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Administration of Justice Memorandum

Judges, Prosecutors, Appellate and Public Defenders, Police Attorneys, Subscribers

Recent Criminal Cases
(December 21, 1993 - April 8, 1994)

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This memorandum discusses United States Supreme Court cases from December 13, 1993 through March 22, 1994, cases of January 28, March 4, and April 8, 1994 from the North Carolina Supreme Court, and cases of December 21, 1993, January 4, 18, February 1, 15, March 1, 15, and April 5, 1994 from the North Carolina Court of Appeals.

United States Supreme Court

Reasonable Doubt Instructions Were Constitutional

Victor v. Nebraska, 114 S.Ct. ___, 127 L.Ed.2d. 583, 54 Crim. L. Rep. 2225 (22 March 1994). The Court, distinguishing *Cage v. Louisiana*, 498 U.S. 39 (1990), upholds the constitutionally of reasonable doubt instructions in a case from California and a case from Nebraska. The California instruction stated:

> A defendant in a criminal action is presumed to be innocent until the contrary is proved, and in case of a reasonable doubt whether his guilt is satisfactorily shown, he is entitled to a verdict of not guilty. This presumption places upon the State the burden of proving him guilty beyond a reasonable doubt.
>
> Reasonable doubt is defined as follows: It is not a mere possible doubt; because everything relating to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge.

The Nebraska instruction stated:

> Reasonable doubt is such a doubt as would cause a reasonable and prudent person, in one of the graver and more important transactions of life, to pause and hesitate before taking the represented facts as true and relying and acting thereon. It is such a doubt as will not permit you, after full, fair, and impartial consideration of all the evidence, to have an abiding conviction, to a moral certainty, of the guilt of the accused. At the same time, absolute or mathematical certainty is not required. You may be convinced of the truth of a fact beyond a reasonable doubt and yet be fully aware that possibly you may be mistaken. You may find an accused guilty upon the strong probabilities of

> the case, provided such probabilities are strong enough to exclude any doubt of his guilt that is reasonable. A reasonable doubt is an actual and substantial doubt arising from the evidence, from the facts or circumstances shown by the evidence, or from the lack of evidence on the part of the state, as distinguished from a doubt arising from mere possibility, from bare imagination, or from fanciful conjecture.

[Although the court upholds these instructions, it makes clear that it does not condone the use of the phrase "moral certainty," and that it may find in a future case that the use of that phrase violates the due process clause. Therefore, judges should consider not using the phrase in their instructions on reasonable doubt.]

[The Court has granted the state's petitions for certiorari in *State v. Bryant*, 334 N.C. 333, 432 S.E.2d 291 (1993) and *State v. Williams*, 334 N.C. 440, 434 S.E.2d 588 (1993) (in both cases, the court ruled that the reasonable doubt instructions violated the ruling in *Cage v. Louisiana*), vacated the judgments in those cases, and remanded them to the North Carolina Supreme Court for further consideration in light of the ruling in *Victor v. Nebraska*.]

No Double Jeopardy Or Collateral Estoppel Violations In Death Sentencing Hearing

Schiro v. Farley, 114 S.Ct. 783, 127 L.Ed.2d. 47, 54 Crim. L. Rep. 2070 (19 January 1994). The jury returned on verdict sheet a verdict of guilty of felony (rape) murder but left blank its verdict on the charge of intentional murder. Trial judge imposed a death sentence, finding as a statutory aggravating factor that the defendant intentionally killed the victim while committing rape. (1) The Court rejects defendant's argument that the double jeopardy clause was violated because his sentencing proceeding constituted a successive prosecution for intentional murder. The clause does not apply to a single prosecution in which a sentencing hearing follows a trial. (2) The Court does not address the defendant's argument whether principles of collateral estoppel would bar the use of the "intentional murder" aggravating factor because the defendant failed to meet his burden of establishing the factual predicate for applying that principle, even if it were applicable. That is, the defendant failed to establish, based on the facts in this case, that the jury's act in leaving the verdict blank for intentional murder was an acquittal of that theory of murder.

No Substantive Due Process Claim To Be Free From Prosecution Except When Probable Cause Exists To Charge

Albright v. Oliver, 114 S.Ct. 807, 127 L.Ed.2d. 114, 54 Crim. L. Rep. 2081 (24 January 1994). Albright was arrested for a criminal offense and released on bond. A trial judge later dismissed the charge because it did not state an offense under state law. Albright then brought a § 1983 action against the arresting officer and others that alleged that the officer's act violated his substantive right under the due process clause of the Fourteenth Amendment to be free from criminal prosecution except when probable cause exists to charge. A four-Justice plurality opinion rules that such a claim does not exist under the due process clause. Without expressing a view whether Albright's claim would succeed under the Fourth Amendment, the court rules that the issue should be analyzed under that constitutional provision.

Due Process Requires Hearing Before Seizing Real Property For Forfeiture

United States v. James Daniel Good Real Property, 114 S.Ct. 492, 126 L.Ed.2d. 490, 54 Crim. L. Rep. 2009 (13 December 1993). Court rules that the due process clause requires that, absent exigent circumstances, the government first must give the owner of real property a hearing before seizing the real property for forfeiture. (Note: this ruling does not apply to the seizure of personal property for forfeiture.)

Federal RICO Action Does Not Require Proof That Acts Motivated By Economic Harm

National Organization For Women v. Scheidler, 114 S.Ct. 798, 127 L.Ed.2d. 99, 54 Crim. L. Rep. 2095 (24 January 1994). Plaintiffs in federal civil RICO action (action brought against defendants for allegedly conspiring to shut down abortion clinics through pattern of racketeering activity) are not required to prove that either the racketeering enterprise or the predicate acts of racketeering were motivated by an economic purpose.

Teague v. Lane Bars Consideration Of State Prisoner's Federal Habeas Claim

Caspari v. Bohlen, 114 S.Ct. 948, 127 L.Ed.2d. 236, 54 Crim. L. Rep. 2160 (23 February 1994). State prisoner brought federal habeas claim that asserted that the double jeopardy clause bars a state from twice subjecting a criminal defendant to a noncapital sentence enhancement proceeding. The court rules that (1) a federal court may, but need not, decline to apply *Teague v. Lane*, 489 U.S. 288 (1989) (nonretroactive principle bars federal habeas relief if asserted claim would announce "new rule" of constitutional law), if the state does not raise the *Teague* issue, and (2) prisoner's claim in this case was barred on *Teague v. Lane* principles.

