

2007 Supplement to

North Carolina

Capital Case Law

Handbook

Second Edition 2004

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This supplement to NORTH CAROLINA CAPITAL CASE LAW HANDBOOK (2nd ed. 2004) includes a discussion of case law through May 2007 and makes other changes. The page numbers in the text of this supplement refer to the page numbers in the book.

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Chapter 1: Introduction

Age Limitation on Imposition of the Death Penalty (page 3)

The United States Supreme Court in *Roper v. Simmons*, 543 U.S. 551 (2005), ruled that the Eighth Amendment prohibits the imposition of a death sentence for a defendant who is convicted of a capital offense that was committed before his or her eighteenth birthday. The North Carolina General Assembly enacted legislation (S.L. 2007-81) to make G.S. 14-17 consistent with the *Simmons* ruling.

Prosecutorial Discretion in Seeking Death Penalty (page 4)

In *State v. Allen*, 360 N.C. 297, 626 S.E.2d 271 (2006), the court ruled that the state did not abuse its discretion under G.S. 15A-2004 in seeking the death penalty. The court noted that to prevail on the assertion of abuse of discretion, the defendant must show a discriminatory purpose (for example, racial discrimination) and a discriminatory effect, and there was no evidence of either in this case.

Notes to Chapter 1

Note 13 (page 6). Additional cases: *Kansas v. Marsh*, 126 S. Ct. 2516 (2006) (Court ruled that the Kansas death penalty statute was not unconstitutional in imposing the death penalty when aggravating and mitigating factors are in equipoise); *State v. Duke*, 360 N.C. 110, 623 S.E.2d 11 (2005) [court commented that North Carolina's death penalty structure differed from the statute that the Kansas Supreme Court struck down in *State v. Marsh*, 278 Kan. 520, 102 P.2d 445 (2004), a case then pending in the United States Supreme Court].

Chapter 2: Selected Pretrial Issues

Case Summaries on Theories of First-Degree Murder

Felony Murder: Included Felonies (page 18)

State v. Herring, 176 N.C. App. 395, 626 S.E.2d 742 (2006). The defendant often found buyers for A, a drug dealer. The defendant agreed to get B, his cousin, to purchase drugs from A. After discussing purchasing cocaine from A and robbing A of his drugs and money, the defendant and B arrived at A's apartment. B left the apartment and obtained

a gun, and then B fought with A over the cocaine. B shot and killed A. The amount of cocaine was a trafficking amount. The defendant was convicted of first-degree felony murder, with trafficking by possessing or attempting to possess cocaine as the underlying felony and committing it with a deadly weapon. The jury rejected the state's alternate theory that A's death was the result of an armed robbery or attempted armed robbery. The court ruled that there was sufficient evidence of the defendant's conviction based on acting in concert with B, who had constructive possession of the cocaine during his struggle with A. Relying on *State v. Barnes*, 345 N.C. 184, 481 S.E.2d 44 (1997), the court stated that as long as the defendant joined with B in committing a (emphasis in opinion) crime (in this case, drug trafficking by possessing or attempting to possess cocaine), he was responsible for all other crimes committed in a single transaction in furtherance of the common purpose or plan: to facilitate B's possession of A's cocaine. It was irrelevant that the defendant may not have intended to join B in shooting and killing A. Also, the state was not required to prove the defendant knew that B possessed a gun.

Rule 24 Mandatory Pretrial Conference (page 25)

In *State v. Matthews*, 358 N.C. 102, 591 S.E.2d 535 (2004), the court ruled that the prosecutor violated Rule 24 of the North Carolina General Rules of Practice for Superior and District Courts by failing to petition for a pretrial conference. The court stated that before the state retries the defendant, the prosecutor must do so; otherwise the prosecutor risks disciplinary action by the trial court.

Case Summaries on the Appointment of Counsel for Indigent Defendants (page 27)

State v. Davis, 168 N.C. App. 321, 608 S.E.2d 74 (2005). The court ruled that the trial judge erred in failing to appoint assistant counsel to the defendant's retained counsel when the defendant was otherwise indigent and the state was seeking the death penalty. Assistant counsel that the defendant cannot afford to retain in a capital case is a "necessary expense" under G.S. 7A-450 that the state must provide or the defendant must waive.

Statutory Pretrial Discovery for Defendant (page 44) and Statutory Discovery for State (page 46)

Legislation enacted in 2004 made substantial changes to statutory discovery for the defendant and the state. The changes are discussed on pages 2–8 of John Rubin, “2004 Legislation Affecting Criminal Law and Procedure,” *Administration of Justice Bulletin* No. 2004/06 (October 2004), available online at <http://ncinfo.io.gov.unc.edu/programs/crimlaw/aoj200406.pdf>.

Case Summaries on Discovery Issues Since Publication of Second Edition of North Carolina Capital Case Law Handbook (new section at page 48)

State v. Shannon, ___ N.C. App. ___, 642 S.E.2d 516 (3 April 2007). [Author’s note: There was a dissenting opinion in this case, and the state has filed a notice of appeal based on the dissenting opinion and also has filed a petition for discretionary review on other issues involving the ruling.] The court ruled that G.S. 15A-903(a)(1) requires the state to disclose, in written or recorded form, statements made to a prosecutor by witnesses during pretrial interviews.

