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Administration of Justice Memorandum

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

Recent Criminal Cases
(April 19, 1994 - July 5, 1994)

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This memorandum discusses United States Supreme Court cases from April 19, 1994 through June 27, 1994, cases of May 6 and June 17, 1994 from the North Carolina Supreme Court, and cases of April 19, May 3, May 17, June 7, June 21, and July 5, 1994 from the North Carolina Court of Appeals.

United States Supreme Court

Miranda Issues

If Defendant During Custodial Interrogation, After Proper *Miranda* Warnings And Waiver, Makes An Ambiguous Or Equivocal Reference To Counsel, Officers Are Not Required To Stop Interrogation To Clarify Defendant's Reference

Davis v. United States, 114 S.Ct. ___, ___ L.Ed.2d ___, 55 Crim. L. Rep. 2206 (24 June 1994). Investigators gave the in-custody defendant *Miranda* warnings and received a proper waiver of his rights. About an hour and a half into the interrogation, the defendant said, "Maybe I should talk to a lawyer." The investigators told the defendant that they did not want to violate his rights, that if he wanted a lawyer then they would stop questioning him, and they would not pursue the matter unless it was clarified whether he was asking for a lawyer or was just making a comment about a lawyer. The defendant said, "No, I'm not asking for a lawyer," and continued on, and said, "No, I don't want a lawyer." After a short break, the investigators reminded the defendant of his rights to remain silent and to counsel. The defendant then made incriminating statements that he later sought to suppress at trial, arguing that the investigators violated the ruling in *Edwards v. Arizona*, 451 U.S. 477 (1981) (officers must immediately stop interrogation if the suspect has clearly asserted the right to counsel).

The Court reviews its prior rulings and states that the determination whether a defendant actually invoked the right to counsel is an objective one. That is, the invocation of the right to counsel requires some statement that can reasonably be construed to be an expression of the desire for the assistance of counsel. The Court rules that if a defendant makes a reference to an attorney that is ambiguous or equivocal so a reasonable officer under the circumstances would have understood only that the defendant *might* be invoking the right to counsel, the officer is not required to stop the interrogation—rather, the defendant must unambiguously request counsel. The Court specifically rejects a requirement that an officer must stop interrogation immediately when a defendant makes an ambiguous or equivocal request for counsel. [Note: the Court's ruling appears to apply only when a defendant makes an ambiguous or equivocal request for counsel during custodial interrogation *after* proper *Miranda* warnings have been given and a waiver of rights has been obtained. If a defendant makes an ambiguous or equivocal request for counsel

when the officer is giving *Miranda* warnings or obtaining a waiver of rights, the officer should clarify whether or not the defendant wants a lawyer since the state has the burden of proving that the defendant waived his or her rights, including the right to counsel.]

The Court notes that when a defendant makes an ambiguous or equivocal request for counsel, it often will be good law enforcement practice for officers to clarify whether or not the defendant wants a lawyer. Clarifying questions protect the rights of the defendant by ensuring that the defendant gets a lawyer if he or she wants one and will minimize the risk of a confession being suppressed by later judicial second-guessing of the meaning of the defendant's statement about counsel. But the Court reiterates that if the defendant's statement is not an unambiguous or unequivocal request for counsel, officers are not obligated to stop questioning the defendant.

The Court upholds the lower court ruling that the defendant's remark to the officers in this case, "Maybe I should talk to a lawyer," was not a request for counsel. Therefore, the officers were not required to stop questioning the defendant.

Court Reaffirms Prior Rulings That Officer's Undisclosed Subjective View Is Irrelevant In Determining Custody Under *Miranda*; Court Again Rejects "Focus-Of-Investigation" Factor

Stansbury v. California, 114 S.Ct. 1526, 128 L.Ed.2d. 293, 55 Crim. L. Rep. 2016 (26 April 1994). In determining whether a suspect was in custody so that an officer must give *Miranda* warnings before conducting interrogation, the California Supreme Court considered as a factor whether the officer's investigation had focused on the suspect. Relying on its prior rulings—including *Beckwith v. United States*, 425 U.S. 341 (1976), *Berkemer v. McCarty*, 468 U.S. 420 (1984), *California v. Beheler*, 463 U.S. 1121 (1983), and *Minnesota v. Murphy*, 465 U.S. 420 (1984)—the court rejects that factor in determining custody. The Court notes that the determination of custody depends on the objective circumstances of the interview, not on the subjective views of the interrogating officers or the person being questioned. An officer's views concerning the nature of an interrogation or beliefs concerning the potential culpability of the person being questioned may be one of many factors in determining the custody issue, but only if the officer's views or beliefs are somehow manifested to the person and would have affected how a reasonable person in that position would perceive one's freedom to leave. See generally Farb, *Arrest, Search, and Investigation in North Carolina*, p. 213 (2d ed. 1992).

(The Court notes that even a clear statement from an officer that the person is a prime suspect is not, in itself, dispositive of the custody issue, since some suspects are free to come and go until an officer decides to make an arrest. The Court also notes that an officer's undisclosed views may be relevant in testing the credibility of the officer's account of what happened during an interrogation; but it is the objective surroundings, not any undisclosed views, that control the custody issue.)

Capital Case Issues

When Defendant's Future Dangerousness Is In Issue, And State Law Prohibits Defendant's Release On Parole, Due Process Requires That Sentencing Jury Must Be Informed That Defendant Is Ineligible For Parole

Simmons v. South Carolina, 114 S.Ct. ___, ___ L.Ed.2d. ___, 55 Crim. L. Rep. 2181 (17 June 1994). The defendant was being tried for capital murder, and he was ineligible for parole if he was convicted of that offense. The defendant was convicted of capital murder. The prosecutor argued in the sentencing hearing that the jury should consider the defendant's future dangerousness in deciding whether to impose the death penalty (although future dangerousness is not a statutory aggravating circumstance, evidence in aggravation under South Carolina law is not limited to statutory circumstances). The trial judge refused defendant's request that the jury be instructed that the defendant was ineligible for parole if he was sentenced to life imprisonment. The Court rules that when the defendant's future dangerousness is in issue, and state law prohibits the defendant's release on parole, due process requires that the sentencing jury must be informed that defendant is ineligible for parole.

[Based on the analyses and statements in the various opinions in this case, the ruling appears not to affect current North Carolina law that prohibits comment on parole eligibility except when there is a

jury inquiry—and then the judge must instruct the jury that life imprisonment means imprisonment for life in the State's prison. See, e.g., *State v. Robbins*, 319 N.C. 465, 356 S.E.2d 279 (1987). In contrast with South Carolina law, future dangerousness is not an aggravating factor under North Carolina law and a person sentenced to life imprisonment is not ineligible for parole.

Effective for offenses committed on or after October 1, 1994, a defendant sentenced to life imprisonment for first-degree murder will not be eligible for parole; however, G.S. 15A-2002 (in the version applicable to those offenses) will require a trial judge to instruct the jury that a sentence of life imprisonment means a sentence of life without parole.]

Admission During Capital Sentencing Hearing Of Defendant's Prior Death Sentence In Another Case Was Not Error, Based On Facts In This Case

Romano v. Oklahoma, 114 S.Ct. 2004, ___ L.Ed.2d. ___, 55 Crim. L. Rep. 2171 (13 June 1994). The defendant was convicted of murder and sentenced to death. He later was convicted of another murder and, during the sentencing hearing before the jury, evidence of the prior murder conviction and death sentence was introduced (there were two aggravating factors relating to the prior murder conviction—prior violent felony conviction and the defendant would constitute a continuing threat to society). The defendant objected to the jury's being informed of the death sentence. The Court rules, based on the facts in this case, that the admission of the death sentence information did not affirmatively mislead the jury in violation of *Caldwell v. Mississippi*, 472 U.S. 320 (1985) and did not violate the defendant's rights under the Eighth or Fourteenth Amendments.

