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SUPREME COURT OF NORTH CAROLINA

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OF
NORTH CAROLINA

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EDWARD THOMAS BRADY
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HENRY E. FRYE

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1. Elected and sworn in 29 November 2004.
2. Retired 31 July 2004.

TRIAL JUDGES OF THE GENERAL COURT OF JUSTICE

SUPERIOR COURT DIVISION

DISTRICT	JUDGES	ADDRESS
	First Division	
1	J. Richard Parker	Manteo
	Jerry R. Tillett	Manteo
2	William C. Griffin, Jr.	Williamston
3A	W. Russell Duke, Jr.	Greenville
	Clifton W. Everett, Jr.	Greenville
6A	Alma L. Hinton	Halifax
6B	Cy A. Grant, Sr.	Windsor
7A	Quentin T. Sumner	Rocky Mount
7B	Milton F. (Toby) Fitch, Jr.	Wilson
7BC	Frank R. Brown	Tarboro
	Second Division	
3B	Benjamin G. Alford	New Bern
	Kenneth F. Crow	New Bern
	John E. Nobles, Jr.	Greenville
4A	Russell J. Lanier, Jr.	Kenansville
4B	Charles H. Henry	Jacksonville
5	Ernest B. Fullwood	Wilmington
	W. Allen Cobb, Jr.	Wilmington
	Jay D. Hockenbury	Wilmington
8A	Paul L. Jones	Kinston
8B	Jerry Braswell	Goldsboro
	Third Division	
9	Robert H. Hobgood	Louisburg
	Henry W. Hight, Jr.	Henderson
9A	W. Osmond Smith III	Yanceyville
10	Donald W. Stephens	Raleigh
	Narley L. Cashwell	Raleigh
	Abraham P. Jones	Raleigh
	Howard E. Manning, Jr.	Raleigh
	Michael R. Morgan	Raleigh
	Ripley Eagles Rand	Raleigh
14	Orlando F. Hudson, Jr.	Durham
	A. Leon Stanback, Jr.	Durham
	Ronald L. Stephens	Durham
	Kenneth C. Titus	Durham
15A	J. B. Allen, Jr.	Burlington
	James Clifford Spencer, Jr.	Burlington

DISTRICT	JUDGES	ADDRESS
15B	Carl Fox	Chapel Hill
	R. Allen Baddour[1]	Chapel Hill
	Fourth Division	
11A	Franklin F. Lanier	Buies Creek
11B	Knox V. Jenkins, Jr.	Smithfield
12	E. Lynn Johnson	Fayetteville
	Gregory A. Weeks	Fayetteville
	Jack A. Thompson	Fayetteville
	James F. Ammons, Jr.	Fayetteville
13	William C. Gore, Jr.	Whiteville
	Ola M. Lewis	Southport
16A	B. Craig Ellis	Laurinburg
16B	Robert F. Floyd, Jr.	Lumberton
	Gary L. Locklear	Pembroke
	Fifth Division	
17A	Edwin Graves Wilson, Jr.	Eden
	Richard W. Stone	Wentworth
17B	A. Moses Massey	Mt. Airy
	Andy Cromer	King
18	Catherine C. Eagles	Greensboro
	Henry E. Frye, Jr.	Greensboro
	Lindsay R. Davis, Jr.	Greensboro
	John O. Craig III	Greensboro
	R. Stuart Albright[2]	Greensboro
19B	Vance Bradford Long	Asheboro
21	Judson D. DeRamus, Jr.	Winston-Salem
	William Z. Wood, Jr.	Winston-Salem
	L. Todd Burke	Winston-Salem
	Ronald E. Spivey	Winston-Salem
23	Michael E. Helms	North Wilkesboro
	Sixth Division	
19A	W. Erwin Spainhour	Concord
19C	Larry G. Ford	Salisbury
19D	James M. Webb	Whispering Pines
20A	Michael Earle Beale	Wadesboro
20B	Susan C. Taylor	Monroe
	W. David Lee	Monroe
22	Mark E. Klass	Lexington
	Kimberly S. Taylor	Hiddenite
	Christopher Collier	Mooresville
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25A	Beverly T. Beal	Lenoir
	Robert C. Ervin	Lenoir
25B	Timothy S. Kincaid	Hickory
	Nathaniel J. Poovey	Hickory
26	Robert P. Johnston	Charlotte

DISTRICT	JUDGES	ADDRESS
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	Richard D. Boner	Charlotte
	J. Gentry Caudill	Charlotte
	David S. Cayer	Charlotte
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	Linwood O. Foust	Charlotte
27A	Jesse B. Caldwell III	Gastonia
	Timothy L. Patti	Gastonia
27B	Forrest Donald Bridges	Shelby
	James W. Morgan	Shelby
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24	James L. Baker, Jr.	Marshall
	Charles Phillip Ginn	Marshall
28	Dennis Jay Winner	Asheville
	Ronald K. Payne	Asheville
29A	Laura J. Bridges	Marion
29B	Zoro J. Guice, Jr.	Rutherfordton
30A	James U. Downs	Franklin
30B	Janet Marlene Hyatt	Waynesville

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D. Jack Hooks	Whiteville
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	PETER M. MCHUGH	Reidsville
	JAMES E. RAGAN III	Oriental
	DONALD L. SMITH	Raleigh
	RUSSELL G. WALKER, JR.	Asheboro

RETIRED/RECALLED JUDGES

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JULIUS ROUSSEAU, JR.	North Wilkesboro
THOMAS W. SEAY	Spencer

1. Appointed and sworn in 24 February 2006 to replace Wade Barber who retired 1 January 2006.
2. Appointed and sworn in 1 January 2006 to replace W. Douglas Albright who retired 31 December 2005.

DISTRICT COURT DIVISION

DISTRICT	JUDGES	ADDRESS
1	Grafton G. Beaman (Chief)	Elizabeth City
	C. Christopher Bean	Edenton
	J. Carlton Cole	Hertford
	Edgar L. Barnes	Manteo
	Amber Davis	Wanchese
2	James W. Hardison (Chief)	Williamston
	Samuel G. Grimes	Washington
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3A	David A. Leech (Chief)	Greenville
	Patricia Gwynett Hilburn	Greenville
	Joseph A. Blick, Jr.	Greenville
	G. Galen Braddy	Greenville
	Charles M. Vincent	Greenville
3B	Jerry F. Waddell (Chief)	New Bern
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	Paul M. Quinn	New Bern
	Karen A. Alexander	New Bern
	Peter Mack, Jr.	New Bern
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	Louis F. Foy, Jr.	Pollocksville
	Sarah Cowen Seaton	Jacksonville
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	Henry L. Stevens IV	Kenansville
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5	John J. Carroll III (Chief)	Wilmington
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	Shelly S. Holt	Wilmington
	Rebecca W. Blackmore	Wilmington
	James H. Faison III	Wilmington
	Sandra R. Criner	Wilmington
	Richard Russell Davis	Wilmington
	Phyllis M. Gorham	Wilmington
6A	Harold Paul McCoy, Jr. (Chief)	Halifax
	W. Turner Stephenson III	Halifax
6B	Alfred W. Kwasikpui (Chief)	Jackson
	Thomas R. J. Newbern	Aulander
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7	William Charles Farris (Chief)	Wilson
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	John M. Britt	Tarboro
	Pell C. Cooper	Nashville
	Robert A. Evans	Rocky Mount
	William G. Stewart	Wilson
	John J. Covolo	Rocky Mount
8	Joseph E. Setzer, Jr. (Chief)	Goldsboro
	David B. Brantley	Goldsboro
	Lonnie W. Carraway	Goldsboro

DISTRICT	JUDGES	ADDRESS
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9	Charles W. Wilkinson, Jr. (Chief)	Oxford
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	Randolph Baskerville	Warrenton
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	L. Michael Gentry	Pelham
10	Joyce A. Hamilton (Chief)	Raleigh
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	Donna S. Stroud	Raleigh
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11	Albert A. Corbett, Jr. (Chief)	Smithfield
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	Jimmy L. Love, Jr.	Sanford
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	George R. Murphy	Smithfield
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	James B. Ethridge	Lillington
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	Scott T. Brewer	Albemarle
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21	William B. Reingold (Chief)	Winston-Salem
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	Laurie L. Hutchins	Winston-Salem
	Lisa V. L. Menefee	Winston-Salem
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	George Bedsworth	Winston-Salem
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	Donald W. Overby	Raleigh
	J. Larry Senter	Raleigh
	Margaret L. Sharpe	Winston-Salem
	Russell Sherrill III	Raleigh
	Catherine C. Stevens	Gastonia
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	Spencer B. Ennis	Graham
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	Roland H. Hayes	Gastonia
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	Edmund Lowe	High Point
	J. Bruce Morton	Greensboro
	Stanley Peele	Hillsborough
	Elton C. Pridgen	Smithfield
	Samuel M. Tate	Morganton
	John L. Whitley	Wilson

1. Appointed and sworn in 16 July 2006 to replace Wayne G. Kimble, Jr. who retired 30 June 2006.
2. Appointed as interim Chief Judge effective 6 August 2005 while Chief Judge John J. Carroll III is serving active military duty.

ATTORNEY GENERAL OF NORTH CAROLINA

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KRISTI HYMAN

Deputy Chief of Staff
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JASON T. CAMPBELL

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Douglas W. Corkhill
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William B. Crumpler
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David L. Elliott
John C. Evans
Caroline Farmer
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Spurgeon Fields III
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Edwin L. Gavin II
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Michael David Gordon
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Angel E. Gray
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CASES REPORTED

ORDERS

PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

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PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

PETITIONS TO REHEAR

GENERAL STATUTES CITED

GENERAL STATUTES CITED

CONSTITUTION OF UNITED STATES CITED

CONSTITUTION OF NORTH CAROLINA CITED

RULES OF EVIDENCE CITED

RULES OF CIVIL PROCEDURE CITED

RULES OF APPELLATE PROCEDURE CITED

LICENSED ATTORNEYS

I, FRED P. PARKER III, Executive Director of the Board of Law Examiners of the State of North Carolina, do hereby certify that the following named persons were admitted to the North Carolina Bar by examination by the Board of Law Examiners on the 25th day of March 2006, and said persons have been issued a certificate of this Board:

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Nikkia D. Squires . . . . . Durham

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Allen Ray Starrett . . . . . .Charlotte
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Nicholas Anthony Ziolkowski . . . . . .Wilmington

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Fred P. Parker III
Executive Director
Board of Law Examiners of the
State of North Carolina

I, FRED P. PARKER III, Executive Director of the Board of Law Examiners of the State of North Carolina, do hereby certify that the following named persons were admitted to the North Carolina Bar by examination by the Board of Law Examiners on the 7th day of April 2006, and said persons have been issued a certificate of this Board:

Tara Elizabeth Agnew . . . . . .Charlotte
Julie Jessica Anders . . . . . .Hilton Head Island, South Carolina
Steven Joseph Antini . . . . . .Roanoke, Virgina
Wilhemina Baker . . . . . .Hope Mills
Kimberly Diane Bartman . . . . . .Philadelphia, Pennsylvania
George Cooper Bell . . . . . .Virginia Beach, Virginia

LICENSED ATTORNEYS

Beverly Hunt Binner . . . . . Charlotte
Suzanne S. Brauer . . . . . Charlotte
John duBayo Broderick III . . . . . Charlotte
Vincent William Burskey . . . . . Charlotte
Jocelyn Burton . . . . . Winston-Salem
Sarah Dohoney Byrne . . . . . Charlotte
Justin Campoli . . . . . Charlotte
Lindsey Morgan Chepke . . . . . Durham
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Frachele R. Vernell Scott . . . . . Durham
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Kathleen Fitzgerald Treadwell . . . . . Burlington
Sean Nelson Rogers Wells . . . . . Emerald Isle
Miranda Mitchell Zolot . . . . . Charlotte

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Fred P. Parker III
Executive Director
Board of Law Examiners of the
State of North Carolina

LICENSED ATTORNEYS

I, FRED P. PARKER III, Executive Director of the Board of Law Examiners of the State of North Carolina, do hereby certify that the following named persons were admitted to the North Carolina Bar by comity by the Board of Law Examiners on the 7th day of April, 2006 and said persons have been issued a certificate of this Board:

Robert Auguste Desilets, Jr. . . . . .Applied from the District of Columbia
Amy Justine Kallal . . . . . .Applied from the State of New York
Patricia Molteni . . . . . .Applied from the State of Missouri
John A. Price . . . . . .Applied from the State of Texas

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Fred P. Parker III
Executive Director
Board of Law Examiners of the
State of North Carolina

I, FRED P. PARKER III, Executive Director of the Board of Law Examiners of the State of North Carolina, do hereby certify that the following named persons were admitted to the North Carolina Bar by comity by the Board of Law Examiners on the 21st day of April, 2006 and said persons have been issued a certificate of this Board:

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Geoffrey Rogers Krouse . . . . . .Applied from the State of New York
Peter Paul Maiorino . . . . . .Applied from the State of New York
Richard P. Sullivan, Jr . . . . . .Applied from the State of Arkansas
Damani Thomas-Wilson . . . . . .Applied from the State of New York
Robert Bruce Vernon . . . . . .Applied from the State of New York

Given over my hand and seal of the Board of Law Examiners on this the 1st day of May, 2006.

Fred P. Parker III
Executive Director
Board of Law Examiners of the
State of North Carolina

I, FRED P. PARKER III, Executive Director of the Board of Law Examiners of the State of North Carolina, do hereby certify that the following named persons were admitted to the North Carolina Bar by comity by the Board of Law Examiners on the 28th day of April, 2006 and said persons have been issued a certificate of this Board:

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Chad Kenneth Reed . . . . . .Applied from the State of Georgia

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Peter Andrew Regulski . . . . . .Applied from the State of Illinois
David Anthony Zybala . . . . . .Applied from the District of Columbia

Given over my hand and seal of the Board of Law Examiners on this the 1st day of May, 2006.

Fred P. Parker III
Executive Director
Board of Law Examiners of the
State of North Carolina

CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

STATE OF NORTH CAROLINA v. BRYAN CHRISTOPHER BELL

No. 86A02

(Filed 7 October 2004)

1. Jury— peremptory challenges—racial discrimination

The trial court did not violate defendant's constitutional right to a jury of his peers in a first-degree murder, first-degree kidnapping, and burning of personal property case by allegedly allowing the State to use its peremptory challenges to dismiss jurors on the basis of their race, because: (1) the State accepted some jurors of the challenged minority race and the State did not use all of its peremptory challenges; and (2) the State enumerated specific reasons for exercising peremptory challenges against dismissed jurors each time defendant asserted a *Batson* objection including that three prospective jurors were opposed to the death penalty; another might have shown concern or undue sympathy towards defendant based on defendant's similar situation with the prospective juror's foster child; another prospective juror was pregnant, seemed unhappy to be there and inattentive at times, and also had a brother who had recently been prosecuted for stealing by the same district attorney's office prosecuting defendant's case; another prospective juror might have show concern or undue sympathy towards defendant based on her prison ministry work, her position as chairperson of Alcoholics Anonymous, and the personal problems she was having with her daughter; another prospective juror suffered from rheumatoid arthritis and on any given day could suffer so much

pain that she would be unable to participate in the proceedings; another prospective juror might have shown undue sympathy based on the fact that she had a child with special needs and also she had been charged with a crime of fraud or dishonesty; and another prospective juror might have shown undue sympathy based on the fact that he also had a child with substance abuse issues and he worked in the mental health field.

2. Criminal Law— joinder—trials—motion to sever

The trial court did not violate defendant's rights to a fair trial and due process of law in a first-degree murder, first-degree kidnapping, and burning of personal property case by joining the trials of defendant and a codefendant and by denying defendant's motion to sever the trials, because: (1) defendant and a codefendant were each charged with accountability for first-degree murder, first-degree kidnapping, and burning of personal property; (2) the charges arose from the same series of events involving the same victim and witnesses, and the evidence tended to indicate a common scheme; (3) although defendant contends he was prejudiced by the introduction of a cloth found in the victim's car which contained the codefendant's semen, the testimony of the State's main witness and also from a medical examiner that no sexual assault occurred, coupled with the trial court's limiting instruction that the evidence was to be considered only for purposes of identification and corroboration, was sufficient to safeguard against the jury's misuse of the State's evidence against defendant; (4) if elimination of a desirable juror were a reason for severance, joinder would never occur; and (5) although defendant contends that the codefendant's alibi evidence and jury arguments prejudiced defendant, a solid case was presented against both defendant and the codefendant.

3. Jury— random jury selection—specific jury panel

Although defendant contends the trial court violated the requirement for random jury selection in a first-degree murder, first-degree kidnapping, and burning of personal property case by placing certain prospective jurors in specific jury panels, this assignment of error is dismissed because: (1) defendant never made a challenge to the jury selection process in accordance with N.C.G.S. § 15A-1211(c); (2) defendant requested that two of the three remaining jurors, about whom he now objects, be assigned to the last panel; and (3) defendant approved the jury panel at the conclusion of jury selection.

4. Criminal Law— prosecutor's argument—he who hunts with pack is responsible for the kill

The trial court did not abuse its discretion in a first-degree murder, first-degree kidnapping, and burning of personal property case by allowing the prosecutor to state during closing arguments that "he who hunts with the pack is responsible for the kill," because the prosecutor was employing the use of an analogy to aid in explaining the complex legal theory of acting in concert.

5. Criminal Law— prosecutor's argument—if trying the devil, you go to hell to get witnesses

The trial court did not abuse its discretion in a first-degree murder, first-degree kidnapping, and burning of personal property case by allowing the prosecutor to state during closing arguments that "if you are going to try the devil, you have to go to hell to get your witnesses," because: (1) the prosecutor made this statement in response to a direct attack by defendant on the credibility of the State's star witness; (2) the prosecutor defended the witness's credibility to the extent that one can defend the credibility of a participant in the crime; and (3) our courts have previously considered and approved use of the phrase to which defendant objects.

6. Criminal Law— appellate review—statements by trial court—absence of objections—plain error inapplicable

Statements made by the trial court regarding appellate review when explaining the function of the court reporter, when informing a prospective juror to speak audibly in order for the court reporter to record her responses, and when explaining the importance of court reporters in honor of National Court Reporter Day during a break in the trial will not be reviewed on appeal because defendant did not object to the statements at the time they were made, and the statements did not constitute jury instructions and thus do not fall within the purview of plain error.

7. Kidnapping— first-degree—motion to dismiss—sufficiency of evidence

The State's evidence was sufficient for submission of a charge of first-degree kidnapping to the jury under the alternative theories alleged in the indictment because: (1) substantial evidence was presented by the State that defendant intended to steal the victim's car and that he kidnapped the victim to facilitate the

theft; (2) substantial evidence was presented that defendant continued to confine the victim in order to facilitate his repeated assaults upon her with a deadly weapon; (3) substantial evidence was presented that defendant confined the victim in order to facilitate the burning of her personal property; (4) while it may have been unnecessary to confine, restrain, or remove the victim in order to accomplish any of defendant's crimes, substantial evidence was presented that defendant did, in fact, make the decision to confine, restrain, and remove the victim in order to facilitate larceny of a motor vehicle, assault with a deadly weapon, and burning of personal property; and (5) substantial evidence was presented that defendant's actions were meant to terrorize the victim.

8. Appeal and Error— preservation of issues—failure to object—failure to assert plain error

Although defendant contends the trial court erred by allowing a prior statement of a witness into evidence for the purpose of corroborating his trial testimony, this assignment of error is dismissed because: (1) defendant never separately objected or joined in a codefendant's objection, thereby waiving his right to appellate review; and (2) defendant failed to specifically assert plain error. N.C. R. App. P. 10(b)(1), 10(c)(4).

9. Appeal and Error— preservation of issues—failure to object—failure to assign error

Although defendant contends the trial court violated double jeopardy principles by submitting the charges of first-degree murder and first-degree kidnapping based on the victim having been seriously injured, this assignment of error is dismissed, because: (1) defendant failed to object to submission of these charges at trial; and (2) not only did defendant fail to raise the issue at trial, but he also failed to properly raise double jeopardy in his assignments of error.

10. Kidnapping— first-degree—disjunctive instructions

The trial court did not err by giving a disjunctive first-degree kidnapping instruction to the jury and by submitting a verdict form which did not require the jury to be unanimous as to the purpose for which the victim was kidnapped, because: (1) N.C.G.S. § 14-39(a) provides numerous routes by which a defendant may be convicted of first-degree kidnapping, but ultimately, a defendant can only be found guilty and punished once; (2) if the

trial court merely instructs the jury disjunctively as to various alternative acts which will establish an element of the offense, the requirement of unanimity is satisfied; and (3) it is not necessary for the State to prove, nor for the jury to find, that a defendant committed a particular act other than that of confining, restraining, or removing the victim.

11. Sentencing— aggravating circumstances—pecuniary gain—no double counting—no plain error

The trial court did not err by submitting the N.C.G.S. § 15A-2000(e)(6) aggravating circumstance that a first-degree murder was committed for pecuniary gain where (1) in response to defendant's concerns of double counting, the court limited evidence supporting the pecuniary gain aggravating circumstance to evidence that money was taken from the victim's purse and limited the evidence to support the aggravating circumstance that the murder was committed during the commission of a kidnapping to evidence that defendant kidnapped the victim to facilitate larceny of her car, and (2) there was sufficient evidence to support submission of the pecuniary gain aggravating circumstance based on defendant's theft of money from the victim's purse. Furthermore, the instruction given by the trial court on the pecuniary gain aggravating circumstance did not constitute plain error where defendant actually supplied the trial court with the language it used to instruct the jury on this aggravating circumstance, and there was no reasonable probability that the result would have been different had error in the instruction, if any, not occurred.

12. Evidence— testimonial statement—unavailable witness—absence of cross-examination—harmless error

Although the trial court erred in a capital sentencing proceeding by overruling defendant's objection to the admission of a robbery victim's testimonial statement to a police officer that defendant had robbed him and cut him with a knife which was introduced to show the aggravating circumstance that defendant committed a prior violent felony when the victim was not found to be unavailable and had never been subjected to cross-examination by defendant, this error was harmless beyond a reasonable doubt because defendant's guilty plea to common law robbery was an admission of the commission of a felony involving the use or threat of violence even without the erroneous admission of the victim's statement.

13. Sentencing— mitigating circumstances—no significant prior criminal history

The trial court did not err in a first-degree murder sentencing proceeding by overruling defendant's objection to the submission of the N.C.G.S. § 15A-2000(f)(1) statutory mitigating circumstance that he had no significant prior criminal history, because: (1) most of defendant's prior convictions were crimes against property; (2) defendant had been convicted of common law robbery but had not repeatedly engaged in threatening or violent behavior beyond that one conviction; (3) defendant's convictions for use of drugs and alcohol, while prior convictions, were not significant enough to keep this mitigating circumstance from the jury and these same convictions were used to support two other mitigating circumstances; (4) defendant received no active prison time for any of his prior convictions, and although defendant's history was fairly recent, numerous mitigating circumstances based on his age and family history were presented for the jury to consider when viewing his criminal history; (5) absent extraordinary facts, the erroneous submission of a mitigating circumstance is harmless; (6) our Supreme Court has repeatedly upheld submission of the (f)(1) mitigating circumstance in cases where the N.C.G.S. § 15A-2000(e)(3) aggravating circumstance that a prior conviction for a crime involving violence to another person was submitted to the jury; and (7) the prosecutor never argued to the jury that defendant had requested this mitigating circumstance, the trial court specifically instructed the jury that defendant did not request it and that the trial court was required by law to give the instruction, and defendant also explained to the jury that he had not requested the mitigating circumstance.

14. Sentencing— instructions—life imprisonment without parole

The trial court did not err by denying defendant's request to instruct the jury throughout its sentencing instructions in a first-degree murder case that "life imprisonment" meant "life in prison without parole," because: (1) the trial court instructed the jury pursuant to N.C.G.S. § 15A-2002, which meant it had no duty to inform the jury that a life sentence means life without parole every time it mentioned a life sentence; (2) the jurors twice heard the term "life without parole" as one of the two sentencing alternatives in the trial court's preliminary instructions during jury voir dire; (3) the trial court used corresponding case law to show

that a sentence of life imprisonment means a sentence of life without parole; and (4) the closing arguments of the parties mentioned "life without parole" numerous times.

15. Sentencing— punishment form—death—life imprisonment

The trial court did not err in a first-degree murder case by submitting the "Issues and Recommendation as to Punishment" form to the jury with sentencing alternatives of "death" or "life imprisonment" instead of "death" or "life imprisonment without parole," because our Supreme Court has previously held that the form need not describe the punishment as "life imprisonment without parole" when the trial court instructs the jury that life imprisonment means life without parole.

16. Sentencing— prosecutor's argument—calling each juror by name to impose death sentence

The trial court did not abuse its discretion in a first-degree murder case by failing to intervene ex mero motu during the prosecutor's sentencing closing argument calling upon each juror by name to impose a sentence of death, because: (1) the prosecutor did not improperly appeal to the jurors' emotions, and the prosecutor did nothing more than argue to the jurors that the State had proven its case and that the jurors should now impose the death penalty; and (2) defendant has failed to show that the prosecutor's sentencing arguments were grossly improper.

17. Sentencing— death penalty—constitutionality

The trial court did not err in a first-degree murder case by submitting the death penalty to the jury as a potential punishment even though defendant contends the death penalty violates provisions of the International Covenant on Civil and Political Rights, because: (1) defendant failed to make this objection before the trial court and has not properly preserved this issue for appellate review; and (2) even if defendant preserved this issue, our Supreme Court has previously considered, and affirmed, the constitutionality of our death penalty against the backdrop of the International Covenant on Civil and Political Rights.

18. Sentencing— aggravating circumstances—murder especially heinous, atrocious, or cruel

The trial court did not err in a first-degree murder case by submitting the N.C.G.S. § 15A-2000(e)(9) aggravating circum-

stance that the murder was especially heinous, atrocious, or cruel, because in the light most favorable to the State, there was substantial evidence for the jury to conclude that the victim was subjected to both physical and psychological torture beyond that present in most first-degree murders.

19. Sentencing— death penalty—proportionate

The trial court did not err in a first-degree murder case by sentencing defendant to the death penalty, because: (1) defendant was convicted on the basis of malice, premeditation and deliberation and under the felony murder rule; (2) defendant was convicted of two additional crimes against the victim including first-degree kidnapping and burning of personal property; and (3) the jury found five aggravating circumstances in this case including that the murder was committed during the commission of a first-degree kidnapping, N.C.G.S. § 15A-2000(e)(5), and that the murder was especially heinous, atrocious, or cruel, N.C.G.S. § 15A-2000(e)(9), either of which is sufficient standing alone to sustain a death sentence.

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of death entered by Judge Jay D. Hockenbury on 24 August 2001 in Superior Court, Onslow County, upon a jury verdict finding defendant guilty of first-degree murder. On 27 September 2004, the Supreme Court allowed defendant's motion to bypass the Court of Appeals as to his appeal of additional judgments. Heard in the Supreme Court 11 May 2004. Additional issues raised in defendant's supplemental brief determined without oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

Roy Cooper, Attorney General, by Gail E. Dawson, Special Deputy Attorney General, for the State.

Rudolf Widenhouse & Fialko, by M. Gordon Widenhouse, Jr., for defendant-appellant.

LAKE, Chief Justice.

On 2 October 2000, defendant was indicted for the first-degree murder of Elleze Thornton Kennedy. On 27 November 2000, defendant was indicted on additional charges of first-degree kidnapping and burning of personal property. He was tried capitally to a jury at the 9 July 2001 Special Criminal Session of Superior Court, Onslow County,

the Honorable Jay D. Hockenbury presiding. The jury found defendant guilty of first-degree murder based on malice, premeditation, and deliberation as well as felony murder and, following a capital sentencing proceeding, recommended that defendant be sentenced to death. Judge Hockenbury sentenced defendant accordingly. The jury also found defendant guilty of first-degree kidnapping and burning of personal property. Judge Hockenbury sentenced defendant to consecutive prison terms of 133 months to 169 months for the kidnapping conviction and 11 to 14 months for the burning of personal property conviction. Defendant appeals his conviction and death sentence for first-degree murder to this Court.

The evidence at trial tended to show that on 3 January 2000, defendant met two friends, Antwaun Sims and Chad Williams, at a game room in Newton Grove. At defendant's request, Williams brought a BB gun with him to Newton Grove and gave it to defendant upon arrival at the game room. After spending some time at the game room, defendant, Sims, and Williams left for the Newton Grove traffic circle where they "hung out," smoked marijuana, and drank brandy. Defendant told Sims and Williams that he wanted to steal a car so that he could leave town, and Sims said he was "down for whatever." At that point, defendant spotted Elleze Kennedy leaving Hardee's, and he said, "I want to rob the lady for her Cadillac."

The evidence further showed that defendant, Sims, and Williams followed Kennedy to her nearby home and watched as she exited her car and turned to lock the door. Defendant then ran up to Kennedy, pointed the BB gun at her and said, "Give me your keys." Kennedy threw her keys into the yard and began to scream, at which time, defendant hit her with the gun, knocking her to the ground.

Sims and Williams found the car keys and then put Kennedy into the car. Kennedy bit Williams as he grabbed her, and Williams punched her in the jaw to make her release his hand. Defendant sat in the back seat with Kennedy. Sims drove the car, and Williams sat in the front passenger seat. At one point, Kennedy asked defendant why he was so mean and where he was taking her. He responded by hitting Kennedy in the face with the BB gun. Kennedy, bleeding badly at that point due to repeated beatings, laid her head against the door and did not say anything else.

Defendant instructed Sims to drive to the Bentonville Battleground and, upon arrival, defendant, Sims, and Williams pulled Kennedy from the car and placed her in the trunk. They got back in

the car and drove toward Benson. Kennedy was unconscious when placed in the trunk, but she later awoke and began moving around in the trunk. Defendant told Sims to turn up the radio so that he did not have to listen to Kennedy in the trunk.

The three men then went to the trailer of Mark Snead, Williams' cousin. They went inside and smoked marijuana with Snead. The men told Snead that the car was rented and that the three were traveling to Florida. Soon thereafter, the three left Snead's trailer and went to the trailer of two individuals referred to as Pop and Giovonni Surles, where Sims used Pop's phone to call his girlfriend, and then the three left. Before leaving the trailer park, Williams got out of the car and walked back to Snead's trailer because, as he testified at trial, he did not wish to go anywhere with Kennedy in the trunk of the car. Defendant and Sims returned a short time later and told Williams that they had released Kennedy, after which Williams left with them.

Defendant, Sims, and Williams made one more stop in Benson to clean the blood from the backseat of the car. They then drove towards Fayetteville on Interstate 95. Sims stopped for gas at a truck stop, and defendant looked through Kennedy's purse and found four dollars to use towards gas. While at the gas station, Williams heard movement in the trunk of the car and realized Kennedy was still trapped in the trunk. Williams confronted defendant with his suspicions, and defendant told Williams he was "tripping." Defendant disposed of the BB gun and Kennedy's credit cards by throwing them out of the window along Interstate 95. Once in Fayetteville, Sims stopped the car, and he and defendant went to the trunk. According to Williams' trial testimony, Sims slammed the trunk repeatedly on Kennedy as she was trying to get out.

Defendant then decided that the group needed to return to Kennedy's house in Newton Grove to look for the scope to the BB gun. Defendant did not find the gun scope, but he did find one of Kennedy's shoes. He picked it up and put it in the car. As they were leaving the house, Williams again asked defendant and Sims to release Kennedy. Defendant told Williams they would release Kennedy, but they had to go somewhere else to do so.

The trio left Kennedy's house a second time and drove the car down a path into a field, parking on a hill at the edge of the clearing. Sims turned off the headlights and opened the trunk. Williams testified at trial that he could hear Kennedy moaning. Williams asked defendant what he was going to do. Defendant responded, "Man, I

ain't trying to leave no witness. This lady done seen my face. I ain't trying to leave no witness." With that, defendant shut the trunk on Kennedy. Defendant then got a lighter from Sims and set his coat on fire, threw the burning coat into the car, and shut the door.

The next morning, defendant sent Sims to check on the car. Sims rode his bicycle down to the car and found that the windows were covered in smoke and Kennedy was dead. Sims reported back to defendant, who then called a friend, Ryan Simmons, to come and pick them up. Before leaving the area, defendant had Simmons drive them down to the car. Defendant and Sims got out to wipe fingerprints from the car. Williams stayed in the car with Simmons and admitted to him that the car was stolen. He did not give the details of the prior evening. Simmons took defendant and Williams to their respective houses to get some personal items and then dropped all three at Sims' brother's home, where they stayed for the next few days.

Kennedy's car was discovered by Joe Godwin on 4 January 2000. The car was parked close to Godwin's property line, and when he went to investigate, he found that all of the windows were covered over. At Godwin's request, his wife called the sheriff's department, and a detective discovered Kennedy's body upon examination of the car. An autopsy report concluded that Kennedy suffered several blunt force trauma injuries to the head but ultimately died from carbon monoxide poisoning, a direct result of the fire set by defendant inside of the car. Defendant, Sims, and Williams were ultimately linked to the crime. Williams gave several statements to police and eventually pled guilty to murder, kidnapping, and theft. Williams testified against defendant and Sims in exchange for acknowledgment of his assistance by the prosecution during his own sentencing proceeding.

Defendant asserts several assignments of error in his trial. He additionally argues that the sentence of death imposed upon him is disproportionate to the crime. For the reasons that follow, we find no prejudicial error in defendant's trial and capital sentencing proceeding, nor do we find defendant's death sentence disproportionate.

[1] In his first assignment of error, defendant contends that the trial court violated defendant's constitutional right to a jury of his peers by allowing the State to dismiss jurors on the basis of their race. The State exercised nine peremptory challenges to exclude African-American prospective jurors from the jury in this case. Defendant

argues that the State's conduct constituted a pattern of racial discrimination in violation of defendant's constitutional rights.

The United States Supreme Court addressed this issue in *Batson v. Kentucky* and set forth a three-part test to determine whether the State has impermissibly excluded jurors on the basis of their race in a given case. 476 U.S. 79, 90 L. Ed. 2d 69 (1986). The first step requires the defendant to establish a *prima facie* case of discrimination. *Id.* at 94, 90 L. Ed. 2d at 86-87. If the trial court determines that such a *prima facie* case has been made, the State is then required to offer a facially valid and race-neutral reason for the peremptory challenges. *Id.* at 97, 90 L. Ed. 2d at 88. Finally, the trial court must determine whether the defendant has proven purposeful discrimination. *Id.* at 98, 90 L. Ed. 2d at 88-89.

