# Recent Cases Affecting Criminal Law and Procedure
## (June 1, 2004 – November 2, 2004

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## North Carolina Supreme Court

### Criminal Law and Procedure

**(1) Possession of Cocaine Is a Felony—Ruling of Court of Appeals Reversed**
**(2) Court of Appeals Erred by Failing to Follow Prior Published Ruling of Court of Appeals**

**State v. Jones,** 358 N.C. 473, 598 S.E.2d 125 (25 June 2004), *reversing*, 161 N.C. App. 60, 588 S.E.2d 5 (2003) (4 November 2003). (1) Reversing the court of appeals, the court ruled, after reviewing the language of G.S. 90-95(d)(2), its legislative history, and other factors, that possession of cocaine is a felony under the statute. (2) The court ruled that the court of appeals, in ruling that possession of cocaine is a misdemeanor, erred by failing to follow a prior published ruling of the court of appeals—State v. Chavis, 134 N.C. App. 546, 518 S.E.2d 241 (1999)—that possession of cocaine is a felony. The court of appeals was bound by the prior ruling until it was overturned by a higher court. In re Civil Penalty, 324 N.C. 373, 379 S.E.2d 30 (1989). See also State v. Sneed, 358 N.C. 538, 599 S.E.2d 365 (1 July 2004) [court overrules similar ruling of court of appeals at 161 N.C. App. 331, 588 S.E.2d 74 (18 November 2003)].

**(1) Short-Form Murder Indictment Was Constitutionally Sufficient to Charge First-Degree Murder Based on Felony Murder Committed During Attempted First-Degree Rape**
**(2) State Was Not Required, In Response to Defendant's Motion for Bill of Particulars, to Specify Felonies on Which It Would Rely in Prosecuting First-Degree Felony Murder**
**(3) Sufficient Evidence Existed To Support Submission of Attempted First-Degree Rape as Underlying Felony for Felony Murder**
**(4) Trial Judge's Error in Not Requiring State to Approve Twelve Jurors Before Passing Them to Defendant Was Not Structural**

**State v. Garcia,** 358 N.C. 382, 597 S.E.2d 724 (25 June 2004). The defendant was indicted for first-degree murder with the short-form indictment under G.S. 15-144. He was convicted of first-degree murder based on the felony murder theory only, the underlying felony being attempted first-degree rape. He was not separately indicted for the attempted rape. (1) The court ruled that the short-form murder indictment was constitutionally sufficient to charge first-degree murder based on felony murder committed during an attempted first-degree rape. (2) The court ruled that the state was not required, in response to the defendant's motion for a bill of particulars, to specify the felonies on which it would rely in prosecuting first-degree felony murder. The court noted that G.S. 15A-925 does not require the state to disclose the legal theories on which it will prosecute. Legal theories are not "factual information" as specified in the statute. The court concluded that because the state's legal theory was not factual information and the defendant was not denied any information necessary for the adequate preparation or conduct of the defendant's defense, the trial judge's denial of the defendant's motion for a bill of particulars was not a palpable and gross abuse of discretion. (3) The court ruled that sufficient evidence existed to support the submission of attempted first-degree rape as the underlying felony for felony murder. Evidence indicated that the defendant forced the victim at gunpoint to go from a clubhouse workout area into a women's restroom, removed her gym shorts and underwear, made her lie on her

stomach, and then beat her to death. (See additional facts set out in the court's opinion.) (4) The court ruled that the trial judge's error in not requiring under G.S. 15A-1214(f) that the state approve twelve jurors before passing them to the defendant was not structural that would otherwise require a new trial without harmless error analysis.

**(1) Trial Judge Did Not Err in Allowing Joinder of Defendants for Trial**
**(2) Evidence Supported Multiple Conspiracy Convictions**
**(3) Double Jeopardy Did Not Prohibit Defendants' Convictions of Both Attempted First-Degree Murder and Assault with Deadly Weapon with Intent to Kill Inflicting Serious Injury Based on Same Act**

**State v. Tirado,** ___ N.C. ___, 599 S.E.2d 515 (13 August 2004). Two defendants, Tirado and Queen, were jointly tried and convicted for the first-degree murders of two victims, A and B, and the attempted first-degree murder of a third victim, C. They also were convicted of multiple related offenses. They were sentenced to death for both first-degree murders. The defendants were two of nine members of the Crips gang who undertook these criminal acts as "missions" randomly targeting people in the community. They first targeted victim C as she was leaving a restaurant, drove her away in her car after putting her in the trunk, and later shot her multiple times, serious injuring but not killing her. They regrouped shortly thereafter and targeted victims A and B in their car, put them in the trunk, robbed them of their jewelry, and later killed them. (1) The court ruled that the trial judge did not err in granting the state's motion to join both defendants for a single trial. The court noted that Queen's redacted statement (eliminating references to Tirado) introduced by the state did not prejudice Queen during the guilt-innocence stage of the trial. Queen's only expressed concern that the jury would not be able to consider his full statement for mitigation purposes, which only affected the sentencing phase. Thus, joinder for the guilt-innocence stage did not prejudice Queen. (Queen and Tirado had separate capital sentencing hearings.) (2) The defendants were convicted of conspiracy to commit first-degree murder of victim C. They also were convicted of three conspiracies involving victims A and B: conspiracy to commit first-degree murder, conspiracy to commit armed robbery, and conspiracy to commit first-degree kidnapping. The court reviewed the evidence and ruled that it supported the existence of separate agreements to support the multiple conspiracy convictions. (3) The court ruled that double jeopardy did not prohibit the defendants' convictions of both attempted first-degree murder and assault with a deadly weapon with intent to kill inflicting serious injury based on the same act of shooting victim C. Each offense has at least one element that is not in the other offense.

**When Trial Judge Before Impanelment of Jury Allowed Counsel to Question Already-Selected Juror About New Information Concerning Juror, Voir Dire Had Necessarily Been Reopened Under G.S. 15A-1214(g) and Trial Judge Erred in Not Allowing Counsel to Exercise a Remaining Peremptory Challenge**

**State v. Boggess,** ___ N.C. ___, 600 S.E.2d 453 (13 August 2004). The defendant was on trial for first-degree murder. During the selection of the jury and before impanelment of the jury, an already-selected juror said that she had learned that the mother of the murder victim (who was also a prosecution witness) was staying with one of the juror's friends during the trial. The judge asked the juror questions and determined that there was not good cause to reopen voir dire. However, the judge allowed counsel to question her, but refused to allow defense counsel to exercise a remaining peremptory challenge. The court ruled, after discussing several of its cases interpreting G.S. 15A-1214, that the trial judge erred in not allowing counsel to exercise a peremptory challenge because voir dire had necessarily been reopened when the judge allowed counsel to question the juror.

**Jury Unanimity Concerning Purpose of Kidnapping Was Not Required**

**State v. Bell,** ___ N.C. ___, ___ S.E.2d ___ (7 October 2004). The trial judge's jury instruction for kidnapping listed four purposes of the kidnapping without requiring the jury to unanimously find one or more of the purposes. The court ruled, relying on State v. Hartness, 326 N.C. 561, 391 S.E.2d 177 (1990), that the jury instruction was not erroneous. Unanimity on establishing an element of one offense is not required.

**Prosecutor's Jury Argument Was Proper**

**State v. Bell,** ___ N.C. ___, ___ S.E.2d ___ (7 October 2004). The defendant was convicted of first-degree murder and other offenses in which two accomplices were involved. The court ruled that the prosecutor's jury argument during the guilt/innocence phase was proper. (1) The prosecutor's argument that "he who hunts with the pack is responsible for the kill" properly used an analogy to explain the theory of acting in concert. (2) The prosecutor's argument that "[i]f you are going to try the devil, you have to go to hell to get your witnesses" responded to a direct attack by the defendant on the credibility of the state's principal witness who was an accomplice of the defendant. It was intended merely to illustrate the kind of witness available in this case. The court noted that neither of these arguments in context were improper characterizations or name calling. The prosecutor, in the zealous representation of the state, simply used vivid analogies to illustrate points to the jury.

## Arrest, Search, and Confession Issues

**Defendant Was Not in Custody Under *Miranda* to Require *Miranda* Warnings; Court Distinguishes Ruling in State v. Buchanan, 355 N.C. 264 (2002)**

**State v. Garcia,** 358 N.C. 382, 597 S.E.2d 724 (25 June 2004). Law enforcement officers responded to an apartment clubhouse where a person had just been beaten to death. A short time later, the defendant agreed to be transported to a police station because he wanted to be there while his girlfriend was being questioned as a witness to the murder. He agreed to be patted down for weapons before he was placed in a police vehicle. Officers knew that there was an outstanding arrest warrant for the defendant (which they intended to serve on the defendant if he attempted to leave) and suspected his involvement in the murder, but they did not communicate this information to the defendant. They told him he was not under arrest. The officers found a room in the police station where the defendant could wait. A detective, not in uniform and unarmed, walked into the room, introduced himself, and thanked the defendant for coming. He asked the defendant about his recent activities and about a cut on his finger. The defendant responded to the detective's questions. The detective told the defendant that the defendant's information was different from information that other witnesses were providing. The defendant responded that he was telling the truth, but the detective told him that his girlfriend had "given him up." The defendant requested a drink and a cigarette lighter and said that he had a story for him. The detective left the defendant alone in the room and got a lighter and beverage for him. When the detective returned, the defendant lit a cigarette. Without receiving *Miranda* warnings, he then gave a detailed confession to the murder. The court ruled, distinguishing State v. Buchanan, 355 N.C. 264, 559 S.E.2d 785 (2002) (defendant was in custody after he confessed to murder when two officers accompanied him to the bathroom, and one officer was in uniform and armed), that the defendant was not in custody under *Miranda* to require *Miranda* warnings before he confessed. The court noted, citing Stansbury v. California, 511 U.S. 318, 114 S. Ct. 1526, 128 L. Ed. 2d 293 (1994), that uncommunicated information to a defendant is not relevant to the issue whether the defendant was in custody.

**Defendant's Reference to Attorney Was Not Clear Request for Counsel Under Davis v. United States**

**State v. Boggess,** ___ N.C. ___, 600 S.E.2d 453 (13 August 2004). During custodial interrogation about a murder, one of the officers told the defendant that he was a "lying piece of shit." The defendant responded, "I'm not lying. I'm telling you the truth. If y'all going to treat me this way, then I probably would want a lawyer." The court ruled that the defendant's statement was not a clear request for counsel under Davis v. United States, 512 U.S. 452, 114 S. Ct. 2350, 129 L. Ed. 2d 362 (1994), to require the officers to stop interrogation. The court stated the defendant's words reflected that he understood perfectly well his right to an attorney and was threatening to exercise it unless the officers improved their behavior.

