Unanimity of Jury Verdict in Criminal Cases

- Constitution of North Carolina, Article I, Sec. 24

  Sec. 24. Right of jury trial in criminal cases.

  No person shall be convicted of any crime but by the unanimous verdict of a jury in open court . . . .

  G.S. 15A-1237(b): Jury verdict must be unanimous

Unanimity of Jury Verdict in Criminal Cases

United States Constitution

- Unanimity of twelve-person jury is not always required in state prosecutions
  - Johnson v. Louisiana, 406 U.S. 356 (1972) (9-3 verdict upheld in non-capital case)
  - Apodaca v. Oregon, 406 U.S. 404 (1972) (10-2 verdict upheld in non-capital case)
- Unanimity is not required on which of two bases supports first-degree murder verdict
  - Schad v. Arizona, 501 U.S. 624 (1991)
- Unanimity of six-person jury for nonpetty offense is required; Burch v. Louisiana, 441 U.S. 130 (1979)

State v. Hartness, 326 N.C. 561 (1990)

- Opinion focused on one indecent liberties charge
- Defendant
  - (1) touched boy's penis with defendant's hands and mouth, and
  - (2) induced boy to touch defendant's penis with boy's hands and mouth
- Trial judge instructed jury on what constitutes indecent liberty, describing both acts
- Ruling: No violation of right to jury unanimity
  - Crime of indecent liberties is single offense that may be proved by any one of a number of acts

State v. Hartness, 326 N.C. 561 (1990)

- Court distinguished State v. Diaz, 317 N.C. 545 (1986)
  - Trafficking by possession, sale, delivery, manufacture, or transportation are separate offenses
  - Improper jury instruction: guilty verdict permitted if jury finds that defendant possessed or transported marijuana

State v. Hartness, 326 N.C. 561 (1990)

- Court reinstated its ruling in State v. Foust, 311 N.C. 351 (1984)
  - First-degree sexual offense jury instruction was not error
    - Guilty verdict permitted if defendant engaged in sexual act by committing fellatio or anal intercourse

State v. Foust

- Court's ruling:
  - Jury instructions, when read as a whole
  - Required "not guilty" verdict
  - If all twelve jurors were not satisfied beyond reasonable doubt
  - Defendant participated in either fellatio or anal intercourse, or both
- Court: better practice to submit separate issues of each unlawful sexual act if more than one act exists

State v. Hartness, 326 N.C. 561 (1990)

- Court relied on two other criminal cases
  - State v. Creason, 313 N.C. 122 (1985)
    - Possession of LSD with intent to sell or deliver is one offense
  - State v. Belton, 318 N.C. 141 (1986)
    - First-degree rape and sexual offense
      - Defendant employed deadly weapon or was aider and abettor (two different acts that proved one offense)

State v. Lyons, 330 N.C. 298 (1991)

- Malicious assault trial
  - Indictment alleged malicious assault was committed on A and B
  - Jury instruction: state must prove that defendant committed assault on A *and/or* B
- Ruling: jury instruction was erroneous, based on State v. Diaz
  - Two offenses, assault on A and assault on B
  - Violated defendant's right to unanimous verdict

State v. Lyons, 330 N.C. 298 (1991)

- Court notes that submission of jury instruction in disjunctive will not always render verdict fatally ambiguous
- Examination of verdict, the indictment, jury instructions, and evidence may remove any ambiguity created by indictment
  - Court noted, as an example, State v. Foust
- G.S. 15A-924(b): count in indictment may not allege more than one offense
  - Defendant by motion may require state to elect single offense to prosecute

State v. Wiggins, 161 N.C. App. 583 (2003)

- Five identical indictments charged statutory rapes, all committed between same specified time period
- Two identical indictments charged statutory sexual offense, all committed between same specified time period
- Child victim testified to four specific incidents of statutory rape
- She also testified that defendant had sexual intercourse with her five or more times a week during a two-year period (which occurred within time period alleged in indictments)

State v. Wiggins, 161 N.C. App. 583 (2003)

- Victim testified to only two incidents qualifying as statutory sexual offense
- Trial judge instructed jury on seven offenses, differentiating each instruction by applicable case number found on indictments
- Verdict sheets identified the seven offenses only by felony charged and their respective case numbers
- Defendant was convicted of all seven charges
- Court stated:
  - Verdict sheets did not lack required specificity needed for unanimous verdict if they could be properly understood by jury based on evidence presented at trial

State v. Wiggins, 161 N.C. App. 583 (2003)

Summary of case

- Two incidents of sexual offense and two convictions
- Five convictions of statutory rape based on testimony of four specific incidents and multiple other nonspecific incidents
- Ruling: Seven charges and seven guilty verdicts, no violation of right to unanimous verdict

State v. Markeith Lawrence, 360 N.C. 368 (7 April 2006)

- Case involved convictions of indecent liberties and statutory rapes
- Defendant charged in three identical indecent liberties indictments, including identical time period
- Victim testified to three specific acts that constituted indecent liberties
  - But N.C. Court of Appeals in its opinion suggested that jury may also have considered a fourth act of indecent liberties

State v. Markeith Lawrence, 360 N.C. 368 (7 April 2006)

