on Facts in This Case

State v. White, 349 N.C. 535, 508 S.E.2d 253 (31 December 1998). During the presentation of the defendant's evidence during a capital sentencing hearing, the defendant told defense counsel that he did not want evidence presented about the history of domestic violence and abuse in his family when he was growing up. The trial judge conducted a hearing concerning the disagreement between defense counsel and the defendant about the presentation of this evidence, and ruled with the defendant, who believed that the presentation of this evidence might harm his defense instead of helping it. The court first noted that defense counsel was not prohibited by the defendant from presenting all mitigating evidence, just this kind of evidence. The court ruled, relying on State v. Ali, 329 N.C. 394, 407 S.E.2d 183 (1991), that the trial judge's ruling was not erroneous. When defense counsel and a fully-informed defendant reach an absolute impasse about tactical decisions, the client's wishes must control: this rule is in accord with the principal-agent nature of the attorney-client relationship.

State Improperly Elicited Testimony That Defendant Had Not Confessed or Expressed Remorse to His Jailers, Based on Facts in This Case

State v. Call, 349 N.C. 382, 508 S.E.2d 496 (31 December 1998). The court ruled that, based on the facts in this case, the trial judge erred in allowing the state to argue that the defendant should be sentenced to death based on improperly-elicited testimony that he had not confessed or expressed remorse to his jailers, in violation of his right to due process and privilege against self-incrimination. The court noted that the defendant had been informed of his constitutional right to silence at his first appearance in district court. He never waived that privilege. He never made a statement to law enforcement officers, and he did not testify at his trial or sentencing hearing. The defense never presented evidence or argument concerning statements made by the defendant concerning the alleged crimes or his feelings or attitudes toward the victims. At the capital sentencing hearing, the defendant called four jailers to testify that he had been a model prisoner during his pretrial incarceration. The state then elicited testimony, over the defendant's objection, that the defendant had neither confessed nor shown remorse for the crimes he was accused of committing. The court ruled that this testimony was improperly allowed under State v. Hoyle, 325 N.C. 232, 382 S.E.2d 752 (1989) (due process violation when using silence against defendant who has been advised of right to remain silent under *Miranda*). The court stated that the state may alert the jury of the defendant's lack of remorse as long as it does not urge the jury to consider the lack of remorse as an aggravating circumstance. However, the state's questions in this case clearly emphasized to the jury that the defendant had not denied the accusations and encouraged the jury to use the exercise of his right to silence when considering whether to recommend life or death.

(1) State's Jury Voir Dire Question About Imposing Death Penalty on Female Defendant Was Permissible
(2) Trial Judge Properly Sustained State's Objection to Defendant's Questions About Prospective Jurors' Religious Beliefs, Based on Facts in This Case
(3) Psychiatric Expert's Testimony at Capital Sentencing Hearing That Defendant's Disorder Would Not Relieve Her of Responsibility For Her Actions Was Admissible
(4) Brutal Beating of Child Was Sufficient Evidence of Aggravating Circumstance G.S. 15A-2000(e)(9) (Especially Heinous, Atrocious, or Cruel)
(5) Evidence Was Insufficient to Support Submission of Mitigating Circumstance G.S. 15A-2000(f)(4) (Defendant Was Accomplice to Murder Committed By Another and Defendant's Participation Was Relatively Minor) and G.S. 15A-2000(f)(5) (Defendant Acted Under Duress or Under Domination of Another Person)

State v. Anderson, 350 N.C. 152, 513 S.E.2d 296 (9 April 1999). The defendant was prosecuted for murder and sentenced to death. (1) The court ruled that the trial judge did not err in allowing the state to ask prospective jurors, "Would the fact that the defendant is a female in any way affect your deliberations with regard to the death penalty?" The question was not an impermissible hypothetical or stakeout question. The court stated that an inquiry into the possible sensitivities of prospective jurors toward a female defendant facing the death penalty is not an inappropriate effort to ferret out any prejudice arising from the defendant's gender. (2) The court ruled that the trial judge did not err in sustaining the state's objection to defendant's questions about prospective jurors' religious beliefs. The impermissible questions concerned their church

membership and whether their churches' members ever expressed opinions about the death penalty. The court noted that instead of questions relating to the jurors' religious beliefs, the impermissible questions concerned their affiliations and beliefs espoused by others in their churches. (3) The court ruled that a psychiatric expert's testimony at the capital sentencing hearing that the defendant's disorder would not relieve her of responsibility for her actions was admissible. The court noted the rules of evidence do not apply at the sentencing hearing. It stated that term "responsibility," in the context of the expert's testimony, was a medical term used appropriately to describe the effect of the defendant's mental conditions on her actions. (4) The court ruled that there was sufficient evidence of aggravating circumstance G.S. 15A-2000(e)(9) (especially heinous, atrocious, or cruel). The victim was two and one-half years old, the defendant was her primary caregiver, and the victim was brutally beaten and severely abused by the defendant and another person. (5) The court examined the evidence and ruled that the evidence was insufficient to support the submission of both mitigating circumstance G.S. 15A-2000(f)(4) (defendant was accomplice to murder committed by another and defendant's participation was relatively minor) and G.S. 15A-2000(f)(5) (defendant acted under duress or under domination of another person). Concerning G.S. 15A-2000(f)(4), although the defendant may not have inflicted the closed-head injury on the night the child died, she significantly abused her over a long time period. Concerning G.S. 15A-2000(f)(5), although a male person who was involved in the murder had criminally assaulted the defendant, such evidence failed to support the defendant's assertion that she acted under his domination on the night of the murder or during the abusive treatment of the child that occurred before the murder.

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

State v. Fleming, 350 N.C. 109, 512 S.E.2d 720 (9 April 1999). The defendant was convicted of first-degree murder and sentenced to death. The court ruled that there was sufficient evidence of aggravating circumstance G.S. 15A-2000(e)(9) (especially heinous, atrocious, or cruel). The evidence showed that the victim was repeatedly assaulted with a blunt object in his home. As the victim struggled to defend himself, the defendant continued to hit him on the head as the victim moved about the house. The victim had multiple cuts and bruises on his head, arms, and right leg. The defendant also manually strangled the victim so that his hyoid bone was fractured. The court stated that the evidence supported a reasonable inference that the victim remained conscious during his ordeal and suffered great physical pain and torture.

Defendant's Death Sentences Were Not Disproportionate, Although Defendant's Brother Received Life Sentences for Same Murders

State v. McNeill, 349 N.C. 634, 509 S.E.2d 415 (31 December 1998). The defendant was convicted of two first-degree murders and sentenced to death for each murder. In a separate trial, the defendant's brother was convicted of the same first-degree murders and was sentenced to life imprisonment for each murder. The court ruled that the death sentences were not disproportionate, based on the facts in this case. The court noted, citing State v. Bonnett, 348 N.C. 417, 502 S.E.2d 563 (1998) and State v. Lemons, 348 N.C. 335, 501 S.E.2d 309 (1998), that the fact that a defendant is sentenced to death while a codefendant receives a life sentence for the same crime is not determinative of the issue of proportionality.