Generally, when a trial court rules that the defendant has failed to establish a *prima facie* case of discrimination, this Court's review is limited to a determination of whether the trial court erred in this respect. *State v. Barden*, 356 N.C. 316, 343, 572 S.E.2d 108, 127 (2002), *cert. denied*, 538 U.S. 1040, 155 L. Ed. 2d 1074 (2003). However, " '[o]nce a prosecutor has offered a race-neutral explanation for the peremptory challenges and the trial court has ruled on the ultimate question of intentional discrimination, the preliminary issue of whether the defendant had made a prima facie showing becomes moot.' " *State v. Lemons*, 348 N.C. 335, 361, 501 S.E.2d 309, 325 (1998) (quoting *Hernandez v. New York*, 500 U.S. 352, 359, 114 L. Ed. 2d 395, 405 (1991)), *judgment vacated on other grounds*, 527 U.S. 1018, 144 L. Ed. 2d 768 (1999). Since the State, in the instant case, did offer race-neutral explanations for each challenge, and the trial court ultimately accepted the State's reasons as valid for the exercise of peremptory challenges, "the only issue for us to determine is whether the trial court correctly concluded that the prosecutor had not intentionally discriminated." *Id.* As this Court has held in this regard, the trial court maintains the unique ability to assess, first-hand, all the circumstances relating to the prosecutor's credibility in each case, and we will not overturn its determination absent clear error.

This Court has held that the State may use several general factors to rebut charges of discrimination in the jury selection process, including evidence that the State accepted some jurors of the challenged minority race and that the State did not use all of its peremptory challenges. *See State v. Smith*, 328 N.C. 99, 120-21, 400 S.E.2d 712, 724 (1991). Eighteen African-American prospective jurors were examined in this case. The State exercised peremptory challenges

against nine of those. Two African-American prospective jurors were passed by the State, and the State only used twenty-four of its thirty-two available peremptory challenges.

The State also enumerated specific reasons for exercising peremptory challenges against dismissed jurors each time defendant lodged an objection based on *Batson*. The trial court found the State's reasons to be reasonable and valid, and we agree. Defendant's first *Batson* challenges came when the State used peremptory challenges to dismiss two African-American prospective jurors and one white prospective juror. The State offered valid, race-neutral reasons for the peremptory challenges of both African-American prospective jurors.

Prospective juror Milford Hayes was excused by the State because he was strongly opposed to the death penalty. Mr. Hayes made his opposition clear from the beginning of the jury selection process and continued to state his opinions during jury *voir dire*. He said, in response to a question, that he would be unable to impose a death sentence upon anyone, even Jeffrey Dahmer. Such a strong and absolute opposition to the death penalty is certainly a valid, race-neutral reason for the State to exercise a peremptory challenge.

Prospective juror Mary Shird-Malone was excused by the State because her foster child was seeking psychiatric treatment due to relationship problems with his natural parents. The State expected defendant to put on evidence of problems similar to those of Ms. Shird-Malone's child, and the prosecutor was concerned that Ms. Shird-Malone's personal family situation might make her overly sympathetic to defendant. Concern for undue sympathy towards defendant is a valid and race-neutral reason to exercise a peremptory challenge. Defendant contends that similarly situated jurors were treated differently based upon a difference in race. Defendant asserts that Connie Phillips, a juror of a different race, was similarly situated because she was in a business where she worked with and around psychologists on a daily basis. However, Ms. Phillips stated that her opinion of psychiatrists and psychologists depended upon the individual, and she was not seeking treatment or counseling of any kind. Furthermore, there were factors weighing in favor of Ms. Phillips that were not applicable to Ms. Shird-Malone. Ms. Phillips was married to a twenty-six-year law-enforcement veteran, and she had no objections to the death penalty. All of these factors go to show that Ms. Shird-Malone and Ms. Phillips were not, in fact, similarly situated individuals. Likewise, there were other prospective jurors who had

minor connections to the psychiatric field, but none were such that they would cause the same concerns expressed by the State regarding Ms. Shird-Malone. No other prospective juror was in a similar situation that would create the same concern as that expressed by the State regarding Ms. Shird-Malone. The State's concerns were valid, race-neutral, and specific to Ms. Shird-Malone.

The State later exercised a peremptory challenge to excuse prospective juror La Star Williams, and defendant again objected based on *Batson*. The State offered several race-neutral reasons for exercising a peremptory challenge to excuse Ms. Williams. Ms. Williams was pregnant, and although she was starting to feel better, she had been very sick. The State felt that Ms. Williams may find it difficult to vote for the death penalty when she was carrying a life of her own. Additionally, Ms. Williams seemed unhappy to be there and inattentive at times. She also had a brother who had recently been prosecuted for stealing by the same district attorney's office prosecuting defendant's case. All of these factors, taken together, serve as valid, race-neutral reasons for dismissing Ms. Williams. Defendant again contends that similarly situated prospective jurors were treated differently based only on their race. One prospective juror's father had been convicted of "price fixing" years before. Another prospective juror's stepson, with whom he had no relationship, was charged with first-degree rape. Defendant claims that because these two prospective jurors had family members with legal troubles, they too should have been dismissed but were not because of their race. However, these two jurors had only one factor in common with Ms. Williams. There were a number of reasons why the State chose to exercise a peremptory challenge against Ms. Williams. While each of the factors may or may not have been sufficient individually, it was the combination that led the State to act as it did. Defendant has failed to establish disparate treatment because the same combination of factors was not present in the other two prospective jurors.

The State also exercised a peremptory challenge to excuse prospective juror Yvonne Midgette. Ms. Midgette was dismissed by the State for several reasons. First, Ms. Midgette ran a prison ministry and dealt with violent criminals on a regular basis. The State was concerned that Ms. Midgette might find it difficult to sentence a man to death considering her prison ministry work. Other factors leading the State to excuse Ms. Midgette included her position as chairperson of Alcoholics Anonymous and the personal problems she was having with her daughter. The State felt that these factors might cause Ms.

Midgette to be unduly sympathetic to defendant during the sentencing phase. The State's reasons for exercising a peremptory challenge to excuse Ms. Midgette were valid and race-neutral.

Defendant next made a *Batson* objection to the State's peremptory challenge of prospective juror Viola Denise Morrow. Ms. Morrow suffers from rheumatoid arthritis. The State was concerned about having Ms. Morrow serve as a juror because she could, on any given day, suffer so much pain that she would be unable to participate in the proceedings. This was a valid and race-neutral reason to excuse Ms. Morrow.

The State exercised a peremptory challenge to excuse prospective juror Diana Roach over defendant's *Batson* objection. The State exercised a peremptory challenge against Ms. Roach because she did not believe in the death penalty. Ms. Roach testified that she was adverse to the death penalty and had been so opposed for her entire life. The State's reason was valid and race-neutral.

The State exercised a peremptory challenge to excuse prospective juror June Leaks based on similar reasoning. The State was concerned about Ms. Leaks' ability to recommend death because as soon as the State brought up the subject, Ms. Leaks began darting her eyes, twisting in her chair, and hesitating in her answers. Defendant contends that a similarly situated juror was passed by the State and that the only difference between the two was their race. Defendant claims that prospective juror Merilyn Thomasson was passed by the State even though she, like Ms. Leaks, seemed uncomfortable with the death penalty. However, Ms. Thomasson testified during *voir dire* that she was sure she could consider the death penalty and recommend it, if proper. She also had previously served on a criminal jury. These factors distinguish Ms. Leaks from Ms. Thomasson, and the State's reason for excusing Ms. Leaks is valid and race-neutral.

The State used a peremptory challenge to excuse prospective juror Mary Adams, over defendant's *Batson* objection. The State explained that Ms. Adams was excused based on several factors. Ms. Adams was a homemaker with a child with special needs. The State was concerned that Ms. Adams might be more lenient or sympathetic towards defendant for these reasons. Further, Ms. Adams had been charged with failure to pay state sales tax in 1998. While the charge was ultimately dropped, the crime was one of fraud or dishonesty which caused the State some concern. Defendant contends that similarly situated jurors were treated differently based upon their race. As

support for this contention, defendant points to two other jurors with previous experiences in the criminal justice system who were passed by the State. While there were other jurors who had earlier encounters with the criminal justice system, no juror had experienced all of the circumstances that caused the State to dismiss Ms. Adams. The State did not engage in disparate treatment, and the reasons for the State's peremptory challenge of Ms. Adams were valid and race-neutral.

The State exercised a ninth peremptory challenge to excuse prospective juror Donald Morgan. Mr. Morgan, like Ms. Adams, had a criminal record. He also had a child with substance abuse issues, and he worked in the mental health field. The factors leading the State to exercise a peremptory challenge against Mr. Morgan were valid and race-neutral.

The State provided valid and race-neutral reasons for exercising each peremptory challenge objected to on the basis of *Batson*. The trial court properly determined, after each *Batson* objection, that the State did not discriminate against African-American prospective jurors on the basis of their race. Defendant's assignment of error is without merit.

[2] In his second assignment of error, defendant contends that the trial court violated defendant's right to a fair trial and due process of law by joining the trials of defendant and codefendant Antwaun Sims. Prior to trial, the State made a motion to join defendant and codefendant's cases for trial. Defendant objected to joinder, but the trial court granted the State's motion. Several months later, and still before trial, defendant made a motion to sever his case from that of his codefendant. The trial court, finding no change in circumstances making it necessary to sever the cases, denied defendant's motion. Defendant renewed his motion several more times throughout the trial, and the trial court repeatedly denied it. Defendant contends that the trial court erred by denying defendant's motions to sever and that, as a result, he received an unfair trial. We disagree.

Joinder is appropriate when (1) each defendant is charged with accountability for each offense; or (2) the offenses charged were (a) part of a common scheme, (b) part of the same transaction, or (c) so closely connected in time, place, and occasion that it would be difficult to separate proof of one charge from proof of the others. N.C.G.S. § 15A-926(b)(2) (2003). " 'The propriety of joinder depends upon the circumstances of each case and is within the sound discretion of the

trial judge.' " *State v. Golphin*, 352 N.C. 364, 399, 533 S.E.2d 168, 195 (2000) (quoting *State v. Pickens*, 335 N.C. 717, 724, 440 S.E.2d 552, 556 (1994)), *cert. denied*, 532 U.S. 931, 149 L. Ed. 2d 305 (2001). The trial court's decision to consolidate cases for trial will not be disturbed on appeal absent a showing that joinder resulted in defendant receiving an unfair trial. *Id.*

Here, defendant and codefendant Sims were each charged with accountability for first-degree murder, first-degree kidnapping, and burning of personal property. Additionally, these charges arose from the same series of events involving the same victim and witnesses, and the evidence tended to indicate a common scheme. There was ample reason for the trial court to decide to join the cases for trial.

Defendant contends that he received an unfair trial as a result of the joinder because inflammatory evidence was admitted against codefendant Sims which likely prejudiced defendant's case. At trial, the State introduced evidence that a cloth containing semen was discovered in the victim's car. The State's DNA evidence connected the cloth to codefendant Sims. Both defendant and codefendant Sims argued that this evidence was prejudicial because the jury could use the evidence to infer a sexual assault. The trial court allowed the evidence and instructed the jury that it could consider the evidence for purposes of identification and corroboration, but it could not consider the evidence as proof of a sexual assault on the victim. Defendant contends that, despite the trial court's instruction, the evidence could have inflamed the jury, thereby prejudicing defendant's case. However, the State's main witness, Chad Williams, testified that no sexual assault occurred, and the medical examiner testified that there was no evidence of a sexual assault. This testimony, coupled with the trial court's limiting instruction, was sufficient to safeguard against the jury's misuse of the State's evidence against defendant.

Defendant additionally contends that he received an unfair trial as a result of joinder because codefendant Sims exercised a peremptory challenge against a prospective juror defendant would have chosen. The trial court conducted jury selection by having one defendant question all jurors passed by the State and exercise all of his peremptory challenges before the other defendant examined the jurors. Codefendant Sims was given the first opportunity to question the prospective jurors and, despite defendant's vocal approval of a particular juror, codefendant Sims exercised a peremptory challenge to excuse that prospective juror from the panel.

The trial court's method of jury selection in this joint trial did not prejudice defendant. The very nature of a joint trial requires that each defendant be entitled to exercise his peremptory challenges separate and independent of his codefendant. Regardless of the method, each defendant would have the opportunity to question and excuse jurors from service. If elimination of a desirable juror were a reason for severance, joinder would never occur. Codefendant Sims' exercise of a peremptory challenge during jury selection to excuse a prospective juror defendant wanted did not result in an unfair trial for defendant and did not require severance.

Defendant further contends that codefendant Sims' alibi evidence and jury arguments prejudiced defendant, requiring severance and separate trials. Sims offered witness testimony that he was not present when Ms. Kennedy was kidnapped or assaulted. Codefendant Sims argued to the jury that defendant and Chad Williams were the true culprits in this crime. Defendant argues that Sims' trial tactics prejudiced him and required severance and separate trials. However, there was ample evidence presented at trial to implicate both defendant and codefendant Sims in the murder of Ms. Kennedy. Codefendant Sims' witnesses did nothing to further incriminate defendant. In fact, defendant used some of codefendant Sims' witnesses to advance his own case. The jury apparently did not find codefendant Sims' evidence persuasive, because he was convicted of the charges against him as well. The jury was picked fairly, and a solid case was presented against both defendant and codefendant Sims. Joinder in this case was proper and did not cause defendant an unfair trial. This assignment of error is overruled.

[3] Defendant's third assignment of error is that the trial court erred by placing certain prospective jurors in specific jury panels, thus violating the requirement for random jury selection. Section 15A-1214 of the North Carolina General Statutes states in part that "[t]he clerk, under the supervision of the presiding judge, must call jurors from the panel by a system of random selection which precludes advance knowledge of the identity of the next juror to be called." N.C.G.S. § 15A-1214(a) (2003). Here, the clerk randomly called prospective jurors to be assigned to eight different panels. However, three prospective jurors were left unassigned to panels. Defendant contends that the trial court violated the randomness requirement of N.C.G.S. § 15A-1214 by assigning those three remaining prospective jurors to the last jury panel, thus requiring a new trial. We hold that defendant failed to properly preserve this issue for our review.

A defendant's challenge to a jury panel must be made in accordance with the requirements of N.C.G.S. § 15A-1211(c), which states that a challenge to a jury panel:

(1) May be made only on the ground that the jurors were not selected or drawn according to law.

(2) Must be in writing.

(3) Must specify the facts constituting the ground of challenge.

(4) Must be made and decided before any juror is examined.

N.C.G.S. § 15A-1211(c) (2003). Here, defendant never made a challenge to the jury selection process. In fact, defendant requested that two of the three remaining jurors, about whom he now objects, be assigned to the last panel. At the conclusion of jury selection, defendant was asked if he approved of the jury panel. Defendant answered affirmatively, again without objection to the jury selection process. Because defendant failed to challenge the jury selection process in accordance with N.C.G.S. § 15A-1211(c), he now cannot request appellate review. *See e.g.*, *State v. Jones*, 358 N.C. 330, 337-38, 595 S.E.2d 124, 130 (2004); *State v. Cummings*, 353 N.C. 281, 292, 543 S.E.2d 849, 856, *cert. denied*, 534 U.S. 965, 151 L. Ed. 2d 286 (2001); *State v. Atkins*, 349 N.C. 62, 102-03, 505 S.E.2d 97, 122 (1998), *cert. denied*, 526 U.S. 1147, 143 L. Ed. 2d 1036 (1999). Defendant's assignment of error is overruled.

[4] Defendant's fourth assignment of error is that the trial court erred by allowing the prosecutor to make certain characterizations of defendant during the State's closing argument. The prosecutor began his guilt-phase closing argument by saying:

> He who hunts with the pack is responsible for the kill. Each of you [has] seen those nature shows: Discovery Channel, Animal Planet. You've seen where a pack of wild dogs or hyenas in a group attack a herd of wildebeests, and they do it as a group.
>
> When they take that wildebeest, one of them might be the one that chases after it and grabs the leg of the wildebeest, slows them down. Another one might be out fending off the wildebeests that are coming and making their counterattacks. You have another that will be the one that actually grasps its jaws about the throat of the wildebeest, ultimately, crushing the throat and taking the very life out of that animal.

> He who hunts with the pack is responsible for the kill. Each and every one of those animals are responsible for that kill. Each and every one of those animals will feast on the spoils of that kill. He who hunts with the pack is responsible for the kill.
>
> Just like the predators of the African plane [sic], Chad Williams, Antwaun Sims, and Christopher Bell stalked their prey. They chased after their pray [sic]. They attacked their prey. Ultimately, they fell [sic] their prey.

Defendant contends that the prosecutor's characterizations were abusive and improper, in violation of N.C.G.S. § 15A-1230(a). We disagree.

"Counsel are afforded wide latitude in arguing hotly contested cases, and the scope of this latitude lies within the sound discretion of the trial court." *State v. Gregory*, 340 N.C. 365, 424, 459 S.E.2d 638, 672 (1995), *cert. denied*, 517 U.S. 1108, 134 L. Ed. 2d 478 (1996). A prosecutor's arguments are not to be reviewed in isolation; rather, consideration must be given to the context of the remarks and to the overall factual circumstances. *State v. Moseley*, 338 N.C. 1, 50, 449 S.E.2d 412, 442 (1994), *cert. denied*, 514 U.S. 1091, 131 L. Ed. 2d 738 (1995).

Looking at the prosecutor's statements in context, it is clear that the prosecutor employed the use of an analogy to aid in explaining a complex legal theory. Defendant and codefendant Sims were prosecuted on the theory that they "acted in concert" with Chad Williams to steal the victim's car, kidnap the victim, and eventually murder the victim. The statement, "he who hunts with the pack is responsible for the kill" is a passage that serves to illustrate for juries the theory of acting in concert. *See State v. Lee*, 277 N.C. 205, 214, 176 S.E.2d 765, 770 (1970).

Here, the prosecutor built upon the basic premise that "he who hunts with the pack is responsible for the kill." The prosecutor created a clear representation of the "pack mentality" for the jury by describing how animals hunt their prey. Reading the text of the prosecutor's argument in its entirety, it is clear that the prosecutor was using an analogy to explain the theory of acting in concert for the jury. The prosecution even went so far as to directly link the analogy to the legal principle, stating, "[h]e who hunts with the pack is responsible for the kill. It's called acting in concert. That's a legal term." Given that the prosecution clearly linked its analogy to the legal

theory it was meant to represent, we cannot now say that the trial court erred by allowing the prosecution to make its argument.

[5] The prosecutor also stated during closing arguments, "[i]f you are going to try the devil, you have to go to hell to get your witnesses." Defendant contends that this also was an improper and inflammatory characterization. Again, we disagree.

The prosecutor made this statement in response to a direct attack by defendant on the credibility of the State's star witness, Chad Williams. The prosecution defended Williams' credibility to the extent that one can defend the credibility of a participant in the crime:

> I want to talk to you a little bit about Chad Williams. One of the things you may wonder—they made a big deal about was why did you put Chad on? Why call Chad as a witness? Think about it. Our job and what we attempted to do is to put on all the evidence before you to give you what happened that night, put it all on. That includes to put on what happened that night.
>
> Now, if the physical evidence tells you things—we wanted to flesh out what happened that night, flesh out the details. The physical evidence doesn't talk and Ms. Kennedy can't tell us. We don't have her to call up here and say, Ms. Kennedy, what did these boys do to you? What did they do to you? She is just standing there in the yard, getting out of her car, and these young men come up and attack her. We don't have her to tell the story.
>
> What we do have is Chad Williams. We put him on, and the defense attorneys, How dare you call someone like that. How dare you call somebody who is a liar, who is a convicted murderer who says all these things. How dare you do that.
>
> Well, I can tell you if there would have been a Baptist or Methodist preacher that was riding with these guys that night and could tell you what happened that night and live to tell it, I would be the first one to call him. I would put him up here. We don't have that luxury.

Over defendant's objection, the prosecutor went on to say, "[i]f you are going to try the devil, you have to go to hell to get your witnesses."

We have previously considered and approved use of the phrase to which defendant objects. *State v. Willis*, 332 N.C. 151, 171, 420 S.E.2d 158, 167 (1992). In *Willis*, the State used the phrase to illustrate the type of witnesses available to the State. *Id.* Here, just as in *Willis*, the

prosecutor's statement was meant merely to illustrate the type of witness available in this case. Chad Williams was a participant in the crime, not an innocent person. In this case, Williams' credibility is not based on his character. It is based upon his participation in the events to which he testified.

After reviewing each of the prosecutor's statements in context, we conclude that neither statement amounted to improper characterization or name calling. The prosecution, in its zealous representation of the State, simply used vivid analogies to illustrate points for the jury. The trial court did not err in allowing the prosecution's statements. This assignment of error is overruled.

[6] Defendant's fifth assignment of error is that the trial court erred by telling the jury that its decision would be reviewed by an appellate court. Defendant contends that the trial court's statements to the jury insinuated that any error the jury made would be corrected by a higher court, thereby reducing the jury's feeling of responsibility for its decision. Defendant did not object to the trial court's jury charge at the time.

Rule 10(b)(2) of the North Carolina Rules of Appellate Procedure provides:

> A party may not assign as error any portion of the jury charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly that to which he objects and the grounds of his objection; provided, that opportunity was given to the party to make the objection out of the hearing of the jury, and, on request of any party, out of the presence of the jury.

N.C. R. App. P. 10(b)(2). Because defendant did not object to the trial court's statements at the time they were made, we are now limited to conducting a plain error review. *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983).

> [T]he plain error rule . . . is always to be applied cautiously and only in the exceptional case where, after reviewing the entire record, it can be said the claimed error is a "*fundamental* error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done," or "where [the error] is grave error which amounts to a denial of a fundamental right of the accused," or the error has " 'resulted in a miscarriage of justice or in the denial to appellant of a fair trial' " or where the error is

> such as to "seriously affect the fairness, integrity or public reputation of judicial proceedings" or where it can be fairly said "the instructional mistake had a probable impact on the jury's finding that the defendant was guilty."

Id. at 660, 300 S.E.2d at 378 (quoting *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir.), *cert. denied*, 459 U.S. 1018, 74 L. Ed. 2d 513 (1982)) (internal citations omitted). "The adoption of the 'plain error' rule does not mean that every failure to give a proper instruction mandates reversal regardless of the defendant's failure to object at trial. To hold so would negate Rule 10(b)(2) which is not the intent or purpose of the 'plain error' rule." *Id.* (citing *United States v. Ostendorff*, 371 F.2d 729 (4th Cir.), *cert. denied*, 386 U.S. 982, 18 L. Ed. 2d 229 (1967)). "[E]ven when the 'plain error' rule is applied, '[i]t is the rare case in which an improper instruction will justify reversal of a criminal conviction when no objection has been made in the trial court.' " *Id.* at 660-61, 300 S.E.2d at 378 (quoting *Henderson v. Kibbe*, 431 U.S. 145, 154, 52 L. Ed. 2d 203, 212 (1977)). "In deciding whether a defect in the jury instruction constitutes 'plain error,' the appellate court must examine the entire record and determine if the instructional error had a probable impact on the jury's finding of guilt." *Id.* at 661, 300 S.E.2d at 378-79 (citing *United States v. Jackson*, 569 F. 2d 1003 (7th Cir.), *cert. denied*, 437 U.S. 907, 57 L. Ed. 2d 1137 (1978)).

Here, the statements made by the trial court cannot even be considered instructions to the jury. The trial court made three statements of which defendant now complains. The first statement was made upon first meeting with the jurors. Upon review of Judge Hockenbury's opening statements in context, it is clear that the trial court's statements were merely introductory in nature and were not meant to influence or instruct the jury in any way. Judge Hockenbury introduced himself to the jury and then proceeded to introduce court personnel who would be in the courtroom during jury selection and the trial. In making its introductions, the trial court said the following:

> Let me introduce some of the court personnel that you will see up here who will be working during this term of court. The Clerk of Superior Court here in Onslow County is The Honorable Ed Cole, and the courtroom clerk here to my right is Lisa Edwards. She will be the clerk during your jury selection process during this term. It's a pleasure to have her here with us. She will,

of course, assist the Court with all the administrative matters that the Court has to do when they hold superior court.

The court reporter here to my left is Briana Nesbit. Her job is to take down and transcribe everything that is said here in the courtroom. As you could see when we had the conference here at the bench, Mrs. Nesbit came over with her machine and transcribed everything that was said here. This is very important because this court is the highest level trial court of the State of North Carolina. The decisions in this court get appealed to the North Carolina Court of Appeals or the North Carolina Supreme Court, as the case may be. Everything needs to get transcribed for that purpose.

Defendant now objects to the portion of Judge Hockenbury's statement referencing appeal of decisions to the North Carolina Court of Appeals and to this Court. However, reviewing this statement in context, it is clear that he merely wished to explain the function of the court reporter to the jury. We do not view this statement as a jury instruction, and therefore, it does not fall within the purview of plain error.

The second statement to which defendant now objects was made during the jury selection process. The trial court was asking a prospective juror questions about her ability to consider the death penalty as a punishment. The prospective juror responded by nodding her head, and the trial court informed the juror that she should speak audibly because the court reporter was recording responses "for appellate purposes." The trial court's statement did not constitute a jury instruction and thus does not fall within the purview of plain error.

The third statement to which defendant now objects occurred during a break in trial proceedings when the trial court took a moment to recognize "National Court Reporter Day." The trial court took the opportunity to explain the importance of court reporters in honor of the special day:

Also, this was a day today for a ceremony for Briana Nesbit. It's National Court Reporter Day, August 3, 2001. We had a ceremony honoring her for the good job that she does for the superior court. There wouldn't be any Supreme Court, because this is the highest level trial court, unless we had a court reporter transcribing. That's how integral they are to the judicial process.

Again, the trial court's statements did not constitute jury instructions and thus do not fall within the purview of plain error. Because none of the trial court's statements regarding appellate review were made for the purpose of instructing the jury as to its role in deciding defendant's case, we decline to consider the merits of defendant's argument. This assignment of error is overruled.

[7] Defendant's sixth assignment of error is that the trial court erred by failing to dismiss the first-degree kidnapping charge against defendant. Defendant contends that the State presented insufficient evidence to convict defendant of first-degree kidnapping under any of the theories submitted, and therefore, the trial court should have dismissed the charge. We disagree.

When ruling on a motion to dismiss, the trial court must determine whether the prosecution has presented "substantial evidence of each essential element of the crime." *State v. Call*, 349 N.C. 382, 417, 508 S.E.2d 496, 518 (1998). " 'Substantial evidence is that amount of "relevant evidence that a reasonable mind might accept as adequate to support a conclusion." ' " *State v. Williams*, 355 N.C. 501, 579, 565 S.E.2d 609, 654 (2002) (quoting *State v. Armstrong*, 345 N.C. 161, 165, 478 S.E.2d 194, 196 (1996)), *cert. denied*, 537 U.S. 1125, 154 L. Ed. 2d 808 (2003) (internal citation omitted). In making its decision, the trial court must view the evidence in the light most favorable to the State. *State v. Hyatt*, 355 N.C. 642, 666, 566 S.E.2d 61, 77 (2002), *cert. denied*, 537 U.S. 1133, 154 L. Ed. 2d 823 (2003).

Kidnapping is the unlawful confinement, restraint, or removal of a person from one place to another for the purpose of: (1) holding that person for a ransom or as a hostage, (2) facilitating the commission of a felony or facilitating flight of any person following the commission of a felony, (3) doing serious bodily harm to or terrorizing the person, or (4) holding that person in involuntary servitude. N.C.G.S. § 14-39(a) (2003). Kidnapping is considered to be in the first-degree when the kidnapped person is not released in a safe place or is seriously injured or sexually assaulted during the commission of the kidnapping. N.C.G.S. § 14-39(b).

Defendant was indicted for first-degree kidnapping on the basis that he confined, restrained, or removed the victim to facilitate felonious larceny of a motor vehicle, burning of personal property, and assault with a deadly weapon,[1] resulting in serious injury to the vic-

1. First-degree murder was also included as an underlying felony in the first-degree kidnapping indictment. The State did not pursue this theory, and the jury was not instructed to consider it.

tim. Defendant was also indicted for first-degree kidnapping on the basis that he confined, restrained, or removed the victim for the purpose of doing serious bodily harm to or terrorizing the victim, resulting in serious injury to the victim. The State presented sufficient evidence at trial of each of these alternative theories of first-degree kidnapping in order to survive a motion to dismiss.

Substantial evidence was presented by the State that defendant intended to steal the victim's car and that he kidnapped the victim to facilitate the theft. Chad Williams testified that defendant stated he wanted to steal a car so that he could leave town. Williams also testified that when defendant spotted the victim getting into her car, defendant said, "I want to rob the lady for her Cadillac." Williams testified that the three approached the victim in her driveway, and defendant pointed a gun at her and demanded the keys to the vehicle. The victim threw the keys and began to scream. At that point, defendant hit the victim with the gun and ordered Williams and Sims to place the victim in the car. Defendant's action in confining the victim was clearly meant to facilitate the larceny of the car. The victim was screaming, and defendant acted so as to prevent the victim from calling attention to the crime.

Substantial evidence also was presented that defendant continued to confine the victim in order to facilitate his repeated assaults upon her with a deadly weapon. The evidence presented at trial indicated that defendant got in the backseat with the victim upon initially stealing the car. According to testimony, defendant repeatedly hit the victim in her face with the gun until she quit struggling and lay back quietly against the door. Defendant then had Sims stop the car, and the three confined the victim to the trunk of her car. The State's evidence at trial indicated that defendant continued to confine the victim in the back seat and in the trunk in order to facilitate the larceny of her vehicle and defendant's continued assaults upon the victim.

In addition, substantial evidence was presented that defendant confined the victim in order to facilitate the burning of her personal property. The three eventually drove the car to a secluded area and opened the trunk to check on the victim. Upon noticing that the victim was still alive, defendant closed the trunk, set fire to his coat, and threw it in the car. Defendant's actions in continuing to confine the victim facilitated the burning of the car.

While it may have been unnecessary to confine, restrain, or remove the victim in order to accomplish any of the defendant's

crimes, substantial evidence was presented that defendant did, in fact, make the decision to confine, restrain, and remove the victim in order to facilitate larceny of a motor vehicle, assault with a deadly weapon, and burning of personal property. Substantial evidence also was presented that defendant's actions were meant to terrorize the victim. Defendant beat the victim, yelled at her, and confined her to the trunk of her car for hours. Defendant's actions resulted in serious injury, and ultimately death, to the victim. Therefore, each element of first-degree kidnapping was established. The evidence presented by the State was sufficient to submit each of these alternative theories of first-degree kidnapping to the jury. This assignment of error is overruled.

[8] Defendant's seventh assignment of error is that the trial court erred in allowing a prior statement of witness Chad Williams into evidence for the purpose of corroborating his trial testimony. Defendant contends that the prior statement was different from Williams' trial testimony and, therefore, not corroborative. However, defendant failed to object at trial or properly preserve this issue for appellate review.

Rule 10(b)(1) of the North Carolina Rules of Appellate Procedure states that "[i]n order to preserve a question for appellate review, a party must have presented to the trial court a timely request, objection or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context." N.C. R. App. P. 10(b)(1). In this case, defendant did not object to the testimony of Agent Jay Tilley regarding various prior statements made by the State's witness, Chad Williams. Codefendant Sims made an objection to the testimony, arguing that it was repetitive and noncorroborative. Defendant never separately objected or joined in codefendant Sims' objection, thereby waiving his right to appellate review.

Defendant has further waived his opportunity for plain error review of this issue. Rule 10(c)(4) of the North Carolina Rules of Appellate Procedure requires that an assignment of error be "specifically and distinctly contended to amount to plain error." N.C. R. App. P. 10(c)(4). Defendant failed to specifically assert plain error. He therefore failed to properly preserve this issue for appellate review. This assignment of error is overruled.

[9] Defendant's eighth assignment of error is that the trial court erred in submitting the charges of first-degree murder and first-degree kid-

napping based on the victim having been seriously injured because the two charges together violate double jeopardy principles. Defendant failed to object to submission of these charges at trial, and he has therefore failed to properly preserve this issue for appellate review.

"It is well settled that an error, even one of constitutional magnitude, that defendant does not bring to the trial court's attention is waived and will not be considered on appeal." *State v. Wiley*, 355 N.C. 592, 615, 565 S.E.2d 22, 39 (2002), *cert. denied*, 537 U.S. 1117, 154 L. Ed. 2d 795 (2003). Here, not only did defendant fail to raise the issue at trial, he failed to properly raise double jeopardy in his assignments of error. Defendant refers to the following assignment of error as the basis for his double-jeopardy argument:

> 34. The trial court committed reversible or, in the alternative, plain error in overruling defendant's objection to an instruction on kidnapping for the purpose of committing an assault with a deadly weapon inflicting serious injury, as this instruction was not supported by the evidence and the applicable legal authorities, thereby denying defendant his federal and state constitutional rights to a fair trial, due process of law, equal protection of the law, and freedom from cruel and unusual punishment.

This assignment of error makes no reference to double jeopardy or submission of a first-degree murder charge. The transcript pages cited, likewise, do not reference double jeopardy. "Our scope of appellate review is limited to those issues set out in the record on appeal." *State v. Hamilton*, 351 N.C. 14, 22, 519 S.E.2d 514, 519 (1999), *cert. denied*, 529 U.S. 1102, 146 L. Ed. 2d 783 (2000). Given that defendant failed to raise double jeopardy at trial, and his assignment of error makes no reference to the issue, he has not properly preserved the issue for our review. This assignment of error is overruled.

[10] Defendant's ninth assignment of error is that the trial court erred in instructing the jury and submitting a verdict form which did not require the jury to be unanimous as to the purpose for which the victim was kidnapped. We note at the outset that it is unclear whether defendant objected to the kidnapping instruction at the trial level on this particular basis as required by Rule 10(b)(1). However, even if defendant properly preserved this issue for appellate review, we conclude there was no error.

The trial court instructed the jury as to first-degree kidnapping, in accord with the pattern jury instructions, as follows:

> The elements of first-degree kidnapping under the theory of facilitating a felony or inflicting serious injury are:
>
> First, that the defendant, or someone with whom he was acting in concert, unlawfully confined a person, Elleze Kennedy, that is, imprisoned her within a given area or restrained a person, that is, restricted her freedom of movement, or removed a person from one place to another.
>
> Second, that the person, Elleze Kennedy, did not consent to this confinement or restraint or removal.
>
> Third, that the defendant, or someone with whom he was acting in concert, confined or restrained or removed that person for the purpose of facilitating the defendant's commission, or the commission by someone with whom he was acting in concert, of felonious larceny of a vehicle, or burning of personal property, or assault with a deadly weapon inflicting serious injury, or for the purpose of doing serious bodily injury to that person.

Similar instructions were given when the trial court instructed the jury on kidnapping as an underlying felony to support a conviction for felony murder. Defendant contends that the trial court's disjunctive instructions were fatally ambiguous because the jury could have convicted defendant without a unanimous decision that defendant confined, restrained, or removed the victim for the purpose of committing a specific crime. We disagree.

