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# Administration of Justice Memorandum

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



## Recent Criminal Cases
## (October 4, 1994 - January 17, 1995)

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This memorandum discusses cases of October 6, November 3, December 9, and December 30, 1994 from the North Carolina Supreme Court, and cases of October 4, October 18, November 1, November 15, December 6, December 20, 1994, and January 6, 1995 from the North Carolina Court of Appeals (opinions were issued on January 3 and 17, 1995, but none were sufficiently significant to be discussed in this memorandum). This memorandum also discusses a significant change to federal legislation on intercepting cordless telephone communications.

### North Carolina Supreme Court

### District Attorney's Calendaring Authority

(1) Statutes Authorizing District Attorney's Calendaring Authority Are Not Facially Unconstitutional
(2) Plaintiffs' [Who Were Criminal Defendants] Complaint And Exhibits Raised Genuine Issue Of Material Fact That Statutes Authorizing District Attorney's Calendaring Authority Were Being Applied Unconstitutionally In Particular Prosecutorial District

**Simeon v. Hardin,** 339 N.C. ___, ___ S.E.2d ___ (30 December 1994). Plaintiffs, who were criminal defendants with pending criminal cases in Durham County Superior Court, brought a civil action alleging—among other things—that North Carolina statutes [G.S. 7A-49.3 and a portion of G.S. 7A-61] granting the District Attorney the authority to calendar criminal cases in superior court violated various provisions of the United States and North Carolina constitutions. (1) The court rules that the statutes granting the District Attorney the authority to calendar criminal cases in superior court were not facially unconstitutional under the United States or North Carolina constitutions. The court finds, among other things, that a criminal superior court has wide discretion in managing cases pending before it, and the vesting of calendaring authority with the district attorney does not intrude on the court's authority. The court also distinguishes State v. Simpson, 551 So.2d 1303 (La. Sup. Ct. 1989) (judicial district's system that allowed the district attorney to choose the judge to whom particular criminal cases were assigned violated due process) by noting that the parties had stipulated in the Louisiana case that the district attorney did in fact choose the judge to preside over particular criminal cases. There was no such stipulation in this North Carolina case. The court also notes that North Carolina statutes do not authorize a district attorney to choose a particular judge to preside over a particular case. (2) The court rules that the plaintiffs' complaint and exhibits raised a genuine issue of material fact (precluding summary judgment for the civil defendant district attorney) that the statutes authorizing the district attorney's calendaring authority were being applied

unconstitutionally in Durham County Superior Court. Among the allegations were that the district attorney delayed calendaring a case for trial to keep a criminal defendant in jail, delaying a trial at which he was likely to be acquitted, and pressuring the defendant to plead guilty. Plaintiffs also alleged that the district attorney placed a large number of cases on the printed trial calendar knowing that all of theses cases would not be called, thereby providing defendants virtually no notice about which cases were actually going to be called for trial. The court finds that these allegations are sufficient to state a claim that the statutes are being applied unconstitutionally, and the court remands the case to superior court for further proceedings.

## Criminal Offenses

Defendant Was Properly Convicted of First-Degree Murder Based On Accessory Before The Fact Although All The Principals Pled Guilty To Second-Degree Murder

**State v. Wilson,** 338 N.C. 244, 449 S.E.2d 391 (3 November 1994). The defendant was convicted of first-degree murder based on the legal principle that he was an accessory before the fact. All the principals in committing the murder had entered plea bargains with the state and pled guilty to second-degree murder. The court rules that a plea bargain is not the same as an acquittal, and therefore the defendant properly could be convicted of first-degree murder; see State v. Cassell, 24 N.C. App. 717, 212 S.E.2d 208 (1975). [A person may not be convicted of an offense based on accessory before the fact if all the principals are acquitted; see State v. Robey, 91 N.C. App. 198, 371 S.E.2d 711 (1988).]

Sufficient Evidence Of Serious Injury Existed In Felonious Assault Case

**State v. Ramseur,** 338 N.C. 502, 450 S.E.2d 467 (9 December 1994). The defendant was convicted of assault with a deadly weapon with intent to kill inflicting serious injury. The court rules that there was sufficient evidence of serious injury: The victim testified that the defendant beat him on the head with the butt of his gun, knocking him to the floor. The defendant then stood over him and attempted to throw a compressor at his head. The victim managed to move his head, but the compressor struck his shoulder; as a result, he was badly bruised, was unable to move his arm properly for three days, and experienced pain and suffering. The victim was hospitalized for several hours and received treatment for his shoulder injury as well as his head injuries. The court rejects defendant's arguments that the injury was not serious because the victim's skin was not broken by the blow and because he did not experience great pain or lingering disability.

Felonious Assault Indictment Properly Was Amended Because Amendment Did Not Substantially Change Nature Of Offense Charged

**State v. Brinson**, 337 N.C. 764, 448 S.E.2d 822 (6 October 1994), *reversing*, 110 N.C. App. 314, 430 S.E.2d 313 (1993) (unpublished opinion). The original felonious assault indictment charged the defendant with assaulting the victim with the defendant's "fists, a deadly weapon, by hitting [the victim] over the body with his fists and slamming his head against the cell bars and floor." The indictment also alleged that the victim's broken neck and paralysis resulted from the assault. The state was permitted to amend the indictment so the pertinent new language stated that the defendant assaulted the victim with "fists by hitting [the victim] over the body with his fists and slamming his head against the cell bars, a deadly weapon, and floor." The defendant objected to the amendment, arguing that he was not prepared to show that the jail cell and floor were not deadly weapons. The court rules that the amendment to the indictment was permissible because it did not substantially alter the charge in the original indictment [see State v. Price, 310 N.C. 596, 313 S.E.2d 556 (1984)]—the original indictment was sufficient to allege that the cell floor and bars were deadly weapons. Identifying fists as a deadly weapon did not preclude the state from identifying at trial other items as deadly weapons when the indictment both described them and necessarily demonstrated their deadly characters. See State v. Palmer, 293 N.C. 633, 239 S.E.2d 406 (1977).

Trial Judge Erred In Permitting State To Amend Felonious Assault Indictment To Change Name Of Victim

**State v. Abraham,** 338 N.C. 315, 451 S.E.2d 131 (9 December 1994). The trial judge erred in allowing the state to amend a felonious assault indictment by changing the name of the victim from "Carlose Antoine Latter" to "Joice Hardin" because the change in the name of the victim substantially altered the offense.

Error To Join Murder Charge With Charge Of Willful Failure To Appear For Murder Trial

**State v. Weathers,** 339 N.C. ___, ___ S.E.2d ___ (30 December 1994). The court rules that the trial judge erred by joining for trial a 1989 murder charge and a later 1991 charge of willful failure to appear for the murder trial. The charges were not transactionally related under G.S. 15A-926(a). However, the court finds the error to be harmless, based on the facts in this case.

Defendant Was Properly Convicted Of First-Degree Felony Murder Based On Felonious Assault Of Second Person As Underlying Felony And Acting In Concert With Accomplice

**State v. Abraham,** 338 N.C. 315, 451 S.E.2d 131 (9 December 1994). The defendant was convicted of first-degree felony murder and two felonious assaults in which the defendant and his accomplice acted in concert in shooting the victims. The court notes that the jury could reasonably infer as follows: The defendant and his accomplice were acting in concert when they accosted four men and began firing their weapons. The other four men (A, B, C, and D) were unarmed and ran when the shooting began. The accomplice shot at and wounded A. The defendant shot at B. Bullets fired during one of these assaults by either the defendant or his accomplice killed C while C was running away. The court rules that this evidence would support the first-degree felony murder convictions against both the defendant and his accomplice on the theory that the bullets that killed C were fired during the course of one of the felonious assaults so that the assaults and the homicide were part of a continuous transaction. The court states that since the evidence supports the guilt of both the defendant and his accomplice as to all the felonious assaults, it makes no difference (i) which of the felonious assaults is the underlying felony, or (ii) which person—the defendant or his accomplice—actually fired the fatal shots or whether they intended that C be killed.

Defendant Was Properly Convicted Of First-Degree Felony Murder Based On Discharging Firearm Into Occupied Property When Murder Victim Came Out Of House After Shooting Into House And Was Shot And Killed Outside House

**State v. Moore,** 339 N.C. ___, ___ S.E.2d ___ (30 December 1994). The defendant fired several shots into a house in which the murder victim and others were located. When the murder victim went outside the house to confront the defendant, the defendant shot him there. The victim went into the house and the defendant continued shooting into the house. The court rules that the defendant was properly convicted of first-degree felony murder based on discharging a firearm into occupied property because the defendant's actions constituted a series of connected events forming one continuous transaction constituting the discharging firearm felony.

Court Clarifies When Defendant May Assert Self-Defense To Felony Murder

**State v. Bell,** 338 N.C. 363, 450 S.E.2d 710 (9 December 1994). The defendant was tried for first-degree felony murder based on the killing of an undercover drug officer during an attempted robbery of the officer. The court rules that the trial judge did not err in instructing the jury that if it concluded that the defendant had killed the officer in the perpetration of a felony (attempted armed robbery), the defendant was not entitled to the defense of self-defense. The evidence in this case showed that the defendant went to a drug transaction with the purpose of committing a robbery. The defendant had his weapon pointed directly at the undercover officer during the attempted robbery. The officer (still in an undercover capacity without identifying himself) reached for his weapon and threatened to shoot the defendant. The defendant then shot and killed the officer. There was no evidence that the dangerous situation had

dissipated when the defendant shot the undercover officer, or that the defendant made any effort to declare his intent to withdraw. The court rules that absent (1) a reasonable basis on which the jury may have disbelieved the state's evidence about the underlying felony, (2) a factual showing that the defendant clearly articulated the intent to withdraw from the situation, or (3) a factual showing that at the time of the killing the dangerous situation no longer existed, the defendant forfeited the right to assert self-defense as a defense to felony murder.