[Note: At a resentencing hearing, a prospective juror's knowledge that a prior sentencing jury had recommended the death penalty is not automatically disqualifying. See *State v. Simpson*, 331 N.C. 267, 415 S.E.2d 351 (1992).]

Indigent Capital Defendant Entitled To Counsel And May Ask For Stay Of Execution Before Filing Federal Habeas Petition

McFarland v. Scott, 114 S.Ct. ___, ___ L.Ed.2d. ___, 55 Crim. L. Rep. 2252 (30 June 1994). The Court rules that an indigent capital defendant is entitled to counsel and may apply for a stay of execution before filing a formal federal habeas corpus petition.

Miscellaneous

Batson Ruling Applies To Peremptory Challenges Based On Gender

J. E. B. v. Alabama, 114 S.Ct. 1419, 128 L.Ed.2d. 89, 55 Crim. L. Rep. 2003 (19 April 1994). The Court rules that the ruling in *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986) (no racial discrimination in exercise of peremptory challenges), applies to the exercise of peremptory challenges based on gender.

Collateral Attack Of Prior Conviction Is Limited To Violation Of Right-To-Counsel Claim

Custis v. United States, 114 S.Ct. 1732, 128 L.Ed.2d. 517, 55 Crim. L. Rep. 2098 (23 May 1994). The Court rules that although a defendant has a federal constitutional right to collaterally attack a prior conviction because it was obtained in violation of an indigent's constitutional right to counsel, a defendant has no federal constitutional right to collaterally attack a prior conviction on other grounds, such as (1) the guilty plea was obtained without proper advice about waiver of rights as required by *Boykin v. Alabama*, 395 U.S. 238 (1969), or (2) the defendant's lawyer provided ineffective assistance of counsel under the Sixth Amendment. The Court rules that a trial judge at a federal sentencing hearing had properly barred the defendant from attacking—under the grounds specified in (1) and (2) above—prior state convictions offered by the government to enhance a federal sentence.

The Court states that the defendant could attack his state convictions in state court or through federal habeas review. If he was successful, he then could apply for reopening of any federal sentence enhanced by the state convictions (although the Court states that it expresses no opinion on the appropriate disposition of such an application).

[The North Carolina Court of Appeals in *State v. Stafford*, 114 N.C. App. 101, 440 S.E.2d 846 (1994) ruled that a defendant may not collaterally attack prior DWI convictions on *Boykin* grounds

when the convictions are offered to prove the offense of habitual impaired driving. The *Stafford* ruling is consistent with the *Custis* ruling, and it would also bar a defendant from collaterally attacking a prior conviction on *Boykin* grounds when the state seeks to use the conviction at sentencing or to impeach the defendant with that conviction. See *State v. Muscia*, 115 N.C. App. ___, ___ S.E.2d ___ (5 July 1994) (court rules, relying on *Stafford*, that the defendant was properly denied collateral attack of a prior DWI conviction used in sentencing for a DWI offense). A defendant's remedy would be to directly attack the prior conviction (if it occurred in a North Carolina state court) by a motion for appropriate relief under G.S. 15A-1415 in the court where the conviction occurred.

For right-to-counsel violations, G.S. 15A-980 allows a defendant to collaterally attack a prior conviction that the state seeks to use for impeachment or sentencing purposes. Thus, North Carolina statutory law is consistent with federal constitutional law as described in *Custis*.

The North Carolina Court of Appeals has ruled that a defendant has the burden of proof when seeking to set aside a conviction on *Boykin* grounds. *State v. Hester*, 111 N.C. App. 110, 432 S.E.2d 171 (1993). And, G.S. 15A-980 specifically provides that a defendant has the burden of proof when seeking to set aside a conviction on right-to-counsel grounds.]

Prior Uncounseled Misdemeanor, When No Active Sentence Imposed, Is Valid For Later Use

Nichols v. United States, 114 S.Ct. 1921, 128 L.Ed.2d. 745, 55 Crim. L. Rep. 2136 (6 June 1994). The defendant in *Nichols* was assessed one point in a federal sentencing hearing for a prior state misdemeanor conviction for driving under the influence, for which he was fined but not incarcerated. The defendant, relying on the *Baldasar v. Illinois*, 446 U.S. 222 (1980) (prior uncounseled misdemeanor conviction—even though valid because active imprisonment was not imposed—may not be used to elevate a second misdemeanor offense to a felony), objected to the use of that conviction, arguing that he was indigent and had not been represented by counsel at that trial and had not waived his right to counsel.

The Court examines the various opinions constituting a majority in *Baldasar* and overruled the case, finding its reasoning unsound. The Court rules that since an uncounseled misdemeanor conviction is constitutionally valid if a defendant does not receive an active sentence for that conviction, that conviction may constitutionally be used in a later proceeding, including a sentencing hearing. [Note: if the defendant in *Nichols* had received an active sentence for the misdemeanor conviction, then the conviction would not have been valid unless the defendant had counsel or properly waived the right to counsel.]

[G.S. 15A-980 authorizes a defendant to make a motion to suppress a prior conviction that was obtained in "violation of [the] right to counsel." If the motion is based on a federal constitutional right to counsel, the *Nichols* ruling would not bar the state from using a prior uncounseled misdemeanor conviction when active imprisonment was not imposed for that conviction. For example, a defendant is convicted of misdemeanor DWI and sentenced to Level V and active imprisonment is not imposed as a condition of special probation. Even if the defendant was indigent at the time of the conviction and did not have counsel or waive counsel, there is no federal constitutional impediment to the state's later use of that conviction at sentencing for a different offense, to prove an element of an different offense (e.g., felony habitual impaired driving), or to impeach the defendant with that conviction.

The *Nichols* ruling does not affect the North Carolina Supreme Court's ruling in *State v. Neeley*, 307 N.C. 247 (1982). The court ruled in *Neeley* that a trial judge may not activate an indigent defendant's suspended sentence if—at the original trial at which the suspended sentence was imposed—the defendant did not have counsel and had not properly waived the right to counsel. This ruling is natural corollary of *Argersinger* and is not affected by *Nichols*.]

Montana's Drug Tax Is Punitive And Therefore Is Subject To Double Jeopardy Prohibition Against Successive Punishments For Same Offense

Department of Revenue of Montana v. Kurth Ranch, 114 S.Ct. 1937, 128 L.Ed.2d. 767, 55 Crim. L. Rep. 2144 (6 June 1994). Members of the Kurth family were arrested for drug offenses, their marijuana plants were seized and destroyed, and they plead guilty to various drug charges. The Kurths later filed a petition for Chapter 11 bankruptcy. In bankruptcy proceedings, the Kurths objected to the drug tax assessment of $181,000 on 1,811 ounces of

harvested marijuana, based on the state department of revenue's claim for unpaid drug taxes. The Court examines the state's drug tax and determines that it has punitive characteristics that subject it to the double jeopardy clause: (1) the tax was more than eight times the drug's market value; (2) the tax had an obvious deterrent purpose; (3) the tax was conditioned on the commission of a crime—the tax assessment was exacted only after taxpayer has been arrested for precise conduct that results in the tax assessment; and (4) although the tax purports to be a species of property tax, it is levied on goods that the taxpayer neither owns nor possesses when the tax is imposed. The Court rules that the state proceeding to collect the drug tax on the possession of the drugs was the functional equivalent of a successive criminal prosecution (i.e., it occurred in a separate proceeding after the guilty pleas to the criminal offenses) that placed the Kurths in jeopardy a second time for the same offense. Therefore, the assessment of the drug tax was barred by the double jeopardy clause. [The Court does not decide whether it would be constitutional to impose this drug tax in the same proceeding as the criminal prosecution or whether imposition of such a drug tax would bar a later criminal prosecution.]