State v. Gillespie, ___ N.C. App. ___, 638 S.E.2d 481 (19 December 2006). [Author’s note: The North Carolina Supreme Court has granted the state’s petition to review this ruling.] The defendant was convicted of first-degree murder and sentenced to life imprisonment without parole. The court ruled, relying on the factors set out in *Taylor v. Illinois*, 484 U.S. 400 (1988), that the trial court erred by imposing the sanction prohibiting testimony on insanity and diminished capacity at the defendant’s trial by two defense mental health experts based on purported defense discovery violations. The court concluded that the record was devoid of any indication that any purported defense discovery violations were willful or done to gain a tactical advantage, and any prejudice to the state in contesting the testimony of the defense experts was outweighed by the prejudice to the defendant in presenting evidence on insanity and diminished capacity. The court reversed the defendant’s conviction and ordered a new trial.

State v. Leyva, ___ N.C. App. ___, 640 S.E.2d 394 (6 February 2007). The defendant was convicted of cocaine trafficking offenses. The court ruled that the trial judge did not err in imposing the sanction of prohibiting testimony by a defense expert on the reliability of confidential informants when the defendant failed to give proper notice to the state

under G.S. 15A-905(c)(2) (give notice to state of expert witnesses defendant reasonably expects to call as witness at trial). The defendant did not give notice to the state until the state had presented the testimony of several officers about confidential informants. The trial judge ruled that the defendant could have anticipated the issue concerning confidential informants because the defendant was aware of the state’s use of a confidential informant, and the defendant’s proposed expert testimony was not required by the interests of justice.

State v. Ryals, ___ N.C. App. ___, 635 S.E.2d 470 (17 October 2006). The defendant was convicted of second-degree murder. State’s witness Lee testified that she saw the defendant beat the victim with his fists and kick and stomp him. State’s witness Winstead also testified about the defendant’s beating of the victim. A police department crime technician recovered a black knit cap and other items from the crime scene. Negroid hair was found on the cap, but a state’s witness testified it was not suitable for further analysis. A defense expert witness compared a DNA sample from the hair on the cap with the defendant’s DNA sample and concluded that it could not have originated from the defendant. Before trial, a judge denied the defendant’s motion for a nontestimonial identification order to collect a DNA sample from Winstead to compare it with DNA from the hair on the cap; the defendant contended that Winstead had a motive to commit the murder, was present at the scene, and could have committed the murder. (1) The court ruled, relying on *State v. McNeil*, 155 N.C. App. 540, 574 S.E.2d 145 (2002), and *State v. Campbell*, 133 N.C. App. 531, 515 S.E.2d 732 (1999), that the state did not violate the defendant’s due process rights under *Brady v. Maryland*, 373 U.S. 83 (1963), when it failed to collect DNA from Winstead and conduct a test comparing his DNA with the DNA from the hair on the cap. (2) The court ruled that the discovery provisions in G.S. 15A-903(e) did not require the state to obtain a DNA sample from Winstead to compare with DNA from the hair on the cap.

State v. Taylor, ___ N.C. App. ___, 632 S.E.2d 218 (18 July 2006). The defendant was convicted of first-degree murder of a victim who had traveled to the defendant’s city for a sexual encounter arranged through text messages sent and received by a cellphone number. (1) The court ruled that the trial judge did not err in allowing a state’s witness (a cellphone store manager) to testify although he had not been listed on the state’s list of witnesses

provided to the defendant. The court noted that the state had disclosed that it would call the custodian of Nextel cellphone records, and the witness's name was in the detective's file that had been provided to the defendant in discovery. (2) The court ruled that the trial judge did not err in denying the defendant's motion to require a law enforcement officer who investigated the case to submit to an interview by defense counsel. The evidence showed that the district attorney's office had not advised the officer that he was prohibited from meeting with defense counsel. The officer had decided on his own not to submit to an interview. The court rejected the defendant's argument that the 2004 discovery amendments supported the defendant's position on this issue. **State v. Blankenship**, ___ N.C. App. ___, 631 S.E.2d 208 (5 July 2006). The defendant filed a request for pretrial discovery, including a request for notice of expert witnesses that the state reasonably expected to call at trial and the additional information required by G.S. 15A-903(a)(2). The state provided the defendant with various discovery materials but nothing about using expert witnesses. The defendant objected when the state during trial called an SBI agent to testify about the manufacturing process of methamphetamine and its ingredients. The state informed the trial judge that it did not know that this SBI agent would be testifying on this issue until then, although the evidence showed that the state was planning to call someone from the SBI to testify. The trial judge overruled the defendant's objection on the ground that the witness was a fact witness, not an expert. However, the state then sought to qualify the SBI agent as an expert witness on manufacturing methamphetamine. The judge permitted the SBI agent to testify as a lay witness. The court ruled that the agent was in fact qualified as, and testified as, an expert witness. The court also ruled that the trial judge abused his discretion in allowing the SBI agent to testify when the state had failed to comply with its discovery obligations concerning expert witnesses. **State v. Cornett**, 177 N.C. App. 452, 629 S.E.2d 857 (2006). The defendant was convicted of DWI in a superior court trial de novo. Before trial de novo in superior court, the defendant moved for discovery of written protocols concerning Intoxilyzer operation, calibration, and measures. The court ruled, relying on G.S. 15A-901 and the official commentary to the section, that there is no statutory discovery for criminal cases originating in district court. The court noted that the defendant did not