## Capital Case Issues

**(1) Evidence Was Sufficient to Support Submission of Aggravating Circumstance G.S. 15A-2000(e)(6) (Murder Committed for Pecuniary Gain)**
**(2) Trial Judge Did Not Err in Submitting Mitigating Circumstance G.S. 15A-2000(f)(1) (No Prior Significant Criminal History) Over Defendant's Objection**

**State v. Bell,** ___ N.C. ___, ___ S.E.2d ___ (7 October 2004). The defendant was convicted of first-degree murder and other offenses. (1) The court ruled that the evidence was sufficient to support the submission of aggravating circumstance G.S. 15A-2000(e)(6) (murder committed for pecuniary gain) based on taking money from the murder victim's purse. The court stated that it was reasonable to infer that the defendant acted for his own pecuniary gain when he kidnapped the victim, stole her car, looked through her purse, and took her money. While obtaining the victim's car to leave town may have been the defendant's primary motivation, it may be reasonably inferred that he was also motivated by the need for money. The court also noted, citing State v. Oliver, 302 N.C. 28, 274 S.E.2d 183 (1981), that it was irrelevant that the defendant killed the victim after he had obtained the money from her purse. [Author's note: The trial judge also submitted aggravating circumstance G.S. 15A-2000(e)(5) (murder committed during kidnapping) based on kidnapping the victim to facilitate the larceny of the car.] (2) The court ruled that the trial judge did not err in submitting mitigating circumstance G.S. 15A-2000(f)(1) (no prior significant criminal history) over the defendant's objection. The evidence supported the submission of this mitigating circumstance. Most of the defendant's prior convictions were crimes against property. Although the defendant had been convicted of common law robbery, he had not repeatedly engaged in threatening or violent behavior beside this one conviction.

**Trial Judge Erred in Capital Sentencing Hearing in Not Allowing Defendant's Mother to Testify About Conversations with Defendant in Which He Expressed Remorse for Murder**

**State v. Garcia,** 358 N.C. 382, 597 S.E.2d 724 (25 June 2004). The defendant was convicted of first-degree murder and sentenced to death. The court ruled that the trial judge erred in the capital sentencing hearing in not allowing the defendant's mother to testify about conversations with the defendant in which he expressed remorse for the murder. The proffered testimony was relevant mitigating evidence. The court noted that the rules of evidence do not apply in a capital sentencing hearing.

**(1) When Two Defendants After Joint Trial Had Separate Capital Sentencing Hearings With Same Jury, Trial Judge Erred in Not Polling Jury After It Returned Death Sentence Recommendation for First Defendant Before Beginning Capital Sentencing for Second Defendant**
**(2) Separate Capital Sentencing Hearings Did Not Violate Constitutional Right to Individualized Sentencing of Defendant Who Had Second Hearing**
**(3) Indigent Defendant's Statutory Right to Two Counsel Was Not Violated When One of His Lawyers Was Absent During Portion of Other Defendant's Capital Sentencing Hearing**
**(4) Separate Evidence Supported Finding of Three Aggravating Circumstances and Judge Did Not Err in Failing to Direct Jury Concerning Which Evidence Supported Each Aggravating Circumstance**

**State v. Tirado,** ___ N.C. ___, 599 S.E.2d 515 (13 August 2004). Two defendants, Tirado and Queen, were jointly tried and convicted of two counts of first-degree murder. (1) Because a statement of Queen implicating Tirado was not admissible against Tirado, the court ordered separate capital sentencing hearings before the same trial jury that had return the convictions. After the jury returned a death sentence recommendation for Tirado, the trial judge did not conduct the statutorily-mandated poll of the jury. Instead, the judge conducted a poll of the jury for its death recommendation against Tirado only after the capital sentencing hearing for Queen had been completed. The court ruled that this procedure violated G.S. 15A-2000(b) because the poll concerning Tirado's death sentence recommendation was not timely, and intervening evidence heard by the jury in Queen's capital sentencing hearing substantially and irreparably prejudiced Tirado. The court ordered a new sentencing hearing for Tirado. (2) The court ruled that the separate capital sentencing hearings for the two defendants did not violate the constitutional rights of defendant Queen who was the subject of the second hearing. The court noted that the trial judge instructed the jury to not consider any evidence in Tirado's sentencing hearing against Queen. (3) The court ruled, relying on State v. Thomas, 350 N.C. 315, 514 S.E.2d 486 (1999), that the indigent defendant Queen's statutory right to two counsel was not violated when one of his lawyers was absent during a portion of defendant Tirado's capital sentencing hearing. (4) The court ruled that separate evidence supported three aggravating circumstances: (i) stealing a victim's car and placing the two victims in the trunk and driving them elsewhere, G.S. 15A-2000(e)(5) (murder committed during kidnapping); (ii) theft of the victims' jewelry, G.S. 15A-2000(e)(6) (murder committed for pecuniary gain), and (iii) a double homicide, G.S. 15A-2000(e)(11) (murder committed during course of conduct involving commission of violence against others). The court noted, responding to a defendant's argument, that it has never required that a trial judge's instructions must direct the jury which evidence supported each aggravating circumstance. The court also noted that the judge instructed the jury that the same evidence cannot be used as the basis for more than one aggravating circumstance.

**Trial Judge's Instruction Given in Response to Capital Sentencing Jury's Question During Its Deliberations About Meaning of Life Imprisonment Was Erroneous**

**State v. Boggess,** ___ N.C. ___, 600 S.E.2d 453 (13 August 2004). The defendant was convicted of first-degree murder and sentenced to death. The jury during its deliberations in the capital sentencing hearing asked the judge to define life imprisonment. The judge instructed the jury that life imprisonment means imprisonment in the state's prison for life without parole, but also said that "You should decide the question of punishment according to the issues submitted to you by the Court, wholly uninfluenced by consideration of what another arm of the government might or might not do in the future." The court ruled that the quoted language was erroneous because it contained the ineluctable suggestion that life without parole was not the absolute alternative to death that the legislature intended jurors to consider when deciding the appropriate sentence.

## Evidence

**Trial Judge in Capital Sentencing Hearing Erred Under *Crawford v. Washington* in Admitting Statements Made By Nontestifying Victim to Officer When State Did Not Show Victim Was Unavailable and Defendant Did Not Have Opportunity to Cross-Examine Victim; However, Error Was Harmless Beyond Reasonable Doubt**

**State v. Bell,** ___ N.C. ___, ___ S.E.2d ___ (7 October 2004). The defendant was convicted of first-degree murder. During the capital sentencing hearing, the trial judge allowed the state during its proof of aggravating circumstance G.S. 15A-2000(e)(3) (prior violent felony conviction) to offer a law enforcement officer's testimony concerning what a nontestifying robbery victim told the officer when he questioned the victim about the robbery. The court ruled that the trial judge erred under Crawford v. Washington, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004), in admitting the statement. The statement was given in response to structured questioning by the officer and thus was a testimonial statement. The state did not adequately show the unavailability of the victim to testify. In addition the defendant did not have the opportunity to cross-examine the victim. The court ruled, however, that the admission of the statement was harmless error beyond a reasonable doubt. [Author's note: The Confrontation Clause applies to capital sentencing hearings, see Robert L. Farb, *North Carolina Capital Case Law Handbook*, p. 156 (2d. ed. 2004), but not to non-capital sentencing hearings, see State v. Phillips, 325 N.C. 222, 381 S.E.2d 325 (1989).]

**Court Declines to Adopt United States Supreme Court Ruling in *Daubert v. Merrell Dow Pharmaceuticals* Concerning Admissibility of Expert Testimony—Ruling of Court of Appeals Reversed**

**Howerton v. Arai Helmet, Ltd.,** 358 N.C. 440, 597 S.E.2d 674 (25 June 2004), *reversing*, 158 N.C. App. 316, 581 S.E.2d 816 (17 June 2003). The court, reversing the ruling of the court of appeals in this case, declined to adopt the ruling in Daubert v. Merrell Dow Pharmaceuticals, 509 U.S. 579 (1993), on the admissibility of expert testimony under Rule 702. Instead, the court reaffirmed the standard set out in State v. Goode, 341 N.C. 513, 461 S.E.2d 631 (1995), and other cases: (1) Is the expert's proffered method of proof scientifically reliable as an area for expert testimony? (2) Is the witness testifying at trial qualified as an expert in that area of testimony? (3) Is the expert's testimony relevant?

**Trial Judge in Second-Degree Vehicular Murder Trial Did Not Err in Allowing State to Prove Malice with Facts from Prior DWI Arrest Resulting in Conviction—Ruling of Court of Appeals Affirmed**

**State v. Locklear,** ___ N.C. ___, 602 S.E.2d 359 (7 October 2004), *affirming per curiam*, 159 N.C. App. 588, 583 S.E.2d 726 (5 August 2003). The court, per curiam and without an opinion, affirmed the ruling of the court of appeals at 159 N.C. App. 588, 583 S.E.2d 726 (5 August 2003). The defendant was convicted of second-degree murder, assault with a deadly weapon inflicting serious injury, DWI, and unsafe movement. The defendant crashed his vehicle into a car in the opposite lane of traffic, killing one passenger in that car and seriously injured another. The defendant performed poorly on sobriety tests and had a 0.08 alcohol concentration. He did not resist the officer's arrest, however. The trial judge allowed the state to introduce evidence of a prior DWI offense resulting in a conviction that had occurred five years before the offenses being tried, in which the impaired defendant made an unsafe traffic turn that resulted in a collision, performed poorly on sobriety tests, and resisted arrest by twisting the officer's wrist and cursing the officer. The court ruled that the trial judge did not err in admitting this evidence to establish malice. It was sufficiently similar to have probative value.

# North Carolina Court of Appeals

## Evidence

**Statement Given by Nontestifying Crime Victim to Law Enforcement Officer During Investigation and Victim's Photo Identification of Defendant Were Testimonial Evidence Under *Crawford v. Washington* and Were Inadmissible Because Defendant Did Not Have Prior Opportunity to Cross-Examine Victim**

**State v. Lewis,** ___ N.C. App. ___, ___ S.E.2d ___ (19 October 2004). The defendant was convicted of robbery and felonious assault of an elderly victim in her apartment. A law enforcement officer arrived and took a statement from the victim describing how the crimes occurred. Later at the hospital, the victim was presented with a photo lineup and identified the defendant as her assailant. The victim died before trial of causes unrelated to these offenses. The court ruled, relying on State v. Clark, ___ N.C. App. ___, 598 S.E.2d 213 (6 July 2004), State v. Pullen, ___ N.C. App. ___, 594 S.E.2d 248 (20 April 2004), and Moody v. State, 594 S.E.2d 350 (Ga. 2004), that the victim's statement to the law enforcement officer and her identification of the defendant at the photo lineup were testimonial evidence under Crawford v. Washington, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004), were offered for the truth of the matter asserted, and their admission at the defendant's trial violated the *Crawford* ruling because the defendant did not have a prior opportunity to cross-examine the victim.