[North Carolina's drug tax law is contained in G.S. 105-113.105 through -113.113. It differs in two significant ways from the Montana drug tax. First, the Montana tax is a property tax levied only at arrest and collected only after a criminal conviction is obtained (i.e., the tax may be collected only after fines or forfeitures have been satisfied). The North Carolina tax is an excise tax that is payable within 48 hours after a person comes into possession of the drugs; the imposition and payment of the tax is not contingent on an arrest, criminal prosecution, or conviction. Second, unlike the Montana tax—which may be imposed when the person no longer owns or possesses the drugs—the North Carolina tax is imposed on drugs when the person possesses them. Thus, the North Carolina tax may be sufficiently distinguishable from the Montana tax so it is not a punishment subject to the double jeopardy clause's prohibition against multiple punishments for the same offense.]

Court Narrows Scope Of Admissible Evidence Under Federal Evidence Rule 804(b)(3) (Declaration Against Interest) To Those Statements Within Declarant's Narrative That Are Individually Self-Inculpatory

Williamson v. United States, 114 S.Ct. ___, ___ L.Ed.2d. ___, 55 Crim. L. Rep. 2231 (27 June 1994). The government in a drug prosecution introduced, under Federal Evidence Rule 804(b)(3) (statement against interest), statements of the defendant's accomplice, Harris. The statements were introduced after Harris had asserted his Fifth Amendment privilege and refused to testify. Parts of the statements were, as described by the Court, "self-inculpatory" (incriminating as to Harris) and parts were "non-self-inculpatory" (not incriminating as to Harris, and they also included statements incriminating as to the defendant). The Court rules that Rule 804(b)(3) does not allow the admission of non-self-inculpatory statements, even if they are made within a broader narrative that is generally self-inculpatory. (That is, collateral statements, even those neutral as to the declarant's interest, are not admissible.) The court states that a trial judge "may not just assume for purposes of Rule 804(b)(3) that a statement is self-inculpatory because it is part of a fuller confession, and this is especially true when the statement implicates someone else."

[Although North Carolina appellate courts are not bound by the Court's nonconstitutionally-based ruling concerning this federal rule of evidence, they often give weight to such a ruling when interpreting similar state rules of evidence. Note, however, that the North Carolina Supreme Court's ruling in *State v. Wilson*, 322 N.C. 117, 367 S.E.2d 589 (1988) differs from the *Williamson* ruling. The court in *Wilson* ruled that a declarant's collateral statements (in this case, a murder victim's statements inculpating the defendant) were admissible under Rule 804(b)(3)—even though they were themselves neutral to the declarant's interest—when they were integral to a more encompassing statement that was against the declarant's interest. Of course, there are also constitutional confrontation clause issues involved in admitting an accomplice's statements; see *Lee v. Illinois*, 476 U.S. 530 (1986) and *White v. Illinois*, 502 U.S. ___ (1992). For other North Carolina cases on Rule 804(b)(3), see *State v. Brown*, 335 N.C. 477, 439 S.E.2d 589 (1994); *State v. Tucker*, 331 N.C. 12, 414 S.E.2d 548 (1992); *State v. Levan*, 326 N.C. 155, 388 S.E.2d 429 (1990); *State v. Artis*, 325 N.C.

278, 384 S.E.2d 470 (1989); *State v. Eggert*, 110 N.C. App. 614, 430 S.E.2d 699 (1993); *State v. Singleton*, 85 N.C. App. 123, 354 S.E.2d 259 (1987).]

Federal Habeas Corpus Is Unavailable For State Prisoner In Reviewing Some Alleged Violations Of Speedy Trial Provisions Of Interstate Agreement On Detainers

Reed v. Farley, 114 S.Ct. ___, ___ L.Ed.2d. ___, 55 Crim. L. Rep. 2192 (20 June 1994). The Court rules that federal habeas corpus review is barred when the issue is the state's alleged failure to comply with the 120-day speedy trial rule in the Interstate Agreement On Detainers and the defendant did not object to the trial date when it was set and did not suffer prejudice attributable to the delayed start of the trial.

North Carolina Supreme Court

Evidence

(1) Evidence Inadmissible Under Rule 609 Was Admissible Under Rule 404(b)
(2) Evidence Of Murder Victim's Prior Sexual Behavior Was Proper State's Rebuttal Evidence
(3) Evidence Of Murder Victim's Character Was Proper State's Rebuttal Evidence When Defendant's Evidence Opened The Door

State v. Sexton, 336 N.C. ___, ___ S.E.2d ___ (17 June 1994). The male defendant was convicted of first-degree murder of a female. The defendant testified that the victim admitted she wanted to "cheat" on her husband and voluntarily committed various sexual acts with him. She then fought with him, and he placed a stocking around her neck. (The state's medical evidence showed the victim died of ligature strangulation of her neck.) (1) The defendant admitted on cross-examination that he had been convicted of assaulting his girl friend. The state then was permitted to ask him if he had choked her (he admitted she had said he had choked her, but did not remember doing so). Although this question exceeds the scope of cross-examination under Rule 609 under *State v. Lynch*, 334 N.C. 402, 432 S.E.2d 349 (1993), it was permissible under Rule 404(b). There was a logical relationship between the murder being tried and the assault, both committed by choking. Defendant had admitted for both offenses that he could not remember whether he had choked the victims. The prior assault was not remote in time to the murder, since the assault had occurred less than a year before the murder. The defendant's defense to the murder was lack of specific intent to kill; his having recently choked another victim was relevant to show intent. (2) The state was permitted to present rebuttal evidence that the victim was not flirtatious, was a strong family person, never discussed cheating on her husband, had an aversion to oral sex, etc. The court rejects the defendant's argument that this evidence of the victim's past sexual behavior and reputation for marital fidelity was introduced in violation of Rule 412 (rape evidence shield rule). The court rules that in the limited circumstance when the rape victim is deceased and the defendant's testimony questions the victim's sexual behavior, the state may present rebuttal evidence concerning the victim's prior sexual conduct to challenge the defendant's credibility. The court states that Rule 412 is intended as a shield for sexual assault victims and not as a sword for defendants. (3) As discussed above, the trial judge permitted the state to offer rebuttal testimony about the victim's general good character, devotion to family, and reputation for marital fidelity. Although such evidence may not have been admissible under Rule 404(a)(2) (pertinent trait of victim's character), the court rules that the defendant's evidence (described above) in attacking the victim's marital fidelity opened the door to the rebuttal evidence.

Defendant's Communications To Attorney Were Made Solely To Facilitate Defendant's Safe Surrender To Law Enforcement Authorities And Therefore Were Not Within Attorney-Client Privilege

State v. McIntosh, 336 N.C. ___, 444 S.E.2d 438 (17 June 1994). The sheriff's office received a call that an officer was needed at a lawyer's office in reference to a shooting. A deputy sheriff went to the lawyer's office, and the lawyer told the deputy that a person (the defendant) had come to his office to turn himself in concerning a shooting. The defendant went with the deputy and made incriminating statements. The defendant moved to suppress his statements and the lawyer's statements, asserting that they were a product of the lawyer's violation of the attorney-client

privilege. The trial judge suppressed the use of the lawyer's statement but allowed the state to introduce the defendant's statements. The court notes that the uncontroverted evidence showed that the defendant consulted with the lawyer solely to facilitate the defendant's safe surrender; therefore, the defendant necessarily authorized the lawyer to inform law enforcement authorities that the defendant had come to his office to turn himself in. Thus, that portion of the defendant's communication was not intended to be confidential, because it was given to the lawyer to convey to law enforcement for surrender. Therefore, the information was not privileged and the lawyer did not violate the attorney-client privilege. (The court also notes that the lawyer's statements to the deputy were not privileged and therefore were admissible.)