argue that he had been denied exculpatory evidence under *Brady v. Maryland*, 373 U.S. 83 (1963). **State v. Fuller**, 176 N.C. App. 104, 626 S.E.2d 655 (2006). The defendant was convicted of DWI in superior court after she had appealed her conviction in district court for trial de novo. Her Intoxilyzer test result was 0.07. The state's extrapolation expert testified that the defendant's blood alcohol concentration when officers first contacted her was 0.08. The state gave notice to the defendant on the day of trial that it would call the extrapolation expert as a witness. The trial judge denied the defendant's motion to prevent the state from calling the expert because she was not notified in sufficient time to procure a rebuttal witness. The defendant conceded on appeal that there were no statutory discovery provisions applicable to the defendant for her trial de novo in superior court. The court noted that Article 48 (discovery) of Chapter 15A applies only to cases within the superior court's original jurisdiction. The court ruled that, in light of the defendant's clear understanding of the importance of extrapolation evidence to the state's case and the long-standing acceptance of such evidence in state courts, the trial judge did not abuse his discretion in denying the defendant's motion. **State v. Farmer**, ___ N.C. App. ___, 630 S.E.2d 244 (6 June 2006). The court ruled, relying on *State v. Godwin*, 336 N.C. 499, 444 S.E.2d 206 (1994), that the trial judge did not err in allowing a state's witness to testify about the defendant's bribery offer to the witness to not testify. The state had not provided this evidence to the defendant in discovery because the state's witness did not reveal the bribery offer until he testified on re-direct examination at trial. **State v. Hocutt**, 177 N.C. App. 341, 628 S.E.2d 832 (2006). The court ruled that the trial court did not abuse its discretion in not dismissing the charge or declaring a mistrial as a sanction for the state's discovery violation. **State v. Jaaber**, 176 N.C. App. 752, 627 S.E.2d 312 (2006). The court ruled that the trial judge did not abuse his discretion when he denied the defendant's motion for a mistrial based on the state's statutory discovery violations (not providing defendant with statements of two witnesses). Because a trial judge is not required to impose any sanctions for statutory discovery violations, what sanctions to impose, if any, are within the trial judge's discretion. **State v. Pendleton**, 175 N.C. App. 230, 622 S.E.2d 708 (2005). The defendant was convicted of multiple sex offenses involving a twelve-year-old. The trial

judge denied the defendant's motion to continue made after the state, on the morning of trial, produced notes originating from the Department of Social Services (DSS) that may have contained names of possible witnesses. The court ruled that notes in a DSS file but not in the prosecutor's file were not discoverable under G.S. 15A-903(a)(1), because DSS is not a prosecutorial agency. Nor did DSS act as a prosecutorial agency in this case. DSS referred the matter to law enforcement, who developed their own evidence by interviewing the victim. Although a DSS employee sat in on a law enforcement interview of the victim, the court stated that this activity did not transform DSS into a prosecutorial agency.

State v. Fair, 164 N.C. App. 770, 596 S.E.2d 871 (2004). The defendant sought pretrial discovery concerning the SBI lab's analysis of a substance as cocaine. The court ruled: (1) the trial judge erred under *State v. Dunn*, 154 N.C. App. 1, 571 S.E.2d 650 (2002), in not requiring the state to provide discovery of data collection procedures; (2) the trial judge did not err by refusing to require the state to provide the defendant with information concerning peer review of the testing procedure, whether the procedure had been submitted to the scrutiny of the scientific community, or is generally accepted in the scientific community; and (3) the trial judge did not err by refusing to require the state to produce citations to empirical studies supporting the lab expert's opinion and citations to articles in scientific treatises or journals supporting the opinion.

State v. Miller, 357 N.C. 583, 588 S.E.2d 857 (2003). The defendant was convicted of first-degree murder and sentenced to death. A defense mental health expert testified at the capital sentencing hearing concerning the accomplice's influence over the defendant in carrying out the murder. The court ruled, relying on *State v. Cummings*, 352 N.C. 600, 536 S.E.2d 36 (2000), and *State v. McCarver*, 341 N.C. 364, 462 S.E.2d 25 (1995), that the trial judge did not err in requiring the expert to provide the state with raw test data from the expert's psychological examination of the defendant and in allowing the state to use it in cross-examining the expert.

Banks v. Dretke, 540 U.S. 668 (2004). The petitioner (a criminal defendant) was convicted in state court of first-degree murder and sentenced to death. He filed a federal habeas petition, alleging that the state withheld materially favorable evidence in violation of *Brady v. Maryland*, 373 U.S. 83 (1963), and other

cases, and knowingly allowed a state's witness to offer false testimony in violation of *Giglio v. United States*, 405 U.S. 150 (1972), and other cases. He sought a reversal of his conviction and death sentence. The Court ruled that the petitioner was entitled to a reversal of his death sentence based on the effect of the state's suppression of materially exculpatory evidence on the fairness of the death penalty phase of the trial (suppression of evidence that a key state's witness was a informant paid for information in this case). The Court also ruled that the petitioner was entitled to a certificate of appealability from the federal district court's denial of his petition for a new trial, based on the state's suppression of materially favorable evidence (pretrial coaching by prosecutors and law enforcement of a key state's witness) and knowingly allowing a state's witness to offer false testimony (the witness's denying that he had talked with anyone about his trial testimony).

