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Administration of Justice Memorandum

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

Recent Criminal Cases
(January 18, 1995 - July 5, 1995)

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This memorandum discusses cases of January 18 through June 26, 1995 from the United States Supreme Court; cases of February 10, March 3, April 7, May 5 and June 2, 1995 from the North Carolina Supreme Court; and cases of February 7, February 21, March 7, March 21, April 4, April 18, May 2, May 16, June 6, June 20, and July 5, 1995 from the North Carolina Court of Appeals. [Note: The case of State v. Hunt, 339 N.C. 622, 457 S.E.2d 276 (2 March 1995) was discussed in Administration of Memorandum No. 95/01 and will not be repeated here. The opinion was originally filed 30 December 1994, but the mandate was stayed until 2 March 1995.]

United States Supreme Court

Constitutional Duty to Provide Discovery

State Violated Due Process by Failing to Provide Materially Favorable Evidence to Defendant

Kyles v. Whitley, 115 S.Ct. 1555, 131 L.Ed.2d. 490, 57 Crim. L. Rep. 2003 (19 April 1995). The defendant was convicted of first-degree murder and sentenced to death, and his conviction and sentence were affirmed on direct appeal. It was revealed on state collateral review that the state had never disclosed certain favorable evidence to the defendant. The court reviewed its prior rulings on the state's constitutional duty to provide materially favorable evidence to a defendant. It noted that United States v. Bagley, 473 U.S. 667 (1985) had ruled that regardless of a defendant's request for favorable evidence, constitutional error occurs when the government suppresses favorable evidence "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." The court made four points about this standard: (1) The defendant does not need to prove that more likely than not (i.e., by a preponderance of evidence) he or she would have received a different verdict with the undisclosed evidence, but whether in its absence the defendant received a fair trial—"a trial resulting in a verdict worthy of confidence." A "reasonable probability" of a different verdict is shown when the suppression of evidence "undermines confidence in the outcome of the trial." (2) The *Bagley* materiality standard is not a sufficiency-of-evidence test. A defendant need not prove that, after discounting inculpatory evidence in light of the undisclosed favorable evidence, there would not have been enough left to convict. Instead, one must only show that favorable evidence could reasonably place the whole case in such a different light as to undermine confidence in the verdict. (3) Once a reviewing court finds constitutional error under *Bagley*, there is no harmless error analysis. The defendant is entitled to a new trial. (4) The

suppressed favorable evidence must be considered collectively, not item-by-item. In discussing this issue, the court rejected the state's argument that it should not be held accountable for favorable evidence known only to law enforcement officers and not to the prosecutor. The prosecutor has a duty to learn of favorable evidence known to others acting on the state's behalf in the case, including law enforcement officers.

The court reviewed the undisclosed favorable evidence in this case and ruled that its disclosure to competent counsel would have made a different result reasonably probable: (1) prior inconsistent statements of eyewitnesses identifying the defendant as the killer, which could have been used to impeach their trial testimony; (2) statements of a police informant, which were self-incriminating and could also be used to question the probative value of crucial physical evidence; and (3) a computer printout of license numbers of cars parked at the murder scene, which did not list the number of the defendant's car.

Search and Seizure

Fourth Amendment's Exclusionary Rule Does Not Require Suppression of Evidence Obtained by Arrest Based on Erroneous Information That There Was an Outstanding Arrest Warrant, If Error Was Made By Court Employees and Not Law Enforcement Officials

Arizona v. Evans, 115 S.Ct. 1185, 131 L.Ed.2d. 34, 56 Crim. L. Rep. 2175 (1 March 1995). An officer stopped the defendant for a traffic violation. The officer was informed by a computer message that there was an outstanding arrest warrant for the defendant, which—unknown to the officer—was incorrect because the warrant had already been dismissed. The officer arrested the defendant based on the information about the warrant, discovered marijuana, and charged the defendant with possession of marijuana. The defendant moved to suppress the marijuana evidence. The Arizona Supreme Court ruled that the evidence should be suppressed regardless of whether the error about the arrest warrant was the fault of court employees or law enforcement personnel. The United States Supreme Court ruled that if the error was the fault of court employees, then the exclusionary rule should not bar the admission of the marijuana evidence. Relying on its rulings in United States v. Leon, 468 U.S. 897 (1984), Massachusetts v. Sheppard, 468 U.S. 981 (1984), and Illinois v. Krull, 480 U.S. 340 (1987), the court noted that the exclusionary rule was historically designed to deter law enforcement misconduct, not errors by court employees. There was no evidence that court employees are inclined to violate the Fourth Amendment to require that the exclusionary rule be invoked. Most importantly, there is no basis for believing that the application of the exclusionary rule would have a significant deterrent effect on court employees who are responsible for informing law enforcement when a warrant has been dismissed.

[Note: Since the North Carolina Supreme Court strongly indicated in State v. Carter, 322 N.C. 709, 370 S.E.2d 553 (1988) that a good-faith exception to the exclusionary rule did not exist under the North Carolina Constitution, thereby not adopting the *Leon* and *Sheppard* rulings that were decided under the United States Constitution, it is unclear whether this ruling would apply in North Carolina state courts. For a post-*Carter* case, see State v. Garner, 331 N.C. 491, 417 S.E.2d 502 (1992).

Note carefully that the United States Supreme Court in this case did not decide (because the issue was not before it) whether or not the arrest was unreasonable under the Fourth Amendment. See, e.g., Hill v. California, 401 U.S. 797, 91 S.Ct. 1106, 28 L.Ed.2d 484 (1971); Maryland v. Garrison, 480 U.S. 79, 107 S.Ct. 1013, 94 L.Ed.2d 72 (1987); State v. Harvey, 281 N.C. 1, 187 S.E.2d 706 (1972).]

Officer's Unannounced Entry Into a Home Must Be Reasonable Under the Fourth Amendment

Wilson v. Arkansas, 115 S.Ct. 1914, 131 L.Ed.2d. 976, 57 Crim. L. Rep. 2122 (22 May 1995). Officers made an unannounced entry into a home to execute a search warrant. The Arkansas Supreme Court ruled that the Fourth Amendment does not require officers to knock and announce before entering a home. The Court, rejecting the state court's ruling, ruled that an officer's unannounced entry into a home must be reasonable under the Fourth Amendment. Whether an officer announced his or her presence and authority before entering a home is among the factors to be considered in determining whether the entry was

reasonable (along with the threat of physical harm to the officer, pursuit of a recently escaped arrestee, and the likely destruction of evidence if advance notice was given). The Court specifically stated that it will leave to lower courts the task of determining whether an unannounced entry was reasonable, and remanded this case to the Arkansas Supreme Court for that purpose.

[Note: G.S. 15A-249 sets standards in entering private premises to execute a search warrant and G.S. 15A-401(e) sets standards in entering private premises to arrest.]

Random Urinalysis Testing of Public School Students Participating in Interscholastic Athletics Was Reasonable Under Fourth Amendment, Based on the Facts in This Case, Even Though Testing Was Not Based on Reasonable Suspicion

Vernonia School District 47J v. Acton, 115 S.Ct. ___, ___ L.Ed.2d. ___, 57 Crim. L. Rep. 2200 (26 June 1995). The court ruled that random urinalysis testing of public school students participating in interscholastic athletics was reasonable under Fourth Amendment, based on the facts in this case, even though the testing was not based on reasonable suspicion.

Miscellaneous

Court Clarifies Step Two of *Batson v. Kentucky* Ruling

Purkett v. Elem, 115 S.Ct. 1769, 131 L.Ed.2d. 834, 57 Crim. L. Rep. 3044 (17 May 1995). The Court stated that under its ruling in Batson v. Kentucky, 476 U.S. 79 (1986), the three steps in assessing whether a party has improperly exercised a peremptory challenge for racial discriminatory reasons are as follows: step one—the party challenging the peremptory challenge must establish a prima facie case of racial discrimination; step two—the burden of production shifts to the proponent of the peremptory challenge to provide a race-neutral explanation for the exercise of the peremptory challenge; and step three—the party challenging the peremptory challenge must prove racial discrimination. In the trial of this case, the prosecutor (under step two) stated that he exercised the peremptory challenge against the prospective black juror because he had long, unkempt hair, a mustache, and a beard. The Court ruled that the prosecutor's proffered explanation in this case was race neutral and satisfied step two's burden of articulating a nondiscriminatory reason for the exercise of the peremptory. The Court rejected the ruling of the federal court of appeals in this case that required that the reason given under step two must be minimally persuasive. The Court stated that it is only in step three that the persuasiveness of the reason becomes relevant.