**(1) Confrontation Clause Did Not Bar Prior Trial Testimony of Unavailable State's Witness**
**(2) Notarized Statement of Unavailable State's Witness and Statements Made to Law Enforcement Officer by Unavailable State's Witness Were Testimonial Statements Under *Crawford v. Washington* and Were Inadmissible Because Defendant Did Not Have Opportunity to Cross-Examine Witness**

**State v. Clark,** ___ N.C. App. ___, 598 S.E.2d 213 (6 July 2004). The defendant was convicted of armed robbery and second-degree kidnapping. The state's evidence showed that the defendant met the victim at a bus station and offered to walk her to a hotel. Several blocks away, they met Moore, with whom the defendant had a brief conversation. The defendant continued walking with the victim and eventually robbed her. In an attempt to determine the identity of the robber, a law enforcement officer interviewed Moore, who also prepared a notarized statement. Moore did not testify at the trial in which the defendant was convicted, but she testified at a prior trial against the defendant on these charges. (1) The court ruled that Moore's prior trial testimony was a testimonial statement under Crawford v. Washington, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004), but the state met its burden of showing that she was unavailable to testify and the defendant had had the opportunity to cross-examine her at that prior trial. Thus the trial judge did not err in admitting Moore's prior trial testimony under *Crawford* and Rule 804. (2) The court ruled that Moore's notarized statement and the statements she made to the officer during his investigation of these offenses were testimonial statements under *Crawford* and, for purposes of appellate review, were considered to have been offered to prove the truth of the matters asserted. Because the defendant did not have an opportunity to cross-examine Moore about these statements, they were inadmissible under *Crawford*.

**(1) Murder Victim's Statements to Wife and Daughter Concerning Robbery and Shooting Were Not Testimonial Under *Crawford v. Washington***
**(2) Court States That *Ohio v. Roberts* Ruling Remains Applicable to Admissibility of Nontestimonial Statements**
**(3) Murder Victim's Statements to Wife and Daughter Concerning Robbery and Shooting Were Not Admissible Under Rule 803(3) (Declarant's Then Existing State of Mind) or Rule 804(b)(5) (Residual Hearsay Exception)**

**State v. Blackstock,** ___ N.C. App. ___, 598 S.E.2d 412 (6 July 2004). The defendant was convicted of first-degree murder and armed robbery in the robbery and shooting of the owner of a convenience store. The victim was shot in the chest and treated at a hospital, where his condition improved over the four days after the robbery. On the fifth day, he developed an infection and died. The trial judge admitted statements about the robbery and shooting made by the victim to his wife and daughter a few days after the crimes had occurred. (1) The court ruled that the murder victim's statements to his wife and daughter concerning the robbery and shooting were not testimonial under *Crawford v. Washington*, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). The court stated that it was unlikely that the victim made the statements under a reasonable belief that they would later be used prosecutorially. In addition, the fact that the victim made the statements to his wife and daughter mitigates against the possibility that he understood he was "bearing witness" against the defendant. (2) The court stated in footnote 2 that the ruling in Ohio v. Roberts, 448 U.S. 56 (1980) (setting out test for admissibility of statements under the Confrontation Clause) remains applicable to the admissibility of nontestimonial statements after *Crawford*. (3) The court ruled that the murder victim's statements to his wife and daughter concerning the robbery and shooting were not admissible under Rule 803(3) (declarant's then existing state of mind) or Rule 804(b)(5) (residual hearsay exception). The statements, made several days after the robbery, were inadmissible under Rule 803(3) because they simply recited the victim's memory of the events that took place and his emotional condition at the time; the court cited In re Hayden, 96 N.C. App. 77, 384 S.E.2d 558 (1989). The statements were inadmissible under Rule 804(b)(5) because they were not trustworthy; they fundamentally contradicted a statement the victim made to a law enforcement officer immediately after the robbery and shooting.

**Written Statement Given to Law Enforcement Officer by Unavailable State's Witness Was Testimonial Statement Under *Crawford v. Washington* and Was Inadmissible Because Defendant Did Not Have Opportunity to Cross-Examine Witness**

**State v. Morton,** ___ N.C. App. ___, 601 S.E.2d 873 (21 September 2004). The defendant was convicted of possession of stolen goods. A law enforcement officer interviewed a suspect during an investigation of a break-in and took a written statement from the suspect that incriminated the defendant. The suspect did not testify at trial. The trial judge allowed the state to introduce the suspect's written statement. The court ruled that the suspect's statement was testimonial (a result of police interrogation) under *Crawford v. Washington*, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004), and was inadmissible because the defendant did not have an opportunity to cross-examine the suspect.

**Trial Judge in Drug Prosecution Erred in Admitting State Witness's Testimony That Defendant Was in Place Known as "Open Air Market for Drugs"**

**State v. Williams,** ___ N.C. App. ___, 596 S.E.2d 313 (1 June 2004). The defendant was convicted of drug offenses. The court ruled, relying on State v. Weldon, 314 N.C. 401, 333 S.E.2d 701 (1985), and other cases, that the trial judge erred in admitting a state witness's testimony that the defendant was in a place known as an "open air market for drugs." The court stated that this evidence is inadmissible hearsay.

**Trial Judge Did Not Err in Ruling That Declarant's Statement Was Inadmissible Under Rule 804(b)(3) (Statement Against Interest)**

**State v. Dewberry,** ___ N.C. App. ___, 600 S.E.2d 866 (7 September 2004). The defendant was on trial for first-degree murder and felonious assault. The state's evidence showed that the victims did not have a gun. The defendant's defense was self-defense based on his seeing the murder victim reach for a gun in his car to use against the defendant. The defendant sought to introduce a statement of a witness who was with the defendant during the alleged offenses: the witness had told people that he had removed a gun from the murder victim's car. The court ruled that the trial judge did not err in ruling that the witness's statement was inadmissible under Rule 804(b)(3) (statement against interest). The statement was not so far against the witness's penal interest that a reasonable person in his position would not have the made the statement unless he believed it to be true. Also, the defendant failed to meet his burden of showing that there existed independent, nonhearsay indications of trustworthiness of the statement. (See the court's opinion for its analysis.)

**Trial Judge Did Not Err in Ruling That Defendant's Statement to Nurse Was Inadmissible During Defendant's Defense Under Rule 803(3) (Statement Made for Medical Diagnosis or Treatment)**

**State v. Gattis,** ___ N.C. App. ___, 601 S.E.2d 205 (7 September 2004). The defendant was convicted of first-degree murder for the death of his estranged wife, first-degree burglary for breaking into her apartment, and assault with a deadly weapon for shooting at another apartment occupant. The defendant contended that his gun discharged accidentally during a struggle with the murder victim. The defendant was also shot. The court ruled that the trial judge did not err in ruling that the defendant's statement to a nurse was inadmissible during the defendant's defense under Rule 803(3) (statement made for medical diagnosis or treatment). The statement to the nurse included his assertion that the gun accidentally discharged during a struggle with his wife. A statement concerning fault does not ordinarily qualify under the rule. A doctor and the nurse testified at trial that the manner in which the bullet wound occurred was not pertinent to how the defendant's wound was treated.

**State's Expert in DWI Trial Was Properly Permitted to Give Opinion of Defendant's Blood Alcohol Concentration Based on Using Average Elimination Rate of Alcohol in Retrograde Extrapolation Method**

**State v. Taylor,** ___ N.C. App. ___, 600 S.E.2d 483 (17 August 2004). The defendant was on trial for habitual DWI. An officer responded to a two-vehicle accident about 1:10 p.m. and arrested the defendant for DWI. The defendant's Intoxilyzer test result at 3:18 p.m. showed an alcohol concentration of 0.05. The state's expert testified at trial that the average elimination rate of alcohol was 0.0165 per hour, and using a retrograde extrapolation method, he opined that the defendant's blood alcohol concentration was 0.08 at the time of the accident (2.1, representing hours between driving and taking the Intoxilyzer test, multiplied by 0.0165 and adding 0.05). The court ruled, using the analysis set out in Howerton v. Arai Helmet, Ltd., 358 N.C. 440, 597 S.E.2d 674 (25 June 2004), that the state's expert was properly permitted to use the average elimination rate of alcohol. The court rejected the defendant's argument that the expert was required to use the defendant's actual elimination rate.

**(1) SANE Nurse Was Properly Qualified as Expert to Offer Opinion About Her Examination of Child Sexual Assault Victim**
**(2) SANE Nurse and Doctor Were Properly Permitted to Testify That Physical Findings Concerning Child Sexual Assault Victim Were Consistent With Vaginal Penetration and Someone Kissing Child's Breast**

**State v. Fuller,** ___ N.C. App. ___, ___ S.E.2d ___ (19 October 2004). The defendant was convicted of rape, sexual offense, and indecent liberties with a female child. The child testified at trial about these offenses, including vaginal penetration and the defendant's kissing her breast. The child was examined at a hospital emergency room by a SANE (sexual assault nurse examiner) nurse and a doctor. They testified that the abrasions on the child's genitalia were consistent with vaginal penetration, and redness on her breast was consistent with having been kissed on the breast. (1) The court ruled, relying on Howerton v. Arai Helmet, Ltd., 358 N.C. 440, 597 S.E.2d 674 (2004), that the SANE nurse was properly qualified as an expert to offer an opinion about her examination of the child victim. (See the nurse's background set out in the court's opinion.) (2) The court ruled, relying on State v. Stancil, 355 N.C. 266, 559 S.E.2d 788 (2002), and State v. Kennedy, 320 N.C. 20, 357 S.E.2d 359 (1987), that the SANE nurse and doctor were properly permitted to testify that the physical findings concerning the victim were consistent with vaginal penetration and someone kissing the child's breast.

**Trial Judge Did Not Err Under Rule 404(b) and Rule 403 in Admitting Evidence of the Death of the Defendant's First Husband in Trial of Defendant for Murder of Second Husband**

**State v. Lanier,** ___ N.C. App. ___, 598 S.E.2d 596 (20 July 2004). The defendant was convicted of first-degree murder of her second husband based on premeditation and deliberation and poisoning. The state's evidence showed that in 1997 the defendant poisoned her second husband and did not give or seek appropriate medical treatment as he became progressively weaker and eventually died from arsenic poisoning. The evidence also showed that the defendant benefited financially from her second husband's death. The court ruled that the trial judge did not err under Rule 404(b) and Rule 403 in admitting evidence of the 1991 death of the defendant's first husband. The evidence showed that the first husband became ill during the summer of 1991 and doctors were unable to determine the cause. When he was almost unconscious, the defendant tried to pour liquor in his mouth instead of seeking medical attention. At a later date, the defendant said that he took prescription medicine and drank one-third of a fifth of liquor and walked outside to check his crab pots. He fell into the water beside the dock and drowned in water that was no higher than three to four feet. He was known to be an excellent swimmer and his neurologist testified at the murder trial of the second husband that even if he had taken the medicine and liquor, he should still have been able to avoid drowning. The official cause of his death was listed as drowning, although a toxicology report indicated no measurable alcohol or prescription medicine in his system. The defendant financially benefited from her first husband's death. The court ruled that the evidence was admissible under Rule 404(b) to show lack of accident. One of the defendant's main defenses was that the second husband's death was an accident, due to his voluntary consumption of rat poison and other toxic substances. The court stated that although both husbands died from different causes, the circumstances surrounding the first husband's death was relevant to the argument that the second husband's death was not accidental, according to the "doctrine of chances"; the court cited State v. Stager, 329 N.C. 278, 406 S.E.2d 876 (1991), and other cases. (See the discussion of the "doctrine of chances" in the opinion.) The court also ruled that the evidence was admissible under Rule 404(b) to show the defendant's motive (financial gain) for the murder.