(1) Court Rejects Proposed Procedural Requirements Before Judge Submits Mitigating Circumstance G.S. 15A-2000(f)(1) (No Significant Prior Criminal History)
(2) Judge Did Not Err in Submitting Mitigating Circumstance G.S. 15A-2000(f)(1) (No Significant Prior Criminal History) Over Defendant's Objection
(3) Court Discourages Biblical Jury Arguments
(4) Judge Did Not Err in Allowing State to Present Photograph of Murder Victim as She Appeared Before Murder

State v. Williams, 350 N.C. 1, 510 S.E.2d 626 (5 February 1999). The defendant pleaded guilty to a first-degree murder that was committed on October 28, 1995. A capital sentencing hearing was held, and the defendant was sentenced to death. At the hearing, the defendant testified on direct examination about his prior convictions. The state was permitted to cross-examine the defendant about the details of his criminal history and to offer rebuttal evidence. (1) The court ruled that the trial judge was not required to determine, before the state presented rebuttal evidence on mitigating circumstance G.S. 15A-2000(f)(1) (no significant prior criminal history), that a rational juror could find from the evidence that the defendant had no significant history of criminal activity. This determination need only be made before deciding to submit this mitigating circumstance. The court also ruled that the judge is not required to make findings of fact to explain its decision to submit this mitigating circumstance. (2) The court ruled that the judge did not err in submitting mitigating circumstance G.S. 15A-2000(f)(1) (no significant prior criminal history) over the defendant's objection. The defendant had been convicted of many misdemeanor assaults on females (one in 1995, four in 1992, and one in 1989), and other offenses such as communicating threats, trespass, and burglary. The court concluded that a rational juror could have found that the defendant's prior criminal activity was insignificant. (3) The court made the following statements (with citations deleted) about Biblical jury arguments:

> We continue to hold that it is not so grossly improper for a prosecutor to argue that the Bible does not prohibit the death penalty as to require intervention ex mero motu by the trial court, *but we discourage such arguments* [italics supplied by court]. We caution all counsel that they should base their jury arguments solely upon the secular law and the facts. Jury arguments based on any of the religions of the world inevitably pose a danger of distracting the jury from its sole and exclusive duty of applying secular law and unnecessarily risk reversal of otherwise error-free trials. Although we believe that parts of our law are divinely inspired, it is the secular law of North Carolina which is to be applied in our courtrooms. Our trial courts must vigilantly ensure that counsel for the State and for defendant do not distract the jury from their sole and exclusive duty to apply secular law.

(4) The court ruled, relying on State v. Harden, 344 N.C. 542, 476 S.E.2d 658 (1996), that it is not error in a capital sentencing hearing to admit a photograph of the murder victim as she appeared when she was alive. The state may use such photographs of the victim to emphasize to the jury that she was once alive, that she is now dead, and the defendant was the person responsible for her death.

Evidence

Motion in Limine Does Not Preserve Appellate Review of Admissibility of Evidence If Defendant Fails to Object When State Offers Evidence at Trial

State v. Hayes, 350 N.C. 79, 511 S.E.2d 302 (4 March 1999), *modifying and affirming*, 130 N.C. App. 154, 502 S.E.2d 853 (21 July 1998). The court ruled that a motion in limine does not preserve appellate review of the admissibility of evidence if the defendant fails to object when the state offers the evidence at trial. The court disavowed the four-part test set out by the North Carolina Court of Appeals in this case that would have preserved appellate review under some circumstances. The court also ruled that to the extent such cases as State v. Moore, 107 N.C. App. 388, 420 S.E.2d 691 (1992) differ from its ruling, they are overruled.

(1) Victim's Statements Were Properly Admitted Under Rule 803(3)
(2) Witness's Testimony About What Witness Told Murder Victim Was Not Offered to Prove Truth of Matter Asserted and Therefore Was Not Hearsay
(3) Witnesses' Impressions of Marital Relationship of Victim and Defendant Were Properly Admitted as Shorthand Statements of Fact Under Rule 701
(4) Trial Judge Did Not Err in Prohibiting Cross-Examination of Accomplices' Understanding of Law of Their Parole Eligibility

State v. Brown, 350 N.C. 193, 513 S.E.2d 57 (9 April 1999). The defendant was convicted of first-degree murder of her husband, in which she hired another person to kill him for financial gain. (1) The court ruled, relying on State v. Westbrooks, 345 N.C. 43, 478 S.E.2d 483 (1996), that the victim's statements were properly admitted under Rule 803(3) because the victim told colleagues about his financial problems with his marriage, the couple's disagreements, deterioration and incompatibility within the marriage, and his concern for his safety because of the ill will within the marriage. The court reviewed the statements and concluded that they indicated his then-existing state of mind and were not merely a recitation of facts. (2) A witness's testimony that she told the victim that he can always get a divorce was not hearsay under Rule 801(c) (evidence offered to prove truth of matter asserted) because it was not offered to prove whether the victim could get a divorce. (3) The court ruled that testimony of witnesses about their impressions of the victim, the defendant, and their marital relationship were all based on their own personal observations and were admissible as shorthand statements of fact under Rule 701. Some examples of admissible testimony were: (i) a witness sensed that the victim was somewhat unhappy in his marriage, and (ii) an officer testified that the defendant during an interview appeared to be trying to be emotional. (4) The court ruled, relying on State v. Westbrooks, 345 N.C. 43, 478 S.E.2d 483 (1996), that the trial judge did not err in prohibiting the defendant from cross-examining the accomplices on their understanding of the law of parole eligibility—that is, their understanding of when they might be eligible for parole.

Trial Judge Erred in Prohibiting Defendant from Offering Testimony of Defense Witness That Was Admissible Under Rule 803(3) (Declarant's Then-Existing Intent to Engage in Future Act)

State v. Rivera, 350 N.C. 285, 514 S.E.2d 720 (9 April 1999). The defendant was convicted of two counts of first-degree murder and sentenced to death. The state's evidence showed that the defendant and accomplices A and B went into an apartment with the intent to rob a drug dealer. The defendant shot and killed two people there. Accomplice C remained outside while the murders were committed. Accomplices A and B testified against the defendant at trial. The defense theory was that A, B, and C committed the murders, and the defendant was not involved at all. The defendant called a witness, an inmate, to testify about a conversation he had with accomplice C while both were in jail. The witness, whom the trial judge did not permit to testify at trial, testified on voir dire that accomplice C told the witness that accomplice C had "two dudes" who were going to say it was the defendant who committed the murders. The court, relying on State v. Sneed, 327 N.C. 266, 393 S.E.2d 531 (1990), ruled that this testimony was admissible under Rule 803(3) as a statement of the declarant's then-existing intent to engage in a future act. Accomplice C's statements tended to show C's intent to direct or assist others in executing a plan to frame the defendant for the two murders. The testimony also would have added weight and credibility to the testimony of another defense witness, who had been permitted to testify that accomplices A and B had told the witness that the defendant had not been present during the murders, and the defendant would have to "take the fall" for the murders.