Double Jeopardy Was Not Violated By Using Uncharged Criminal Misconduct to Increase Sentence for Conviction of Another Crime and Then Prosecuting for That Uncharged Criminal Misconduct

Witte v. United States, 115 S.Ct. ___, ___ L.Ed.2d. ___, 57 Crim. L. Rep. 2160 (14 June 1995). In 1990 the defendant was involved in a cocaine offense (no charge was brought then). In 1991 the defendant was involved in a marijuana offense, for which he was charged and convicted. In calculating his sentence under the federal sentencing guidelines, the amount of drugs involved in the 1990 cocaine offense was considered and effectively increased his sentence. When the defendant was later charged with the 1990 cocaine offense, he moved to dismiss this charge on the ground that punishment for it would violate the multiple punishment prohibition of the double jeopardy clause. The Court ruled that the defendant's double jeopardy rights were not violated by the prosecution for the 1990 cocaine offense. First, the later prosecution did not violate the *Blockburger* test [Blockburger v. United States, 284 U.S. 299 (1932)] because each offense required proof of an element that the other did not. Second, relying on its ruling in Williams v. Oklahoma, 358 U.S. 576 (1959) (defendant pled guilty to murder and later was convicted of kidnapping arising out of same incident; no double jeopardy violation when trial judge considered, in imposing sentence for kidnapping, that the kidnapping victim was murdered), the Court rejected the defendant's argument that double jeopardy barred a later prosecution and punishment for criminal activity that already had been considered in sentencing for a separate crime. The Court also noted its rulings upholding recidivist statutes against double

jeopardy challenges [see, e.g., Gryger v. Burke, 334 U.S. 728 (1948)]; under such a statute, a defendant is punished for the offense of conviction, which is rendered more severe because of the defendant's prior criminal convictions. The Court ruled that when a legislature has authorized a particular punishment range for an offense, the resulting sentence within that range constitutes punishment only for the offense of conviction under double jeopardy principles.

Defendant May Waive Federal Rules' Provisions Making Inadmissible Statements By Defendant During Plea Discussions

United States v. Mezzanatto, 115 S.Ct. 797, 130 L.Ed.2d. 697, 56 Crim. L. Rep. 2114 (18 January 1995). The defendant was convicted of federal drug charges after being cross-examined, over his counsel's objections, about inconsistent statements that he had made during earlier plea discussions with the government. Before the defendant had entered plea discussions with the prosecutor (his attorney was present), the defendant had agreed that any statements he made could be used to impeach any contradictory testimony he might give at a later trial. The Court ruled that the defendant may properly waive the provisions of Rule 410 of the Federal Rules of Evidence and Rule 11(e)(6) of the Federal Rules of Criminal Procedure, which exclude statements made during plea discussions from admission into evidence against a criminal defendant.

[Note: North Carolina's Rule 410 and G.S. 15A-1025 are similar to the federal rules involved in this ruling. However, North Carolina appellate courts are not bound to interpret North Carolina's rule and statute the same way.]

Change in Frequency of Parole Hearings Did Not Violate Ex Post Facto, Based on Facts in This Case

California Dept. of Corrections v. Morales, 115 S.Ct. 1597, 130 L.Ed.2d. 624, 57 Crim. L. Rep. 2022 (25 April 1995). A change in the frequency of parole hearings did not violate the Ex Post Facto Clause, based on the facts in this case.

North Carolina Supreme Court

Criminal Offenses

Habitual Felon Indictment Need Not Allege Predicate Felony Being Tried

State v. Cheek, 339 N.C. 725, 453 S.E.2d 862 (3 March 1995), *reversing,* 113 N.C. App. 203, 438 S.E.2d 759 (1993). Overruling State v. Moore, 102 N.C. App. 434, 402 S.E.2d 435 (1991) and State v. Hawkins, 110 N.C. App. 837, 431 S.E.2d 503 (1993), the court ruled that an habitual felon indictment need not allege the predicate felony or felonies being tried. [Note: the supreme court previously had ruled in State v. Todd, 313 N.C. 110, 326 S.E.2d 249 (1985) that the indictment for the predicate felony being tried need not refer to the habitual felon indictment.]

Person May Properly Be Convicted of First-Degree Murder As Accessory Before the Fact Even Though the Actual Killer Had Pled Guilty to Second-Degree Murder

State v. Larrimore, 340 N.C. 119, 456 S.E.2d 789 (5 May 1995). The defendant, as an accessory before the fact to first-degree murder, was properly tried for first-degree murder even though the person who actually killed the victim had pled guilty to second-degree murder.

Evidence Was Sufficient to Support Conviction of Kidnapping for the Purpose of Terrorizing Victim

State v. Davis, 340 N.C. 1, 455 S.E.2d 627 (7 April 1995). After shooting victim A during an attempted robbery, the defendant pointed his gun at victim B, ordered her down on the floor, and threatened to kill her. Victim B fell to the floor and began crawling toward the back room of the pawn shop. She testified that the defendant's voice sounded as if it was right behind her, and he kept repeating the words, "Crawl back there." The defendant argued on appeal that his

motive for taking victim B into the back room was not to terrorize her. Instead, his words and conduct toward victim B were simply part of the chain of events surrounding the fatal shooting of victim A and were therefore insufficient to support the kidnapping conviction. The court rejected this argument and ruled that this evidence was sufficient to support kidnapping for the purpose of terrorizing victim B.

Defendant Was Not Entitled To Instruction on Defense of Accident in Murder Case

State v. Riddick, 340 N.C. ___, 457 S.E.2d 728 (2 June 1995). The defendant was convicted of first-degree murder. The court noted that the undisputed evidence showed that the defendant sought out the victim, intentionally confronted the victim with a loaded firearm, assaulted the victim, and a gun was in the defendant's hand when two bullets, one of which entered the victim's body, were fired from it. The defendant testified that he fired one shot into the air to scare the victim, the gun went off a second time accidentally when he was startled by a loud noise, and he only wanted to scare the victim and did not intend to hurt the victim. The court ruled, citing State v. Lytton, 319 N.C. 422, 355 S.E.2d 485 (1987), that the defendant was not entitled to an instruction of the defense of accident, because the *uncontroverted* evidence was that the defendant was engaged in unlawful conduct and acted with a wrongful purpose when the killing occurred.

Jury Instruction on Premeditation and Deliberation Was Not Error

State v. Leach, 340 N.C. 236, 456 S.E.2d 785 (5 May 1995). The trial judge instructed the jury on premeditation and deliberation using N.C.P.I.—Crim. 206.10, which lists circumstances from which the jury may infer premeditation and deliberation. The defendant argued that the instruction was error because two of the circumstances mentioned in the instruction were not supported by the evidence. The court ruled that the instruction was not error, even if evidence did not support each of the circumstances mentioned in the instruction. The court noted that the instruction tells jurors that they "may" find premeditation and deliberation from certain circumstances, "such as" the circumstances mentioned. More importantly, the instruction does not indicate that the trial judge believes that evidence exists that would support each or any of these circumstances. The court disapproved of State v. Buchanan, 287 N.C. 408, 215 S.E.2d 80 (1975) (evidence did not support two circumstances mentioned in instruction on premeditation and deliberation; new trial ordered), to the extent it may be construed to be inconsistent with the ruling in this case.

(1) Aiding and Abetting Instruction Using "Should Have Known" and "Reasonable Grounds to Believe" Was Error
(2) Using Disjunctive in Jury Instruction for Two Theories of Committing an Offense—Aiding and Abetting "or" Principal—Was Not Error

State v. Allen, 339 N.C. 545, 453 S.E.2d 151 (10 February 1995). (1) The trial judge erred when he instructed the jury that the defendant would be guilty of aiding and abetting if, in addition to other elements, the jury found that when the defendant handed his accomplice the gun "he knew or had reasonable grounds to know that his intention was to kill" the murder victim. Elsewhere in the instruction, the judge used the words "he knew or he should have known" that his accomplice intended to kill the murder victim. The court ruled that the judge's use of the phrases "should have known" and "reasonable grounds to believe" was erroneous, citing State v. Rogers, 316 N.C. 203, 341 S.E.2d 713 (1986) and State v. Blankenship, 337 N.C. 543, 447 S.E.2d 727 (1994). (2) The trial judge's instruction permitted the jury to find the defendant guilty either on the theory of the defendant as the principal or the theory of the defendant aiding and abetting the accomplice, who acted as the principal. Relying on State v. Hartness, 326 N.C. 561, 391 S.E.2d 177 (1990) and State v. Creason, 313 N.C. 122, 326 S.E.2d 24 (1985), the court ruled that the instruction was not fatally ambiguous. It allowed the jury to find the defendant guilty based on either of two underlying facts (theories), both of which separately support a theory of guilt for only one offense. It was distinguishable from an instruction that would allow the jury to find a defendant guilty of two underlying acts, either of which is in itself a separate offense; see State v. Lyons, 330 N.C. 298, 412 S.E.2d 308 (1991).