- Ruling: No violation of defendant's right to unanimous verdict
- Under *Hartness* and *Lyons*, defendant may be unanimously convicted of indecent liberties even if
  - (1) jurors considered greater number of incidents of immoral or indecent behavior than number of charges; and
  - (2) indictments lacked specific details to identify specific incidents

State v. Markeith Lawrence, 360 N.C. 368 (7 April 2006)

- Defendant charged in five identical short-form indictments with statutory rape, including identical time periods
- No specific details in indictments to link charged statutory rapes to specific acts
- Victim testified she had sexual intercourse with defendant thirty-two separate times, but testified to only five specific instances
- Ruling: right to unanimous verdict was not violated

State v. Markeith Lawrence, 360 N.C. 368 (7 April 2006)

- Court found *Wiggins* reasoning to be persuasive
- Court noted that this case was clearer than *Wiggins* because five charges and testimony about five specific incidents
- Court noted:
  - (1) defendant did not object at trial on unanimity issue
  - (2) jury was instructed on all issues, including unanimity
  - (3) separate verdict sheets were submitted to jury for each charge

State v. Markeith Lawrence, 360 N.C. 368 (7 April 2006)

- (4) jury reached verdicts on all counts in less than one and one-half hours
- (5) record reflected no confusion or questions about jurors' duty
- (6) jury poll was conducted; verdicts individually affirmed by jurors

State v. Gary Lawrence, 360 N.C. 393 (7 April 2006)

- Supreme Court, per curiam and without an opinion, reversed the decision of Court of Appeals
  - Concerning the seven convictions of second-degree sexual offense that had been reversed by Court of Appeals
  - For reasons stated in *State v. Markeith Lawrence*
- Effect was to uphold these seven convictions
- Court stated that the portion of Court of Appeals opinion finding no error in the other nine convictions remained undisturbed

State v. Gary Lawrence, 165 N.C. App. 548 (2004)

- Court of Appeals opinion
- Defendant convicted at trial of 16 sex offenses involving three of his children: C.L., G.L., and S.L.
  - Four counts of second-degree rape
  - Ten counts of second-degree sexual offense
  - Two counts of indecent liberties
- Court of Appeals reversed seven of the ten counts of second-degree sexual offense
- Court of Appeals upheld the other convictions

State v. Gary Lawrence, 165 N.C. App. 548 (2004)

- Court of Appeals in *Gary Lawrence* interpreted *State v. Wiggins* as permitting one conviction of statutory rape resting on generic testimony
- See later case of State v. Bullock, ___ N.C. App. ___ (18 July 2006): rejects limitation of only one conviction based on generic testimony

State v. Gary Lawrence, 165 N.C. App. 548 (2004)

- Two convictions of sexual offense against victim S.L.
  - Were based on testimony that during single incident there occurred digital penetration, oral sex, and applying lubricant in her vagina
  - Ruling: only one conviction allowed
    - Because jury was not instructed that it must be unanimous on particular act that defendant allegedly committed
    - Evidence of several different sexual acts must be considered as alternative means to establish single criminal offense

State v. Gary Lawrence, 165 N.C. App. 548 (2004)

- Court upholds one of the two convictions of sexual offense against victim S.L.
  - Court stated that it may safely conclude that jury unanimously agreed on commission of one sexual offense

State v. Gary Lawrence, 165 N.C. App. 548 (2004)

- One conviction of sexual offense against victim C.L. in Currituck County
- Five convictions of sexual offense against victim G.L. in Pasquotank County
- Court of Appeals reversed all six convictions
- For all six convictions, there was evidence of greater number of separate offenses than were submitted to jury
- Regarding offenses against G.L., generic testimony was given without jury instructions limiting its consideration to one criminal offense

State v. Gary Lawrence, 165 N.C. App. 548 (2004)

- Jury was allowed to consider evidence of many sexual acts without guidance on separating them into separate criminal offenses
- None of verdict sheets associated the offense indictment number with a given incident or separate offense
- Jury instructions did not separate individual criminal offenses or guide jury to identify given verdict sheet with corresponding incident
- Jury verdicts were ambiguous

State v. Richard Brigman, ___ N.C. App. ___ (20 June 2006)

- Defendant was convicted of 27 counts of indecent liberties and 18 counts of first-degree sexual offense
- Evidence of more acts of indecent liberties and sexual offense than charges
- Verdict sheets did not set out specific act that jury must find to convict
- Judge instructed jury that verdict must be unanimous, and separate verdict sheets were submitted to jury
- Ruling: Based on *State v. Markeith Lawrence* and *State v. Gary Lawrence*, right to unanimous verdict was not violated

State v. Laney, ___ N.C. App. ___ (5 July 2006)

- Defendant convicted of two counts of indecent liberties
- Defendant touched victim's breasts and then placed his hand inside waistband of her pants
- Ruling: Based on *State v. Hartness*, only one conviction was permitted
  - Two acts were part of one transaction
  - Sole act was touching, not two distinct sexual acts
  - No time gap between two touching incidents
  - Two acts combined were for purpose of arousing or gratifying defendant's sexual desire

State v. Laney, ___ N.C. App. ___ (5 July 2006)

- Court distinguished *State v. Markeith Lawrence*
  - Three separate and distinct encounters

State v. Bullock, ___ N.C. App. ___ (18 July 2006)