Two lines of cases have developed regarding the use of disjunctive jury instructions. *State v. Diaz* stands for the proposition that

> a disjunctive instruction, which allows the jury to find a defendant guilty if he commits either of two underlying acts, *either of which is in itself a separate offense*, is fatally ambiguous because it is impossible to determine whether the jury unanimously found that the defendant committed one particular offense.

State v. Lyons, 330 N.C. 298, 302-03, 412 S.E.2d 308, 312 (1991) (citing *Diaz*, 317 N.C. 545, 346 S.E.2d 488 (1986). In such cases, the focus is on the conduct of the defendant. *Id.* at 307, 412 S.E.2d at 314.

In contrast, this Court has recognized a second line of cases standing for the proposition that "if the trial court merely instructs the jury disjunctively as to various alternative acts *which will establish an element of the offense*, the requirement of unanimity is satisfied." *Lyons*, 330 N.C. at 302-03, 412 S.E.2d at 312 (citing *State v. Hartness*, 326 N.C. 561, 391 S.E.2d 177 (1990)). In this type of case, the focus is on the intent or purpose of the defendant instead of his conduct.

The present case falls into the *Hartness* line of cases. N.C.G.S. § 14-39(a) provides that a defendant is guilty of kidnapping if he

> shall unlawfully confine, restrain, or remove from one place to another, any other person . . . without the consent of such person . . . if such confinement, restraint or removal is for the purpose of:
>
> (1) Holding such other person for a ransom or as a hostage or using such other person as a shield; or
>
> (2) Facilitating the commission of any felony or facilitating flight of any person following the commission of a felony; or
>
> (3) Doing serious bodily harm to or terrorizing the person so confined, restrained or removed or any other person; or
>
> (4) Holding such other person in involuntary servitude in violation of G.S. 14-43.2.

N.C.G.S. § 14-39(a). This statute provides numerous routes by which a defendant may be convicted of first-degree kidnapping. Ultimately, however, a defendant can only be found guilty and punished once. It is not necessary for the State to prove, nor for the jury to find, that a defendant committed a particular act other than that of confining, restraining, or removing the victim. Beyond that, a defendant's intent or purpose is the focus, thus placing the case *sub judice* squarely within the *Hartness* line of cases. The trial court's instructions and the verdict form were proper. This assignment of error is overruled.

[11] Defendant's tenth assignment of error is that the trial court erred in submitting the (e)(6) aggravating circumstance that the murder was committed for pecuniary gain because the evidence did not show that defendant killed the victim to obtain money.

At the beginning of the sentencing proceeding charge conference, the State requested submission of the pecuniary gain aggravating cir-

cumstance, as well as several other aggravating circumstances for consideration during the sentencing for defendant's first-degree murder conviction. Defendant objected solely on the basis of double counting and argued that the jurors should not be permitted to use larceny of a car to support two different aggravating circumstances: (1) that the murder was committed while the defendant was engaged in the commission of a first-degree kidnapping, N.C.G.S. § 15A-2000(e)(5), and (2) that the murder was committed for pecuniary gain, N.C.G.S. § 15A-2000(e)(6). In response to defendant's concerns of double counting, the trial court limited the evidence supporting the aggravating circumstance that defendant murdered the victim for pecuniary gain to evidence that money was taken from the victim's purse. The trial court also limited the evidence to support the aggravating circumstance that the murder was committed during the course of the kidnapping to evidence that defendant kidnapped the victim to facilitate the larceny of the car. Defendant approved the instructions after these changes were made.

Further, during argument on how to instruct the jury regarding the aggravating circumstances, defendant actually supplied the trial court with the language it used to instruct the jury for the pecuniary gain circumstance. At no time did defendant object or argue that the evidence was insufficient to submit the pecuniary gain aggravating circumstance. The only objection defendant made was that the same evidence was being used to support more than one aggravating circumstance. These concerns were alleviated when the trial court limited the evidence for the aggravating circumstances and defendant agreed to the changes.

"Defendant may not swap horses after trial in order to obtain a thoroughbred upon appeal." *State v. Benson*, 323 N.C. 318, 322, 372 S.E.2d 517, 519 (1988); *see also State v. Sharpe*, 344 N.C. 190, 194, 473 S.E.2d 3, 5 (1996); *State v. Frye*, 341 N.C. 470, 496, 461 S.E.2d 664, 677 (1995), *cert. denied*, 517 U.S. 1123, 134 L. Ed. 2d 526 (1996).

Defendant did not object to the sufficiency of the evidence to support the pecuniary gain aggravating circumstance at trial and has not preserved this issue for appellate review. N.C. R. App. P. 10(b)(1). In fact, defendant expressly approved the action of the trial court to which he now objects. Because defendant did not properly preserve this issue for our review, this assignment of error should be overruled.

Even if defendant had properly preserved this issue for appeal, he has failed to demonstrate that the trial court erred in submitting the aggravating circumstance that the murder was committed for pecuniary gain, specifically to obtain money. " 'In determining the sufficiency of the evidence to submit an aggravating circumstance to the jury, the trial court must consider the evidence in the light most favorable to the State, with the State entitled to every reasonable inference to be drawn therefrom.' " *State v. Anthony*, 354 N.C. 372, 434, 555 S.E.2d 557, 596 (2001) (quoting *State v. Syriani*, 333 N.C. 350, 392, 428 S.E.2d 118, 141, *cert. denied*, 510 U.S. 948, 126 L. Ed. 2d 341 (1993)), *cert. denied*, 536 U.S. 930, 153 L. Ed. 2d 791 (2002). In order to submit the pecuniary gain aggravating circumstance, there must be evidence that defendant was motivated to kill, at least in part, for money or something of value. *State v. White*, 355 N.C. 696, 710, 565 S.E.2d 55, 64 (2002), *cert. denied*, 537 U.S. 1163, 154 L. Ed. 2d 900 (2003). However, financial gain need not be defendant's primary motivation. *State v. Davis*, 353 N.C. 1, 36, 539 S.E.2d 243, 266 (2000), *cert. denied*, 534 U.S. 839, 151 L. Ed. 2d 55 (2001).

The evidence at trial showed that defendant wished to leave Newton Grove but had no car and no job. Therefore, in order to leave town, defendant needed a means of transportation and money to finance his trip. It is reasonable to infer, based on the evidence, that defendant acted for his own pecuniary gain when he kidnapped the victim, stole her car, looked through her purse, and took her money. While obtaining a car may have been defendant's primary motivation, it may be reasonably inferred from the evidence that he was also motivated by the need for money.

The fact that defendant killed the victim after he had obtained the money from her purse is irrelevant. This Court addressed the issue in *State v. Oliver* and determined that the hope of pecuniary gain and the murder itself were "inextricably intertwined." 302 N.C. 28, 62, 274 S.E.2d 183, 204 (1981). The hope of pecuniary gain motivated the murder which was ultimately committed in an effort to enjoy the fruits of the crime. *Id.* The evidence here showed that defendant unequivocally told his codefendants that he had no intention of leaving a witness. It is reasonable to infer from the evidence that defendant, motivated by the hope for pecuniary gain, kidnapped the victim, stole her car and her money, and then killed her in an attempt to elude the authorities. Considering the evidence in the light most favorable to the State, we hold that there was sufficient evidence to support submission of the pecuniary gain aggravating circumstance based on

defendant's theft of money from the victim's purse. This assignment of error is overruled.

On 7 May 2004, this Court allowed defendant's motion to amend the record on appeal and motion to file a supplemental brief addressing two additional assignments of error. In one of defendant's additional assignments of error, he contends that the trial court improperly and unconstitutionally instructed the jury on the pecuniary gain aggravating circumstance. Defendant failed to object to this jury instruction, and this Court is limited to a plain error review. *See Odom*, 307 N.C. at 659, 300 S.E.2d at 378. However, a review of the record shows that not only did defendant fail to object to the trial court's jury instruction regarding pecuniary gain, he actually supplied the trial court with the language that it used in instructing the jury on this aggravating circumstance.

This Court has consistently denied appellate review to defendants who have attempted to assign error to the granting of their own requests. In *State v. Basden*, the defendant requested a jury instruction on a mitigating circumstance and expressed his satisfaction with the proposed jury instruction when read by the trial court. 339 N.C. 288, 302, 451 S.E.2d 238, 246 (1994), *cert. denied*, 515 U.S. 1152, 132 L. Ed. 2d 845 (1995). The trial court instructed the jury in accordance with the defendant's request, and the defendant voiced no objection. *Id.* On appeal, the defendant challenged the language used in the instruction. *Id.* This Court rejected the defendant's contention and stated: "Having invited the error, defendant cannot now claim on appeal that he was prejudiced by the instruction." *Id.* at 303, 451 S.E.2d at 246; *see also* N.C.G.S. § 15A-1443(c) (2003); *State v. Harris*, 338 N.C. 129, 150, 449 S.E.2d 371, 380 (1994), *cert. denied*, 514 U.S. 1100, 131 L. Ed. 2d 752 (1995); *State v. Weddington*, 329 N.C. 202, 210, 404 S.E.2d 671, 677 (1991).

Here, the evidence shows that the trial court and the State agreed with defendant's request to limit the instruction on the pecuniary gain aggravating circumstance to the money taken from Ms. Kennedy's purse. The trial court and the State further agreed to limit the instruction on the aggravating circumstance that the murder was committed during the commission of a first-degree kidnapping to evidence that the victim was kidnapped to facilitate the larceny of the car. The record shows that these instructions were so modified in response to defendant's concerns.

Furthermore, reading the jury instruction as a whole, we cannot say as a matter of law that the error, if any, rose to the level of plain error such that there is a reasonable probability that the result would have been different had the error not occurred. *State v. Collins*, 334 N.C. 54, 62, 431 S.E.2d 188, 193 (1993). This assignment of error is overruled.

[12] In defendant's other additional assignment of error set forth in his supplemental brief, he contends that the trial court erred by overruling his objection to the admission of a testimonial statement made by a witness who was not found to be unavailable and had never been subjected to cross-examination by defendant. During the sentencing phase of defendant's trial, one of the aggravating circumstances upon which the State relied was defendant's commission of a prior crime of violence. *See* N.C.G.S. § 15A-2000(e)(3) (2003). To prove this aggravating circumstance, the State introduced an indictment and judgment against defendant for a prior common-law robbery. The State also called Officer John Conerly to testify regarding the incident because he had investigated the robbery and taken a statement from the victim at the time of the crime. The prosecutor explained, "[T]he victim is not available. The victim was a Hispanic and has left, we tracked, pulled the record, he's left the state and possibly the country." The State offered no other evidence to prove the victim's unavailability, and the trial court made no findings of fact or conclusions of law regarding unavailability.

Officer Conerly testified that he was the Chief of Police in Newton Grove in 1998 when he received a call about a robbery. Officer Conerly stated that he investigated the crime and took a statement from Jose Gasca, the victim, regarding the robbery. The statement provided:

> He [Gasca] stated that he was in West Hunting and Fishing. That he had seven hundred dollars, I believe he was sending back to his sister in Mexico. That someone ran up behind him and pushed and shoved him, grabbed his money. That he chased them outside. That they jumped into a vehicle and had taken off, and that he was struggling with the fella who was getting in the vehicle. That he cut him with what he thought was a knife.

In *Crawford v. Washington*, ––– U.S. –––, 158 L. Ed. 2d 177 (2004), the United States Supreme Court overruled *Ohio v. Roberts*, 448 U.S. 56, 65 L. Ed. 2d 597 (1980), and held the Confrontation Clause bars out-of-court testimony by a witness unless the witness

was unavailable and the defendant had a prior opportunity to cross-examine him, regardless of whether the trial court deems the statements reliable. In *Crawford*, the Court held:

> Where testimonial statements are involved, we do not think the Framers meant to leave the Sixth Amendment's protection to the vagaries of the rules of evidence, much less to amorphous notions of "reliability." . . . Admitting statements deemed reliable by a judge is fundamentally at odds with the right of confrontation. To be sure, the Clause's ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination.

Id. at ––, 158 L. Ed. 2d at 199.

Here, the State presented Gasca's statement relating details of the robbery through the testimony of Officer Conerly. The only evidence of Gasca's unavailability was the State's assertion. The State presented no evidence of the efforts it took to procure Gasca beyond stating that it had "pulled the record" and found that Gasca had left the state. "[O]nce the [S]tate decides to present the testimony of a witness to a capital sentencing jury, the Confrontation Clause requires the [S]tate to undertake good-faith efforts to secure the 'better evidence' of live testimony before resorting to the 'weaker substitute' of former testimony." *State v. Nobles*, 357 N.C. 433, 441, 584 S.E.2d 765, 771 (2003) (quoting *United States v. Inadi*, 475 U.S. 387, 394-95, 89 L. Ed. 2d 390, 398 (1986)). The evidence presented by the State of its efforts to find Gasca does not amount to the "good-faith efforts" required by *Nobles*.

Further, the admission of Gasca's statement by Officer Conerly violates the cross-examination requirements of *Crawford*. "Where testimonial evidence is at issue . . . the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination." *Crawford*,–– U.S. at ––, 158 L. Ed. 2d at 203. In *Crawford*, the Supreme Court failed to spell out a comprehensive definition of "testimonial" but stated, "[w]hatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations." *Id.* The Court also declined to define "police interrogation" and stated in footnote four: "Just as various definitions of 'testimonial' exist, one can imagine various definitions of 'interro-

gation,' and we need not select among them in this case." *Id.* at —— n.4, 158 L. Ed. 2d at 194 n.4. A witness's "recorded statement, knowingly given in response to structured police questioning, qualifies under any conceivable definition." *Id.*

Here, the statement made by Gasca was in response to structured police questioning by Officer Conerly regarding the details of the robbery committed by defendant. There can be no doubt that this statement was made to further Officer Conerly's investigation of the crime. Gasca's statement contributed to defendant's arrest and conviction of common-law robbery. Therefore, Gasca's statement is testimonial in nature, triggering the requirement of cross-examination set forth by *Crawford*.

The record is devoid of evidence that defendant had a prior opportunity to cross-examine Gasca at any point before Gasca's statement was introduced into evidence through the testimony of Officer Conerly. Therefore, the trial court erred in allowing the State to introduce Gasca's statement through Officer Conerly.

We now turn our attention to whether the trial court's error prejudiced defendant. Because this error is one with constitutional implications, the State bears the burden of proving that the error was harmless beyond a reasonable doubt. N.C.G.S. § 15A-1443(b). One way the State may meet its burden is by showing that there is overwhelming evidence of defendant's guilt. *State v. Autry*, 321 N.C. 392, 400, 364 S.E.2d 341, 346 (1988).

At trial, Officer Conerly first read defendant's statement admitting to committing the robbery against Gasca. Officer Conerly then proceeded to read into evidence Gasca's statement that he was robbed and cut by defendant. The substance of Gasca's statement was already in evidence, based on defendant's own statement and Officer Conerly's observations. Defendant's cross-examination of Officer Conerly further confirmed that not only did defendant confess to committing the crime, but that defendant thereafter pled guilty to common-law robbery. Defendant contends that he was prejudiced because Gasca's statement was the only evidence that the robbery was violent and that without this statement the jury may have rejected this aggravating circumstance. We disagree.

The aggravating circumstance of committing a prior crime of violence can be found if the defendant has been previously convicted of a felony involving the use or threat of violence to a person, not just the use of violence. Here, the indictment and judgment presented into

evidence show that defendant pled guilty to common-law robbery. The elements of common-law robbery are " ' "the felonious, non-consensual taking of money or personal property from the person or presence of another by means of violence or fear." *State v. Smith*, 305 N.C. 691, 700, 292 S.E.2d 264, 270, *cert. denied*, 459 U.S. 1056, 74 L. Ed. 2d 622 (1982).' " *State v. Moss*, 332 N.C. 65, 72, 418 S.E.2d 213, 217 (1992) (quoting *State v. Herring*, 322 N.C. 733, 739-40, 370 S.E.2d 363, 368 (1988)). Therefore, defendant's guilty plea to common-law robbery was an admission of the commission of a felony involving the use or threat of violence even without the erroneous admission of Gasca's statement that defendant robbed him and cut him with a knife. Since defendant's plea of guilty to common-law robbery sufficiently established the aggravating circumstance in and of itself, the trial court's erroneous admission of Gasca's statement is harmless error beyond a reasonable doubt. This assignment of error is overruled.

[13] Defendant's eleventh assignment of error is that the trial court erred in overruling defendant's objection to the submission of the (f)(1) statutory mitigating circumstance that he had no significant prior criminal history.

During the charge conference portion of the sentencing proceeding, the trial court stated its intention to submit the (f)(1) mitigating circumstance for the jury's consideration. Defendant objected and requested that the jury be instructed that defendant objected to the submission of this mitigating circumstance and that the submission was required by law. The trial court granted defendant's request. At sentencing, the trial court instructed the jury on the mitigating circumstance and made it clear that defendant had not requested it. The trial court listed defendant's prior crimes, which included felony possession of stolen goods, felony common-law robbery, misdemeanor possession of stolen goods, misdemeanor larceny, misdemeanor communicating a threat, use of alcohol while under age, and use of illegal drugs. Defendant also informed the jury that he had not requested the instruction and that it was required by law.

Defendant argues that because he specifically objected to the submission of the mitigating circumstance and because no rational jury could have found it from the evidence presented at trial, the trial court erred in submitting it to the jury. We disagree.

> "The test governing the decision to submit the (f)(1) mitigator is 'whether a rational jury could conclude that defendant had

> no *significant* history of prior criminal activity.' If so, the trial court has no discretion; the statutory mitigating circumstance must be submitted to the jury, without regard to the wishes of the State or the defendant."

State v. White, 343 N.C. 378, 394-95, 471 S.E.2d 593, 602-03 (quoting *State v. Walker*, 343 N.C. 216, 223, 469 S.E.2d 919, 922, *cert. denied*, 519 U.S. 901, 136 L. Ed. 2d 180 (1996)), *cert. denied*, 519 U.S. 936, 136 L. Ed. 2d 229 (1996) (internal citations omitted). The circumstance under consideration here is after all a statutory mitigating circumstance which, if found, must be taken as having value to defendant. Any reasonable doubt regarding whether to submit a mitigating circumstance must be resolved in favor of a defendant. *State v. Smith*, 347 N.C. 453, 469, 496 S.E.2d 357, 366-67, *cert. denied*, 525 U.S. 845, 142 L. Ed. 2d 91 (1998). The trial court should focus on " 'whether the criminal activity is such as to influence the jury's sentencing recommendation' " in determining if a defendant's history is "significant." *State v. Blakeney*, 352 N.C. 287, 319, 531 S.E.2d 799, 821 (2000) (quoting *State v. Greene*, 351 N.C. 562, 569, 528 S.E.2d 575, 580, *cert. denied*, 531 U.S. 1041, 148 L. Ed. 2d 543 (2000)), *cert. denied*, 531 U.S. 1117, 148 L. Ed. 2d 780 (2001). The nature and age of a defendant's criminal activities are important to the trial court's analysis of whether a rational juror could reasonably find the "no significant history of prior activity" mitigating circumstance. *State v. Jones*, 346 N.C. 704, 716, 487 S.E.2d 714, 721 (1997). However, " 'the mere number of criminal activities is not dispositive.' " *Id.* (quoting *State v. Geddie*, 345 N.C. 73, 102, 478 S.E.2d 146, 161 (1996), *cert. denied*, 522 U.S. 825, 139 L. Ed. 2d 43 (1997)).

Here, the trial court properly submitted the (f)(1) mitigating circumstance because a rational jury could have found from the evidence submitted that defendant had no *significant* history of prior criminal activity. Most of defendant's prior convictions were crimes against property. Defendant had been convicted of common-law robbery but had not repeatedly engaged in threatening or violent behavior beyond that one conviction. Defendant's convictions for use of drugs and alcohol, while prior convictions, were not significant enough to keep this mitigating circumstance from the jury. These same convictions were used to support two other mitigating circumstances. Defendant received no active prison time for any of his prior convictions, and although defendant's history was fairly recent, numerous mitigating circumstances based on his age and family history were presented for the jury to consider when viewing his crimi-

nal history. In light of these circumstances, the trial court did not err in determining that a rational juror could have reasonably found the mitigating circumstance that defendant had no significant history of prior criminal activity.

Even assuming *arguendo* that the trial court erred in submitting the (f)(1) mitigating circumstance to the jury, this Court has held that " '[a]bsent extraordinary facts . . . , the erroneous submission of a mitigating circumstance is harmless.' " *State v. Bone*, 354 N.C. 1, 16, 550 S.E.2d 482, 492, (2001) (quoting *Walker*, 343 N.C. at 223, 469 S.E.2d at 923), *cert. denied*, 535 U.S. 940, 152 L. Ed. 2d 231 (2002).

Defendant contends that extraordinary facts are presented when the trial court submits the (f)(1) (no significant history of criminal activity) mitigating circumstance and the State also relies on the (e)(3) aggravating circumstance (a prior conviction for a crime involving violence to another person). "This Court has repeatedly upheld submission of the (f)(1) mitigating circumstance in cases where the (e)(3) aggravating circumstance was submitted to the jury." *Blakeney*, 352 N.C. at 319, 531 S.E.2d at 821; *see also State v. Ball*, 344 N.C. 290, 310-11, 313, 474 S.E.2d 345, 357, 359 (1996), *cert. denied*, 520 U.S. 1180, 137 L. Ed. 2d 561 (1997); *Walker*, 343 N.C. at 224-26, 469 S.E.2d at 923-24; *State v. Brown*, 315 N.C. 40, 61-63, 337 S.E.2d 808, 824-25 (1985), *cert. denied*, 476 U.S. 1165, 90 L. Ed. 2d 733 (1986), *overruled on other grounds by State v. Vandiver*, 321 N.C. 570, 364 S.E.2d 373 (1988).

Defendant also contends that because the prosecutor argued to the jury that it should reject the (f)(1) mitigating circumstance, the mitigating circumstance was effectively turned into an aggravating circumstance. We disagree.

In *Walker*, this Court examined the issue of a prosecutor's conduct in addressing the jury regarding the (f)(1) mitigating circumstance when defendant had specifically objected to its submission. The Court stated that:

> [P]rosecutors must not argue to the jury that a defendant has requested that a particular mitigating circumstance be submitted or has sought to have the jury find that circumstance, when the defendant has in fact objected to the submission of that particular mitigating circumstance. Additionally, the better practice when a defendant has objected to the submission of a particular mitigating circumstance is for the trial court to instruct the jury

> that the defendant did not request that the mitigating circumstance be submitted. In such instances, the trial court also should inform the jury that the submission of the mitigating circumstance is required as a matter of law because there is some evidence from which the jury could, but is not required to, find the mitigating circumstance to exist.

Walker, 343 N.C. at 223-24, 469 S.E.2d at 923. Here, the prosecutor never argued to the jury that defendant had requested the (f)(1) mitigating circumstance. All the prosecutor did was explain to the jury why it should reject the mitigating circumstance. Further, the trial court specifically instructed the jury that defendant did not request the mitigating circumstance and that the trial court was required by law to give the instruction. Defendant also explained to the jury that he had not requested the mitigating circumstance.

Defendant has failed to show that the trial court erred in submitting the (f)(1) mitigating circumstance to the jury or that the prosecutor's actions in addressing the jury regarding the mitigating circumstance were error. But, even if the trial court had erred in submitting the mitigating circumstance to the jury, defendant has failed to show that extraordinary circumstances exist which would cause the error to be prejudicial to defendant. This assignment of error is overruled.

[14] Defendant's twelfth assignment of error is that the trial court erred in denying defendant's request to instruct the jury, throughout its sentencing instructions to the jury, that "life imprisonment" meant "life in prison without parole."

During the charge conference, defendant's codefendant requested that the trial court continuously define the term "life imprisonment" as meaning "life without parole." Defendant joined in this request. The trial court denied the request and relied on the pattern jury instructions. Defendant also requested that the trial court modify the verdict sheet to reflect "life without parole." This request was denied as well.

Section 15A-2002 of the General Statutes states: "The judge shall instruct the jury, in words substantially equivalent to those of this section, that a sentence of life imprisonment means a sentence of life without parole." N.C.G.S. § 15A-2002 (2003). This Court has held that when a trial court instructs the jury pursuant to N.C.G.S. § 15A-2002, the trial court has no duty to inform the jury "that a life sentence

means life without parole every time [it] mention[s] a life sentence." *State v. Bonnett*, 348 N.C. 417, 448-49, 502 S.E.2d 563, 584 (1998), *cert. denied*, 525 U.S. 1124, 142 L. Ed. 2d 907 (1999); *see also Davis*, 353 N.C. at 40-41, 539 S.E.2d at 269 ("We find nothing in the statute that requires the judge to state 'life imprisonment without parole' every time he alludes to or mentions the alternative sentence.").

Here, the jurors twice heard the term "life without parole" as one of the two sentencing alternatives in the trial court's preliminary instructions during jury *voir dire*. The jurors were questioned during *voir dire* with the term "life without parole" used numerous times as one of the sentencing alternatives. One juror even demonstrated an understanding of what the term meant under questioning by defendant as to what life imprisonment meant by stating, "I meant life in prison without any chance of getting out." Further, during closing arguments, the State and defense counsel frequently referred to "life without parole."

The trial court began sentencing phase instructions by saying:

> Members of the Jury, having found the defendants Antwaun Kyral Sims and Bryan Christopher Bell guilty of murder in the first degree, it is now your duty to recommend to the Court whether each defendant should be sentenced to death or life imprisonment. *A sentence of life imprisonment means a sentence of life without parole.* The Court has allowed the defendants' cases to be joined for this sentencing hearing. Even though the defendants are joined for this sentencing hearing, you must determine the sentence of each defendant individually.

(Emphasis added.) After this instruction, the trial court used the term "life imprisonment." Based on this instruction, the trial court instructed the jury in accordance with N.C.G.S. § 15A-2002 and with corresponding case law that a "sentence of life imprisonment means a sentence of life without parole." This instruction, in conjunction with the jury *voir dire* and the closing arguments of the parties in which the term "life without parole" was used numerous times, makes it clear that the jurors had no reasonable basis for misunderstanding the meaning of the term "life imprisonment."

[15] Defendant also contends that the trial court erred by submitting the "Issues and Recommendation as to Punishment" form to the jury with sentencing alternatives of "death" or "life imprisonment" instead of "death" or "life imprisonment without parole." We disagree.

This Court has previously held that the "Issues and Recommendation as to Punishment" form need not describe the punishment as "life imprisonment without parole" when the trial court instructs the jury that life imprisonment means life without parole. *State v. Gainey*, 355 N.C. 73, 110-11, 558 S.E.2d 463, 487, *cert. denied*, 537 U.S. 896, 154 L. Ed. 2d 165 (2002). The trial court's instructions regarding life imprisonment were in accordance with N.C.G.S. § 15A-2002, and the jurors were informed numerous times as to the meaning of "life imprisonment." Defendant's assignment of error on this issue is overruled.

[16] Defendant's thirteenth assignment of error is that the trial court erred by failing to intervene and censor the prosecutor's sentencing proceeding closing argument when each juror was called upon by name to impose a sentence of death. Defendant argues that the prosecutor improperly appealed to the emotions of the jurors. Defendant concedes that he failed to object to this argument and therefore this Court is limited to reviewing this issue to determine whether the conduct was so grossly improper that the trial court erred in failing to intervene *ex mero motu* to correct the error. *State v. Sexton*, 336 N.C. 321, 348-49, 444 S.E.2d 879, 894-95, *cert. denied*, 513 U.S. 1006, 130 L. Ed. 2d 429 (1994). "[T]he impropriety of the argument must be gross indeed in order for this Court to hold that a trial judge abused his discretion in not recognizing and correcting *ex mero motu* an argument which defense counsel apparently did not believe was prejudicial when he heard it." *State v. Johnson*, 298 N.C. 355, 369, 259 S.E.2d 752, 761 (1979).

This Court has previously considered this issue and ruled against defendant's position. *See State v. Wynne*, 329 N.C. 507, 524-25, 406 S.E.2d 812, 821 (1991). Just as in those cases, the prosecutor here did not improperly appeal to the jurors' emotions when asking them to impose the death penalty. Rather, the prosecutor was reminding the jurors that they had earlier averred that they could and would follow the law if the State proved what was required to impose the death penalty. "[T]he prosecutor in a capital case has a duty to strenuously pursue the goal of persuading the jury that the facts of the particular case at hand warrant imposition of the death penalty." *State v. Green*, 336 N.C. 142, 188, 443 S.E.2d 14, 41, *cert. denied*, 513 U.S. 1046, 130 L. Ed. 2d 547 (1994). Here, the prosecutor did nothing more than argue to the jurors that the State had proven its case and that the jurors should now impose the death penalty.

This argument is of a different nature than a defendant's emotional appeal to each individual juror to spare his life. *See State v. Holden*, 321 N.C. 125, 163, 362 S.E.2d 513, 536-37 (1987), *cert. denied*, 486 U.S. 1061, 100 L. Ed. 2d 935 (1988). A defendant's argument to each juror individually to spare his life is not based on the evidence presented at trial or the reasonable inferences that could be taken from it. *Id.* Defendant has failed to show that the prosecutor's sentencing arguments were grossly improper and that the trial court abused its discretion in failing to intervene *ex mero motu*. This assignment of error is overruled.

[17] Defendant's fourteenth assignment of error is that the trial court erred in submitting the death penalty to the jury as a potential punishment because the death penalty violates provisions of the International Covenant on Civil and Political Rights, which this country ratified on 8 September 1992. We first note that defendant failed to make this objection before the trial court and has not properly preserved this issue for appellate review. Beyond that, this Court has previously considered, and affirmed, the constitutionality of our death penalty against the backdrop of the International Covenant on Civil and Political Rights. *See Williams*, 355 N.C. at 586, 565 S.E.2d at 658; *State v. Smith*, 352 N.C. 531, 566, 532 S.E.2d 773, 795 (2000), *cert. denied*, 532 U.S. 949, 149 L. Ed. 2d 360 (2001). We see no reason to depart from our previous holdings in this regard. This assignment of error is overruled.

Defendant's fifteenth assignment of error is that the trial court erred in submitting the aggravating circumstance that this murder was especially heinous, atrocious, or cruel. Defendant first argues that N.C.G.S. § 15A-2000(e)(9) is unconstitutionally vague. However, we have previously considered and rejected this argument. *See e.g.*, *State v. Garcia*, 358 N.C. 382, 424, 597 S.E.2d 724, 753 (2004); *State v. Roache*, 358 N.C. 243, 327, 595 S.E.2d 381, 434 (2004); *State v. Miller*, 357 N.C. 583, 601, 588 S.E.2d 857, 869 (2003), *cert. denied*, —— U.S. ——, —— L. Ed. 2d ——, 72 U.S.L.W. 3768 (2004); *State v. Haselden*, 357 N.C. 1, 26, 577 S.E.2d 594, 610, *cert. denied*, —— U.S. ——, 157 L. Ed. 2d 382 (2003). We see no reason to depart from our previous holdings as to this issue.

[18] Defendant additionally argues that the trial court erred in submitting the (e)(9) aggravating circumstance because it was unsupported by the evidence. We disagree.

We have previously identified three types of murders which warrant submission of the (e)(9) aggravating circumstance. *See State v. Gibbs*, 335 N.C. 1, 61-62, 436 S.E.2d 321, 356 (1993), *cert. denied*, 512 U.S. 1246, 129 L. Ed. 2d 881 (1994). One type includes those killings that are physically agonizing or otherwise dehumanizing to the victim. *State v. Lloyd*, 321 N.C. 301, 319, 364 S.E.2d 316, 328, *judgment vacated on other grounds*, 488 U.S. 807, 102 L. Ed. 2d 18 (1988). Another type includes those killings involving psychological torture where the victim is left to her "last moments aware of but helpless to prevent impending death." *State v. Hamlet*, 312 N.C. 162, 175, 321 S.E.2d 837, 846 (1984). The final type includes those killings that "demonstrate[] an unusual depravity of mind on the part of the defendant beyond that normally present in first-degree murder." *Brown*, 315 N.C. at 65, 337 S.E.2d at 827.

When determining whether it is proper to submit the (e)(9) aggravating circumstance, evidence must be considered in the light most favorable to the State and every reasonable inference must be drawn in its favor. *State v. Flippen*, 349 N.C. 264, 270, 506 S.E.2d 702, 706 (1998), *cert. denied*, 526 U.S. 1135, 143 L. Ed. 2d 1015 (1999).

In the present case, the victim, an eighty-nine year old woman, was kidnapped from her own home, repeatedly beaten, and placed in the trunk of her own car to await most certain death. The victim fought to free herself from the trunk of her car, only to have the trunk lid repeatedly slammed down upon her. The victim was trapped in her car for hours, helpless and obviously in fear for her life. She struggled and fought for her life, ultimately losing the fight and dying alone in the trunk of her own car, which defendant had set on fire.

After reviewing the evidence presented at trial, in the light most favorable to the State, we conclude that there was substantial evidence for the jury to conclude that the victim was subjected to both physical and psychological torture beyond that present in most first-degree murders. Therefore, the trial court did not err in submitting the (e)(9) aggravating circumstance. This assignment of error is overruled.

Defendant's sixteenth assignment of error is that the trial court erred in failing to dismiss defendant's murder indictment because the indictment failed to specifically allege each element of first-degree murder. This Court has repeatedly held contrary to defendant's position. *See State v. Hunt*, 357 N.C. 257, 582 S.E.2d 593, *cert. denied*, 539

U.S. 985, 156 L. Ed. 2d 702 (2003); *State v. Braxton*, 352 N.C. 158, 531 S.E.2d 428 (2000), *cert. denied*, 531 U.S. 1130, 148 L. Ed. 2d 797 (2001); *State v. Wallace*, 351 N.C. 481, 528 S.E.2d 326, *cert. denied*, 531 U.S. 1018, 148 L. Ed. 2d 498 (2000). We have considered defendant's argument on this issue and find no reason to depart from our previous holdings. This assignment of error is overruled.

Defendant's seventeenth assignment of error is that the trial court committed plain error by instructing the jury, according to the pattern jury instructions, that unanimity was required for any answer to Issues I, III, and IV on the "Issues and Recommendation as to Punishment" form. As to Issue I, the trial court instructed the jury that it must be unanimous in its findings regarding the existence of aggravating circumstances. As to Issue III, the trial court instructed the jury that it must be unanimous in its decision as to whether the mitigating circumstances found were insufficient to outweigh the aggravating circumstances found by the jury. Finally, as to Issue IV, the trial court instructed the jury that if it unanimously determined that the mitigating circumstances were insufficient to outweigh the aggravating circumstances, it must then be unanimous in its decision as to whether the aggravating circumstances were sufficient to impose the death penalty. This Court has previously considered arguments regarding these jury instructions and has held contrary to defendant's position. *See State v. DeCastro*, 342 N.C. 667, 467 S.E.2d 653, *cert. denied*, 519 U.S. 896, 136 L. Ed. 2d 170 (1996); *State v. McLaughlin*, 341 N.C. 426, 462 S.E.2d 1 (1995), *cert. denied*, 516 U.S. 1133, 133 L. Ed. 2d 879 (1996); *State v. McCarver*, 341 N.C. 364, 462 S.E.2d 25 (1995), *cert. denied*, 517 U.S. 1110, 134 L. Ed. 2d 482 (1996). We have considered defendant's argument on this issue and find no reason to depart from our previous holdings. This assignment of error is overruled.