(1) Court Makes Several Rulings on State's Hearsay Evidence Concerning Defendant's Misconduct Toward His Second Wife (Victim in This Murder Prosecution)
(2) Defendant's Killing of First Wife Was Properly Admitted Under Rule 404(b)

State v. Murillo, 349 N.C. 573, 509 S.E.2d 752 (31 December 1998). The defendant was convicted of first-degree murder of his second wife, who had been the victim of domestic violence by the defendant during their marriage from 1987 until her death in 1992.

(1) The court made several rulings on the state's hearsay evidence concerning the defendant's misconduct toward his second wife during their marriage: (a) The victim's statements that she intended to end her marriage reflected her state of mind and were admissible under Rule 803(3)—State v. Bishop, 346 N.C. 365, 488 S.E.2d 769 (1997). (b) The victim's statements during a phone conversation held shortly after the defendant had held a gun to her head were admissible as an excited utterance under Rule 803(2)—see State v. Smith, 315 N.C. 76, 337 S.E.2d 833 (1985). (c) The victim's statements to witness A could not be used to corroborate witness B's testimony about what the victim told witness B—see State v. Rose, 335 N.C. 301, 439 S.E.2d 518 (1994). (d) The victim's statements to family and friends about prior beatings of her by the defendant that were made contemporaneously with and in explanation of her statements showed her then-existing state of mind (fear of the defendant) and were admissible under Rule 803(3)—see State v. Westbrooks, 345 N.C. 43, 478 S.E.2d 483 (1996). (e) The victim's statement about a prior assault was inadmissible under Rule 803(3) as an improper recitation of mere remembered facts, State v. Hardy, 339 N.C. 207, 451 S.E.2d 600 (1994), because the victim was not upset when she made the statement and was not relating any feelings or intent concerning her relationship with the defendant. (f) The court rejected the defendant's argument that the victim's statements that admittedly fell within Rule 803(3) should be rejected

because of remoteness. The court noted that it consistently has allowed evidence spanning the entire marriage when a husband is charged with murdering his wife in order to show malice, intent, and ill will toward the victim, citing State v. Lynch, 327 N.C. 210, 393 S.E.2d 811 (1990). The court stated that remoteness generally affects only the weight to be given evidence, not its admissibility.

(2) The state was permitted to offer evidence that the defendant in 1970 killed his first wife with a rifle. (The defendant had been convicted of involuntary manslaughter for this killing.) The court ruled that this evidence was admissible under Rule 404(b) to show lack of accident in the murder case being tried. The court noted that, as in State v. Stager, 329 N.C. 278, 406 S.E.2d 876 (1991), the similarities between the deaths of the defendant's two wives was indicative of intent and lack of accident. Similarities need not be bizarre or uncanny; they simply must tend to support a reasonable inference that the same person committed both criminal acts.

Acts of Domestic Violence Do Not Bear on Truthfulness or Untruthfulness and Are Not Proper Impeachment Questions Under Rule 608(b)

State v. Call, 349 N.C. 382, 508 S.E.2d 496 (31 December 1998). The court stated that acts of domestic violence do not bear on truthfulness or untruthfulness and are not proper impeachment questions under Rule 608(b).

Miscellaneous

Bail Bondsmen Have Common Law Authority to Break into Principal's Residence and Use Reasonable Force Against Third Party There, When Searching for Their Principal to Take Principal into Custody

State v. Mathis, 349 N.C. 503, 509 S.E.2d 155 (31 December 1998), *affirming*, 126 N.C. App. 688, 486 S.E.2d 475 (1997). The court ruled that bail bondsmen have the common law authority to break into a principal's residence and to use reasonable force against a third party there, when searching for their principal to take the principal into custody. However, the court stated that bail bondsmen do not have the authority to enter a residence in which the principal does not reside when searching for their principal.

NORTH CAROLINA COURT OF APPEALS

Double Jeopardy Issues

No Double Jeopardy Violation When Criminal Drug Prosecution After Defendant's Payment of Drug Tax; Court Is Bound By Its Prior Rulings and Not By Conflicting Ruling of Fourth Circuit Court of Appeals

State v. Adams, 132 N.C. App. 819, 513 S.E.2d 588 (6 April 1999). The defendant was arrested for various drug offenses. He was assessed and paid a portion of the amount of drug taxes due. He then moved to dismiss the criminal drug offenses on grounds of double jeopardy. The trial judge granted the motion. The court reversed the trial judge's ruling because it conflicted with rulings in State v. Ballenger, 123 N.C. App. 179, 472 S.E.2d 572 (1996), *affirmed per curiam*,

345 N.C. 626, 481 S.E.2d 572 (1997), and State v. Creason, 123 N.C. App. 495, 473 S.E.2d 771 (1996), *affirmed per curiam*, 346 N.C. 165, 484 S.E.2d 525 (1997). The court noted the conflicting Fourth Circuit Court of Appeals ruling in Lynn v. West, 134 F.3d 582 (4th Cir. 1998), but stated that, with the exception of United States Supreme Court decisions, federal appellate decisions are not binding on North Carolina appellate or trial courts. The court ruled that it is bound by the *Ballenger* and *Creason* rulings.

(1) Double Jeopardy Clause Does Not Bar Criminal Prosecution for Substantive Offense Used as Basis for Revoking Defendant's Probation
(2) Trial Judge Did Not Err in Allowing State to Add Charge to Trial Calendar That Was Related to Other Charges on Trial Calendar

State v. Monk, 132 N.C. App. 248, 511 S.E.2d 332 (16 February 1999). (1) The court ruled, relying on reasoning in State v. Pratt, 21 N.C. App. 538, 204 S.E.2d 906 (1974), State v. Young, 21 N.C. App. 316, 204 S.E.2d 185 (1974), and cases from other jurisdictions, that the Double Jeopardy Clause does not bar a criminal prosecution for a substantive offense that was also used as the basis for revoking a defendant's probation. The sentence that a defendant may be required to serve as a result of a revocation of probation is the punishment for the offense for which he was placed on probation—it is not the punishment for the offense that triggered the revocation of probation. (2) The state published a trial calendar that inadvertently left off one of the several offenses pending for trial against the defendant. The trial judge granted the state's motion to include that offense on the trial calendar. The court ruled, citing G.S. 7A-49.3(c) and Simeon v. Hardin, 339 N.C. 358, 451 S.E.2d 858 (1994), that the trial judge did not err in granting the motion because the trial judge retains the ultimate authority over managing the trial calendar.