- Defendant convicted of eleven courts of rape of pre-teen daughter
- One conviction based on her testimony of a specific act
- Ten convictions based on generic testimony of vaginal intercourse “more than two times a week” over one and one-half years
- One indictment for each of ten months from January through October
- Ruling: right to unanimous verdict was not violated

State v. Bullock, ___ N.C. App. ___ (18 July 2006)

- Court rejects defendant's unanimity argument that state presented evidence of more acts of rape than charges of rape
- Relies on Supreme Court's statement in *Markeith Lawrence* that it found persuasive the reasoning in *Wiggins*
- Court ruled, in light of *Gary Lawrence*, prior Court of Appeals rulings that generic testimony can only support one conviction are no longer binding precedent
- Binding precedent is *Wiggins*, which did not limit to one the number of convictions based on generic testimony

State v. Bullock, ___ N.C. App. ___ (18 July 2006)

- Six factors from *Markeith Lawrence* upholding convictions on unanimity issue
- (1) No objection at trial
- (2) Jury was instructed separately on each count, identified by date, and separate charge on unanimity
- (3) One verdict sheet, but eleven counts broken out separately and identified by date
- (4) Total deliberation time was 3 hours, 14 minutes
- (5) Jury questions did not indicate any confusion
- (6) Neither party requested jury poll

State v. Fuller, ___ N.C. App. ___ (1 August 2006)

- No unanimity violation when
  - Two indecent liberties convictions and testimony of more than two acts of indecent liberties
- No unanimity violation when
  - Three first-degree rape convictions when victim testified to three specific acts of rape, although evidence suggested other rapes may have occurred
  - Verdict sheets included specific dates for acts of rape

State v. Bates, ___ N.C. App. ___ (3 October 2006)

- Reconsideration in light of *Markeith Lawrence*
- Defendant convicted of
  - Seven counts of indecent liberties
  - Six counts of first-degree sexual offense
- Defendant charged with ten indecent liberties offenses
- Evidence showed ten incidents of indecent liberties
- Jury returned seven guilty verdicts
- Ruling: based on *Richard Brigman*, no violation of constitutional right to unanimous verdict

State v. Bates, ___ N.C. App. ___ (3 October 2006)

- Jury's possible consideration of ten incidents of indecent liberties in reaching seven guilty verdicts
  - Did not violate unanimity requirement, based on *Markeith Lawrence*

State v. Bates, ___ N.C. App. ___ (3 October 2006)

- Defendant charged with eleven counts of first-degree sexual offense
- Evidence showed six to ten incidents of first-degree sexual offense
- Jury returned six guilty verdicts
- Ruling
  - No violation of constitutional right to unanimous verdict
  - Ruling based on unpublished COA ruling (State v. Spencer, 6/6/2006) and *Markeith Lawrence*

State v. Bates, ___ N.C. App. ___ (3 October 2006)

- Four factors
  - 1. Evidence
    - More charges than supported by evidence; opportunity for confusion
    - But not impossible to match verdict to specific incident; *State v. Spencer*
  - 2. Indictments (see above)
  - 3. Jury instructions
    - Instruction: All twelve jurors must unanimously agree as to each charge
    - Ensured jury would match unanimous verdicts with evidence

State v. Bates, ___ N.C. App. ___ (3 October 2006)

- 4. Verdict sheets
  - Listed each charge separately with notation of felony charged next to each one
  - But did not contain case numbers
  - Provided dates ranges for each charge, but ranges did not correspond with specific evidence at trial
  - Differentiated some charges by including specific act next to charge (e.g., "by cunnilingus")
    - Reduced risk jurors considered different incidents in reaching verdicts and increased likelihood of unanimity

Preparing Jury Instructions on Unanimity Issues

- Examine indictments
  - What crimes are alleged?
  - Do indictments charge one offense or multiple offenses?
  - What time period(s) are alleged?
- Evidence
  - Was there testimony about specific acts?
  - Was there generic testimony?
  - Was testimony about acts within alleged time period? If not, did discrepancy unfairly affect defendant's defense?

Preparing Jury Instructions on Unanimity Issues

- Compare indictments with evidence presented at trial
- Examine appellate case law on unanimity, particularly whether there is one offense or multiple offenses
- Separate verdict sheets or separate verdicts set out within verdict sheet for each offense
  - Link to indictment number and evidence, if possible
- Be clear in instructing jury on unanimity for each charged offense
- Poll jury even if not requested by parties?

Unanimity Issue: Fact Scenario

- Indictment charged 30 counts of statutory rape
- All counts alleged time period as "from January 2004 through March 2005"
- Victim testified that defendant had sexual intercourse with her (as well as digital penetration and oral sex) every night from January 2004 through March 2005, except when she had her menstrual period
- Victim testified about only one specific act of sexual intercourse—on March 20, 2005
- How do you instruct the jury?