Arrest, Search, and Confession Issues

Mentally-Retarded Defendant Knowingly and Intelligently Waived *Miranda* Rights

State v. Brown, 339 N.C. 606, 453 S.E.2d 165 (10 February 1995). The court affirmed *per curiam* and without an opinion, the opinion of the North Carolina Court of Appeals, 112 N.C. App. 390, 436 S.E.2d 163 (1993), that a mentally retarded fifteen-year-old defendant knowingly and intelligently waived his *Miranda* and juvenile rights. The court of appeals opinion relied on the ruling in State v. Fincher, 309 N.C. 1, 305 S.E.2d 665 (1983).

Officers Had Reasonable Suspicion to Make Investigative Stop of Defendant to Investigate Murder

State v. Lovin, 339 N.C. 695, 454 S.E.2d 229 (3 March 1995). The murder victim's body was discovered in the afternoon and his Porsche was reported missing. At 4:00 P.M. a person saw a Porsche that matched the description of the victim's car, and it was being driven by a male with a lot of hair, a gold watch, and large frame glasses. She followed it until it turned toward the airport. She reported this information to a law enforcement agency. Officers went to the airport and found the hood of the Porsche was still warm. A ticket agent reported that the defendant was acting suspiciously at the ticket counter. She described him as having long brown hair and wearing a gold watch. The court ruled this and other information in the officers' possession provided reasonable suspicion to make an investigative stop of the defendant to investigate the murder.

Evidence

Non-Confidential Out-of-Court Statement By Spouse May Be Used Against Defendant Spouse

State v. Rush, 340 N.C. 174, 456 S.E.2d 819 (5 May 1995). The state was permitted to offer, through a 911 dispatcher, out-of-court statements made by the defendant's spouse to the 911 dispatcher on the night of the murder. (The defendant's spouse had refused to testify for the state at trial.) The court noted that G.S. 8-57(b) (spouse of defendant is competent but not compellable to testify for the state against the defendant) is solely directed to compelled testimony and thus does not address the issue before it. G.S. 8-57(c) also was not in issue because the defendant conceded that the statements were not confidential communications. The court ruled that non-confidential out-of-court statements made by a defendant's spouse to a third party are admissible against the defendant; the admissibility of these statements promotes the administration of justice without infringing on the confidence of the marital relationship. The effect of the court's ruling is to overrule contrary rulings in State v. Dillahunt, 244 N.C. 524, 94 S.E.2d 479 (1956) and State v. Warren, 236 N.C. 358, 72 S.E.2d 763 (1952). Of course, the statements must be relevant and must be offered for a nonhearsay purpose or under an exception to the hearsay rule.

Witness Was Unavailable Under Rule 804(b)(5) So Hearsay Statement Was Admissible

State v. Bowie, 340 N.C. 199, 456 S.E.2d 771 (5 May 1995). The trial judge properly found that the witness, who had moved to Philadelphia, was unavailable so as to allow hearsay evidence to be admitted under Rule 804(b)(5), based on the following evidence. Several weeks before trial, a superior court judge issued an order under G.S. 15A-813 with a recommendation that the witness be taken into custody and delivered to a North Carolina officer to assure her attendance at trial. As a result of this recommendation, rather than attempting to serve the witness well in advance of trial, law enforcement officers went to Philadelphia a few days before the beginning of trial. They went to the address of the witness, but her mother told the officers that she had moved and she did not know her new address or telephone number. The officers searched the house but did not find her.

Mental Health Expert May Testify About Hearsay Information on Which Expert Formed Her Opinion

State v. Davis, 340 N.C. 1, 455 S.E.2d 627 (7 April 1995). Ms. King was part of a medical group that evaluated the defendant's mental health status and

Dr. Sultan, the defendant's mental health expert, relied on Ms. King's information in formulating her final diagnosis. During the defendant's direct examination of Dr. Sultan, the trial judge did not permit her to testify about an episode in jail involving the defendant about which Ms. King told Dr. Sultan. The court ruled that the trial judge erred, since an expert may give an opinion based on facts not otherwise admissible in evidence, if that information is reasonably relied on by an expert in forming an opinion (which occurred in this case involving this episode); see Rule 703.

Cross-Examination of Psychologist About Article Was Improper

State v. Lovin, 339 N.C. 695, 454 S.E.2d 229 (3 March 1995). The state cross-examined the defense psychologist about an article (which denigrated psychologists as not making more accurate clinical judgments than lay people). The state did not establish the article as a learned treatise, and thus it was not admissible as substantive evidence under Rule 803(18). The court also ruled that the article was not admissible to impeach the psychologist, who had not read it, and the state had not proved the article's validity.

State's Introduction of Defendant's Statement Did Not Permit Defendant to Introduce Another Defendant's Statement Made Later that Day

State v. Lovin, 339 N.C. 695, 454 S.E.2d 229 (3 March 1995). The state's witness testified about her telephone conversation with the defendant. The defendant on cross-examination was not permitted to elicit from the state's witness a telephone conversation with the defendant later that day. The court cited State v. Weeks, 322 N.C. 152, 367 S.E.2d 895 (1988) (state introduced defendant's inculpatory oral statements, reduced to writing, that were made to officers in the morning; trial judge properly did not allow the defendant to introduce, during the state's case, a written statement made by the defendant later in the afternoon of the same day).

Defendant's Statement Within Another Person's Statement Was Admissible

State v. Larrimore, 340 N.C. 119, 456 S.E.2d 789 (5 May 1995). A defense witness (McPherson) testified at trial that a window of a truck that the defendant had borrowed had not been broken. On rebuttal, a detective testified that McPherson had previously told him that when he called the defendant to ask the defendant to return the truck, the defendant advised McPherson that the window had been broken out and the truck was being repaired. The court ruled that the detective's testimony was admissible. McPherson's statement was admissible as a prior inconsistent statement, and the defendant's statement within McPherson's statement was admissible as an admission, Rule 801(d). The court cited State v. Connley, 295 N.C. 327, 245 S.E.2d 663 (1978).

Evidence of Defendant's Involvement in Soliciting Murder of Husband Nineteen Years After Murder Being Tried Was Admissible Under Rule 404(b), Based on Facts in This Case

State v. White, 340 N.C. ___, ___ S.E.2d ___ (2 June 1995). The defendant was being tried for the murder of her four-year-old stepson that occurred in 1973. The defendant's defense was that the child accidentally choked to death by swallowing a plastic bag. The state offered evidence that beginning in 1991 and through the next ten months the defendant solicited a person (Taylor) to kill her husband. When Taylor told the defendant that he could not kill someone, the defendant encouraged him to commit the murder by telling him, "[I]t's not that hard to do. I had a stepchild. I put a bag over it until it stopped breathing. It was better off." The court ruled that the evidence of the solicitation to murder her husband was properly admitted under Rule 404(b) to explain the context of the defendant's admission that she killed her stepson and to refute the defense of accident.

Capital Case Issues

Judge Erred in Failing to Give Special Instruction on Accessory Theory Under G.S. 14-5.2

State v. Larrimore, 340 N.C. 119, 456 S.E.2d 789 (5 May 1995). The defendant was being tried for first-degree murder based on the accessory-before-

the-fact principle. One of the state's witnesses was the person the defendant hired to kill the victim. The court ruled that the trial judge erred in failing to instruct the jury on the special question whether the jury based its first-degree murder verdict solely on the uncorroborated testimony of the killer (see G.S. 14-5.2). In this case, the error was harmless because the defendant received a life sentence, and in this case a life sentence for a Class A felony was the same as for a Class B felony (i.e., parole eligibility after serving twenty years). But note that, for offenses committed on or after October 1, 1994, there are significant differences—life imprisonment for a Class A felony is without parole and the punishment for a Class B2 felony in revised G.S. 14-5.2 is not mandatory life imprisonment.

Miscellaneous

Judge Properly Denied Defendant's Motion for *Ex Parte* Hearing on Motion for Funds to Hire Investigator

State v. White, 340 N.C. ___, ___ S.E.2d ___ (2 June 1995). Relying on State v. Phipps, 331 N.C. 427, 418 S.E.2d 178 (1992) (no error to deny *ex parte* hearing on motion for fingerprint expert) and distinguishing State v. Ballard, 333 N.C. 515, 428 S.E.2d 178 (1993) and State v. Bates, 333 N.C. 523, 428 S.E.2d 693 (1993) (error to deny *ex parte* hearing on motion for mental health expert), the court ruled that the defendant was not entitled as a matter of right to an *ex parte* hearing on her motion for funds to hire an investigator and the judge did not abuse his discretion in denying that motion for an *ex parte* hearing.