Court Upholds Self-Defense Instructions But Suggests Modification Under Certain Circumstances

**State v. Watson**, 338 N.C. 168, 449 S.E.2d 694 (3 November 1994). The court reaffirms its ruling on self-defense instructions in State v. McAvoy, 331 N.C. 583, 417 S.E.2d 489 (1992) and rejects defendant's argument that an honest, but unreasonable, belief in the need to kill is equivalent to the use of excessive force and should result in a verdict of voluntary manslaughter based on the theory of imperfect self-defense.

The court notes a possible modification, under certain facts, to the first element in the law of self-defense as set out in State v. Norris, 303 N.C. 526, 530, 279 S.E.2d 570, 572-73 (1981):

> "(1) it appeared to defendant and he believed it to be necessary to kill the deceased in order to save himself from death or great bodily harm;"

Although it was not necessary to modify the instruction in the case before it (because all the evidence showed an intent to kill rather than an intent to use deadly force), the court states, that the instruction may need to be modified to substitute "to use deadly force [against] the deceased" for "to kill the deceased" when the defendant intended to use deadly force to disable the victim, but not to kill the victim.

Discharging Firearm Into Occupied Property Is Not Specific Intent Crime And Therefore Voluntary Intoxication Is Not A Defense

**State v. Jones,** 339 N.C. ___, ___ S.E.2d ___ (30 December 1994). Discharging a firearm into occupied property does not require the state to prove any specific intent and therefore voluntary intoxication is not a defense.

## Arrest, Search, And Confession Issues

(1) Defendant Initiated Communication After Asserting *Miranda* Right To Counsel
(2) When Defendant Initiated Communications With Law Enforcement Officer After Asserting, Twelve Hours Earlier, His *Miranda* Right To Counsel, Officer Was Not Required To Repeat *Miranda* Warnings Before Interrogating Him, Based On The Facts In This Case

**State v. Harris**, 338 N.C. 129, 449 S.E.2d 371 (3 November 1994). North Carolina law enforcement officers went to Georgia to return the defendant to North Carolina for a first-degree murder charge in North Carolina. After properly being advised of his *Miranda* rights, the defendant asserted his right to counsel. No interrogation was conducted. After his return to North Carolina twelve hours later, the defendant through his brother—who was visiting the defendant in jail—asked to talk to the sheriff. The court rules that (1) the defendant initiated communication with the sheriff by telling his brother to inform the sheriff that he wanted to speak with him; and (2) the sheriff was not required to give *Miranda* warnings again before interrogating the defendant, based on the facts in this case; see generally State v. McZorn, 288 N.C. 417, 219 S.E.2d 201 (1975). The court states that there was no reason to believe that the defendant, having been properly advised of his *Miranda* rights twelve hours earlier, had forgotten them. For example, he should have known of his right to an attorney, because he had exercised that right twelve hours earlier.

Totality Of Circumstances Supported Finding That Defendant's Confession Was Voluntary

**State v. Hardy,** 339 N.C. ___, ___ S.E.2d ___ (30 December 1994). The court examines all the evidence surrounding the defendant's confession to law enforcement officers and rules that the confession was voluntary, even though one officer lied about a witness having identified the defendant and some of

the officer's statements, in isolation, could be interpreted to contain implicit promises or threats. The court concludes, citing State v. Jackson, 308 N.C. 549, 304 S.E.2d 134 (1983), that the defendant's independent will was not overcome by mental or psychological coercion or pressure to induce a confession that he was not otherwise disposed to make.

Defendant's Stepdaughter Had Authority To Consent To Search Of House And Bedroom Which She Shared With Defendant

**State v. Weathers,** 339 N.C. ___, ___ S.E.2d ___ (30 December 1994). The court rules that the defendant's stepdaughter had the authority to consent to a search of the house and bedroom which she shared with the defendant. [The opinion does not provide the age of the stepdaughter.]

(1) Probable Cause For Arrest And Criminal Charge Existed As A Matter Of Law To Support Defendant's Motion For Directed Verdict On Plaintiff's Malicious Prosecution Claim
(2) Court Rejects Argument That State's Voluntary Dismissal Of Criminal Charge Without Explanation Is Prima Facie Showing Of Absence Of Probable Cause In Malicious Prosecution Claim

**Best v. Duke University,** 337 N.C. 742, 448 S.E.2d 506 (6 October 1994). An officer saw plaintiff's vehicle enter Duke Faculty Club driveway at 5:00 A.M., turn its lights off, and continue down the driveway. Ten or fifteen minutes later, the officer saw plaintiff's vehicle exit the driveway and go toward the rear of the Washington-Duke Hotel. The officer knew that the hotel was having problems with thefts. He decided to stop the vehicle by blocking it. However, the plaintiff drove his vehicle around the officer and sped away. Plaintiff did not stop even when the officer pulled beside him, rolled down his window, and flashed his badge. Eventually, the plaintiff's vehicle stopped. The officer saw wrought-iron furniture inside. Plaintiff said to another officer (Russell) there that he was taking the furniture to a friend's house. A check of the Faculty Club then indicated that there was no missing furniture. Plaintiff was allowed to leave. The next day Russell learned that furniture similar in description to plaintiff's furniture had in fact been stolen from the Faculty Club the previous night. Arrest warrants for larceny and trespass were obtained and plaintiff was arrested. At the criminal trial, the state at the close of the state's evidence took a voluntary dismissal of the trespass charge without an explanation, and the judge found the defendant not guilty of the larceny charge.

Plaintiff sued defendant Duke University for malicious prosecution (and other torts) based on his arrest and prosecution for trespass and larceny. (1) The court examines the evidence and rules that probable cause existed as a matter of law for plaintiff's arrest for trespass and larceny and his later prosecution for larceny; thus, defendant's motion for a directed verdict on the malicious prosecution claim should have been granted at trial. (2) The court rejects the plaintiff's argument that the state's voluntary dismissal of a criminal charge without an explanation is a prima facie showing of absence of probable cause in a malicious prosecution claim. The court distinguishes its ruling in Pitts v. Village Inn Pizza, Inc., 296 N.C. 81, 249 S.E.2d 375 (1978) (there was disputed issue of whether probable cause existed in malicious prosecution claim when evidence showed prosecutor had voluntarily dismissed criminal charge before trial) because in *Pitts* the only evidence presented was the issuance of an arrest warrant charging a criminal offense and the prosecutor's dismissal of that charge. In this case, uncontroverted evidence established probable cause as a matter of law; thus the prosecutor's voluntary dismissal was not sufficient evidence of a lack of probable cause to establish a question of fact for the jury. The court states that it disapproves *Pitts* to the extent that it may be read to suggest otherwise. The court also notes that, unlike in *Pitts*, the prosecutor in this case had prosecuted the plaintiff on a second charge—the larceny charge.

## Evidence

Two Statements Of Murder Witness (Who Had Died Before Trial) To Law Enforcement Officer Were Properly Admitted Under Residual Hearsay Exception [Rule 804(b)(5)] And Did Not Violate Confrontation Clause

**State v. Brown,** 339 N.C. ___, ___ S.E.2d ___ (30 December 1994). One week after the defendant allegedly shot and killed the witness's husband, the witness gave a statement to a law enforcement officer in which she stated that she had broken up with the defendant four months before the shooting; since then the defendant had threatened many times to kill her and her husband. She then described the events surrounding the shooting, including that her husband had placed a knife in his pants. The same officer tape-recorded a second interview with the wife eight months later when the officer learned from the district attorney's office that she was dying of AIDS. The second statement essentially was the same as her first, except she admitted she had dated the defendant for about one year before ending the relationship in an effort to reconcile with her husband. The wife did not die until a month later, which was six months before the defendant's trial began. The officer conceded on cross-examination that he made no effort to contact the defense with the information that the wife was near death. The trial judge made all six findings required by State v. Triplett, 316 N.C. 1, 340 S.E.2d 736 (1986). In particular, the judge found the wife's statements contained sufficient guarantees of trustworthiness: she observed her husband's reaction to the defendant's presence just before the shooting; she was able to accurately describe the relationship that existed between herself, her husband, and the defendant; she had no relationship to the state other than that of a witness; she described the events consistently to family members, a doctor, and law enforcement; she was motivated to tell the truth, based on her terminal condition and immediate impending death. The court rules that the judge's findings were supported by the evidence and the statements were properly admitted under Rule 804(b)(5). The court also rules, based on Idaho v. Wright, 497 U.S. 805 (1990), that the admission of the statements did not violate the defendant's confrontation rights under the Sixth Amendment.

Jail Inmate's Letter Detailing Defendant's Confession To Murder Was Erroneously Admitted Under Residual Hearsay Rule, Rule 804(b)(5)

**State v. Swindler,** 339 N.C. ___, ___ S.E.2d ___ (30 December 1994). The court rules that the trial judge erred in admitting under Rule 804(b)(5) a jail inmate's letter detailing the defendant's confession to murder. The court examines the evidence in this case and determines that the letter did not satisfy the four factors to determine trustworthiness set out in State v. Nichols, 321 N.C. 616, 365 S.E.2d 561 (1988): (1) the inmate did not personally know of the events described in the letter; (2) the inmate was not motivated to tell the truth, but to say what the police wanted to hear; (3) while the inmate never recanted the letter, he refused to acknowledge that he wrote the letter; and (4) the inmate was unavailable because he refused to testify. Also, the letter contained many inaccuracies.

Defendant's Statements To Psychiatrist, When Offered By The Defendant, Were Not Admissible As Substantive Evidence

**State v. Harris,** 338 N.C. 211, 449 S.E.2d 462 (3 November 1994). The defendant was on trial for murder and other crimes. The trial judge sustained the state's objection to the defendant's attempt to introduce, as substantive evidence, the defendant's statements made to his psychiatric expert, who offered his opinion that the defendant could not have formed the specific intent to kill. The court rules that the defendant's statements (1) were not admissible under Rule 803(4) (medical diagnosis or treatment) because they were made to the psychiatrist to prepare for trial; defense counsel arranged the interview with the defendant less than two months before trial and nine months after the killing [for similar ruling, see State v. Jones, 339 N.C. ___, ___ S.E.2d ___ (30 December 1994)]; and (2) were not admissible under Rule 804(3) (declaration against interest) since the statements served only to reduce the defendant's potential liability (the court also questions whether a defendant may challenge his own unavailability under this hearsay exception).