**Trial Judge Erred in Admitting State's Evidence of Prior Offense Under Rule 404(b) to Attack Defendant's Credibility**

**State v. Cook,** ___ N.C. App. ___, 599 S.E.2d 67 (3 August 2004). The defendant was tried for embezzlements on three different dates over a period of six weeks at a restaurant. The trial judge allowed the state to introduced evidence under Rule 404(b) of the defendant's alleged embezzlement at a grocery store about 17 months before the offenses being tried. The judge instructed the jury that it could consider the evidence as it bears on the credibility of the defendant's explanation for the missing money in the offenses being tried. The court ruled that the trial judge erred in admitting this evidence for the purpose of attacking the defendant's credibility. The court noted that the judge's ruling allowed the state to circumvent the strict limitations of Rules 608 and 609. In effect, the evidence was admitted for the sole purpose of attacking the defendant's character, which is not permitted under Rule 404(b).

**State Was Properly Permitted in Adjudicatory Hearing in Delinquency Case to Impeach Testifying Juvenile with Prior Juvenile Adjudications**

**In re S. S. T.,** ___ N.C. App. ___, 599 S.E.2d 59 (20 July 2004). The court ruled, relying on G.S. 7B-3201(b) and distinguishing Rule 609(d), that the state was properly permitted in an adjudicatory hearing in a delinquency case to impeach the testifying juvenile with his prior juvenile adjudications of delinquency. [Author's note: Note that Rule 609(d) bars impeachment of a defendant in superior or district court with juvenile adjudications.]

## Criminal Law and Procedure

**(1) When Defendant Is Convicted in District Court and Placed on Probation, Probation Is Not Stayed If Defendant Appeals for Trial De Novo in Superior Court**
**(2) Probation Violation Report Was Not Timely Filed Within Period of Probation That Began When Defendant Was Convicted in District Court**

**State v. Smith,** ___ N.C. App. ___, 598 S.E.2d 408 (6 July 2004). **(Author's note: The North Carolina Supreme Court has granted the state's petition to review these rulings and the state's petition for a writ of supersedeas, which stays the rulings until the court issues its ruling.)** On December 6, 2000, the defendant was convicted of assault on a female in district court and placed on supervised probation for twelve months. The defendant appealed for trial de novo in superior court and was later allowed to withdraw the appeal. The case was remanded to district court for immediate execution of the judgment. On January 24, 2002, the defendant's probation officer filed a probation violation report. (1) The court ruled that when a defendant appeals for trial de novo in superior court, G.S. 15A-1431(f) does not stay probation. (The court noted that probation is stayed under G.S. 15A-1451 when a defendant appeals from superior court to the appellate division.) Thus, the defendant's twelve-month probationary sentence began on December 6, 2000. (2) The court ruled that the probation violation report was not timely filed under G.S. 15A-1344(f)(1) within twelve months of December 6, 2000. Thus, the alleged probation violation must be dismissed.

**Court Rules Short-Form Murder Indictment under G.S. 15-144 Is Constitutional and Will Support Conviction for Attempted Murder; However, Indictment in This Case Was Not Correct Because Crime of Attempted Common Law Murder Is Not Recognized by General Statutes**

**State v. Jones,** ___ N.C. App. ___, 598 S.E.2d 694 (20 July 2004). **(Author's note: The North Carolina Supreme Court has granted the state's petition to review this ruling and the state's petition for a writ of supersedeas, which stays the ruling until the court issues its ruling.)** The court's opinion stated that the defendant was charged with and convicted of "attempted common law murder." The court

noted that the North Carolina Supreme Court has upheld the constitutionality of the short-form murder indictment under G.S. 15-144. The court then stated: "Because the indictment is constitutional and sufficient for murder, it will support a conviction for attempted murder. However, although the short form indictment is constitutional, this indictment is not correct because the crime of attempted common law murder is not recognized by our General Statutes."

[Author's note: The court's opinion does not set out the indictment in this case. The record on appeal shows the following: The indictment's caption states: "Attempted Murder—Common Law." The pertinent words charging the offense were: "did unlawfully, willfully, and feloniously and of malice aforethought attempt to kill and murder (victim's name)."

G.S. 14-17 divides common law murder into two degrees, first-degree murder and second-degree murder. For a history of the statutes governing the crime of murder, see State v. Hunt, 357 N.C. 257, 582 S.E.2d 593 (2003). There is no crime denominated by statute as "common law murder" or "attempted common law murder." Attempted first-degree murder is a recognized crime, although attempted second-degree murder is not. State v. Coble, 351 N.C. 448, 527 S.E.2d 45 (2000). Attempted first-degree murder is punishable as a Class B2 felony under G.S. 14-2.5.

The language in this indictment was sufficient to allege the offense of attempted first-degree murder. It used the language under G.S. 15-144 that is sufficient to charge first-degree murder and added the words "attempt to." Even if the indictment had not alleged "attempt to," G.S. 15-170 ("Upon the trial of any indictment the prisoner may be convicted of the crime charged . . . or of an attempt to commit the crime so charged . . .") would have authorized the submission of attempted first-degree murder to the jury.

Thus it appears that the court's ruling does not affect the validity of an indictment whose caption is "Attempted First-Degree Murder" or similar caption and alleges the words set out in G.S. 15-144. The court's ruling appears only to affect an indictment that uses the caption "Attempted Murder—Common Law" or a similar caption. The court's rationale appears to be that the statutory short-form language under G.S. 15-144 cannot support an indictment whose caption specifies a non-statutory offense such as "attempted common law murder" even though the words in the indictment properly allege and support the submission of attempted first-degree murder under G.S. 15-144 and G.S. 15-170.]

**Assault on a Female Is Not a Lesser-Included Offense of First-Degree Rape Under G.S. 14-27.2 When First-Degree Rape Indictment Used Exact Language of G.S. 14-27.2**

**State v. Hedgepeth,** ___ N.C. App. ___, 598 S.E.2d 202 (6 July 2004). The defendant was indicted for first-degree rape under G.S. 14-27.2. The indictment used the exact language of the statute in alleging the elements; it did not utilize the shortened language authorized for rape indictments under G.S. 15-144.1. The court noted that assault on a female is not a lesser offense of first-degree rape under the definitional test used to determine lesser offenses; State v. Herring, 322 N.C. 733, 370 S.E.2d 363 (1988). The court ruled that when the language of an indictment alleges each element of first-degree rape, then a trial judge has jurisdiction to instruct only on first-degree rape and its lesser-included offenses—and assault on a female is not a lesser-included offense. The court distinguished dicta in State v. Hatcher, 117 N.C. App. 78 (1994), but it indicated if the indictment had used the shortened language in G.S. 15-144.1, then assault on a female could be submitted based on the explicit provision in G.S. 15-144.1(a).

**Trial Judge Did Not Err in Not Dismissing Superseding Habitual Felon Indictment That Changed Allegations Involving Felony Convictions Set Out in Original Habitual Felon Indictment, When Superseding Indictment Was Brought After Defendant Had Been Arraigned on Substantive Felony Indictments and Original Habitual Felon Indictment, But Before Defendant's Trial on Substantive Felonies; Court Distinguishes State v. Little, 126 N.C. App. 262 (1997)**

**State v. Cogdell,** ___ N.C. App. ___, 599 S.E.2d 570 (20 July 2004). On January 14, 2002, the defendant was indicted for several felony offenses. On January 22, 2002, the defendant was indicted as an habitual

felon. The defendant was arraigned on these indictments on May 29, 2002. A superseding habitual felon indictment was issued on September 3, 2002, which changed the allegations involving the three felony convictions set out in the original habitual felon indictment. The defendant was arraigned on this indictment on September 6, 2002. The defendant's trial began on December 9, 2002. Distinguishing State v. Little, 126 N.C. App. 262, 484 S.E.2d 835 (1997), the court ruled that the trial judge did not err in not dismissing the superseding indictment. In *Little*, the state obtained an habitual felon indictment before the defendant pled to the substantive felonies. However, after obtaining convictions on those substantive felonies, the state obtained a superseding habitual felon indictment, deleting one of the felonies alleged in a prior habitual felon indictment and replacing it with another. The court in *Little* ruled that it was error to adjudicate and sentence the defendant on the superseding habitual felon indictment because the defendant was entitled to rely, when he entered his plea to the substantive felonies, on the allegations in the habitual felon indictment in evaluating the state's likelihood of success on the habitual felon indictment. The court distinguished *Little* on the following grounds: (1) unlike the present case, the superseding habitual felon indictment in *Little* occurred *after* (court's emphasis) the defendant was convicted of the substantive felonies; (2) there was no indication in *Little* that the pleas to the substantive felonies actually occurred at an arraignment—the court stated that the critical event that forecloses substantive changes in an habitual felon indictment is the plea entered before the actual trial, not at an earlier arraignment; (3) the court stated that the most important distinction between this case and *Little* involves notice; although the superseding habitual felon indictment in this case was brought after the defendant's first arraignment, it was brought three months before the defendant's trial and thus the defendant received sufficient notice that he was being prosecuted as a habitual felon for the three felony convictions alleged in the superseding indictment.

**(1) Trial Judge Erred at Defendant's First Trial in Granting Defendant's Motion to Dismiss First-Degree Arson Indictment When Indictment Alleged "Dwelling House" and Evidence Showed That Garage Was Burned**

**(2) When Trial Judge Incorrectly Granted Defendant's Motion to Dismiss First-Degree Arson Indictment Because of Fatal Variance Between Indictment and Evidence at First Trial, Double Jeopardy Barred Second Trial Based on New Indictment Alleging Burning of Same Building Under G.S. 14-62**

**State v. Teeter,** ___ N.C. App. ___, 599 S.E.2d 435 (3 August 2004). The defendant was indicted for first-degree arson based on an indictment alleging he burned the "dwelling house" of the victims while they were in the dwelling house. The evidence at trial showed that the defendant burned a garage that was approximately ten to fifteen yards from the house while the victims were in the house. The garage contained household items, including a freezer filled with food. At the close of the state's evidence, the defendant moved for a dismissal on the ground that there was a fatal variance between the allegation of "dwelling house" in the indictment and the evidence that the garage was burned. The judge granted a dismissal of the first-degree arson on that ground. The defendant was later re-indicted and convicted under G.S. 14-62 (burning uninhabited building) for burning the same garage. The case before the court of appeals was the defendant's appeal of his conviction under G.S. 14-62. (1) The court ruled that the trial judge at the first trial had erred in granting the defendant's motion to dismiss the first-degree arson charge. Under the common law definition of arson, a defendant may be properly charged with arson when he or she burns an outbuilding within the curtilage of an inhabited house. The indictment was not invalid because it did not specify the particular outbuilding within the curtilage that the defendant burned. The absence of a specific reference to the garage neither impaired the defendant's ability to present a defense nor exposed him to the possibility of successive prosecutions. (2) The court ruled, relying on State v. Ballard, 280 N.C. 479, 186 S.E.2d 372 (1972) (court ruled that trial judge at first armed robbery erred in granting defendant's motion to dismiss because of fatal variance and second armed robbery trial was barred because same evidence was used at second armed robbery trial), that when trial judge incorrectly granted the defendant's motion to dismiss the first-degree arson indictment because of fatal variance

between indictment and evidence at trial, double jeopardy barred a retrial based on a new indictment alleging burning of same building under G.S. 14-62 and when the state's evidence at the retrial was the same as the first trial.