Double Jeopardy Clause Barred State's Right to Appeal Trial Judge's Midtrial Dismissal of Criminal Charge When Judge Dismissed Charge on His Own Motion, Not on Defendant's Motion

State v. Vestal, 131 N.C. App. 756, 509 S.E.2d 249 (29 December 1998). After the jury had been empanelled and sworn, the trial judge on his own motion dismissed with prejudice the criminal charge against the defendant because a police department had violated a court order by using in an undercover operation drugs that had been forfeited in a prior case and were awaiting destruction. The defendant did not make a motion to dismiss. The state gave notice of appeal. G.S. 15A-1445(a) provides that the state may appeal an order dismissing a criminal charge unless the rule against double jeopardy prohibits further prosecution. The court ruled that because the rule against double jeopardy precludes further prosecution in this case, the state's appeal must be dismissed. Distinguishing State v. Priddy, 115 N.C. App. 547, 445 S.E.2d 610 (1994) (double jeopardy clause did not bar state's right to appeal midtrial dismissal motion made by defendant), the court noted that the defendant in this case did not take an active role in the process that led to the dismissal of the charge against him. Rather, the trial judge's dismissal of the charge on his own motion involuntarily deprived the defendant of his constitutional right to have his trial completed by the jury that had been empanelled and sworn. Thus the rule against double jeopardy barred further prosecution of the defendant for this charge.

Criminal Offenses and Procedure

Jury Instruction on First-Degree Sexual Offense Did Not Violate Unanimity Requirement Because Two Sexual Acts Committed in Single Transaction Is One Offense

State v. Petty, 132 N.C. App. 453, 512 S.E.2d 428 (2 March 1999). The jury instruction for first-degree sexual offense provided that the jury could convict the defendant if it found that the defendant committed either cunnilingus or inserted an object into the minor victim's genital area. The court rejected the defendant's argument that this instruction violated the state constitutional requirement that a jury's verdict must be unanimous. Relying on State v. Hartness, 326 N.C. 561, 391 S.E.2d 177 (1990), State v. McCarty, 326 N.C. 782, 392 S.E.2d 359 (1990), and other cases, the court ruled that the single wrong of engaging in a sexual act with a minor may be proved by a finding of various alternatives, including cunnilingus and digital penetration—which are not disparate crimes, but merely alternative ways of showing the commission of one crime during a single transaction. The court noted, however, that alternative sexual acts committed in separate transactions may properly form the basis for charging the defendant with separate crimes; the court cited State v. Dudley, 319 N.C. 656, 356 S.E.2d 361 (1987) (court upholds two rape convictions with same victim) and State v. Small, 31 N.C. App. 556, 230 S.E.2d 425 (1976) (similar ruling).

Defendant Was Properly Convicted of Both Assault with Deadly Weapon on Law Enforcement Officer and Assault with Deadly Weapon with Intent to Kill Based on Same Act; Court Declines to Follow Prior Court of Appeals Rulings Because of Conflicts with Supreme Court Rulings

State v. Coria, 131 N.C. App. 449, 508 S.E.2d 1 (1 December 1998). A defendant pointed a weapon at a law enforcement officer and shot at him multiple times. The defendant was convicted of (1) assault with a deadly weapon on a law enforcement officer (G.S. 14-34.2) and (2) assault with a deadly weapon with intent to kill [G.S. 14-32(c)]. Both convictions were based on the same shootings. The court rejected the defendant's argument the double jeopardy protections of the United States and North Carolina constitutions prohibited punishment for both offenses. The court, relying on State v. Gardner, 315 N.C. 444, 340 S.E.2d 701 (1986), State v. Pipkins, 337 N.C. 431, 446 S.E.2d 360 (1994), State v. Fernandez, 346 N.C. 1, 484 S.E.2d 350 (1997), and State v. Woodberry, 126 N.C. App. 78, 485 S.E.2d 59 (1997), ruled the defendant may constitutionally be punished for both offenses because each offense contained an element that was not in the other offense. The court declined to follow rulings in State v. Byrd, 50 N.C. App. 736, 275 S.E.2d 522 (1981) (defendant could not be convicted of both assault with a deadly weapon on law enforcement officer and assault with a deadly weapon inflicting serious injury) and State v. Locklear, 121 N.C. App. 355, 465 S.E.2d 61 (1996) (same ruling as *Byrd*). The court recognized that it was bound by its prior rulings unless overturned by a higher court, but it believed it was bound by the North Carolina Supreme Court rulings (and the *Woodberry* ruling) cited above, not *Byrd* and *Locklear*, which are inconsistent with those rulings. The court also ruled that the legislature intended to allow punishment for both offenses—one offense was designed to give greater protection to law enforcement officers, and the other offense was designed to protect life and bodily harm.

Sufficient Evidence of Indecent Liberties When Naked Defendant Masturbated in His Home Behind Sliding Glass Door While Children Played in His Yard, and Defendant Was About 35 Feet from Children

State v. Nesbitt, 133 N.C. App. 420, 515 S.E.2d 503 (1 June 1999). On two different occasions, young children, while walking home from a school bus stop near the defendant's home, stopped to play with dogs that were in the defendant's yard (the court noted that the evidence showed that he let the dogs out to encourage the children to play with them). On one occasion, children saw the defendant standing naked in his house behind a sliding glass door, waving at them and masturbating. On another occasion, the defendant (again standing naked in his house behind the sliding glass door) began masturbating while the children were in his yard; when the children saw him, he continued to masturbate. The defendant was approximately 35 feet from the children. The court ruled that this evidence was sufficient to prove indecent liberties violations under G.S. 14-202.1(a)(1). The facts were sufficient to prove that the defendant was "with" the children as that term is set out in the statute. The court cited State v. Strickland, 77 N.C. App. 454, 335 S.E.2d 74 (1985) and other cases.

Movement of Victim Was Inherent Part of Armed Robbery and Thus Kidnapping Conviction Was Not Permitted

State v. Ross, 133 N.C. App. 310, 515 S.E.2d 252 (18 May 1999). The defendant, acting with accomplices, was convicted of armed robbery and kidnapping. The victim was ordered to get down on the floor of his apartment. He backed up to the kitchen and dropped to the floor. Two rings were taken from the victim's hand. Then the victim was ordered to his bedroom and told to get on the floor there. An accomplice then took property from the bedroom. The court ruled that the victim's movement into the kitchen was not a removal that was separate and apart from the armed robbery. The court also ruled that the accomplice's action in ordering the victim into the bedroom was an inherent part of the robbery and did not expose him to greater danger than that inherent in the armed robbery itself. Thus the kidnapping conviction was not permitted. The court relied on State v. Irwin, 304 N.C. 93, 282 S.E.2d 439 (1981) and distinguished rulings in State v. Joyce, 104 N.C. App. 558, 410 S.E.2d 516 (1991), State v. Brice, 126 N.C. App. 788, 486 S.E.2d 719 (1997), and State v. Davidson, 77 N.C. App. 540, 335 S.E.2d 518 (1985).