[Although the court does not decide this issue, the defendant's statements to the psychiatrist may properly have been offered by the defendant for the nonhearsay purpose of supporting the psychiatrist's opinion. See State v. Ward, 338 N.C. 64, 449 S.E.2d 709 (3 November 1994) (trial judge erred in not admitting content of defendant's conversations with psychiatrist to show basis of psychiatrist's diagnosis); State v. Wade, 296 N.C. 454, 251 S.E.2d 407 (1979). If offered for that purpose, however, the

court indicated that the state could have used the statements as substantive evidence—an admission under Rule 801(d).]

Mental Health Expert May Properly Offer Opinion Whether Defendant Was Lying During Expert's Evaluation Of Defendant To Show Reliability Of Information On Which Expert Based Opinion

**State v. Jones,** 339 N.C. ___, ___ S.E.2d ___ (30 December 1994). Defense mental health expert offered opinion that at the time of the killing the defendant was so intoxicated that he was incapable of premeditation and deliberation. Relying on State v. Kennedy, 320 N.C. 20, 357 S.E.2d 359 (1987) and State v. Wise, 326 N.C. 421, 390 S.E.2d 142 (1990), the court rules that the expert should have been permitted to offer his opinion whether the defendant was lying to him during his evaluation of the defendant to show the reliability of the information on which the expert based his opinion. Such opinion testimony does not violate the rules [Rules 608 and 405(a)] prohibiting expert opinion testimony about the credibility of a witness.

(1) Five-Year-Old Was Competent To Testify About Events That Occurred When She Was Two-And-One-Half Years Old
(2) Five-Year-Old Was Properly Permitted To Sit On Her Stepmother's Lap While Testifying
(3) Prosecutor Was Properly Permitted To Cross-Examine Expert About Defendant's Prior Crimes When Expert Used Them To Form Opinion

**State v. Reeves,** 337 N.C. 700, 448 S.E.2d 802 (6 October 1994). The defendant was convicted of first-degree murder and sexual assault and sentenced to death. (1) The court rules that the evidence in this case supported the trial judge's findings that a five-year-old, a witness to the murder of her mother, was competent to testify about the murder that had occurred when she was two-and-one-half years old. (2) The court rules that the trial judge properly permitted the five-year-old to testify while sitting in her stepmother's lap. Before the child's testimony, the trial judge instructed the stepmother that she must not intimate in any way to the child about how she should testify. After the testimony was complete, the trial judge found that the stepmother had followed the court's instructions. The court notes that implicit in the trial judge's ruling was a finding that the child would be more at ease and be able to testify better if she sit in her stepmother's lap. The court also states that although a trial judge should be cautious in allowing this procedure, it was not error in this case. (3) A defense psychiatrist offered his opinion that the defendant suffered from substance and alcohol abuse, had borderline personality disorder and organic brain syndrome, and suffered from sexual paraphilia. He said that one fact on which he based his opinions was about eight months after the defendant had murdered the victim in this case, he had kidnapped, raped, and cut a woman in Virginia. The prosecutor on cross-examination asked the psychiatrist whether the defendant had told him about two other rapes of women and whether the psychiatrist had considered those crimes in forming his opinions. The psychiatrist said, "Yes, I did." The trial judge allowed this evidence with a limiting instruction that it was only to be considered as it affected the psychiatrist's opinion about the defendant's mental and emotional condition. The court rules that this evidence was admissible under Rule 705 and the trial judge did not abuse his discretion in allowing the evidence under Rule 403.

Defendant's Testimony From His First Trial Was Properly Admitted At His Second Trial

**State v. Hunt,** 339 N.C. ___, ___ S.E.2d ___ (30 December 1994). The defendant testified at his trial and was convicted of first-degree murder, but was awarded a new trial by the supreme court. At the retrial, the state was permitted to introduce the defendant's testimony from his first trial (it was read by the court reporter). The defendant again was convicted of first-degree murder. The defendant argued on appeal, based on Harrison v. United States, 392 U.S. 219 (1968), that the state's introduction of the defendant's first trial testimony was error because the improper introduction of a state witness's prior statements in the first trial induced the defendant to testify during the first trial, thus violating his Fifth Amendment privilege against self-incrimination. Distinguishing the *Harrison* ruling and relying on State v. Wills, 293 N.C. 546, 240 S.E.2d 328 (1977) and State v. Farrell, 223 N.C. 804, 28 S.E.2d 560 (1944), the court rules that the admission

of the defendant's prior testimony was proper. Unlike the facts in *Harrison*, the defendant in this case was not induced to testify in the first trial because *unconstitutionally-obtained* evidence had been introduced during state's case. Here, evidence was admitted solely in violation of state evidence rules.

Witness's Testimony At First Trial Was Properly Admitted Under Rule 804(b)(1) When He Asserted His Fifth Amendment Privilege At Second Trial

**State v. Hunt,** 339 N.C. ___, ___ S.E.2d ___ (30 December 1994). At the defendant's first murder trial, a witness testified for the defendant. Before the second trial, the witness was indicted for his involvement in the murder. The state called the witness to testify at the defendant's second trial, but the witness asserted his Fifth Amendment privilege and refused to testify. The trial judge then permitted the state to introduce the witness's testimony from the first trial because the witness was unavailable under Rule 804(b)(1). The court rejects the defendant's argument that the defendant did not have the same motive in examining the witness at the first trial that he would have had at the second trial, based on the facts in this case.

Factual Findings In City Manager's Report That Reviewed Police Department's Investigation Of Murder Were Not Admissible For Defendant Under Rule 803(8)(C)

**State v. Hunt,** 339 N.C. ___, ___ S.E.2d ___ (30 December 1994). Distinguishing State v. Acklin, 317 N.C. 677, 346 S.E.2d 481 (1986), the court rules that factual findings in a city manager's report that reviewed the police department's investigation of the murder for which the defendant was being tried were not admissible for the defendant under Rule 803(8)(C) (makes admissible against the state in criminal cases, "factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness"). The report was prepared by interviewing people within the police department and others, including private citizens, and considering information from a report prepared by a local minister. The court states that the city manager's report "was not the result of 'authority granted by law' to conduct an investigation into the . . . murder, there was no assurance that the report contained factual findings that would be admissible, and the report was not prepared for the purpose of being introduced against the State in a criminal case."

Similar Assault Committed Two Months Earlier Than Offense Being Tried Was Admissible Under Rule 404(b)

**State v. Abraham,** 338 N.C. 315, 451 S.E.2d 131 (9 December 1994). The defendant and his accomplice were convicted of first-degree murder and two felonious assaults. The court rules that the trial judge properly admitted under Rule 404(b) (to prove the identities of the assailants) evidence of a similar shooting by the defendant and his accomplice that occurred two months before the offenses being tried. Several common factors existed between the two separate crimes: The casings recovered from the earlier shooting matched those fired from a gun used in the offense being tried. One of the guns used in both incidents was in the control of the defendant or his accomplice. On both occasions, witnesses identified the defendant and his accomplice as being in a blue Cadillac on a Charlotte street before they began the assaults.

Commission Of Assault In Strikingly Similar Manner To Commission Of Murder Was Admissible Under Rule 404(b), Although Assault Was Committed Eight Years Before Murder

**State v. Carter,** 338 N.C. ___, ___ S.E.2d ___ (30 December 1994). The defendant was tried for a 1989 murder in which he used a brick to strike the victim's head. The state offered, under Rule 404(b), evidence that the defendant eight years earlier in 1981 (when he was thirteen years old) had assaulted an elderly man with a piece of cinder block that was roughly the same size and dimensions of a brick used in the murder. The wound on the murder victim was above her right eye, and the defendant was right-handed. In the 1981 assault, the wound on the victim was also above the victim's right eye. The court rules that the evidence was properly admitted under the rule to prove identity of the perpetrator of the murder. The court notes that there are "unusual facts and

strikingly similar acts in both crimes." The passage of time between the 1981 assault and the murder affected the weight of the evidence rather than its admissibility. The court also rules that the evidence was properly admitted under the balancing test of Rule 403.

Defendant's Proffered Evidence Of Guilt Of Another Was Not Admissible

**State v. Moseley,** 338 N.C. 1, 449 S.E.2d 412 (3 November 1994). A state's witness testified that he saw the defendant with the victim at a club on the night she was murdered. During cross-examination, the defense counsel attempted to elicit testimony that a black-haired man had also approached the victim at the club that night, pushed her, and told her, "You better stop or I'm going to get you." The witness also testified (at a hearing on an offer of proof) that the victim indicated to him that the black-haired man was the boyfriend of her cousin and that the man thought the victim was trying to break up his relationship with her cousin; the witness indicated that the victim was frightened. None of the testimony in the preceding two sentences was admitted. The pathologist's testimony (that was admitted at trial) showed that a dark hair was found under the chipped fingernail of the victim's left index finger. The court rules that the excluded testimony was mere speculation and conjecture of another's guilt; it failed to point directly to another person as the perpetrator of the murder. The defendant never developed any connection between the dark hair found under the victim's fingernail and the unnamed black-haired man at the club. Additionally, the excluded testimony was not inconsistent with the guilt of the defendant, based on the facts in this case. The court rejects defendant's argument that State v. Cotton, 318 N.C. 663, 351 S.E.2d 277 (1987) required that the excluded testimony be admitted.

State's Cross-Examination Of Defendant's Witnesses Was Permissible Under Rule 611(b) Even If It Was Impermissible Under Rule 608(b)

**State v. Bell,** 338 N.C. 363, 450 S.E.2d 710 (9 December 1994). The defendant was being tried for first-degree murder of an undercover officer during a drug transaction in which the defendant was allegedly purchasing marijuana from the undercover officer and the officer's informant. The defendant contended throughout the trial that he went to the place where the transaction was to occur not to buy or steal marijuana but merely to confront the officer's informant concerning his repeated attempts to lure the defendant's son into using drugs. To contradict this assertion, the state wanted to show that the defendant's son was already involved in the drug culture and the defendant was aware of that involvement. The trial judge allowed the state on cross-examination to question the son and the defendant's wife concerning the son's use of marijuana, and the wife concerning her knowledge of her son's involvement with illegal drugs. The court states that this cross-examination was not conducted for the impermissible purpose under Rule 608(b) of attacking these witnesses' credibility. Instead, it was permissible under Rule 611(b) to shed light on the defendant's true intent in meeting the undercover officer and the officer's informant. The fact that the son, with his parent's knowledge, had been using and selling illegal drugs for years cast doubt on the defendant's contention that his purpose in going to the place where the murder occurred was merely to confront the informant for attempting to lure the son into illegal drugs.