Court Urges Judges and Attorneys to Make Full Record of Issue of Defendant's Consent If There Is a *Harbison* Jury Argument

State v. House, 340 N.C. 187, 456 S.E.2d 292 (5 May 1995). The defendant argued on appeal that his constitutional rights were violated, based on the ruling in State v. Harbison, 315 N.C. 175, 337 S.E.2d 504 (1985), by his lawyer's concession to the jury in closing argument (in a first-degree murder prosecution) that the defendant was guilty of second-degree murder or involuntary manslaughter. However, the record on appeal was silent about whether the defendant consented to his lawyer's concession. The court ruled that it will not presume from a silent record that there was no consent. However, the court noted that the defendant could litigate this issue by filing a motion for appropriate relief based on ineffective assistance of counsel. The court reminded judges and attorneys of the need to make a full record when a *Harbison* issue arises at trial.

Trial Judge Did Not Err in Declining to Question Juror During Trial About Juror's Alleged Relationship With Accomplice, a State's Witness, Based on Facts in This Case

State v. Conaway, 339 N.C. 487, 453 S.E.2d 824 (10 February 1995). The jury returned first-degree murder verdicts on 15 October 1992. On 19 October 1992, at the beginning of the death penalty sentencing hearing, the defendant's counsel advised the trial judge that on 10 October 1992, his secretary had received an anonymous phone call at the office in which the caller indicated that a juror was a cousin of an accomplice who testified for the state in the trial. The defense counsel requested that the trial judge question the juror about his relationship, if any, to the accomplice and implied that the juror might not have been entirely honest in his responses during jury voir dire. The court ruled that given the defendant's critical delay in bringing this alleged phone call to the trial judge's attention and the lack of evidence to substantiate the call, the trial judge did not abuse his discretion in denying the defendant's motion to question the juror.

Cofield Motion Must Be Timely Made Under G.S. 15A-952(c)

State v. Miller, 339 N.C. 663, 455 S.E.2d 137 (3 March 1995). A defendant's *Cofield* motion (alleging racial discrimination in selecting grand jury foreperson) is considered a motion under G.S. 15A-955(1) and therefore must be timely made under G.S. 15A-952(c) (*e.g.*, at arraignment if arraignment was held before court session for which trial was calendared).

North Carolina Court Of Appeals

Arrest, Search, and Confession Issues

Defendant Did Not Have Fourth Amendment Privacy Interest in Challenging Accomplice's Consent Search of Accomplice's Bag and Accomplice's Testimony Against Defendant, Although Search of Bag Occurred After Cab (In Which Defendant and Accomplice Were Passengers) Was Unconstitutionally Stopped

State v. Smith, 117 N.C. App. 671, 452 S.E.2d 827 (7 February 1995) (Note: there was a dissenting opinion in this case, but the defendant declined to seek further review.) Officers stopped a cab in which the defendant and Campbell were passengers. The defendant consented to a search of his luggage and Campbell consented to the search of his luggage, in both of which cocaine was found. The defendant was charged with a trafficking offense. A judge granted the defendant's motion to suppress evidence seized from defendant's luggage because the stop of the cab was unconstitutional. The defendant then was charged with a drug trafficking conspiracy offense. The defendant then moved to suppress the cocaine found in Campbell's luggage and to suppress the testimony of Campbell. The court ruled that a judge (who was a different judge than the judge who had ruled on the first motion) properly denied that motion because the defendant did not have a reasonable expectation of privacy in Campbell's luggage and did not have standing to object to the potential testimony of Campbell, even if it was the fruit of the illegal stop of the cab.

Defendant Failed to Show State Action in Obtaining Telephone Records; Thus, a Fourth Amendment Issue Was Not Presented

State v. Suggs, 117 N.C. App. 654, 453 S.E.2d 211 (7 February 1995). Defendant failed to present evidence in the record about how the state obtained the telephone records it offered at trial. The court rejected the defendant's argument that state action was shown because the state called the telephone company's custodian to testify and to produce the records at trial. Absent any other additional evidence in the record, a Fourth Amendment issue was not presented because there was insufficient evidence of state action. [For a discussion of how to obtain telephone records, see Farb, *Arrest, Search, and Investigation in North Carolina*, page 86 (2d ed. 1992).]

(1) Probable Cause and Exigent Circumstances Existed to Make Warrantless Search Of Defendant for Drugs
(2) Officers' Search of Defendant's Pants in Public Place Was Unreasonable Under the Fourth Amendment, Based on the Facts in This Case

State v. Smith, 118 N.C. App. 106, 454 S.E.2d 680 (7 March 1995). **(There was a dissenting opinion on issue (2), so the Supreme Court may review that issue.)** (1) An officer knew the defendant for two to three years and had information that he was operating a drug house and selling drugs in a certain area of Fayetteville. The officer received a phone call at 12:15 A.M. on 12 May 1992 from a reliable informant, who told the officer that the defendant would be driving a red Ford Escort with a specific license plate and was going to an unknown location to purchase cocaine. The defendant then would go to a particular apartment on Johnson Street, where he was to package the cocaine, and then would go to a house on Buffalo Street where he would sell the cocaine. The informant said that the defendant would have the cocaine concealed in or under his crotch when he left the Johnson Street apartment. The officer and other officers took the informant to Johnson Street, where the informant pointed out the apartment and Ford Escort. At approximately 1:15 A.M. on 12 May 1992, the defendant left the apartment in the Ford Escort. The officers stopped the defendant's car in the middle of Johnson Street where it intersected with Bragg Boulevard. The court ruled, based on these facts, that the officers had probable cause to make a warrantless search of the defendant, including his crotch area. (2) After stopping the defendant's vehicle, the officer informed the defendant that he was going to search him completely by using his flashlight and hands. He asked the defendant to step behind the car door of the defendant's vehicle, which was open, and the officer stood between him and the car door on the outside. After the defendant opened his trousers, the officer

could not see underneath the defendant's scrotum and testicles and therefore asked the defendant to pull down his underwear. Because the defendant resisted, the officer slid the defendant's underwear down and pointed his flashlight there. He saw the corner of a small paper towel underneath the defendant's scrotum. He pulled the underwear further. The defendant resisted. The officer pushed the defendant into the door, reached underneath the defendant's scrotum, and removed the paper towel which contained cocaine. The court noted that this search was conducted in the middle of an intersection of two main thoroughfares at 1:30 A.M. The state's evidence did not show whether the defendant was protected from the view of passing drivers, how well lighted the area was, or whether there were passing cars then. The search of the defendant was "akin to a strip search in a public place," was not limited in scope, and was not required by unusual circumstances, since the defendant could not have disposed of the drugs before being placed in a patrol car or taken to a law enforcement station. The court ruled that "[u]nder these circumstances, the search of defendant was intolerable in its intensity and scope and therefore unreasonable under the Fourth Amendment."

(1) Defendant Consented to Search During Bus Boarding
(2) Defendant Was Not Seized During Bus Boarding

State v. James, 118 N.C. App. 221, 454 S.E.2d 858 (21 March 1995). An officer saw the defendant nervously pacing about until reboarding a bus. The defendant moved toward the rear of the bus and picked up a duffel-type bag from a seat and put it in the overhead luggage bin. Officers went through the typical bus boarding procedures used to find illegal drugs. The defendant agreed to allow an officer to look in his bag. The officer removed a portable radio from the bag and noticed that screws on the radio had been unscrewed several times. The officer asked the defendant if he would get off the bus so they could talk privately. The defendant did not respond verbally but left the bus with the officer. They went to a private area of the bus terminal, where the officer again obtained a consent to search. The officer discovered cocaine in the radio. (1) Relying on State v. McDowell, 329 N.C. 363, 407 S.E.2d 200 (1991) and other cases, the court reviewed the facts of the bus boarding and ruled that the defendant's consent to search was voluntarily given, although he had an IQ of 70. (2) Relying on State v. Christie, 96 N.C. App. 178, 385 S.E.2d 181 (1989) and State v. Bromfield, 332 N.C. 24, 418 S.E.2d 491 (1992), the court ruled that the defendant was not seized when he was on the bus or when he left the bus with the officers.