Defendant Was Not Entitled to Jury Instruction on Defense of Abandonment When Evidence Showed That He Had Already Committed Overt Act With Requisite Mental Intent When He Abandoned Committing Offense

State v. Gartlan, 132 N.C. App. 272, 512 S.E.2d 74 (16 February 1999). The defendant was convicted of attempted first-degree murder of his three children. He had attempted to kill himself and three children by running his car in a closed garage. However, he changed his mind after seeing his younger daughter turn blue with breathing difficulty. All three children were taken to the hospital and treated for carbon monoxide poisoning. The court ruled that the trial judge did not err in refusing to give instructions on the defense of abandonment. The court noted that the evidence showed that the defendant intended to kill his children, had started his car with the garage door closed, and all the children had been exposed to carbon monoxide poisoning. Relying on State v. Miller, 344 N.C. 658, 477 S.E.2d 915 (1966), the court ruled that the

defendant could not legally abandon the offense of attempted first-degree murder after committing these overt acts with the intent to kill.

Defendant's Fingerprint and Other Evidence Supported Conviction of Felonious Breaking or Entering

State v. Hamilton, 132 N.C. App. 316, 512 S.E.2d 80 (16 February 1999). Evidence was presented that on or about April 29, 1993, someone gained access to a department store in Clinton and stole merchandise by climbing up to an awning covering the store's rear entrance, going onto and cutting a hole in the roof, and entering the store. The defendant's fingerprints were found on top of the awning, eleven feet, four inches from the ground. The store manager testified that no roofing work had been done in recent months. Evidence was also introduced that the defendant had previously been convicted of breaking and entering a department store in Greenville on July 25, 1990, by cutting a hole in the roof and entering the store. The court ruled that this was sufficient evidence to support the defendant's conviction of felonious breaking or entering.

State Was Properly Permitted to Obtain Second Violent Habitual Felon Indictment After Judge Granted Defendant's Motion to Dismiss Indictment for Pleading Error

State v. Mewborn, 131 N.C. App. 495, 507 S.E.2d 906 (1 December 1998). The defendant was indicted for armed robbery and for being a violent habitual felon. The defendant was convicted of armed robbery. Before the violent habitual felon hearing began, the judge granted the defendant's motion to dismiss the violent habitual felon indictment because it failed to name the state or other sovereign against whom the violent felonies were committed. However, the judge also permitted the state to seek a second indictment and entered a prayer for judgment continued in the armed robbery case. The state obtained a second indictment, the hearing was held at a later time, the defendant was found to be a violent habitual felon, and the defendant was sentenced to life imprisonment without parole for the armed robbery. The court ruled, relying on State v. Oakes, 113 N.C. App. 332, 438 S.E.2d 477 (1994), that the trial judge did not err in allowing the state to seek a second violent habitual felon indictment.

Insufficient Evidence of Constructive Possession of Firearm to Support Defendant's Conviction of Possession of Firearm by Convicted Felon

State v. Alston, 131 N.C. App. 514, 508 S.E.2d 315 (1 December 1998). The defendant was riding in the front passenger seat of a car driven by his wife. An officer stopped the car and saw a .22 caliber pistol on the transmission console that was located between the driver's and front passenger's seats. The car was registered to the defendant's brother, and the pistol was purchased by and registered to the defendant's wife. Both the defendant and his wife had equal access to the pistol, but no evidence otherwise linked the pistol to the defendant. The court ruled that there was insufficient evidence of constructive possession of the firearm to support the defendant's conviction of possession of a firearm by a convicted felon.

Burning Uninhabited House Under G.S. 14-62 Is Not Lesser-Included Offense of Arson

State v. Britt, 132 N.C. App. 173, 510 S.E.2d 683 (2 February 1999). The court ruled that burning an uninhabited house under G.S. 14-62 is not a lesser-included offense of arson (first- or second-degree) under G.S. 14-58. The court reasoned that while it is *not* an essential element of the crime of arson that the burned house be uninhabited, it *is* an essential element of the crime of burning an uninhabited house that the house be uninhabited. [Note: Based on this ruling, the state must indict for both offenses if it wants them to be submitted to the jury.]

State Must Prove "Measurable Amount" of Damage in Prosecution of G.S. 14-49.1 (Maliciously Damaging Occupied Real Property By Using Incendiary Device)

State v. Bennett, 132 N.C. App. 187, 510 S.E.2d 698 (2 February 1999). The defendant was convicted of G.S. 14-49.1 (maliciously damaging occupied real property by using incendiary device). The court noted that a 1993 legislative amendment to G.S. 14-49.1 that removed "attempt to damage" from the statute, and ruled that this amendment now required that the state must prove "measurable damage" to obtain a conviction. The court examined the facts in this case—the defendant set fire to the jail floor that left a small stain—and ruled that this evidence did not prove "measurable damage." The court also ruled that the state's evidence supported a conviction for an attempt to violate G.S. 14-49.1 and remanded for entry of judgment and sentencing for that offense.

Discharging Firearm into Occupied Property Is Not Specific Intent Offense

State v. Byrd, 132 N.C. App. 220, 510 S.E.2d 411 (2 February 1999). The court ruled that discharging a firearm into occupied property (G.S. 14-34.1) is not a specific intent offense. See also State v. Jones, 339 N.C. 114, 451 S.E.2d 114 (1994) (same ruling).

Insufficient Evidence of "Purpose of Arousing and Gratifying Sexual Desire" to Support Delinquency Adjudication of Children's Indecent Liberties Offense (G.S. 14-202.2)

In re T. S., 133 N.C. App. 272, 515 S.E.2d 230 (18 May 1999). A nine-year-old juvenile was adjudicated delinquent of the children's indecent liberties offense (G.S. 14-202.2). The victim was three years old. The court noted that, unlike the adult indecent liberties offense (G.S. 14-202.1), both prongs of G.S. 14-202.2 require the state to prove that the act was committed for the purpose of arousing or gratifying sexual desire. The court reviewed the evidence and determined that it failed to show that the nine-year-old committed fellatio on the victim for that purpose. The court rejected the state's argument that it should apply to G.S. 14-202.2 the case law interpreting the adult indecent liberties offense, which provides that this purpose may be inferred from the act itself [see, for example, State v. Connell, 127 N.C. App. 685, 493 S.E.2d 292 (1997)]. The court stated that the addition of the language, "purpose of arousing and gratifying sexual desire," in subdivision (a)(2) of the children's indecent liberties statute indicates a legislative recognition that a lewd act by adult standards may be innocent between children, and unless there is a showing of the child's sexual intent in committing such an act, it is not a crime under G.S. 14-202.2. The court stated that without some evidence of the child's maturity, intent, experience, or

other factor indicating the child's purpose in acting, a sexual purpose may not be attributed to the child's actions.