(1) State Was Properly Permitted To Cross-Examine Defendant Under Rule 609 About Guilty Pleas For Which Prayer For Judgment Had Been Continued For Sentencing After The Pending Trial
(2) Defendant's Statement Was Not Admissible As Excited Utterance Under Rule 803(2)
(3) Pretrial Statement Of State's Witness Contained Significant Discrepancies From Witness's Trial Testimony And Should Not Have Been Admitted As Corroborative Evidence

**State v. Sidberry,** 337 N.C. 779, 448 S.E.2d 798 (6 October 1994). The defendant was indicted for first-degree murder. (1) Before the murder trial, the defendant pled guilty to two unrelated charges of sale and delivery of cocaine. Prayer for judgment was continued for these cases pending the disposition of the murder charge. The court rules that the state was properly permitted under Rule 609 to cross-examine the defendant at trial about these drug pleas. The guilty pleas were equivalent to convictions under Rule 609(a). The court notes that the defendant was

told by his attorney and by the judge during the guilty plea hearing for the drug offenses that the entry of the pleas had potential consequences in his pending murder trial and could also be used to enhance punishment under the Fair Sentencing Act if he was convicted of less than first-degree murder. The judge determined that the defendant understood the impact of his guilty pleas and then accepted the pleas. (2) The court rules that the defendant's exculpatory statement to his aunt was not admissible as an excited utterance under Rule 803(2). After the shooting, the defendant first talked to his aunt on the telephone from his grandmother's house. He did not mention the shooting on the telephone. Instead, he waited until after he had ridden home, an hour after the shooting, to tell her what had happened. The court states that these facts indicate a lapse of time sufficient to manufacture a statement and that the statement lacked spontaneity. (3) The court rules that the trial judge erred in permitting a pretrial statement to be admitted as corroborative evidence when there were two significant discrepancies between the pretrial statement of a state's witness and his trial testimony (whether the defendant handed the gun to the accomplice just before the accomplice shot the victim and whether the next day the accomplice had said to the defendant that he should not have listened to the defendant about shooting the victim). However, the court finds the error to be harmless, based on the evidence in this case.

Murder Victim's Diary Entry Was Not Admissible Under Rule 803(3) Because Statements In Entry Merely Recited Facts That Described Events; They Were Not Statements Relating To Victim's State Of Mind

**State v. Hardy,** 339 N.C. ___, ___ S.E.2d ___ (30 December 1994). The state introduced the 27 February 1992 diary entry by the murder victim in which she described an incident with the defendant, her husband. She described his assaulting her in the morning. At night, he threw various items at her and screamed that he was going to kill her. She described filing an harassment charge. The court rules that the statements in the diary were not admissible under Rule 803(3) because they merely recited facts that described events; they did not reflect the victim's state of mind. The diary entry was at best speculative concerning the victim's state of mind. The court notes that while the diary entry described two attacks by the defendant and while that may infer a victim who is attacked will fear her attacker, there were also indications in the diary (described by the court) that the victim was not intimidated by the defendant.

The court states that the policy behind Rule 803(3) is a necessity to admit into evidence a person's own contemporary statements of his or her mental or physical condition, and such statements are more trustworthy than the declarant's in-court testimony. Mere statements of fact, however, are provable by other means and are not inherently trustworthy. In this case, the facts in the diary, which portray attacks on the victim and a threat against her, were admissible through the testimony of other people who witnessed these events. These facts lack the trustworthiness of statements such as "I'm frightened" and are the type of evidence the hearsay rule is designed to exclude.

Murder Victim's Statement Was Admissible Under Rule 803(3) Because It Concerned The Victim's State Of Mind And Emotional Condition

**State v. Corbett,** 339 N.C. ___, ___ S.E.2d ___ (30 December 1994). Shortly before the victim was murdered, she tearfully told her minister that the defendant was the father of her child and she feared for her life if she went to court in an effort to obtain child support from the defendant. The court rules that her statement was admissible under Rule 803(3) because it related directly to the victim's state of mind and emotional condition. And, her state of mind was relevant because it related directly to circumstances surrounding the confrontation with the defendant on the day she was murdered. The probative value of the statement was not outweighed by unfair prejudice under Rule 403.

## Capital Case Issues

(1) Separate Aggravating Circumstances Were Properly Found For Two Prior Violent Felony Convictions [15A-2000(e)(3)]

(2) Separate Aggravating Circumstances Were Properly Found For Each Felony Committed During Murder [15A-2000(e)(5)]

**State v. Moseley**, 338 N.C. 1, 449 S.E.2d 412 (3 November 1994). The defendant was convicted of first-degree murder. (1) The court rules that the jury properly found separate statutory aggravating circumstances under G.S. 15A-2000(e)(3) for two prior violent felony convictions based on offenses committed against the same victim—assault with a deadly weapon inflicting serious injury and attempted second-degree sexual offense. (2) The court rules that the jury properly found separate statutory aggravating circumstances under G.S. 15A-2000(e)(5) that the murder was committed while the defendant was engaged in the commission of (a) first-degree sexual offense, and (b) first-degree rape.

Attempted Second-Degree Rape Is A Prior Violent Felony Under G.S. 15A-2000(e)(3)

**State v. Holden,** 338 N.C. 394, 450 S.E.2d 878 (9 December 1994). The defendant's conviction of attempted second-degree rape under North Carolina law was automatically a prior violent felony conviction under G.S. 15A-2000(e)(3) without the necessity to present evidence that the facts underlying the conviction showed that violence was used.

Defendant's Virginia Conviction For First-Degree Murder Was Not Capital Felony Under G.S. 15A-2000(e)(2) Because Death Penalty Did Not Exist At Time Of Conviction

**State v. Bunning,** 338 N.C. 483, 450 S.E.2d 462 (9 December 1994). The defendant pled guilty in a Virginia court to first-degree murder and was sentenced to twenty years' imprisonment. There was no death penalty in Virginia when he plead guilty because the Virginia Supreme Court had previously declared that its death penalty was unconstitutional. The court rules that the crime to which the defendant pled guilty was not punishable by death and therefore was not a capital felony under G.S. 15A-2000(e)(2). The court rules that a capital felony is a crime for which the defendant could receive the death penalty; see G.S. 15A-2000(a)(1).

Trial Judge Properly Did Not Instruct On Mitigating Circumstance Of No Prior Significant Criminal History [15A-2000(f)(1)]

**State v. Jones,** 339 N.C. ___, ___ S.E.2d ___ (30 December 1994). The trial judge properly did not instruct on the mitigating circumstance of no prior significant criminal history [15A-2000(f)(1)] when the defendant had three prior violent felony convictions: two counts of assault with a deadly weapon with intent to kill inflicting serious injury and common law robbery. No rational juror could have found that the defendant had no significant history of prior criminal activity.

(1) Trial Judge Erred In Failing To Peremptorily Instruct On Statutory Mitigating Circumstance [15A-2000(f)(2)], And Error Was Not Harmless Beyond Reasonable Doubt
(2) Trial Judge Erred In Failing To Instruct On Statutory Mitigating Circumstance [15A-2000(f)(7)] Despite Defendant's Withdrawal Of Request To Instruct On That Circumstance

**State v. Holden,** 338 N.C. 394, 450 S.E.2d 878 (9 December 1994). (1) The court rules that the defendant offered uncontroverted evidence of the mitigating circumstance under G.S. 15A-2000(f)(2) (murder committed while defendant under influence of mental or emotional disturbance), and the trial judge erred in denying the defendant's request for a peremptory instruction. The court also rules that the error was not harmless beyond a reasonable doubt. Although one or more jurors found that the mitigating circumstance existed, it was not known whether all jurors found that it existed. It is possible that if the peremptory instruction had been given, more jurors or all jurors would have done so. And that could have affected the balancing of mitigating circumstances against aggravating circumstances, thereby affecting the sentencing recommendation. (2) The court rules that the trial judge erred in failing to instruct on the statutory mitigating circumstance under G.S. 15A-2000(f)(7) (age of the defendant when murder committed) despite the defendant's withdrawal of a request to instruct on that circumstance. The evidence supported the submission of this circumstance: Although the defendant was thirty years old at the time of the murder, the defense psychologist testified that the defendant's mental age was ten years and that his problem-solving skills were closer to those of a ten year old.

Jury May Decline To Find Statutory Mitigating Circumstance Although Judge Gives Peremptory Instruction On That Circumstance

**State v. Rouse,** 339 N.C. ___, ___ S.E.2d ___ (30 December 1994). The court rules that even when a defendant is entitled to a peremptory instruction on a given mitigating circumstance because the evidence is uncontroverted, the jury is still free to reject the circumstance if it does not find the evidence credible or convincing. The court concludes that the jury could have found that the evidence of the mental health experts was not credible or convincing on the impaired capacity mitigating circumstance [15A-2000(f)(6)]. The court disapproves of language in State v. Kirkley, 308 N.C. 196, 302 S.E.2d 144 (1983) that is inconsistent with this ruling. The court states, however, that a defendant may be entitled to a directed verdict on a statutory mitigating circumstance if the evidence in support of the circumstance is substantial, manifestly credible, and uncontradicted (but the evidence in this case did not support such an instruction).