[Author's note: The North Carolina Supreme Court ruling in *Ballard*, relied on by the court of appeals in this case, is now questionable based on United States Supreme Court cases decided after *Ballard*, such as Lee v. United States, 432 U.S. 23 (1977) (dismissal at defendant's request of indictment for defect in alleging crime after double jeopardy had attached did not bar retrial of crime), and United States v. Scott, 437 U.S. 82 (1978) [no double jeopardy bar to government's appeal (and thus retrial) when defendant's motion resulted in termination of his trial on a ground unrelated to factual guilt or innocence]. See also United States v. Akpi, 26 F.3d 24 (4th Cir. 1994); United States v. Thurston, 362 F.3d 1319 (11th Cir. 2004); United States v. Davis, 873 F.2d 900 (6th Cir. 1989). In addition, the crime under G.S. 14-62 is not the "same" offense as first-degree arson under Blockburger v. United States, 284 U.S. 299 (1932), and thus it does not appear that double jeopardy barred the second trial. See also State v. Johnson, 9 N.C. App. 253, 175 S.E.2d 711 (1970) (double jeopardy did not bar second trial after judge at first trial had dismissed charge for a fatal variance; different offense was charged at second trial); State v. Stinson, 263 N.C. 283, 139 S.E.2d 558 (1965) (similar ruling).]

**(1) BB Gun Was Dangerous Weapon to Support Armed Robbery Convictions**
**(2) Evidence Supported Convictions of Kidnapping in Addition to Armed Robbery**

**State v. Hall,** ___ N.C. App. ___, 599 S.E.2d 104 (3 August 2004). The defendant was convicted of two counts of armed robbery and two counts of second-degree kidnapping involving robberies of the same convenience store on June 2, 2002, and June 16, 2002. (1) A BB gun was used in both armed robberies. The court ruled, relying on State v. Westall, 116 N.C. App. 534, 449 S.E.2d 24 (1994), that the evidence was sufficient to prove that the BB gun was a dangerous weapon. An officer testified, based on testing he performed on the gun, that it was capable of denting a quarter-inch piece of cedar plywood at distances of up to two feet. In one robbery, the defendant placed the BB gun directly into the backs of the store clerks. In the other robbery, the defendant pointed the gun directly at the victim's face at a distance of only six to eight inches. (2) The court ruled that the evidence supported convictions of second-degree kidnapping in addition to armed robbery because the defendant's restraint of the victims in both robberies were separate and apart from the restraint necessary to accomplish the robberies. In both robberies, the defendant restrained one employee to coerce another employee to give him the money. The defendant could have accomplished the robberies by directly approaching the employees with access to the money.

**(1) Evidence Supported Conviction of Kidnapping in Addition to Armed Robbery**
**(2) Victim Was Not Released in Safe Place Under First-Degree Kidnapping When Defendants Left Victim on Side of Interstate Highway**

**State v. Burrell,** ___ N.C. App. ___, 598 S.E.2d 246 (6 July 2004). The defendants were convicted of armed robbery and first-degree kidnapping. The defendants forced the victim at gunpoint into his car at a hotel parking lot and took personal property from him, and then drove him for two hours to search for ATMs to withdraw money. They then let him out of the car on an interstate highway and drove away in his car. (1) The court ruled the evidence supported the defendants' convictions of kidnapping in addition to armed robbery because (a) the robbery indictment only alleged the items that had been taken initially from the victim, so the robbery was complete before they took the victim to the ATMs, and (b) the victim was exposed to a greater danger during the two hours than inherent in the armed robbery itself. (2) The court ruled the victim was not released in a safe place under first-degree kidnapping when the defendants left the victim on the side of the interstate highway and drove away in his car.

**Rape Victim Who Was Fifteen Years, Eleven Months of Age at Time of Offense Was "15 Years Old" Under G.S. 14-27.7A (Statutory Rape or Sexual Offense of Person Who Is 13, 14, or 15 Years Old)**

**State v. Roberts,** ___ N.C. App. ___, ___ S.E.2d ___ (19 October 2004). The court ruled, distinguishing State v. McGaha, 306 N.C. 699, 295 S.E.2d 449 (1982), that a rape victim who was fifteen years, eleven months of age at time of offense was "15 years old" under G.S. 14-27.7A (statutory rape or sexual offense of person who is 13, 14, or 15 years old).

**Evidence Was Sufficient to Support Convictions of Statutory Rape and Sex Offense with Thirteen Year Old When Each Indictment Alleged Sex Act Occurred in Monthly Periods and Victim Testified That Sex Acts Occurred Regularly Over Several Months**

**State v. Bingham,** ___ N.C. App. ___, 598 S.E.2d 686 (20 July 2004). The defendant was indicted for several counts of statutory rape and sex offense with a thirteen year old under G.S. 14-27.7A(a): (1) statutory rape between December 1, 2000, and January 31, 2001; (2) statutory rape between March 1, 2001, and April 30, 2001; (3) statutory sex offense between March 1, 2001, and April 30, 2001; (4) statutory rape between May 1, 2001, and June 30, 2001; and (5) statutory sex offense between May 1, 2001, and June 30, 2001. The victim testified that between November 13, 2000 (her thirteenth birthday), and August 2001, the defendant engaged in sexual activity with her 25 to 40 times, and activity occurred at least every other week. The activity included vaginal intercourse, fellatio, cunnilingus, and digital penetration of her vagina. She could not remember the exact dates on which the offenses occurred. The court ruled, relying on State v. Burton, 114 N.C. App. 610, 442 S.E.2d 384 (1994), that this testimony was sufficient to support the defendant's convictions for the charges alleged in the indictments. A child's uncertainty about the time of the offense affects only the weight to be given to the child's testimony. Judicial tolerance of variance between dates alleged and the dates proved is particularly applicable when, as in this case, the allegations concern instances of child sex abuse occurring *years before* (emphasis in court's opinion). Unless a defendant demonstrates that he was deprived of the opportunity to present an adequate defense due to a temporal variance, the policy of leniency governs.

**Trial Judge Erred in Not Submitting Misdemeanor Breaking or Entering as Lesser Offense of Felonious Breaking or Entering, But Did Not Err in Not Submitting Misdemeanor Larceny as Lesser Offense of Felony Larceny Committed Pursuant to a Breaking or Entering**

**State v. Friend,** ___ N.C. App. ___, 596 S.E.2d 275 (1 June 2004). The defendant was convicted of felonious breaking or entering a residence and felony larceny committed pursuant to the felonious breaking or entering. The defendant's evidence showed that he broke into the residence to sleep there. The court ruled that the trial judge erred in not submitting misdemeanor breaking or entering as a lesser offense of felonious breaking or entering. However, the court ruled that the trial judge did not err in not submitting misdemeanor larceny as lesser offense of felony larceny committed pursuant to the breaking or entering, because the evidence was uncontradicted that if a larceny occurred, it occurred pursuant to a breaking or entering. Larceny is a felony whether it is committed pursuant to a felony or misdemeanor breaking or entering—see G.S. 14-72(b)(2) and G.S. 14-54.

**(1) Store Employee Qualified as "Clerk" For Embezzlement Under G.S. 14-90**
**(2) Sufficient Evidence of Embezzlement Under G.S. 14-90 When Store Employee Engaged in "Underringing," "Free Bagging," and "Markdown Fraud"**

**State v. Robinson,** ___ N.C. App. ___, ___ S.E.2d ___ (19 October 2004). The defendant, a store employee selling merchandise (her title was "merchandise associate"), was convicted of embezzlement under G.S. 14-90. The evidence showed that the employee engaged in "underringing," free bagging," and

"markdown fraud," described by the court as follows. "Underringing" occurs when an employee receives merchandise from a customer for purchase, and the employee keys in a price on the cash register lower than the price stated on the price tag. "Free bagging" occurs when a customer presents multiple items for purchase at a cash register and the employee rings up fewer than all of the items, but places all of the items in a bag for the customer to take from the store. "Markdown fraud" occurs when an employee takes an item from the sales floor to a markdown machine, creates a price tag for the item that is lower than the true price of the item, and then purchases the item at the lower price. (1) The court ruled that the store employee qualified as a "clerk" for embezzlement under G.S. 14-90. A "merchandise associate" is the same as a "clerk." (2) The court ruled that there was sufficient evidence to support the defendant's conviction under G.S. 14-90 for the acts of "underringing," "free bagging," and "markdown fraud." Testimony also showed that all store employees, including the defendant, were entrusted with the store's merchandise.

**(1) Trial Judge's Jury Instruction in Trial of Assault on Handicapped Person Resulted in Fatal Variance with Indictment**
**(2) G.S. 14-32.1(e) Does Not Prohibit Convictions for Both Aggravated Assault on Handicapped Person and Armed Robbery**

**State v. Hines,** ___ N.C. App. ___, 600 S.E.2d 891 (7 September 2004). The defendant was convicted of aggravated assault on a handicapped person, armed robbery, and other offenses. (1) The court ruled that the trial judge's jury instruction on aggravated assault on a handicapped person resulted in a fatal variance with the indictment. The indictment alleged that the offense was committed with an unknown blunt force object causing trauma to the victim's head. The jury instruction included an intentionally striking to the head as well as assaulting the victim by pulling off in the car when part of the victim's body was in the car or near enough to be hit by the car as it pulled away. (2) The court ruled, distinguishing State v. Ezell, 159 N.C. App. 103, 582 S.E.2d 679 (2003), that the provision in G.S. 14-32.1(e) ("Unless his conduct is covered under some other provision of law providing greater punishment . . .") does not prohibit convictions for both aggravated assault on a handicapped person and armed robbery that occurred during the same transaction.