Georgia v. Randolph, 126 S. Ct. 1515 (2006)

- Search of dwelling based on co-occupant's consent does not permit entry if physically-present occupant refuses to give consent
- If co-occupant is not physically present, officer has no obligation to search for co-occupant
- Information learned from consenting co-occupant may allow entry based on exigent circumstances, or
- Seizure of objecting co-occupant so officer can obtain search warrant
  - Illinois v. McArthur, 531 U.S. 326 (2001)

Brigham City v. Stuart, 126 S. Ct. 1943 (2006)

- Facts
  - Officers arrive due to report of loud party
  - See assault in the home and enter
- Ruling:
  - Officers may enter home without a search warrant
  - When they have objectively reasonable basis for believing that
  - Occupant is seriously injured or imminently threatened with such injury

Hudson v. Michigan, 126 S. Ct. 2159 (2006)

- Ruling:
  - Fourth Amendment's exclusionary rule does not apply to bar admission of evidence
  - Seized pursuant to valid search warrant for home
  - Even though officers violated Fourth Amendment's knock-and-announce requirement
- North Carolina exclusionary law; 15A-974(2)
  - Substantial violation of state law requiring notice of identity and purpose (G.S. 15A-249)
  - Subjects seized evidence to suppression

United States v. Grubbs, 126 S. Ct. 1494 (2006)

- Anticipatory search warrants do not categorically violate Fourth Amendment
  - Probable cause that evidence will be found in place to be searched
  - Probable cause that triggering event will occur
- Conditions precedent to execution of search warrant do not need to be set out in search warrant itself
  - Sufficient if set out in affidavit to search warrant

Anticipatory Search Warrants

- State v. Carrillo, 164 N.C. App. 204 (2004)
  - Anticipatory search warrant was valid under Fourth Amendment when contingency language for executing search warrant was set out in affidavit and warrant incorporated affidavit by reference
- State v. Baldwin, 161 N.C. App. 382 (2003)
  - Anticipatory search warrant properly authorized search of house when package was taken into house and then placed in car and driven away

Anticipatory Search Warrants

- State v. Phillips, 160 N.C. App. 549 (2003)
  - Defendant opened the front door from inside of the residence and retrieved the package left a few minutes earlier by officer who had attempted to deliver package
  - Search warrant execution was proper when it occurred shortly thereafter
- page 140, *Arrest, Search, and Investigation in North Carolina* (3d ed. 2003)

Search Warrants and Staleness Concerning Affidavit's Information

- State v. Pickard, ___ N.C. App. ___ (5 July 2006)
- Search warrant affidavit described defendant's sex crimes with four children under nine (offense dates not given) and with 14 year old about 18 months earlier
- Search warrant for computers, video cameras, photographs, etc.
- Not stale because affidavit showed
  - On-going sex crimes with children
  - Items to be seized were of continuing utility to defendant

Sanchez-Llamas v. Oregon, 126 S. Ct. 2669 (2006)

- Vienna Convention on Consular Relations
  - International treaty requires law enforcement to inform foreign national of right to have consular official notified of arrest
  - Discussed on page 44 and note 347 on page 63, *Arrest, Search, and Investigation in North Carolina* (3d ed. 2003)
- Ruling
  - Suppression of statements by foreign national is not remedy for violation of treaty

Requirement for Including Verdicts in Final Mandate

- State v. Withers, ___ N.C. App. ___ (5 September 2006)
  - Reversible error when judge failed to include verdict of not guilty by reason of self-defense in final mandate
- State v. McHone, ___ N.C. App. ___ (1 November 2005)
  - Reversible error when judge failed to include verdict of not guilty in final mandate

Appellate Review of Decision Not to Submit Capital Mitigating Circumstance (f)(1)

- State v. Hurst, 360 N.C. 181 (2006)
  - Judge did not submit (f)(1) (no significant history of prior criminal activity)
- Court reaffirms duty to submit statutory m/c regardless of defendant's or state's position
- However, although doctrine of invited error is inapplicable, whole record review will include consideration of parties' position on whether to submit statutory m/c
- Note: Standard of review when judge submits (f)(1) over defendant's objection [State v. Walker, 343 N.C. 216 (1996)]
  - Absent extraordinary circumstances, error in submitting (f)(1) is harmless

Double Jeopardy "Double-Counting" Issue;
State v. Crump, ___ N.C. App. ___ (1 August 2006)

- Defendant convicted of possessing firearm by felon based on possessing firearm in 2003
- To prove offense, state used 1998 conviction of possessing firearm by felon as underlying felony
- State also used 1998 conviction to prove habitual felon status
- Court rejected defendant's "double-counting" double jeopardy argument
- Defendant was punished for possessing firearm in 2003, not the offense committed in 1998

State's Failure to Comply with Discovery;
State v. Blankenship, ___ N.C. App. ___ (5 July 2006)

- Defendant filed pretrial discovery of expert witnesses
- State complied with other discovery, but nothing provided about expert witnesses
- State called SBI agent to testify about methamphetamine manufacturing and ingredients used
- State knew it was planning to call an SBI witness, although not sure which agent it was calling
- Court's ruling: trial judge abused discretion in allowing SBI agent to testify

Discovery of Notes In DSS File But Not in Prosecutor's File

- State v. Pendleton, ___ N.C. App. ___ (20 December 2005)
  - Not discoverable under G.S. 15A-903(a)(1) because Department of Social Services is not prosecutorial agency and did not as prosecutorial agency in this case
  - DSS referred matter to law enforcement, who developed their own evidence (although DSS employee sat in on interview of victim)