Defendant's Sixth Amendment Right To Cross-Examine State's Witness Was Violated When Witness Refused To Answer Questions Based On Fifth Amendment Self-Incrimination Privilege

State v. Ray, 336 N.C. ___, ___ S.E.2d ___ (17 June 1994). The defendant was convicted of first-degree murder that was drug-related. During direct examination of a state's witness—an eyewitness to the murder—the state asked the witness about his and the murder victim's involvement with drug dealing. On cross-examination, the witness refused to answer some questions about drug dealing, asserting his Fifth Amendment privilege against compelled self-incrimination. The trial judge found that some of the answers to the cross-examination questions could be incriminating and that the witness had a right to refuse to answer those questions. After the witness had completed his testimony, the defendant requested the trial judge to direct the witness to answer the questions to which he had invoked the privilege or to strike the witness's entire testimony. The court notes that the issue of whether the witness was properly allowed to assert the privilege was not raised on appeal. However, the court rules that the defendant's right to confront witnesses through cross-examination was unreasonably limited by the witness's assertion of the testimonial privilege. The court discusses several cases, particularly *United States v. Cardillo*, 316 F.2d 606 (2d Cir. 1963), and notes that courts have distinguished between the assertion of the privilege preventing inquiry into matters about which the witness testified on direct examination (if so, the defendant's motion to strike the testimony should be granted) and the assertion of the privilege preventing inquiry into collateral matters, such as the credibility of the witness (if so, the defendant's motion to strike the testimony should be denied). The court examines the facts in this case and rules that the trial judge erred in not striking the testimony of the witness because the prohibited inquiry on cross-examination involved matters discussed on direct examination—drug dealing that was the basis of the relationship between the victim, defendant, and the witness. [However, the court finds that the error was harmless beyond a reasonable doubt.]

(1) Assuming It Was Error To Exclude Rule 412 Evidence, Error Was Harmless
(2) State's Cross-Examination Was Improper Under Rules 404(b) And 608(b)

State v. McCarroll, 336 N.C. ___, ___ S.E.2d ___ (17 June 1994), *reversing*, 109 N.C. App. 574, 428 S.E.2d 229 (1993). (1) The Court of Appeals in this case had ruled that the trial judge had erred in excluding defendants' proffered testimony about the prosecuting witness's alleged false accusation of sexual activity. The Supreme Court rules, assuming without deciding that it was error, that the error was harmless beyond a reasonable doubt. (2) The prosecuting witness testified that she had been sexually abused on another occasion (other than the acts being tried) when she was living with her family in Kansas. The state cross-examined one of the defendants (the witness's mother) about her relationship to the man who the witness testified had molested her. The state questioned the defendant about whether she was having an affair with that man. It was not probative of the defendant's truthfulness or untruthfulness under Rule 608(b) and it was not admissible under Rule 404(b), based on the facts in this case. [However, the court finds this error was not prejudicial.]

Jurors' Affidavits Revealing Their Misunderstanding About Parole Eligibility Were Inadmissible Under Rule 606(b)

State v. Robinson, 336 N.C. 78, 443 S.E.2d 306 (6 May 1994). The court rules that the trial judge properly refused under Rule 606(b) to consider with a motion for appropriate relief jurors' affidavits

indicating their misunderstanding about parole eligibility for a defendant sentenced to life imprisonment for first-degree murder. Their discussions were "internal influences" (i.e., coming from the jurors themselves) that could not be considered. See also *State v. Quesinberry*, 325 N.C. 125, 381 S.E.2d 681 (1991).

Fourth and Fifth Amendment Issues

(1) Exigent Circumstances Supported Warrantless Entry Of House To Arrest Defendant
(2) Wife May Consent To Search Of Premises Shared With Her Husband

State v. Worsley, 336 N.C. 268, 443 S.E.2d 68 (6 May 1994). (1) Officers arrived at the murder scene and discovered the victim's body, the subject of a brutal stabbing, lying in a common area of an apartment complex. An eyewitness to the murder identified the defendant as the killer. Another witness informed the officers that he had seen the defendant running toward the defendant's apartment shortly after the murder. The officers went to the defendant's nearby apartment and discovered fresh blood on the doorknob of the back door. The officers knocked loudly on the defendant's door and identified themselves as officers, but received no response. They then entered the apartment. The court rules that officers had exigent circumstances to enter the defendant's home—without consent or an arrest warrant—to arrest the defendant. (2) Overruling *State v. Hall*, 264 N.C. 559, 142 S.E.2d 177 (1965) and other cases, the court rules that a wife may consent to a search of the premises she shares with her husband.

Court Affirms Court Of Appeals Opinion That Search Of Defendant's Pocket During Frisk Was Unconstitutional

State v. Beveridge, 336 N.C. ___, 444 S.E.2d 223 (17 June 1994). The court, per curiam and without an opinion, affirms the Court of Appeals opinion, 112 N.C. App. 688, 436 S.E.2d 912 (7 December 1993) that is discussed below.

While Officer Johnson was arresting a driver for impaired driving, Officer Gregory (while securing the car) asked the defendant, a passenger, to get out. Officer Gregory noticed a strong odor of alcohol about the defendant, who also was acting "giddy." The officer believed, based on the facts in this case, that the defendant was under the influence of alcohol and a controlled substance. He told the defendant he was going to pat him down for weapons. During the pat down, the officer noticed that there was a cylindrical-shaped rolled-up plastic bag in his front pocket. The officer asked him what it was, and the defendant started laughing and pulled out some money. However, the officer could still see the long cylindrical bulge he had in his pocket. He asked the defendant what it was. The defendant then stuck his hand in his pocket and tried to palm what he had. The officer asked him what he was trying to hide, and the defendant rolled open his hand and showed the officer a white plastic bag with a white powdery substance in it. The officer believed that the substance was cocaine and then arrested him for possession of cocaine. The court rules that Officer Gregory was justified in conducting a limited pat down of the defendant to determine whether the defendant was armed, but once he concluded that there was no weapon, he could not continue to search "or question" the defendant to determine whether the bag contained illegal drugs. (That part of the court's ruling in quotation marks in the preceding sentence does not appear consistent with prevailing federal constitutional law.) The court rules that the search exceeded the scope of the frisk under *Minnesota v. Dickerson*, 113 S.Ct. 2130, 124 L.Ed.2d. 334 (1993), because it was not immediately apparent that the item in the defendant's pocket was an illegal substance.

Capital Case Issues

The Only Evidence Of Criminal Activity To Be Considered Under The Capital Statutory Mitigating Circumstance Of No Significant Prior Criminal History Is Criminal Activity Committed Before Date Of Murder For Which Defendant Is Being Sentenced

State v. Coffey, 336 N.C. ___, 444 S.E.2d 431 (17 June 1994). The court rules that the only evidence of criminal activity that may be considered under the capital statutory mitigating circumstance of no significant prior criminal history [G.S. 15A-2000(f)(1)] is criminal activity committed before the date of the murder for which the defendant is being sentenced.