(1) Defendant Was Not Seized Before He Dropped Drugs in Officer's View
(2) Officer Had Reasonable Suspicion to Detain and Then Probable Cause to Arrest Defendant
(3) Officer's Order to Defendant to Spit Items From Mouth Was Valid as Search Incident to Arrest

State v. Taylor, 117 N.C. App. 644, 453 S.E.2d 225 (7 February 1995). Officer A knew that the defendant had been arrested for drugs previously and had a reputation in the community as a drug dealer. Officer A and other officers saw the defendant with others in an area known for drug trafficking. As officers approached in their marked car, the defendant left the area. The officers saw him at a nearby intersection. The defendant stopped as the police car approached him. As officer A got out of the car, the defendant walked toward him and dropped something on the ground. The officer approached the defendant and brought him over to the police car. He determined that the item dropped was marijuana and arrested the defendant. He then noticed that the defendant was talking "funny" and ordered him to spit out whatever was in mouth. The defendant spit out individually-wrapped pieces of crack cocaine. The court ruled: (1) the defendant was not seized until after he dropped the item to the ground, since he had not yielded to a show of authority before then; see California v. Hodari D., 499 U.S. 621 (1991); (2) after the defendant dropped the item, officer A had reasonable suspicion to detain the defendant, considering everything the officer knew; (3) officer A had probable cause to arrest the defendant when he determined the item was marijuana; and (4) even if the defendant did not voluntarily spit out the cocaine, it was admissible as a search incident to arrest.

(1) Officers Had Reasonable Suspicion to Stop Defendant for Possession of Drugs
(2) Officer's Application of Pressure to Defendant's Throat to Prevent Him from Swallowing Drugs Was Reasonable

State v. Watson, ___ N.C. App. ___, ___ S.E.2d ___ (5 July 1995). Three officers approached a convenience store at night. Officer A had made fifty or more arrests for possessing cocaine in this area. Officer A knew the defendant had previously been arrested for drug charges. The defendant, on seeing the officers, put items in his mouth and started to go back into the store. Officer A grabbed the defendant's jacket, and the defendant then attempted to drink a soft drink. The officer took the drink away, ordered the defendant to spit out the objects in his mouth, and applied pressure to the defendant's throat so he would spit out the items. The defendant did spit out three baggies containing crack cocaine. (1) Based on this and other evidence (for example, officers testified at the suppression hearing that drug dealers will attempt to conceal or to swallow drugs when they see officers), the court ruled that the officers had reasonable suspicion to stop the defendant; the court cited State v. Butler, 331 N.C. 227, 415 S.E.2d 719 (1992). (2) The court also ruled that exigent circumstances supported the reasonableness of the officer's actions in applying pressure to the defendant's throat so he would not swallow the drugs he had placed in his mouth (considering the officers' training and experience, their familiarity with the area, the defendant, and the practice of drug dealers to hide drugs in their mouth to elude detection).

(1) Officer's Question to Defendant After He Asserted His Right to Counsel Violated *Edwards v. Arizona*

(2) Admission of Illegally-Obtained Confession at Trial Did Not Improperly Induce Defendant to Testify

State v. Easterling, ___ N.C. App. ___, ___ S.E.2d ___ (6 June 1995). The defendant was tried and convicted of multiple counts of rape and sexual offense that he committed with his accomplice, Sherman White. (1) After a detective gave the defendant his *Miranda* warnings, the defendant asserted his right to counsel. The detective later informed the defendant that he would be taken to the magistrate's office to be served with arrest warrants. The detective then said, "Who was Sherman?" The defendant said "White." Just a few moments later the defendant indicated that he wanted to talk about the case. The detective then gave him *Miranda* warnings, obtained a waiver, and the defendant gave an incriminating statement that was introduced in the state's case-in-chief at trial. The court ruled that the detective's question constituted interrogation because it was designed to elicit an incriminating response, and therefore was improper under *Edwards v. Arizona*, 384 U.S. 436 (1981) because it was made after the defendant's assertion of his right to counsel. In addition, the defendant's statement a few moments later that he was willing to talk about the case was a continuation of the improper interrogation (that is, it was not simply the defendant's initiation of communication with the detective). Thus, the trial judge erred in admitting the defendant's confession. (2) The court ruled that, based on the state's overwhelming evidence against the defendant in this case, the defendant was not induced to testify in his behalf because of the introduction in the state's case-in-chief of this illegally-obtained confession; see generally Harrison v. United States, 392 U.S. 219 (1968). The court also ruled that the introduction of the confession was harmless error beyond a reasonable doubt.

Defendant Was Not in Custody to Require *Miranda* Warnings During Interview or Polygraph Test, Based on Facts in This Case

State v. Soles, ___ N.C. App. ___, ___ S.E.2d ___ (5 July 1995). Officers took the defendant, with his consent, to Gastonia for questioning. The defendant was not handcuffed during a four-hour interview, was left alone, and was allowed to use the vending machines. The defendant conceded that he was free to leave and voluntarily gave a statement to the officers. The court ruled that the defendant was not in custody to require *Miranda* warnings. At a second interview, a polygraph examiner confronted the defendant about patterns of deception and questioned him in addition to the polygraph testing. The operator had given *Miranda* warnings to the defendant and obtained a waiver before the testing. In any event, the court ruled that the defendant was not in custody to require *Miranda* warnings, since the defendant had voluntarily come to the police station for the polygraph and was free to leave at any time. The court also ruled, based on the facts in this case, the defendant's statement was voluntarily given.

Criminal Offenses

There Must Be a Separate Habitual Felon Indictment for Each Substantive Felony Indictment

State v. Patton, ___ N.C. App. ___, ___ S.E.2d ___ (6 June 1995). The court ruled that the habitual felon statute requires a one-to-one correspondence between the substantive felony indictment and the habitual felon indictment. Thus, the trial judge erred in this case in sentencing a defendant as an habitual felon for convictions based on five forgery and uttering indictments when there was only one habitual felon indictment.

(1) Indictment Sufficiently Charged Felony Habitual Impaired Driving
(2) Habitual Impaired Driving Under G.S. 20-138.5 Is a Felony Offense for Which the Superior Court Has Original Jurisdiction
(3) Felony Habitual Impaired Driving Conviction May Be Used to Establish Habitual Felon Status

State v. Baldwin, 117 N.C. App. 713, 453 S.E.2d 193 (7 February 1995). The defendant was indicted for felony habitual impaired driving and as an habitual felon. The court ruled that: (1) the felony habitual impaired driving indictment was sufficient when it alleged that the defendant had been convicted of impaired driving on 13 November 1989 and twice on 12 December 1989; (2) habitual impaired driving under G.S. 20-138.5 is a felony offense for which the superior court has original jurisdiction [see similar ruling in State v. Priddy, 115 N.C. App. 547, 445 S.E.2d 610 (1994)] and (3) a prior felony habitual impaired driving conviction is a substantive felony conviction that may constitute a felony conviction to establish habitual felon status.

(1) Failure to Properly Arraign Habitual Impaired Driving Defendant under G.S. 15A-928(c) Was Not Reversible Error
(2) Defense Counsel's Stipulation to Defendant's Prior Convictions Was Proper

State v. Jernigan, 118 N.C. App. 240, 455 S.E.2d 163 (21 March 1995). The defendant was charged with habitual impaired driving. (1) The trial judge did not formally arraign the defendant concerning the prior convictions and did not advise the defendant that he could admit the prior convictions, deny them, or remain silent, as required by G.S. 15A-928(c). However, since the defendant stipulated to the convictions before trial and the case was submitted to the jury without reference to these convictions, the trial judge did not commit reversible error. The defendant, on appeal, did not contend that he was unaware of the charges against him, that he did not understand his rights, or that he did not understand the effect of the stipulation. (2) The court, relying on State v. Watson, 303 N.C. 533, 279 S.E.2d 580 (1981), rejected the defendant's argument that his attorney's stipulation was ineffective because the defendant was not advised of his rights by the trial judge concerning the stipulation; the judge was not required to do so. And the defendant did not contend that his attorney was acting contrary to his wishes.

Evidence in Habitual Felon Hearing Was Insufficient to Prove that Prior Conviction Was a Felony

State v. Lindsey, 118 N.C. App. 549, 455 S.E.2d 909 (18 April 1995). The court ruled that the following evidence in an habitual felon hearing was insufficient to prove that a prior New Jersey conviction was a felony. The defendant pled guilty to an indictment alleging that the defendant unlawfully received or possessed goods worth more than $200 and less than $500 that had been feloniously stolen, the defendant knowing the goods to have been feloniously stolen. The court noted that the indictment did not charge the defendant with felonious possession of stolen property. The judgment did not recite that the defendant pled guilty to a felony or was sentenced as a felon. There was no official certification that the offense was a felony in New Jersey in 1975.