Illinois v. Fisher, 540 U.S. 544 (2004). Chicago police arrested the defendant for possession of cocaine. Four tests conducted by crime laboratories confirmed that the white powdery substance seized from the defendant by the police was cocaine. When the defendant was charged in 1988, he filed a discovery motion requesting all physical evidence that the state intended to use at trial. The state responded that all evidence would be made available at a reasonable time and date on request. The defendant was released on bond, later failed to appear in court, and remained a fugitive until his arrest in 1999. Before trial, the state informed the defendant that the police, acting in accordance with established procedures, had destroyed the alleged cocaine earlier in 1999. The Court ruled that the Due Process Clause did not require the dismissal of the drug charge under *Arizona v. Youngblood*, 488 U.S. 51 (1988) (unless defendant can show bad faith by law enforcement, failure to preserve potentially useful evidence does not constitute due process violation), when defendant did not show that the police had acted in bad faith in destroying the alleged cocaine. The Court noted that the police testing of the chemical makeup of the substance inculpatated, not exculpatated, the defendant. The Court stated that the existence of a pending discovery request did not eliminate the defendant's duty to show bad faith by the police in destroying the substance.

Notes to Chapter 2

Note 2 (page 13). In *State v. Walker*, 170 N.C. App. 632, 613 S.E.2d 330 (2005), the court ruled that the short-form murder indictment was not unconstitutional under *Blakely v. Washington*, 542 U.S. 296 (2004).

Chapter 3: Selected Trial Issues

Jury Selection Issues

Individual Voir Dire (page 76)

In *State v. Roache*, 358 N.C. 243, 595 S.E.2d 381 (2004), the court ruled that when jury selection in a capital case was conducted with individual voir dire under G.S. 15A-1214(j), the trial judge did not err in requiring that once the state had passed an individual juror, the defendant was required to pass or challenge that same juror. Thus, all parties are required to accept or reject a juror before the next prospective juror is called. The court examined the provisions in G.S. 15A-1214 and concluded that subsection (j), applicable only in capital cases, contains a distinct procedure, separate from the mandatory procedure outlined in subsections (d) through (f), in which the state must pass twelve jurors before the defendant is required to pass or challenge any juror. The court stated, however, that its ruling should not be interpreted to infringe on the trial judge's inherent authority to permit individual voir dire limited to a specific issue, such as pretrial publicity. If a limited individual voir dire is undertaken, the procedure outlined in subsections (d) through (f), including the requirement to pass a complete panel of twelve, must be followed.

Case Summaries on Impermissible Discrimination in Selecting Jurors (page 92)

Miller-El v. Dretke, 545 U.S. 231 (2005). The Court ruled that the defendant proved that the state used peremptory challenges in a racially discriminatory manner in violation of *Batson v. Kentucky*, 476 U.S. 79 (1986), and was entitled to a new trial. The evidence showed that the state: (1) used peremptory challenges to exclude 91 percent of the prospective black jurors; (2) engaged in disparate questioning of white and black prospective jurors and did not offer racially neutral reasons in exercising peremptory challenges;

and (3) used the Texas jury practice of shuffling juror cards in a racially discriminatory manner. **Johnson v. California**, 545 U.S. 162 (2005). The Court ruled that a California state court's standard of "more likely than not" is inappropriate to measure the sufficiency of a prima facie case of purposeful discrimination in jury selection under *Batson v. Kentucky*, 476 U.S. 79 (1986). Instead, the prima facie evidence standard means evidence sufficient to permit a trial judge to draw an inference that discrimination has occurred.

Selected Evidence Issues

Case Summaries on Rule 404(b): Evidence of Other Crimes, Wrongs, or Acts (page 103)

State v. Badgett, ___ N.C. ___, ___ S.E.2d ___ (4 May 2007). The defendant was convicted of a first-degree murder committed in 2002. The trial judge admitted under Rule 404(b) evidence of the facts involving the defendant's killing of another person in 1992 as well as the defendant's conviction of voluntary manslaughter for that killing. (1) The court ruled that evidence of the killing was not too dissimilar or remote to be admitted. The court reviewed the evidence and concluded that there were remarkable similarities between the two killings, including fatal stab wounds to an unarmed victim's neck with a folding pocketknife that occurred during an argument with the victim in the victim's home. Concerning the temporal requirement, the defendant was in prison for five of the ten years between the two killings (such time is excluded by case law), leaving only five years between them. (2) The court ruled that the trial judge erred in allowing the state to introduce evidence of the defendant's conviction of voluntary manslaughter for the 1992 killing. The court relied on its ruling in *State v. Wilkerson*, 356 N.C. 418, 571 S.E.2d 583, *reversing per curiam*, 148 N.C. App. 310, 559 S.E.2d 5 (2002) (for reasons stated in dissenting opinion of the Court of Appeals). Evidence of the fact of the prior conviction was inadmissible when the state had also introduced evidence of the underlying facts and circumstances of the conviction and, in this case, the defendant did not testify so the conviction was not admissible under Rule 609.

Hearsay Exceptions and the Confrontation Clause (new section at page 114)

See the following publications on the rulings in *Crawford v. Washington*, 541 U.S. 36 (2004), and *Davis v. Washington*, 126 S. Ct. 2266 (2006), and their impact on the admissibility of hearsay under the Confrontation Clause:

- Jessica Smith, “*Crawford v. Washington*: Confrontation One Year Later,” (School of Government, April 2005), available online at <http://www.io.unc.edu/pubs/electronicversions/pdfs/crawford.pdf>.
- Jessica Smith, “Emerging Issues in Confrontation Litigation: A Supplement to *Crawford v. Washington*: Confrontation One Year Later,” (School of Government, March 2007), available online at <http://www.sog.unc.edu/pubs/electronicversions/pdfs/crawfordsuppl.pdf>.
- James Markham, “The Forfeiture by Wrongdoing Exception to the Confrontation Rule,” (School of Government, July 2006), available online at <http://ncinfo.io.unc.edu/programs/crimlaw/crawfordforfeituremarham2006.pdf>.
- John Rubin, “*Crawford v. Washington*, 541 U.S. 36 (2004): Flow Chart” (School of Government, October 31, 2006), available online at <http://ncinfo.io.unc.edu/programs/crimlaw/crawford%20flow%20chart%202006%20ed.pdf>.