Proper Not To Submit No Significant History Of Prior Criminal Activity

State v. Sexton, 336 N.C. ___, ___ S E.2d ___ (17 June 1994). The evidence of the defendant's prior criminal activity was a conviction of forgery and uttering on May 1, 1989 and a conviction for two counts of assault on a female on October 22, 1989. The court notes that one of these counts was the assault by choking of a female that occurred less than one year before the strangulation of the murder victim; the defendant testified he did not remember choking the assault victim, a circumstance strikingly similar to his professed lack of memory about the details of the strangulation of the murder victim. The court states that "[g]iven the nature and recency of his record of assault, we cannot say that the trial court erred in determining that no reasonable juror could have concluded defendant's criminal history was insignificant." Therefore, the trial judge did not err in failing to submit the mitigating circumstance [G.S. 15A-2000(f)(1)]. [However, compare the ruling in this case with *State v. Mahaley*, 332 N.C. 583, 423 S.E.2d 58 (1992) (error not to submit this mitigating circumstance when defendant had no prior convictions and the prior criminal history included use of illegal drugs and theft of money and credit cards to support drug habit); *State v. Wilson*, 322 N.C. 117, 367 S.E.2d 589 (1988) (error not to submit this mitigating circumstance when defendant had prior felony conviction for second-degree kidnapping of former wife—who was not the murder victim—committed four years before murder being tried, had stored illegal drugs in his shed, and had participated in theft with murder victim); *State v. Brown*, 315 N.C. 40, 337 S.E.2d 808 (1988) (trial judge did not err in submitting this mitigating circumstance when defendant had seventeen prior felony convictions); *State v. Lloyd*, 321 N.C. 301, 364 S.E.2d 316 (1988) (trial judge did not err in submitting this mitigating circumstance when defendant had two felony convictions about twenty years before the murder and had seven alcohol-related misdemeanor convictions over an eleven-year period up to the time of the murder).]

Proper Not To Submit No Significant History Of Prior Criminal Activity

State v. Jones, 336 N.C. 229, 443 S.E.2d 48 (6 May 1994). The trial judge properly refused to submit mitigating circumstance that defendant had no significant history of prior criminal history [G.S. 15A-2000(f)(1)] based on the following evidence: The defendant was using illegal drugs for several weeks before the murder. He had broken into a particular convenience store "six or seven times" and stole various articles. He had broken into a pawn shop and stolen several guns. He sold some of the guns and used one of them to kill the victim in this case. Members of the defendant's family testified that he had shoplifted and "hustled" as a child. The court cites *State v. Stokes*, 308 N.C. 634, 304 S.E.2d 184 (1983).

(1) Proper Not To Submit No Significant History Of Prior Criminal Activity
(2) Error Not To Submit Mitigating Factor About Defendant's Adjustment To Prison Life

State v. Robinson, 336 N.C. 78, 443 S.E.2d 306 (6 May 1994). (1) The trial judge properly refused to submit mitigating circumstance that defendant had no significant history of prior criminal history [G.S. 15A-2000(f)(1)] based on the following evidence: The defendant had been involved in criminal activity since his adolescence. (The defendant was 31 years old at the time of the sentencing hearing.) He had been a drug user since age thirteen and he sometimes made up to $4,000 to $5,000 a week selling drugs. He made his living selling drugs; he had been seen selling illegal drugs—including cocaine, marijuana, and PCP—in Maryland and two North Carolina cities. Three years before the murder in this case, he was convicted of robbery of a business and two of its employees. Evidence also showed that the defendant in the case in which he was being sentenced had come from Maryland to sell drugs and to commit a robbery. (2) The trial judge, relying on *State v. Pinch*, 306 N.C. 1, 292 S.E.2d 203 (1982), refused to submit the nonstatutory mitigating circumstance that "[i]n a structured prison environment, [the defendant] is able to conform his behavior to the rules and regulations and performs tasks he is required to perform." The court rules that the trial judge erred in refusing to do so, based on *Skipper v. South Carolina*, 476 U.S. 1 (1986), decided after *Pinch*. The court overrules *Pinch* to the extent it conflicts with *Skipper*.

(1) Attempted Rape Conviction Was Violent Felony Conviction Under G.S. 15A-2000(e)(3)
(2) No *Case* Error When Prosecutor Accepted Plea To Felony Murder Theory Only
(3) No Error In Peremptory Instruction On Nonstatutory Mitigating Factor
(4) Defendant Has No Right To Allocution In Capital Sentencing Hearing

State v. Green, 336 N.C. 142, 443 S.E.2d 14 (6 May 1994). (1) Defendant was convicted by a general court martial of attempted rape. Court rules that attempted rape is defined as a *violent* crime by military case law and therefore qualifies as a prior violent felony conviction under G.S. 15A-2000(e)(3) without the necessity to show that the defendant used violence in committing the offense. (2) The prosecutor did not violate the ruling in *State v. Case*, 330 N.C. 161, 410 S.E.2d 57 (1991) (prosecutor erred in not presenting all statutory aggravating circumstances in a capital sentencing hearing) by allowing the defendant to plead guilty to first-degree murder under the felony murder theory only, even though there was evidence of first-degree murder by premeditation and deliberation as well, since the total number of available aggravating circumstances would not have been different if the state had obtained a conviction of first-degree murder based on both theories. (3) The trial judge did not err in refusing the defendant's request to give the peremptory instruction in N.C.P.I. 150.11 (October 1991) for nonstatutory mitigating factors, because that instruction is only appropriate for statutory mitigating factors. Although a peremptory instruction on a nonstatutory mitigating circumstance may direct the jurors that the evidence supports the factual existence of the circumstance, each juror—before "finding" the circumstance—must also consider the circumstance to have mitigating value. (4) The court rules that a defendant does not have common law, statutory, or constitutional right to allocution at a capital sentencing hearing. The court stated that the "defendant has no right to testify without being subjected to cross-examination or to make unsworn statements of fact during [jury] argument or otherwise." The court also stated that "the only [remnant] of the common law right of allocution remaining in capital cases is the right to present strictly legal arguments to the presiding judge as to why no judgment should be entered."

Miscellaneous

(1) Retroactivity Standard Of *Teague v. Lane* Is Adopted For Federal Constitutional Issues Raised In Hearings For Motions For Appropriate Relief
(2) Ruling In *McKoy v. North Carolina* Is Applied Retroactively To Capital Cases That Became Final Before *McKoy* Was Decided, When Defendant Properly Raised Issue At Trial

State v. Zuniga, 336 N.C. ___, 444 S.E.2d 443 (17 June 1994). In 1985 the defendant was convicted of first-degree murder and sentenced to death. The trial judge instructed the jury that it could not consider any mitigating circumstance that it did not find unanimously. The defendant objected to this instruction and assigned it as error on appeal to the supreme court. The court rejected the assignment of error and affirmed the conviction and death sentence. On November 16, 1987, the United States Supreme Court denied defendant's petition for a writ of certiorari. The defendant then filed a motion for appropriate relief in state court, again alleging error in the jury instruction. While the motion was pending, the United States Supreme Court ruled in *McKoy v. North Carolina*, 494 U.S. 433 (1990) the instruction was unconstitutional. Relying on *Teague v. Lane*, 489 U.S. 288 (1989), the superior court judge refused to give *McKoy* retroactive application and denied the defendant's motion.

[*Teague v. Lane* provides that the new rules of federal constitutional criminal procedure will apply retroactively to cases on direct review, but they generally will not be applied retroactively to cases on collateral review (i.e., federal habeas corpus)—with two exceptions: the new rule will be applied retroactively if (1) the new rule places an entire category of primary conduct beyond the reach of criminal law; or prohibits imposition of a certain type of punishment for a class of defendants based on their status or offense; or (2) the new rule is a watershed rule of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding.]

(1) The court notes that the *Teague* ruling applies only in federal habeas corpus proceedings. However, the court adopts the *Teague* ruling as the test for retroactivity for new federal constitutional

rules of criminal procedure for state collateral review (e.g., motions for appropriate relief).