North Carolina Supreme Court

Arrest, Search, and Confessions

Evidence That Defendant Was Advised Of *Miranda* Rights Was Admissible In This Case

State v. Carter, 335 N.C. 422, 440 S.E.2d 268 (28 January 1994). A detective was permitted to testify that in the police department's interrogation room he advised the defendant of his *Miranda* rights and the defendant indicated he understood those rights. The court rules that the testimony (1) did not violate *Doyle v. Ohio*, 426 U.S. 610 (1976) because no evidence was introduced showing that the defendant exercised his right to remain silent; and (2) was relevant in this case because defense counsel consistently throughout the trial had attacked the professionalism of the investigating officers, and the testimony tended to refute the characterization of the officers' conduct as unprofessional.

(1) Defendant Did Not Have Standing To Contest Search Of Murder Victim's Car
(2) Defendant Properly Waived *Miranda* Rights Despite Possible Language Differences

State v. Mlo, 335 N.C. 353, 440 S.E.2d 98 (28 January 1994). The defendant was convicted of first-degree murder. (1) The defendant sought to suppress evidence obtained from a search of the murder victim's car. The court rules that the defendant's unsubstantiated and self-serving statements that the victim had loaned his car to him were insufficient to satisfy his burden of showing a legitimate possessory interest in the car; thus, the defendant did not have standing to contest the search of the car. There was evidence from the victim's best friend that he had never known the victim to loan his car to anyone. (2) The detective anticipated potential language difficulties in questioning the defendant, and believing that the defendant spoke Vietnamese, he obtained a Vietnamese interpreter. However, the defendant, a native of Vietnam's Montagnard region, spoke Dega as well as some English and Vietnamese. On those occasions when the interpreter assisted the defendant, the defendant was able to continue the interview in English, giving logical responses to the questions asked. During the interview, the defendant appeared to understand the questions and responded most of the time in English without the interpreter's assistance. The court upholds the trial judge's ruling that the defendant knowingly, intelligently, and voluntarily waived his *Miranda* rights.

Criminal Offenses

Evidence Was Sufficient To Establish Serious Personal Mental Injury For First-Degree Rape Conviction

State v. Baker, ___ N.C. ___, ___ S.E.2d ___ (8 April 1994), *reversing*, 109 N.C. App. 557, 428 S.E.2d 216 (1993). The defendant was convicted of first-degree rape. Evidence showed that in the months after the rape, the victim suffered from depression and loss of appetite, quit her job because she could not handle dealing with the public, moved out of mobile home in which she was raped, contacted a rape crisis center for counseling, had nightmares, could not sleep, and was unable to care for her baby for nine months (the child's grandmother cared for the child during that time). At the time of the trial, one year after the rape, the victim's nerves were still bad, she was depressed, and she still had trouble sleeping. The court rules, relying on *State v. Boone*, 307 N.C. 198, 297 S.E.2d 585 (1982), *State v. Mayse*, 97 N.C. App. 559, 389 S.E.2d 585 (1990), and *State v. Davis*, 101 N.C. App. 12, 398 S.E.2d 645 (1990), that this evidence was sufficient to support serious personal mental injury to support the first-degree rape conviction. The court rejects the defendant's argument that the state—to establish serious personal

mental injury—must prove that the defendant committed acts not present in every forcible rape that caused the mental injury. What is required is that the injury extend for some appreciable time beyond the events surrounding the rape itself and that it is a mental injury beyond that normally experienced in every forcible rape.

Evidence Was Sufficient To Support First-Degree Burglary Conviction

State v. Howell, 335 N.C. 457, 439 S.E.2d 116 (28 January 1994). Evidence of a breaking through the back door of a residence was sufficiently proved by circumstantial evidence and habit and custom. A witness testified that everyone used the back door to the residence. The murder victim's wife testified that when she left the residence, the victim was sitting at the end of the table in the dining room with his back to the door (there was no storm door). Although she did not say that she closed the door when she left, it was reasonable to infer that, on a stormy day, the victim would not be sitting at the table with the door completely open. In addition, the wife testified that when she returned home, she got her house key out because she was expecting the door to be closed and locked as usual. The court rules that jury could determine whether it was satisfied beyond a reasonable doubt that the door was at least partially closed to require the defendant to use some force to enter the residence.

Evidence Was Sufficient to Support Embezzlement Conviction

State v. Johnson, 335 N.C. 509, 439 S.E.2d 722 (28 January 1994), *reversing*, 108 N.C. App. 550, 424 S.E.2d 165 (1993). Evidence showed that the defendant, an attorney, represented McCoy for her claim for damages incurred in an automobile accident. The defendant (or someone in his office) settled the claim with the insurance company, without the McCoy's knowledge, in the amount of $20,000. The company delivered a check in that amount to the defendant's office, where McCoy's signature was forged on the check, and the money was deposited in the defendant's personal account. McCoy's signature was also forged on the release to the insurance company. The court rules that there was sufficient evidence to convict the defendant of embezzlement. The defendant came into possession of the check lawfully so far as McCoy was concerned and then wrongly converted it to his own use. The court notes that the defendant may have been guilty of obtaining property by a false pretense as to the insurance company, but he was the agent of McCoy and in lawful possession of the check as her agent. When he converted it to his own use, he was guilty of embezzlement.

Evidence Was Insufficient For Voluntary Intoxication Instruction In First-Degree Murder Case

State v. Brown, 335 N.C. 477, 439 S.E.2d 589 (28 January 1994). The defendant was convicted of first-degree murder and other offenses. The trial judge denied the defendant's request for an instruction on voluntary intoxication as a defense to charges requiring specific intent. The court upholds the trial judge's denial. The defendant had offered evidence that he had consumed eight to twelve beers beginning about 7:30 P.M. the evening of the murder. His expert testified that the defendant's pattern of drinking that many beers a day could have caused an "accumulative impairment of mental functions," he would have been acutely intoxicated at the time of the murder, and his capacity to plan and have good judgment would have been adversely affected. The court states that although the evidence in the case suggests that the defendant was intoxicated to some degree, it did not meet the standard to require an instruction set out in *State v. Medley*, 295 N.C. 75, 243 S.E.2d 374 (1978).