Conspiracy Conviction of Defendant Was Upheld Even Though Only Other Conspirator Was Acquitted At Later Separate Trial

State v. Soles, ___ N.C. App. ___, ___ S.E.2d ___ (5 July 1995). The defendant was convicted of conspiracy to commit murder. At a later separate

trial, the other conspirator (there were no others) was acquitted of that conspiracy charge. The court, distinguishing State v. Raper, 204 N.C. 503, 168 S.E.2d 831 (1933) (defendant's conspiracy conviction must be set aside when all co-conspirators had been acquitted at same trial or prior trial), ruled that the defendant's conviction remained valid, because the acquittal of the co-conspirator occurred at a later separate trial.

Insufficient Evidence of Solicitation to Commit Felonious Assault with Deadly Weapon When There Was No Evidence How Injury Was to Be Inflicted

State v. Suggs, 117 N.C. App. 713, 453 S.E.2d 211 (7 February 1995). The defendant solicited Bateman to "break [the victim's] face" or break the victim's legs or arms for $2,500. The court ruled that this was insufficient evidence for a conviction of solicitation to commit assault with a deadly weapon inflicting serious injury, when there was no evidence how Bateman was to inflict the injuries on the victim. The mere fact that the defendant asked Bateman to inflict serious injury on the victim does not necessarily imply the use of a deadly weapon.

Defendant's Shooting of Victim Was Proximate Cause of Death, Even Though Victim Later Chose Surgery Against Medical Advice

State v. Gilreath, 118 N.C. App. 200, 454 S.E.2d 871 (21 March 1995). The defendant shot the victim in the chest on 4 July 1990. The victim had several operations and remained in the hospital over one year. Against medical advice, the victim in August 1992 underwent colostomy removal surgery because he stated that he would rather be dead than to endure his physical condition. He died shortly after the surgery. A pathologist testified that the victim died of complications from the bullet wound to his chest. The court rejected the defendant's argument that the cause of death was the victim's decision to undergo surgery against medical advice. The bullet wound caused or directly contributed to the victim's death.

Jury Instruction on "Willful" Element Was Error

State v. Whittle, 118 N.C. App. 130, 454 S.E.2d 688 (7 March 1995) **(Note: there was a dissenting opinion on this issue, so the Supreme Court will likely review this case.)** The court ruled that the following jury instruction on "willful" was error because it was incomplete: "willful means intentionally. An act is done willfully when it is done intentionally." The instruction should also have stated that to be willful, the act or inaction must also be "purposely and designedly in violation of law." *Cf.* Ratzlaf v. United States, 510 U.S. ___, 114 S.Ct. 655, 126 L.Ed.2d 615 (1994) (when willful violation of federal statute required for conviction, government must prove defendant acted with knowledge of illegality of conduct).

Grand Jury Presentment for Misdemeanor That Was Returned Within Two Years of Act Constituting Misdemeanor Was Not Barred by Statute of Limitations

State v. Whittle, 118 N.C. App. 130, 454 S.E.2d 688 (7 March 1995). The grand jury returned a presentment for two misdemeanors within two years of the acts constituting the misdemeanors, but the grand jury returned indictments for these misdemeanors after two years of the acts constituting the misdemeanors. The court ruled that the prosecution for these misdemeanors was not barred by the statute of limitations, G.S. 15-1.

Defendant's Convictions for Trafficking by Possessing Cocaine and Failure to Pay Drug Tax on Cocaine Did Not Violate Double Jeopardy

State v. Morgan, 118 N.C. App. 461, 455 S.E.2d 490 (4 April 1995). The court ruled that the defendant's convictions for trafficking by possessing cocaine and failure to pay excise taxes on the same cocaine (G.S. 105-113.110) did not violate the double jeopardy clause. Each offense required proof of different elements; neither was a lesser-included offense of the other.

DWI Arrestee's Refusal to Follow Officer's Instructions in Taking Intoxilyzer Was a Willful Refusal, Based on the Facts in This Case

Tedder v. Hodges, ___ N.C. App. ___, ___ S.E.2d ___ (6 June 1995). The court ruled that the following evidence of the DWI arrestee's failure to follow the

Intoxilyzer operator's instructions was sufficient in this case to support a finding of a willful refusal to submit to a chemical analysis. After the officer requested the arrestee to take the test, the arrestee put his fingers in his mouth and the officer had to restart the observation period. The officer told the arrestee that if he did it again he would be written up as a refusal. During the testing period, the arrestee blew into the instrument five or six times, but he would stop blowing each time the tone would start. The officer had previously told the arrestee that he would have to blow hard enough to start the tone and to blow until the officer told him to stop. In addition, the arrestee kept leaning over and putting his fingers in his mouth.

Officer Violated Defendant's Right to Have Witness at Breathalyzer Test When He Told Defendant, After He Requested His Wife To Be at Test, That It Might Not Be a Good Idea

State v. Myers, 118 N.C. App. 452, 455 S.E.2d 492 (4 April 1995). At DWI trial, the defendant made a motion to suppress Breathalyzer results because he was denied his right to have a witness of his choice present when the test was administered. The evidence showed that the defendant told the arresting officer that he wanted his wife to come into the Breathalyzer room with him, and the officer said that might not be a good idea because she had been drinking also. The wife left to check on her children. Later during the reading of the right to have a witness present, the defendant said the only person he wanted was his wife, but she was gone. The court ruled, based on these facts, that the defendant's right to have a witness present during the test was violated and the Breathalyzer results must be suppressed. The court stated that the officer's remark was tantamount to a refusal of the defendant's request to have his wife present, and it also noted that there was no evidence that the wife would have disrupted the testing procedures.

Parking Lot of Private Club Was Not a Public Vehicular Area as a Matter of Law, Based on These Facts; Issue Should Have Been Submitted to Jury

State v. Snyder, 118 N.C. App. 540, 455 S.E.2d 914 (18 April 1995). A nightclub parking lot was connected with an adjacent motel parking lot. In a prosecution for impaired driving on the nightclub's parking lot, the trial judge erred in instructing the jury that the nightclub's parking lot was a public vehicular area as a matter of law, since there was conflicting evidence on this issue. The fact that the club's parking lot connected with the motel parking lot tended to indicate it was open to the public, as did the nightclub manager's testimony that everyone was welcome to drop in and check out the club. On the other hand, the lot was the nightclub's exclusive property and the club's policy prohibited the use of the lot by people other than members or guests, and members were not permitted to park there overnight.

Amending Indictments

Habitual Impaired Driving Indictment Was Improperly Amended to Add "Public Vehicular Area" as Place Where Offense Was Committed

State v. Snyder, 118 N.C. App. 540, 455 S.E.2d 914 (18 April 1995). An habitual impaired driving indictment alleged that the offense occurred on a street or highway. The court ruled that the trial judge improperly permitted the state to amend the indictment to include "public vehicular area," since the amendment altered an essential element of the offense (the situs of the offense) and therefore substantially altered the charge.

Embezzlement Indictments Were Improperly Amended to Change Owner of Property

State v. Hughes, 118 N.C. App. 573, 455 S.E.2d 912 (18 April 1995). Embezzlement indictments alleged that the gasoline belonged to "Mike Frost, President of Petroleum World, Incorporated, a North Carolina Corporation having [its] principal place of business in Cliffside, North Carolina." Evidence at trial showed that the gasoline was actually owned by Petroleum World, Incorporated, a corporation. The trial judge permitted the state to amend the indictments to delete the words "Mike Frost, President." The court ruled that the amendment, changing ownership from an individual to a

corporation, substantially altered the offense and therefore was improper.

Constitutional and Statutory Discovery

Trial Judge's Failure to Conduct In Camera Review of State's Files Was Error, Based on Facts in This Case

State v. Kelly, ___ N.C. App. ___, 456 S.E.2d 861 (2 May 1995). The defendant was charged with multiple counts of child sexual assaults at a day care center. The North Carolina Supreme Court during pretrial appellate review affirmed that part of a superior court judge's pretrial order that required the state to turn over for in camera inspection: medical and therapy notes in the state's possession concerning the children alleged to be victims. The trial judge (who was a different judge than the judge who had issued the pretrial order) failed to conduct the in camera review. The court ruled that the trial judge was bound by the pretrial order as affirmed by the supreme court, and the failure to conduct the review was error under Pennsylvania v. Ritchie, 480 U.S. 39 (1987).

State Did Not Violate Constitutional Discovery Obligation Because State Provided Favorable Evidence to Defendant at Trial

State v. Wilson, ___ N.C. App. ___, 456 S.E.2d 870 (2 May 1995). The state did not violate its constitutional duty to provide favorable evidence to the defendant when it provided the information after jury selection.