(2) Following the ruling in *Williams v. Dixon*, 961 F.2d 448 (4th Cir. 1992), the court rules that, assuming without deciding that *McKoy* was a new rule, it came within the second *Teague* exception (see discussion above) and therefore it retroactively applied to the defendant's death sentence. The court notes that because the defendant objected to the *McKoy*-flawed instructions at trial and assigned them as error on appeal, the defendant did not waive the right to assert *McKoy* error. The court grants the defendant a new sentencing hearing because the *McKoy* error was not harmless beyond a reasonable doubt. [The court specifically does not decide whether a defendant who did not assign the instruction as error on direct review waived the right to assert the *McKoy* error in a motion for appropriate relief.]

Burglary Indictment Need Not Specify Felony That Defendant Intended To Commit When Breaking And Entering Dwelling

State v. Worsley, 336 N.C. 268, 443 S.E.2d 68 (6 May 1994). The court rules, relying on *State v. Freeman*, 314 N.C. 432, 333 S.E.2d 743 (1985) (kidnapping indictment need not specify felony the defendant intended to commit at the time of the kidnapping) and overruling contrary prior cases, that an indictment for burglary need not specify the felony that the defendant intended to commit when breaking and entering the dwelling. It need only allege that the defendant intended to commit a felony. The court notes that a defendant who needs further factual information may make a motion for a bill of particulars under G.S. 15A-925.

Superior Court Judge Properly Disbarred Attorney Who Was Convicted Of Two Felonies

In re Delk, 336 N.C. ___, 444 S.E.2d 198 (17 June 1994), *reversing*, 110 N.C. App. 310, 429 S.E.2d 595 (1993). A licensed attorney was convicted of two felonies. The judge presiding at the trial did not enter an order of professional discipline then. (1) The North Carolina State Bar sought an order to the lawyer requiring him to appear in Graham County on a specific date to show cause why he should not be disciplined. A superior court judge holding court in Mecklenburg County, without consent of the parties, issued a show cause order *ex parte*. The court rules that the show cause order was validly issued. A show cause order does not substantially affect a party's rights. As long as the controversy is heard in the proper county, it is irrelevant that a show cause order is issued in another county. (2) The court rules that the question of disbarring the attorney was not part of the criminal case against the attorney and did not have to be determined when the criminal case was tried. It could be determined later. (3) The court rejects the attorney's argument that the North Carolina State Bar violated its own rules when it asked the judge to disbar him. Since this disciplinary hearing was conducted under the court's inherent authority to discipline attorneys, the court was not bound by the State Bar's rules. (4) The court rules that if a superior court judge finds that court records disclose that a person has been convicted of a crime showing that he or she is unfit to practice law, that is a sufficient finding of fact to support disbarment. (5) The court rejects the attorney's argument that this proceeding was a civil action that required compliance with the rules of civil procedure, including filing of a complaint and issuance of a summons. The court states that the show cause order notified the attorney of the nature, date, time, and place of hearing, which adequately protected the attorney's due process rights.

Prosecutor's Use Of Peremptory Challenges Did Not Violate *Batson* Ruling

State v. Robinson, 336 N.C. 78, 443 S.E.2d 306 (6 May 1994). The court examines several peremptory challenges of black prospective jurors by the prosecutor in this case and rules that they did not violate the ruling in *Batson v. Kentucky*, 476 U.S. 79 (1986) (prosecutor may not exercise peremptory challenges of jurors in racially discriminatory manner).

Sentencing Issues

Court Upholds Various Statutory And Nonstatutory Aggravating Factors In Second-Degree Sexual Offense And Indecent Liberties Cases And Disavows Reasoning Of Court Of Appeals

State v. Farlow, 336 N.C. ___, ___ S.E.2d ___ (17 June 1994), *reversing*, 110 N.C. App. 95, 429

S.E.2d 181 (1993). This case involved sentencing of a defendant for illegal sex acts with two young male victims.

(1) The defendant plead guilty to two counts each of second-degree sexual offense and taking indecent liberties with an eleven-year-old male. The trial judge found as a nonstatutory aggravating factor for the indecent liberties conviction that the victim's age made him particularly vulnerable. The trial judge found as a statutory aggravating factor for the sexual offense conviction that the victim was "very young" (i.e., the victim's age). The court notes that G.S. 15A-1340.4(a) provides that evidence necessary to prove an element of the offense may not be used to prove an aggravating factor.

Statutory aggravating factor that victim was "very young." The court reviews its case law on the statutory aggravating factor [G.S. 15A-1340.4(a)(1)j] that the victim was very young, very old, or mentally or physically infirm—*State v. Ahearn*, 307 N.C. 584, 300 S.E.2d 689 (1983), *State v. Long*, 316 N.C. 60, 340 S.E.2d 392 (1986), *State v. Hines*, 314 N.C. 522, 335 S.E.2d 6 (1985), *State v. Thompson*, 318 N.C. 395, 348 S.E.2d 798 (1986), *State v. Sumpter*, 318 N.C. 102, 347 S.E.2d 396 (1986)—and restates the general rules: When age is an element of an offense (e.g., indecent liberties) and the evidence shows that the victim's age caused the victim to be more vulnerable to the crime committed than he or she otherwise would have been, the trial judge may properly find the statutory aggravating factor based on age. Since the victim's being "very young" is not necessary to prove indecent liberties, the same evidence is not being used to prove the offense of indecent liberties and the statutory aggravating factor.

Nonstatutory aggravating factor of young victim's vulnerability. The court notes that trial judge may also find nonstatutory aggravating factors supported by the evidence. The court rules that the Court of Appeals erred in ruling that since evidence of the victim's age was necessary to prove the indecent liberties offenses, that evidence may not be used to prove an aggravating factor. The court also expressly disavows similar dictum in *State v. Vanstory*, 84 N.C. App. 535, 353 S.E.2d 236 (1987). The court rules that the trial judge did not err in finding as a nonstatutory aggravating factor for the indecent liberties conviction that the defendant's "actions at the age of the victim in this offense made that victim particularly vulnerable to the offense committed." Evidence showed the defendant increased the victim's vulnerability by bestowing gifts on him.

Aggravating factor when joined offenses. The court also overrules the Court of Appeals ruling that the trial judge erred in finding—for the second-degree sexual offense conviction—the statutory aggravating factor that the victim was "very young" because it was an element of the joined indecent liberties offense. The court notes its prior ruling, *State v. Wright*, 319 N.C. 209, 353 S.E.2d 214 (1987), that the rule barring the use of joinable convictions as an aggravating factor does not apply to the use of a fact needed to prove an *element* of a contemporaneous conviction. The court also notes that if the trial judge properly found this factor, it could be used for both the indecent liberties and second-degree sexual offense convictions.

Other nonstatutory aggravating factors. The court also upholds, for the indecent liberties convictions, the trial judge's finding of the nonstatutory aggravating factors that the (i) victim suffered severe mental and emotional injury that is in excess of that associated with these offenses, and (ii) the defendant engaged in a course of criminal conduct over many years, involving the commission of sexual offenses against very young children.

(2) The defendant plead guilty to two counts of second-degree sexual offense and four counts of indecent liberties with a nine-year-old male. The court rules that the trial judge properly found the statutory aggravating factor that the "defendant took advantage of a position of trust or confidence to commit" these offenses. The defendant befriended the victim and took him on trips and other outings. Gradually, the victim spent more and more time at the defendant's home and essentially lived with the defendant while the victim's mother was away. Under these facts, the defendant took advantage of a position of trust or confidence to commit the offenses.

Trial Judge Erred In Finding Two Aggravating Factors Based On The Same Evidence

State v. Morston, 336 N.C. ___, ___ S.E.2d ___ (17 June 1994). The court rules that the trial judge erroneously used the same evidence [see G.S. 15A-1340.4(a)(1) (same evidence may not be used to prove more than one factor in aggravation)]—the defendant had conspired with others to murder a law

enforcement officer who was interfering with their drug trade—to find two aggravating factors: (1) the offense was committed to *disrupt* the lawful exercise of a governmental function or the enforcement of laws, and (2) the offense was committed to *hinder* the lawful exercise of a governmental function or the enforcement of laws [both aggravating factors found are contained in G.S. 15A-1340.4(1)d].