**Defendant Was Not Entitled to Defense of Accident When Gun Allegedly Accidentally Discharged While Defendant Was Engaged in Unlawful Conduct**

**State v. Gattis,** ___ N.C. App. ___, 601 S.E.2d 205 (7 September 2004). The defendant was convicted of first-degree murder for the death of his estranged wife, first-degree burglary for breaking into her apartment, and assault with a deadly weapon for shooting at another apartment occupant. The defendant contended that his gun discharged accidentally during a struggle with the murder victim. The court ruled, relying on State v. Riddick, 340 N.C. 338, 457 S.E.2d 728 (1995), that the defendant was not entitled to the defense of accident when the gun allegedly accidentally discharged while the defendant was engaged in unlawful conduct. The defendant unlawfully entered the murder victim's home with a loaded gun, threatened both the murder and assault victims, unlawfully fired the gun and reloaded it, and struck the murder victim in the head with the gun before the fatal bullet was fired.

**Court Reviews Jury Instructions and Issue of Unanimity of Verdict Involving Multiple Sex Offenses Involving Three Children of Defendant and Reverses Some Convictions and Upholds Other Convictions**

**State v. Lawrence,** ___ N.C. App. ___, 599 S.E.2d 87 (3 August 2004). The defendant was charged with multiple counts of second-degree rape, second-degree sexual offense, and indecent liberties against three of his children. The court reviewed the evidence concerning the charges, the jury instructions, and the issue of unanimity of verdict involving these offenses and reversed some convictions and upheld other

convictions. Because of the complexity of the evidence, charges, and jury instructions, the court's analysis and rulings will not be summarized here. See the court's extensive discussion of the issues in its opinion.

**Court Finds Sufficient Evidence to Support Three Convictions of Indecent Liberties with Child**

**State v. Fuller,** ___ N.C. App. ___, ___ S.E.2d ___ (19 October 2004). The court ruled that there was sufficient evidence to convict the defendant of three counts of indecent liberties: (1) the defendant lifted the child's shirt and kissed her breasts; (2) he kissed her private parts with his lips; and (3) he penetrated her vagina with his fingers. Following these acts, the defendant obtained a washcloth from the bathroom and "wiped something off the bed." The court stated that these acts were sufficient for the jury to infer that the defendant committed them "for the purpose of arousing or gratifying sexual desire."

**(1) After Trial Judge Rejected Plea Agreement, Defendant Could Not Accept It at Later Date Unless State Negotiated Another Plea Agreement With Defendant**
**(2) Indictment for Statutory Sexual Offense Committed Against Person 13, 14, or 15 Years Old Need Not Allege Specific Sex Act Allegedly Committed by Defendant**

**State v. Daniels,** ___ N.C. App. ___, 596 S.E.2d 256 (1 June 2004). (1) On June 26, 2002, the trial judge rejected the plea agreement between the state and defendant when the defendant said he was "not guilty" when the judge questioned him. On July 15, 2002, the defendant asserted that he wanted to plead guilty pursuant to the plea agreement that was before the judge on June 26, 2002. The court ruled that after the trial judge rejected the plea agreement, the defendant could not accept it at a later date unless the state negotiated another plea agreement with the defendant. The agreement rejected by the judge was null and void. In this case, the state had not negotiated another plea agreement with the defendant after June 26, 2002. (2) The court ruled, referring to G.S. 15-144.2(a), that an indictment for statutory sexual offense committed against person who is 13, 14, or 15 years old need not allege the specific sex act allegedly committed by the defendant.

**Weight of Marijuana Is Determined at Time of Seizure of Marijuana, Including Moisture Naturally Contained Within Marijuana—Weight Is Not Determined When Marijuana Is Later Usable or Suitable for Consumption**

**State v. Gonzales,** ___ N.C. App. ___, 596 S.E.2d 297 (1 June 2004). **(Author's note: The North Carolina Supreme Court has granted the defendant's petition to review this ruling.)** Officers seized 731 potted marijuana plants. Officers cut the plants where they joined the soil and bagged them. The freshly cut plants weighed a total of 25.5 pounds. When submitted to the SBI about two weeks later, they weighed 6.9 pounds. (Author's note: A drug trafficking offense requires a weight of more than 10 pounds of marijuana.) The court ruled, relying on state and federal case law, that the weight of marijuana is determined at the time of seizure of the marijuana, including moisture naturally contained within marijuana. The weight is not determined when the marijuana is usable or suitable for consumption. The court also noted that the defendant has the burden of showing that some of the weight of marijuana is attributable to parts of the plant (such as the mature stalk or sterile seeds) that is not included in the definition of marijuana under G.S. 90-87(16). The court indicated that the defendant also could show that excess water or extraneous debris contributed to the weight of the marijuana.

**(1) When State Drug Charges Were Brought After Federal Prosecution of Defendant Based on Same Acts as State Charges, Some State Drug Prosecutions Were Barred Under G.S. 90-97 While Other Prosecutions Were Not Barred**
**(2) Evidence Did Not Support Multiple Drug Conspiracy Convictions Because Only One Conspiracy Existed**

**State v. Brunson,** ___ N.C. App. ___, 599 S.E.2d 576 (3 August 2004). An undercover law enforcement officer made three separate purchases of cocaine from the defendant over a one month period; at least one other person was involved with the defendant. The defendant was charged in federal court with three counts of unlawful distribution of cocaine for the three transactions. He pled guilty in federal court on one count. The state then brought charges based on the same acts. The defendant was convicted of nine counts of trafficking cocaine and three counts of trafficking conspiracy. The court ruled that G.S. 90-97 (if state drug law is violation of federal law, conviction or acquittal under federal law for the "same act" is bar to state prosecution) barred the state prosecution of the nine counts of trafficking cocaine. The court rejected the state's argument that an elemental analysis of federal and state offenses should be used to determine whether the state prosecution is barred. The court instead focused on the underlying actions for which the defendant is prosecuted at the federal and state level. The court also ruled, however, that G.S. 90-97 did not bar the prosecution of the trafficking conspiracy charges because the defendant was not charged with conspiracy in federal court. (2) The court ruled, relying on State v. Griffin, 112 N.C. App. 838, 437 S.E.2d 390 (1993), and other cases, that the state's evidence did not support multiple drug conspiracy convictions because only one conspiracy existed. The three drug transactions involved the same principal participants engaging in virtually identical conduct for each transaction, and the same objective existed over a short interval of one month.

**(1) Trial Judge Did Not Err in Denying Defendant's Motion to Dismiss Indictment for Possession of Firearm by Convicted Felon Because Allegation of Disqualifying Felony Conviction Omitted Punishment for That Offense as Required by G.S. 14-415.1(c)**
**(2) Trial Judge Did Not Err in Declining to Instruct on Justification as Affirmative Defense to Possession of Firearm by Convicted Felon**

**State v. Boston,** ___ N.C. App. ___, 598 S.E.2d 163 (6 July 2004). (1) The court ruled, relying on State v. House, 295 N.C. 189, 244 S.E.2d 654 (1978), that the trial judge did not err in denying the defendant's motion to dismiss an indictment for possession of a firearm by a convicted felon because the allegation of the disqualifying felony conviction omitted the punishment for that offense, as required by G.S. 14-415.1(c). The allegation is not material and does not affect a substantial right. (2) The court ruled, relying on State v. Napier, 149 N.C. App. 462, 560 S.E.2d 867 (2002), that the trial judge did not err in declining to instruct on justification as an affirmative defense to possession of firearm by convicted felon. There was no evidence that the defendant was under an imminent threat of death or injury when he decided to possess a firearm.

**(1) Indictment Charging Registered Sex Offender With Failing to Notify Sheriff of Change of Address Was Not Required to Identify Date Defendant Had Moved or Defendant's New Address**
**(2) Felony Conviction That Triggered Requirement Defendant Register as Sex Offender Was Properly Used to Determine Defendant's Prior Record Level**

**State v. Harrison,** ___ N.C. App. ___, 598 S.E.2d 261 (6 July 2004). The defendant, a registered sex offender, was convicted under G.S. 14 208.11(a)(2) of failing to notify the registering sheriff of a change of address. (1) The court ruled that the indictment charging this offense was not required to identify the date the defendant moved or the defendant's new address. (2) The court ruled that the felony conviction

(second-degree rape) that triggered the requirement that the defendant register as a sex offender was properly used to determine the defendant's prior record level. It did not violate double jeopardy to do so.

**Defendant Convicted of First-Degree Kidnapping of Child Was Properly Ordered to Register as Sex Offender**

**State v. Sakobie,** ___ N.C. App. ___, 598 S.E.2d 615 (20 July 2004). The defendant was convicted of first-degree kidnapping. She stole a car with a five-year-old inside, drove him to several places over a period of hours, and then pushed him out of the car near a mobile home and drove away. The court, rejecting the defendant's constitutional and statutory arguments, ruled that the defendant was properly ordered to register as a sex offender. An offense against a minor under G.S. 14-208.6(1i) includes the kidnapping committed in this case.

**Aiding and Abetting Voluntary Manslaughter Is a Recognized Crime**

**State v. Shaw,** ___ N.C. App. ___, 596 S.E.2d 884 (15 June 2004). The court ruled, distinguishing State v. Coble, 351 N.C. 448, 527 S.E.2d 45 (2000) (attempted second-degree murder is not a recognized crime), that aiding and abetting voluntary manslaughter is a recognized crime.

**Trial Judge Erred in Common Law Robbery Trial in Failing to Submit Misdemeanor Larceny as Lesser-Included Offense**

**State v. Boston,** ___ N.C. App. ___, 600 S.E.2d 863 (17 August 2004). The defendant was convicted of common law robbery. The trial judge submitted common law robbery and larceny from the person to the jury, but declined to submit misdemeanor larceny. The defendant's evidence showed that he and the victim were in the same room of the victim's house, they were talking, and when the victim turned away the defendant took the victim's wallet from a table in the same room. In addition, the victim did not see the defendant take the wallet. The court ruled, relying on State v. Barnes, 345 N.C. 146, 478 S.E.2d 188 (1996), and State v. Lee, 88 N.C. App. 478, 363 S.E.2d 656 (1988), and distinguishing State v. Buckom, 328 N.C. 313, 401 S.E.2d 362 (1991), that the trial judge erred in not submitting misdemeanor larceny. The defendant's evidence showed that the wallet was not under the eye of, or the protection or control of, the victim when the it was taken.

**Trial Judge in Statutory Sexual Offense Case Erred in Conducting In Camera Review of County Department of Social Services File Concerning Alleged Victim by Failing to Disclose Materially Exculpatory Evidence to Defendant**

**State v. Johnson,** ___ N.C. App. ___, 599 S.E.2d 599 (17 August 2004). The defendant was convicted of first-degree statutory sexual offense. Before trial, the trial judge conducted an in camera review of county department of social services file concerning the alleged minor victim and provided a portion of the file to the defendant. The court examined the file and ruled that the trial judge erred in not providing other information in the file to the defendant because it contained materially exculpatory evidence: an alternative explanation for the abuse of the alleged victim. (See the court's opinion for a discussion of the evidence in the file.)