Mandatory Presumption On Finding Of Firearm In Robbery Case Was Proper

State v. Williams, 335 N.C. 518, 438 S.E.2d 727 (28 January 1994), *affirming*, 108 N.C. App. 295, 423 S.E.2d 333 (1992). The defendant was convicted of two separate robberies. In one robbery, the victim testified that the defendant pulled from his pocket an object that looked like a pistol and demanded money, although the object was wrapped so it couldn't be seen. The victim believed it was a real gun. In the other robbery, the victim testified that the defendant had his right hand in his jacket pocket, was pointing it at her while demanding money from the cash register, and said he was going to shoot her. The defendant offered an alibi defense and also testified that he did not own a gun and did not "mess with

guns." The court rules that the trial judge properly instructed the jury in both cases about the mandatory presumption that the object was a firearm or other dangerous weapon, as set out in *State v. Joyner*, 312 N.C. 779, 324 S.E.2d 841 (1985). The court rejects the defendant's argument that his testimony was substantial evidence tending to show that he did not possess a firearm when the robberies occurred (if the defendant had presented such evidence, the mandatory presumption instruction is not given; only a permissive inference instruction is given).

Separate Convictions For Armed Robbery And Larceny Of Firearm Were Proper, Based On Facts In This Case

State v. Barton, 335 N.C. 741, ___ S.E.2d ___ (4 March 1994). The defendant and his accomplices shot and killed the victim, took his wallet from his body, and fled the scene in the victim's car. They later removed the victim's firearm from the car's glove compartment. Distinguishing *State v. Adams*, 331 N.C. 317, 416 S.E.2d 380 (1992) (improper to sentence defendant for larceny of firearm and felonious larceny pursuant to breaking or entering, based on a single taking of a firearm), the court rules that both convictions were proper, since the armed robbery of the victim—resulting in the taking of his wallet and car—and the later larceny of the victim's firearm from his car constituted separate takings.

Evidence Was Insufficient To Support Conviction For Maintaining Vehicle For Illegally Keeping Drugs

State v. Mitchell, ___ N.C. ___, ___ S.E.2d ___ (8 April 1994), *reversing*, 104 N.C. App. 514, 410 S.E.2d 211 (1991). The defendant was convicted of unlawfully, willfully, and knowingly maintaining a vehicle for illegally keeping drugs under G.S. 90-108(a)(7); the date of the offense was 6 September 1989. The evidence showed that on 6 September 1989 the defendant had bags of marijuana in his pocket before he got out of a vehicle to enter a convenience store. The next day, 7 September 1989, the defendant was arrested for possession of marijuana and a marijuana cigarette was found during a search of his vehicle. The state also presented evidence of the presence of drugs and drug paraphernalia at the defendant's home. The court rules that G.S. 90-108(a)(7) does not prohibit the mere temporary possession of marijuana within a vehicle. The focus of the inquiry is on the *use*, not the contents, of the vehicle. Although the contents of a vehicle are clearly relevant in determining its use, its contents are not dispositive when, in this case, they do not establish that the use of the vehicle was a prohibited one. The court states that when "the State has merely shown that the defendant had two bags of marijuana while in his car, that his car contained a marijuana cigarette the following day, and that his home contained marijuana and drug paraphernalia, the State has not shown that the vehicle was used for selling or keeping a controlled substance." The court, on the other hand, favorably notes and summarizes cases in which defendants were properly convicted of violations of G.S. 90-108(a)(7): *State v. Bright*, 78 N.C. App. 239, 337 S.E.2d 87 (1985); *State v. Allen*, 102 N.C. App. 598, 403 S.E.2d 907 (1991); *State v. Thorpe*, 94 N.C. App. 270, 380 S.E.2d 777 (1989); and *State v. Rich*, 87 N.C. App. 380, 361 S.E.2d 321 (1987).

Inconsistent Verdicts Allowed At Same Trial—Conviction Of Aider And Abettor But Acquittal Of Principal

State v. Reid, 335 N.C. 647, ___ S.E.2d ___ (4 March 1994). The defendant was convicted of felonious assault based on acting in concert with the principal, co-defendant Adams, who was found not guilty. The court rules, relying on the rationale of United States Supreme Court rulings [e.g., *United States v. Powell*, 469 U.S. 57 (1984)], that inconsistent jury verdicts in the same trial are permissible.

Evidence

(1) Defendant Properly Barred From Introducing Accomplice's Statement Under Rule 804(b)(3)
(2) State May Cross-Examine State-Paid Defense Expert About Witness Fee

State v. Brown, 335 N.C. 477, 439 S.E.2d 589 (28 January 1994). (1) The defendant was convicted of first-degree murder in which his accomplice did the actual shooting of the victim. The accomplice's initial statements to law enforcement indicated that he had acted alone when committing the murder. His later statements to law enforcement implicated the defendant as being involved in the murder. (The defendant confessed to his involvement in the murders.) The

defendant called the accomplice (who was to be tried later for the murder) as a witness at the defendant's trial. The accomplice invoked his Fifth Amendment privilege not to testify. The defendant then moved under Rule 804(b)(3) (statement against interest) to introduce into evidence the accomplice's initial statements that he acted alone when committing the murder. The trial judge denied the motion, ruling that the statements bore insufficient indications of trustworthiness. The court reviews the accomplice's initial statements, notes how they conflicted with other evidence and the fact that the defendant had confessed his involvement and his fingerprints has been found at the murder scene, and upholds the trial judge's ruling. The court also rejects the defendant's argument that failure to admit this evidence violated his constitutional rights under *Chambers v. Mississippi*, 410 U.S. 284 (1973), since that ruling requires that the proffered evidence bear persuasive assurances of trustworthiness. (2) The court rules that the prosecutor was properly permitted to impeach the defense expert witness concerning his witness fee, and rejects the defendant's argument that the cross-examination was improper because the expert witness was court-appointed and paid with state funds.

Evidence Of Other Arsenic Poisonings Was Admissible Under Rule 404(b)

State v. Moore, 335 N.C. 567, ___ S.E.2d ___ (4 March 1994). The defendant was convicted of first-degree murder in the arsenic poisoning death of her male friend. The court rules that the trial judge properly admitted under Rule 404(b) (to prove motive, *modus operandi*, opportunity, intent, and identity) evidence of the arsenic poisoning death of her first husband and the near-fatal arsenic poisoning of her current husband. The court relies on *State v. Stager*, 329 N.C. 278, 406 S.E.2d 876 (1991).