(1) Defendant Has Burden to Move Court for Withdrawal of Prior Waiver of Counsel
(2) Trial Judge Failed to Make Oral Inquiry of Defendant Under G.S. 15A-1242 Before Allowing Defendant to Represent Himself

State v. Hyatt, 132 N.C. App. 697, 513 S.E.2d 90 (6 April 1999). On August 5, 1996, the trial judge allowed the defendant to discharge his court-appointed lawyer because he stated that he would hire his own lawyer. The defendant told the court that he would represent himself if he couldn't hire an attorney; he signed the waiver of counsel form that indicated that he had been informed of the charges against him, the punishment for the charges, and his right to appointed counsel and the right to assistance of counsel. He was given a continuance until September 9, 1996. On that date, he asked for a continuance because he had not hired a lawyer yet. The trial judge granted the continuance and warned him that this continuance was his last. On October 7, 1996, he again appeared without a lawyer. The judge, without further inquiry, brought the case to trial, and the defendant represented himself. (1) The court ruled that a defendant has the burden to move for the withdrawal of a prior waiver of counsel. The defendant did not do so in this case. (2) The court ruled that the trial judge erred in allowing the defendant to represent himself because the judge failed to orally inform the defendant of the matters set out in G.S. 15A-1242. The defendant's prior written waiver was insufficient. The court ordered a new trial.

Judge in Probation Revocation Hearing Erred in Failing To Consider and To Make Findings about Probationer's Evidence of Lawful Excuse for Violating Probation Conditions

State v. Hill, 132 N.C. App. 209, 510 S.E.2d 413 (2 February 1999). The court noted that State v. Robinson, 248 N.C. 282, 103 S.E.2d 376 (1958), provides that a probationer's sentence may not be revoked if the probationer can demonstrate a lawful excuse for violating conditions of probation. In the probation revocation hearing involved in this case, the probationer's attorney offered to provide the judge with evidence demonstrating that the probationer's health problems prevented him from both paying restitution and completing his community service requirements. The judge, however, refused to consider and evaluate this evidence. Further, the judge failed to find as a fact that the probationer did not have a lawful excuse for his alleged probation violation. The court ruled that the trial judge erred in failing to do so.

Indictment for Conversion by Bailee (G.S. 14-168.1) Was Fatally Defective in Alleging Name of Victim

State v. Woody, 132 N.C. App. 788, 513 S.E.2d 801 (6 April 1999). The court ruled that an indictment alleging a violation of conversion by bailee (G.S. 14-168.1) was fatally defective because the name of the victim, "P&R unlimited," failed to alleged a legal entity capable of owning property.

Capital Case Issues

Judge Did Not Abuse Discretion in Denying Defendant's Motion for Pretrial *Watson* Hearing to Determine If Sufficient Evidence of Aggravating Circumstances

State v. Wilds, 133 N.C. App. 195, 515 S.E.2d 466 (18 May 1999). The defendant was convicted of first-degree murder, and the jury at the capital sentencing hearing recommended life imprisonment. Before trial, the judge denied the defendant's motion to conduct a *Watson* [State v. Watson, 310 N.C. 384, 312 S.E.2d 448 (1984)] hearing to determine if there was sufficient evidence of aggravating circumstances to justify a capital trial. The judge stated that evidence may be introduced at trial that may support an aggravating circumstance although not revealed at a *Watson* hearing. The court ruled that the judge did not abuse his discretion in denying the defendant's motion.

Arrest, Search, and Confessions

Officer's Search of Vehicle for Weapons After Removing Occupants Was Not Justified Under *Michigan v. Long*

State v. Minor, 132 N.C. App. 478, 512 S.E.2d 483 (2 March 1999). Two officers stopped a car because its temporary tag was smeared and illegible. Before stopping the car, officer A had seen the defendant-passenger move his hand toward the center console of the car after the police car's blue lights had been activated. Officer A removed the driver, frisked him, and talked with him while officer B stood at the passenger side of the car. Officer B saw the defendant rub his hand on his thigh as though feeling his pocket. The defendant then put his hand on the door handle as if to emerge from the car, but the defendant dropped his hand and remained in the car when he saw officer B beside the car. After determining that the driver had no weapons, officer A ordered the passengers, the defendant and one other man, out of the car. Both men were frisked, and no contraband or weapons were discovered on them. Officer A then searched the interior of the car and found a jacket with a .32 caliber handgun in the pocket where the defendant had been sitting. Distinguishing Michigan v. Long, 463 U.S. 1032, 103 S. Ct. 3469, 77 L. Ed. 2d 1201 (1983) (officer may search vehicle for weapon when reasonable suspicion that occupant is dangerous and may gain access to weapon) and relying on State v. Braxton, 90 N.C. App. 204, 368 S.E.2d 56 (1988), the court ruled that the officer's search of the car was not justified under *Michigan v. Long*. The court stated that the defendant's motions were not "clearly furtive." Because the officers did not have any specific knowledge linking the defendant to criminal activity or any reasonable belief he was armed or dangerous, the search of the vehicle violated the Fourth Amendment.

(1) Officer Had Reasonable Suspicion to Stop Out-of-State Vehicle for Windshield-Tinting Violation, Even Though Other Reasons for Stopping Vehicle Were Not Valid
(2) Defendant Voluntarily Consented to Search of Vehicle After Officer's Statements to Him

State v. Schiffer, 132 N.C. App. 22, 510 S.E.2d 165 (5 January 1999). An officer saw a vehicle which he believed the tinting of its windows and windshield was darker than permitted by North

Carolina law. Once he pulled behind the vehicle, he saw it had Florida tags. He then pulled alongside the vehicle to see if the window displayed a sticker indicating that the tinting complied with Florida law. [The officer also saw that the windshield tinting extended about ten inches from the top of the windshield, about four to five inches in excess of what is permitted under G.S. 20-127(b).] Finding no such sticker, he stopped the vehicle. After the driver rolled down his window, the scent of unburned marijuana emanated from the vehicle. The officer asked the defendant's consent to search the vehicle. The defendant said he did not know if he could consent to its search because he did not own the vehicle. The officer explained that the defendant could consent because he was in control of the vehicle. He further explained that he could search the vehicle even without the defendant's consent because he smelled marijuana, and he could obtain a search warrant. The defendant then consented to a search of the vehicle.

(1) The court reviewed North Carolina law at the time of this vehicle stop and concluded that the officer was under a good faith but mistaken belief that G.S. 20-127 required vehicles with tinted windows or windshields to display a label in each tinted window or windshield indicating that its tinting complied with North Carolina law. Such labels had been but were no longer required. In addition, a recently-enacted statutory change had exempted North Carolina's *window* tinting restrictions for out-of-state vehicles that were in compliance with their state's tinting laws. However, the *windshield*-tinting restrictions in G.S. 20-127 applied to out-of-state vehicles, and the officer therefore had reasonable suspicion to stop the vehicle based on his observation that the windshield tinting was excessive, and that was one of the reasons the officer stopped the vehicle.

(2) The court ruled that the defendant's consent was voluntary. The court stated that the officer's statements to the defendant just before the defendant consented were entirely accurate. The officer did not speak to the defendant in an intimidating manner, and he did not engage in any other conduct designed to coerce the defendant into agreeing to a search. The court noted that the smell of marijuana gave the officer probable cause to justify a warrantless search of the car without the defendant's consent.