Defendant Is Entitled To Credit For Incarceration Served Under Term Of Special Probation When Probation Is Later Revoked And Active Imprisonment Is Imposed

State v. Farris, 336 N.C. ___, 444 S.E.2d 182 (17 June 1994), *affirming*, 111 N.C. App. 254, 431 S.E.2d 803 (1993). The court rules that under G.S. 15-196.1 a defendant is entitled to credit for incarceration served under a term of special probation when probation is later revoked and active imprisonment is imposed. The court distinguishes G.S. 15A-1351(a), which permits a judge—when imposing a sentence of special probation—to elect to credit time already served by a defendant to either a suspended sentence or any imprisonment required for special probation. The court states that this statute does not apply to sentencing when probation is revoked; instead, G.S. 15-196.1 controls.

North Carolina Court of Appeals

Criminal Offenses

Defendant's Failure To Object To Second-Degree Murder Instruction Bars Appellate Review Of Defendant's Argument That The Instruction Should Not Have Been Given

State v. Blue, 115 N.C. App. ___, 443 S.E.2d 748 (7 June 1994). At jury charge conference, the trial judge informed the state and defense counsel that he would submit first-degree murder, second-degree murder, and not guilty. Defense counsel did not object during the charge conference or before the jury retired to consider its verdict. The court notes that if an objection had been properly made, the court would be required to reverse the defendant's conviction under *State v. Arnold*, 329 N.C. 128, 404 S.E.2d 822 (1991). The court states, "But to allow a defendant who does not so object to then use his choice at trial to gain reversal on appeal would afford a criminal defendant the right to appellate review, predicated on invited error." The court rules that under these circumstances the defendant may not assign error on appeal on this issue.

Error Not To Give Attempted Second-Degree Rape Charge As Lesser Offense Of Second-Degree Rape

State v. Nelson, 114 N.C. App. 341, 442 S.E.2d 333 (19 April 1994). **(Note: there was a dissenting opinion in this case, but not on this issue.)** The defendant was charged with second-degree rape. The alleged victim testified that the defendant had vaginal intercourse with her against her will. The defendant testified that the alleged victim consensually performed oral sex on him and she then began rubbing his (no longer erect) penis against her vagina and tried to insert it into her vagina—but she never got it inside her vagina. The court rules, relying on dicta in *State v. Williams*, 314 N.C. 337, 333 S.E.2d 708 (1985) (if a defendant unequivocally denies the *element* of penetration, then the trial judge must submit a lesser offense), that the trial judge erred in not submitting the lesser offense of attempted second-degree rape. In this case, the defendant unequivocally denied the *element* of penetration.

"Intent" Felony Specified In First-Degree Burglary Indictment Was Surplusage, Permitting Jury Instruction On Another Felony

State v. Roten, 115 N.C. App. ___, 443 S.E.2d 794 (7 June 1994). First-degree burglary indictment alleged that the breaking and entering was committed with the intent to commit first-degree sexual offense. The judge instructed the jury on the intent to commit second-degree sexual offense. The court rules that since the indictment need not allege the specific felony, *State v. Worlsey*, 336 N.C. 268, 443 S.E.2d 68 (6 May 1994), the indictment's allegation was surplusage that may be disregarded.

(1) Defendant's Punch To Victim's Head Was A Proximate Cause Of Death
(2) Defendant Was Responsible For Unforseeable Consequences Of His Assault
(3) Forseeability Is Not Component Of Proximate Cause When Wound Was Intentionally Inflicted

State v. Lane, 115 N.C. App. ___, 444 S.E.2d 233 (7 June 1994). The defendant hit the victim in the head with his fist, and the victim fell on the cement on the edge of a street. An officer discovered the victim later, saw no sign of external injuries, but took him to jail because he was intoxicated. Later he was found unconscious in jail and was taken to the hospital (he had a 0.34 blood alcohol concentration) where he died. The autopsy revealed no external injuries, but did reveal brain swelling and other conditions. The medical examiner's opinion was that the victim died as a result of blunt force injury to the head. The defendant was convicted of involuntary manslaughter. (1) The court rules that the alleged police negligence in failing to take the victim for medical attention was not the sole cause of death; since the defendant's punch to the victim's head was *a* proximate cause, the defendant was criminally responsible for the victim's death since his act caused or directly contributed to the death. (2) The court rejects the defendant's contention that he was not the proximate cause of the victim's death because of the unforseeable consequences of the defendant's assault (alcoholics like the victim are more susceptible to brain swelling than nondrinkers). (3) Distinguishing *State v. Hall*, 60 N.C. App. 450, 299 S.E.2d 680 (1983) and *State v. Mizelle*, 13 N.C. App. 206, 185 S.E.2d 317 (1971), the court rules that when a wound is intentionally inflicted, forseeability is not a component of proximate cause.

Evidence Was Sufficient To Prove Child Sexual Assaults During Time Periods Alleged In Indictments

State v. Burton, 114 N.C. App. 610, 442 S.E.2d 384 (3 May 1994). In 1991, three women reported to the sheriff's department that their stepfather had sexually molested them in the 1970s. Charges were later brought in indictments that an offense allegedly occurred either during a month in a particular year (for example, March 1977) or during a time period (for example, between September 1975 and May 1976). The court reviews the evidence relating to each indictment and rules that a fatal variance did not exist between the evidence and the indictments, relying on the ruling in *State v. Everett*, 328 N.C. 72, 399 S.E.2d 305 (1991); the court states that judicial tolerance of variances between the dates alleged and proved are particularly applicable to child sex abuse allegations occurring years ago. The court additionally notes that the defendant was not prejudiced since his defense was based on his denial of the charges rather than an alibi for the time periods set out in the indictments.

Evidence Was Sufficient For Conviction Of Offering Bribe To Law Enforcement Officer

State v. Hair, 114 N.C. App. 464, 442 S.E.2d 163 (19 April 1994). The defendant was convicted of offering a bribe to a county alcohol beverage control (ABC) officer in violation of G.S. 14-218. The defendant offered money to the officer with a request that the officer arrest or stop a particular person for driving while impaired (the person owed a gambling debt to the defendant, and the defendant wanted the officer to undertake the stop or arrest for DWI to pressure the person to pay the debt). The court rejects the defendant's argument that influencing the officer in the performance of *official duty*—an element of bribery—includes only when an officer has the duty to arrest for DWI. The court, noting *State v. Greer*, 238 N.C. 325, 77 S.E.2d 917 (1953), rules that official duty includes any authorized action. The evidence was sufficient for this element in this case because the county ABC officer had the authority to arrest for DWI. The court also rules that the defendant's *corrupt intent*—an element of bribery—means a wrongful design to acquire some pecuniary profit or other advantage. The court rejects the defendant's argument that he did not have corrupt intent because he did not request the officer to make an illegal arrest or detention. Evidence of corrupt intent was sufficient in this case because the defendant offered a bribe to the officer for the defendant's own personal gain—harassing someone to pay a gambling debt to the defendant.