Capital Case Issues

(1) Evidence Sufficient Under G.S. 15A-2000(e)(11) ("Other Violent Crimes" Aggravating Factor)
(2) Sentencing For Other Convictions Is Irrelevant In Death Penalty Recommendation
(3) Pattern Jury Instruction On *McKoy* Issue Is Constitutional

State v. Lee, 335 N.C. 244, 439 S.E.2d 547 (28 January 1994). The defendant was convicted of first-degree murder for kidnapping, sexually assaulting, and murdering a female jogger (victim A) on 24 September 1989. (1) The state offered evidence under G.S. 15A-2000(e)(11) that on 29 September 1989 the defendant kidnapped, raped, sodomized, and robbed another female jogger (victim B), who managed to escape. Relying on *State v. Cummings*, 332 N.C. 487, 422 S.E.2d 692 (1992), the court rules that this evidence was sufficient under this aggravating factor, when the defendant's motivation and *modus operandi* were the same, the crimes were committed in close temporal proximity, and the defendant believed that both victims were members of an associated group (female joggers from a local university). (2) Trial judge properly excluded defendant's proffered evidence at capital sentencing hearing that trial judge would sentence defendant (after sentencing hearing) for kidnapping of victim A and for non-capital crimes against victim B. Such evidence was irrelevant in deciding whether the defendant should be sentenced to death. (3) The court rules that the pattern jury instructions on the jury's consideration of mitigating circumstances in Issues Two, Three, and Four complied with *McKoy v. North Carolina*, 494 U.S. 433 (1990).

Error To Submit Both Burglary and Pecuniary Gain As Aggravating Circumstances

State v. Howell, 335 N.C. 457, 439 S.E.2d 116 (28 January 1994). Relying on *State v. Quesinberry*, 319 N.C. 228, 354 S.E.2d 446 (1987), court rules that judge erred in submitting both aggravating circumstances—murder was committed for pecuniary gain [G.S. 15A-2000(e)(6) and murder was committed while defendant was committing burglary [G.S. 15A-2000(e)(5)]—when these aggravating circumstances were supported by the same evidence. In this case, pecuniary gain was the motive for committing the burglary.

Proper To Submit Both Aggravating Circumstances G.S. 15A-2000(e)(4) and -2000(e)(5)

State v. Sanderson, ___ N.C. ___, ___ S.E.2d ___ (8 April 1994). Distinguishing *State v. Quesinberry*, 319 N.C. 228, 354 S.E.2d 446 (1987), court rules that trial judge properly submitted (and jury could

properly find) separate aggravating circumstances G.S. 15A-2000(e)(4) (murder was committed for the purpose of avoiding lawful arrest), and G.S. 15A-2000(e)(5) (murder was committed while the defendant was engaged in a kidnapping), because these circumstances were supported by different evidence.

Especially Heinous, Atrocious, Or Cruel Was Proper Aggravating Circumstance In First-Degree Murder By Poisoning

State v. Moore, 335 N.C. 567, ___ S.E.2d ___ (4 March 1994). The defendant was convicted of first-degree murder by poisoning, and the evidence showed that victim suffered severely over a ten-month period. The court rules that the aggravating circumstance of especially heinous, atrocious, or cruel was properly found and rejects defendant's argument to extend *State v. Cherry*, 298 N.C. 86, 257 S.E.2d 551 (1979) (underlying felony may not be an aggravating circumstance when defendant is convicted only on felony-murder theory) to this case. The court notes that neither the fact that the poison is administered in small doses over extended periods of time nor the type of poison—slow or fast acting—are elements of the offense.

Defense Questions To Prospective Jurors Should Have Been Allowed Under *Morgan v. Illinois*; Court Modifies Prior Ruling In *State v. Taylor*

State v. Conner, 335 N.C. 618, ___ S.E.2d ___ (4 March 1994). The court rules that the trial judge in a capital case erred, under *Morgan v. Illinois*, 112 S.Ct. 2222, 119 L.Ed.2d 492 (1992) (defendant has constitutional right to ask capital case jurors if they would automatically vote for death penalty regardless of evidence of mitigating circumstances), in not permitting defense counsel to ask the following questions of prospective jurors:

> Is your support for the death penalty such that you would find it difficult to consider voting for life imprisonment for a person convicted of first degree murder?
>
> Would your belief in the death penalty make it difficult for you to follow the law and consider life imprisonment for first degree murder?

The court notes that even though defense counsel did not use the words "automatically" or "always," the gist of the questions was to determine whether the juror was willing to consider a life sentence in appropriate circumstances or would automatically vote for the death penalty.

The court, however, upholds the trial judge's refusal to allow the following question:

> Do you feel that the death penalty is the appropriate penalty for someone convicted of first degree murder?

The court notes that this question was overly broad and asked about a legislative policy. The court also rules that in light of *Moran v. Illinois* and the ruling in this case, the first three questions considered inappropriate in *State v. Taylor*, 304 N.C. 249, 283 S.E.2d 761(1981) are now proper questions. These questions were:

> Mr. Warwick, if the State convinced you beyond a reasonable doubt that the defendant was guilty of premeditated murder and you had returned that verdict guilty, do you think then that you would feel that the death penalty was the only appropriate punishment?
>
> Mr. Warwick, if you had sat on the jury and had returned a verdict of guilty of first degree murder, would you then presume that the penalty should be death?
>
> At the first stage of the trial and because of that you voted guilty for first degree murder, then do you think that you could at that time consider a life sentence or would your feelings about the death penalty be so strong that you couldn't consider a life sentence?

Error To Bar Defense Counsel's Argument About Severity Of Punishment At Guilt Stage

State v. Smith, 335 N.C. 539, 438 S.E.2d 719 (28 January 1994). The court rules that the trial judge improperly barred defense counsel during the guilt stage of a first-degree murder trial from arguing to the jury about the severity of the punishment for first-degree murder and that the defendant was not guilty.

The argument in effect properly encouraged the jury to carefully consider the case because of the severity of the punishment. The argument did not improperly question the appropriateness of the punishment or suggest that the defendant should be acquitted because of the severity of the punishment.