**(1) When Indictment Alleged Conjunctively Several Means By Which Crime Was Committed, There Was Not a Fatal Variance When State Offered Evidence Supporting Only One of the Alleged Means**
**(2) Separate Uses of Same Credit Card Were Separate Offenses under G.S. 14-113.9**
**(3) Three Separate Credit Card Purchases Supported Three Convictions of Obtaining Property by False Pretenses**
**(4) Trial Judge Did Not Err in Instructing Jury on Prima Facie Evidence Provision in G.S. 14-113.10**

**State v. Rawlins,** ___ N.C. App. ___, 601 S.E.2d 267 (7 September 2004). The defendant was convicted of three counts of financial transaction card theft and three counts of obtaining property by false pretenses. The defendant used credit cards of victim A and victim B to make three separate purchases at a Wal-Mart store on June 7, 2002. He made a purchase with victim A's credit card, then a purchase with victim B's credit card, and then a purchase with victim A's credit card. (1) The defendant argued on appeal that there was a fatal variance between the indictment and evidence at trial because the indictment alleged that the defendant possessed the three credit cards with the intent to use, sell, and transfer them, and the state did not prove that he did so with intent to transfer them. The court ruled, relying on State v. Gray, 292 N.C. 270, 233 S.E.2d 905 (1977), and State v. Williams, 210 N.C. 159, 185 S.E.2d 661 (1936), that there was not a fatal variance because the state is only required to prove one of the means to commit an offense when the various means of committing the offense are alleged conjunctively. (2) The court ruled that separate uses of the same credit card are separate offenses under G.S. 14-113.9 and upheld the defendant's two convictions for the two separate purchases with victim A's credit card. (3) The court ruled that the three separate purchases with the credit cards supported three convictions of obtaining property by false pretenses. (4) The court ruled that the trial judge did not err in instructing the jury on the meaning of the prima facie evidence provision in G.S. 14-113.10. (See the court's discussion of this issue in its opinion.)

**Trial Judge Erred in Not Submitting Defense of Entrapment to DWI Charge**

**State v. Redmon,** ___ N.C. App. ___, 596 S.E.2d 854 (1 June 2004). The court ruled that the trial judge erred in not submitting the defense of entrapment to a DWI charge. The court stated that the defendant's evidence, if believed, would tend to show that the officer induced the defendant to drive his truck and that the defendant was not predisposed to drive while impaired (see the detailed facts on inducement and predisposition set out in the court's opinion.)

**(1) Two DWI Convictions Consolidated for Judgment Count as Two Convictions in Prosecution of Habitual DWI**
**(2) Evidence Was Sufficient to Support Impaired Driving in Habitual DWI Prosecution**

**State v. Allen,** ___ N.C. App. ___, 596 S.E.2d 261 (1 June 2004). (1) The court ruled, distinguishing habitual felon law, that two DWI convictions consolidated for judgment count as two convictions in the prosecution of habitual DWI. (2) The court ruled that the following evidence was sufficient to support impaired driving in an habitual DWI prosecution: An officer, informed by a dispatcher that an impaired driver was driving an older model white Toyota pickup truck, saw a truck matching that description cross the centerline of a road. The officer stopped the vehicle. The officer noticed a very strong odor of alcohol emanating from the truck while he spoke with the defendant-driver. The defendant had difficulty getting out of the truck, was unsteady on his feet, and had to hold onto the side of the truck to walk. While the defendant was cooperative, he seemed sleepy, his speech was slurred, and he was difficult to understand. The officer did not ask the defendant to perform psychophysical tests because he believed the defendant was incapable of performing the tests without risk of physical harm from a potential fall. The officer

opined that the defendant was impaired. Also, the defendant refused to take the Intoxilyzer test, which the court noted as a significant fact.

**(1) Judge in Plenary Hearing for Criminal Contempt Erred When Failing to Find That Facts on Which Finding of Criminal Contempt Rested Were Established Beyond a Reasonable Doubt**
**(2) Alco-Sensor Test Result That Showed Criminal Defendant Was Impaired While in Courtroom Was Inadmissible at Criminal Contempt Hearing**

**State v. Ford,** ___ N.C. App. ___, 596 S.E.2d 846 (1 June 2004). The defendant was in district court awaiting trial for DWI. Evidence showed that the defendant had the odor of alcohol about her. At the request of the district court judge, an officer administered an Alco-Sensor test, and the reading was 0.08. This and other evidence resulted in the district court judge finding the defendant in direct criminal contempt. The defendant appealed to superior court, where a judge conducted a hearing and found the defendant had been in direct criminal contempt in district court, using the result of the Alco-Sensor test. The judge did not find that the facts supporting the finding of criminal contempt were established beyond a reasonable doubt. (1) The court ruled that a judge in a plenary hearing for criminal contempt errs when failing to find that the facts on which a finding of criminal contempt rested were established beyond a reasonable doubt. (2) The court ruled that the Alco-Sensor test result that showed that the criminal defendant was impaired while in the courtroom was inadmissible at a criminal contempt hearing under the provisions of G.S. 20-16.3(d), which specifies when a test result is admissible.

**Court Makes Several Rulings Concerning Defendant's Pretrial Right to Discovery of Information Relating to SBI Lab's Drug Analysis**

**State v. Fair,** ___ N.C. App. ___, 596 S.E.2d 871 (15 June 2004). The defendant sought pretrial discovery concerning the SBI lab's analysis of a substance as cocaine. The court ruled: (1) the trial judge erred under State v. Dunn, 154 N.C. App. 1, 571 S.E.2d 650 (2002), in not requiring the state to provide discovery of data collection procedures; (2) the trial judge did not err in not requiring the state to provide the defendant with information concerning peer review of the testing procedure, whether the procedure had been submitted to the scrutiny of the scientific community, or is generally accepted in the scientific community, and (3) the trial judge did not err in not requiring the state to produce citations to empirical studies supporting the lab expert's opinion and citations to articles in scientific treatises or journals supporting the opinion.

**Superior Court Had Jurisdiction Over Felony Even Though It Had Not Been Transferred from Juvenile Court to Superior Court Under G.S. 7B-2200, Because It Was Transactionally Related Under G.S. 7B-2203(c) to Felony That Had Been Transferred from Juvenile Court to Superior Court**

**State v. Jackson,** ___ N.C. App. ___, 600 S.E.2d 16 (17 August 2004). A fifteen year old juvenile was involved with others in committing an attempted armed robbery and murder. Two juvenile petitions, one alleging first-degree murder and the other alleging attempted armed robbery, were filed in juvenile court against him. The juvenile court judge found probable cause and ordered that these offenses be transferred to superior court for trial as an adult. The juvenile was then indicted for first-degree murder, attempted armed robbery, and conspiracy to commit armed robbery. He was convicted in superior court of all three offenses. The court ruled that the superior court had jurisdiction over the felony of conspiracy to commit armed robbery even though this offense was not transferred from juvenile court to superior court under G.S. 7B-2200 (setting out probable cause hearing and transfer to superior court), because it was transactionally related under G.S. 7B-2203(c) to the felony of attempted armed robbery that had been transferred from juvenile court to superior court.

**Superior Court Judge Has Authority to Set Conditions of Release Pending Defendant's Appeal to Court of Appeals of Conviction in Which Defendant Received Probationary Sentence**

**State v. Howell,** ___ N.C. App. ___, ___ S.E.2d ___ (2 November 2004). The court ruled that a superior court judge has the authority to set conditions of release pending the defendant's appeal to the court of appeals of a conviction in which the defendant received a probationary sentence. The court rejected the defendant's argument that because G.S. 15A-1451(a)(4) stays his probationary sentence pending appeal and thus he is not in custody, a superior court judge has no authority to set conditions of release.

**Trial Judge Did Not Err in Denying Indigent Defendant Funds to Hire Accident Reconstruction Expert for Vehicular Homicide Trial**

**State v. Speight,** ___ N.C. App. ___, 602 S.E.2d 4 (7 September 2004). The court ruled that the trial judge did not err in denying the indigent defendant funds to hire an accident reconstruction expert for a vehicular homicide trial. (See the court's analysis in its opinion.)

**(1) Double Jeopardy Did Not Bar District Attorney's Civil Nuisance Action under Chapter 19 of General Statutes Based on Defendants' Prostitution Business After Defendants Had Previously Been Convicted of Prostitution Offenses**
**(2) Trial Judge Erred in Entering Summary Judgment for Plaintiff District Attorney on Issue of Damages**

**State ex rel. Albright v. Arellano,** ___ N.C. App. ___, 599 S.E.2d 415 (3 August 2004). (1) The court ruled, based on Hudson v. United States, 522 U.S. 93 (1997), that double jeopardy did not bar a district attorney's civil nuisance action under Chapter 19 of General Statutes based on the defendants' prostitution business after the defendants had been previously convicted of prostitution offenses. (2) The court ruled that the trial judge erred in entering summary judgment for the plaintiff (district attorney) on the issue of damages. See the court's discussion of the facts involving this issue.

## Arrest, Search, and Confession Issues

**Officers Had Reasonable Suspicion to Make Investigative Stop of Vehicle**

**State v. Blackstock,** ___ N.C. App. ___, 598 S.E.2d 412 (6 July 2004). The court ruled, citing State v. Fox, 58 N.C. App. 692, 294 S.E.2d 410 (1982), *affirmed per curiam*, 307 N.C. 460, 298 S.E.2d 388 (1983), State v. Tillett, 50 N.C. App. 520, 274 S.E.2d 361 (1981), and other cases, that officers had reasonable suspicion to make an investigative stop of a vehicle. The court noted that two people (one of whom was the defendant) were observed loitering at a closed shopping center shortly before midnight wearing dark clothing in an area targeted by law enforcement officers as a high crime area. No other vehicles were in the shopping center parking lot. When a vehicle did appear, which the two people may have recognized as a law enforcement vehicle, the men abruptly and hurriedly returned to their vehicle, which was parked out of general public view, and departed. Once in the vehicle, the passenger turned and looked behind as if trying to determine the identity of the officers following them. The court concluded that these cumulative factors, together with the other detailed findings by the trial judge, adequately supported the officers' reasonable belief that the two people were involved in criminal activity.

**Officer Had Probable Cause to Make Investigative Stop of Vehicle for Speeding, Readily Observed Traffic Violation**

**State v. Barnhill,** ___ N.C. App. ___, 601 S.E.2d 215 (7 September 2004). The trial judge granted the defendant's motion to suppress evidence in a DWI and speeding trial because an officer did not have

reasonable suspicion to make an investigative stop of a vehicle for speeding. The state appealed the ruling. The court, relying on State v. Wilson, 155 N.C. App. 89, 574 S.E.2d 93 (2002), noted that the standard for an investigative stop of a vehicle for a readily observed traffic violation, such as speeding, is probable cause, not reasonable suspicion. [Author's note: For a comment on *State v. Wilson*, see Robert L. Farb, *Arrest, Search, and Investigation in North Carolina*, p. 52, n. 103 (3d. ed. 2003).] The court then ruled that the officer had probable cause to stop the defendant's vehicle for speeding. The court rejected, as contrary to the rules of evidence, the trial judge's ruling that an officer must articulate objective criteria to corroborate his opinion of the vehicle's speed. The court stated that an officer's opinion may be based on personal observation. Also, the court stated that an officer need not have specialized training to be able to visually estimate a vehicle's speed. The court then examined the facts in this case and upheld the officer's stop of the vehicle for speeding: the officer had an unobstructed view of the vehicle as it traveled on a street, and his personal observation of its speed, coupled with the sound of the engine racing and the bouncing of the car as it passed through an intersection, established probable cause to believe that the defendant was exceeding a speed greater than was reasonable and prudent under the existing conditions in violation of G.S. 20-141(a).