Defendant's eighteenth assignment of error is that the trial court erred by instructing the jury, according to the pattern jury instructions, that it had a duty to recommend a death sentence if it determined that mitigating circumstances were insufficient to outweigh aggravating circumstances and that the aggravating circumstances were sufficiently substantial to warrant the death penalty. This Court has previously held the pattern jury instruction at issue to be constitutional. *See State v. Skipper*, 337 N.C. 1, 57, 446 S.E.2d 252, 283 (1994), *cert. denied*, 513 U.S. 1134, 130 L. Ed. 2d 895 (1995); *State v. McDougall*, 308 N.C. 1, 26, 301 S.E.2d 308, 323-24, *cert. denied*, 464 U.S. 865, 78 L. Ed. 2d 173 (1983). We have considered defendant's

argument and see no reason to depart from our previous holdings. This assignment of error is overruled.

Defendant's nineteenth assignment of error is that the trial court erred by instructing the jury regarding defendant's burden of proof on mitigating circumstances and argues that the instruction was unconstitutionally vague due to the use of the term "satisfy." This Court has previously considered this argument and held contrary to defendant's position. *See State v. Payne*, 337 N.C. 505, 532-33, 448 S.E.2d 93, 109 (1994), *cert. denied*, 514 U.S. 1038, 131 L. Ed. 2d 292 (1995); *Skipper*, 337 N.C. at 58, 446 S.E.2d at 284. We have considered defendant's argument and see no reason to depart from our prior holdings. This assignment of error is overruled.

Defendant's twentieth assignment of error is that the trial court erred by instructing the jury that it was to determine whether factually proven nonstatutory mitigating circumstances had actual mitigating value. Defendant contends that such an instruction allows the jury to refuse to consider mitigating evidence in violation of the constitutional requirement that a sentencer consider and give effect to all mitigating evidence. However, nonstatutory mitigating circumstances, in and of themselves, do not have mitigating value as a matter of law. *State v. Lee*, 335 N.C. 244, 292, 439 S.E.2d 547, 572, *cert. denied*, 513 U.S. 891, 130 L. Ed. 2d 162 (1994). This Court has previously held that such an instruction to the jury does not violate the Constitution. *See State v. Robinson*, 336 N.C. 78, 117-18, 443 S.E.2d 306, 325 (1994), *cert. denied*, 513 U.S. 1089, 130 L. Ed. 2d 650 (1995); *State v. Hill*, 331 N.C. 387, 417-18, 417 S.E.2d 765, 780 (1992), *cert. denied*, 507 U.S. 924, 122 L. Ed. 2d 684 (1993). We have considered defendant's argument on this issue and see no reason to depart from our earlier holdings. This assignment of error is overruled.

Defendant's twenty-first assignment of error is that the trial court erred by instructing the jury, according to the pattern jury instructions, on a definition of aggravation that was unconstitutionally broad. This Court has previously considered this issue and ruled against defendant's position. *See Lee*, 335 N.C. at 288-89, 439 S.E.2d at 570-71; *State v. Hutchins*, 303 N.C. 321, 350-51, 279 S.E.2d 788, 806-07 (1981). We have considered defendant's argument and see no reason to depart from our earlier holdings. This assignment of error is overruled.

Defendant's twenty-second assignment of error is that the trial court erred in instructing the jury as to Issues III and IV on the "Issues

and Recommendation as to Punishment" form that each juror "may" consider mitigating circumstances found to exist in Issue II. Defendant argues that these instructions made consideration of proven mitigation discretionary rather than mandatory. This Court has previously ruled that such instructions are not erroneous. *See Gregory*, 340 N.C. at 418-19, 459 S.E.2d at 668-69; *Lee*, 335 N.C. at 286-87, 439 S.E.2d at 569-70. We have considered defendant's arguments and see no reason to depart from our prior holdings. This assignment of error is overruled.

Defendant's twenty-third assignment of error is that the trial court erred by instructing the jury that each juror could only consider at Issues III and IV the mitigating circumstances which that particular juror had found at Issue II. Defendant argues that this instruction unconstitutionally precluded the full and free consideration of mitigating evidence. This Court has previously considered this argument and ruled against defendant's position. *See Robinson*, 336 N.C. at 120-21, 443 S.E.2d at 326-27; *Lee*, 335 N.C. at 287, 439 S.E.2d at 569-70. We have considered defendant's arguments and see no reason to depart from our prior holdings. This assignment of error is overruled.

Defendant's twenty-fourth assignment of error is that the North Carolina death penalty statute is vague and overly broad, unconstitutionally applied, and cruel and unusual punishment. This Court has consistently held that North Carolina's capital sentencing statute, N.C.G.S. § 15A-2000, is constitutional on its face and as applied. *See State v. McKoy*, 327 N.C. 31, 394 S.E.2d 426 (1990); *State v. Barfield*, 298 N.C. 306, 259 S.E.2d 510 (1979), *cert. denied*, 448 U.S. 907, 65 L. Ed. 2d 1137 (1980). We have reviewed defendant's arguments and find no reason to depart from our prior holdings. This assignment of error is overruled.

[19] Having concluded that defendant's trial and capital sentencing proceeding were free of prejudicial error, we must now review the record and determine: (1) whether the evidence supports the aggravating circumstances found by the jury and upon which the sentencing court based its sentence of death; (2) whether the sentence was imposed under the influence of passion, prejudice, or any other arbitrary factor; and (3) whether the sentence is "excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." N.C.G.S. § 15A-2000(d)(2) (2003).

After a thorough review of the record on appeal, briefs, and oral arguments of counsel, we conclude that the evidence fully supports

the aggravating circumstances found by the jury. Additionally, we find no indication that the sentence of death in this case was imposed under the influence of passion, prejudice, or any other arbitrary factor. We therefore turn to our final statutory duty of proportionality review.

We conduct a proportionality review "to eliminate the possibility that a person will be sentenced to die by the action of an aberrant jury." *Holden*, 321 N.C. at 164-65, 362 S.E.2d at 537. In doing so, we must look at both the defendant and the crime. *State v. Watts*, 357 N.C. 366, 379, 584 S.E.2d 740, 750 (2003), *cert. denied*, —— U.S. ——, 158 L. Ed. 2d 370 (2004). In the present case, defendant was found guilty of first-degree murder, first-degree kidnapping, and burning of personal property. Following a capital sentencing proceeding, the jury found the existence of five aggravating circumstances: (1) defendant had been previously convicted of a felony involving the use or threat of violence, N.C.G.S. § 15A-2000(e)(3); (2) the murder was committed for the purpose of avoiding lawful arrest, N.C.G.S. § 15A-2000(e)(4); (3) the murder was committed while defendant was engaged in the commission of a first-degree kidnapping, N.C.G.S. § 15A-2000(e)(5); (4) the murder was committed for pecuniary gain, N.C.G.S. § 15A-2000(e)(6); and (5) the murder was especially heinous, atrocious, or cruel, N.C.G.S. § 15A-2000(e)(9).

The trial court submitted five statutory mitigating circumstances to the jury, including the "catchall" statutory mitigating circumstance, N.C.G.S. § 15A-2000(f)(9). However, the jury found only two statutory mitigating circumstances to exist: that the murder was committed while defendant was under the influence of mental or emotional disturbance, N.C.G.S. § 15A-2000(f)(2); and defendant's age at the time of the crime, N.C.G.S. § 15A-2000(f)(7). The trial court additionally submitted ten nonstatutory mitigating circumstances, of which the jury found six to exist: (1) a lack of adequate role modeling during defendant's formative years contributed to defendant's acceptance of peer pressure in forming his opinions and shaping his behavior; (2) defendant was intoxicated, reducing his ability to make appropriate judgments; (3) defendant has a desire to correct his deficiencies and make a positive contribution to society in the future; (4) defendant was negatively affected as a young teen by the family trauma caused by his father; (5) defendant had a chaotic and unstable home life lacking in parental guidance; and (6) defendant changed and began acting tough when his father entered into his life.

We begin our proportionality review by comparing this case to the eight cases where this Court has determined the sentence of death to be disproportionate. *See State v. Kemmerlin*, 356 N.C. 446, 573 S.E.2d 870 (2002); *Benson*, 323 N.C. 318, 372 S.E.2d 517; *State v. Stokes*, 319 N.C. 1, 352 S.E.2d 653 (1987); *State v. Rogers*, 316 N.C. 203, 341 S.E.2d 713 (1986), *overruled on other grounds by State v. Gaines*, 345 N.C. 647, 483 S.E.2d 396, *cert. denied*, 522 U.S. 900, 139 L. Ed. 2d 177 (1997), and by *Vandiver*, 321 N.C. 570, 364 S.E.2d 373; *State v. Young*, 312 N.C. 669, 325 S.E.2d 181 (1985); *State v. Hill*, 311 N.C. 465, 319 S.E.2d 163 (1984); *State v. Bondurant*, 309 N.C. 674, 309 S.E.2d 170 (1983); and *State v. Jackson*, 309 N.C. 26, 305 S.E.2d 703 (1983). After careful review, we conclude that this case is not substantially similar to any case in which this Court has previously found the death penalty disproportionate.

In conducting a proportionality review, we must also compare this case with prior cases where this Court has found the death penalty to be proportionate. *Haselden*, 357 N.C. at 31, 577 S.E.2d at 613. First, defendant was convicted on the basis of malice, premeditation and deliberation and under the felony murder rule. " 'The finding of premeditation and deliberation indicates a more cold-blooded and calculated crime.' " *Id.* at 30, 577 S.E.2d at 612 (quoting *State v. Artis*, 325 N.C. 278, 341, 384 S.E.2d 470, 506 (1989), *judgment vacated on other grounds*, 494 U.S. 1023, 108 L. Ed. 2d 604 (1990)). This Court has repeatedly noted that " 'a finding of first-degree murder based on theories of premeditation and deliberation and of felony murder is significant.' " *State v. Carroll*, 356 N.C. 526, 554-55, 573 S.E.2d 899, 917 (2002) (quoting *Bone*, 354 N.C. at 22, 550 S.E.2d at 495), *cert. denied*, 539 U.S. 949, 156 L. Ed. 2d 640 (2003).

Further, defendant was convicted of two additional crimes against the victim: first-degree kidnapping and burning of personal property. The jury found five aggravating circumstances in this case, including that the murder was committed during the commission of a first-degree kidnapping, N.C.G.S. § 15A-2000(e)(5), and that the murder was especially heinous, atrocious, or cruel, N.C.G.S. § 15A-2000(e)(9). This Court has previously determined that the (e)(5) and (e)(9) aggravating circumstances are sufficient, standing alone, to sustain a death sentence. *See Haselden*, 357 N.C. at 30, 577 S.E.2d at 612; *State v. Bacon*, 337 N.C. 66, 110 n.8, 446 S.E.2d 542, 566 n.8 (1994), *cert. denied*, 513 U.S. 1159, 130 L. Ed. 2d 1083 (1995).

Upon comparison of the present case with those in which we have previously conducted a proportionality review, we conclude that

this case is more similar to cases in which this Court has found the sentence of death proportionate than to those in which this Court has found the sentence of death disproportionate.

The inquiry into proportionality does not, however, end here. The similarities between this case and prior cases in which a sentence of death was found proportionate "merely serves as an initial point of inquiry." *State v. Daniels*, 337 N.C. 243, 287, 446 S.E.2d 298, 325 (1994), *cert. denied*, 513 U.S. 1135, 130 L. Ed. 2d 895 (1995). The final decision of whether a death sentence is disproportionate "ultimately rest[s] upon the 'experienced judgments' of the members of this Court." *Green*, 336 N.C. at 198, 443 S.E.2d at 47. Therefore, having thoroughly reviewed the entire record in this matter, and based upon the characteristics of defendant and his crime, we cannot conclude as a matter of law that the sentence of death in this case is disproportionate or excessive.

Accordingly, we hold that defendant received a fair trial and capital sentencing proceeding, free of prejudicial error.

NO ERROR.

ANNETTE EVANS, AS GUARDIAN *AD LITEM* FOR TYRONE HORTON v. HOUSING AUTHORITY OF THE CITY OF RALEIGH, NORTH CAROLINA

No. 216PA03

(Filed 7 October 2004)

1. Immunity— governmental—public housing authority—governmental function

A public housing authority created and operated pursuant to N.C.G.S. Ch. 157, like other municipal corporations, is entitled to immunity in tort and contract for acts undertaken by its agents and employees in the exercise of its governmental functions, but not for any proprietary functions it may undertake.

2. Immunity— governmental—public housing authority

A public housing authority performs a governmental function in providing housing for low and moderate income families and is entitled to rely on the doctrine of governmental immunity.

3. Immunity— governmental—public housing authority—waiver—purchase of liability insurance

A Chapter 157 housing authority has statutory authority to accept liability for its governmental functions by the purchase of insurance, and thus, can waive its sovereign immunity.

4. Immunity— governmental—public housing authority—remand of order denying motion to dismiss

The trial court's order denying defendant public housing authority's motion to dismiss plaintiff's claims arising from the use of lead paint on grounds of sovereign or governmental immunity is remanded, because: (1) the order did not contain findings of fact or conclusions of law; and (2) our Supreme Court is unable to discern whether the ruling below was premised upon defendant's insurance coverage.

On discretionary review pursuant to N.C.G.S. § 7A-31, prior to a determination by the Court of Appeals, of an order entered 9 January 2003 by Judge Narley L. Cashwell in Superior Court, Wake County. Heard in the Supreme Court 13 October 2003.

Stubbs & Perdue, P.A., by J. Michael Malone, for plaintiff-appellee.

Francis & Austin, PLLC, by Charles T. Francis and Alan D. Woodlief, Jr., for defendant-appellant.

Ward and Smith, P.A., by David L. Ward, Jr., for Eastern Carolina Regional Housing Authority, Mid-East Regional Housing Authority, and Washington Housing Authority, amici curiae.

EDMUNDS, Justice.

Plaintiff Tyrone Horton was born on 3 June 1992. On 18 June 2002, through his guardian *ad litem*, plaintiff filed the instant action in Wake County Superior Court. According to the allegations in the Complaint, defendant Housing Authority of the City of Raleigh, North Carolina owned and operated the property where plaintiff resided with his family from his birth until on or about 1 February 1996. The paint present in defendant's property was manufactured and sold before 1978 and contained greater than 0.5% lead by weight. When plaintiff's family leased the premises from defendant, paint dust and chips found at the home raised the lead hazard to levels exceeding the

standards in the North Carolina Administrative Code and the North Carolina General Statutes. Although defendant promised to repair the premises, no such repairs were undertaken. Plaintiff suffered lead poisoning, resulting in severe injuries.

After setting out these allegations in his Complaint, plaintiff pled numerous causes of action: (1) violation of the North Carolina Residential Rental Agreements Act, N.C.G.S. §§ 42-38 to -46; (2) breach of the implied warranty of habitability; (3) breach of the express warranty that the premises would be maintained in a fit and habitable condition; (4) negligence; (5) negligence *per se*; and (6) unfair and deceptive trade practices. Plaintiff also sought punitive damages.

On 19 August 2002, defendant filed a motion to dismiss. In its motion, defendant claimed that, pursuant to Rule 12(b)(2) of the North Carolina Rules of Civil Procedure, the court did not have personal jurisdiction over defendant. In the alternative, defendant contended that, pursuant to Rule 12(b)(1) of the North Carolina Rules of Civil Procedure, the court did not have subject matter jurisdiction over the case. Specifically, defendant alleged that it was organized in accordance with Chapter 157 of the North Carolina General Statutes, was invested with a governmental function, and was shielded from liability by sovereign or governmental immunity. Defendant further alleged that, to the extent it could waive its immunity pursuant to N.C.G.S. § 160A-485, it had not purchased insurance or participated in a risk retention pool that provided coverage for the claims asserted by plaintiff.

Defendant's motion was heard during the 16 December 2002 term of Wake County Superior Court. After considering the arguments of counsel and reviewing the pleadings and various documents and exhibits submitted by the parties, the trial court determined that "[d]efendant's Motion to Dismiss based on sovereign or governmental immunity should be denied." On 5 February 2003, defendant filed a notice of appeal to the North Carolina Court of Appeals. *See Mabrey v. Smith*, 144 N.C. App. 119, 121, 548 S.E.2d 183, 185 (denial of motion to dismiss based on governmental immunity immediately appealable), *disc. rev. denied*, 354 N.C. 219, 554 S.E.2d 340 (2001). On 22 April 2003, defendant petitioned for discretionary review by this Court prior to determination by the Court of Appeals, and on 1 May 2003, plaintiff filed a response asking that defendant's petition be allowed, with modifications. On 21 August 2003, this Court allowed defendant's petition as submitted.

[1] In reviewing the action of the trial court, we must first consider whether defendant is entitled to any form of immunity. "Under the doctrine of sovereign immunity, the State is immune from suit absent waiver of immunity. Under the doctrine of governmental immunity, a county is immune from suit for the negligence of its employees in the exercise of governmental functions absent waiver of immunity." *Meyer v. Walls*, 347 N.C. 97, 104, 489 S.E.2d 880, 884 (1997) (citations omitted). These immunities do not apply uniformly. The State's sovereign immunity applies to both its governmental and proprietary functions, while the more limited governmental immunity covers only the acts of a municipality or a municipal corporation committed pursuant to its governmental functions. *Guthrie v. N.C. State Ports Auth.*, 307 N.C. 522, 533, 299 S.E.2d 618, 624 (1983); *Orange Cty. v. Heath*, 282 N.C. 292, 294, 192 S.E.2d 308, 309-10 (1972).

A public housing authority created and operated pursuant to Chapter 157 of the North Carolina General Statutes is a municipal corporation. *See Jackson v. Hous. Auth. of High Point*, 316 N.C. 259, 262, 341 S.E.2d 523, 525 (1986) (citing *Cox v. City of Kinston*, 217 N.C. 391, 8 S.E.2d 252 (1940); *Wells v. Hous. Auth. of Wilmington*, 213 N.C. 744, 197 S.E. 693 (1938)). While a municipal corporation has immunity for acts committed in its governmental capacity, *see Orange Cty.*, 282 N.C. at 294, 192 S.E.2d at 309-10, "when a municipal corporation undertakes functions beyond its governmental and police powers and engages in business in order to render a public service for the benefit of the community for a profit, it becomes subject to liability for contract and in tort as in case of private corporations," *Town of Grimesland v. City of Washington*, 234 N.C. 117, 123, 66 S.E.2d 794, 798 (1951). Although defendant housing authority is somewhat different from a city or a county, in that it exists for the specific purpose of creating and maintaining affordable, safe, and sanitary housing for low and moderate income renters, we see no reason why it should be treated differently from other municipal corporations as to immunity issues. Accordingly, defendant, like other municipal corporations, is entitled to immunity in tort and contract for acts undertaken by its agents and employees in the exercise of its governmental functions, but not for any proprietary functions it may undertake.

[2] We next consider whether defendant performs a governmental or proprietary function in providing housing for low and moderate income families. This Court has defined the difference between these functions as follows:

> Any activity of the municipality which is discretionary, political, legislative or public in nature and performed for the public good in behalf of the State, rather than for itself, comes within the class of governmental functions. When, however, the activity is commercial or chiefly for the private advantage of the compact community, it is private or proprietary.

Millar v. Town of Wilson, 222 N.C. 340, 341, 23 S.E.2d 42, 44 (1942). We have provided various tests for determining into which category a particular activity falls, but have consistently recognized one guiding principle: "[G]enerally speaking, the distinction is this: If the undertaking of the municipality is one in which only a governmental agency could engage, it is governmental in nature. It is proprietary and 'private' when any corporation, individual, or group of individuals could do the same thing." *Britt v. City of Wilmington*, 236 N.C. 446, 451, 73 S.E.2d 289, 293 (1952). The difficulties of applying this principle have been noted. *See, e.g.*, *Sides v. Cabarrus Mem'l Hosp., Inc.*, 287 N.C. 14, 22, 213 S.E.2d 297, 302 (1975); *Koontz v. City of Winston-Salem*, 280 N.C. 513, 528, 186 S.E.2d 897, 907 (1972); *Hare v. Butler*, 99 N.C. App. 693, 698, 394 S.E.2d 231, 235, *disc. rev. denied*, 327 N.C. 634, 399 S.E.2d 121 (1990).

Plaintiff argues that operation of a housing authority is a proprietary function, citing the Court of Appeals opinion in *Jackson v. Hous. Auth. of High Point*, 73 N.C. App. 363, 326 S.E.2d 295 (1985). Therefore, plaintiff contends, because the Housing Authorities Law does not specifically provide for immunity, a housing authority is liable to the same extent as a private individual or a corporation. However, when this Court affirmed *Jackson*, we considered only liability for punitive damages and noted that "[n]o question has been raised on this appeal about the general immunity of a municipal corporation from any liability in tort resulting from negligence in performing a governmental function, in the absence of waiver of immunity by the purchase of liability insurance." 316 N.C. at 262, 341 S.E.2d at 525. Accordingly, the language in the Court of Appeals opinion upon which plaintiff relies is not binding on this Court.

One of the tests that courts have employed to differentiate between governmental and proprietary functions is whether or not a fee is charged for the service. A fee suggests that an activity is proprietary, *see Sides*, 287 N.C. at 22-23, 213 S.E.2d at 302-03, particularly if a profit results, *see Schmidt v. Breeden*, 134 N.C. App. 248, 255, 517 S.E.2d 171, 174-75 (1999). However, a housing authority operating

pursuant to Chapter 157 may charge rent to low and moderate income tenants only "at rentals within the financial reach of such persons." N.C.G.S. § 157-29(b)(2) (2003); *see also id.* § 157-9.1 (2003). In addition, "[n]o housing authority may construct or operate its housing projects so as to provide revenues for other activities of the city." *Id.* § 157-29(a). According to the record, defendant operates at a net loss unless operating subsidies from the federal government are considered. Therefore, we do not believe defendant's charging of rent to tenants is dispositive.

We find that the language of the Housing Authorities Law, *see id.* §§ 157-1 to -39.87 (2003), when considered with the prior holdings of this Court, provides useful direction. In affirming the constitutionality of the progenitor of the current Housing Authorities Law, *see id.* § 157-30 (2003), we determined that the original Act invested a housing authority with a governmental function. *Wells*, 213 N.C. at 749, 197 S.E. at 696-97. This Court has never retreated from that holding. *Cox*, 217 N.C. at 394, 8 S.E.2d at 255 (The holding in *Wells* was "couched in language as clear and concise as we could employ."). *See also Martin v. N.C. Hous. Corp.*, 277 N.C. 29, 45, 175 S.E.2d 665, 674 (1970); *cf. Carter v. City of Greensboro*, 249 N.C. 328, 333, 106 S.E.2d 564, 568-69 (1959) (City housing project that was not created and operated pursuant to Chapter 157 and that generated "substantial financial returns" for the city engaged in a proprietary function.). In enacting the current Housing Authorities Law, the General Assembly declared

> that unsanitary or unsafe dwelling accommodations exist in urban and rural areas throughout the State . . . ; that these conditions cannot be remedied by the ordinary operation of private enterprise; that the . . . providing of safe and sanitary dwelling accommodations for persons of low income are *public uses and purposes for which public money may be spent* and private property acquired; . . . and that the necessity for the provisions hereinafter enacted is hereby declared as a matter of legislative determination to be in the public interest.

N.C.G.S. § 157-2(a) (2003) (emphasis added). This statutory indication that the provision of low and moderate income housing is a governmental function is consistent both with our determination in *Millar* that an "activity of the municipality which is . . . public in nature and performed for the public good in behalf of the State . . . comes within the class of governmental functions," 222 N.C. at 341, 23

S.E.2d at 44, and with the earlier holdings cited above. Accordingly, we reaffirm that a housing authority organized in accordance with the provisions of Chapter 157 of the North Carolina General Statutes provides a governmental function and is entitled to rely on the doctrine of governmental immunity.

[3] We must next determine whether defendant waived its immunity. Plaintiff argues that, pursuant to N.C.G.S. § 160A-485(a), defendant's purchase of liability insurance constituted a waiver. That statute provides that "[a]ny city is authorized to waive its immunity from civil liability in tort by the act of purchasing liability insurance." N.C.G.S. § 160A-485(a) (2003). However, "[t]he term 'city' does not include counties or municipal corporations organized for a special purpose." *Id.* § 160A-1(2) (2003). As noted above, defendant housing authority was organized for the special purpose of providing housing for low and moderate income renters. *See also Carolinas Chapter NECA, Inc. v. Hous. Auth. of Charlotte*, 29 N.C. App. 755, 756, 225 S.E.2d 653, 653-54 (1976). Accordingly, the provisions of Chapter 160A of the North Carolina General Statutes, and specifically section 160A-485(a), do not control whether or not defendant had legal capacity to waive its immunity by purchasing liability insurance.

Turning instead to the statute setting out the powers of a housing authority, we observe that such an authority has the statutory power "to sue and be sued." N.C.G.S. § 157-9(a) (2003). We have held that this power, standing alone, does not necessarily act as a waiver of immunity. *Guthrie*, 307 N.C. at 537-38, 299 S.E.2d at 627. In that case, we concluded that "[t]he State of North Carolina ha[d] not given its consent for the Ports Authority to be sued in the courts of the State," *id.* at 538, 299 S.E.2d at 627, despite the Ports Authority's statutory power to "sue and be sued," N.C.G.S. § 143B-454(a)(1) (2003). We explained that

> [s]tatutory authority to "sue or be sued" is not always construed as an express waiver of sovereign immunity and is not dispositive of the immunity defense when suit is brought against an agency of the State. . . .
>
> We conclude that the language of the State Tort Claims Act and G.S. § 143-454(1), vesting the Ports Authority with authority to sue or be sued, when read together, evidence a legislative intent that the Authority be authorized to sue as plaintiff in its

> own name in the courts of the State but contemplates that all tort claims against the Authority for money damages will be pursued under the State Tort Claims Act.[1]

Guthrie, 307 N.C. at 538, 299 S.E.2d at 627 (citations omitted). However, unlike the Ports Authority, *see* N.C.G.S. § 143B-454 (2003); *Guthrie*, 307 N.C. at 529-32, 299 S.E.2d at 622-23, a housing authority is given the additional authority "to insure or provide for the insurance of the property or operations of the authority against such risks as the authority may deem advisable." N.C.G.S. § 157-9(a). When these provisions of N.C.G.S. § 157-9(a) are read together, we believe they establish that the General Assembly foresaw the possibility that tenants would sue a housing authority in tort and intended that housing authorities have the power to waive their tort immunity through the purchase of liability insurance. Accordingly, we hold that a Chapter 157 housing authority has statutory authority to accept liability for its governmental functions by the purchase of insurance.

[4] The final issue is whether the insurance purchased by defendant applied to the injuries alleged by plaintiff. Generally, a municipality waives its immunity only to the extent of the insurance obtained. *Seibold v. City of Kinston*, 268 N.C. 615, 621, 151 S.E.2d 654, 658 (1966); *see also* N.C.G.S. § 153A-435(a) (2003) (purchase of liability insurance waives county's governmental immunity to the extent of the coverage); N.C.G.S. § 160A-485(a) (city's waiver of immunity from civil liability in tort by purchase of insurance limited to extent city indemnified by insurance contract). Again, we see no reason why this principle should not apply to other municipal corporations, including defendant. Defendant argues that specific terms in its insurance policies excluded coverage for any harm to residents arising from the use of lead paint. Because the trial court's order denying defendant's motion to dismiss on grounds of sovereign or governmental immunity did not contain findings of fact or conclusions of law, *see* N.C.G.S. § 1A-1, Rule 52(a)(2) (2003), we are unable to discern whether the ruling below was premised upon defendant's insurance coverage. Accordingly, we remand to the trial court for a determination of whether defendant waived its immunity as to the claims asserted by plaintiff.

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1. We do not believe that any difference between the phrases "sue *and* be sued," found in both N.C.G.S. § 143-454(a)(1) and N.C.G.S. § 157-9, and "sue *or* be sued," as used in *Guthrie*, is significant to the case at bar.

Remanded for further proceedings not inconsistent with this opinion.

REMANDED.

CHRISTOPHER YOUNG v. GREAT AMERICAN INSURANCE COMPANY OF NEW YORK, NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PENNSYLVANIA, CITY OF FAYETTEVILLE, APRIL S. WORTHAM, OPHELIA PECHIE, AND SHANNON STECK PEELE

No. 54A04

(Filed 7 October 2004)

Insurance— law enforcement liability policy—sexual assaults by officer

The decision of the Court of Appeals in this case is reversed for the reason stated in the dissenting opinion in the Court of Appeals that a law enforcement liability insurance policy did not provide coverage for sexual assaults by a police officer after traffic stops and an accident investigation because the officer did not commit the sexual assaults "while performing law enforcement duties" as required for coverage under the policy.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 162 N.C. App. 87, 590 S.E.2d 4 (2004), reversing an order and judgment entered 6 August 2002 by Judge James F. Ammons, Jr. in Superior Court, Cumberland County. Heard in the Supreme Court 15 September 2004.

Cranfill, Sumner & Hartzog, L.L.P., by Susan K. Burkhart, for defendant-appellant Great American Insurance Company.

White & Stradley, LLP, by J. David Stradley, for defendant-appellees April S. Wortham, Ophelia Pechie, and Shannon Steck Peele.

PER CURIAM.

For the reasons stated in the dissenting opinion, we reverse the decision of the Court of Appeals.

REVERSED.

FISHER v. HOUSING AUTH. OF CITY OF KINSTON

[359 N.C. 59 (2004)]

STEVEN M. FISHER, GUARDIAN *AD LITEM* FOR RHONDA CHILDS, A MINOR v. HOUSING AUTHORITY OF THE CITY OF KINSTON, NORTH CAROLINA

No. 94PA03

(Filed 7 October 2004)

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 155 N.C. App. 189, 573 S.E.2d 678 (2002), reversing an order granting summary judgment to defendant entered 27 June 2001 by Judge Benjamin G. Alford in Superior Court, Lenoir County. Heard in the Supreme Court 13 October 2003.

Donaldson & Black, P.A., by Phyllis Lile-King, for plaintiff-appellee.

Wyrick Robbins Yates & Ponton, LLP, by K. Edward Greene; and White & Allen, P.A., by Matthew S. Sullivan, for defendant-appellant.

Mast, Schulz, Mast, Mills, Stem & Johnson, P.A., by Bradley N. Schulz, on behalf of the North Carolina Academy of Trial Lawyers, amicus curiae.

Crossley, McIntosh, Prior & Collier, by Clay A. Collier, on behalf of the North Carolina Association of Defense Attorneys, amicus curiae.

PER CURIAM.

Pursuant to this Court's opinion in *Evans v. Hous. Auth. of Raleigh*, ___ N.C. ___, ___ S.E.2d ___ (Oct. 7, 2004) (No. 216PA03), the decision of the Court of Appeals is reversed and remanded.

REVERSED AND REMANDED.

STATE OF NORTH CAROLINA v. MICHAEL KEITH HOLDEN

No. 574PA03

(Filed 7 October 2004)

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 160 N.C. App. 503, 586 S.E.2d 513 (2003), setting aside judgments entered upon defendant's conviction of two counts of first-degree statutory rape of a child under thirteen years of age by Judge Jerry R. Tillett on 16 January 2002 in Superior Court, Gates County, and awarding defendant a new trial. Heard in the Supreme Court on 14 September 2004.

Roy Cooper, Attorney General, by Amy C. Kunstling, Assistant Attorney General, for the State-appellant.

Rudolph A. Ashton, III and Kirby H. Smith, III for defendant-appellee.

Thomas F. Loflin, III and Seth H. Jaffe, Managing Attorney, on behalf of American Civil Liberties Union of North Carolina Legal Foundation, Inc., amicus curiae.

PER CURIAM.

The members of the Court are equally divided, with three members voting to affirm and three members voting to reverse the decision of the Court of Appeals.[1] Accordingly, the decision of the Court of Appeals is left undisturbed and stands without precedential value. *See Crawford v. Commercial Union Midwest Ins. Co.*, 356 N.C. 609, 572 S.E.2d 781 (2002); *Robinson v. Byrd*, 356 N.C. 608, 572 S.E.2d 781 (2002).

AFFIRMED.

1. At the time this case was heard and decided, the Court consisted of only six members, due to the retirement of Associate Justice Orr on 31 July 2004.

STATE OF NORTH CAROLINA v. WILLARD LAVELL ALSTON

No. 19A04

(Filed 7 October 2004)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 161 N.C. App. 367, 588 S.E.2d 530 (2003), finding no prejudicial error in the judgment entered 4 September 2002 by Judge Clifton W. Everett, Jr. in Superior Court, Wilson County. Heard in the Supreme Court 15 September 2004.

Roy Cooper, Attorney General, by M. Elizabeth Guzman, Assistant Attorney General, for the State.

Angela H. Brown for defendant-appellant.

PER CURIAM.

The members of the Court were equally divided, with three members voting to affirm and three members voting to reverse the decision of the Court of Appeals.[1] Accordingly, the decision of the Court of Appeals is left undisturbed and stands without precedential value. *See Crawford v. Commercial Union Midwest Ins. Co.*, 356 N.C. 609, 572 S.E.2d 781 (2002); *Robinson v. Byrd*, 356 N.C. 608, 572 S.E.2d 781 (2002).

AFFIRMED.

1. At the time this case was heard and decided, the Court consisted of only six members, due to the retirement of Associate Justice Orr on 31 July 2004.

IN RE ESTATE OF MOORE

[359 N.C. 62 (2004)]

IN THE MATTER OF: THE ESTATE OF ROBERT L. MOORE, JR., INCOMPETENT

No. 534PA03

(Filed 7 October 2004)

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 160 N.C. App. 85, 584 S.E.2d 807 (2003), reversing an order entered by Judge Howard E. Manning, Jr. on 7 June 2002 in Superior Court, Wake County, and remanding for re-computation of guardianship commissions. Heard in the Supreme Court 13 September 2004.

Law Office of Michael W. Patrick, by Michael W. Patrick, for petitioner-appellee.