State's Failure to Disclose That Fingerprint Analysis Had Been Performed on Bottle Was Not Error, Based on Facts in This Case

State v. Hodge, ___ N.C. App. ___, 456 S.E.2d 855 (2 May 1995). The defendant was charged with drug offenses. A state's witness revealed at trial that a medicine bottle in which cocaine had been found had been submitted for fingerprint analysis, but no fingerprint comparisons could be made due to smudges. The defendant, alleging that the state had committed a constitutional violation by failing to disclose exculpatory evidence, moved for a mistrial or continuance. The trial judge denied the motions. The court ruled that since no meaningful analysis could be conducted, the state did not suppress any exculpatory evidence. The court also rejected the defendant's argument that he could have employed his own fingerprint expert to examine the bottle had he known of the state's analysis, since the defendant knew the bottle existed and was free to conduct his own tests.

Police Destruction of Evidence Did Not Constitute Due Process Violation, Based on Facts in This Case

State v. Graham, 118 N.C. App. 231, 454 S.E.2d 878 (21 March 1995). Defendant was convicted of second-degree rape. The defendant's defense was consent. The police department inadvertently destroyed the rape kit and the victim's clothing. The defendant objected to testimony by the state's experts about their analysis of body fluids and hairs contained in the rape kit with those of the defendant. The court ruled: (1) the evidence was not favorable to the defendant since the defendant did not deny having sexual relations with the victim, and (2) there was no due process violation, citing Arizona v. Youngblood, 488 U.S. 51 (1988).

Evidence

Collateral Estoppel Did Not Bar Felony Cocaine Possession Prosecution After District Court Acquittal of Marijuana and Drug Paraphernalia Possession Charges, Although All Offenses Were Based on Items Found in Defendant's Pocketbook

State v. Solomon, 117 N.C. App. 701, 453 S.E.2d 201 (7 February 1995). A search of a cigarette case incident to the defendant's arrest resulted in the seizure of rolling papers, marijuana, and cocaine. On 29 March 1993, the defendant was found not guilty in district court of possession of marijuana and possession of drug paraphernalia. On 30 June 1993, the defendant was convicted of felony possession of cocaine. The court rejected the defendant's argument that the district court acquittals barred the later

cocaine prosecution. The defendant asserted that the acquittals were based on a reasonable doubt that she knew of the contents of the cigarette case. The court noted that since there was no transcript of the district court prosecution, the basis of the acquittals was speculative and therefore insufficient to support the application of the collateral estoppel doctrine.

Trial Judge Properly Found Four-Year-Old Sexual Assault Victim Was Competent to Testify

State v. Ward, 118 N.C. App. 389, 455 S.E.2d 666 (4 April 1995). The court ruled that, based on the facts in this case, a four-year-old sexual assault victim was competent to testify. The sexual assault occurred when the victim was two years old.

Expert Improperly Testified About Sexual Assault Victim's Truthfulness and Although Defendant Did Not Object to Testimony at Trial, New Trial Is Ordered Based on Plain Error

State v. Hannon, 118 N.C. App. 448, 455 S.E.2d 494 (4 April 1995). The alleged victim of a sexual assault was a mentally-handicapped high school student. Although the state's witness testified about the victim's truthfulness (in effect, the victim is telling the truth about having sex with the defendant, and this is how I know she is telling the truth) before she was qualified as an expert in the behavior of mentally-retarded children, the court ruled that the trial judge implicitly accepted her as an expert before she stated her opinion and the judge conveyed that impression to the jury. Therefore, the expert testimony about the victim's truthfulness was improper; see State v. Kim, 318 N.C. 618, 350 S.E.2d 347 (1986); State v. Teeter, 85 N.C. App. 624, 355 S.E.2d 804 (1987). Although the defendant did not object to this improper testimony at trial, the court found plain error and ordered a new trial. In this case there was no evidence of sexual intercourse other than the victim's testimony, and the state's case depended largely on the victim's credibility.

Prosecutor's Cross-Examination of Defendant About Consuming Alcohol on Day of Sexual Assault Was Permissible Under Rule 611(b)

State v. Alkano, ___ N.C. App. ___, ___ S.E.2d ___ (20 June 1995). The defendant was tried for a sexual assault allegedly committed at a nightclub where alcohol was served. The court ruled, citing State v. Williams, 330 N.C. 711, 412 S.E.2d 359 (1992), that the prosecutor's questioning of the defendant about his consumption of alcohol on the evening of the sexual assault was permissible for impeachment purposes under Rule 611(b) to determine whether his use of alcohol impaired his mental or physical ability to observe and remember events. The court noted that the prosecutor did not ask the defendant questions about addiction to or habitual use of alcohol.

Prosecutor's Questions to Defendant About Her Prior Drug Use Was Improper Under Both Rule 608(b) and Rule 611(b)

State v. Wilson, ___ N.C. App. ___, 456 S.E.2d 870 (2 May 1995). A prosecutor's questions to the defendant about her prior drug use were improper under Rule 608(b) because they were not related to truthfulness; see State v. Morgan, 315 N.C. 626, 340 S.E.2d 84 (1986). The court rejected the state's contention that the questions were proper under Rule 611(b) based on State v. Williams, 330 N.C. 711, 412 S.E.2d 359 (1992) [cross-examination of key state's witness about prior drug use and mental instability was permissible under Rule 611(b)]. The court stated that there was no compelling reason to extend *Williams* to cross-examination of a defendant.

Parents Were Improperly Permitted to Offer Testimony About Their Allegedly Sexually-Abused Children That Could Only Have Been Offered Through Expert Testimony

State v. Kelly, ___ N.C. App. ___, 456 S.E.2d 861 (2 May 1995). The court reviewed the testimony of parents of allegedly sexually-abused children and ruled that their testimony was improperly permitted. Explanations of the symptoms and characteristics of sexually-abused children are admissible only by expert testimony for the limited purpose of assisting the jury in understanding the behavior patterns of

abused children. Evidence of a particular child's symptoms, and their consistency with established characteristics of abused children, may only be offered by an expert. The court noted, however, that parental observations and perceptions are admissible—testimony that a child seemed embarrassed, frightened, or displayed other emotions, and testimony about a child's statements and complaints.

Defendant's Reputation as Drug Dealer Was Inadmissible When His Character Was Not in Issue

State v. Taylor, 117 N.C. App. 644, 453 S.E.2d 225 (7 February 1995). The trial judge erred in permitting the state to offer evidence that the defendant had a reputation as a drug dealer when defendant had not offered any evidence and had not put his character in issue.

State May Not Ask Defense Witness About Pending Charge to Show Witness's Bias

State v. Graham, 118 N.C. App. 231, 454 S.E.2d 878 (21 March 1995). Although a defendant may ask a state's witness about pending criminal charges to show the witness may be testifying to receive a lighter sentence, see State v. Evans, 40 N.C. App. 623, 253 S.E.2d 333 (1979), the court ruled that the state may not ask a defense witness about a pending charge to show the witness's bias. Therefore, the trial judge erred in allowing the state to elicit from the defense witness that he was currently in jail awaiting trial.

Miscellaneous

Defendant Has No Right To Appeal Trial Judge's Denial of Defendant's Motion To Dismiss on Double Jeopardy Grounds

State v. Shoff, ___ N.C. App. ___, 456 S.E.2d 875 (16 May 1995). The court analyzed prior conflicting appellate court rulings and ruled that a defendant has no right to appeal a trial judge's denial of a defendant's motion to dismiss a criminal charge on double jeopardy grounds [see G.S. 15A-1444(d)]. The court specifically did not decide whether an appellate court's extraordinary writ may be available to review a defendant's double jeopardy issue.

Even Assuming Error When District Attorney Did Not Make Written Application for Reconvening Grand Jury and Trial Judge Did Not Issue Written Order, No Prejudicial Error Requiring Dismissal of Indictment

State v. Parker, ___ N.C. App. ___, ___ S.E.2d ___ (5 July 1995). The trial judge denied the defendant's motion to dismiss bills of indictments returned by a grand jury that had been reconvened under G.S. 15A-622(g) pursuant to the district attorney's oral application to a superior court judge (also, the judge had not issued a written order to reconvene the grand jury). The defendant contended that the district attorney's application and the judge's order must be in writing. Assuming without deciding that the defendant's contention was correct, the court ruled that the defendant was not prejudiced by the assumed errors and therefore was not entitled to the dismissal of the indictments.

Defendant Was Not Entitled to Continuance When State Filed Statement of Charges in Superior Court, Based on Facts in This Case

State v. Chase, 117 N.C. App. 686, 453 S.E.2d 195 (7 February 1995). The defendant was convicted of misdemeanor gambling charges in district court and appealed for trial de novo. In superior court, the trial judge allowed the state to file misdemeanor statements of charges after granting the defendant's motion to dismiss the warrants because they were insufficient to charge the gambling offenses [see G.S. 15A-922(e)]. The court ruled that the trial judge did not err in failing to allow a continuance to the defendant under G.S. 15A-922(b)(2) because the statement of charges did not materially change the pleadings and additional time was unnecessary.