**(1) Officer's Statement Was Admissible At Suppression Hearing Under Rule 801(d)(D) (Admission by Party-Opponent)**
**(2) Officer Did Not Have Probable Cause to Make Investigative Stop of Vehicle for Readily Observed Traffic Violation, a Seatbelt Violation**

**State v. Villeda,** ___ N.C. App. ___, 599 S.E.2d 62 (20 July 2004). An officer stopped a vehicle driven by an Hispanic male for a seatbelt violation. He was later arrested for DWI, convicted in district court, and appealed for trial de novo in superior court. The defendant moved to suppress evidence seized as a result of the traffic stop. A suppression hearing was conducted, and the trial judge granted the defendant's motion to suppress evidence related to the traffic stop and dismissed the DWI charge. (1) At the suppression hearing, the defendant presented testimony of three attorneys who had represented defendants in other cases involving this officer to show that the officer had stopped Hispanic males based on impermissible ethnic bias. The trial judge admitted their out-of-court conversations with the officer. The state argued on appeal that their testimony concerning the officer's statements was inadmissible hearsay. The court ruled, relying on cases from other jurisdictions, that the officer's statements were admissible under Rule 801(d)(D) (statement offered against a party and is made by agent or servant concerning a matter within the scope of agency or employment and during existence of relationship). [Author's note: Rule 104(a) provides, in pertinent part, that preliminary questions concerning the admissibility of evidence shall be determined by the court, and in making its determination the court is not bound by the rules of evidence except those with respect to privileges. Thus hearsay is admissible at suppression hearings. See Robert L. Farb, *Arrest, Search, and Investigation in North Carolina*, pp. 21, 26, 83 (3d. ed. 2003).] (2) The court ruled, citing State v. Wilson, 155 N.C. App. 89, 574 S.E.2d 93 (2002), and other cases, that an officer must have probable cause to make an investigative stop of a vehicle for readily observed traffic violations, such as a seatbelt violation. The court ruled that the officer did not have probable cause to stop the defendant's vehicle for a seatbelt violation. Evidence showed that the officer could not see inside vehicles driving in front of him at night on the stretch of road on which the defendant was stopped, and thus supported the trial judge's finding that the allegation that the defendant was not wearing a seat belt was incredible. [Author's note: For a comment on *State v. Wilson*, see Robert L. Farb, *Arrest, Search, and Investigation in North Carolina*, p. 52, n. 103 (3d. ed. 2003).]

**Officers Did Not Seize Defendant Until They Detained Him After High Speed Vehicle Chase**

**State v. Leach,** ___ N.C. App. ___, ___ S.E.2d ___ (2 November 2004). An informant advised law enforcement officers that he was going to make a drug purchase from the defendant at a specific location. When the defendant arrived there in his vehicle, the officers surrounded it. The defendant immediately

backed away and led the officers on a high speed chase for nearly thirty miles. The court ruled, relying on California v. Hodari D., 499 U.S. 621 (1991) (person is not seized under Fourth Amendment until he or she submits to an officer's show of authority or physical force is applied by an officer), that the defendant was not seized under the Fourth Amendment until the officers physically restrained him after the chase. Thus, the defendant's abandonment of cocaine during the chase was not the fruit of a seizure.

**Defendant's Motion to Suppress Made During Trial Was Timely Filed**

**State v. Speight,** ___ N.C. App. ___, 602 S.E.2d 4 (7 September 2004). The defendant filed a motion to suppress during trial, alleging that evidence was improperly seized as a result of a consent search. The court ruled, relying on State v. Fisher, 321 N.C. 19, 361 S.E.2d 551 (1987), that the motion was timely filed during trial because the state failed to give proper notice under G.S. 15A-975(b) (state must notify defense counsel twenty working days before trial of intention to use certain evidence) that would have otherwise required the motion to be made before trial.

**Jail Personnel's Seizure and Reading of Letters That Were Outgoing Mail to Non-Attorney Did Not Violate Fourth Amendment, and Letters to Wife Were Not Inadmissible Under Marital Communications Privilege**

**State v. Fuller,** ___ N.C. App. ___, ___ S.E.2d ___ (19 October 2004). Jail personnel seized and read the defendant's letters that were not marked "legal," were given to them to be mailed with the outgoing mail, and were not addressed to an attorney. The court ruled, relying on State v. Wiley, 355 N.C. 592, 565 S.E.2d 22 (2002), that the defendant did not have a reasonable expectation of privacy in the letters and his Fourth Amendment rights were not violated. The court also ruled, relying on State v. Wallace, 162 N.C. 623, 78 S.E. 1 (1913), that these letters to his wife were not inadmissible under the marital communications privilege when a third party—jail personnel lawfully having them in their possession and authorized to read them—was effectively a party to the communication.

**Physical Evidence Found As Result of Non-Coerced Statement Obtained from Defendant After *Miranda* Violation Was Admissible**

**State v. Goodman,** ___ N.C. App. ___, 600 S.E.2d 28 (17 August 2004). The defendant, after waiving his *Miranda* rights, talked to officers but later asserted his right to counsel. Five days later, officers went to the jail and told the defendant that they were not going to question him about the murder, but that they had information that he had killed someone and might know where the body was. The defendant made some incriminating statements and took the officers to the body. The trial judge ordered the statements suppressed based on the officers' *Miranda* violation. [Author's note: See the discussion of Arizona v. Roberson, 486 U.S. 675 (1988), on p. 205 of Robert L. Farb, *Arrest, Search, and Investigation in North Carolina* (3d. ed. 2003).] However, the trial judge did not suppress the physical evidence, the body and items found near the body, that had been obtained as a result of the *Miranda* violation. The court ruled, relying on State v. May, 334 N.C. 609, 434 S.E.2d 180 (1993), and United States v. Patane, 124 S. Ct. 2620 (2004), that the physical evidence found as result of the non-coerced statement obtained from the defendant after the *Miranda* violation was admissible, and upheld the trial judge's ruling on that ground.

**When In-Custody Juvenile Volunteered Statements to Officers After Attending Court Hearing, Officer's Response and Request for Clarification Were Not Interrogation Under *Miranda* and Also Did Not Violate His Sixth Amendment Right to Counsel**

**State v. Jackson,** ___ N.C. App. ___, 600 S.E.2d 16 (17 August 2004). The fifteen year old juvenile-defendant was charge with felonies. Two officers were with him during a juvenile court hearing. After the hearing, the defendant was being talkative. When the defendant saw a cap that had been introduced into

evidence, he spontaneously stated that he knew where the cap came from. One of the officers responded, "so do I." The defendant then talked about a robbery. The officer never initiated a conversation at any point other than to ask him sometimes for clarification. The court ruled that the officer's response and request for clarification were not interrogation under *Miranda* and also did not violate his Sixth Amendment right to counsel.

## Sentencing

### Court Remands Defendant's Punishment in Aggravated Range for Resentencing Under *Blakely v. Washington*

**State v. Allen,** ___ N.C. App. ___, 601 S.E.2d 299 (7 September 2004). **(Author's note: The North Carolina Supreme Court has granted the state's petition to review this ruling and the state's petition for a writ of supersedeas, which stays the ruling until the court issues its ruling.)** The defendant was convicted of felonious child abuse inflicting serious bodily injury. The trial judge found as a aggravating factor that the offense was especially, heinous, atrocious, and cruel, and sentenced the defendant in the aggravated range. The court ruled that the reasoning of *Blakely v. Washington*, 124 S. Ct. 2531 (2004) (other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be presented to jury and proved beyond a reasonable doubt; "statutory maximum" is maximum sentence judge may impose solely based on facts reflected in jury verdict or admitted by defendant), applies to the sentence imposed in this case. The court remanded the case to the trial court for resentencing consistent with the *Blakely* ruling. The court, relying on State v. Ahearn, 307 N.C. 584, 300 S.E.2d 689 (1983), rejected the state's argument that the court should determine whether the constitutional error in sentencing the defendant was harmless beyond a reasonable doubt. [Author's note: For an analysis of the *Blakely* ruling, see "*Blakely v. Washington* and North Carolina's Sentencing Laws," at http://ncinfo.iog.unc.edu/programs/crimlaw/faculty.htm.]

*See also* State v. Speight, ___ N.C. App. ___, 602 S.E.2d 4 (7 September 2004) **(Author's note: the North Carolina Supreme Court has granted the state's petition to review this ruling and the state's petition for a writ of supersedeas, which stays the ruling until the court issues its ruling.)** [court remands for resentencing under *Blakely* the defendant's sentences for involuntary manslaughter in the aggravated range and a DWI sentence in Level Two, with a finding of the "serious injury" grossly aggravating factor under G.S. 20-179(c)(3) and a non-statutory aggravating factor of using a motor vehicle in the commission of a felony leading to the death of two people—the court rejected the state's argument that the court should determine whether the constitutional error in sentencing the defendant was harmless beyond a reasonable doubt (Author's note: some of the information about the DWI sentence comes from the record on appeal in this case)].

### Defendant's Guilty Plea to Assault on Female Resulting in PJC Is Conviction Under Structured Sentencing Act

**State v. Canellas,** ___ N.C. App. ___, 596 S.E.2d 889 (15 June 2004). The court ruled, relying on State v. Hatcher, 136 N.C. App. 524, 524 S.E.2d 815 (2000), that the defendant's guilty plea to assault on a female that resulted in a PJC is a conviction under the Structured Sentencing Act. Thus the trial judge did not err in using the PJC as a conviction in determining the defendant's prior record level.

### When Multiple Offenses Are Consolidated for Judgment and Each Offense Is Equally the Highest Classified Offense, Consolidated Judgment May Be Aggravated by Any Factor That Is Element of One, But Not All, Offenses

**State v. Harrison,** ___ N.C. App. ___, 596 S.E.2d 834 (1 June 2004). The defendant pled guilty to multiple felonies, all of which were punished as Class C felonies because the defendant was an habitual

felon. All the offenses were consolidated for judgment, and the sentencing judge found two aggravating factors and sentenced him in the aggravated range. The defendant argued that these factors constituted elements of the offenses to which the defendant pled guilty, which is prohibited by G.S. 15A-1340.16(d). The court ruled, distinguishing State v. Tucker, 357 N.C. 633, 588 S.E.2d 853 (2003), that when multiple offenses are consolidated for judgment and each offense is equally the highest classified offense, a consolidated judgment may be aggravated by any factor that is element of one, but not all, offenses.