Boyce & Isley, P.L.L.C., by G. Eugene Boyce; and Bailey & Dixon, L.L.P., by Gary S. Parsons and Jennifer D. Maldonado, for respondent-appellant.

PER CURIAM.

DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

STATE v. LOCKLEAR

[359 N.C. 63 (2004)]

STATE OF NORTH CAROLINA v. BUDDY LEE LOCKLEAR

No. 504A03

(Filed 7 October 2004)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 159 N.C. App. 588, 583 S.E.2d 726 (2003), finding no error in the judgments entered 9 May 2002 by Judge Jay D. Hockenbury in Superior Court, Onslow County. Heard in the Supreme Court 13 September 2004.

Roy Cooper, Attorney General, by Patricia A. Duffy, Assistant Attorney General, for the State.

Duncan B. McCormick for defendant-appellant.

PER CURIAM.

AFFIRMED.

WALTER CLARK ERWIN v. LENA LOWDERMILK TWEED

No. 499A03

(Filed 7 October 2004)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 159 N.C. App. 579, 583 S.E.2d 717 (2003), reversing an order and declaratory judgment signed 31 May 2002 by Judge James L. Baker, Jr. in Superior Court, Burke County. Heard in the Supreme Court 13 September 2004.

Bryce Thomas & Associates, by Bryce O. Thomas, Jr., for plaintiff-appellee.

Willardson, Lipscomb & Miller, L.L.P., by William F. Lipscomb, for unnamed defendant-appellant N.C. Farm Bureau Mutual Insurance Company.

PER CURIAM.

AFFIRMED.

PATAKY v. PATAKY

[359 N.C. 65 (2004)]

DIANA MAE PATAKY v. KENNETH PATAKY

No. 571A03

(Filed 7 October 2004)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 160 N.C. App. 289, 585 S.E.2d 404 (2003), reversing and remanding an Order entered 30 November 2001 by Judge William L. Daisy in District Court, Guilford County. On 5 February 2004, the Supreme Court allowed discretionary review of an additional issue. Heard in the Supreme Court 14 September 2004.

Nix & Cecil, by Lee M. Cecil, for plaintiff-appellant.

Joyce L. Terres for defendant-appellee.

PER CURIAM.

As to the appeal of right based on the dissenting opinion, we affirm the majority decision of the Court of Appeals. We conclude that the petition for discretionary review as to an additional issue was improvidently allowed.

AFFIRMED; DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

GLENN R. CARROLL, EMPLOYEE v. TOWN OF AYDEN, EMPLOYER, SELF-INSURED (N.C. LEAGUE OF MUNICIPALITIES, SERVICING AGENT)

No. 611A03

(Filed 7 October 2004)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 160 N.C. App. 637, 586 S.E.2d 822 (2003), affirming an opinion and award entered by the North Carolina Industrial Commission on 17 July 2002. Heard in the Supreme Court 14 September 2004.

Stanley Law Firm, by Wade A. Stanley, for plaintiff-appellant.

Lewis & Roberts, P.L.L.C., by Jack S. Holmes and Bryant D. Paris, III, for defendant-appellees.

PER CURIAM.

AFFIRMED.

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

Addison v. Kye Case below: 165 N.C. App. 543	No. 413P04	Plt's PDR Under N.C.G.S. § 7A-31 (COA03-1111)	Denied 10/06/04
Bruggeman v. Meditrust Co., LLC Case below: 165 N.C. App. 790	No. 496A04	1. Defs' NOA Based Upon a Dissent (COA03-944) 2. Defs' PDR as to Additional Issues Under N.C.G.S. § 7A-31 3. Defs' PWC to Review the Order of the Superior Court and Decision of the North Carolina COA (COA02-1613) 4. Joint Motion to Withdraw NOA, PDR and PWC and Dismiss Appeal	1. 2. —— 3. —— 4. Allowed 10/06/04
Cannon v. Day Case below: 165 N.C. App. 302	No. 398P04	Defs' PDR Under N.C.G.S. § 7A-31 (COA03-704)	Denied 10/06/04
Crowder v. State Case below: 157 N.C. App. 142	No. 422P04	Plt's PWC to Review the Decision of the COA (COA02-509)	Denied 10/06/04
Freeman v. Crawford & Co. Case below: 164 N.C. App. 779	No. 354P04	1. Def's PDR Under N.C.G.S. § 7A-31 (COA03-921) 2. Joint Motion to Dismiss PDR	1. Dismissed as moot **09/16/04** 2. Allowed **09/16/04**
Godfrey v. Res-Care, Inc. Case below: 165 N.C. App. 68	No. 419P04	Def's PDR Under N.C.G.S. § 7A-31 (COA03-790 and 791)	Denied 10/06/04
Golds v. Golds Case below: 164 N.C. App. 227	No. 271P04	1. Def's NOA Based Upon a Constitutional Question (COA03-472) 2. Def's PDR Under N.C.G.S. § 7A-31	1. Dismissed *ex mero motu* 10/06/04 2. Denied 10/06/04
Hardee v. N.C. Bd. of Chiropractic Exam'rs Case below: 164 N.C. App. 628	No. 288P04	1. Petitioner's Motion for Temporary Stay (COA03-860) 2. Petitioner's Petition for Writ of Supersedeas 3. Petitioner's PDR Under N.C.G.S. § 7A-31	1. Stay Dissolved 10/06/04 2. Denied 10/06/04 3. Denied 10/06/04

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

Howlett v. CSB, LLC Case below: 164 N.C. App. 715	No. 367P04	Plts' PDR Under N.C.G.S. § 7A-31 (COA03-746)	Denied 10/06/04
In re Appeal of Appalachian Student Housing Corp. Case below: 165 N.C. App. 379	No. 475A04	1. Watauga County's NOA Based Upon a Constitutional Question (COA03-908) 2. Appalachian Student Housing Corporation's Motion to Dismiss Appeal	1. —— 2. Allowed 10/06/04
In re Appeal of Franklin Smith Enters., Inc. Case below: 165 N.C. App. 705	No. 453P04	Franklin Smith Enterprises, Inc.'s PDR Under N.C.G.S. § 7A-31 (COA03-1000)	Denied 10/06/04
In re Caldwell Cty. Election Protest Case below: 165 N.C. App. 543	No. 445P04	Petitioners' (Hutchings and Wall) PDR Under N.C.G.S. § 7A-31 (COA03-1177)	Denied 10/06/04
In re J.L.K. Case below: 165 N.C. App. 311	No. 402P04	Respondent's (G.K.) PDR Under N.C.G.S. § 7A-31 (COA03-421)	Denied 10/06/04
In re M.G. Case below: 162 N.C. App. 386	No. 076A04	Appellee's (Roberta Rhodes, Guardian ad Litem) Motion to Dismiss Appeal on the Ground that the Issues are Moot (COA02-1547)	Allowed **08/31/04**
In re M.L. Case below: 164 N.C. App. 779	No. 362P04	Respondent's PDR Under N.C.G.S. § 7A-31 (COA03-441)	Denied 10/06/04
In re R.T.W. Case below: 165 N.C. App. 274	No. 417PA04	Petitioner's (Orange County DSS) PDR Under N.C.G.S. § 7A-31 (COA03-728)	Allowed **08/30/04** Consolidated with 79PA04 for Oral Argument

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

Jones v. Davis Case below: 163 N.C. App. 628	No. 232A04	1. Plts' (Jones, Southard, M/M Bowers and M/M Sammons) NOA Based Upon a Dissent (COA03-594) 2. Def's (Surry County) PWC to Review the Decision of the COA	1. —— 2. Allowed 10/06/04
Larkin v. Larkin Case below: 165 N.C. App. 390	No. 452A04	1. Def's NOA Based on a Dissent 2. Def's PDR as to Additional Issues (COA03-1091)	1. —— 2. Denied 10/06/04
Leverette v. Batts Temp. Servs., Inc. Case below: 165 N.C. App. 328	No. 411P04	Defs' PDR Under N.C.G.S. § 7A-31 (COA03-818)	Denied 10/06/04
McCormick v. Hanson Aggregates Southeast, Inc. Case below: 164 N.C. App. 459	No. 304P04	1. Plt's Motion for Temporary Stay (COA03-630) 2. Plt's Petition for Writ of Supersedeas 3. Plt's NOA Based Upon a Constitutional Question 4. Plt's PDR Under N.C.G.S. § 7A-31 5. Def's Motion to Dismiss Appeal	1.Stay Dissolved **08/20/04** 2. Denied **08/20/04** 3. —— 4. Denied **08/20/04** 5. Allowed **08/20/04**
Miyares v. Forsyth Cty. Case below: 165 N.C. App. 543	No. 478P04	Plt's PDR Under N.C.G.S. § 7A-31 (COA03-1278)	Denied 10/06/04
N.C. Indus. Capital, LLC v. Rushing Case below: 163 N.C. App. 204	No. 157P04	1. Def's (West's Charlotte Transfer & Storage, Inc.) Petition for Supersedeas (COA03-274) 2. Def's (West's Charlotte Transfer & Storage, Inc.) PDR Under N.C.G.S. § 7A-31	1. Denied **08/23/04** 2. Denied **08/23/04**
N.C. State Bar v. Rogers Case below: 164 N.C. App. 648	No. 341P04	1. Def's NOA Based Upon a Constitutional Question (COA03-706) 2. Def's PDR Under N.C.G.S. § 7A-31 3. N.C. State Bar's Motion to Dismiss Appeal 4. Def's Motion to Amend PDR	1. —— 2. Denied 10/06/04 3. Allowed 10/06/04 4. Denied 10/06/04

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

Pompano Masonry Corp. v. HDR Architecture, Inc. Case below: 165 N.C. App. 401	No. 450PA04	Def's PDR Under N.C.G.S. § 7A-31 (COA03-43)	Allowed 10/06/04
Sellers v. Libbey Owens Ford Co. Case below: 164 N.C. App. 411	No. 309P04	1. Def. and Third-Party Administrator's PDR Under N.C.G.S. § 7A-31 (COA03-1023) 2. Plt's Conditional PDR Under N.C.G.S. § 7A-31	1. Denied 10/06/04 2. Dismissed as moot 10/06/04
State v. Abdullah Case below: 165 N.C. App. 543	No. 426P04	Def's PDR Under N.C.G.S. § 7A-31 (COA03-840)	Denied 10/06/04
State v. Allen Case below: 166 N.C. App. 139	No. 485PA04	1. AG's Motion for Temporary Stay (COA03-1369) 2. AG's Petition for Writ of Supersedeas 3. AG's PDR Under N.C.G.S. § 7A-31	1. Allowed **09/23/04** 2. Allowed **09/23/04** 3. Allowed **09/23/04**
State v. Barnes Case below: 164 N.C. App. 598	No. 337P04	Def's PDR Under N.C.G.S. § 7A-31 (COA03-911)	Denied 10/06/04
State v. Blackwell Case below: 166 N.C. App. 280	No. 490PA04	AG's Motion for Temporary Stay (COA03-793)	Allowed **09/23/04** Stay Dissolved **09/29/04**
State v. Boston Case below: 165 N.C. App. 890	No. 463P04	1. AG's Motion for Temporary Stay (COA03-932) 2. AG's Petition for Writ of Supersedeas 3. AG's PDR Under N.C.G.S. § 7A-31	1. Allowed **09/03/04** Stay Dissolved **10/06/04** 2. Denied 10/06/04 3. Denied 10/06/04

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

State v. Brunson Case below: 165 N.C. App. 667	No. 435P04	1. AG's Motion for Temporary Stay 2. AG's Petition for Writ of Supersedeas 3. AG's PDR Under N.C.G.S. § 7A-31 (COA03-240) 4. Motion by Def. to Lift Stay	1. Allowed **08/23/04** 2. Denied 10/06/04 3. Denied 10/06/04 4. Allowed 10/06/04
State v. Call Case below: Ash County Superior Court	No. 341A96-4	Def's PWC to Review the Order of the Superior Court	Denied 10/06/04
State v. Canupp Case below: 165 N.C. App. 544	No. 390P04	Def's PDR Under N.C.G.S. § 7A-31 (COA03-1428)	Denied 10/06/04
State v. Carter Case below: 165 N.C. App. 275	No. 409P04	1. Def's NOA Based Upon a Substantial Constitutional Question 2. Def's PDR Under N.C.G.S. § 7A-31 (COA03-318) 3. AG's Motion to Dismiss Appeal	1. —— 2. Denied 10/06/04 3. Allowed 10/06/04
State v. Clark Case below: 164 N.C. App. 780	No. 358P04	Def's PDR Under N.C.G.S. § 7A-31 (COA03-812)	Denied 10/06/04
State v. Cogdell Case below: 165 N.C. App. 368	No. 447P04	Def's PDR Under N.C.G.S. § 7A-31 (COA03-605)	Denied 10/06/04
State v. Daniels Case below: 164 N.C. App. 558	No. 340P04	Def's PDR Under N.C.G.S. § 7A-31 (COA03-450)	Denied 10/06/04
State v. Davis Case below: Buncombe County Superior Court	No. 109A98-2	Def's PWC to Review the Order of the Superior Court	Denied 10/06/04

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

State v. Davis Case below: 165 N.C. App. 545	No. 436P04	Def's PDR Under N.C.G.S. § 7A-31 (COA03-647)	Denied 10/06/04
State v. Davis Case below: 165 N.C. App. 706	No. 466P04	Def's PDR Under N.C.G.S. § 7A-31 (COA03-463)	Denied 10/06/04
State v. Dennison Case below: 163 N.C. App. 375	No. 179A04	1. AG's Petition for Writ of Supersedeas (COA02-1512) 2. AG's NOA Based Upon a Dissent 3. Def's Motion for Review Pursuant to N.C. R. App. P. Rule 2—Motion to Bypass the COA as to Undecided Issue of Insufficiency of Evidence 4. AG's PDR as to Additional Issues	1. Allowed 10/06/04 2. —— 3. Denied 10/06/04 4. Allowed 10/06/04
State v. Harris Case below: 165 N.C. App. 905	No. 462P04	AG's Motion for Temporary Stay (COA03-916)	Allowed **09/02/04**
State v. Harrison Case below: 165 N.C. App. 332	No. 403P04	Def's PDR Under N.C.G.S. § 7A-31 (COA03-1362)	Denied 10/06/04
State v. Jackson Case below: 165 N.C. App. 276	No. 414P04	Def's PDR Under N.C.G.S. § 7A-31 (COA03-1086)	Denied 10/06/04
State v. Jackson Case below: 165 N.C. App. 763	No. 486P04	1. Def's NOA Based Upon a Constitutional Question (COA03-733) 2. Def's PDR Under N.C.G.S. § 7A-31 3. AG's Motion to Dismiss Appeal	1. —— 2. Denied 10/06/04 3. Allowed 10/06/04

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

State v. Jones Case below: 165 N.C. App. 540	No. 389PA04	1. AG's Petition for Writ of Supersedeas (COA02-1633) 2. AG's PDR Under N.C.G.S. § 7A-31 3. Def's Conditional PDR	1. Allowed **10/06/04** 2. Allowed **10/06/04** 3. Allowed **10/06/04**
State v. Jones Case below: 165 N.C. App. 276	No. 399A04	1. Def's NOA Based on a Substantial Constitutional Question (COA03-590) 2. AG's Motion to Dismiss Appeal	1. —— 2. Allowed 10/06/04
State v. Lawrence Case below: 165 N.C. App. 548	No. 457PA04	AG's Motion for Temporary Stay (COA03-614)	Allowed Pending Determination of the State's PDR **09/01/04**
State v. McClelland Case below: 146 N.C. App. 750	No. 479P04	Def's PDR Under N.C.G.S. § 7A-31 (COA01-327)	Dismissed 10/06/04
State v. Perkins Case below: Pitt County Superior Court	No. 060A94-4	Def's Motion to Vacate Disproportionate and Excessive Death Sentence	Denied **09/23/04**
State v. Perkins Case below: Pitt County Superior Court	No. 060A94-5	1. Def's PWC to Review Order of Superior Court 2. Def's Motion to Stay His 8 October 2004 Execution Date to Provide the Court an Adequate Opportunity to Review Def's Petition	1. Denied 10/06/04 2. Denied 10/06/04
State v. Rehm Case below: 165 N.C. App. 547	No. 438P04	Def's PDR Under N.C.G.S. § 7A-31 (COA03-370)	Denied 10/06/04
State v. Rouse Case below: Randolph County Superior Court	No. 120A92-4	Def's Motion for Relief	Dismissed 10/06/04
State v. Scanlon Case below: Durham County Superior Court	No. 480A99-5	Def's Petition for Writ of Prohibition	Denied **08/18/04**

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

State v. Scarlett Case below: 165 N.C. App. 547	No. 456P04	1. Def's NOA Based Upon a Constitutional Question (COA03-1122) 2. Def's PDR Under N.C.G.S. § 7A-31 3. AG's Motion to Dismiss Appeal	1. —— 2. Denied 10/06/04 3. Allowed 10/06/04
State v. Smith Case below: 165 N.C. App. 256	No. 407PA04	1. AG's Motion for Temporary Stay (COA03-758) 2. AG's Petition for Writ of Supersedeas 3. AG's PDR Under N.C.G.S. § 7A-31	1. Allowed **08/16/04** 2. Allowed **10/06/04** 3. Allowed **10/06/04**
State v. Speight Case below: 166 N.C. App. 106	No. 491PA04	1. AG's Motion for Temporary Stay (COA03-776) 2. AG's Petition for Writ of Supersedeas 3. AG's PDR Under N.C.G.S. § 7A-31	1. Allowed **09/23/04** 2. Allowed **09/23/04** 3. Allowed **09/23/04**
State v. Tabor Case below: 164 N.C. App. 231	No. 248P04	Def's PDR Under N.C.G.S. § 7A-31 (COA03-752)	Denied 10/06/04
State v. Taylor Case below: 165 N.C. App. 278	No. 412P04	1. Def's NOA Based on a Constitutional Question (COA03-349) 2. Def's PDR Under N.C.G.S. § 7A-31 3. AG's Motion to Dismiss Appeal	1. —— 2. Denied 10/06/04 3. Allowed 10/06/04
State v. Teeter Case below: 165 N.C. App. 680	No. 433P04	1. AG's Motion for Temporary Stay (COA03-1013) 2. AG's Petition for Writ of Supersedeas 3. AG's PDR Under N.C.G.S. § 7A-31	1. Allowed **08/23/04** Stay Dissolved **10/06/04** 2. Denied 10/06/04 3. Denied 10/06/04
State v. Trent Case below: 166 N.C. App. 76	No. 477PA04	1. AG's Motion for Temporary Stay (COA03-1019) 2. AG's Petition for Writ of Supersedeas	1. Denied **09/15/04** 2. Allowed **10/06/04**

State v. Valladares Case below: 165 N.C. App. 598	No. 432P04	AG's Motion for Temporary Stay (COA03-879)	Denied **08/23/04**
Town of Highlands v. Hendricks Case below: 164 N.C. App. 474	No. 323P04	Defs' PDR Under N.C.G.S. § 7A-31 (COA03-55)	Denied 10/06/04 **Martin, J., recused**
Trivette v. State Farm Mut. Auto. Ins. Co. Case below: 164 N.C. App. 680	No. 327P04	Plt's PDR Under N.C.G.S. § 7A-31 (COA03-986)	Denied 10/06/04
Vaughn v. Insulating Servs. Case below: 165 N.C. App. 469	No. 394P04	Plt's PDR Under N.C.G.S. § 7A-31 (COA03-781)	Denied 10/06/04
Whitt v. Harris Teeter, Inc. Case below: 165 N.C. App. 32	No. 416A04	1. Def's (Harris Teeter) NOA Based on a Dissent (COA03-335) 2. Def's (Harris Teeter) PDR as to Additional Issues	1. —— 2. Denied 10/06/04
Williams v. Haigler Case below: 163 N.C. App. 614	No. 218P04	1. Defs' NOA Based Upon a Constitutional Question (COA03-387) 2. Defs' PDR Under N.C.G.S. § 7A-31 3. Plt's Motion to Dismiss Appeal 4. Plt's Conditional PDR	1. —— 2. Denied **08/20/04** 3. Allowed **08/20/04** 4. Dismissed as moot **08/20/04** **Martin, J. and Wainwright, J., recused**

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

Young v. Mastrom, Inc. ——————— Beith v. Mastrom, Inc. ——————— Mastrom, Inc. v. Carpenter Case below: 165 N.C. App. 905	No. 500P04	Appellant's (Young, Beith & Carpenter) PWC to Review the Decision of the COA (COA03-762)	Denied 10/06/04
Zubaidi v. Earl L. Pickett Enters., Inc. Case below: 164 N.C. App. 107	No. 280P04	1. Defs' NOA Based Upon a Constitutional Question (COA03-685) 2. Defs' PDR Under N.C.G.S. § 7A-31 3. Plts' Motion to Dismiss Appeal	1. —— 2. Denied 10/06/04 3. Allowed 10/06/04

STATE OF NORTH CAROLINA v. JOHN HENRY THOMPSON

No. 142A03

(Filed 3 December 2004)

1. Jury— selection—examination after peremptory challenge—replacement not yet called

There was no apparent prejudice from an alleged violation of N.C.G.S. § 15A-1214(a) when a prosecutor in a capital first-degree murder trial examined the remaining jurors after a peremptory challenge without first calling a replacement juror.

2. Jury— selection—examination after peremptory challenge—no structural error

A violation of the random selection provision of N.C.G.S. § 15A-1214(a) during jury selection (examination of the remaining jurors after a peremptory challenge without seating a replacement) was not structural error. A technical violation of a statute is not sufficient to support a claim of a defect in the trial mechanism so serious that the trial cannot reliably determine guilt or innocence.

3. Sentencing— capital—victim impact statement—family's refusal to speak

A clinical social worker's testimony in a capital sentencing proceeding that the victim's family was not willing to talk with her about defendant's remorse and willingness to accept a life sentence was not an impermissible victim impact statement. The family had never spoken with the witness, her testimony did not present their opinions and characterizations about the crime and defendant, and the evidence was not admitted through a family member or formal victim impact statement.

4. Sentencing— capital—mitigating circumstances—defendant's willingness to plea bargain—not submitted

The trial court did not err in a capital sentencing proceeding by refusing to submit the nonstatutory mitigating circumstance that defendant was willing to plead guilty and accept a life sentence. There is no definitive evidence in the record that the State offered or that defendant would have accepted a plea for a lesser sentence and any willingness to accept the plea may have indicated only defendant's willingness to lessen his exposure to the death penalty. Defendant chose to proceed to trial and cannot

now complain that he should have been allowed to reveal his hypothetical willingness to enter a guilty plea.

5. Sentencing— capital—mitigating circumstances—no significant criminal history—not submitted

The trial court did not err in a capital sentencing proceeding by not submitting ex mero motu the mitigating circumstance of no significant criminal history. No rational jury could have concluded that defendant had no significant history of prior criminal activity based on evidence that defendant had prior felony convictions for five second-degree kidnappings and two armed robberies with similarities between those cases and this case. Additionally, the jury found seven aggravating circumstances based on the prior convictions.

6. Sentencing— capital—mitigating circumstances—defendant's age—not submitted

The trial court did not err in a capital sentencing proceeding by not submitting ex mero motu the mitigating circumstance of defendant's age at the time of the crime. There was evidence that defendant functioned emotionally as an adult that counterbalanced the defense testimony; moreover, the jury did not find the submitted circumstance that "defendant functions emotionally at the age of an adolescent."

7. Sentencing— capital—mitigating circumstances—nonstatutory—peremptory instruction—rejection of unchallenged evidence

The trial court did not err in a capital sentencing proceeding by giving peremptory instructions that permitted the jury to reject a nonstatutory mitigating circumstance by finding that it did not exist even when the trial court found that all the evidence tended to show its existence.

8. Sentencing— capital—mitigating circumstances—nonstatutory—peremptory instruction—rejection of unchallenged evidence

The trial court did not err in a capital sentencing proceeding by giving peremptory instructions that permitted the jury to reject a nonstatutory mitigating circumstance by finding that it did not exist even when the trial court found that all the evidence tended to show its existence.

9. Appeal and Error— cumulative error—no underlying error

There was no need to consider defendant's cumulative error argument regarding jury instructions and mitigating circumstances where there was no error on those issues.

10. Sentencing— capital—aggravating circumstances—prior violent felonies—armed robberies

There was no error in a capital sentencing proceeding where defendant argued that the aggravating circumstances that he had previously been convicted of a felony involving violence against each of two people was not supported by the evidence. Although defendant argued that the indictments for those two felonies listed the name of a restaurant as the victim and that the evidence showed that the restaurant was the entity that was robbed, with the two individuals merely being present, both the aggravating circumstances submitted to the jury and the evidence at trial conveyed to the jury that the two employees were present and endangered or threatened during the robberies, which is the gravamen of the offense. Furthermore, it is clear from the indictments and other evidence that the property taken did not belong to defendant. Any inconsistency between the aggravating circumstance, the indictment, and the trial testimony was immaterial.

11. Robbery— indictment—victim capable of owning property—not a required element—larceny distinguished

The trial court did not err by not dismissing an indictment for robbery with a dangerous weapon because the indictment did not include the element that the victim, Domino's Pizza, was a legal entity capable of owning property. While an indictment for larceny must allege that an entity listed as the victim be capable of owning property, armed robbery is a separate and distinct crime and an armed robbery indictment is not fatally defective simply because it does not correctly identify the owner of the property taken. The property description here was sufficient to demonstrate that the property did not belong to defendant.

12. Sentencing— capital—prosecutor's argument—defendant's decisions

The prosecutor in a capital sentencing proceeding did not engage in an improper argument by referring to decisions defendant made on the day of the murder and arguing that those decisions led to the present proceeding and the jury's decision. There was no indication that the prosecutor expressly or implicitly

argued that life imprisonment should not be considered, that the jury should disregard defendant's pleas for mercy, or that defendant's sentence was determined automatically and was not the jury's decision.

13. Sentencing— capital—prosecutor's argument—factors

The prosecutor in a capital sentencing proceeding did not make an improper closing argument by referring to "factors" which would help the jury making its decision. The use of "factors" did not refer to additional aggravating circumstances, but to facts the jury could consider when weighing both aggravating and mitigating circumstances. The prosecution meticulously explained the statutory aggravating circumstances submitted to the jury, the trial court instructed the jury only on those circumstances, and it is presumed that the jury followed the instructions.

14. Constitutional Law— capital sentencing—defendant's right to be present throughout—bailiff's contact with jury

Defendant was not entitled to a new capital sentencing proceeding because he and his attorney were excluded from alleged unrecorded exchanges between the bailiff and the jury. The court ordered the jury brought in at the end of the day so that he could release them, the bailiff conferred with the court, proceedings continued, and a verdict was announced shortly thereafter. Defendant had the right to be present at all stages of his trial, but error will not be assumed where it does not appear in the record.

15. Constitutional Law— effective assistance of counsel—concession of guilt

A first-degree murder defendant's representation was constitutionally sufficient in his concessions of guilt. In context, counsel's statements during voir dire were part of a broader series of questions aimed at whether prospective jurors were predisposed to vote automatically for or against the death penalty and were not intended as concessions of guilt. Defendant voluntarily and knowingly consented on the record to counsel's argument during the guilt phase.

16. Constitutional Law— effective assistance of counsel—identity of claims—motion for appropriate relief

Defendant's request that the Supreme Court identify a list of potential ineffective assistance of counsel claims not subject to

the statutory procedural bar for motions for appropriate relief was denied because of the sheer number and breadth of defendant's potential claims, his failure to provide an argument as to why the record was insufficient to raise those claims currently, and the fact that he refers to a cumulative ineffective assistance of counsel claim. However, the relief sought by defendant is not a request for an advisory opinion and is not entirely without precedent. Moreover, defendant's attempt to raise this issue on direct appeal does not preclude raising his claims in a future proceeding.

17. Sentencing— death penalty—not disproportionate

A sentence of death was not disproportionate where defendant murdered the manager of his former place of employment during an armed robbery; he shot his victim in the face with a sawed-off shotgun, manually reloaded the shotgun, cocked the hammer, and pulled the trigger, causing a second fatal wound; defendant set fire to the building in an apparent attempt to cover up his crimes; defendant's criminal history includes seven violent felonies committed during two robberies factually similar to this case; the jury found seven aggravating circumstances based upon those felonies; this case is more analogous to cases in which the death penalty has been found proportionate than to those in which it has been found disproportionate; and the death penalty was neither excessive nor disproportionate considering the nature of the crime and the defendant.

Justice NEWBY did not participate in the consideration of decision of this case.

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of death entered by Judge Peter M. McHugh on 14 November 2002 in Superior Court, Guilford County, upon a jury verdict finding defendant guilty of first-degree murder. On 5 September 2003, the Supreme Court allowed defendant's motion to bypass the Court of Appeals as to his appeal of additional judgments. Heard in the Supreme Court 10 May 2004.

Roy Cooper, Attorney General, by Barry S. McNeill, Special Deputy Attorney General, for the State.

Staples Hughes, Appellate Defender, by Janet Moore, Assistant Appellate Defender, for defendant-appellant.

BRADY, Justice.

Kenneth Bruhmuller was murdered at his workplace on 31 March 2001. On 16 April 2001, a Guilford County grand jury indicted defendant John Henry Thompson for the first-degree murder of Bruhmuller, burning of a building used for trade, and robbery with a dangerous weapon. On 5 August 2002, another Guilford County grand jury returned a superseding indictment against defendant for burning of a building used for trade. Defendant was tried capitally before a jury at the 4 November 2002 Regular Criminal Session of the Superior Court, Guilford County. On 8 November 2002, the jury returned a verdict of guilty of first-degree murder on the basis of malice, premeditation, and deliberation and under the felony murder rule. The jury also found defendant guilty of robbery with a firearm and burning of a building used in trade. On 14 November 2002, following a capital sentencing proceeding, the jury recommended a sentence of death for the first-degree murder conviction, and the trial court entered judgment in accordance with that recommendation. The trial court sentenced defendant to a term of 103 months minimum and 133 months maximum imprisonment for the robbery conviction and a consecutive term of 21 months minimum and 26 months maximum imprisonment for the burning of a building offense.

Defendant appealed his sentence of death to this Court as of right pursuant to N.C.G.S. § 7A-27(a). On 5 September 2003, this Court allowed defendant's motion to bypass the Court of Appeals as to his appeal of the noncapital convictions and judgments.

This Court heard oral argument in defendant's case on 10 May 2004. After consideration of the assignments of error raised by defendant on appeal and a thorough review of the transcript, the record on appeal, the briefs, and oral arguments, we find no error meriting reversal of defendant's first-degree murder conviction or death sentence.

Evidence presented by the State at trial, including video surveillance, indicated that on Saturday, 31 March 2001, defendant entered Domino's Pizza on South Chapman Street in Greensboro, North Carolina, shortly before the business was to open at 11:00 a.m. Defendant ordered five large pizzas from Kenneth Bruhmuller, the manager and only employee present. Defendant was a former assistant manager at that same Domino's and knew Bruhmuller. The order was placed in defendant's first name, "John," and defendant was charged a discounted price. Bruhmuller and defendant then exited the store.

Domino's area supervisor, Will Spivey, testified that it was the common practice of Domino's employees to wash their vehicles at the rear entrance of the building. Spivey also testified that managers usually parked their cars in the alleyway leading to the rear of the building. After defendant and Bruhmuller went outside, Bruhmuller moved his car, which was blocking the alleyway, and defendant backed his car down the alleyway toward the rear of the building. A short time later, defendant was recorded by video surveillance reentering the building, but he soon walked out of view of the lobby area video camera. Several minutes passed before the lobby area camera showed defendant's car pulling out of the alleyway, after which time the building began to fill with smoke. It was later determined that approximately $195.00 was missing from a cash drawer in the business' office area.

When other employees arrived around 11:15 a.m., the building was filled with smoke, and flames were rising out of a broken window. The employees opened the front doors, crawled a few feet into the building, and yelled Bruhmuller's name, but received no response. Greensboro Fire Department personnel responded at the scene shortly thereafter and discovered Bruhmuller's body on the floor in the office area. Fire Department Captain Gary Church testified that Bruhmuller appeared to have "a fatal wound . . . from a gunshot" or "a wound to the head, from some type of explosion." Captain David L. Leonard, the arson investigator, believed that the fire originated in the break/storage room area due to the ignition of "readily available material," on a couch and, after ruling out other causes, concluded that it could only have been started by "human intervention."

Spivey and assistant manager Kenneth Leland Smith identified defendant as the suspect in the surveillance video taken from inside the store on the day of the fire. Defendant was subsequently arrested and transported to the Greensboro Police Department for an interview.

A pat down search incidental to defendant's arrest revealed that he was carrying Bruhmuller's driver's license and social security card. In a subsequent search, police discovered a knife in defendant's front right pocket and a spent, twenty-gauge shotgun shell casing in his front left pocket.

Defendant signed a consent form allowing police to search his vehicle. In the trunk, police discovered a sawed-off twenty-gauge Model 37 Winchester shotgun, a short sword, a bayonet with a cover,

and a black ski mask. On the floorboard of the car's interior, police located a piece of crumpled up white paper that matched printer paper used to label pizza boxes found at the scene of the crime. Police also found a bag containing seventeen loose twenty-gauge shotgun shells and an empty, twenty-five-count box of shotgun shells.

After being advised of his *Miranda* rights and signing a waiver of rights form, defendant gave a statement to Greensboro Police Department Detective Norman Rankin. Defendant said, "I'm sorry Saturday ever happened." He began crying and said, "That was stupid." He further stated that his bills were "piling up" and that he could not get a job. Defendant continued, saying "[i]t was an accident. Going to Domino's was the accident. I went there just to get the money. I planned this when I drove by the store."

Defendant later told Detective Rankin that he took $200.00 from a drawer in the office, as well as Bruhmuller's wallet, which contained an additional $20.00 to $25.00. Regarding the killing of Bruhmuller, defendant said that "[i]t's like the gun fired by itself, 'cause, I swear, I don't remember pulling the trigger." Defendant identified the weapon as a twenty-gauge shotgun that had been "sawed off." Defendant said that he left the building after it caught on fire, but did not recall setting the fire. According to defendant, he later threw Bruhmuller's wallet away but kept his driver's license and social security card. During the interview Detective Rankin wrote what defendant told him verbatim, and defendant then read and signed the written statement. Responding to specific questions posed by Detective Rankin, defendant admitted to robbing Domino's of $200.00 because he needed money to pay bills, although he denied that the robbery was planned. He admitted to using a shotgun, but stated that the shooting of "Ken" was accidental, and again denied setting the fire.