[Author’s note: If you have difficulty accessing these publications using the website addresses given above, use the following website address and choose the specific publication: <http://ncinfo.io.unc.edu/programs/crimlaw/faculty.htm>.]

Case Summaries on Defense Lawyer’s Admission of Defendant’s Guilt of Lesser-Included Offense(s) (new section at page 138)

Florida v. Nixon, 543 U.S. 175 (2004). The Court ruled that a defense counsel’s strategic decision to concede to the jury, without defendant’s explicit consent, defendant’s guilt of first-degree murder at the guilt/innocence phase of a capital trial and to present evidence and argue for life imprisonment at the penalty phase, was not per se ineffective assistance of counsel under the Sixth Amendment. Defense counsel had attempted to explain this proposed strategy to the defendant at least three times, but the defendant was generally unresponsive; he never verbally approved or protested the strategy. At trial, defense counsel conceded the defendant’s guilt of first-

degree murder during the opening statement, cross-examined some of the state’s witnesses and objected to the introduction of some of the state’s evidence, contested aspects of the jury instructions, and in closing argument conceded the defendant’s guilt but reminded the jury of the importance of the penalty phase. At the penalty phase, the defense counsel presented eight witnesses, including two mental health experts, and argued for life imprisonment. The Court rejected a state appellate court’s ruling that defense counsel’s concession of guilt was per se ineffective assistance of counsel. The Court instead ruled that the issue of ineffective assistance of counsel must be judged under the standard set out in *Strickland v. Washington*, 466 U.S. 668 (1984). The Court stated that a presumption of prejudice is not appropriate based solely on a defendant’s failure to provide express consent to a tenable strategy that counsel has adequately disclosed to and discussed with the defendant. [Author’s note: The Court’s ruling appeared to effectively overrule the legal standard set out in *State v. Harbison*, 315 N.C. 175, 337 S.E.2d 504 (1985) (There is ineffective assistance of counsel per se under the Sixth Amendment when defendant’s counsel admits the defendant’s guilt to the jury without the defendant’s consent.). See the court’s discussion of the *Nixon* ruling in *State v. Al-Bayyinah*, 359 N.C. 741, 757, 616 S.E.2d 500, 512 (2005).] **State v. Matthews**, 358 N.C. 102, 591 S.E.2d 535 (2004). The defendant was convicted of first-degree murder and sentenced to death. The court ruled that defense counsel during jury argument conceded the defendant’s guilt of second-degree murder without the defendant’s consent, and under *State v. Harbison*, 315 N.C. 175, 337 S.E.2d 504 (1985), that error constituted ineffective assistance of counsel per se under the Sixth Amendment, requiring a new trial. [Author’s note: *Matthews* was decided before the ruling in *Florida v. Nixon*, discussed above.]

Jury Instructions

Cases in Which There Was Error When Judge Did Not Instruct on Second-Degree Murder (page 141)

State v. Gwynn, ___ N.C. App. ___, 641 S.E.2d 719 (20 March 2007). The court ruled, based on the principles set out in *State v. Millsaps*, 356 N.C. 556, 572 S.E.2d 767 (2002) (when to submit lesser-included offenses of first-degree felony murder), that in a first-degree murder trial in which the state

sought a conviction based solely on the felony murder theory, the trial judge erred in not submitting second-degree murder to the jury when there was conflicting evidence concerning the commission of the underlying felony of armed robbery.

Diminished Capacity and Voluntary Intoxication

The two publications cited in “Research References” on page 147 of the book are available online at <http://ncinfo.iog.unc.edu/programs/crimlaw/aoj.htm>. Scroll to the bottom of the webpage to access the publications.

Case Summaries on Diminished Capacity (page 147)

State v. Poindexter, 359 N.C. 287, 608 S.E.2d 761 (2005). The court ruled that defense counsel in the guilt-innocence phase of the defendant’s capital murder trial did not provide ineffective assistance of counsel when they did not assert a diminished capacity defense. The court noted that the defendant testified at the guilt-innocence phase that unknown assailants committed the murder, a defense inconsistent with the diminished capacity defense.

State v. Roache, 358 N.C. 243, 595 S.E.2d 381 (2004). The defendant, acting with an accomplice, killed five people and was convicted of five counts of first-degree murder. The court ruled that the trial judge did not err in failing to instruct on diminished capacity concerning the acting in concert doctrine. The court noted that it has never applied diminished capacity to the general intent necessary for acting in concert.

Chapter 4: The Capital Sentencing Hearing

Selected Evidence Issues

Case Summaries on Rules of Evidence at Sentencing Hearing (page 156)

State v. Bell, 359 N.C. 1, 603 S.E.2d 93 (2004). The defendant was convicted of first-degree murder. During the capital sentencing hearing, the trial judge allowed the state during its proof of aggravating circumstance G.S. 15A-2000(e)(3) (prior violent felony conviction) to offer a law enforcement officer’s testimony concerning what a nontestifying robbery victim told the officer when

he questioned the victim about the robbery. The court ruled that the trial judge erred under *Crawford v. Washington*, 541 U.S. 36 (2004), in admitting the statement. The statement was given in response to structured questioning by the officer and thus was a testimonial statement. The state did not adequately show the unavailability of the victim to testify. In addition, the defendant did not have the opportunity to cross-examine the victim. The court ruled, however, that the admission of the statement was harmless error beyond a reasonable doubt.