Allowing State's Witness to Testify Whose Name Did Not Appear on Witness List

- State v. Brown, ___ N.C. App. ___ (18 April 2006)
  - Trial judge did not err in allowing witness to testify
  - Witness approached state on morning of trial
  - State was unaware of witness or that witness had observed victim's injuries
  - Judge conducted voir dire of witness concerning whether witness was not known to state

Miranda Warnings in Foreign Languages

- State v. Ortez, ___ N.C. App. ___ (5 July 2006)
  - *Miranda* warnings given in Spanish by Spanish-fluent officer were adequate
  - Issue about use of "corte de ley" for "court of law" and "interrogatorio" for "questioning"
  - Issue about Spanish translation of the *Miranda* right to counsel for an indigent person
- State v. Nguyen, ___ N.C. App. ___ (18 July 2006)
  - *Miranda* waiver by Vietnamese-speaking defendant was valid when Vietnamese-speaking officer acted as translator for interrogating officer

Blakely v. Washington Issues

- State v. Norris, 360 N.C. 507 (2006)
  - No *Blakely* error when trial judge found aggravating factor but imposed presumptive sentence
  - Court in a footnote recognizes ruling in *Washington v. Recuenco*, 126 S. Ct. 2546 (2006), that *Blakely* error is not structural error
    - Prior ruling in State v. Allen, 359 N.C. 425 (2005), is in direct conflict with *Recuenco*

Stipulation to Legal Issue in Sentencing Was Invalid

- State v. Palmateer, ___ N.C. App. ___ (19 September 2006)
- Ruling:
  - Stipulation in sentencing worksheet to legal issue was invalid
    - Out-of-state conviction was substantially similar to North Carolina offense
  - Issue must be decided by judge

Indictment Issue

- State v. Calvino, ___ N.C. App. ___ (15 August 2006)
  - Indictment for sale and delivery of cocaine
  - Ruling: Fatally defective for failing to name recipient of cocaine known to state
    - Indictment had alleged recipient of cocaine as “a confidential source of information”

Positive Drug Test: Sufficient for Conviction of Possession of Drug?

- State v. Harris, ___ N.C. App. ___ (1 August 2006)
  - Positive urine test for marijuana was by itself insufficient evidence for conviction of possession of marijuana (Note: N.C. Supreme Court granted review of ruling on 10/5/2006)
  - Positive urine test for cocaine was sufficient evidence for conviction of possession of cocaine when
    - Witness testified that she had seen defendant snort cocaine three days before urine test

Rule 404(b) Evidence in Sex Offense Case

- State v. Brown, ___ N.C. App. ___ (20 June 2006)
  - Trial concerning sexual offense with thirteen-year-old female victim
  - State's evidence that before sex offense defendant showed victim four photos of nude adult women with whom victim was acquainted
  - Defendant told victim that he was going to take similar pictures of her
  - Ruling: Photos admissible under Rule 404(b) to show plan and preparation to commit offense as well as to corroborate victim's testimony
  - Court distinguished State v. Bush, 164 N.C. App. 254 (2004) (videotape not shown to victim was inadmissible)

Felonious Breaking or Entering of Inner Office of Law Firm

- State v. Brooks, ___ N.C. App. ___ (20 June 2006)
  - Sufficient evidence for conviction when defendant entered inner office of law firm to which public access was not allowed and then committed theft

Jury Instruction Error in Burglary Trial

- State v. Farrar, ___ N.C. App. ___ (19 September 2006)
- Indictment charged first-degree burglary: with intent to commit larceny
- Jury instruction: with intent to commit armed robbery
- Plain error required new trial
- Relied on ruling in State v. Silas, 360 N.C. 377 (2006)
  - Amendment to indictment at charge conference: intent to commit murder changed to intent to commit felonious assaults

Jury Instruction Error in Burglary Trial

- Amendment was substantial alteration of charge and thus prohibited
- Note: indictment need not allege specific felony
  - State v. Worsley, 336 N.C. 268 (1994) (burglary)
  - State v. Silas (breaking or entering)

Ruling on Suppression Motion

- State v. Trent, 359 N.C. 583 (2005)
  - Ruling on suppression motion was void because
    - It was not announced in open court or
    - Entered during session in which motion was heard and
    - Judge did not have explicit consent of both parties to enter ruling after session had ended
  - Defendant was entitled to new trial without consideration whether defendant was prejudiced by admission of evidence

Ruling on Suppression Motion

- State v. Branch, ___ N.C. App. ___ (4 April 2006)
  - Based on State v. Trent, 359 N.C. 583 (2005), ruling issued out of term was nullity
    - Although parties had consented to issuance of order later, it was not explicit consent to entry of order out of term

Definition of Interrogation under *Miranda*

- Express questioning
  - Booking-questions exception
  - Public safety exception
- Functional equivalent of questioning: words or actions officer should know are reasonably likely
  - To elicit incriminating response from defendant

Definition of Interrogation under *Miranda*

- As the words or actions are perceived by particular defendant
  - Rhode Island v. Innis, 466 U.S. 291 (1980)

- Volunteered statements
  - Officer's response to volunteered statement
    - State v. Walls, 342 N.C. 1 (1995): "What happened to your hand?"