Presence of Alternate Juror in Jury Room Was Not Prejudicial Error, Based on Facts in This Case

State v. Jernigan, 118 N.C. App. 240, 455 S.E.2d 163 (21 March 1995). The trial judge sent the jurors, including the alternate juror, to the jury room to select a foreperson and return to the court for further

instructions. The judge instructed them not to talk about the case itself. The jurors returned to the courtroom, after having selected a foreperson, and were reinstructed on the charge. The judge then excused the alternate juror. The court stated that it must presume that the jurors followed the judge's instructions and did not discuss the case. Because the jury had not deliberated in this case, the court—distinguishing State v. Bindyke, 288 N.C. 608, 220 S.E.2d 521 (1975)—ruled there was no prejudicial error.

Defense Challenge of Prospective Juror for Cause Should Have Been Granted

State v. Shope, 118 N.C. App. 270, 454 S.E.2d 716 (21 March 1995). The court examined the voir dire of a prospective juror and ruled that the trial judge erred in denying the defendant's challenge for cause. The juror clearly stated that she believed that the defendant was guilty, and he would have to prove his innocence. Although she ultimately agreed to be fair and impartial and discard her preconceptions, she still adhered to her prior statements, which showed that she could not be fair and impartial.

Prosecutor's Jury Argument Improperly Commented on Defendant's Right to Jury Trial

State v. Thompson, 118 N.C. App. 33, 454 S.E.2d 271 (21 February 1995). The court ruled that the prosecutor's jury argument that in effect complained that the defendant had failed to plead guilty and thereby put the state to its burden of proof violated the defendant's Sixth Amendment right to a jury trial. However, the court found the error to be harmless beyond a reasonable doubt.

Prosecutor's Jury Argument Improperly Recited Evidence Prosecutor Knew Was Inadmissible, and Trial Judge Erred By Not Correcting Argument Even Though Defendant Did Not Object

State v. Wilson, ___ N.C. App. ___, 456 S.E.2d 870 (2 May 1995). The defendant at trial denied on cross-examination that she had committed a theft. During the jury argument, the prosecutor explained that the state could not impeach a witness on a collateral matter. The prosecutor then explained that he could not call three specifically-named witnesses, who were ready to testify, to contradict her. The court ruled that this jury argument was so grossly improper that the trial judge erred in failing to correct the argument, even though the defendant did not object to it.

Appellate Review of Adult-Juvenile Jurisdiction Issue Was Dismissed as Moot

State v. Dellinger, 118 N.C. App. 529, 455 S.E.2d 877 (18 April 1995). The defendant was born on 26 October 1976. On 23 August 1993, the defendant was indicted for crime against nature that was allegedly committed between January and December 1989. Thus, the defendant was either twelve or thirteen then. The court noted that under G.S. 7A-253 that the district court had exclusive, original jurisdiction of the offense since the defendant was under eighteen at the time of the indictment. However, the defendant during appellate review became eighteen (on 26 October 1994) and thus was no longer under the district court's jurisdiction. Therefore, appellate review of the defendant's motion was moot because the defendant is now an adult subject to the jurisdiction of superior court. The court cited In re Cowles, 108 N.C. App. 74, 422 S.E.2d 443 (1992), State v. Lundberg, 104 N.C. App. 543, 410 S.E.2d 216 (1991), and In re Stedman, 305 N.C. 92, 286 S.E.2d 527 (1982). [Two judges on the panel wrote a concurring opinion in which they stated that the defendant should not be triable as an adult for an offense that he committed when he was 13 or under, but they felt constrained by prior court rulings on the issue.]

Prosecutor May Sign a Juvenile Delinquency Petition as a Complainant

In re Stowe, ___ N.C. App. ___, 456 S.E.2d 336 (2 May 1995). As long as the intake counselor follows the statutory procedures before the signing of a petition alleging delinquency, and a prosecutor does not encroach on the important role of the intake counselor, the prosecutor may sign the petition as the complainant.

Sentencing

Error to Allow Victim's Attorney to Address Court at Sentencing Hearing, Based on Facts in This Case

State v. Jackson, ___ N.C. App. ___, ___ S.E.2d ___ (20 June 1995). Relying on G.S. 15A-1334(b) (no person other than defendant, defendant's counsel, prosecutor, and one making a presentence report may comment to the court on sentencing unless called as a witness by defendant, prosecutor, or court), the court ruled that the trial judge erred in allowing the victim's attorney to address the court during the sentencing hearing.

Statutory Aggravating Factor That Defendant Knowingly Created Great Risk of Death to More Than One Person by Hazardous Device Was Properly Found for Second-Degree Murder Conviction Based on Impaired Driving

State v. McBride, 118 N.C. App. 316, 454 S.E.2d 840 (21 March 1995). The defendant was convicted of second-degree murder based on impaired driving and crossing over into oncoming lane and striking a car, killing one passenger and seriously injuring two others. The court ruled that the sentencing judge properly found the statutory aggravating factor [G.S. 15A-1340.4(a)(1)g; now codified as G.S. 15A-1340.16(d)(8)] that the defendant knowingly created a great risk of death to more than one person by means of a weapon or device that would normally be hazardous to the lives of more than one person.

Statutory Aggravating Factor That Defendant Took Advantage of Position of Trust Was Improperly Found When Defendant and Sexual Assault Victim Were Merely Acquaintances at Work

State v. Hammond, 118 N.C. App. 257, 454 S.E.2d 709 (21 March 1995). The defendant was convicted of sexually assaulting and kidnapping a person who was a social worker at a mental health center. The defendant was a driver for the center. The only relationship between them was having worked at the center. The court ruled that the trial judge erred in finding the statutory aggravating factor [now codified in G.S. 15A-1340.16(d)(15)] that the defendant took advantage of a position of trust, based on the evidence in this case.

Conviction That Occurred After Original Sentencing and Was Final Before Resentencing Was "Prior Conviction" Statutory Aggravating Factor Under Fair Sentencing Act

State v. Mixion, 118 N.C. App. 559, 455 S.E.2d 904 (18 April 1995). A conviction that was obtained after original sentencing and was final at the time of resentencing (i.e., after the time for appeal had expired or the conviction had been finally upheld on direct appeal) was a prior conviction statutory aggravating factor under the Fair Sentencing Act [see G.S. 15A-1340.4(1)(o) and 15A-1340.2(1)]. [Note: For what constitutes a prior conviction under the Structured Sentencing Act, see G.S. 15A-1340.11(7).]

Non-Statutory Aggravating Factor of Defendant Knowingly Providing False Alibi to Investigating Officer Was Properly Found

State v. Harrington, 118 N.C. App. 306, 454 S.E.2d 713 (21 March 1995). The defendant was convicted of second-degree murder. The trial judge found as a non-statutory aggravating factor that the defendant knowingly provided a false alibi for the murder to law enforcement officers. Relying on the reasoning in Roberts v. United States, 445 U.S. 552 (1980) and United States v. Ruminer, 786 F.2d 381 (10th Cir. 1986), the court ruled that it was proper factor to consider in sentencing. The court distinguished State v. Blackwood, 60 N.C. App. 150, 298 S.E.2d 196 (1982) (defendant's not offering assistance to law enforcement officers was improper non-statutory aggravating factor) because in this case the defendant actively proffered a false alibi and was not simply exercising his right to remain silent or plead not guilty. The court also distinguished State v. Vandiver, 321 N.C. 570, 364 S.E.2d 373 (1988) (defendant's committing perjury may not be non-statutory aggravating factor) since the trial judge in this case, unlike *Vandiver*, was not required to exercise any "subjective evaluation" in determining that the defendant had given a false alibi. The court,

however, cautioned trial judges against the unwarranted use of this non-statutory factor.

URESA Issues

Judge's Order that Conditioned Mother's Right to Receive URESA Child Support Payments on Her Compliance With Child Visitation Rights Was Void

Vanburen County DSS ex rel. Swearengin v. Swearengin, 118 N.C. App. 324, 455 S.E.2d 161 (21 March 1995). The plaintiff sought to enforce a Florida child support order in North Carolina under URESA. The court ruled, following Pifer v. Pifer, 31 N.C. App. 486, 229 S.E.2d 700 (1976), that a trial judge in a URESA action only has jurisdiction to enforce the father's obligation of child support. Thus, the judge's order in this case that conditioned the mother's right to receive child support on her compliance with child visitation rights was void.

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