North Carolina Chief Medical Examiner John D. Butts, M.D. testified concerning the autopsy he performed on Bruhmuller's body. The autopsy revealed two shotgun entry wounds to Bruhmuller's facial region, one in the central part of the face and the other in the chin and mouth area. Dr. Butts concluded that the wounds were inflicted from a distance that "was close, but not very, very close. . . . consistent with a distance of several feet." Dr. Butts testified to his opinion that Bruhmuller died as a result of the gunshot wounds, either of which would have been instantaneously fatal. According to Dr. Butts,

Bruhmuller's air passages were not sooty, an indication that he had not inhaled smoke, and the level of carbon monoxide in his blood was inconsistent with someone who had inhaled "combustion product gases" from a fire.

Special Agent David Santora of the North Carolina State Bureau of Investigation was qualified at trial as an expert in firearm and toolmark identification. Santora testified that he determined the spent shotgun shell casing found in defendant's pocket was fired from the shotgun found in defendant's car. Santora also testified that pellets recovered from a pool of blood in the Domino's office and pellets recovered from Bruhmuller's head during the autopsy were derived from a gauge of shotgun shell that was "most consistent in size and weight" with the gauge of the unspent shells found in defendant's car. Santora explained that the firearm found in defendant's car was a single-action shotgun that holds only one shell at a time. Agent Santora testified that to load this shotgun, "One would insert a live shotgun shell into the barrel, and it would stop, so it was flush with the end. Close the gun. It would lock up. (Demonstrated.) And then the hammer would be manually cocked, and the trigger would be pulled. (Demonstrated.) And that would fire the shotgun shell." According to Santora, the firearm would have to be reloaded, the hammer cocked, and the trigger pulled between every shot.

During defendant's capital sentencing proceeding, forensic psychologist Dr. James H. Hilkey testified on defendant's behalf. According to Dr. Hilkey's testimony and written evaluation, defendant informed the doctor that on the morning of the crime, he had consumed alcohol and had smoked marijuana. Defendant stated that he drove to a local car wash, but because it was crowded, he decided to wash his car at Domino's. Defendant said that when he opened his trunk, he saw the shotgun and decided to use it to take enough money to satisfy his bills. He stated that he did not intend to kill Bruhmuller and that the first shot was an accident. When asked about the second shot, defendant said, tearfully, that he knew the first wound was fatal and did not want Bruhmuller to suffer. Dr. Hilkey testified to his opinion that defendant "fits clearly the diagnosis for both alcohol and substance abuse" and, at the time of the killing, defendant "was operating under the influence of a mental or emotional disturbance."

Additional relevant facts will be presented when necessary to resolve specific assignments of error raised by defendant.

JURY SELECTION

[1] Defendant assigns statutory and structural error to the method of jury selection implemented at trial. In particular, defendant argues that the trial court violated the random selection provision of N.C.G.S. § 15A-1214(a) by allowing prosecutors to examine remaining jurors following the exercise of a peremptory challenge without first calling a replacement juror to the jury box.

The transcript shows that late in the afternoon on 4 November 2002, the State conducted *voir dire* of the final four prospective jurors remaining in the current jury panel. Upon the State's challenge of two jurors for cause, the trial court inquired of the prosecutor, "[D]o you have any objection to proceeding with questions to the remaining two members of the panel, although it would not constitute a full panel?" The prosecutor responded that he did not object. Then the trial court turned to defense counsel asking, "Is there any objection by the defense to continuing examination of the two jurors in the box?" Defense counsel responded, shaking his head from side to side to indicate that he did not object. Thereafter, the prosecutor continued *voir dire* of the two remaining prospective jurors. The State subsequently exercised peremptory challenges as to these two jurors.

Generally, a defendant who assigns error to a violation of N.C.G.S. § 15A-1214 must show that he was prejudiced by that statutory violation before he is entitled to relief. *State v. Garcia*, 358 N.C. 382, 406, 597 S.E.2d 724, 743 (2004); *State v. Jaynes*, 353 N.C. 534, 545, 549 S.E.2d 179, 190 (2001), *cert. denied*, 535 U.S. 934, 152 L. Ed. 2d 220 (2002); *State v. Lawrence*, 352 N.C. 1, 13, 530 S.E.2d 807, 815 (2000), *cert. denied*, 531 U.S. 1083, 148 L. Ed. 2d 684 (2001). Here, defendant has made no attempt, either in written brief or at oral argument before this Court, to show how the alleged statutory violation prejudiced his defense. Prejudice is not readily apparent from the record before the Court; therefore, defendant's assignment of statutory error is overruled.

[2] Defendant also argues that the alleged statutory violation amounted to structural error. "Structural error is a rare form of constitutional error resulting from 'structural defects in the constitution of the trial mechanism' which are so serious that 'a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence.' " *State v. Garcia*, 358 N.C. at 409, 597 S.E.2d at 744 (quoting *Arizona v. Fulminante*, 499 U.S. 279, 309-10, 113 L. Ed. 2d 302, 331 (1991) and *Rose v. Clark*, 478 U.S. 570, 577-78, 92 L. Ed. 2d

460, 470 (1986)). As we have previously stated, a mere technical violation of N.C.G.S. § 15A-1214 is insufficient to support a claim of structural error. *Garcia*, 358 N.C. at 410, 597 S.E.2d at 745. Defendant does not argue that the alleged statutory violation was so serious as to render his trial unreliable as a determination of guilt or innocence, nor does defendant argue that his case is similar to the six cases of structural error that the United States Supreme Court has identified to date. *See Johnson v. United States*, 520 U.S. 461, 468-69, 137 L. Ed. 2d 718, 728 (1997) (listing six cases in which the United States Supreme Court has found structural error and citing: *Gideon v. Wainwright*, 372 U.S. 335, 9 L. Ed. 2d 799 (1963) (complete deprivation of the right to counsel); *Sullivan v. Louisiana*, 508 U.S. 275, 124 L. Ed. 2d 182 (1993) (constitutionally deficient jury instructions on reasonable doubt); *Vasquez v. Hillery*, 474 U.S. 254, 88 L. Ed. 2d 598 (1986) (unlawful exclusion of grand jurors of the defendant's race); *McKaskle v. Wiggins*, 465 U.S. 168, 79 L. Ed. 2d 122 (1984) (denial of the defendant's right to self-representation); *Waller v. Georgia*, 467 U.S. 39, 81 L. Ed. 2d 31 (1984) (denial of the right to a public trial); and *Tumey v. Ohio*, 273 U.S. 510, 71 L. Ed. 749 (1927) (biased trial judge)). Accordingly, this assignment of error is overruled.

CAPITAL SENTENCING PROCEEDING

[3] Defendant next assigns prejudicial error and, in the alternative, plain error to the prosecutor's elicitation of victim-impact evidence during defendant's capital sentencing proceeding. Specifically, defendant asserts that the prosecutor's cross-examination of social worker Deborah Taylor Grey improperly elicited evidence that the victim's family, the Alexanders, wanted the jury to recommend a sentence of death for defendant. Defendant argues that the prosecutor's elicitation of this evidence was deliberate and that the prosecutor thus violated the Eighth Amendment prohibition against cruel and unusual punishment by presenting evidence as to family members' characterization and opinion about the crime, the defendant, or the appropriate sentence. *South Carolina v. Gathers*, 490 U.S. 805, 104 L. Ed. 2d 876 (1989), *overruled in part by Payne*, 501 U.S. 808, 115 L. Ed. 2d 720; *Booth v. Maryland*, 482 U.S. 496, 96 L. Ed. 2d 440 (1987), *overruled in part by Payne v. Tennessee*, 501 U.S. 808, 115 L. Ed. 2d 720 (1991).

Defendant acknowledges that *Booth v. Maryland* and *South Carolina v. Gathers*, the two cases upon which he relies, were overruled in part by *Payne v. Tennessee*. Defendant argues, however, that

the type of victim-impact evidence admitted at the sentencing phase of his trial, which concerned the family's opinion as to the appropriate sentence, was not addressed by *Payne*. According to defendant, the admission of such evidence is still prohibited by *Booth* and *Gathers*; thus, the admission of Grey's testimony here was prejudicial error or, in the alternative, plain error for which defendant must receive a new sentencing hearing.

During the capital sentencing phase of defendant's trial, defendant called Deborah Taylor Grey, a licensed clinical social worker. Grey prepared a psychosocial history of defendant, including information on his family, education, employment, and relationship background, and testified to her findings on direct examination. On cross-examination, the prosecutor elicited the following testimony from Grey:

> Q [THE PROSECUTOR] During the course of this thorough background check that you did, did you have an occasion to do any background at all on the victim or his family?
>
> A [GREY] I did not have a chance to do background interviews, as far as the victim or his family.
>
> Q Why not?
>
> A I had contacted actually the Bruhmullers—or the Andrews (sic) family, and asked if they would be willing to talk with me, and they were not.
>
> Q And why did you contact them?
>
> A I contacted them for two reasons. One reason was to be able to talk to them. The other reason was because Mr. Thompson had expressed a considerable degree of remorse and a willingness to take a sentence of life imprisonment. And I contacted them, to see if they would be open to discussing that.
>
> Q Had you seen the pictures of what Mr. Thompson had done to their son?
>
> A No, I had not.
>
> Q Based on what you know about it, is it understandable to you why they might not want to talk to you?

A Yes, it was.

Grey went on to testify that she contacted Bruhmuller's biological father, who had been estranged from his son "[f]or a considerable period of time."

On redirect examination, defendant's attorney elicited testimony from Grey that the victim's biological father "would be satisfied with Mr. Thompson serving a life sentence . . . . [w]ithout the possibility of parole." On recross examination, Grey testified as follows:

> Q [THE PROSECUTOR] Do you know when [was] the last time Kenneth Bruhmuller's father saw him?
>
> A [GREY] I do not. I know from what he said to me that it had been many years.
>
> Q And do you know that this gentleman back here [referring to the victim's stepfather] is actually the one that raised him as a son?
>
> A I do.
>
> Q Have you asked this gentleman back here what his opinion was?
>
> A Well, I wrote the Andrews (sic) a letter, and they declined to talk with me, which I certainly understand. And I would not press this on them.

Grey was later recalled by defendant and further cross-examined by the prosecution. At that time, Grey testified that Bruhmuller and his biological father were estranged, adding that the father did not attend his son's funeral. At the end of Grey's testimony, the following exchange took place:

> Q [THE PROSECUTOR] But in spite of all that, he took it upon himself to give you an opinion about what the sentence should be in this case?
>
> A [GREY] He didn't tell me what he thought the sentence should be. What he said was—and he acknowledged that he was not a part of Kenneth's life as an adult, or even for much of his childhood. He said that from his perspective and from where he was in his own life, that he would be content with the idea of somebody serving a life sentence without the possibility of parole.

Defendant did not object to Grey's testimony concerning her contact with Bruhmuller's family.

In *Booth*, the United States Supreme Court held that the admission of any victim-impact evidence violates the Eighth Amendment because such evidence "is irrelevant to a capital sentencing decision, and that its admission creates a constitutionally unacceptable risk that the jury may impose the death penalty in an arbitrary and capricious manner." 482 U.S. at 502-03, 96 L. Ed. 2d at 448. Pursuant to a Maryland state law permitting it to do so, the prosecution at trial read to the jury a victim impact statement which noted the sentiments and opinions of the victim's family members. *Id.* at 498-99, 96 L. Ed. 2d at 446. The Court in *Booth* concluded that evidence that "describe[s] the personal characteristics of the victims and the emotional impact of the crimes on the family" or which "set[s] forth the family members' opinions and characterizations of the crimes and the defendant" is inadmissible because neither relate to defendant's blameworthiness. *Id.* at 502, 96 L. Ed. 2d at 448; *see also Gathers*, 490 U.S. at 811, 104 L. Ed. 2d at 883 (holding that a prosecutor's comments regarding the personal characteristics of a victim were "indistinguishable in any relevant respect from that in *Booth*" and, therefore, were violative of the Eighth Amendment).

However, in *Payne*, the United States Supreme Court overruled *Booth* and *Gathers* in part by holding that the admission of victim-impact evidence in a capital proceeding was not a *per se* violation of the Eighth Amendment. 501 U.S. at 827, 115 L. Ed. 2d at 736. "[E]vidence about the victim and about the impact of the murder on the victim's family is relevant to the jury's decision as to whether or not the death penalty should be imposed." *Id.* Thus, such evidence is admissible unless it "is so unduly prejudicial that it renders the trial fundamentally unfair." *Id.* at 825, 115 L. Ed. 2d at 735.

Although the Court in *Payne* concluded that *Booth* and *Gathers* were "wrongly decided and should be, and now are, overruled," *id.* at 830, 115 L. Ed. 2d 739, the Court stated that this holding was limited to the portions of *Booth* and *Gathers* concerning "evidence and argument relating to the victim and the impact of the victim's death on the victim's family." *Id.* at 830 n.2, 115 L. Ed. 2d at 739 n.2. The Court noted that "*Booth* also held that the admission of a victim's family members' characterizations and opinions about the crime, the defendant, and the appropriate sentence violates the Eighth Amendment" and that "[n]o evidence of the latter sort was presented at the trial in [*Payne*]." *Id.* Thus, defendant is correct in stating that the portion of *Booth* which holds that "the family members' opinions and characterizations of the crime[]" and the defendant are *per se*

inadmissible was undisturbed by *Payne*. *Booth*, 482 U.S. at 502, 508-09, 96 L. Ed. 2d at 448, 451-52.

However, we do not agree that Grey's testimony at defendant's trial was the same type of evidence excluded in *Booth*. In *Booth*, a victim-impact statement prepared by the Maryland Division of Parole and Probation was read aloud to the jury. This victim impact statement, which was ultimately found inadmissible, contained statements by the victims' son that his parents were

> "butchered like animals" and that he "doesn't think anyone should be able to do something like that and get away with it." The VIS also noted that the [victims'] daughter "could never forgive anyone for killing [her parents] that way. She can't believe that anybody could do that to someone. The victims' daughter states that animals wouldn't do this. [The perpetrators] didn't have to kill because there was no one to stop them from looting. . . . The murders show the viciousness of the killers' anger. She doesn't feel that the people who did this could ever be rehabilitated and she doesn't want them to be able to do this again or put another family through this."

Booth, 482 U.S. at 508, 96 L. Ed. 2d at 452 (alteration in original) (citations omitted).[1]

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1. The Booth Court attached the victim-impact statement at issue in an appendix to its decision. The portions of that statement relevant to this issue are excerpted below:

> The victims' granddaughter . . . vividly remembers every detail of the days following her grandparents' death. Perhaps she described the impact of the tragedy most eloquently when she stated that it was a completely devastating and life altering experience.
>
> . . .
>
> The victims' son feels that his parents were not killed, but were butchered like animals. He doesn't think anyone should be able to do something like that and get away with it. He is very angry and wishes he could sleep and not feel so depressed all the time. He is fearful for the first time in his life, putting all the lights on and checking the locks frequently. His children are scared for him and concerned for his health. They phone him several times a day. At the same time he takes a fearful approach to the whereabouts of his children. He also calls his sister every day. He states that he is frightened by his own reaction of what he would do if someone hurt him or a family member. He doesn't know if he'll ever be the same again.
>
> . . .
>
> The victims' daughter attended the defendant's trial and that of the co-defendant because she felt someone should be there to represent her parents. She had never been told the exact details of her parents' death and had to listen to the

The testimony at issue in this case is of an entirely different nature than the statements admitted in *Booth*. Grey, a defense witness, simply testified that the Alexanders did not respond to her inquiries with respect to the defendant's remorse for the murder of their son and the defendant's "willingness" to plead guilty and that Grey understood why. As the Alexanders never actually communicated with Grey, her testimony was not "the family members' opinions and characterizations of the crime[] and the defendant." *See id.*, at 502, 96 L. Ed. 2d at 448. Moreover, the evidence was neither admitted through a family member nor through a formally prepared victim impact statement. Therefore, Grey's testimony is not an inadmissible victim impact statement and it does not violate *Booth* or *Payne*. This assignment of error is overruled.

Defendant next argues that he is entitled to a new sentencing hearing based upon prejudicial errors in the trial court's failure to properly submit five mitigating circumstances to the jury for consideration. Defendant argues that he requested peremptory instructions as to each mitigating circumstance and that the requested mitigating circumstances were supported by the evidence at trial. He asks that this Court review these assigned errors both individually and cumulatively.

[4] First, defendant assigns error to the trial court's failure to submit to the jury the nonstatutory mitigating circumstance that "[t]he defendant was willing to plead guilty to [f]irst [d]egree [m]urder and serve the rest of his life in prison without parole." According to

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medical examiner's report. After a certain point, her mind blocked out and she stopped hearing. She states that her parents were stabbed repeatedly with viciousness and she could never forgive anyone for killing them that way. She can't believe that anybody could do that to someone. The victims' daughter states that animals wouldn't do this. They didn't have to kill because there was no one to stop them from looting. Her father would have given them anything. The murders show the viciousness of the killers' anger. She doesn't feel that the people who did this could ever be rehabilitated and she doesn't want them to be able to do this again or put another family through this. She feels that the lives of her family members will never be the same again.

. . .

The victims' family members note that the trials of the suspects charged with these offenses have been delayed for over a year and the postponements have been very hard on the family emotionally. The victims' son notes that he keeps seeing news reports about his parents' murder which show their house and the police removing their bodies. This is a constant reminder to him. The family wants the whole thing to be over with and they would like to see swift and just punishment. *Booth*, 482 U.S. at 511-14, 96 L. Ed. 2d at 454-56.

defendant, the trial court's refusal to instruct the jury as to this mitigating circumstance is prejudicial error for which he must receive a new sentencing hearing.

Preliminarily, we note that the trial court did submit three nonstatutory mitigating circumstances from which the jury could determine that defendant had accepted responsibility: "[a]fter his arrest, the defendant admitted to shooting Mr. Bruhmuller and taking money from the store"; "[t]he defendant has expressed regret for the murder of Kenneth Bruhmuller," and "[t]he defendant has accepted responsibility for his criminal conduct." The trial court also instructed the jury as to the statutory catchall mitigating circumstance, which is "[a]ny other circumstance or circumstances arising from the evidence which one or more . . . [jurors] deems to have mitigating value." *See* N.C.G.S. § 15A-2000 (f)(9) (2003). The jury found as a mitigating circumstance that defendant accepted responsibility for his conduct.

Following his conviction for first-degree murder, defendant submitted a written request for peremptory instruction on a number of mitigating circumstances, including the "willing to plead" mitigating circumstance. During the sentencing-phase charge conference, the trial court questioned whether the mitigating circumstance could properly be submitted to the jury. The State argued that the mitigating circumstance should not be submitted because defendant never entered a guilty plea to first-degree murder and because by pleading not guilty, defendant denied "every element of the offense." While acknowledging defendant's right to plead not guilty, the State argued that, in so pleading, defendant gave up his right to have his purported *willingness* to plead guilty to first-degree murder submitted as a mitigating circumstance. Defendant pointed to Grey's testimony that defendant "had expressed a considerable degree of remorse and a willingness to take a sentence of life imprisonment." Following further discussion, the trial court ruled that defendant was not entitled to the mitigating circumstance.

This Court recently addressed a similar assignment of error in *State v. Carroll*, 356 N.C. 526, 573 S.E.2d 899 (2002), *cert. denied*, 539 U.S. 949, 156 L. Ed. 2d 640 (2003). In *Carroll*, the Court determined that the defendant was not entitled to a nonstatutory mitigator that he accepted responsibility by offering to plead guilty to second-degree murder. The defense attorney in *Carroll* moved to present evidence that defendant "was 'willing to accept responsibility and take a plea . . . of 391 to 479 months and that he made that offer.' " *Id.* at 548, 573 S.E.2d at 913. Even so, the attorney conceded that this evidence

was normally " 'precluded from the case in chief' " because it " 'would be considered part of a settlement conference.' " *Id.* The defense attorney noted that negotiations were ongoing and that defendant was willing to plead guilty to second-degree murder. *Id.* However, the State had never made a plea offer. *Id.* The State informed the trial court that, although "the defense had made several suggestions concerning what the State should offer defendant, no one ever made clear whether 'defendant ha[d] himself offered to take any time.' " *Id.* The trial court denied the motion because the evidence was not relevant and because it was " 'relative to pretrial negotiations.' " *Id.* Defense counsel renewed the motion, which the trial court again denied, following the trial court's jury charge. *Id.*

In *Carroll*, this Court determined that the trial court did not err by refusing to allow the defendant to present mitigating evidence as to his offer to plead guilty to second-degree murder. In so doing, the Court reasoned as follows:

> In the present case, the evidence is at best conflicting as to defendant's willingness to plead guilty to second-degree murder. From our review of the record, we can conclusively determine only that defendant's attorney tried repeatedly to obtain a plea offer from the State. Because the State never made an offer, we cannot know with certainty whether defendant would have indeed pled guilty to second-degree murder and accepted a plea agreement.
>
> Assuming *arguendo* that defendant was willing to plead guilty to second-degree murder, this is evidence only of defendant's willingness to lessen his exposure to the death penalty or a life sentence upon a first-degree murder conviction. Defendant's willingness to accept a second-degree murder plea would be more likely a result of his assessment of the risk of trial than his willingness to accept responsibility for his actions. Indeed, defendant admitted to police that he was likely to get the death penalty for his crime. Moreover, defendant chose to plead not guilty and proceed to trial rather than enter a guilty plea and accept responsibility for the killing. Having made this choice, defendant cannot now complain that he should have been allowed to reveal during sentencing his hypothetical willingness to enter a guilty plea to a lesser crime.
>
> Finally, the trial court did submit to the jury the nonstatutory mitigating circumstances that "[d]efendant at an early stage in the

> proceedings admitted his involvement in the capital felony to law enforcement officers," "[d]efendant's cooperation and the information he provided were valuable to law enforcement," "[d]efendant has expressed remorse for the murder," "[d]efendant told the officers through his mother where to find him and peacefully surrendered." The trial court also submitted to the jury the catchall mitigating circumstance. *See* N.C.G.S. § 15A-2000 (f)(9). Accordingly, the jury was given ample means to determine whether defendant had accepted responsibility for his actions.

Id. at 548-49, 573 S.E.2d at 914.

As in *Carroll*, there is no definitive evidence in the record that the State offered, or that defendant would have accepted, a plea to receive a lesser sentence. Assuming Grey's testimony was sufficient to infer that defendant would have pled guilty to first-degree murder in return for receiving a sentence of life without parole, it is difficult to assess whether defendant's willingness to do so had mitigating value in demonstrating his admission of responsibility. It may have indicated only his "willingness to lessen his exposure to the death penalty." *Id.* at 549, 573 S.E.2d at 914. Furthermore, like the defendant in *Carroll*, defendant in the present case chose to plead not guilty and proceed to trial. "Having made this choice, defendant cannot now complain that he should have been allowed to reveal during sentencing his hypothetical willingness to enter a guilty plea to a lesser crime." *Id.*

For these reasons, we hold that the trial court did not err by refusing to submit a "willing to plead" mitigating circumstance to the jury. Accordingly, we overrule this assignment of error.

[5] Defendant next assigns error to the trial court's failure to submit the N.C.G.S. § 15A-2000(f)(1) and (f)(7) mitigating circumstances to the jury. Section 15A-2000(f)(1) concerns whether "defendant has no significant history of prior criminal activity" and section 15A-2000(f)(7) concerns "[t]he age of the defendant at the time of the crime." Defendant argues that the trial court should have submitted these mitigating circumstances *ex mero motu*, despite his failure to request them.

We agree that a defendant's failure to request a jury instruction on the f(1) mitigating circumstance does not relieve the trial court of its duty to instruct the jury as to that mitigating circumstance if the evidence supports instruction. *See State v. Mahaley*, 332 N.C. 583, 597,

423 S.E.2d 58, 66 (1992) (noting that the f(1) mitigating circumstance must be submitted "without regard to the wishes of the State or the defendant"), *cert. denied*, 513 U.S. 1089, 130 L. Ed. 2d 649 (1995). However, before submitting the f(1) mitigating circumstance, "a trial court must 'determine whether a rational jury could conclude that defendant had no *significant* history of prior criminal activity.' " *State v. Atkins*, 349 N.C. 62, 87, 505 S.E.2d 97, 113 (1998) (quoting *State v. Wilson*, 322 N.C. 117, 143, 367 S.E.2d 589-70, 604 (1988)), *cert. denied*, 526 U.S. 1147, 143 L. Ed. 2d 1036 (1999). "A significant history of prior criminal activity . . . is one likely to influence the jury's sentence recommendation." *Id.* at 88, 505 S.E.2d at 113. "When the trial court is deciding whether a rational juror could find the (f)(1) mitigating circumstance to exist, the nature and age of the prior criminal activities are important, and the mere number of criminal activities is not dispositive." *State v. Greene*, 351 N.C. 562, 569, 528 S.E.2d 575, 580 (finding that the trial court did not err by refusing to submit the f(1) mitigating circumstance where "much of defendant's prior criminal activity was recurrent, recent, and similar in nature to his conduct" in that case), *cert. denied*, 531 U.S. 1041, 148 L. Ed. 2d 543 (2000).

During sentencing, the State presented evidence that defendant had twice previously committed armed robbery of a Greensboro Bojangles restaurant and, in the process, kidnapped five victims. The evidence tended to show that at closing time on 17 March 1990, defendant entered a Bojangles restaurant wearing a "ski mask type thing" and carrying a sawed-off, pump-type shotgun. Defendant held a bystander at gunpoint and demanded money from Billy Adams, the assistant manager. Adams gave defendant money from the drive-through cash register only, explaining that the front registers had already been cleared out. Defendant then told Adams to give him the money kept in a separate "lock box." Adams complied with defendant's demands while the remaining employees hid in a closet. Defendant left with approximately $400.00.

Evidence further indicated that the following month, during the early morning hours of 8 April 1990, defendant entered the same Bojangles while holding an employee at gunpoint. Again, defendant's face was covered, and he was carrying a "pump type shotgun" with the "stock end cut off." Defendant ordered three female employees, including a pregnant woman named April Dobbins, into the store's freezer. Defendant blocked the freezer door with a metal rack. While holding the shotgun behind manager Thomas Lenk, defendant

ordered him to walk to the office in the back of the store. There, defendant instructed Lenk to open the safe. Lenk testified at the sentencing proceeding that defendant stood behind him with the shotgun as he complied with defendant's instructions. After Lenk gave defendant the money in the safe, defendant shot the office phone. Dobbins testified that upon hearing the shot, she thought defendant had shot Lenk. Defendant then ordered Lenk to the front of the store, where he instructed him to empty the registers. After Lenk did so, defendant escorted Lenk, shotgun in hand, into the store's cooler. Lenk testified that, as he walked to the cooler, he prayed defendant would not shoot him.

Detective Gary Evers of the City of Greensboro Police Department testified that he was assigned to investigate the two robberies, which occurred less than one month apart. At trial, Evers detailed how his investigation led him to defendant and the eventual seizure of items relating to the robberies from defendant's residence and vehicle. Following the seizure, defendant gave a detailed statement, admitting that he committed the two robberies. Defendant, who was twenty-two years old at the time of the crimes, pled guilty to two counts of robbery with a dangerous weapon and five counts of second-degree kidnapping. The counts were consolidated into one judgment, and defendant received a twenty-two-year sentence. Defendant served eight years of his sentence and was released in 1998.

Grey testified that, at the time of the 1990 robberies, defendant was experiencing financial difficulty and having a hard time finding employment. Also, it was revealed at sentencing that defendant had worked at that same Bojangles before committing the two armed robberies.

Considering the evidence of defendant's prior felony convictions for five second-degree kidnappings and two armed robberies, as well as the similarities between defendant's conduct leading to those convictions and the facts underlying Bruhmuller's murder, we determine that no "rational jury could conclude that defendant had no *significant* history of prior criminal activity." *Atkins*, 349 N.C. at 87, 505 S.E.2d at 113 (quoting *Wilson*, 322 N.C. at 143, 367 S.E.2d at 604). Additionally, we note that the jury found seven aggravating circumstances to exist based on defendant's prior convictions, namely that defendant had "been previously convicted of a felony involving the use or threat of violence to the person" on seven previous occasions. *See* N.C.G.S. § 15A-2000(e)(3) (2003). Although defendant is correct

that the (f)(1) "no significant history of prior criminal activity" mitigating circumstance can, and in some cases should, be submitted simultaneously with multiple (e)(3) aggravating circumstances, *see State v. Bone*, 354 N.C. 1, 16-17, 550 S.E.2d 482, 492 (2001), *cert. denied*, 535 U.S. 940, 152 L. Ed. 2d 231 (2002), given the particular facts underlying the submission of seven (e)(3), prior felony conviction, aggravating circumstances in this case, " 'it is unimaginable that . . . the same jury might simultaneously have found that aggravating circumstance to be so irrelevant that it could reasonably infer the existence of the mitigating circumstance in N.C.G.S. [] 15A-2000(f)(1).' " *State v. Jones*, 339 N.C. 114, 158, 451 S.E.2d 826, 850 (1994) (quoting *State v. Artis*, 325 N.C. 278, 316, 384 S.E.2d 470, 491 (1989), *judgment vacated*, 494 U.S. 1023, 108 L. Ed. 2d 604 (1990)) (alteration in original), *cert. denied*, 515 U.S. 1169, 132 L. Ed. 2d 873 (1995). Accordingly, this assignment of error is overruled.

[6] We likewise reject defendant's argument that the trial court erred by not submitting the f(7) mitigating circumstance, "[t]he age of the defendant at the time of the crime," to the jury *ex mero motu*. In support of this assignment of error, defendant argues that although his chronological age was thirty-two years at the time of the murder, he functioned at a significantly younger level. In particular, defendant points to Dr. Hilkey's testimony that he exhibited aspects of a dependent personality disorder, lacked internal skills to respond maturely to stressful situations, and functioned emotionally as an adolescent. Defendant further notes that he presented evidence of "family violence and abuse" and that the trial court found the evidence sufficient to submit a nonstatutory mitigating circumstance that he "function[ed] emotionally at the age of an adolescent."

During the sentencing phase, Dr. Hilkey testified that defendant suffered from chronic depression and a severe personality disorder. He stated that defendant was very uncomfortable with close relationships, could not sustain meaningful relationships, and lacked the ability to be flexible and to deliberate regarding his thoughts. Dr. Hilkey further testified that defendant behaved in a very childlike manner and was dependent on others. Dr. Hilkey also testified that defendant functioned better in structured environments where there was less stress. According to Dr. Hilkey, defendant's emotional functioning was like that of an adolescent whose thinking is rigid, is impulsive at times, and has the right intentions, but ultimately fails.

As defendant suggests in his brief, there was also evidence introduced that his father was sometimes absent from the family structure

when defendant was a child, abused alcohol, created a restrictive environment for his family when he was present, and was abusive, particularly toward defendant's mother. Dr. Hilkey testified that the father's alcohol abuse was an environmental and genetic factor contributing to defendant's alcohol and drug dependency.

For the purpose of assessing whether the f(7) mitigating circumstance should have been submitted, this Court considers age a "flexible and relative concept." *State v. Johnson*, 317 N.C. 343, 393, 346 S.E.2d 596, 624 (1986). Thus, "chronological age is not the determinative factor in concluding this mitigating circumstance exists." *State v. Gainey*, 355 N.C. 73, 105, 558 S.E.2d 463, 483, *cert. denied*, 537 U.S. 896, 154 L. Ed. 2d 165 (2002). "The defendant's immaturity, youthfulness, or lack of emotional or intellectual development is also relevant." *Id.* "Nevertheless, evidence showing emotional immaturity is not viewed in isolation, particularly where other evidence shows 'more mature qualities and characteristics.' " *State v. Spruill*, 338 N.C. 612, 660, 452 S.E.2d 279, 305 (1994) (quoting *Johnson*, 317 N.C. at 393, 346 S.E.2d at 624), *cert. denied*, 516 U.S. 834, 133 L. Ed. 2d 63 (1995).

> Although evidence showing emotional immaturity is relevant to submission of the (f)(7) mitigating circumstance, "this Court will not conclude that the trial court erred in failing to submit the age mitigator [*ex mero motu*] where evidence of defendant's emotional immaturity is *counterbalanced by other factors* such as defendant's chronological age, defendant's apparently normal intellectual and physical development, and defendant's lifetime experience."

State v. Meyer, 353 N.C. 92, 101, 540 S.E.2d 1, 6 (2000) (quoting *State v. Steen*, 352 N.C. 227, 257, 536 S.E.2d 1, 19 (2000), *cert. denied*, 531 U.S. 1167, 148 L. Ed. 2d 997 (2001) (alteration in original) (emphasis added), *cert. denied*, 534 U.S. 839, 151 L. Ed. 2d 54 (2001).

Notwithstanding defendant's summary of the facts at trial, additional evidence was presented contradicting Dr. Hilkey's testimony and tending to show that defendant functioned emotionally as an adult. He was thirty-two years old when he murdered Bruhmuller. Defendant graduated from high school in 1987 with a C average, and his I.Q. was within the normal range. Defendant moved in with his girlfriend, Ivey Milton, and her children, developing a spouse-like relationship with Milton and becoming a father-figure for Milton's two children and two other minors who lived with them. He continued to

have contact with the family in that capacity even after he was arrested. Defendant worked at Domino's and other places, contributing both financial and emotional support to the family even in Milton's absence. Between November 1999 and January 2001, defendant paid the family's rent on time, with the exception of one month.

We determine that these factors, which tend to show defendant's "apparently normal intellectual and physical development," *see Meyer*, 353 N.C. at 101, 540 S.E.2d at 6 (quoting *Steen*, 352 N.C. at 257, 536 S.E.2d at 19), counterbalance Dr. Hilkey's testimony. Moreover, while defendant is correct that the trial court submitted a nonstatutory mitigating circumstance that "[d]efendant functions emotionally at the age of an adolescent," the jury did not find that circumstance to exist and to have mitigating value. Accordingly, the trial court did not err in failing to submit "[t]he age of the defendant" to the jury *ex mero motu* as a mitigating circumstance. This assignment of error is overruled.

[7] In his next assignment of error, defendant contends that the trial court committed reversible error by refusing to give peremptory instructions on two nonstatutory mitigating circumstances as submitted by defense counsel. Specifically, defendant requested, in writing, peremptory instructions as to the following: (1) "After his arrest, [d]efendant confessed to shooting the [sic] Mr. Bruhmuller and taking money from the store"; and (2) "The [d]efendant has consistently expressed remorse for the murder of Kenneth Bruhmuller." Defendant argues that in denying the requested peremptory instructions, the trial court substituted its own subjective opinion for the jury's determination of these two nonstatutory mitigating circumstances. We disagree.

Regarding defendant's first request for a mitigating circumstance on his "confession," the following exchange took place:

> MR. CAUSEY: The first nonstatutory [mitigating circumstance] would be language to the effect that "After his arrest, the defendant, or John Thompson, "confessed to shooting Kenneth Bruhmuller and taking money from the store."
>
> THE COURT: I've got an issue I'd like to raise with you about that terminology. And it arises from the same basis on which I gave an instruction to the jury at the [guilt] phase. I'm not sure that the statement that was taken from the defendant constitutes

a confession, so much as an admission. Would you be satisfied with an instruction to the effect that, "After his arrest, the defendant admitted to shooting Mr. Bruhmuller and taking money from the store"?