Court Reaffirms Prior Ruling That State's Evidence Of Defendant's Bad Character In Capital Sentencing Hearing Can Only Be Offered In Rebuttal; State's Evidence Was Properly Admitted In This Case

**State v. Carter,** 338 N.C. ___, ___ S.E.2d ___ (30 December 1994). The court reaffirms its ruling in State v. Silhan, 302 N.C. 223, 275 S.E.2d 450 (1981) that the state in a capital sentencing hearing may offer evidence of the defendant's bad character only in rebuttal to the defendant's offer of good character evidence. The court rules that the state's evidence (prior criminal behavior) offered in rebuttal in this case was properly admitted. The court notes that while the defendant did not offer "good character" evidence *per se*, his adoptive mother did testify that she felt that the defendant was the "normal Marcus," kind, giving, and helping.

Testimony About Deceased Victim Was Not Error, Based On Facts In This Case

**State v. Reeves,** 337 N.C. 700, 448 S.E.2d 802 (6 October 1994). The defendant was convicted of first-degree murder and sentenced to death. The state offered evidence at the sentencing that the victim "was a very good person. She always went to church. She loved her children. She was a good wife and mother. And she was just a very good person, would do anything for anybody, and she died not knowing what happened to her two-and-a-half-year-old child." The court rules that this evidence: (1) did not violate the United States Constitution—see Payne v. Tennessee, 501 U.S. 808, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991); and (2) was relevant under Rule 402 and its exclusion was not required under the United States or North Carolina constitutions, federal or state statutes, or rules of evidence. The court states that "[w]hile evidence of a victim's character may not by the strictest interpretation be relevant to any given issue, the State should be given some latitude in fleshing out the humanity of the victim so long as it does not go too far. The State should not be permitted to ask for the death sentence because the victim is a 'good person,' any more than a defendant should be entitled to seek life imprisonment because the victim was someone of 'bad character.' The State did not do so in this case."

Court Reaffirms Prior Rulings That Defendant Is Not Entitled To Bill Of Particulars From State Disclosing Statutory Aggravating Circumstances On Which It Will Rely In Capital Sentencing Hearing

**State v. Baker,** 338 N.C. ___, ___ S.E.2d ___ (30 December 1994). The court finds no reason to depart from its prior rulings in State v. Taylor, 304 N.C. 249, 283 S.E.2d 761 (1981) and State v. Roper, 328 N.C. 337, 402 S.E.2d 600 (1991) and reaffirms that a trial judge does not err in denying a defendant's motion for a bill of particulars disclosing statutory aggravating circumstances on which the state intends to rely in a capital sentencing hearing. [Note: The case did not involve the issue whether a trial judge has the authority to require the state to provide such information under Rule 24 of the General Rules of Practice for the Superior and District Courts.]

Defendant Does Not Have Right To Open And Close Final Jury Arguments In Capital Sentencing Hearing

**State v. Jones,** 339 N.C. ___, ___ S.E.2d ___ (30 December 1994). Relying on State v. Wilson, 313 N.C. 516, 330 S.E.2d 450 (1985), the court rules

that although G.S. 15A-2000(a)(4) gives a defendant the right to make the final argument in a capital sentencing hearing, neither this statute nor any other statute gives the defendant the right to make the first and last jury arguments.

## Miscellaneous

Denial Of Defense Motion For Funds To Employ Defense Forensic Pathologist Was Not Error, Based On Facts In This Case

**State v. Moseley,** 338 N.C. 1, 449 S.E.2d 412 (3 November 1994). The court rules that the trial judge properly denied a defense motion for funds to employ a forensic pathologist. The court states that a review of the record, slides, and photographs showed that the similarities between the location and types of wounds of the murder victim in this case and the victim of another murder admitted under Rule 404(b) were obvious and self-explanatory, even to the ordinary lay juror. And there was substantial additional evidence that demonstrated the similarities between the two murders from which the jury could find that they were committed by the same person. The defendant failed to demonstrate that the assistance of a pathologist would have materially aided him in the preparation of his defense or that lack of such an expert deprived him of a fair trial.

Defendant Was Properly Denied Appointment Of Eyewitness Identification Expert

**State v. Abraham,** 338 N.C. 315, 451 S.E.2d 131 (9 December 1994). The court rules, based on the standard set out in Ake v. Oklahoma, 470 U.S. 68 (1985), that the trial judge in a first-degree murder case did not err in denying the defendant's motion for the appointment of an expert on eyewitness identification. The defendant failed to show how an expert would have materially assisted him. His pretrial motion was based solely on his perceived need to show the unreliability of the identification of the defendants at an earlier shooting offered under Rule 404(b), not the shooting that was being tried. The court also notes that this was not a case involving the uncorroborated identification by a single eyewitness. Victims of an earlier shooting and the shooting being tried knew the defendants. Further, the identification issues for which the defendant sought expert assistance involved matters within the scope of the jury's general capability and understanding.

State's Delegation Of Law Enforcement Authority To Campbell University, A Religious Institution, Violates First Amendment's Establishment Clause

**State v. Pendleton,** 339 N.C. ___, ___ S.E.2d ___ (30 December 1994). The defendant was arrested for DWI on the Campbell University campus by a Campbell University police officer, who exercised law enforcement authority as a commissioned company police officer under former Chapter 74A (now codified as Chapter 74E). The court upholds the trial judge's dismissal of the DWI charge. It rules that the state's delegation of its law enforcement power to Campbell University, a religious institution (based on the law and factual findings in this case), violated the First Amendment's establishment clause as set out in Larkin v. Grendel's Den, Inc., 459 U.S. 116 (1982). The court stresses that its ruling is based on the unique facts concerning Campbell University that were found by the superior court in this case.

Trial Judge Properly Handled Impasse Between Defendant And Defense Counsel About Trial Strategy

**State v. Brown,** 339 N.C. ___, ___ S.E.2d ___ (30 December 1994). On several occasions, both before and during trial, defense counsel notified the trial judge that the defendant refused to cooperate in the preparation of his defense. The judge, relying on State v. Ali, 329 N.C. 394, 407 S.E.2d 183 (1991), ruled that the defendant's wishes must prevail whenever he and his counsel reached an impasse about trial strategy. The defendant argued on appeal that the judge should have either allowed him to proceed *pro se* or ordered him to abide by his attorney's decisions. The court notes that every time that the trial judge asked the defendant whether he wanted to dismiss his attorney and represent himself, the defendant chose to keep his attorney. Therefore, the judge properly did not allow the defendant to proceed *pro se*. Also, as required by *Ali*, defense counsel notified the judge of his advice to the defendant, the reasons for the advice, the defendant's decision, and

the conclusion reached. The court rules that the trial judge properly ensured that the defendant was fully informed of the consequences of his decision and his attorney's opinions before ordering the attorney to proceed according to the defendant's wishes.

Trial Judge Who Is Merely Repeating Instruction To Jury Based On Its Request Is Not Required To Give Parties Opportunity To Be Heard Before Reinstructing Jury

**State v. Weathers,** 339 N.C. ___, ___ S.E.2d ___ (30 December 1994). Agreeing with the ruling in State v. Buchanan, 108 N.C. App. 338, 423 S.E.2d 819 (1990), the court rules that a trial judge who is merely repeating an instruction to a jury based on its request is not required under G.S. 15A-1234(c) to give parties an opportunity to be heard before reinstructing the jury.

Trial Judge Properly Denied Defendant's Motion To Conduct *In Camera* Inspection Of SBI Investigative Report

**State v. Hunt,** 339 N.C. ___, ___ S.E.2d ___ (30 December 1994). Because the prosecutor in this case provided the defense counsel with prior statements made by the state's witnesses after they testified on direct examination, the court rules that the trial judge was not required under North Carolina discovery statutes to conduct its own *in camera* review of the SBI investigative report, based on the facts in this case. The court also rules that because the defendant failed to show that nondisclosed evidence from the SBI report was "material" and what effect, if any, the nondisclosure would have had on the outcome of the trial, no federal constitutional principle required the trial judge to order the state to make the SBI report available to the defendant or the trial judge to conduct an *in camera* inspection of the SBI report.

Prosecutor's Jury Argument, That Responded To Defense Counsel's Opening Statement, Was Permissible

**State v. Harris,** 338 N.C. 211, 449 S.E.2d 462 (3 November 1994). Defense counsel in his opening statement stated that the defendant and another originally intended to commit a breaking and entering, not a robbery. Evidence was not admitted during trial to support that contention. The prosecutor during closing argument highlighted the absence of evidence by posing the question, "What witness said that?" The court rules that the prosecutor's argument was proper, and notes that the question focused on the defendant's general failure to present evidence and did not improperly comment on the defendant's failure to testify.

Proper To Find Non-Statutory Aggravating Factor For Felonious Assault Conviction That Victim Sustained "Extremely Severe And Permanent Injuries"

**State v. Brinson,** 337 N.C. 764, 448 S.E.2d 822 (6 October 1994), *reversing*, 110 N.C. App. 314, 430 S.E.2d 313 (1993) (unpublished opinion). The court rules that the trial judge properly found as a non-statutory aggravating factor for a felonious assault conviction that the victim sustained "extremely severe and permanent injuries." The evidence concerning the victim's broken neck, aside from the evidence concerning the resulting permanent paralysis, was sufficient to establish the element of serious injury. The non-statutory aggravating factor rested solely on the resulting permanent paralysis, and thus the finding of this factor did not violate the provision in G.S. 15A-1340.3(a)(1) that evidence necessary to prove an element of an offense may not be used to prove an aggravating factor. See State v. Blackwelder, 309 N.C. 410, 306 S.E.2d 783 (1983).

## North Carolina Court Of Appeals

### Arrest, Search, and Confession Issues

Defendant Did Not Satisfy Burden Of Showing Reasonable Expectation Of Privacy In Briefcase

**State v. Cohen,** ___ N.C. App. ___, 450 S.E.2d 503 (6 December 1994). Officers obtained the consent of the defendant's wife to search her car. The officers searched its contents, including an unlocked briefcase. The defendant made a motion to suppress the search of the briefcase on the ground that his wife did not have the authority to consent to its search by the officers. The trial judge refused to accept the wife's

affidavit at the suppression hearing because she was available as a witness; the defendant declined the judge's offer of additional time to produce his wife as a witness. The court rules that the judge properly refused to admit the affidavit, based on these facts. The court also rules that the defendant's suppression motion was properly denied since the defendant failed to present evidence that he had an ownership or possessory interest in the briefcase.