Jury Argument

Cases Summaries on Miscellaneous Issues (page 163)

Prosecutor’s Disparagement of Defendant (new section)

State v. Matthews, 358 N.C. 102, 591 S.E.2d 535 (2004). The court stated that the prosecutor made an improper jury argument when the prosecutor engaged in name-calling and used scatological language in referring to the defendant’s theory of the case. The prosecutor characterized the defendant as a “monster,” “demon,” “devil,” “a man without morals,” and as having a “monster mind.” The court stated that these improper characterizations constituted improper name-calling; the prosecutor was not arguing the evidence and conclusions that can be inferred from the evidence. In addition, the prosecutor improperly used scatological language by stating “That’s bull crap” in an attack on the defendant’s theory of the case. *See also* *State v. Maske*, 358 N.C. 40, 591 S.E.2d 521 (2004) (prosecutor improperly referred to defendant as an “S.O.B.”).

State v. Roache, 358 N.C. 243, 595 S.E.2d 381 (2004). The defendant, acting with an accomplice, killed five people and was convicted of five counts of first-degree murder. The court ruled that the prosecutor’s jury argument was improper when it characterized the defendant and his accomplice as wild dogs high on the taste of blood and power over their victims.

Defense Counsel’s Admission Defendant Committed Prior Crimes (new section)

State v. Al-Bayyinah, 359 N.C. 741, 616 S.E.2d 500 (2005). The defendant was convicted of first-degree murder and sentenced to death. Defense counsel

during jury argument at the capital sentencing hearing appeared to admit, without the defendant's consent, that the defendant had committed the crimes for which he had been previously convicted. The defendant was willing to allow defense counsel to admit that the defendant had been convicted, but not to admit he had committed the crimes. The court ruled that the defendant failed to show that the jury argument prejudiced his defense, and thus the defendant was not provided with ineffective assistance of counsel. The court stated that the state had the necessary proof of these convictions to support the aggravating circumstance of prior violent felony convictions. The court noted that the United States Supreme Court in *Florida v. Nixon*, 543 U.S. 175 (2004), ruled that whether or not a defendant expressly consented to counsel's argument was not dispositive in finding ineffective assistance of counsel. In addition, the court noted, citing *State v. Walls*, 342 N.C. 1, 463 S.E.2d 738 (1995), that the ruling in *State v. Harbison*, 315 N.C. 175, 337 S.E.2d 504 (1985) (counsel's admission of defendant's guilt is per se ineffective assistance of counsel), does not apply to sentencing proceedings.

Issues Pertinent to Capital Resentencing Hearings

Case Summaries (page 175)

State v. Duke, 360 N.C. 110, 623 S.E.2d 11 (2005). The court ruled, relying on *State v. Sanderson*, 346 N.C. 669, 488 S.E.2d 133 (1997), and distinguishing *Ring v. Arizona*, 536 U.S. 584 (2002), that there is no double jeopardy violation in submitting an aggravating circumstance in a capital resentencing hearing that had not been submitted in the first capital sentencing hearing in which the defendant had received a death sentence.

Chapter 5: Aggravating Circumstances

Aggravating Circumstance (e)(3): Defendant Previously Convicted of Violent Felony

Method of Proof (page 193)

In *State v. Bell*, 359 N.C. 1, 603 S.E.2d 93 (2004), the defendant was convicted of first-degree murder. During the capital sentencing hearing, the trial judge allowed the state during its proof

of aggravating circumstance G.S. 15A-2000(e)(3) (prior violent felony conviction) to offer a law enforcement officer's testimony concerning what a nontestifying robbery victim told the officer when he questioned the victim about the robbery. The court ruled that the trial judge erred under *Crawford v. Washington*, 541 U.S. 36 (2004), in admitting the statement. The statement was given in response to structured questioning by the officer and thus was a testimonial statement. The state did not adequately show the unavailability of the victim to testify. In addition, the defendant did not have the opportunity to cross-examine the victim. The court ruled, however, that the admission of the statement was harmless error beyond a reasonable doubt.

Case Summaries on Aggravating Circumstances (e)(3)

Scope of Admissible Evidence to Show Circumstances Surrounding Commission of Prior Violent Felony (page 197)

See *State v. Bell*, 359 N.C. 1, 603 S.E.2d 93 (2004), summarized immediately above.

State v. Valentine, 357 N.C. 512, 591 S.E.2d 846 (2003). The court ruled that the trial judge erred in limiting the defendant's cross-examination of a state's witness (concerning whether the witness signed an affidavit denying that the defendant was involved in the crime resulting in the defendant's prior conviction) who testified in support of aggravating circumstance (e)(3) (prior violent felony conviction).

Aggravating Circumstance (e)(6): Murder Committed for Pecuniary Gain

Jury Instructions on Aggravating Circumstances (e)(6) (page 210)

State v. Maske, 358 N.C. 40, 591 S.E.2d 521 (2004). The defendant was convicted of first-degree murder based on premeditation and deliberation and felony murder, the felony being robbery. After killing the victim, the defendant took personal property in the apartment where the victim lived. The court ruled that the trial judge erred in instructing on aggravating circumstance G.S. 15A-2000(e)(6) (murder committed for pecuniary gain). After quoting from the pattern jury instruction's general description of the aggravating circumstance, the

trial judge stated, “If you find from the evidence beyond a reasonable doubt that when the defendant killed the victim, the defendant took \$200 from the victim’s purse, you would find this aggravating circumstance” The court stated that while the general description of the aggravating circumstance was a correct statement of the law, the quoted sentence removed from the jury the requirement that it make a finding whether there was a connection between the killing and the taking of something of value. Because the instruction allowed the jury to find the aggravating circumstance even if the taking had no causal relationship to the killing, it was erroneous.