MR. CAUSEY: Yes.

THE COURT: I think that is uncontroverted, having amended it to that extent.

Do you want to be heard on the request for a peremptory on that, Mr. Wood?

MR. WOOD [PROSECUTOR]: No, Your Honor.

THE COURT: I will submit a peremptory, nonstatutory peremptory instruction on that.

As for defendant's second requested mitigating instruction on remorse, the transcript reflects the following:

MR. CAUSEY: Judge, our second nonstatutory [mitigating circumstance] would be, "The defendant, John Thompson, has consistently expressed remorse for the murder of Kenneth Bruhmuller." And again, that would have come from Dr. Hilkey at the latter part of today.

THE COURT: Again, I have problems with the terminology, first with "consistently." We've got evidence from Dr. Hilkey and Ms. Grey of three, I think three statements attributed to the defendant—well, the statement at the time he was arrested, one to Grey, and one to Hilkey, and I don't—I'm having some difficulty in comprehending how that should be submitted, at least as a peremptory as "consistently."

MR. CAUSEY: If we removed the phrase "consistently" and just go with that language?

THE COURT: I would be—I would think that would be more in line with the evidence.

MR. CAUSEY: Okay.

THE COURT: Now, what about—I also—I think there's clear expression of regret. I don't know if what I've heard constitutes what I understand remorse to be.

MR. CAUSEY: Well, we would say that—I would contend that the questions that were asked of Dr. Hilkey were in the phraseology of remorse, and his testimony—

THE COURT: Well, Dr. Hilkey doesn't get to define the word "remorse"—

MR. CAUSEY: Right.

. . .

THE COURT: And the jury is also instructed that they're [sic] not required to accept the opinion of an expert to the exclusion of other facts and circumstances established by competent evidence in the case.

MR. CAUSEY: I guess my point would be, if that's the language they heard from the witness stand, is it up to the jury to either find it or not find it or give it—

THE COURT: Well, it would be. And if you want to submit remorse, I'll be happy to do that, but I'm certainly—I don't believe that that would merit a peremptory instruction.

MR. CAUSEY: Okay. What—I'm just asking, what phrase are you thinking that we could interchange.

THE COURT: Well, you know, it's up to you, Bill.

MR. CAUSEY: Yeah.

THE COURT: If you wanted to ask for regret[,] I think there's been an expression of regret on at least three occasions that it happened.

MR. CAUSEY: And I just want to make sure I'm clear. If we say, "The defendant has expressed regret for the murder of Kenneth Bruhmuller," would we get—are you saying we would get the peremptory?

THE COURT: I think you would be entitled to a peremptory on that phrasing.

MR. CAUSEY: So, yes, I would change that to "The defendant has expressed regret for the murder of Kenneth Bruhmuller," and ask that be given peremptorily. . . .

. . .

THE COURT: Then, upon a request, as I understand it, an amended request to submit the fourth mitigating circumstance as, "Consider whether the defendant expressed regret for the murder of Kenneth Bruhmuller," and—that's what you're requesting at this time? Is that the phrasing you are—

MR. CAUSEY: Yes, regret.

Thereafter, the trial court agreed to give the following nonperemptory mitigating circumstance: "Consider whether the defendant has expressed remorse for the murder of Kenneth Bruhmuller." Defense counsel later informed the trial court that he would "like to abandon" the instruction concerning remorse "and just leave the one that says 'regret' " because he did not "want the jury to have to pick and choose" between remorse and regret. The trial court complied, submitting peremptory nonstatutory mitigating instructions as to defendant's admission of guilt and defendant's regret. After the jury was so charged, defense counsel stated that he was renewing all "previous objections." Neither nonstatutory mitigator was found by the jury.

"A defendant is not prejudiced by the granting of relief which he has sought or by error resulting from his own conduct." N.C.G.S. § 15A-1443(c) (2003). A defendant is therefore "precluded from obtaining relief when the error was invited by his own conduct." *Gainey*, 355 N.C. at 108, 558 S.E.2d at 485. "To the extent that defendant agreed with the trial court's manner of instruction, defendant has invited any alleged error, and he may not obtain relief from such error." *Id.* at 110, 558 S.E.2d at 486.

In *State v. Wilkinson*, the defendant submitted a jury instruction in writing on the meaning of "depravity of mind" that read, " 'a circumstance which makes a murder *unusually* heinous, atrocious, or cruel.' " 344 N.C. 198, 212-13, 474 S.E.2d 375, 382-83 (1996). The trial court deleted the word "unusually" and, in its place, inserted the word "especially." *Id.* at 213, 474 S.E.2d at 383. The defendant indicated to the trial court that he had no objection to the substitution, but argued on appeal that the modification was plain error. *Id.*

This Court noted in *Wilkinson* that, normally, where a defendant fails to object to an error at trial, we would determine whether the alleged error constituted plain error. *Id.* "However, this Court has consistently denied appellate review to defendants who have attempted to assign error to the granting of their own requests." *Id.*

Because the defendant agreed to the substitution, the Court concluded that the defendant was complaining on appeal about an instruction he had actually requested; therefore, any error was invited by the defendant. *Id.* at 214, 474 S.E.2d at 383; *see also State v. White*, 349 N.C. 535, 570, 508 S.E.2d 253, 275 (1998) ("Where a defendant tells the trial court that he has no objection to an instruction, he will not be heard to complain on appeal."), *cert. denied*, 527 U.S. 1026, 144 L. Ed. 2d 779 (1999).

Here, the above-noted portions of the sentencing phase transcript demonstrate that defendant, like the defendant in *Wilkinson*, invited any error in the trial court's refusal to give peremptory instructions to the jury on the nonstatutory mitigating circumstances that he confessed and that he was remorseful. Defendant's attorney actively agreed to the instructions the trial court thought appropriate. In so doing, defendant amended the proposed peremptory jury instructions that he had previously submitted in writing to the court. Furthermore, concerning the mitigating circumstance of remorse, defendant later abandoned the modified instruction, which had been allowed by the trial court. The trial court did not deviate from defendant's agreed upon instruction on regret. Therefore, defendant invited any error in the trial court's actions. Accordingly, defendant is not entitled to review based upon this assignment of error and it is overruled.

[8] Defendant next assigns as error the trial court's deviation from the standard peremptory, nonstatutory mitigating instruction approved by this Court in *State v. Lynch*, 340 N.C. 435, 459 S.E.2d 679 (1995), *cert. denied*, 517 U.S. 1143, 134 L. Ed. 2d 558 (1996). Defendant argues that in adding the last paragraph of the peremptory, nonstatutory instructions set out below, the trial court invited jury nullification by repeatedly emphasizing that the jury could reject unchallenged evidence.

In *Lynch*, this Court approved the following phrasing for peremptory instructions on nonstatutory mitigating circumstances:

> "All of the evidence tends to show [named mitigating circumstance]. Accordingly, as to this mitigating circumstance, I charge that if you find the facts to be as all the evidence tends to show, you will answer, 'Yes,' as to the mitigating circumstance Number [#] on the issue and recommendation form if one or more of you deems it to have mitigating value."

340 N.C. at 476, 459 S.E.2d at 700.

Defendant contends that by approving certain phrasing for peremptory, nonstatutory mitigating instructions in *Lynch*, this Court modified prior law which allowed the jury to reject a nonstatutory mitigating circumstance even when the trial court finds that all the evidence tends to show its existence. We disagree.

Our opinion in *Lynch* simply stated that the particular peremptory instruction given by the trial court in that case was a correct statement of law. *Id.* Even when a defendant is entitled to a peremptory instruction as to a nonstatutory mitigating circumstance, jurors can reject that nonstatutory mitigating circumstance, either because the jurors find that it does not exist *or* because they determine that it does not have mitigating value.

To find a nonstatutory mitigating circumstance, a juror must first determine "whether the proffered circumstance exists factually. Jurors who find that a nonstatutory mitigating circumstance exists are then to consider whether it should be given any mitigating weight." *State v. Green*, 336 N.C. 142, 173, 443 S.E.2d 14, 32, *cert. denied*, 513 U.S. 1046, 130 L. Ed. 2d 574 (1994). Even where defendant is entitled to a peremptory instruction, "[t]he jury may still reject that circumstance if it finds the evidence is not convincing or if it finds the circumstance does not have mitigating value." *Jones*, 339 N.C. at 162, 451 S.E.2d at 852-53. *See Green*, 336 N.C. at 173-74, 443 S.E.2d at 32-33; *State v. Gay*, 334 N.C. 467, 492, 434 S.E.2d 840, 854 (1993). Similarly, as we stated in *State v. McCollum*, "It is well settled that a peremptory instruction does not deprive the jury of its right to reject the evidence because of a lack of faith in its credibility." 334 N.C. 208, 229, 433 S.E.2d 144, 155 (1993), *cert. denied*, 512 U.S. 1254, 129 L. Ed. 2d 895 (1994).

In the present case, the trial court gave peremptory instructions concerning 14 of the 17 nonstatutory mitigating circumstances submitted to the jury. As to each of those mitigating circumstances, the trial court gave the instruction, or one similar to it, recited below:

> You would find this mitigating circumstance if you do find that the defendant [insert mitigating circumstance], and that this circumstance does have mitigating value.
>
> The defendant has the burden of establishing this mitigating circumstance by the preponderance of the evidence. All of the evidence tends to show that this circumstance does exit. Accordingly, as to this mitigating circumstance number [insert #],

> I charge that if one or more of you find the facts to be as all the evidence tends to show, and further deems that to have mitigating value you would so indicate by having your foreman write "yes" in the space provided after mitigating circumstance number [insert #] on the Issues and Recommendation form.
>
> If none of you finds this circumstance to exist, even though there is no evidence to the contrary, or if none of you deems it to have mitigating value, you would so indicate by having your foreman write "no" in that space.

The trial court's peremptory instruction on nonstatutory mitigating circumstances in the case *sub judice* was a correct statement of the law. *Cf. Lawrence*, 352 N.C. at 31-32, 530 S.E.2d at 826 (approving a peremptory instruction similar to the one given in the present case despite the defendant's argument that "once a peremptory instruction is given as to a mitigating circumstance, the only question that remains is how much weight the jury will give the circumstance"). Accordingly, we reject defendant's assignment of error.

[9] Finally, because we find no error with respect to the trial court's jury instructions and submission of the mitigating circumstances discussed *supra*, there is no need to consider defendant's cumulative error argument on this point.

[10] By his next assignment of error, defendant contends that two of the seven N.C.G.S. § 15A-2000(e)(3) (prior violent felony conviction) aggravating circumstances submitted to and found by the jury were not supported by the evidence. As to these two aggravators, the trial court instructed the jury that it must determine whether defendant had "been previously convicted of a felony involving the use or threat of violence to the person, with regard to an armed robbery of Billy Adams on March 17, 1990," and whether defendant had "been previously convicted of a felony involving the use or threat of violence to the person, with regard to an armed robbery of April Dobbins on April 8, 1990." Defendant correctly points out that the indictments for these two felonies listed "Bojangles Restaurant" as the victim of the robbery, with "Billy Adams" and "April Dobbins" as being "present and in attendance." Defendant further notes that the evidence at trial, particularly the testimony of Adams and Dobbins, showed that the restaurant was the entity that was robbed, while the individuals listed in the indictments were merely present.

In support of his argument, defendant compares his case to one in which an indictment for armed robbery varies from proof of the

charge submitted at trial. According to defendant, "[j]ust as nonsuit would have been warranted had the [S]tate presented these indictments alleging robberies of Bojangles, and then sought convictions for robberies of two entirely different named victims, so too is there a fatal variance here between the [S]tate's indictments and evidence and the corresponding instructions and findings on these aggravating factors." We disagree.

When the prosecution submitted the seven e(3) aggravating circumstances at trial, defendant objected, but on the grounds that the circumstances should be consolidated into one aggravator. Thus, defendant did not properly preserve this issue for appellate review, *see* N.C. R. App. P. 10(b)(1) ("In order to preserve a question for appellate review, a party must have presented to the trial court a timely request, objection or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context."), and is only entitled to relief if the trial court's submission of defendant's prior felonies was plain error. *State v. Odom*, 307 N.C. 655, 659-60, 300 S.E.2d 375, 378 (1983).

Furthermore, defendant misapprehends the law regarding the effect of a variance between the designated property owner in an armed-robbery indictment and the evidence as to the property owner presented at trial. It is well established that an indictment for armed robbery need not allege that the property taken "be laid in a particular person." *State v. Spillars*, 280 N.C. 341, 345, 185 S.E.2d 881, 884 (1972). Likewise, "[v]ariance between the allegations of the [armed robbery] indictment and the proof in respect of the ownership of the property taken is not material." *State v. Ballard*, 280 N.C. 479, 485, 186 S.E.2d 372, 375 (1972). "The gravamen of the offense is the endangering or threatening of human life by the use or threatened use of firearms or other dangerous weapons in the perpetration of or even in the attempt to perpetrate the crime of robbery." *Id.* "An indictment for robbery will not fail if the description of the property is sufficient to show it to be the subject of robbery and negates the idea that the accused was taking his own property." *Spillars*, 280 N.C. at 345, 185 S.E.2d at 884; *see also State v. Pratt*, 306 N.C. 673, 681, 295 S.E.2d 462, 467 (1982) ("As long as it can be shown defendant was not taking his own property, ownership need not be laid in a particular person to allege and prove robbery"); *State v. Jackson*, 306 N.C. 642, 650-51, 295 S.E.2d 383, 388 (1982) ("As long as the evidence shows the defendant was not taking his *own* property, ownership is irrelevant . . . . A tak-

ing from one having the care, custody or possession of the property is sufficient").

Here, both the aggravating circumstances submitted to the jury and the evidence presented at trial, including the armed robbery indictments and the testimony of Adams and Dobbins, conveyed to the jury that those two employees of the property owner listed in the aggravating circumstances were present and endangered or threatened in the course of the armed robberies. It is further clear from both the indictments and other evidence admitted at trial that the property taken did not belong to defendant. In both instances, any inconsistency between the aggravating circumstance, indictment, and trial testimony was thus immaterial. Because we conclude that the trial court did not commit error, much less plain error, in submitting the challenged aggravating circumstances, we reject defendant's assignment of error as to this issue.

[11] Similarly, we reject defendant's related argument that the trial court erred in failing to dismiss his indictment for robbery with a dangerous weapon because the indictment omitted the essential element that the victim, Domino's Pizza, was "a legal entity capable of owning property." First, the cases cited by defendant in support of his argument are inapposite. *State v. Bell* found a fatal variance between a robbery indictment and the evidence presented at trial because although the indictment alleged that " 'Jean' Rogers" was robbed, all evidence at trial indicated " 'Susan' Rogers" was actually the victim. 270 N.C. 25, 29, 153 S.E.2d 741, 744 (1967). Thus, the facts in *Bell* distinguish that case from the instant case. *State v. Norman* concluded that an indictment for larceny must allege that an entity listed as the victim is " 'a legal entity capable of owning property' " because proof of offense of the ownership rights of another is an essential element of larceny. 149 N.C. App. 588, 593, 562 S.E.2d 453, 457 (2002) (quoting *State v. Woody*, 132 N.C. App. 788, 790, 513 S.E.2d 801, 803 (1999)). However, armed robbery and larceny are separate and distinct crimes with separate elements, and, as we noted above, an indictment for armed robbery is not fatally defective simply because it does not correctly identify the owner of the property taken.

Second, the property description in the robbery indictment was sufficient to demonstrate that the property did not belong to the defendant. Despite defendant's contentions to the contrary, it is irrelevant whether the indictment alleged that Domino's was a legal entity. Therefore, defendant's assignment of error as to this issue is overruled.

[12] Defendant next contends that during his sentencing hearing, the prosecutor engaged in improper closing argument by misrepresenting the facts and the law on two separate occasions. However, defendant did not timely object to either of the challenged portions of the prosecutor's arguments.

The first portion of allegedly improper prosecutorial argument is as follows:

> This is not a matter of you doing something to him. Don't let anybody imply to you at any point in this trial that you're doing this to him. Don't let anyone beg you not to take his life. That's not what's going on here. You're not doing this to him. He's doing it to you. He made all these decisions back on March 31, 2001. That day, he chose to take an innocent man, and play not only judge and jury, but executioner. And when he made that decision, he made your decision. This is not a matter of you doing it to him. He put himself in that seat, by his own acts and conduct.

According to defendant, this argument was improper because the prosecutor knew defendant was willing to plead guilty and accept a sentence of life imprisonment without parole; nonetheless, the prosecutor urged the jury to ignore defendant's "pleas for mercy." Defendant further contends that the argument misconstrues the law because the prosecutor, not defendant, was responsible for the capital trial, citing N.C.G.S. § 15A-2004(a) (2003) ("The State may agree to accept a sentence of life imprisonment for a defendant at any point in the prosecution of a capital felony . . ."). Finally, defendant contends that this line of argument, along with the prosecutor's elicitation of the Alexanders' opinion as to the proper sentence, misled the jury to believe that life imprisonment without parole was not an appropriate sentence and that defendant was responsible for forcing the jury to make a life-or-death sentencing decision.

Counsel is afforded wide latitude to present arguments "which are warranted by the evidence and are not calculated to mislead or prejudice the jury." *State v. Riddle*, 311 N.C. 734, 738, 319 S.E.2d 250, 253 (1984), *quoted in State v. Roache*, 358 N.C. 243, 301-02, 595 S.E.2d 381, 418-19 (2004). The standard for reviewing the propriety of a prosecutor's closing argument is well settled:

> Where a defendant fails to object to the closing arguments at trial, defendant must establish that the remarks were so grossly improper that the trial court abused its discretion by failing to intervene *ex mero motu*. "To establish such an abuse, defendant

> must show that the prosecutor's comments so infected the trial with unfairness that they rendered the conviction fundamentally unfair." *See State v. Davis*, 349 N.C. 1, 23, 506 S.E.2d 455, 467 (1998), *cert. denied*, 526 U.S. 1161, 144 L. Ed. 2d 219 (1999).

Roache, 358 N.C. at 296-97, 595 S.E.2d at 415-16 (quoting *State v. Grooms*, 353 N.C. 50, 81, 540 S.E.2d 713, 732 (2000), *cert. denied*, 534 U.S. 838, 151 L. Ed. 2d 54 (2001)).

Moreover, "statements contained in closing arguments to the jury are not to be placed in isolation or taken out of context on appeal. Instead, on appeal we must give consideration to the context in which the remarks were made and the overall factual circumstances to which they referred." *Green*, 336 N.C. at 188, 443 S.E.2d at 41. Immediately preceding the challenged portion of his argument, the prosecutor reminded the jury that during jury selection, defendant's attorney asked the jury whether it "had what it took to make a life or death decision," and informed the jury that "it's time to make a decision." Later the prosecutor further emphasized to the jury, "When you make *your decision*, nobody's going to tell you its going to be easy . . . . [I]t's not as easy as saying just life or death." (Emphasis added.)

Furthermore, on numerous occasions, this Court has rejected the line of reasoning presented by defendant, finding no error or gross impropriety in similar prosecutorial arguments. *See State v. Prevatte*, 356 N.C. 178, 266, 570 S.E.2d 440, 489 (2002) (concluding that nothing in the prosecutor's argument that the defendant signed his own death warrant in the victim's blood "relieves the jury of its responsibility of fairness and impartiality"), *cert. denied*, 538 U.S. 986, 155 L. Ed. 2d 681 (2003); *State v. Walls*, 342 N.C. 1, 64, 463 S.E.2d 738, 772 (1995) (concluding that when the prosecutor argued that " '[we]'re the master of our destiny [and] we are responsible for the consequences of our actions,' " "[t]he thrust of the prosecutor's argument was not that the jury's decision was not final, but rather, that it was the defendant, who by choosing his course of actions, signed his own death warrant"), *cert. denied*, 517 U.S. 1197, 134 L. Ed. 2d 794 (1996); *Jones*, 339 N.C. at 161, 451 S.E.2d at 852 (concluding that "it is highly doubtful that the jury thought itself relieved of the responsibility of recommending the defendant's sentence" when the prosecutor argued that the defendant " 'put himself in this position' " and " 'gave himself the death penalty' "); *State v. Reeves*, 337 N.C. 700, 734, 448 S.E.2d 802, 818 (1994) (finding, where the prosecution argued that the defendant

" 'wrote his own death warrant when he killed and brutalized [the victim]' " and that the " 'death warrant that he has wrote [sic] is here before you folks to sign, to make legal,' " that "[t]he jury should have in no way deduced from this that it was not their [sic] responsibility to impose the death penalty"), *cert. denied*, 514 U.S. 1114, 131 L. Ed. 2d 860 (1995); *see also State v. McNeil*, 350 N.C. 657, 689, 518 S.E.2d 486, 505 (1999) ("This Court has repeatedly held it is not improper to argue that defendant, as judge, jury, and executioner, single-handedly decided the victim's fate"), *cert. denied*, 529 U.S. 1024, 146 L. Ed. 2d 321 (2000).

Defendant's arguments are wholly without merit. The record reveals no indication that the prosecutor expressly or implicitly communicated to the jury that life imprisonment should not be considered, that the jury should disregard evidence of defendant's "pleas for mercy," or, most importantly, that defendant's sentence "was determined automatically" and was not the jury's upcoming decision. Here, the prosecution simply referenced decisions defendant made on the day of the murder and argued that those decisions led to the present proceeding and the jury's decision. "Clearly, the gist of the prosecutor's argument was that the defendant, by committing a capital crime, put himself in the position where he would be tried for his life." *Jones*, 339 N.C. at 161, 451 S.E.2d at 852. Because the prosecutor's argument in no way relieved the jury of its responsibility to recommend a sentence or to remain fair and impartial, the trial court did not err in failing to intervene *ex mero motu*.

[13] The second portion of the closing argument challenged by defendant is as follows:

> There are three *factors* present in this case, which I think would help you in making your decision on which of the aggravators and mitigators you should consider. And the three factors are, number one, this defendant has got a prior history for violent conduct. Number two, this defendant killed a totally helpless and innocent victim. And number three, based on the evidence you heard in the first phase of the trial, there can be no residual doubt in your mind about who pulled the trigger and who committed this crime. You have the right man. For these reasons, when you fill out your verdict sheet, I ask you, after weighing all the aggravating and mitigating factors, to sentence Mr. Thompson . . . to death for the murder of Kenneth Bruhmuller.

(Emphasis added.)

Defendant contends that in this portion of the closing argument, the prosecution erroneously attempted to submit additional non-statutory aggravating circumstances to the jury, including that defendant killed an innocent victim and that the jury should have no residual doubt as to defendant's guilt.

Again, we find defendant's argument meritless. Although it is common practice for practitioners and courts to interchange the proper term "circumstance" with "factor" when referring to aggravating circumstances, the prosecution's use of the term "factors" during closing argument clearly did not refer to any additional aggravating circumstances. The prosecution merely requested that the jury consider certain facts when weighing *both* mitigating and aggravating circumstances. In a separate section of his argument, the prosecution meticulously explained the eight statutory aggravating circumstances submitted to the jury. After the attorneys completed their arguments, the trial court instructed the jury as to only eight statutory aggravating circumstances. We presume, as we must, that the jury followed the instructions as submitted to it by the trial court. *See State v. Jennings*, 333 N.C. 579, 618, 430 S.E.2d 188, 208, *cert. denied*, 510 U.S. 1028, 126 L. Ed. 2d 602 (1993). Accordingly, this assignment of error is overruled.

[14] In his next assignment of error, defendant contends that he is entitled to a new capital sentencing proceeding because he and his attorney were excluded from alleged unrecorded exchanges between the bailiff and the jury. Defendant contends that this alleged exchange necessarily altered the outcome of his capital sentencing proceeding and that his exclusion from this alleged communication violated his unwaivable constitutional right to be present at all stages of his capital murder trial, his right to a complete record for appeal, and the due process and confrontation clauses of the constitution of the United States and the State of North Carolina. We disagree.

According to the defendant, the alleged exchange took place on 14 November 2002 near the end of his capital sentencing proceeding and after the jury had begun its deliberations. The transcript reveals the following:

> (Proceedings continued at 5:01 p.m. The defendant was present. The jury was not present.)
>
> THE COURT: Bring them in.
>
> I'm going to release the jury for the day at this time, counsel.

(The bailiff conferred with the [c]ourt at the bench.)

(Time was allowed.)

(Proceedings continued at 5:08 p.m. The defendant was present. The jury was not present.)

BAILIFF ODUM: They have a verdict, Judge.

THE COURT: All right.

Ladies and gentlemen, the jury has announced to the bailiff that it has reached a verdict.

From the above-quoted portion of the transcript, defendant infers that

> an unrecorded, private exchange between the bailiff and the trial court substantially changed the course of these capital proceedings. Something in that exchange caused the court to reverse its order for the bailiff to bring the jury into the courtroom for an evening recess. Thus the exchange must have focused on the bailiff's perceptions or interpretations of the words or conduct of jury members. Those interactions may have been either the bailiff's direct communications with, or indirect observations of, one or more jurors. In either case, the interactions between the bailiff and the jury, like the private conference between the bailiff and the judge, occurred in defendant's absence, off the record, and at a pivotal stage of the life-and-death decision-making process.

We acknowledge that a defendant's right to be present during all stages of his trial is guaranteed by the constitutions of the United States and the State of North Carolina. *State v. Golphin*, 352 N.C. 364, 389, 533 S.E.2d 168, 189 (2000), *cert. denied*, 532 U.S. 931, 149 L. Ed. 2d 305 (2001). However, defendant's argument relies exclusively on North Carolina law and our discussion is limited accordingly.

The right of confrontation, as guaranteed by Article I, Section 23 of the North Carolina Constitution "extends to all times during the trial when anything is said or done which materially affects defendant as to the charge against him." *State v. Chapman*, 342 N.C. 330, 337-38, 464 S.E.2d 661, 665 (1995), *cert. denied*, 518 U.S. 1023, 135 L. Ed. 2d 1077 (1996). When a defendant is tried capitally, the right to be present is unwaivable. *Golphin*, 352 N.C. at 389, 533 S.E.2d at 189.

When a violation of this right is found on appeal, defendant will prevail unless the State can show that any such violation was harmless beyond a reasonable doubt. *State v. Huff*, 325 N.C. 1, 32, 381 S.E.2d 635, 652-53 (1989), *judgment vacated on other grounds*, 497 U.S. 1021, 111 L. Ed. 2d 777 (1990). However, this burden does not shift to the State unless and until defendant demonstrates constitutional error on the record. *State v. Blakeney*, 352 N.C. 287, 305-06, 531 S.E.2d 799, 813-14 (2000) (finding that when the transcript of a dialogue with the court indicated that defense counsel was present during a proceeding in a capital case, defendant's argument that the transcript's failure to specifically indicate whether he was present during the same proceeding constituted a Confrontation Clause violation was insufficient to show error; thus, the burden did not shift to the State), *cert. denied*, 531 U.S. 1117, 148 L. Ed. 2d 780 (2001); *State v. Adams*, 335 N.C. 401, 408-10, 439 S.E.2d 760, 763-64 (1994) (finding error in the trial judge's *ex parte* communications with three jurors but that such error was harmless, and further finding that the capital defendant could not carry his "burden in the first instance" that there may have been other impermissible *ex parte* communications not reflected in the record because the record did not reveal the existence of any such communications), *cert. denied*, 522 U.S. 1096, 139 L. Ed. 2d 878 (1998); *cf. State v. Smith*, 326 N.C. 792, 794, 392 S.E.2d 362, 363-64 (1990) (granting the capital defendant a new trial because the record revealed the existence of *ex parte* communications between three prospective jurors and the trial judge but, because the record was silent as to the contents of the communications, the Court could not determine whether the errors were harmless beyond a reasonable doubt).

We determine that defendant has not shown a violation of the North Carolina Confrontation Clause on the record. Although defendant speculates that the bailiff may have engaged in "direct communications with, or indirect observations of, one or more jurors," the transcript in no way indicates that any such communication between the bailiff and the jury members occurred, particularly as the trial judge did not instruct the bailiff to communicate with the jury. Because "[w]e will not assume error 'when none appears on the record,' " defendant's assignment of error is overruled. *Blakeney*, 352 N.C. at 304, 531 S.E.2d at 812 (quoting *State v. Williams*, 274 N.C. 328, 333, 163 S.E.2d 353, 357 (1968)), *quoted in State v. Daughtry*, 340 N.C. 488, 517, 459 S.E.2d 747, 762 (1995), *cert. denied*, 516 U.S. 1079, 133 L. Ed. 2d 739 (1996)).

INEFFECTIVE ASSISTANCE OF COUNSEL

[15] Next, defendant assigns error to statements made by his defense counsel during both the jury selection and guilt-innocence phases of trial. Defendant argues that counsel improperly conceded to jurors during *voir dire* that defendant is guilty of first-degree murder, thereby depriving him of his Sixth Amendment right to effective assistance of counsel. Defendant further argues that counsel failed to establish a sufficient record of his knowing and voluntary consent to this trial strategy during the guilt-innocence phase and that such concessions constitute ineffective assistance of counsel *per se* under this Court's decision in *State v. Harbison*, 315 N.C. 175, 337 S.E.2d 504 (1985), *cert. denied*, 476 U.S. 1123, 90 L. Ed. 2d 672 (1986).

The two-part test for ineffective assistance of counsel is the same under both the state and federal constitutions. *State v. Braswell*, 312 N.C. 553, 562-63, 324 S.E.2d 241, 248 (1985). A defendant must first show that his defense counsel's performance was deficient and, second, that counsel's deficient performance prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 693 (1984). Deficient performance may be established by showing that "counsel's representation 'fell below an objective standard of reasonableness.' " *Wiggins v. Smith*, 539 U.S. 510, 521, 156 L. Ed. 2d 471, 484 (2003) (quoting *Strickland*, 466 U.S. at 688, 80 L. Ed. 2d at 693). Generally, "to establish prejudice, a 'defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.' " *Wiggins*, 539 U.S. at 534, 156 L. Ed. 2d at 493 (quoting *Strickland*, 466 U.S. at 694, 80 L. Ed. 2d at 698).

In *Harbison*, defense counsel told the jury during closing argument that he did not "feel that [the defendant] should be found innocent. I think he should do some time to think about what he has done. I think you should find him guilty of manslaughter and not first degree." 315 N.C. at 178, 337 S.E.2d at 506. This Court held that when a defense counsel, "to the surprise of his client admits his client's guilt, the harm is so likely and so apparent that the issue of prejudice need not be addressed." *Id.* at 180, 337 S.E.2d at 507. By admitting the defendant's guilt without his consent, counsel had "swept away" the defendant's right to plead "not guilty" and the defendant's "rights to a fair trial and to put the State to the burden of proof." *Id.* Accordingly, this Court concluded that a "per se . . . violation of the Sixth Amendment [] has been established in every criminal case in which

the defendant's counsel admits the defendant's guilt to the jury without the defendant's consent." *Id.* at 180, 337 S.E.2d at 507-08. *See also State v. Matthews*, 358 N.C. 102, 591 S.E.2d 535 (2004). However, defendant has not shown a *Harbison* violation in this case.

With regard to jury selection: During *voir dire*, defense counsel asked several prospective jurors, "Do you feel that you're up to making a life or death decision?" On at least three occasions, defense counsel followed his question with one of these statements: "That's what you are going to be asked to do,"; "[W]e are here, and if you're selected on the jury, you would be called upon to make such a decision"; and "I'm asking in a real way, because that would be a decision that all four of you would be making in this case, in this courtroom, with respect to John Thompson." Defendant argues that defense counsel's statements could only be interpreted as admissions of defendant's guilt of capital murder because the statements implied that the trial would *necessarily* include a capital sentencing phase. As the jury *voir dire* was conducted in panels with the potential jury pool present in the courtroom, defendant contends that four jurors who were later seated also heard defense counsel's statements.

This Court has consistently considered a defense counsel's statements in context to determine whether they are concessions under *Harbison*. *See State v. Hinson*, 341 N.C. 66, 78, 459 S.E.2d 261, 268 (1995) (finding no ineffective assistance under *Harbison* in defense counsel's closing argument and emphasizing that "defendant [had] taken the challenged comments out of context"). After a careful review of the transcripts and briefs, we are satisfied here that defense counsel's statements during *voir dire* were not intended as concessions of defendant's guilt; rather, the statements were part of a broader series of questions through which defense counsel sought to ascertain whether prospective jurors were predisposed to automatically vote for either life in prison without parole or the death penalty. In particular, defense counsel repeatedly prefaced his questions with variations of the following inquiry:

> MR. CAUSEY: [D]o you feel that *if you were in the sentencing phase*, where you have sat on the jury, you've heard all the evidence, found John guilty of premeditated, deliberated murder, would you still be able to consider both life without parole and the death penalty as both [sic] possible punishment? Or would you lean towards one or the other?

(Emphasis added.) At another time defense counsel asked:

> Do you likewise feel that *if we were in a sentencing hearing* and you've already found John guilty of first-degree, premeditated murder, that's no longer an issue, you've said he's done it, he thought about it, meant to do it, and did it, killed another person. Would you at that point of the trial be able to consider both life without parole as a possible punishment and the death penalty?

(Emphasis added.)

Further, the trial court informed potential jurors before *voir dire* that the attorneys "have the right to . . . ask you some questions about your positions on the death penalty, on capital punishment." Notwithstanding those questions, the trial court instructed the prospective jurors that the trial would not proceed to a capital sentencing phase unless the jury found defendant guilty of first-degree murder and "there would be no sentencing hearing convened, unless and until a person is found guilty of first-degree murder. So the fact that we are discussing a sentencing hearing presumes that there has been a verdict of first-degree murder returned." When viewed in context, defense counsel's statements during jury selection appear wholly distinct from the statements of the defense counsel in *Harbison* and do not constitute ineffective assistance of counsel *per se* under *Harbison*.