Error To Bar Defense Counsel From Making More Than One Argument At Capital Sentencing Hearing

State v. Barton, 335 N.C. 696, ___ S.E.2d ___ (4 March 1994). The court rules that the trial judge erred in limiting each counsel for the defendant to one argument at the end of the defendant's capital sentencing hearing. Under G.S. 84-14, defense counsel may make as many arguments as they want. See *State v. Gladden*, 315 N.C. 398, 340 S.E.2d 673 (1986); *State v. Eury*, 317 N.C. 511, 346 S.E.2d 447 (1986). [Note, however, that at a capital sentencing hearing, defense counsel do not have the right to make opening and closing arguments. *State v. Wilson*, 313 N.C. 516, 330 S.E.2d 450 (1985).]

Reasonable Doubt Instruction

Reasonable Doubt Instructions Were Not Error

State v. Patterson, 335 N.C. 437, 439 S.E.2d 578 (28 January 1994). The trial judge gave the following instruction on reasonable doubt:

> The State must prove to you that the [d]efendant is guilty beyond a reasonable doubt. Of course a reasonable doubt of a [d]efendant's guilt also might arise from a lack or insufficiency of the evidence. However, a reasonable doubt is not a vain, imaginary or fanciful doubt but it is a sane, rational doubt. Proof beyond a reasonable doubt means that you must be fully satisfied, entirely convinced or satisfied to a moral certainty of the [d]efendant's guilt.

The court states that although the instruction use the term "moral certainty," it was unlike the improper jury instructions in *Cage v. Louisiana*, 498 U.S. 39 (1990) and *State v. Bryant*, 334 N.C. 333, 432 S.E.2d 291 (1993), because it did not define reasonable doubt with terms such as "grave uncertainty," "actual substantial doubt," "honest, substantial misgiving," or other terms that suggest a higher degree of doubt than is required for acquittal under the reasonable doubt standard. The court rules that the instruction did not violate the *Cage* ruling.

State v. Adams, 335 N.C. 401, 439 S.E.2d 760 (28 January 1994). The trial judge gave the following instruction on reasonable doubt:

> A reasonable doubt, members of the jury, means just that, a reasonable doubt. It is not a mere possible, fanciful or academic doubt, nor is it proof beyond a shadow of a doubt nor proof beyond all doubts, for there are few things in human existence that are beyond all doubt.
>
> Nor [is it] a doubt suggested by the ingenuity of counsel or by your own mental ingenuity, not warranted by the testimony, nor is it a doubt born of a merciful inclination or disposition to permit—to permit the defendant to escape the penalty of the law. Nor is it a doubt suggested or prompted by sympathy for the defendant or those with whom he may be connected.
>
> A reasonable doubt is a sane, rational doubt, an honest—honest, substantial misgiving, one based on reason and common sense, fairly arising out of some or all of the evidence that has been presented or the lack or insufficiency of that evidence, as the case may be.
>
> Proof beyond a reasonable doubt is such proof that fully satisfies or entirely convinces you of the defendant's guilt.

Following the ruling in *State v. Hudson*, 331 N.C. 122, 415 S.E.2d 732 (1992), the court rules that this instruction did not violate the ruling in *Cage v. Louisiana*, 498 U.S. 39 (1990).

State v. Conner, 335 N.C. 618, ___ S.E.2d ___ (4 March 1994). The trial judge's instruction defined reasonable doubt as "an honest substantial misgiving based on the jury's reason and common sense and reasonably arising out of some or all of the evidence that has been presented or the lack or insufficiency of

that evidence." The instruction did not use the terms "grave uncertainty," "actual substantial doubt," or "moral certainty." Following the ruling in *State v. Hudson*, 331 N.C. 122, 415 S.E.2d 732 (1992), the court rules that this instruction did not violate the ruling in *Cage v. Louisiana*, 498 U.S. 39 (1990).

Discovery

Judge May Require State-Paid Defense Expert To Prepare And Furnish Written Report To State If Defendant Intends To Call Expert As Witness At Trial

State v. Lee, 335 N.C. 244, 439 S.E.2d 547 (28 January 1994). The court rules that the reciprocal discovery statute [G.S. 15A-905(b)] authorizes a judge to require a state-paid defense expert (in this case, a psychologist who testified as an expert for the defendant) to prepare and to furnish the state—in advance of the witness' testimony—a written report of the expert's examination of the defendant, when the defendant intends to call the expert as a witness at trial.

Compare this ruling with *State v. White*, 331 N.C. 604, 419 S.E.2d 557 (1992), when the court ruled that the trial judge erred, when granting the defendant's motion for state-paid experts, in requiring the experts to prepare written reports and provide them to the state by a certain date, and, if they did not, they would not be permitted to testify and would not be paid for their services. The court noted that the trial court's order was not limited, as required by G.S. 15A-905(b), to disclosure of reports intended to be introduced at trial or reports relating to the testimony of an expert whom the defendant intended to call as a witness at trial.

Miscellaneous

Joinder Of Defendants For Trial Was Error, Based On Facts In This Case

State v. Pickens, 335 N.C. 717, 440 S.E.2d 552 (4 March 1994). Defendants Pickens and Arrington were tried jointly for murder of a nine-year-old child who was killed by a bullet fired into an apartment from the outside. There was conflicting testimony about various altercations and shootings inside and outside various apartments in the apartment complex where the child was killed. Both defendants presented evidence that challenged the credibility of each other's witnesses. The court rules that, based on the facts of this case, the trial judge erred in denying the defendants' motions to sever their trials from each other. Their defenses were antagonistic and the joint trial deprived them of a fair trial. Each defendant contended that it was the other defendant who fired the shots that killed the child and that they were not acting in concert (the court notes the paucity of evidence that the defendants were acting in concert).

No Assertion Of *Batson* Error On Appeal When Failure To Raise Issue At Trial

State v. Adams, 335 N.C. 401, 439 S.E.2d 760 (28 January 1994). The court rules that a defendant who fails at trial to raise error under *Batson v. Kentucky*, 476 U.S. 79 (1986) (prosecutor's exercising peremptory challenges of jurors in racially discriminatory manner) is barred from raising the issue on appeal. The court distinguishes *State v. Robbins*, 319 N.C. 465, 356 S.E.2d 465 (1987) and *State v. Davis*, 325 N.C. 607, 386 S.E.2d 418 (1989), which permitted defendants to raise the *Batson* issue on appeal without objections at their trials, because the trials in those cases occurred before *Batson* had been decided.