Arrest and Search Issues

(1) Officers' Search Of Garbage Carried Off Defendant's Curtilage By Sanitation Worker At Officers' Direction Was Unconstitutional
(2) Probable Cause Existed To Support Search Warrant Without Considering Unconstitutionally-Seized Evidence

State v. Hauser, 115 N.C. App. ___, ___ S.E.2d ___ (5 July 1994). Officers made arrangements with

the city sanitation department to collect trash at the defendant's residence and give it to the detective. A sanitation worker collected the garbage left near the residence (described by the court as within the curtilage of the residence) for collection and gave it to the officers. Officers found cocaine residue in the garbage. Officers obtained a search warrant based on the cocaine found in the garbage and information received from four informants. One of the informants stated that the defendant had sold him cocaine at the defendant's residence. In addition, the officers provided facts showing the reliability of the informants' information. (1) The court rules, distinguishing *California v. Greenwood*, 486 U.S. 35 (1988) (garbage collected at curbside of defendant's residence by trash collector at officer's request did not violate Fourth Amendment because the defendant exposed his garbage to the public by placing it by the curb and thus did not have a reasonable expectation of privacy), that the search of the garbage was unconstitutional. The court reasoned that the defendant maintained a reasonable expectation of privacy because the garbage was left for collection within the curtilage; thus, it was not accessible to the public and therefore the defendant's expectation of privacy was not destroyed. (2) The court rules that probable cause existed to support the search warrant, even after excluding the information unconstitutionally obtained from the search of the defendant's garbage.

[Note: The ruling in (1) above does not appear to be consistent with federal constitutional law. The United States Supreme Court in *Greenwood* applied a reasonable-expectation-of-privacy theory (garbage that is placed at the curbside exposed it to public and therefore any subjective expectation of privacy was not objectively reasonable) to decide *the facts of the case before it*. The *Greenwood* ruling did not bring into question prior lower court rulings, based on facts similar to this case, that are directly contrary to the ruling in this case. See *United States v. Biondich*, 652 F.2d 743 (8th Cir. 1981) (trash collector, at direction of police, picked up on regular collection day defendant's garbage near his house and provided it to police; no Fourth Amendment violation); *United States v. Sumpter*, 669 F.2d 1215 (8th Cir. 1982) (similar ruling); *State v. Stevens*, 123 Wisc.2d 303, 367 N.W.2d 788, *cert. denied*, 474 U.S. 852 (1985) (similar ruling). See also Wayne R. LaFave, *Search and Seizure* § 2.6 at 103 (Supp. 1994) ("Even if the police may not themselves enter the curtilage to take the garbage, *Greenwood* does not suggest that their dealings with the trash collector will taint his actions. In coming onto the curtilage and taking the trash, the collector is doing exactly what the householder contemplated"). It is highly unlikely that the Court—applying the reasonable-expectation-of-privacy theory to garbage being picked up by a sanitation worker *where the garbage had been placed for collection by the sanitation department by the resident (even if it is located within the curtilage)*—would rule that the resident has a reasonable expectation of privacy in the garbage wherever it is located *after* it has been collected. Even in *Greenwood*, the Court—in concluding the defendant's reasonable expectation of privacy was not objectively reasonable—gave examples supporting its ruling that are equally applicable to this case: (a) one's garbage is subject to sorting through by a sanitation worker or by others, such as law enforcement officers, acting with the worker's permission; and (b) people go to the sanitary landfill and wade through garbage looking for valuable items. And although the Court in *Greenwood* did not use abandonment theory in justifying the officer's actions, it may still remain a viable theory under the facts in this case. See generally *United States v. Scott*, 975 F.2d 927, note 1 (1st Cir. 1992), *cert. denied*, 113 S.Ct. 1877 (1993).]

Officers Were Not Required To Give Notice Of Their Authority And Purpose When Entering House To Arrest Suspect They Were Pursuing, When Suspect Was Aware Of Their Identities And Purpose

Lee v. Greene, 114 N.C. App. 580, 442 S.E.2d 547 (3 May 1994). An officer arrested the suspect's husband in the driveway of the home of the suspect and her husband. Because the suspect blocked the front door of the officer's car in which the husband was sitting, the officers (another officer had arrived by then) decided to arrest her for obstructing and delaying the arrest of her husband. When the suspect began moving toward her house, they ran after her. As she entered her house and was closing the door, the officers grabbed the door and entered the house. The court rules that the officers, under these circumstances, were not required to give notice of their authority and purpose under G.S. 15A-401(e). The suspect knew the officers' identities and their reason for being at her house. Moreover, the officers were about to arrest the suspect as she entered her house

and attempted to close the door. Under these circumstances, compliance with G.S. 15A-401(e) was not required.

Evidence

(1) Defendant's Threat To Victim That Included Reference To Another Crime For Which He Later Was Acquitted Was Admissible, Based On The Facts In This Case
(2) Trial Judge Properly Excluded Testimony Of Defendant's Expert Psychologist On Suggestibility Of Child Witnesses

State v. Robertson, 115 N.C. App. ___, ___ S.E.2d ___ (21 June 1994). The defendant was convicted of attempted first-degree statutory rape and attempted first-degree sexual offense of a twelve-year-old girl. (1) The victim testified that during the commission of the sexual acts the defendant threatened her by saying, "[I]f [she] told anybody what he [defendant] was going to do, he was going to hurt [her] like he hurt Koda." When these offenses occurred, the defendant was charged and on pretrial release for the murder of Aileen Koda Smith. The defendant was acquitted of that charge before the trial of these offenses. The defendant contended that trial judge should have excluded her reference to "Koda" under Rule 403, based on *State v. Scott*, 331 N.C. 39, 413 S.E.2d 787 (1992) (evidence that defendant committed a prior offense for which he was tried and acquitted may not be admitted under Rule 403 in a later trial for a different offense when its probative value depends on the proposition that the defendant in fact committed the prior crime). The court distinguishes *Scott* by noting that the probative value of the defendant's statement was to show that the victim was scared of the defendant as well as why she did not scream or make any noise; the statement does not depend on the proposition that the defendant in fact hurt Koda. The court also rules that the statement was admissible, under *State v. Agee*, 326 N.C. 542, 391 S.E.2d 171 (1990), as part of the "chain of circumstances" establishing the context of the charged crime. (2) The court rules that the trial judge did not err in excluding the testimony of the defendant's expert psychologist on the suggestibility of child witnesses. The expert would have testified that suggestibility is significant in young children or intellectually-impaired people; the defendant offered the testimony to show the victim's memory may have been created or altered through suggestion. However, the expert admitted that he had not examined or evaluated the victim or anyone else connected with this case. The court rules that the trial judge could properly conclude that the probative value of the expert's proposed testimony was outweighed by its potential to prejudice or to confuse the jury, and the proposed testimony would not have "appreciably aided" the jury since he had never examined or evaluated the victim; see *State v. Knox*, 78 N.C. App. 493, 337 S.E.2d 154 (1985).

Defendant May Not Collaterally Attack Prior DWI Conviction Used For Sentencing

State v. Muscia, 115 N.C. App. ___, ___ S.E.2d ___ (5 July 1994). The court rules, relying on *State v. Stafford*, 114 N.C. App. 101, 440 S.E.2d 846 (1994) (defendant may not collaterally attack prior DWI conviction used in proving element of habitual impaired driving offense), that the defendant was properly denied collateral attack of a prior DWI conviction used in sentencing for a DWI offense.

Collateral Estoppel Did Not Bar Evidence Of Willful Refusal In DWI Prosecution

State v. O'Rourke, 114 N.C. App. 435, 442 S.E.2d 137 (19 April 1994). The defendant was arrested for DWI and refused to take the Breathalyzer test. The defendant, notified by the Division of Motor Vehicles that his driver's license would be revoked, requested a revocation hearing before DMV to contest the revocation. After the hearing, DMV rescinded the revocation. The court rules that, assuming DMV rescinded the revocation on the ground that the defendant did not willfully refuse to take the Breathalyzer test, the doctrine of collateral estoppel does not bar the state from introducing evidence of his refusal to take the Breathalyzer test in the defendant's criminal trial. Privity did not exist between the state actor in the criminal prosecution—the district attorney—and the state actor in the revocation hearing—the Commissioner of Motor Vehicles.