Defendant Did Not Have Reasonable Expectation of Privacy in Illegal Drugs Seized from His Mail Box When They Were Placed There by Person to Whom He Had Given Drugs, Based on Facts in This Case

State v. Phillips, 132 N.C. App. 765, 513 S.E.2d 568 (6 April 1999). While the defendant was driving his van and was being pursued by law enforcement officers, he threw a package of crack cocaine on a passenger's lap and told her to put it in his apartment. She got out of the van and went to his apartment. She put the package in his mailbox because the defendant's apartment door was locked. After she told an officer where she had put the package, an officer went to the mailbox, lifted the lid, and looked inside. He seized the package, which appeared to have crack cocaine inside. The court ruled, relying on State v. Jordan, 40 N.C. App. 412, 252 S.E.2d 857 (1979) and other cases, that the defendant relinquished his reasonable expectation of privacy in the drugs when he gave them to the passenger, because he no longer had control over them.

Hearsay Evidence Was Admissible to Show Officer Had Reasonable Grounds to Believe that Person Had Committed Implied Consent Offense (DWI)

Gibson v. Faulkner, 132 N.C. App. 728, 515 S.E.2d 452 (6 April 1999). The court ruled, relying on Melton v. Hodges, 114 N.C. App. 795, 443 S.E.2d 83 (1994), that the trial judge properly could rely on hearsay evidence (information an officer gave the arresting officer) in concluding that the arresting officer had reasonable grounds to believe that a person had committed an implied consent offense (in this case, DWI).

Evidence

Evidence Was Properly Admitted under Rule 803(2) (Excited Utterance)

State v. Coria, 131 N.C. App. 449, 508 S.E.2d 1 (1 December 1998). A young Hispanic woman came out of a wooded ravine and approached the porch of the state's witness. She appeared visibly upset, scared, her hair was full of twigs, and her face was swollen and bruised. The woman, who at times lapsed into her native language of Spanish, told the witness that she needed help and to call the police. She described a beating inflicted on her by her father (the defendant), and how she had fled the beating and shortly thereafter had arrived at the house of the state's witness. She also told a law enforcement officer about the beating when the officer arrived at the house; the officer testified that she was very excited and upset when he spoke to her, almost hysterical. The court ruled that the woman's statements to both the state's witness and the officer were properly admitted under Rule 803(2) (excited utterance). The court stated that she made the statements while still under the stress of a startling event and thus had no opportunity to reflect on her statements. The court, relying on State v. Thomas, 119 N.C. App. 708, 460 S.E.2d 349 (1995), noted that the period of time between the event and the statement is a relevant factor, but the issue is whether the delay in making the statement provided an opportunity to fabricate the statement.

When Defendant Offered Statement of Nontestifying Witness Under Residual Hearsay Rule, State's Witness Was Properly Permitted Under Rule 806 to Testify About Declarant's Prior Inconsistent Statement to Challenge Declarant's Credibility

State v. Small, 131 N.C. App. 488, 508 S.E.2d 799 (1 December 1998). The defendant was permitted to offer a statement of a nontestifying declarant under the residual hearsay exception [Rule 803(24)]. The court ruled that the trial judge under Rule 806 properly permitted a state's witness to testify on rebuttal about a prior inconsistent statement of the nontestifying declarant. In pertinent part, Rule 806 provides that "[w]hen a hearsay statement has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes if declarant had testified as a witness[, and] [e]vidence of a statement or conduct by the declarant at any time, inconsistent with his hearsay statement, is not subject to any requirement that he may have been afforded an opportunity to deny or explain." The court noted that this rule treats the out-of-court declarant the same as a live witness for purposes of impeachment. Because the evidence of the inconsistent statement would have been admissible had the declarant testified, Rule 806 allows its admission to impeach the declarant's credibility in the declarant's absence.

Evidence of Defendant's Breaking or Entering Conviction That Was Committed in Similar Manner Almost Three Years Earlier Was Properly Admitted under Rule 404(b) to Show Identity in Trial for Breaking or Entering

State v. Hamilton, 132 N.C. App. 316, 512 S.E.2d 80 (16 February 1999). Evidence was presented that on or about April 29, 1993, someone gained access to a department store in Clinton and stole merchandise by climbing up to an awning covering the store's rear entrance, going onto and cutting a hole in the roof, and entering the store. The defendant's fingerprints were found on top of the awning, eleven feet, four inches from the ground. The store manager testified that no roofing work had been done in recent months. Evidence was also introduced that the defendant had previously been convicted of breaking and entering a department store in Greenville on July 25, 1990, by cutting a hole in the roof and entering the store. The court ruled that this prior conviction was properly admitted under Rule 404(b) to show identity, and the trial judge did not abuse his discretion under Rule 403 in admitting this evidence.

Two Similar Sex Acts Committed Against Other Minor Victims by Defendant Several Years Before Sex Act Being Tried Were Properly Admitted Under Rule 404(b) to Show Defendant's Modus Operandi

State v. Blackwell, 133 N.C. App. 31, 514 S.E.2d 116 (20 April 1999). The defendant was convicted of first-degree statutory rape, first-degree sexual offense, and first-degree burglary. The court ruled that the trial judge did not err in admitting evidence of two similar sex acts committed against other minor victims by the defendant about ten and seven years (excluding time spent in prison, about six years), respectively, before the sex acts being tried. The acts were properly admitted under Rule 404(b) to show defendant's modus operandi. The court noted that on all three occasions, the defendant licked his lips, called his minor victims expletive terms, and attempted to perform cunnilingus on them.

Ten Year Old Assault Conviction Was Properly Admitted in First-Degree Murder Trial (Murder Victim Was Victim of Assault) Under Rule 404(b) to Show Intent, Ill Will, and Malice; Remoteness in Time Affected Weight, Not Admissibility of Evidence

State v. Wilds, 133 N.C. App. 195, 515 S.E.2d 466 (18 May 1999). The defendant was convicted of the first-degree murder of his wife, based on the theory of premeditation and deliberation. The court ruled the trial judge did not err in allowing the introduction of evidence of a ten-year-old assault conviction (the assault was committed against the murder victim) under Rule 404(b) to show intent, ill will, and malice. The court, relying on State v. Stager, 329 N.C. 278, 406 S.E.2d 876 (1991) and State v. Gary, 348 N.C. 510, 501 S.E.2d 57 (1998), noted that remoteness in time under Rule 404(b) generally affects the weight of the evidence rather than its admissibility.