Trial Judge May Not Bar Defense From Asking Question Of Prospective Juror Already Asked By Judge

State v. Conner, 335 N.C. 618, ___ S.E.2d ___ (4 March 1994). Trial judge erred, in violation of G.S. 15A-1214(c), in prohibiting defense counsel from asking questions of prospective jurors that had already been asked by the trial judge.

Trial Judge's Anti-Deadlock Instruction Was Erroneous

State v. Buckom, 335 N.C. 765, ___ S.E.2d ___ (4 March 1994). The court affirms, per curiam and without opinion, the Court of Appeals opinion in this case at 111 N.C. App. 240, 431 S.E.2d 776 (1993). The Court of Appeals opinion ruled that the trial judge's instruction to jurors—who had indicated that they were deadlocked—was erroneous because it

stated that the main purpose in trying to reconcile their differences with further deliberations was to avoid the expense of a retrial.

Police Department's Improper Release Of Car Does Not Result In Dismissal Of Charge

State v. Mlo, 335 N.C. 353, 440 S.E.2d 98 (28 January 1994). The murder victim's car, in which stains were found that were consistent with the victim's blood type, was released by the police department to the victim's estate without a court order or the district attorney's authorization; this release violated G.S. 15-11.1(a). Relying on *Arizona v. Youngblood*, 488 U.S. 51 (1988), the court rules that the charge against the defendant should not be dismissed based on the improper release. The police did not act in bad faith in releasing the car, and the value of any tests the defendant wished to conduct on the car was marginally exculpatory at best.

North Carolina Court of Appeals

Search and Seizure

Plain View Seizure Of Nude Photographs During Drug Search Warrant Was Proper

State v. Cummings, 113 N.C. App. 368, 438 S.E.2d 453 (18 January 1994). Officers executing a search warrant for drugs, drug records, etc. discovered and seized 94 photographs of various nude women. Court rules that seizure was proper under plain view justification because photographs could have been evidence of an obscenity offense.

Criminal Offenses

Accessory Before Fact Responsible For Crimes Flowing From Crime Counseled Or Procured

State v. Marr, ___ N.C. App. ___, ___ S.E.2d ___ (1 March 994). The defendant furnished information to Smith and Jaynes so they could commit a breaking and entering and larceny of the victim's property. While committing these crimes, Smith and Jaynes killed the victim and burned his property. The court rules that the defendant was properly convicted of armed robbery, burglary, murder, and arson under the accessory-before-the-fact theory. See G.S. 14-5.2. An accessory before the fact who has counseled, procured, or planned a criminal event must answer for all crimes flowing from the accomplished event.

Insufficient Evidence Of Nighttime For Burglary Conviction

State v. Barnett, 113 N.C. App. 69, 437 S.E.2d 711 (21 December 1993). Court rules that the following evidence in a first-degree burglary prosecution was insufficient to prove that the breaking and entering had occurred during nighttime ["when it is so dark that a man's face cannot be identified except by artificial light or moonlight," *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980)]: (1) evidence showed that someone broke into the home between 10:00 P.M. (when the victim went to bed) on 3 April 1982 and 6:30 A.M. (when the victim arose) on 4 April 1992; (2) the victim's dog barked at some time between 2:00 A.M. and 3:00 P.M. on 4 April 1992, but she did not arise to see why her dog was barking; (3) the state did not present evidence of the light outside when the victim arose, but court of appeals takes judicial notice from U.S. Naval Observatory records that twilight began at 5:41 A.M. and the sun rose at 6:07 A.M. on 4 April 1992; and (4) the defendant went to a convenience store around 8:00 A.M. on 4 April 1992 and attempted to sell the victim's pocketbook. No one saw the defendant enter the victim's home. Court notes that the breaking and entering could have occurred at any time until 6:30 A.M., which was after nighttime had ended.

Insufficient Evidence Of Common Law Obstructing Justice And Violation Of G.S. 14-230

State v. Eastman, 113 N.C. App. 347, 438 S.E.2d 460 (18 January 1994). (1) The court rules that the defendant was not an officer of the state under G.S. 14-230 (failure to discharge duties) and therefore could not be convicted of a violation of that statute. The defendant was the director of cottage life at the Governor Morehead School for the Blind and did not exercise the sovereign power of the state in the course of his employment. There also was no evidence that the defendant's position was created by state, constitution, or delegation of state authority. (2) The court reverses defendant's conviction of common law

obstruction of justice because there was insufficient evidence that he intended to conceal or destroy evidence of a sexual abuse investigation at the Governor Morehead School.

Evidence

Defendant May Not Collaterally Attack Prior Convictions On *Boykin v. Alabama* Grounds

State v. Stafford, ___ N.C. App. ___, ___ S.E.2d ___ (15 March 1994). The defendant, charged with felony habitual impaired driving, moved to suppress prior convictions that the state sought to use in the state's case-in-chief. The defendant alleged that his guilty pleas had been entered in violation of *Boykin v. Alabama*, 395 U.S. 238 (1969) (guilty plea must be made voluntarily and understandingly). The court rules that a defendant may not collaterally attack a guilty plea based on *Boykin* grounds.

[Note that the issue of the defendant's right to attack, on *Boykin* grounds, prior convictions that the government wants to introduce in a sentencing hearing, has been orally argued and is awaiting decision by the United States Supreme Court in *Custis v. United States*, No. 93-5209, a case from a federal court of appeals, 988 F.2d 1355 (4th Cir. 1991).]

Criminal Charges Properly Dismissed When State Failed To Disclose Confidential Informant

State v. McEachern, ___ N.C. App. ___, ___ S.E.2d ___ (5 April 1994). The state's evidence at a pretrial hearing showed that on 7 March 1991, a confidential informant told an officer that he saw cocaine in the defendant's trailer home and there was a man selling it identified as Toney (defendant's first name). On 8 March 1991, the informant made a controlled buy, set up by the officer, from the same person at the trailer home. Later that day, the officer obtained a search warrant for the trailer home. The defendant was backing out of his yard when the officers arrived. They entered the trailer home and found marijuana and cocaine. The defendant testified that he gave permission to his nephew to use his trailer home for a party and was out of town from 7 March 1991 until just before the officers arrived on 8 March 1991. He said that there were no illegal drugs in his home when he left on 7 March 1991 and he did not know who was in his home during his absence. The defendant argued that the informant, if called as a witness, could testify that the defendant was not in fact the person who was selling drugs and who sold him drugs; the informant could also testify that the drugs belonged to a third party.