Chapter 6: Mitigating Circumstances

Judge’s Duty Regarding Submission of Statutory and Nonstatutory Mitigating Circumstances

Case Summaries (page 234)

State v. Polke, 361 N.C. 65, 638 S.E.2d 189 (2006). The defendant was convicted of first-degree murder and sentenced to death. (1) The defendant at the capital sentencing hearing requested that the trial judge submit mitigating factor G.S. 15A-2000(f)(1) (no significant prior criminal history), and the judge did so. The defendant on appeal argued that the trial judge erroneously submitted this mitigating factor. The court ruled that the doctrine of invited error applies when a trial judge in a capital sentencing hearing erroneously submits this mitigating factor at the defendant’s request. The defendant cannot be prejudiced by an error resulting from his own conduct. [Author’s note: The court noted, on the other hand, its recent ruling in *State v. Hurst*, 360 N.C. 181, 624 S.E.2d 309 (2006), discussed immediately below, that the doctrine of invited error does not apply when mitigating factor G.S. 15A-2000(f)(1) is withheld at the defendant’s request.] (2) The court ruled that a trial judge’s failure to submit an aggravating factor in a capital sentencing hearing is not structural error and thus not subject to structured error analysis. **State v. Hurst**, 360 N.C. 181, 624 S.E.2d 309 (2006). The defendant was convicted of first-degree murder and sentenced to death. The trial judge declined to submit mitigating circumstance G.S. 15A-2000(f)(1) (no significant history of prior criminal activity). The defendant had asked the trial judge not to submit the circumstance but then argued on appeal that the judge erred in not submitting it. The court reaffirmed prior

rulings that the judge has a duty to submit mitigating circumstance (f)(1) when evidence supports its submission, regardless of the defendant’s position on whether or not to submit it. The court discussed some of its prior case law on (f)(1). The court noted that some of its cases had resulted in a distortion of capital sentencing as trial judges have focused too closely on the existence, nature, and extent of a defendant’s record and have correspondingly failed to consider the aspect of the court’s rulings that allows the court to determine whether a reasonable jury would find the defendant’s criminal activity to be significant. The court stated that when a judge decides not to submit the circumstance, that determination is entitled to deference. Whenever a defendant contends the trial judge erred in not submitting (f)(1), the court will review the whole record in evaluating whether the judge acted correctly, considering the court’s admonition that any reasonable doubt concerning the submission of a statutory or requested mitigating circumstance should be resolved in the defendant’s favor. Although the doctrine of invited error is inapplicable, “a whole record review will necessarily include consideration of the parties’ positions as to whether the instruction should be given.” The court then examined the evidence in this case and upheld the trial judge’s decision not to submit (f)(1): A few months before the murder, the defendant broke and entered a residence in West Virginia and stole a firearm. In 1998 the defendant had been convicted of several breaking and entering offenses in North Carolina. He abused marijuana, crack cocaine, and Oxycontin. He had a pending DUI in West Virginia. The court overruled *State v. Rouse*, 339 N.C. 59, 451 S.E.2d 543 (1994), to the extent it implied that if evidence concerning a defendant’s criminal history is offered in a context other than to determine whether the (f)(1) instruction should be given, the defendant might not be entitled to the instruction.

Peremptory Jury Instructions for Statutory and Nonstatutory Mitigating Circumstances

A peremptory instruction for a nonstatutory mitigating circumstance (discussed in paragraph two on page 237 of the book) is now available as a pattern jury instruction: N.C.P.I.—Crim. 150.12.

The second and third lines of the summary of *State v. Stephens*, 347 N.C. 352, 493 S.E.2d

435 (1997), on page 237 of the book should refer to “mitigating” circumstance G.S. 15A-2000(f)(1), not an “aggravating” circumstance.

The last sentence of the summary of *State v. Rouse*, 339 N.C. 59, 451 S.E.2d 679 (1994), on page 238 of the book should have noted that the availability of a directed verdict for a statutory mitigating circumstance has been effectively disavowed in *State v. Holden*, 346 N.C. 404, 488 S.E.2d 514 (1997). See note 25 on page 240 of the book.

Mitigating Circumstance (f)(1): No Significant Prior Criminal History

Case Summaries on Mitigating Circumstance (f)(1) (page 245)

See *State v. Polke*, 361 N.C. 65, 638 S.E.2d 189 (2006), and *State v. Hurst*, 360 N.C. 181, 624 S.E.2d 309 (2006), summarized on page 9 of this supplement. The seventh sentence of the summary of *State v. Rouse*, 339 N.C. 59, 451 S.E.2d 543 (1994), on page 248 of the book describes the court as stating that testimony about the defendant’s criminal activity was “elicited in contexts in which the jury would not have considered it as bearing” on mitigating circumstance (f)(1). The court in *State v. Hurst*, 360 N.C. 181, 624 S.E.2d 309 (2006), overruled *Rouse* to the extent this statement implied that if evidence concerning a defendant’s criminal history is offered in a context other than to determine whether the (f)(1) instruction should be given, the defendant might not be entitled to the instruction.