Officer Did Not Have Probable Cause Or Consent To Open Aspirin Bottle That Had Been Given To Him By The Defendant

**State v. Wise,** ___ N.C. ___, 449 S.E.2d 774 (15 November 1994). **(Note: there was a dissenting opinion in this case.)** A SHP trooper stopped a vehicle for speeding. He saw the defendant-passenger grab his midsection between his stomach and his belt line with both hands. The trooper patted down the defendant, reaching from the driver's side of the car, and felt a "round cylinder object" in the area where the defendant had grabbed, but he determined that it was not a weapon. The trooper asked the defendant what he had grabbed, which prompted the defendant to reach inside his jacket and hand the trooper a white, non-transparent Bayer aspirin bottle. The trooper shook the bottle and it "rattled lightly," sounding as if it had "BBs in it." He was suspicious because such a bottle normally has cotton in it so the rattle would not sound the same. The trooper then opened the bottle, shined his flashlight in it, looked inside, and saw what he determined was rock cocaine. The court rules that the officer unconstitutionally opened the bottle: (1) there was no evidence that the defendant consented to a search of the bottle; and (2) there was no probable cause to believe, based on these facts, that the bottle contained illegal drugs.

(1) Officer's Looking Through Small Opening In Drawn Curtains Of Apartment Window Was Unconstitutional Search, Based On Facts In This Case
(2) Consent To Search Apartment Was Tainted By Unlawful Search

**State v. Wooding,** ___ N.C. App. ___, 449 S.E.2d 760 (15 November 1994). An officer received a radio communication that a person at the Southern Lights Restaurant had seen a black man of a given description get out of a 1980s gray Monte Carlo car and hide behind a dumpster near the restaurant. The person believed that the man lived in one of the apartments at 109 North Cedar Street. While investigating this communication, the officer received another radio communication that a robbery had occurred at the Equinox Restaurant. The description of the robber matched the description of the suspicious person at the Southern Lights Restaurant. The officer want to 109 North Cedar Street. He saw a gray Monte Carlo car parked in front of the building, which contained four apartments, two at ground level and two upstairs. Before leaving his vehicle, the officer saw—through an open window in the side of one of the downstairs apartments—a black male matching the earlier descriptions. After getting out of his vehicle, the officer saw this same person through the open window walking around the apartment and "heard a lot of noise which appeared to [him] to be coins hitting metal." He believed that the noise was definitely change being counted or sifted through. The officer went to the back porch of the apartment in which he had seen the black male (there was a partition that separated the porches of the two lower level apartments). Once on the porch, the officer leaned over a couch next to the window, got close to the window, and looked into the apartment through a three to four inch opening in the window curtains. The officer saw two black males sitting on the floor in the hallway counting money. The officer radioed what he had seen to an officer who was in the front of the apartment with the robbery victim (the victim heard the officer's communication). Shortly thereafter, the defendant came out onto the front porch and was arrested for the robbery. Then the other person came out of the apartment and was identified as the robber by the victim. Both men thereafter consented to a search of the apartment, and the officers found a handgun and money in the apartment. (1) The court, relying on State v. Tarantino, 322 N.C. 386, 368 S.E.2d 588 (1988) (looking through cracks in building violated Fourth Amendment), rules that the officer's looking into the apartment window was an unlawful search under the Fourth Amendment. (2) The court rejects the state's argument that the later consent search of the apartment (when a handgun and money were found) was based on lawful activity independent of the officer's initial unlawful

observation into the apartment window. The court rules that (i) the arrest of the defendant was based entirely on the officer's unlawful search and was therefore itself unlawful; (ii) the consent to search, given by the defendant after his arrest, was tainted by the unlawful search; and (iii) the victim's identification of the second person in the apartment was made only after the victim learned what the officer had seen, through the back window—two people counting money in the apartment; thus, the identification and the later consent to search were also tainted by the unlawful search.

(1) Probable Cause Existed To Support Search Warrant
(2) Independent Source Exception To Exclusionary Rule Makes Admissible Evidence Seized Under Proper Search Warrant Despite Allegedly Initial Illegal Entry

**State v. Waterfield,** ___ N.C. App. ___, 450 S.E.2d 524 (6 December 1994). On 13 May 1993 officers went to the defendant's residence without a search warrant. The defendant refused to give his consent to a search of his residence. One officer told the defendant that he would stay with the defendant while the other officers obtained a search warrant. When the officers insisted that the defendant remain in their view at all times, the defendant shut and locked the door. One officer kicked the door down and forced the defendant to sit in a chair. About one-and-one-half hours later, officers returned with a search warrant and conducted a search. No information obtained during the initial entry was used in the affidavit for the search warrant. (1) The affidavit stated that on 1 April 1993 three people gave an officer about three grams of marijuana they said the defendant had given them. They stated that the defendant had shown them marijuana kept in a padlocked cabinet in his bedroom at his residence. On 2 April 1993 a confidential informant told an officer he had seen marijuana in the defendant's residence and stated that the defendant kept the marijuana in a padlocked cabinet in his bedroom. On 5 April 1993 officers visited the defendant's residence and confirmed that he lived there. On 12 May 1993 another confidential informant reported to an officer that within the last 24 hours the informant had seen about a half pound of marijuana at the defendant's residence and had seen the defendant sell marijuana from his home; the informant also stated that the defendant kept marijuana in a padlocked cabinet in his bedroom. The court rules that the affidavit supplied probable cause to support the search warrant. Although the affidavit did not mention the reliability of the officers' sources of information, it did provide information about the presence and sale of marijuana at the defendant's residence within 24 hours of the warrant application. It further described the location and manner of the defendant's storage of the marijuana that matched information supplied by other sources. (2) Relying on Segura v. United States, 468 U.S. 796 (1984), the court rules that the search pursuant to the search warrant was valid because the information used to obtain the search warrant was obtained entirely independent of the allegedly illegal initial entry to secure the residence.

Probable Cause Did Not Exist To Support Search Warrant To Search Home

**State v. Styles,** 116 N.C. App. 479, 448 S.E.2d 385 (4 October 1994). The court rules that the following affidavit did not support a search warrant (dated 11 September 1992) to search the defendant's home:

> I [name of officer] being first duly sworn, do hereby swear the following to be true to the best of my knowledge and based upon personal knowledge and upon information I received from a confidential informant. That [defendant] is a known felon with a large criminal record. He has been convicted of possession of marijuana in the past two years and [has] been reported to me before on many occasions for selling controlled substances. In addition to this I received information today that [defendant] has a large quantity of marijuana in his possession today. This was relayed to me by a confidential reliable informant who stated that two other men had been to the apartment on 9-10-92 and saw large quantities of marijuana in the apartment. This informant has given me reliable information in the past which led to arrests.

The court concludes that the affiant did not adequately explain why the double hearsay was credible: "[t]he deputy only states that the informant has given the deputy reliable information in the past. The magistrate had no way of knowing whether the informant was with the two men, if he observed the two men, or if the two men told the informant what happened."

Officer Had Probable Cause To Believe Person Had Committed Impaired Driving Offense, Based On Facts In This Case, Which Included Alco-Sensor Test Result

**Moore v. Hodges**, 116 N.C. App. 727, 449 S.E.2d 218 (1 November 1994). A trooper arrived at the scene of a one-car accident and saw Moore's vehicle in the ditch on the side of the road. Moore was lying down in the back of a rescue squad vehicle while being treated for injuries. She told the trooper at the hospital that she was driving the vehicle and it went off the road. She admitted that she had some liquor earlier in the day. The trooper noticed her mumbled speech and detected a faint odor of alcohol about her. He administered an alcohol screening test [authorized for probable cause determinations under G.S. 20-16.3(d)] with an Alco-Sensor [approved under N.C. Administrative Code Title 15A, rule 19B.0503(a)]. The test registered a result higher than 0.10. The court rules that, based on these facts, the trooper had probable cause to believe that Moore had committed impaired driving.

Plaintiff's Evidence, Taken In The Light Most Favorable To The Plaintiff On Defendant's Motion For Summary Judgment, Was Sufficient To Allege Fourth Amendment Violation

**Davis v. Town of Southern Pines**, 116 N.C. App. 663, 449 S.E.2d 240 (1 November 1994). Plaintiff civilly sued law enforcement officers and town for violating her Fourth Amendment rights by taking her to jail for allegedly being intoxicated in public. The evidence, taken in the light most favorable to the plaintiff on defendant's motion for summary judgment, showed that the plaintiff was publicly intoxicated at 1:30 A.M., and she tripped and fell while walking to a phone booth to call a cab. The plaintiff told the law enforcement officers that she was not bothering anybody and that she was going to call a cab to take her home. Plaintiff's sister offered to call a cab for the plaintiff and take care of her. The officers then took the plaintiff to jail against her will, which the court rules constituted an arrest under the Fourth Amendment. The court rules, based on these proffered facts, the officers did not have probable cause to believe the plaintiff was in need of assistance under G.S. 122C-303 [which authorizes officers to take a publicly intoxicated person to jail if the person is apparently in need of and apparently unable to provide for oneself food, clothing, or shelter, but is not apparently in need of immediate medical care and if no other facility is readily available to receive the person].

## Criminal Offenses

Use Of Pellet Gun Was Sufficient Evidence Of Dangerous Weapon To Support Armed Robbery Conviction, Based On Facts In This Case

**State v. Westall**, 116 N.C. App. 534, 449 S.E.2d 24 (18 October 1994). During the robbery of a convenience store, the defendant pointed a pistol at the employee and demanded money. He pressed the pistol to her lower back near her kidney and marched her to the cash register. The defendant emptied the cash register and left. The pistol was a Crossman .177 caliber pistol capable of firing either pellets or BBs at 450 feet per second. The trial judge submitted both armed robbery and common law robbery to the jury, and the defendant was convicted of armed robbery. The court rules that sufficient evidence showed that the pistol was actually capable of threatening or endangering the employee's life. A projectile from the pistol was capable of totally penetrating a quarter-inch of plywood and would have resulted in a life-threatening injury to the employee had the defendant fired it. The court disavows any interpretation of State v. Summey, 109 N.C. App. 518, 428 S.E.2d 245 (1993), that a pellet gun is not, as a matter of law, a dangerous weapon.