The trial judge found that the defendant's testimony established that the informant was a material and necessary witness for the defense to corroborate his alibi, pointed to the guilt of a third party, and showed nonexclusivity of the defendant's premises. The judge granted the defendant's motion to require the state to disclose the informant's identity. The state refused to do so, and the judge then dismissed all the charges against the defendant. The court, relying on *Brady v. Maryland*, 373 U.S. 83 (1963), *Roviaro v. United States*, 353 U.S. 53 (1957) and G.S. 15A-910(3b), upholds the trial judge's rulings that required disclosure of the informant's identity and the dismissal of all charges when the state failed to disclose.

Evidence Of Seat Belt Violation Inadmissible In DWI Prosecution, But New Law Is Enacted

State v. Williams, ___ N.C. App. ___, ___ S.E.2d ___ (1 March 1994). An officer stopped the defendant for a seat belt violation and later charged her with that violation and DWI. She pled responsible to the seat belt violation and the trial judge then dismissed the DWI for lack of evidence, based on G.S. 20-135.2A(d) (evidence of failure to wear a seat belt is inadmissible in any criminal or civil proceeding except based on seat belt violation). The court upholds the trial judge's action.

Note, however, that Chapter 5 (House Bill 34), Extra Session 1994, has amended G.S. 20-135.2A(d) to allow evidence of failure to wear a seat belt to be admissible "as justification for the stop of a vehicle or detention of a vehicle operator and passengers." This new law is effective for trials, actions, or proceedings beginning on or after March 3, 1994. [Note: it is not a violation of the ex post facto clause to use at trial a rule of evidence enacted after the time of the offense. See *Hopt v. Utah*, 110 U.S. 574, 4 S.Ct. 202, 28 L.Ed. 262 (1884); *In re Stedman*, 305 N.C. 92, 286 S.E.2d 527 (1982).]

Defendant's Statements To Wife About Sexual Assault Were Not Within Spousal Communications Privilege

State v. Smith, ___ N.C. App. ___, ___ S.E.2d ___ (1 March 1994). The defendant was convicted of attempted first-degree rape of his stepdaughter, who was twelve years old. His wife testified for the state that sometime after the assault, the defendant confessed to her that he had assaulted the stepdaughter and then put a rifle into his mouth and asked her to pull the trigger—he told her that he could not go to heaven if he committed suicide. The wife also testified that she had threatened to leave the defendant several times and he had threatened to kill himself. The court rules that the defendant's confession to his wife was not a marital communication induced by the marital relationship and prompted by the affection, confidence, and loyalty engendered by the relationship. Instead, the defendant's confession was driven by his own psychological motivations rather than by any confidence induced by the marital relationship.

[There appears to be an additional reason why the evidence would be admissible, although it was not discussed. G.S. 8-57.1 provides that the husband-wife privilege may not be invoked to exclude evidence about the abuse or neglect of a child under sixteen years old. This statute (as well as G.S. 7A-551) would appear to make the privilege automatically inapplicable under the facts of this case, which involved the abuse of a twelve year old.]

State's Rule 404(b) Evidence Of Similar Assault On Another Was Admissible In Murder Case

State v. Parker, 113 N.C. App. 216, 438 S.E.2d 745 (4 January 1984). The defendant was convicted of second-degree murder (killing of a female in 1991) based on circumstantial evidence. The court rules that evidence of an assault on another female in 1986 was admissible under Rule 404(b) to prove motive and identity. The court notes that both women had rejected the defendant in his relationship with them; the defendant had kept both women under constant surveillance; threatened to kill both; threatened to commit suicide over both; ran both off the road with his vehicle; pulled weapons on both; and—in the 1986 assault—stabbed the female victim, requiring her hospitalization.

State's Rule 404(b) Evidence Of Similar Assault On Another Was Inadmissible In Murder Case

State v. Irby, ___ N.C. App. ___, 439 S.E.2d 226 (1 February 1994). The defendant was convicted of two counts of second-degree murder based on his shooting of two people who had driven a vehicle on a rural road near defendant's home on 1 December 1990. The defendant offered the defense of self-defense. The state presented Rule 404(b) evidence that on 23 December 1988 Sam Butler and others (these people were not involved in the murder case) threw some firecrackers while driving on this same rural road and had lost control of their vehicle and had a flat tire after hearing two gunshots. As Butler tried to get his truck out of the ditch, he heard the sound of bullets passing over his head. The defendant later that day admitted that he had shot at someone who had thrown firecrackers in his yard. Relying on the rulings in *State v. Morgan*, 315 N.C. 626, 340 S.E.2d 84 (1986) and *State v. Mills*, 83 N.C. App. 606, 351 S.E.2d 130 (1986), the court rules that the Rule 404(b) evidence—offered by the state to show defendant's specific intent to kill and the victims' lack of aggression—was inadmissible. The evidence did not relate to the defendant's intent or his apparent necessity to defend himself.

Evidence Of Assault On Another Was Inadmissible Under Rule 404(b) And Rule 608(b)

State v. Brooks, ___ N.C. App. ___, 439 S.E.2d 234 (1 February 1994). The defendant was convicted of second-degree murder in shooting stepdaughter's boyfriend. The court rules that the trial judge erred in permitting the state to cross-examine the defendant about various acts of violence he allegedly committed against his wife. The evidence was not admissible under Rule 608(b) because it was not probative of truthfulness or untruthfulness. The evidence was not admissible under Rule 404(b) because his prior acts of violence toward his wife were not relevant concerning his motive, opportunity, intent, etc. in his shooting of his stepdaughter's boyfriend.