Mitigating Circumstance (f)(2): Under Influence of Mental or Emotional Disturbance

Cases in Which Evidence Did Not Support Peremptory Instruction (page 254)

State v. Duke, 360 N.C. 110, 623 S.E.2d 11 (2005). The defendant was convicted of two counts of first-degree murder and sentenced to death. The court ruled that the defendant was not entitled to a peremptory instruction on mitigating circumstances G.S. 15A-2000(f)(2) (defendant under influence of mental or emotional disturbance) and -2000(f)(6) (defendant’s impaired capacity to appreciate criminality of conduct or to conform conduct to requirements of law). Concerning (f)(2), the

defense mental health expert admitted on cross-examination that two clinicians could reach different conclusions about the defendant’s mental condition. In addition, the expert testified that other mental health professionals had previously given inconsistent diagnoses of the defendant’s condition. Concerning (f)(6), the state offered evidence that the jury could reasonably have found that the defendant knew and appreciated the criminality of his actions. **State v. Roache**, 358 N.C. 243, 595 S.E.2d 381 (2004). The defendant, acting with an accomplice, killed five people and was convicted of five counts of first-degree murder. He was sentenced to death for two of the murders. The court ruled that the trial judge did not err in failing to give a peremptory jury instruction on statutory mitigating circumstances G.S. 15A-2000(f)(2) (under influence of mental or emotional disturbance) and G.S. 15A-2000(f)(6) (capacity to appreciate criminality of conduct was impaired). The court, relying on *State v. Richmond*, 347 N.C. 412, 495 S.E.2d 677 (1998), ruled that a peremptory instruction is not required when all the evidence supporting the instruction comes from a mental health professional evaluating the defendant in preparation for trial.

Mitigating Circumstance (f)(6): Defendant’s Impaired Capacity

Cases in Which Evidence Did Not Support Peremptory Instruction (page 260)

See the summaries of *State v. Duke*, 360 N.C. 110, 623 S.E.2d 11 (2005), and *State v. Roache*, 358 N.C. 243, 595 S.E.2d 381 (2004), under “Mitigating Circumstance (f)(2): Under Influence of Mental or Emotional Disturbance,” above.

Mitigating Circumstance (f)(7): Defendant’s Age at Time of Murder

Cases in Which Evidence Was Insufficient to Require Submission of (f)(7)

State v. Thompson, 359 N.C. 77, 604 S.E.2d 850 (2004). The defendant was convicted of first-degree murder and sentenced to death. The court ruled that the trial judge did not err in not submitting mitigating circumstance G.S. 15A-2000(f)(7) (defendant’s age when murder committed). Testimony of the defense expert that the defendant was emotionally immature

was contradicted by other evidence tending to show that the defendant functioned emotionally as an adult. **State v. Hurst**, 360 N.C. 181, 624 S.E.2d 309 (2006). The defendant was convicted of first-degree murder and sentenced to death. The court ruled that the trial judge did not err in not submitting mitigating circumstance G.S. 15A-2000(f)(7) (defendant's age when murder committed). The defendant had argued that he was 23 years old at the time of the murder and emotionally immature. The court concluded that the evidence demonstrated that the defendant's maturity was consistent with his chronological age.

Mitigating Circumstance (f)(9): Any Other Circumstance Having Mitigating Value

Defendant's Sentences for Other Criminal Convictions (page 266)

State v. Squires, 357 N.C. 529, 591 S.E.2d 837 (2003). The court ruled, citing *State v. Price*, 331 N.C. 620, 418 S.E.2d 169 (1992), that trial judge did not err in not submitting as a nonstatutory mitigating circumstance that the defendant had been sentenced to 105 years' imprisonment in Georgia for convictions there. A defendant's prison sentence for other crimes is not a nonstatutory mitigating circumstance.

Defendant's Willingness to Plead Guilty and Accept Life Sentence (new section)

State v. Thompson, 359 N.C. 77, 604 S.E.2d 850 (2004). The defendant was convicted of first-degree murder and sentenced to death. The court ruled, relying on *State v. Carroll*, 356 N.C. 526, 573 S.E.2d 899 (2002), that the defendant's willingness to plead guilty to first-degree murder and accept a life sentence was not a mitigating circumstance. The court noted that the defendant chose to plead not guilty and proceed to trial.

Consideration of Accomplice's Sentence or Plea Bargain (page 266)

State v. Roache, 358 N.C. 243, 595 S.E.2d 381 (2004). The defendant, acting with an accomplice, killed five people and was convicted of five counts of first-degree murder. He was sentenced to death for two of the murders. The court ruled, relying on *State v. Williams*, 305 N.C. 656, 292 S.E.2d 243 (1982), that the trial judge did not err in prohibiting the defendant from introducing evidence in a capital sentencing hearing that the accomplice received

life imprisonment for same five murders for which defendant was convicted. The court stated that an accomplice's sentence has no mitigating effect in and of itself. The court rejected, distinguishing *State v. Roseboro*, 351 N.C. 536, 528 S.E.2d 1 (2000), the defendant's argument that evidence of the accomplice's sentences should have been admitted under the catchall mitigating circumstance, G.S. 15A-2000(f)(9). The court stated the accomplice's sentence may be considered under (f)(9) when evidence of the sentence is already before the court, such as when the accomplice testified at trial and evidence of a plea bargain was presented for impeachment.

Juror's Residual Doubt of Defendant's Guilt (page 267)

Oregon v. Guzek, 546 U.S. 517 (2006). The Court ruled that the Eighth and Fourteenth amendments do not grant a defendant a constitutional right to present at a capital sentencing hearing new evidence that he was not present at the murder scene that is inconsistent with the defendant's conviction of that murder.