(1) Trial Judge Did Not Err in Prosecution of Attempted Murder and Assault With Deadly Weapon by Allowing State to Introduce Evidence That Defendant Had AIDS
(2) Evidence That Defendant Was on House Arrest When He Committed Offenses Was Admissible to Show Circumstances of Offenses Being Tried, Based on Facts in This Case

State v. Monk, 132 N.C. App. 248, 511 S.E.2d 332 (16 February 1999). The defendant was tried for first-degree statutory rape, taking indecent liberties, attempted murder, and assault with a deadly weapon. These offenses involved the defendant's having sexual relations with a twelve-year old. He was convicted of first-degree statutory rape and indecent liberties. (1) In attempting to prove the offenses of attempted murder and assault with a deadly weapon, the state was allowed to introduce evidence (through the victim and the defendant's mother) that the defendant had AIDS—to support its theory that the defendant attempted to murder the victim and assault her with a deadly weapon by attempting to infect her with the virus. Although the trial judge dismissed the charges of attempted murder and assault with a deadly weapon at the close of the state's case, the defendant argued on appeal that the trial judge erred in denying the defendant's motion to prohibit the state from introducing the AIDS evidence. The court ruled that the evidence was relevant to the state's charges and was not unfairly prejudicial. (2) The victim testified that she knew before she had been sexually assaulted that the defendant was on house arrest. Based on that knowledge, she ran out of the house where she was sexually assaulted and to a street corner, because she knew that he couldn't go that far with the ankle bracelet that he had to wear while on house arrest. The court ruled, relying on State v. Robertson, 115 N.C. App. 249, 444 S.E.2d 643 (1994) and State v. Agee, 326 N.C. 542, 391 S.E.2d 171 (1990), that evidence of the house arrest was admissible to establish the circumstances of the offenses being tried. The court noted that the state did not present evidence or argue that the defendant had been convicted of a prior crime, and the testimony was not used to prove the defendant's character in violation of Rule 404(b) (evidence may not prove character of person to show that person acted in conformity therewith).

Trial Judge Erred in Preventing Defense Counsel from Cross-Examining State's Witness About Pending Charges to Challenge Witness's Credibility

State v. Reaves, 132 N.C. App. 615, 513 S.E.2d 562 (6 April 1999). The court ruled, relying on State v. Prevatte, 346 N.C. 162, 484 S.E.2d 377 (1997) and State v. Hoffman, 349 N.C. 167, 505 S.E.2d 80 (1998), that the trial judge erred in preventing defense counsel from cross-examining a state's witness (the victim) about unrelated pending criminal charges against him and any leniency he might receive for his testimony in this case.

Officer Properly Complied With Intoxilyzer Testing Rules When No Additional Procedures Were Performed Between Collection of Second and Third Samples

State v. Moore, 132 N.C. App. 802, 513 S.E.2d 346 (6 April 1999). The defendant was arrested for DWI and given the Intoxilyzer test. His first sample, taken at 7:15 p.m., was 0.20. His second sample, taken at 7:17 p.m., was 0.23. Because the first two samples differed by more than 0.02, a third sample was taken at 7:18 p.m., which was 0.23. The court rejected the defendant's argument that the rules required the officer to repeat steps (3) through (8) of 15A NCAC

19B.0320 before taking the third sample. Relying on State v. Tew, 326 N.C. 732, 392 S.E.2d 603 (1990) and State v. Lockwood, 78 N.C. App. 205, 336 S.E.2d 678 (1985), the court examined the rules and the operation of the Intoxilyzer and ruled that only step (6) was required, which is the requirement that the defendant must comply with the message, "PLEASE BLOW." The other operational procedures were not required.

Sentencing

When Judge Finds That Defendant Provided "Substantial Assistance" under G.S. 90-95(h)(5), Judge's Discretion in Departing from Mandatory Minimum for Drug Trafficking Offense Is Not Limited by Structured Sentencing Act's Minimum for Offense of Same Class

State v. Saunders, 131 N.C. App. 551, 507 S.E.2d 911 (1 December 1998). The defendant pleaded guilty to a trafficking offense. The sentencing judge found that the defendant provided "substantial assistance" under G.S. 90- 95(h)(5), but the judge believed that his discretion in departing from the mandatory minimum sentence for the trafficking offense was limited to sentencing in the Structured Sentencing Act's (SSA's) minimum for an offense of the same class. The court ruled that the sentencing judge erred. The sentencing judge was not limited by the SSA's minimum for an offense of the same class; the judge was free to depart in any manner in imposing a sentence.

(1) Judge Improperly Found Non-Statutory Aggravating Factor That Defendant, Immediately After Commission of Offense, Gave to Another Person the Weapon Used to Commit Crime
(2) Judge Under Structured Sentencing Act May Find Non-Statutory Aggravating Factors Even If Not Requested by State

State v. Rollins, 131 N.C. App. 601, 508 S.E.2d 554 (15 December 1998). The defendant was convicted of discharging a firearm into occupied property. (1) At the sentencing hearing held under the Structured Sentencing Act, the judge found as a non-statutory aggravating factor that the defendant attempted to dispose of evidence by giving the handgun used to commit this offense to another person immediately after the commission of the offense. The evidence showed that the defendant, moments after commission of the offense and near the scene of the shooting, handed the handgun used in the offense to another person. No law enforcement officers were present and the investigation had not focused on the defendant yet. Relying on State v. Blackwood, 60 N.C. App. 150, 298 S.E.2d 196 (1982), the court ruled that the defendant's passing of the weapon to another lacked the characteristic of affirmative misconduct or active misrepresentation to law enforcement officials. The defendant's possession of the handgun necessarily implicated himself in unlawful activities and the use of this conduct as a non-statutory aggravating factor unconstitutionally punished him (in violation of the Fifth Amendment privilege against self-incrimination) for in effect remaining silent and not presenting the weapon to law enforcement authorities. (2) The court ruled, following case law under the Fair Sentencing Act such as State v. Flowe, 107 N.C. App. 468, 420 S.E.2d 475 (1992), that a judge under the Structured Sentencing Act may find a nonstatutory aggravating factor even if it is not requested by the state.

(1) Probation Condition That Juvenile Could Not Watch Television for One Year Did Not Violate First Amendment
(2) Restitution Order Was Not Supported by Evidence

In re McDonald, 133 N.C. App. 433, 515 S.E.2d 719 (1 June 1999). Respondent was adjudicated delinquent of injury to real property for spray painting "Charles Manson Rules" on the wall of a boat house. (1) During the dispositional hearing, the juvenile told the judge that she spray painted those words because she had recently watched a televised documentary about Charles Manson. The judge stated that the juvenile was "too susceptible to impression to be watching television" and imposed as a probation condition that she could not watch television for one year. The court stated that the judge had the authority to impose this condition because it was related to her unlawful conduct and her needs. The court ruled, relying on Wisconsin v. Mitchell, 508 U.S. 476, 113 S. Ct. 2194, 124 L. Ed. 2d 436 (1993), that the condition did not violate the juvenile's First Amendment rights. The judge considered the juvenile's words only to determine what factors influenced her delinquent conduct and the best way to remove those factors from her life. (2) The court ruled that the judge's restitution order that the juvenile pay $200 to the owner of the boat house was not supported by any evidence of the damage to the boat house, and thus the order must be set aside.