Moving Victim Into Restroom In Back Of Store Where Rape Was Committed Was Sufficient Evidence To Support Convictions Of Kidnapping And Rape, Based On The Facts In This Case

**State v. Hill,** 116 N.C. App. 573, 449 S.E.2d 573 (18 October 1994). The defendant was convicted of first-degree rape and second-degree kidnapping. The defendant pulled a gun on the victim, a store employee, while she was behind the counter in the front of the store. He told her he was going to tie her up and rob her. He then forced her into the restroom, tied her hands behind her back, and raped her. Relying on State v. Walker, 84 N.C. App. 540, 353 S.E.2d 245 (1987), the court rules that the evidence was sufficient to support both convictions. Although the defendant could have committed the rape in the front of the store, he forced the victim into the store restroom as described above. At that time, the crime of kidnapping was complete, irrespective of the fact that the defendant thereafter committed rape.

Defendant Was Not Entitled To Dismissal When Charged With Attempted Rape But Evidence At Trial Showed Completed Rape

**State v. Canup,** ___ N.C. App. ___, ___ S.E.2d ___ (20 December 1994). The defendant was charged with attempted second-degree rape. The evidence at trial showed a completed act of rape. The defendant argued that there was a fatal variance between the proof and indictment that required a dismissal of the charge. Relying on State v. Wade, 49 N.C. App. 257, 271 S.E.2d 77 (1980), the court rules there was no error. The court notes that the completed commission of a crime must include an attempt to commit a crime and the evidence in this case supported the defendant's being charged with either second-degree rape or attempted second-degree rape and being convicted of either offense. And if there was any error in submitting attempted second-degree rape, it was harmless. The court distinguishes State v. Jeffries, 57 N.C. App. 416, 291 S.E.2d 859 (1982) and State v. Green, 95 N.C. App. 558, 383 S.E.2d 419 (1989) by noting that the issue in those cases was whether the trial judge was required to instruct the jury on lesser offenses of the charged offense.

(1) Indictment For Second-Degree Rape Would Support Verdict Of Attempted Second-Degree Rape Or Assault On A Female, Based on G.S. 15-144.1
(2) Trial Judge's Decision At First Trial (Which Resulted In Hung Jury On Second-Degree Rape) Not To Submit Any Lesser Offenses Of Second-Degree Rape Did Not Constitute "Acquittal" Of Lesser Offenses Of Attempted Second-Degree Rape And Assault On A Female

**State v. Hatcher,** ___ N.C. ___, 450 S.E.2d 19 (15 November 1994). The defendant was indicted for second-degree rape. At the jury instruction conference, neither the state nor the defendant requested instructions on any lesser-included offenses. The judge instructed on second-degree rape only. There was a hung jury and a mistrial was declared. Before the second trial, the judge ruled on double jeopardy grounds that the state was barred from trying the defendant on lesser offenses of attempted second-degree rape and assault on a female (the state had brought indictments for these offenses after the new trial). (1) The court notes that the indictment for second-degree rape would support a verdict for attempted second-degree rape or assault on a female, based on G.S. 15-144.1. (2) Relying on State v. Thomas, 325 N.C. 583, 386 S.E.2d 555 (1989) (court rules, after ordering retrial because the judge erred in not submitting involuntary manslaughter, that defendant could be retried for first-degree murder on both premeditation and deliberation and felony murder theory and all lesser-included offenses, even though at first trial only first-degree murder felony murder theory had been submitted to jury and no lesser-included offenses had been submitted), the court rules that defendant may properly be tried at the second trial for second-degree rape, attempted second-degree rape, and assault on a female. The defendant was not acquitted of these lesser offenses of second-degree rape because the judge at the first trial did not submit them to the jury.

Arresting Or Charging Officer May Not Give Notification Of Rights Under G.S. 20-16.2 When Officer Designates Chemical Analysis Of Breath, Even If Officer Designates An Automated Instrument And Is Authorized To Administer That Instrument; Court States That Ruling Is Applicable To Administrative Driver's License Revocations But Not Criminal Cases

**Nicholson v. Killens,** 116 N.C. App. 473, 448 S.E.2d 542 (4 October 1994), *superseding opinion at* 115 N.C. App. 552, 445 S.E.2d 608 (19 July

1994). An officer arrested Nicholson for impaired driving, transported him to a room for a chemical analysis of his breath, advised him of his rights under G.S. 20-16.2(a), and requested that he submit to a chemical analysis of his breath with an Intoxilyzer 5000 instrument (an automated instrument). The officer was properly authorized to administer that instrument. Nicholson willfully refused to submit to the test. The Division of Motor Vehicles revoked Nicholson's license in an administrative hearing for the willful refusal. The court rules that Nicholson was not notified of his rights as required by G.S. 20-16.2(a) because the arresting or charging officer may not give the notification of rights unless the officer designates a chemical analysis of blood. The court rejects the state's argument that G.S. 20-139.1(b1) permitted the officer to give the notification of rights in this case. However, the court makes clear that its ruling only applies to bar the administrative revocation of the petitioner's driver's license for refusing to submit to a breath test. The ruling does not apply to criminal cases.

Privately-Maintained Paved Road Within Mobile Home Park Was Public Vehicular Area To Support DWI Conviction

**State v. Turner,** ___ N.C. App. ___, ___ S.E.2d ___ (20 December 1994). The defendant was convicted of DWI when she drove on a privately-maintained paved road within a privately-owned mobile home park. The court rules that the road was a public vehicular area to support the DWI conviction. The mobile home park was owned by one individual who had divided the property into lots for lease; therefore, it met the definition of "subdivision" within the definition of "public vehicular area" in G.S. 20-4.01(32). The streets within the subdivision were not marked by signs indicating the roads were private or by signs prohibiting trespassing. And the streets were available for use by residents, their guests, and other visitors.

Drug-Selling Offenses That Occurred One Month Apart Were Properly Joined For Trial

**State v. Styles,** 116 N.C. App. 479, 448 S.E.2d 385 (4 October 1994). On 11 September 1992, officers found ten bags of marijuana in the defendant's home. He was charged with possession with intent to sell and deliver and maintaining a dwelling for keeping and selling controlled substances. On 11 October 1992, the defendant allegedly sold marijuana at his home to a person under 16 and was charged the next day with sale or delivery of controlled substance to a person under 16. The court rules that the trial judge did not abuse his discretion in joining these offenses for trial under G.S. 15A-926(a). The "common thread" was the selling and distribution of marijuana, and the "scheme" was to sell the marijuana for profit.

Break-Ins That Occurred One Month Apart Were Properly Joined For Trial

**State v. Howie,** 116 N.C. App. 609, 448 S.E.2d 867 (18 October 1994). Evidence at trial showed that the defendant committed two similar break-ins in the same community, one at the residence of victim A on 7 July 1992 and another at the residence of victim B on 5 August 1992. In each case, the defendant saw the victim using her ATM card at a NationsBank at Watauga Village and attempted to memorize the card number. He then followed the victim home, broke into the house, and stole the victim's purse. The court rules that the trial judge properly joined the offenses for trial. The court rejects the defendant's contention that the lapse of time between the two break-ins was sufficiently long to break any transactional connection between them. The court notes that the offenses were not only similar, but they involved the same pattern of operation.

Anti-Noise County Ordinance Is Constitutional In Part And Unconstitutional In Part

**State v. Garren,** ___ N.C. App. ___, ___ S.E.2d ___ (20 December 1994). A county anti-noise ordinance defined "loud, raucous and disturbing" noise as any sound that "annoys, disturbs, injures or endangers the comfort, health, peace or safety of reasonable persons of ordinary sensibilities." The court rules that because this was an objective standard for measuring what noise was prohibited, this section of the ordinance was not unconstitutionally overbroad or vague. The court notes that there must be some evidence at trial—based on this objective standard—to support a conviction; examples would include testimony that a person could not hear a

person standing next to him or her or that furniture or windows were rattling from vibrations created by the noise. The court approvingly cites State v. Dorsett, 3 N.C. App. 331, 164 S.E.2d 607 (1968).

The court rules as unconstitutionally overbroad a section of the ordinance that bans any singing, yelling, or the playing of any radio, amplifier, musical instrument, phonograph, loudspeakers, or other device producing sound regardless of their level of sound or actual impact on a person.

## Miscellaneous

DNA Evidence Was Admissible

**State v. Hill,** 116 N.C. App. 573, 449 S.E.2d 573 (18 October 1994). The defendant was convicted of first-degree rape and second-degree kidnapping. SBI Agent Mark Boodee was accepted by the trial judge as an expert in the fields of molecular genetics and forensic analysis. (1) Boodee testified that he performed DNA tests and six autorads produced visual matches with the defendant and two autorads produced inconclusive results. He characterized the four matches as an extremely rare result. The court rejects defendant's argument that Boodee in effect improperly stated his opinion that the defendant was the person who committed the rape. (2) Boodee testified that the possibility of selecting another unrelated individual having the same profile as the defendant was approximately 1 in 2.6 million for the North Carolina white population. The court rejects the defendant's argument that the database was too small to permit the use of statistical analysis concerning the probability estimate. Relying on State v. Futrell, 112 N.C. App. 651, 436 S.E.2d 884 (1993) and State v. Pennington, 327 N.C. 89, 393 S.E.2d 847 (1990), the court notes that the trial testimony showed that Boodee had the requisite skill to form an opinion concerning the statistical probability of DNA matching. (3) The court rules that Boodee was properly permitted to testify that Dr. Bruce Weir determined that 500 samples were a representative sample on which the North Carolina population frequency database was developed. Boodee testified in detail about Dr. Weir's professional background and the results of the statistical testing to which Dr. Weir had subjected the SBI database. Boodee was familiar with Dr. Weir's analysis of the SBI database and the results, particularly since Boodee used the database himself when making his statistical calculations for this case. The court notes that Rule 703 permits an expert to base an opinion on facts or data perceived before the hearing if it is of a type reasonably relied on by experts in the field. Rule 703 also permits an expert to rely on an out-of-court communication as a basis for an opinion; see State v. Jones, 322 N.C. 406, 368 S.E.2d 844 (1988); State v. Robinson, 330 N.C. 1, 409 S.E.2d 288 (1991).