Definition of Interrogation under *Miranda*

- Questions by undercover law enforcement officers or by non-law enforcement officers
  - Illinois v. Perkins, 496 U.S. 292 (1990): undercover officer in jail
  - State v. Holcomb, 295 N.C. 608 (1978): defendant talking with uncles at sheriff's office

Definition of Interrogation under *Miranda*

- State v. Morrell, 108 N.C. App. 4665 (1993): social worker told defendant that she was investigating alleged sexual abuse
- Whether person is agent of law enforcement officer—is it the proper question after *Illinois v. Perkins*?

Definition of Interrogation under *Miranda*

- Officer's request for consent search is not interrogation
  - Even if defendant has asserted right to counsel or right to silence or Sixth Amendment right to counsel exists
  - U.S. v. Hildago, 7 F.3d 1566 (11th Cir. 1993); U.S. v. Shlater, 85 F.3d 1251 (7th Cir. 1996)
  - Page 203, ASI

Asserting Right to Remain Silent under *Miranda*

- What constitutes an assertion of right to remain silent?
  - Assertion must be a clear assertion
    - State v. Golphin, 352 N.C. 364 (2000)
    - Davis v. U.S., 512 U.S. 452 (1994)

Asserting Right to Remain Silent under *Miranda*

  - No duty to clarify ambiguous assertion, but officer may want to do so
- Officer's duty to stop only if clear assertion of right to remain silent

Asserting Right to Remain Silent under *Miranda*

- Resumption of questioning after clear assertion of right to remain silent
  - Must scrupulously honor assertion
  - Michigan v. Mosley, 423 U.S. 96 (1975)
  - State v. Jacobs, 174 N.C. App. 1 (2005)

Asserting Right to Counsel: Davis v. United States, 512 U.S. 452 (1994)

- Defendant properly warned of and waived *Miranda* rights
- About 1.5 hours into interrogation, defendant said, “Maybe I should talk to a lawyer”
- Court ruled that statement was not clear assertion of right to counsel and officers did not need to stop interrogation

Asserting Right to Counsel: Davis v. United States, 512 U.S. 452 (1994)

- No duty to clarify ambiguous assertion of right to counsel, but prudent officer may wish to do so
  - But should clarify if questions about counsel during waiver of counsel stage
    - But see State v. Ash, 169 N.C. App. 715 (2005)

Asserting Right to Counsel under *Miranda*

- Is "I think I need a lawyer" a clear assertion?
  - State v. Jackson, 348 N.C. 52 (1998): yes
  - Burket v. Angelone, 208 F.3d 172 (4th Cir. 2000): no

Asserting Right to Counsel under *Miranda*

- Is "Do you think I need a lawyer?" or similar question or statement a clear assertion?
  - State v. Torres, 330 N.C. 517 (1992): yes, but decided before *Davis v. United States*
  - Mueller v. Angelone, 181 F.3d 557 (4th Cir. 1999): no

Asserting Right to Counsel under *Miranda*

- "Uh, yeah, I'd like to do that" after being told of his right to counsel was clear assertion of right to counsel
  - Smith v. Illinois, 469 U.S. 91 (1984)

Asserting Right to Counsel under *Miranda*

- Officer told defendant he was a "lying piece of shit"
- Defendant said: I'm not lying. I'm telling the truth. If you are going to treat me this way, "then I probably would want a lawyer."
- Ruling: not clear request for counsel
  - State v. Boggess, 358 N.C. 676 (2004)

Asserting Right to Counsel under *Miranda*

- Defendant mentioned that she had an attorney for a related charge
- Ruling: not clear assertion of right to counsel
  - State v. Strobel, 164 N.C. App. 310 (2004)

Asserting Right to Counsel under *Miranda*

- Partial assertion of right to counsel
  - Connecticut v. Barrett, 479 U.S. 523 (1987)
    - I will give oral statement but will not give written statement without lawyer

Asserting Right to Counsel under *Miranda*

- Request to speak to someone other than counsel
  - Fare v. Michael C., 442 U.S. 707 (1979): request to speak to probation officer
  - State v. Hyatt, 355 N.C. 642 (2002): request to speak to father

Asserting Right to Counsel under *Miranda*

- Assertion before defendant is in custody is not recognized as assertion
  - State v. Daughtry, 340 N.C. 488 (1995)
- Assertion when in custody and impending interrogation is recognized as assertion
  - State v. Torres, 330 N.C. 517 (1992)

Asserting Right to Counsel under *Miranda*

- Assertion of right to counsel by lawyer instead of defendant
  - State v. Reese, 319 N.C. 110 (1987): lawyer instructed officers not to question his client
- Denial of access by lawyer to person undergoing custodial interrogation
  - Moran v. Burbine, 475 U.S. 412 (1986); State v. Hyatt, 355 N.C. 642 (2002)

Arizona v. Roberson
486 U.S. 675 (1988)

- Defendant arrested for burglary, advised of *Miranda* rights, and asserted right to counsel
- While still in custody three days later, a different officer interrogated defendant about unrelated burglary after giving *Miranda* warnings
  - Officer was unaware of defendant's assertion of right to counsel

Arizona v. Roberson
486 U.S. 675 (1988)

- Ruling
  - Based on Edwards v. Arizona, 451 U.S. 477 (1981)
  - Officer's questioning of defendant about unrelated burglary was prohibited while he remained in custody after asserting right to counsel

Arizona v. Roberson
486 U.S. 675 (1988)