State's Rule 404(b) Evidence Of Similar Sexual Assaults On Stepsister Was Admissible Despite Length Of Time Between Prior Assaults And Current Offense

State v. Jacob, ___ N.C. App. ___, ___ S.E.2d ___ (15 February 1994). The defendant was convicted of two counts of statutory rape of his daughter when she was ten years old. The victim did not report the crimes until her older stepsister had revealed that she had been sexually assaulted by the defendant when she was nine years old. These assaults had occurred several years apart, with the stepsister being assaulted first (the sister and stepsister were not living together when the assaults occurred). The court rules that trial judge properly admitted under Rule 404(b) the testimony of the stepsister, who was twenty-two years old at the time of trial (thus, the assaults had occurred thirteen years ago). The defendant had a common plan and scheme to molest his minor prepubescent daughters by initiating and instructing them in sexual intercourse, and this plan and scheme continued from the time of the assaults on the stepsister to the time of the assaults on the daughter. Also, the defendant committed these sexual assaults in a similar manner. The court notes that the remoteness in time of the sexual assaults on the stepsister—thirteen years from the time of trial—was explained by the defendant's divorce from her mother; thus, he no longer had access to her for most of those thirteen years.

Rape Victim's Prior Sexual Behavior Was Inadmissible Under Rule 412(b)(3)

State v. Mustafa, 113 N.C. App. 240, 437 S.E.2d 906 (4 January 1994). The defendant was charged with rape and other sex offenses that allegedly occurred in a van. The defendant's defense was consent. The court rules that the rape victim's prior ongoing sexual relationship with a boyfriend since the 1970s was not a pattern of sexual behavior closely resembling the sexual assaults being tried, and therefore the evidence was inadmissible under Rule 412(b)(3).

Miscellaneous

No Double Jeopardy Or Other Violation When Sentencing Based On Second Habitual Felon Indictment

State v. Oakes, 113 N.C. App. 332, 438 S.E.2d 477 (18 January 1994). The defendant was found guilty of a felony drug offense but the trial judge granted the defendant's motion to dismiss the habitual felon indictment for failing to allege the underlying felony with particularity. The trial judge continued the sentencing hearing to allow the state to obtain a new habitual felon indictment. The state obtained a new habitual felon indictment and the defendant was sentenced as an habitual felon for the felony drug offense. The court rules (1) the trial judge did not abuse his discretion in continuing the sentencing hearing; (2) the second habitual felon indictment was proper because until a judgment was entered on the felony drug offense, there remained a pending, uncompleted felony prosecution to which a new habitual felon indictment could attach; and (3) there was no double jeopardy violation in sentencing defendant under the second habitual felon indictment.

Defense Request For Jury Poll Was Too Late

State v. Ballew, ___ N.C. App. ___, ___ S.E.2d ___ (1 March 1994). **(Note: there was a dissenting opinion in this case, but not on the issue discussed below.)** After the jury had returned its verdicts, the trial judge had instructed them that they were free to discuss the case if they wished, and all jurors had returned to the jury assembly room, the defendant requested that the jury be polled. The court rules that the trial judge properly refused to poll the jury, because the jurors had "dispersed" under G.S. 15A-1238 (on motion after verdict and before jury has dispersed, jury must be polled), and therefore the defendant's request was too late. After leaving the courtroom, the jury had become susceptible to extraneous influences.

Reasonable Doubt Instruction Was Constitutional

State v. Long, ___ N.C. App. ___, 440 S.E.2d 576 (1 March 1994). The court rules, based on the ruling in *State v. Patterson*, 335 N.C. 437, 439 S.E.2d 578 (28 January 1994), that the following instruction on reasonable doubt did not violate the ruling in *Cage v. Louisiana*, 498 U.S. 39 (1990):

> Now, a reasonable doubt is not a vain, imaginary, or fanciful doubt, but it's a sane

and rational doubt. It's a doubt based on common sense. When it is said that you, the jury must be satisfied of the defendant's guilt beyond a reasonable doubt it is meant that you must be fully satisfied, or entirely satisfied, or satisfied to a moral certainty of the truth of the charge. If, after considering, comparing and weighing the evidence or lack of evidence the minds of the jury are left in such a condition that you cannot say you have an abiding faith to a moral certainty in the defendant's guilt then you have a reasonable doubt, otherwise not.

(1) Evidentiary Hearing Required On Defendant's Consent To Allow Counsel To Concede Guilt Of Lesser Offense
(2) Battered Syndrome Instruction In N.C.P.I—Crim. 206.35 Is Constitutional

State v. Baynes, ___ N.C. App. ___, ___ S.E.2d ___ (5 April 1994). **(Note: there was a dissenting opinion on the ruling in (1) below, so the Supreme Court may review this issue.)** (1) The defendant was convicted of second-degree murder. The court remands for an evidentiary hearing on whether the defendant consented to his defense counsel's concession during jury argument that the defendant was guilty of the lesser offense of involuntary manslaughter. The record was silent whether the defendant had consented. (2) The court rules that the battered syndrome instruction in N.C.P.I.—Crim. 206.35 (see page three of the instruction) does not unconstitutionally shift the burden of proof to the defendant.

Amount Of Restitution Ordered Was Error

State v. Hayes, 113 N.C. App. 172, 437 S.E.2d 717 (21 December 1993). The defendant was convicted of five counts of embezzling about $208,900.00. The trial judge ordered the defendant, as a condition of probation, to pay restitution in payments of over $3,000.00 monthly over a five-year probationary period. The court rules that the trial judge erred because he failed to consider the defendant's financial resources [see G.S. 15A-1343(d)] in ordering restitution, since the defendant had $800.00 in monthly income, paid about $350.00 monthly for child support, had recently completed bankruptcy proceedings, etc.

Juvenile Petition May Not Be Amended To Charge Different Offense, Even With Juvenile's Consent

In re Davis, ___ N.C. App. ___, ___ S.E.2d ___ (5 April 1994). Juvenile petition charged juvenile with setting fire to a public building (G.S. 14-59). At the end of the state's evidence, the juvenile's attorney agreed with the state to proceed on the charge of setting fire to personal property (G.S. 14-66), which is not a lesser-included offense of G.S. 14-59. The juvenile was adjudicated delinquent of committing G.S. 14-66. The court rules that the trial judge erred in permitting the petition to be effectively amended to charge the juvenile with a different offense (G.S. 7A-627 permits amendment if it does not change the nature of the offense charged). The court also rules that the trial court's jurisdiction over G.S. 14-66 could not be conferred by consent.

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