Officer's Opinion About Pellet Gun's Force And Damage It May Cause Was Admissible

**State v. Westall,** 116 N.C. App. 534, 449 S.E.2d 24 (18 October 1994). A pellet gun was used in an armed robbery, and the state offered an officer's opinion testimony about the force of the pellet gun and the damage to the human body that could be caused by a projectile fired from it. The officer saw the firing of a comparable pellet gun and witnessed its destructive force. The court rules that this observation, coupled with the officer's experience with firearms and their capabilities, provided the officer with sufficient facts and data on which to form an expert opinion. There was no error in allowing the officer to conclude that the pellet gun used at point-blank range was a life-threatening weapon.

(1) State Could Appeal Midtrial Dismissal Of Criminal Charges Because Dismissal Was Unrelated To Factual Finding Of Guilt Or Innocence
(2) State Did Not Violate Constitutional Discovery Rulings Because Evidence Was Disclosed To Defendant At Trial
(3) State Did Not Violate Statutory Discovery Because State's Witness Did Not Make A "Statement" As Defined In G.S. 15A-903(f)(5)

**State v. Shedd,** ___ N.C. App. ___, 450 S.E.2d 13 (15 November 1994). The trial judge during trial dismissed first-degree murder charges against the defendant for two discovery violations by the state. (1) The court rules that the state was authorized to appeal the midtrial dismissal without violating the double jeopardy clause because the dismissal was unrelated to a finding of the defendant's factual guilt or innocence; the court cites State v. Priddy, 115

N.C. App. 547, 445 S.E.2d 610 (1994); United States v. Scott, 437 U.S. 82 (1978). (2) The trial judge ruled that the state failed to produce evidence of an officer's log entry that indicated that a key state's witness was too intoxicated to give a statement to the officer on the night of the murder. The trial judge also ruled that the log entry was relevant to the witness's credibility, and the state's failure to provide this information to the defense violated Brady v. Maryland, 373 U.S. 83 (1963). However, the court rules that since this evidence was disclosed at trial, there was no *Brady* violation—the court cites State v. Abernathy, 295 N.C. 147, 244 S.E.2d 373 (1978) and State v. Lineberger, 100 N.C. App. 307, 395 S.E.2d 716 (1990). (2) The trial judge ruled that the state violated discovery rules by failing to provide to the defense a pretrial statement made by a key state's witness. At trial, the witness testified about the events of the murder. The trial judge found that the witness had given a statement to an officer about these events, and the state therefore violated discovery statutes in failing to give a copy of this statement to the defense. The court notes that the definition of a "statement" in G.S. 15A-903(f)(5)a. includes "[a] written statement made by the witness and signed or otherwise adopted or approved by [the witness]." The evidence, however, showed that the witness made a statement but did not sign, read, or have it read to her. She neither received a copy of it nor ever saw it. Thus, the court concludes that there is no evidence that the witness signed, adopted, or otherwise approved of the statement. Since there was no "statement" as defined by the discovery statute, the trial judge was not authorized to impose sanctions since the statute was not violated.

The court reverses the trial judge's order of dismissal since there was neither a *Brady* violation nor a statutory discovery violation.

Defendant Had No Right To Appeal Activation Of Probationary Sentence When He Voluntarily Elected To Serve His Sentence

**State v. Ikard,** ___ N.C. App. ___, ___ S.E.2d ___ (20 December 1994). After being convicted of second-degree murder and sentenced to twenty-five years in prison, the defendant voluntarily elected to serve a probationary sentence that had previously been imposed for a cocaine conviction. The trial judge activated the suspended sentence imposed under that probation and ordered the sentence to be served consecutively to the sentence for the murder conviction. The defendant appealed and argued that the sentence should run concurrently to the murder conviction because he elected to serve the prison sentence. The court dismisses the appeal, ruling that G.S. 15A-1347 does not authorize an appeal when a defendant voluntarily elects to serve a probationary sentence, since the judge did not activate the sentence "as a result of a finding of a violation of probation."

(1) Trial Judge Did Not Err In Ordering Defendant To Speak In Court So Witness Could Make Voice Identification
(2) Habitual Felon Indictment Was Properly Amended To Change Date Of Commission Of Felony

**State v. Locklear,** ___ N.C. App. ___, 450 S.E.2d 516 (6 December 1994). (1) The court rules, relying on State v. Perry, 291 N.C. 284, 230 S.E.2d 141 (1976) and cases from other states, that the defendant's Fifth Amendment privilege against compelled self-incrimination was not violated when the trial judge ordered the defendant to speak the exact words of the robber in the jury's presence so the state's witness could make a voice identification. (2) The court rules, relying on State v. Price, 310 N.C. 596, 313 S.E.2d 556 (1984), that the trial judge properly permitted the state to amend an habitual felon indictment to change the date of the commission of a felony alleged in the indictment.

Trial Judge Erred In Failing To Give No-Duty-To-Retreat Instruction In Self-Defense Case

**State v. Nixon,** ___ N.C. App. ___, 450 S.E.2d 562 (6 December 1994). The court reviews the evidence in this case and rules that the trial judge erred in refusing the defendant's request that the judge give a jury instruction that the defendant had no duty to retreat before using deadly force against a felonious assault. The trial judge erroneously believed that this instruction applied only when the defendant was in a home or business.

(1) Trial Judge Erred In Failing To Give No-Duty-To-Retreat Instruction In Self-Defense Case

(2) Trial Judge's Error In Failing To Give No-Duty-To-Retreat Instruction In Self-Defense Case Was Constitutional Error, Requiring State To Prove Error Was Harmless Beyond Reasonable Doubt

**State v. Brown,** ___ N.C. App. ___, 450 S.E.2d 538 (6 December 1994) **(Note: there was a dissenting opinion on the issue in (2) below, so the Supreme Court may review this case.)** (1) The court reviews the evidence in this case and rules that the trial judge erred in refusing the defendant's request that the judge give a jury instruction that the defendant had no duty to retreat before using deadly force. The use of deadly force occurred in the home where the defendant and the victim (her husband) resided. (2) The court also rules that the trial judge's error in failing to give a no-duty-to-retreat instruction in a self-defense case was constitutional error under the due process clause, requiring the state to prove that the error was harmless beyond a reasonable doubt.

Order Of Transfer Of Juvenile Case To Superior Court For Trial As Adult Is Not Appealable And Writ Of Prohibition Staying Superior Court Trial Is Therefore Not Warranted

**In re Green,** ___ N.C. App. ___, ___ S.E.2d ___ (6 January 1995). The court summarily rules that an order of transfer of a juvenile case to superior court for trial as an adult is not appealable, and a writ of prohibition directing a stay of further proceedings in superior court is therefore not warranted.

Video Poker Machines At Issue In This Case Are Illegal Slot Machines Under G.S. 14-306

**Collins Coin Music Co. v. N.C. Alcohol Beverage Control Comm'n,** ___ N.C. App. ___, ___ S.E.2d ___ (20 December 1994). The court rules that the video poker machines at issue in this case did not fit within the authorized exceptions for illegal slot machines under G.S. 14-306, and therefore the video poker machines were illegal. The element of chance dominates the element of skill in operating the machine and therefore the machine does not fit within the "skill or dexterity" exception. Since a player can receive up to $500.00 of merchandise in a single hand in exchange for paper coupons won, the machine does not fit within the exception that allows a person to win paper coupons that may be exchanged for merchandise with a value not exceeding $10.00.

URESA: Mother Is Not Equitably Estopped To Collect Child Support Arrearages Due Under Child Support Order When She Agreed To Forgive Arrearages In Exchange For Obligor Father's Consent To Allow Mother's New Husband To Adopt Child Who Is Subject Of Child Support Order

**State ex rel. Raines v. Gilbert,** ___ N.C. App. ___, 450 S.E.2d 1 (15 November 1994). Alabama mother brought URESA action against former husband (living in North Carolina) for past due child support payments for their child (living with mother in Alabama). The father went to Alabama to settle the action with the mother. They agreed that the mother would drop the action and accept $2,000, instead of the actual higher amount, in exchange for the father's consent to the child's adoption by the mother's new husband. The father signed the necessary consent forms, and the child was adopted by the mother's new husband. The court rules that the mother is not equitably estopped to collect all child support arrearages due under child support order, because the public policy of North Carolina would be violated if the father is allowed to release his parental interest in his child in exchange for a waiver of past due child support payments. The court notes that the agreement violates G.S. 48-37 because the mother and father gave and received consideration for placing the child for adoption.

*Note: The North Carolina Supreme Court has granted review of the following cases which appeared in prior Administration of Justice Memorandum issues:*

**State v. Rambert,** 116 N.C. App. 89, 446 S.E.2d 599 (16 August 1994) (discussed on pages 11-12 of Administration of Justice Memorandum Number 94/11).

**State v. Hauser,** 115 N.C. App. 431, 445 S.E.2d 73 (5 July 1994) (discussed on pages 14-15 of Administration of Justice Memorandum Number 94/08).

## New Federal Legislation Makes Unlawful The Interception Of Radio Portion Of Cordless Telephone Communication Unless Federal Court Order Authorizes The Interception

On October 25, 1994, the President signed the Communications Assistance for Law Enforcement Act of 1994 (P.L. 103-414). Among its provisions was the deletion, effective October 25, 1994, of prior federal statutory law that did not make unlawful the interception of the radio portion of a cordless telephone communication that is transmitted between the cordless telephone handset and the base unit. Therefore, in North Carolina the interception of such a communication without a federal court order *is* now a violation of federal law. [As a result of this legislation, delete the following sentence in the third full paragraph on page 83 of *Arrest, Search, and Investigation in North Carolina* (2d ed. 1992): "However, federal law does not prohibit the interception of the radio portion of a cordless telephone communication that is transmitted between the cordless telephone handset and its base unit, as it may be easily picked up through an AM/FM receiver."]

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