  - Irrelevant that interrogating officer was unaware of defendant's assertion of right to counsel
- Ruling in *Arizona v. Roberson* does not bar interrogation about other crimes after defendant is convicted and serving sentence
  - U.S. v. Arrington, 215 F.3d 855 (8th Cir. 2000); Isaacs v. Head, 300 F.3d 1232 (11th Cir. 2002)

Sixth Amendment Right to Counsel

- When does Sixth Amendment right to counsel begin?
  - Adversary judicial proceedings
    - In North Carolina, district court first appearance or indictment for felony, whichever occurs first
      - State v. Tucker, 331 N.C. 12 (1992); State v. Nations, 319 N.C. 318 (1987); State v. Phipps, 331 N.C. 427 (1992)

Sixth Amendment Right to Counsel

- Not when arrest warrant is issued
  - –State v. Taylor, 354 N.C. 28 (2001)

Sixth Amendment Right to Counsel

- Not when person requests counsel at extradition proceeding in another state
  - –Chewning v. Rogerson, 29 F.3d 418 (8th Cir. 1994)
- Separate determination for each criminal charge
  - –Texas v. Cobb, 532 U.S. 162 (2001): see later slide

Sixth Amendment Right to Counsel

- Assertion of Sixth Amendment right to counsel
  - Patterson v. Illinois, 487 U.S. 285 (1988)
    - Officers may initiate conversation with indicted defendant without counsel who has not yet asserted right to counsel

Sixth Amendment Right to Counsel

- –But *Patterson* ruling inapplicable to use of informants or undercover officers to surreptitiously question indicted defendant
- *Miranda* warnings normally sufficient to waive counsel
  - –But suggested expanded warning on p. 209 of ASI

Sixth Amendment Right to Counsel

- Applies to both interrogation and deliberately eliciting statements
  - Fellers v. United States, 124 S.Ct. 1019 (2004)
    - After indictment (but before defendant asserted right to counsel) officers conversed with defendant about case without waiver of counsel; no *Miranda* warnings given
    - Ruling: officers deliberately elicited statements

Sixth Amendment Right to Counsel

- Right applies whether or not defendant is in custody
- Use of informant to obtain statement from defendant

McNeil v. Wisconsin
501 U.S. 171 (1991)

- Defendant arrested for armed robbery, asserted right to remain silent but not right to counsel, and was placed in custody
- Defendant appeared in court at initial appearance represented by public defender

McNeil v. Wisconsin
501 U.S. 171 (1991)

- While still in custody, officers—after giving *Miranda* warnings—interrogated defendant about unrelated murder

McNeil v. Wisconsin
501 U.S. 171 (1991)

- Ruling: Defendant in court at initial appearance only asserted his Sixth Amendment right to counsel, which is offense specific
  - Appearance in court was not assertion of Fifth Amendment right to counsel, which occurs during custodial interrogation

McNeil v. Wisconsin
501 U.S. 171 (1991)

  - Court's footnote about invoking right to counsel in anticipation of interrogation
- Court indicated that assertion of right to counsel under *Miranda* does not bar reinterrogation when break in custody—see later case of State v. Warren, 348 N.C. 80 (1998)

Texas v. Cobb, 532 U.S. 162 (2001)

- Home was burglarized and mother and daughter were missing
- Defendant confesses to burglary but denies knowledge about missing mother and daughter
- Indicted for burglary and lawyer appointed
- Later defendant is arrested for murders of mother and daughter, given *Miranda* warnings, and confesses

Texas v. Cobb
532 U.S. 162 (2001)

- Ruling
  - Sixth Amendment right to counsel is offense specific
  - Did not also attach for murders when defendant had been indicted for burglary
    - Even though all offenses were related to each other

Texas v. Cobb
532 U.S. 162 (2001)

- One exception:
  - When all elements of new offense are included in offense for which defendant had been indicted
    - Then Sixth Amendment right to counsel attaches for all offenses

State v. Strobel, 164 N.C. App. 310 (2004)

- Defendant arrested for conspiracy to commit armed robbery and attorney appointed
- Month later, defendant arrested for armed robbery based on same incident
- No Sixth Amendment violation under *Texas v. Cobb* when officer questioned defendant after later arrest
  - Charges were separate under *Cobb* ruling

State v. Warren
348 N.C. 80 (1998)

- Defendant, questioned in Asheville about murder there, asserted right to counsel
  - He was arrested for other charges, appeared in district court with lawyer, and later released

State v. Warren
348 N.C. 80 (1998)

- Defendant later arrested in High Point for South Carolina murder, given *Miranda* warnings, and confessed to murders in High Point, Asheville, and other places

State v. Warren
348 N.C. 80 (1998)

- Ruling
  - Break in custody allowed officers to interrogate defendant in High Point
    - Court noted statement in *McNeil v. Wisconsin*
- No Sixth Amendment right to counsel for High Point murder to bar questioning of that murder

Resumption of Interrogation after Assertion of Right to Counsel

- Defendant initiates communication with officer
  - Although not always required, better practice to give *Miranda* warnings if officer intends to interrogate defendant

Resumption of Interrogation after Assertion of Right to Counsel

- Release from jail
  - But remember Sixth Amendment right to counsel protects defendant from initiation of questioning of same charge
    - For example, defendant invokes right to counsel during custodial interrogation after arrest for felonious breaking or entering

Resumption of Interrogation after Assertion of Right to Counsel

- Defendant requests counsel at first appearance for felonious breaking or entering
- Defendant is released on bond
- May officer initiate interrogation about this felonious breaking or entering?
- May officer initiate interrogation about unsolved first-degree murder?

Right to Counsel under Fifth and Sixth Amendments

- When does the right to counsel exist?
- Does the right to counsel exist whether or not the defendant is in custody?
- What warnings or waivers of the right to counsel are necessary?
- What if the defendant asserts the right to counsel?

Right to Counsel under Fifth and Sixth Amendments

- What if the defendant only asserts the right to remain silent?
- McNeil v. Wisconsin, 501 U.S. 171 (1991)

Using Informant or Undercover Officer to Obtain Statement

- Massiah v. United States, 377 U.S. 201 (1964)
- Hoffa v. United States, 385 U.S. 293 (1966)
- United States v. White, 401 U.S. 745 (1971)
- United States v. Henry, 447 U.S. 264 (1980)

Using Informant or Undercover Officer to Obtain Statement

- Maine v. Moulton, 474 U.S. 159 (1985)
  - Statement inadmissible for one charge, admissible for another charge
- Kuhlmann v. Wilson, 477 U.S. 436 (1986): listening post

Using Informant or Undercover Officer to Obtain Statement

- Illinois v. Perkins, 496 U.S. 292 (1990)
  - Alexander v. Connecticut, 917 F.2d 747 (2d Cir. 1990)
- State v. Brown, 67 N.C. App. 223 (1984)
- State v. Thompson, 322 N.C. 204 (1992)
- State v. Taylor, 332 N.C. 372 (1992)

Waiver of Counsel During Polygraph Examination

- Waiver may include waiver of right to counsel during polygraph examiner's post-test interview of defendant
  - State v. Shepherd, 163 N.C. App. 646 (2004)

Admissibility of Written Confession

- Before introducing written confession, state must show confession was
  - Read to or by defendant and signed or otherwise acknowledged to be correct; *or*
  - Verbatim record of questions asked by officer and answers given by defendant
    - State v. Wagner, 343 N.C. 250 (1996); State v. Bartlett, 121 N.C. App. 521 (1996)

Defendant's Suppression Hearing Testimony

- State may not use testimony to prove guilt
  - Simmons v. United States, 390 U.S. 377 (1968)
- State may use testimony to impeach defendant if defendant testifies at trial
  - State v. Bracey, 303 N.C. 112 (1981)

Evidence Obtained as Result of *Miranda* Violation

- May impeach defendant if he or she testifies at trial
  - Harris v. New York, 401 U.S. 222 (1971); State v. Bryant, 280 N.C. 551 (1972); State v. Stokes, 357 N.C. 220 (2003)
- Statement obtained with *Miranda* warnings is admissible even though it was obtained after statement taken in violation of *Miranda*

Evidence Obtained as Result of *Miranda* Violation

- As long as inadmissible statement was voluntary
- Oregon v. Elstad, 470 U.S. 298 (1985); State v. Edgerton, 328 N.C. 319 (1991)
- Ruling in *Oregon v. Elstad* survives ruling in Dickerson v. United States, 530 U.S. 428 (2000)—see United States v. Sterling, 283 F.3d 216 (4th Cir. 2002)

Miranda Warnings

- Officer deliberately fails to give *Miranda* warnings and obtains confession
- Twenty minutes later, officer gives *Miranda* warnings and obtains confession
- Ruling: neither first nor second confession is admissible
  - Missouri v. Seibert, 124 S. Ct. 2601 (2004)

Evidence Obtained as Result of *Miranda* Violation

- Physical evidence is admissible even though obtained as a result of *Miranda* violation
  - U.S. v. Patane, 124 S. Ct. 2620 (2004)
  - State v. Houston, 169 N.C. App. 367 (2005) (applying *Patane*)
  - State v. Goodman, 165 N.C. App. 865 (2004) (applying *Patane*)
  - State v. May, 334 N.C. 609 (1993)

Evidence Obtained as Result of *Miranda* Violation

Inevitable discovery doctrine also may permit physical evidence to be admissible

– State v. Vick, 130 N.C. App. 207 (1998)

Evidentiary Use of Defendant's Assertion of Right to Counsel or Right to Remain Silent

- Generally, evidentiary use is impermissible
  - State v. Ladd, 308 N.C. 272 (1983); State v. Hoyle, 325 N.C. 232 (1989); State v. Quick, 337 N.C. 359 (1994)

Evidentiary Use of Defendant's Silence

- Post-arrest silence after *Miranda* warnings given
  - Doyle v. Ohio, 426 U.S. 610 (1976)
  - Anderson v. Charles, 447 U.S. 404 (1980)
- Pre-arrest silence or post-arrest silence when no *Miranda* warnings given
  - Constitutional issue
    - Fletcher v. Weir, 455 U.S. 603 (1982)

Evidentiary Use of Defendant's Silence

- State evidence issue
  - State v. Westbrooks, 345 N.C. 43 (1996): pre-arrest silence admissible as prior inconsistent statement
  - State v. Lane, 301 N.C. 382 (1980): post-arrest silence about alibi was not prior inconsistent statement