As for the guilt phase of trial, defendant argues that counsel essentially conceded guilt of felony murder by acknowledging that defendant had robbed Domino's and shot Bruhmuller. Defendant also contends that the trial court did not request sufficient details on the content of his defense counsel's anticipated trial strategy. Without such detail, defendant argues that the record fails to establish that he understood the gravity of counsel's concessions, specifically, that he understood defense counsel would concede his guilt on the capital charge of felony murder.[2] Because the record reflects that defendant

2. Although defendant also argues that "[n]either the short-form indictment nor any other aspect of this record established that defendant received notice of the 'true nature of the charge'—*i.e.*, the elements of capital murder on the theories presented by the prosecution—*before* his lawyers conceded guilt on that charge to the jury," we note that this Court has previously held that short-form indictments meet state and federal constitutional requirements and are sufficient to charge first-degree felony murder as well as first-degree murder carried out with malice, premeditation, and deliberation. *State v. Hunt*, 357 N.C. 257, 582 S.E.2d 593, *cert. denied*, 539 U.S. 985, 156 L. Ed. 2d 702 (2003); *see also State v. Braxton*, 352 N.C. 158, 174-75, 531 S.E.2d 428, 437-38 (2000), *cert. denied*, 531 U.S. 1130, 148 L. Ed. 2d 797 (2001). Moreover, our holding in *State v. Harbision*, is narrowly designed to safeguard defendant's rights to effective assistance of counsel and to plead "not guilty," and does not implicate the panoply of due process concerns briefed by this defendant.

knowingly and voluntarily consented to the trial strategy employed by his defense counsel, these assignments of error are overruled.

During the guilt-innocence phase and before closing arguments, the trial court inquired of defense counsel whether "there will be any portion of the argument which could be construed as an acknowledgment of culpability or an admission of guilt on the part of the defendant." Counsel responded, "Your Honor, the way that I plan on handling that is, by acknowledging responsibility in these cases, but without specifically mentioning guilt" and confirmed that he had discussed this strategy with defendant, after which the trial court questioned defendant directly.

The trial court asked defendant to stand and swore him under oath. Thereafter, the court entered the following colloquy on the record:

> THE COURT: Mr. Thompson, at this time, I'm going to speak to you about the conversation I just had with Mr. Chamberlin, about the argument that he intends to make to the jury in your case. He has told me that he has in fact discussed the general nature and subject of his argument with you. Have you had that discussion with Mr. Chamberlin?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: Okay. Do you understand that in any criminal case, the decision as to what plea [is] to be entered must be made exclusively by the person who is charged, in this case, by you?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: You understand that you have to decide what plea to enter before the jury and before the Court? Related to that is a rule that the decision as to whether to admit guilt or culpability or fault to any kind of criminal offense, if that's going to be done by your lawyer during arguments to the jury, that has to be agreed to by the person accused, by the defendant, that is, by you. Do you understand that?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: And before an attorney can go before a jury and say that his client was guilty or possibly responsible for any criminal conduct, he has to have the accused person's, that's your, consent before he can do that. Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: Okay. Have you in fact—again, I'll ask you, have you discussed that particular trial strategy with your lawyer, particularly Mr. Chamberlin, about his final argument?

THE DEFENDANT: Yes, sir.

THE COURT: And do you in fact agree that Mr. Chamberlin may make that type of argument to the jury, admitting responsibility for some of these events?

THE DEFENDANT: Yes, sir.

THE COURT: Okay. Do you have any questions you'd like to ask me about any of what we've just discussed here?

THE DEFENDANT: No, sir.

THE COURT: Okay. You are agreeing to Mr. Chamberlin making an argument to that general effect to the jury; is that correct?

THE DEFENDANT: Yes, sir.

THE COURT: All right. Thank you, Mr. Thompson. Would you be seated, please.

Defense counsel ultimately argued to the jury during the guilt-phase closing argument that although defendant had robbed the Domino's and shot Bruhmuller, he had not acted with premeditation and deliberation. For that reason, defense counsel urged the jury to find defendant not guilty of first-degree murder based upon the theory of malice, premeditation, and deliberation. Defense counsel did not otherwise address the State's theory of first-degree felony murder predicated upon robbery with a dangerous weapon.

Immediately following defense counsel's closing argument, the trial court inquired as to whether defendant was "able to clearly hear the speech that [defense counsel] just made to the jury." Defendant responded that he had heard the closing argument, after which the court asked, "Is that the type of speech or statement that you and [defense counsel] had discussed making to the jury?" and "Do you agree and consent to him making that speech to the jury?" Defendant responded, "Yes, sir" to both questions.

In *Harbison*, the defendant had not consented to his counsel's concession of guilt, and the trial court did not take steps to ascertain whether this strategy had been discussed with the defendant. This

Court has since stated that an on-the-record exchange between the trial court and the defendant is the preferred method of determining whether the defendant knowingly and voluntarily consented to an admission of guilt during closing argument. *State v. McDowell*, 329 N.C. 363, 386-87, 407 S.E.2d 200, 213 (1991). However, this Court has declined to define such a colloquy as the sole measurement of consent or to set forth strict criteria for an acceptable colloquy. *Id.* at 387, 407 S.E.2d. at 213.

It is sufficient to note that the exchange that took place here is nearly identical to the on-the-record discussion which we held to show knowing and voluntary consent in *McDowell*, 329 N.C. at 385-86, 407 S.E.2d at 212-13. Although the trial court in *McDowell* also provided the defendant with an unobtrusive means to signal during closing argument that defense counsel had exceeded his authority, *id.* at 386, 407 S.E.2d at 213, we do not view this practice as essential to a determination of defendant's knowing and voluntary consent to concessions made in the argument.

Here, the trial court twice confirmed that defense counsel had discussed the trial strategy with defendant. The court also twice informed defendant that he had the right to choose which plea to enter and that his counsel could not admit any degree of "guilt or culpability or fault" without his consent. Then, the court twice asked defendant whether he agreed that defense counsel had permission to "admit[] responsibility for some of these events" to the jury. Defendant stated that he agreed and that he had no questions about his discussion with the court. Following closing argument, the court inquired and defendant stated under oath that defense counsel had made the type of statement which he expected and that he agreed and consented to defense counsel's argument.

Accordingly, we find that defendant's on-the-record consent to his counsel's argument complied with the requirements of *Harbison*; therefore, we deny defendant's alternative request that this Court remand his case for an evidentiary hearing on whether defendant consented to defense counsel's concessions of guilt.

Because defendant voluntarily and knowingly consented to defense counsel's concessions, no *per se* violation occurred, and further review is "pursuant to the normal ineffectiveness standard set forth in *Strickland v. Washington*, 466 U.S. 668, 80 L. Ed. 2d 674 . . . (1984)[] and *State v. Braswell*, 312 N.C. 553, 324 S.E.2d 241 (1985)." *McDowell*, 329 N.C. at 387, 407 S.E.2d at 213. However,

defendant has entered only a general assignment of error on this point, and defendant's only arguments relate to his claim that defense counsel's statements violated the *per se* ineffective assistance of counsel standard established by *Harbison*. For this reason, defendant is deemed to have waived broader review under *Strickland* and *Braswell* as to whether defense counsel's alleged concessions constituted ineffective assistance of counsel. N.C. R. App. P. 28(a) ("Questions raised by assignments of error in appeals from trial tribunals but not then presented and discussed in a party's brief are deemed abandoned.").

[16] Next, defendant contends that the record on appeal contains several additional ineffective assistance of counsel issues. However, defendant presents no more than a general argument that these issues cannot be resolved without further development of the record or references to information outside of the record. Defendant asks this Court to rule that he cannot be procedurally barred from raising these claims during future litigation because he was unable to litigate them fully on direct appeal. He emphasizes that the cold record prevents review under the ineffective assistance of counsel standard established by *Strickland* and *Braswell* and what he characterizes as "the cumulative prejudice review" required by *Wiggins v. Smith*.

> Defendant seeks to preserve the following claims:
>
> Denial of defendant's Motion to compel investigators to provide all investigative materials to the prosecutor . . . ; counsel's apparent failures to request individual jury *voir dire*, to object to "death qualification" of the jury, to seek supplemental questioning of jurors who expressed concern about the death penalty and were challenged by the [S]tate for cause on that basis, and to exhaust peremptory strikes while seating, *inter alia*, one or more jurors whose family members were victims of violent crime . . . ; any acts or omissions, as noted throughout this [b]rief, that this Court might construe as trial waiver resulting in the decision against defendant of any aspect of any Issue raised on appeal; any possible bases for collateral attack on defendant's 1990 guilty plea and judgment, such as insufficiency of the evidence or the incompletely voluntary, intelligent, and knowing nature of the plea, whether or not related to possible prosecutorial overreaching on the elements of "kidnapping" that inhere in the act of robbery under *State v. Fulcher*, 294 N.C. 503, 523, 243 S.E.2d 338, 351 (1978); and counsel's opening the door in the

> sentencing phase to prejudicial information regarding defendant's disciplinary record in prison. . . .

In the alternative, defendant's appellate counsel moves this Court to stay the present appeal and order appointment of two post-conviction attorneys to pursue such claims in a motion for appropriate relief.[3] Apart from broad statements that the cold record does not permit review and references to transcript and record pages, defendant presents no support for his assertion that these issues cannot be litigated on direct review, nor does defendant indicate what additional types of evidence may be needed to resolve them.

Although defendant assigns error to the ineffective assistance of counsel claims listed above, he has expressly stated in brief and at oral argument that he is not requesting substantive review of any ineffective assistance of counsel claims; rather, defendant asks this Court to identify a list of potential ineffective assistance of counsel claims not subject to the procedural bar to motions for appropriate relief provided in N.C.G.S. § 15A-1419. For this reason, the Court will not analyze whether his ineffective assistance of counsel claims meet the standard established by *Strickland*. *See* N.C. R. App. P. 28(a) ("Questions raised by assignments of error in appeals from trial tribunals but not then presented and discussed in a party's brief, are deemed abandoned.").

A motion for appropriate relief is denied when "[u]pon a previous appeal the defendant was in a position to adequately raise the ground or issue underlying the present motion but did not do so." N.C.G.S. § 15A-1419(a)(3) (2003). Section 15A-1419 " 'is not a general rule that any claim not brought on direct appeal is forfeited on state collateral review. Instead, the rule requires North Carolina courts to determine whether the particular claim at issue could have been brought on direct review.' " *State v. Fair*, 354 N.C. 131, 166, 557 S.E.2d 500, 525 (2001) (quoting *McCarver v. Lee*, 221 F.3d 583, 589 (4th Cir. 2000), *cert. denied*, 531 U.S. 1089, 148 L. Ed. 2d 694 (2001)), *cert. denied*, 535 U.S. 1114, 153 L. Ed. 2d 162 (2002). It is well established that ineffective assistance of counsel claims "brought on direct review will be decided on the merits when the cold record reveals that no further

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3. In a related argument, defendant likewise requests that this Court, *ex mero motu*, identify any ineffective assistance of counsel claims that should be litigated, allow his appellate counsel to withdraw based upon deficient performance, appoint replacement appellate and post-conviction counsel, and stay the proceedings. Given our discussion and disposition of this issue, we decline to grant defendant such relief.

investigation is required, i.e., claims that may be developed and argued without such ancillary procedures as the appointment of investigators or an evidentiary hearing." *Id.* at 166, 557 S.E.2d at 524. Thus, when this Court reviews ineffective assistance of counsel claims on direct appeal and determines that they have been brought prematurely, we dismiss those claims without prejudice, allowing defendant to bring them pursuant to a subsequent motion for appropriate relief in the trial court. *Id.* at 167, 557 S.E.2d at 525.

> It is not the intention of this Court to deprive criminal defendants of their right to have [ineffective assistance of counsel] claims fully considered. Indeed, because of the nature of [ineffective assistance of counsel] claims, defendants likely will not be in a position to adequately develop many [ineffective assistance of counsel] claims on direct appeal. Nonetheless, to avoid procedural default under N.C.G.S. § 15A-1419(a)(3), defendants should necessarily raise those [ineffective assistance of counsel] claims on direct appeal that are apparent from the record.

Id.

Although the relief defendant seeks is not appropriate in the case *sub judice*, it is not entirely unprecedented, contrary to the State's argument. *See State v. Watts*, 357 N.C. 366, 378, 584 S.E.2d 740, 749 (2003), *cert. denied*, —— U.S. ——, 158 L. Ed. 2d 370 (2004) (holding no waiver of ineffective assistance of counsel claim by failure to raise it on direct appeal when the defendant's trial attorney failed to present any mitigating evidence at sentencing); *see also State v. Hyatt*, 355 N.C. 642, 668, 566 S.E.2d 61, 78 (2002), *cert. denied*, 537 U.S. 1133, 154 L. Ed. 2d 823 (2003) (dismissing without prejudice an ineffective assistance of counsel claim alleging counsel's failure to procure certain records that could have been useful to impeach key witnesses at trial, while rejecting a second ineffective assistance claim on the record after finding that although that claim was capable of being developed and argued on direct appeal, defendant failed to state the claim with specificity or to present supporting arguments); *State v. Long*, 354 N.C. 534, 539-40, 557 S.E.2d 89, 93 (2001) (directing that the defendant not be precluded from raising ineffective assistance of counsel claim in future postconviction proceedings where the sole contention was the propriety of trial counsel's preparation and preservation of a defense to first-degree murder based upon intoxication).

In light of our holdings in *Watts*, *Long*, and *Hyatt*, we do not agree with the State that defendant is seeking an advisory opinion as to the application of the section 15A-1419(a)(3) procedural bar. However, given the sheer number and breadth of defendant's potential ineffective assistance of counsel claims, his failure to provide the Court with *any* argument as to why the record is insufficient to raise those claims at this time, and the fact that he refers to a cumulative ineffective assistance of counsel claim, we decline to determine whether his potential claims are subject to the procedural bar established by N.C.G.S. § 15A-1419(a)(3). We note that defendant's attempt to raise this issue on direct appeal in no way precludes him from raising his ineffective assistance of counsel claims during a future proceeding.

PRESERVATION ISSUES

Preliminarily, we address an issue which defendant did not characterize as one submitted for preservation, but which our review indicates is most appropriately examined under this heading. Defendant argues that the trial court erred in failing to submit the nonstatutory mitigator that he had "a family and support system who will continue to provide support for him emotionally during his incarceration." As defendant acknowledges, this Court has previously addressed this issue, holding contrary to defendant's position. While "[a] capital defendant must be permitted to present any aspect of the defendant's character, record, or any other circumstance which a jury could deem to have mitigating value . . . . 'The feelings, actions, and conduct of third parties have no mitigating value as to defendant and, therefore, are irrelevant to a capital sentencing proceeding.' " *State v. Hardy*, 353 N.C. 122, 132-33, 540 S.E.2d 334, 343 (2000) (citations omitted) (quoting *State v. Locklear*, 349 N.C. 118, 161, 505 S.E.2d 277, 302 (1998), *cert. denied*, 526 U.S. 1075, 143 L. Ed. 2d 559 (1999)), *cert. denied*, 534 U.S. 840, 151 L. Ed. 2d 56 (2001); *see also Locklear*, 349 N.C. at 160-61, 505 S.E.2d at 302 (finding no error in trial court's excluding from jury charge a mitigator stating that "defendant continues to have family members, such as his mother, brother, aunts and uncles, who care for and support him"). Despite defendant's arguments to the contrary, we find no compelling reason to revisit our position on this issue in the context of the present case.

Defendant raises three additional issues he concedes have been previously decided by this Court contrary to his position, but

requests that we reconsider these issues in light of the circumstances surrounding the present case. Defendant further specifies that he raises these issues to preserve them for later review.

Defendant assigns error to the prosecutor's use of a short-form murder indictment, arguing that the indictment failed to allege all elements of first-degree murder and failed to allege aggravating circumstances. Therefore, according to defendant, his conviction and death sentence are not supported by the indictment and violate his due process rights as secured by the United States Constitution. As defendant concedes, this Court has previously addressed and rejected these arguments. In *Hunt*, this Court held that the use of a statutorily authorized short-form indictment "violates neither the North Carolina nor the United States Constitution." 357 N.C. at 278, 582 S.E.2d at 607. Defendant presents no compelling reason why the Court should reconsider this issue. Accordingly, this assignment of error is overruled.

Defendant also assigns error to the trial court's failure to determine whether defendant made a voluntary, knowing, and intelligent decision regarding his right to testify in the sentencing phase of his capital trial. Defendant notes that the trial court did inquire during the guilt-innocence phase whether he wished to testify, but made no such inquiry during the sentencing phase. As defendant concedes, this Court has previously addressed and rejected similar arguments in *State v. Smith*, 357 N.C. 604, 588 S.E.2d 453 (2003), *cert. denied*, —— U.S. ——, —— L. Ed. 2d —— (2004). In *Smith*, the trial court failed to inquire whether the defendant wished to testify at his sentencing hearing. This Court rejected defendant's argument that his rights were violated because at the end of the guilt-innocence phase of the trial, defendant personally and through counsel informed the court that he had decided not to testify; furthermore, defendant never made any request to testify during his sentencing proceeding. *Id.* at 618-19, 588 S.E.2d at 463. Because we find that our decision in *Smith* controls the disposition of this issue and we see no reason to revisit our holding in that case, we conclude that defendant is not entitled to relief as to this issue.

Finally, defendant contends that the trial court erred in sentencing him to death because the death penalty is cruel and unusual and the North Carolina capital sentencing scheme is unconstitutionally vague and overbroad. Defendant also contends that the death sentence was not supported by the evidence in this case and was

imposed under the influence of passion, prejudice, and other arbitrary factors in violation of his rights to due process, equal protection, and a capital sentencing hearing free from arbitrariness and caprice, as protected by state, federal, and international law. As to this issue, defendant presents the following arguments: (1) the nature of the capital sentencing jury instructions and the likelihood of systematic jury misunderstanding and misapplication of the law render his capital sentencing proceeding and death sentence fundamentally unfair and unreliable; (2) this Court's method of proportionality review does not satisfy the standards set forth in N.C.G.S. § 15A-2000(d)(2) and violates capital defendants' rights to due process, effective assistance of counsel, and freedom from cruel and unusual punishment; (3) that North Carolina's capital sentencing scheme is unconstitutionally infected with racial bias; and (4) the overbroad application of the "prior appeal" procedural bar contained in N.C.G.S. § 15A-1419(a)(3) renders our capital sentencing scheme unconstitutional.

Defendant argues that his death sentence must be vacated under the state and federal constitutions, as well as the International Covenant on Civil and Political Rights. Initially, we acknowledge that notions of international justice are not always consistent with the jurisprudence of our state and nation. We recognize that our foremost task is to uphold the Constitutions of the United States and the State of North Carolina. *Cf. Stanford v. Kentucky*, 492 U.S. 361, 369 n.1, 106 L. Ed. 2d 306, 318 n.1 (1989) ("We emphasize that it is *American* conceptions of decency that are dispositive . . . ."); *Thompson v. Oklahoma*, 487 U.S. 815, 868-69 n.4, 101 L. Ed. 2d 702, 741 n.4 (1988) (Scalia, J., dissenting) ("[T]he views of other nations, however enlightened . . . cannot be imposed upon Americans through the Constitution."). To that end, we exercise judicial restraint and decline to consider the general principles of international law raised by defendant. Further, we have previously considered defendant's constitutional arguments on these matters and decline to depart from our existing law.

PROPORTIONALITY

[17] Having determined that defendant's trial and capital sentencing proceeding were free from prejudicial error, this Court must now determine: (1) whether the record supports the jury's findings of the aggravating circumstances upon which the court based its death sentence; (2) whether the sentence was imposed under the influence of passion, prejudice, or any other arbitrary factor; and (3) whether the

death sentence is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. N.C.G.S. § 15A-2000(d)(2) (2003).

Concerning the first two determinations listed above, defendant was convicted of the first-degree murder of Kenneth Bruhmuller based upon the theory of malice, premeditation, and deliberation and upon the felony murder rule. As aggravating circumstances, the prosecutor requested and the trial court submitted to the jury that defendant had previously been "convicted of a felony involving the use or threat of violence to the person": (1) with regard to an armed robbery of Billy Adams on 17 March 1990; (2) with regard to an armed robbery of April Dobbins on 8 April 1990; (3) with regard to the kidnapping of Benjamin Thomas Pittman on 17 March 1990; (4) with regard to the kidnapping of Vivian Hooker on 8 April 1990; (5) with regard to the kidnapping of Thomas Lenk on 8 April 1990; (6) with regard to the kidnapping of April Dobbins on 8 April 1990; and (7) with regard to the kidnapping of Carlita Greene on 8 April 1990. *See* N.C.G.S. § 15A-2000(e)(3). The prosecutor also submitted that the murder was "committed for pecuniary gain." *See* N.C.G.S. § 15A-2000(e)(6). The jury found all eight of these aggravating circumstances to exist.

The jury also found two statutory mitigating circumstances: (1) that the murder was committed while defendant "was under the influence of mental or emotional disturbance," N.C.G.S. § 15A-2000(f)(2), and (2) that defendant's capacity "to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired," N.C.G.S. § 15A-2000(f)(6). The statutory catch-all mitigating circumstance was also submitted to the jury, but the jury declined to find that it existed. *See* N.C.G.S. § 15A-2000(f)(9) ("Any other circumstance arising from the evidence which the jury deems to have mitigating value."). Of the 17 nonstatutory mitigating circumstances submitted, one or more jurors found that five existed and had mitigating value: (1) that defendant "accepted responsibility for his criminal conduct"; (2) that defendant "provided financial support for children who were not his own"; (3) that "defendant provided love and emotional support to children who were not his own"; (4) that defendant "has continued to provide guidance and emotional support to these children since his incarceration"; and (5) that defendant "was reared in an unstable environment."

After a thorough review of the transcript, record on appeal, briefs, and oral arguments of counsel, we conclude that the jury's finding of the eight distinct aggravating circumstances submitted was

fully supported by the evidence. We also conclude that nothing in the record suggests that defendant's death sentence was imposed under the influence of passion, prejudice, or any other arbitrary factor.

As for our final determination, we must consider whether the imposition of the death penalty in defendant's case is "excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." N.C.G.S. § 15A-2000(d)(2); *State v. Robinson*, 336 N.C. 78, 132-33, 443 S.E.2d 306, 334 (1994), *cert. denied*, 513 U.S. 1089, 130 L. Ed. 2d 650 (1995). The purpose of the proportionality review is "to eliminate the possibility that a person will be sentenced to die by the action of an aberrant jury." *State v. Holden*, 321 N.C. 125, 164-65, 362 S.E.2d 513, 537 (1987), *cert. denied*, 486 U.S. 1061, 100 L. Ed. 2d 935 (1988). Proportionality review also acts "[a]s a check against the capricious or random imposition of the death penalty." *State v. Barfield*, 298 N.C. 306, 354, 259 S.E.2d 510, 544 (1979), *cert. denied*, 448 U.S. 907, 65 L. Ed. 2d 1137 (1980), *overruled in part on other grounds by State v. Johnson*, 317 N.C. 193, 344 S.E.2d 775 (1986).

In conducting a proportionality review, we first compare the present case with other cases in which this Court concluded that the death penalty was disproportionate. *McCollum*, 334 N.C. at 240, 433 S.E.2d at 162. This Court has determined the death sentence to be disproportionate on eight occasions. *State v. Kemmerlin*, 356 N.C. 446, 573 S.E.2d 870 (2002); *State v. Benson*, 323 N.C. 318, 372 S.E.2d 517 (1988); *State v. Stokes*, 319 N.C. 1, 352 S.E.2d 653 (1987); *State v. Rogers*, 316 N.C. 203, 341 S.E.2d 713 (1986), *overruled in part on other grounds by State v. Gaines*, 345 N.C. 647, 483 S.E.2d 396, *cert. denied*, 522 U.S. 900, 139 L. Ed. 2d 177 (1997), *and by State v. Vandiver*, 321 N.C. 570, 364 S.E.2d 373 (1988); *State v. Young*, 312 N.C. 669, 325 S.E.2d 181 (1985); *State v. Hill*, 311 N.C. 465, 319 S.E.2d 163 (1984); *State v. Bondurant*, 309 N.C. 674, 309 S.E.2d 170 (1983); *State v. Jackson*, 309 N.C. 26, 305 S.E.2d 703 (1983).

This case is not substantially similar to any of the cases in which this Court has found that the death sentence was disproportionate. In *Benson*, the defendant shot the victim in both legs with a shotgun during the course of an armed robbery, while the victim, a store manager, was making a night deposit at a bank. 323 N.C. at 320-21, 372 S.E.2d at 518. The victim later died of cardiac arrest due to loss of blood from the wounds inflicted. *Id.* at 321, 372 S.E.2d at 518. The defendant in *Benson* pled guilty to first-degree murder; his conviction was based solely upon the theory of felony murder; only one aggravating

circumstance, that the murder was committed for pecuniary gain, was submitted to and found by the jury; and the jury found, *inter alia*, as a mitigating circumstance that defendant had no significant criminal history. *Id.* at 328-29, 372 S.E.2d at 522. In contrast, defendant in the present case was convicted based upon the theory of malice, premeditation and deliberation, *and* the felony murder rule. It is well established that " '[t]he finding of premeditation and deliberation indicates a more cold-blooded and calculated crime.' " *Carroll*, 356 N.C. at 554, 573 S.E.2d at 917 (quoting *Artis*, 325 N.C. at 341, 384 S.E.2d at 506); *accord State v. Leeper*, 356 N.C. 55, 66, 565 S.E.2d 1, 8, *cert. denied*, 537 U.S. 1076, 154 L. Ed. 2d 573 (2002); *State v. Harris*, 338 N.C. 129, 161, 449 S.E.2d 371, 387 (1994), *cert. denied*, 514 U.S. 1100, 131 L. Ed. 2d 752 (1995). Moreover, this Court considers it significant when a defendant's conviction for first-degree murder is predicated upon both the theories of malice, premeditation and deliberation, and of felony murder. *Carroll*, 356 N.C. at 554-55, 573 S.E.2d at 917. It is further significant that the jury found eight aggravating circumstances against defendant, seven of which were based upon defendant's prior, similar violent crimes. *Cf. Jackson*, 309 N.C. 26, 305 S.E.2d 703 (finding the death penalty disproportionate in a robbery-murder case where the jury found only one aggravating circumstance, that the murder was committed for pecuniary gain).

Furthermore, while we have found the death penalty to be disproportionate in two cases where the jury found multiple aggravating circumstances, *see Young*, 312 N.C. 669, 325 S.E.2d 181 (finding of disproportionality where the jury found the murder was committed for pecuniary gain and during the course of a robbery); *Bondurant*, 309 N.C. 674, 309 S.E.2d 170 (same where the jury found the murder to be heinous, atrocious, and cruel and part of a course of conduct), this Court has never determined the death penalty to be disproportionate when the jury found that the defendant was previously convicted of a felony involving the use or threat of violence to the person, *State v. Peterson*, 350 N.C. 518, 538, 516 S.E.2d 131, 143 (1999), *cert. denied*, 528 U.S. 1164, 145 L. Ed. 2d 1087 (2000); *see also Kemmerlin*, 356 N.C. 446, 573 S.E.2d 870 (only post-*Peterson* case finding the death penalty disproportionate, but in that case, e(3) was not found as an aggravating circumstance). As this Court has previously stated, " '[t]he jury's finding of the prior conviction of a violent felony aggravating circumstance is significant in finding a death sentence proportionate.' " *State v. Brown*, 357 N.C. 382, 395, 584 S.E.2d 278, 286 (2003) (quoting *State v. Lyons*, 343 N.C. 1, 27, 468 S.E.2d 204, 217, *cert. denied*, 519 U.S. 894, 136 L. Ed. 2d 167 (1996)), *cert. denied*, ——

U.S. ——, 158 L. Ed. 2d 106 (2004). In the present case, the jury found not one, but *seven*, aggravating circumstances based upon N.C.G.S. § 15A-2000(e)(3). In light of the above analysis, defendant's case is clearly distinguishable from those in which we have held the death penalty to be disproportionate.

We also consider cases in which this Court has found the death penalty to be proportionate. *McCollum*, 334 N.C. at 244, 433 S.E.2d at 164. Although in so doing we examine those cases that are "roughly similar" to the crime and defendant in the present case, "we are not bound to cite every case used for comparison." *Roache*, 358 N.C. at 328, 595 S.E.2d at 435.

Evidence presented during both the guilt-innocence and the sentencing phases of defendant's trial indicated that, during the armed robbery of his former place of employment, defendant shot the manager, Kenneth Bruhmuller, whom he knew, in the face at close range with a sawed-off shotgun. Defendant then manually reloaded the shotgun with a new shell, cocked the hammer, and pulled the trigger, causing a second lethal wound to Bruhmuller's head. In an apparent attempt to cover up his crimes, defendant set fire to the building. Defendant's criminal history reflects convictions for seven violent felonies committed during the course of two robberies factually similar to the robbery in the present murder case. The jury found seven aggravating circumstances based upon those felonies. As indicated above, such a finding is significant in our determination that the death penalty is proportionate here. *Peterson*, 350 N.C. at 538, 516 S.E.2d at 144. In fact, this Court has previously deemed the (e)(3) aggravating circumstance, "standing alone, to be sufficient to sustain a sentence of death." *State v. Squires*, 357 N.C. 529, 543, 591 S.E.2d 837, 846 (2003), *cert. denied*, —— U.S. ——, 159 L. Ed. 2d 252 (2004); *see also State v. Bacon*, 337 N.C. 66, 110 n.8, 446 S.E.2d 542, 566 n.8 (1994), *cert. denied*, 513 U.S. 1159, 130 L. Ed. 2d 1083 (1995). Based upon precedent and the pertinent facts of this case, we conclude that this case is more analogous to cases in which we have found the death penalty to be proportionate than to those in which we have found the death penalty to be disproportionate.

Ultimately, a determination of whether the death penalty is disproportionate " 'rest[s] upon the "experienced judgments" of the members of this Court.' " *Roache*, 358 N.C. at 328, 595 S.E.2d at 435 (quoting *Green*, 336 N.C. at 198, 443 S.E.2d at 47 and *State v. Williams*, 308 N.C. 47, 81, 301 S.E.2d 335, 355, *cert. denied*, 464 U.S. 865, 78 L. Ed. 2d 177 (1983)). Considering the nature of the crime and

the defendant in the present case, we conclude that the sentence was neither excessive nor disproportionate.

Based on the foregoing and the entire record in this case, we hold that defendant received a fair trial and capital sentencing proceeding, free of reversible error. Accordingly, the judgment of the trial court must be and is left undisturbed.

NO ERROR.

Justice NEWBY did not participate in the consideration or decision of this case.

STATE OF NORTH CAROLINA v. JAMES LEWIS MORGAN

No. 182A00

(Filed 3 December 2004)

1. Criminal Law— motion to continue—adequate preparation time—timeliness of discovery

The trial court did not abuse its discretion in a capital first-degree murder case by denying defendant's motion to continue the pretrial hearing held pursuant to Rule 24 of the General Rules of Practice for the Superior and District Courts based on the complexities of the case, his newly appointed second chair attorney's alleged unfamiliarity with the file and facts, and possible scheduling conflicts arising from the new attorneys's civil practice, and by denying his motion to continue his trial based on his attorneys' prior trial obligations, the inability of defense experts to conduct a thorough examination of both defendant and any forensic evidence by the date set for trial, and the State's alleged failure to provide timely discovery to defendant, because: (1) despite the newly appointed attorney's hectic professional schedule, the record demonstrates that he effectively participated in defendant's trial as second chair counsel; (2) defense attorneys were given adequate time to prepare for the defense of this case, and defendant has not established that he would have been better prepared had the continuance been granted; and (3) although defendant contends the denial of his motion to continue prevented his expert witness from conducting a thorough examina-

tion of a bloodstain pattern report that linked defendant to the crime, defense counsel stated at the 7 June 1999 motion hearing that he had retained an expert to review the State's blood spatter report and there was additional compelling evidence other than the blood spatter evidence, including defendant's own statements, linking defendant to the murder.

2. Attorneys— substitution of counsel—medical condition—effective assistance of counsel

The trial court did not err in a capital first-degree murder case by removing defendant's second chair counsel and substituting another attorney in her stead, because: (1) the trial court had reason to question the attorney's competency as an advocate at the time of defendant's trial based on her recent brain surgery and pending radiation therapy; and (2) realizing that the attorney's current medical condition could affect her ability to provide competent legal assistance and thereby interfere with defendant's constitutional right to effective assistance of counsel, the trial court justifiably and properly removed her.

3. Homicide— first-degree murder—short-form indictment—constitutionality

The short-form indictment used to charge defendant with first-degree murder was constitutional.

4. Jury— capital trial—excusal for cause—failure to preserve issue—ability to follow law

Although defendant contends the trial court abused its discretion in a capital first-degree murder case by refusing to excuse for cause two prospective jurors, this assignment of error is dismissed because: (1) defendant failed to comply with the statutory method under N.C.G.S. § 15A-1214(h) to preserve this issue; and (2) even if defendant had complied with statutory procedures, he would not be entitled to relief since further questioning of both prospective jurors revealed that neither would automatically impose the death penalty regardless of the circumstances or the law and both prospective jurors affirmed that they could set aside their personal opinions and reach a decision based on the law.

5. Jury— capital trial—excusal for cause—reservations about death penalty

The trial court did not abuse its discretion in a capital first-degree murder case by excusing for cause thirty-six prospective

jurors who expressed reservations about imposing the death penalty, because: (1) one of the prospective jurors was excused because he was a reporter who was familiar with the case and whose professional responsibilities made him uncomfortable with the idea of serving as a juror; (2) each of the remaining thirty-six prospective jurors stated during voir dire that their views on capital punishment would substantially impair their ability to render a verdict in accordance with the law, and each expressed an inability to impose the death penalty regardless of the facts and circumstances.

6. Evidence— hearsay—unavailable witness—present sense impression—right of confrontation

The trial court did not err in a capital first-degree murder case by admitting three of a witness's out-of-court statements even though the witness died prior to trial, because: (1) the witness's statement that he needed help because defendant was "tripping" was made to explain or describe a condition immediately after the declarant perceived the condition, which is a typical example of a present sense impression under N.C.G.S. § 8C-1, Rule 803(1), and the lapse in time between defendant's behavior and the witness's description to defendant's brother who was located just half a mile away meant the likelihood that this time afforded the witness an opportunity deliberately to misrepresent defendant's condition was remote; (2) the statements the witness made to a detective were elicited only when asked by defense counsel during cross-examination, and thus, defendant cannot object to its admission; and (3) although the witness's statement to a sergeant was admitted in violation of defendant's Sixth Amendment right to confront his accuser, the erroneous admission was harmless in light of other overwhelming evidence that was properly admitted to establish defendant's guilt of first-degree murder, including blood spatter evidence, the broken bottle on the street beside the victim's body, the forty-eight wounds inflicted on the victim, a witness's testimony that defendant chased his nephew while yelling, "I'll kill you, too," and the testimony of two inmates that defendant composed and sang a rap song in which he said that the victim paid with her life for smoking defendant's crack and denying him sex.

7. Evidence— prior crimes or bad acts—assault—identity—intent

The trial court did not abuse its discretion in a capital first-degree murder case by denying defendant's motion to exclude evidence of two prior assaults he committed in 1992, because: (1) although defendant admitted that he was responsible for the victim's death and witnesses put him at the scene, the evidence was admissible to show the assailant's identity since defendant pled not guilty, defendant did not make any pretrial statement and did not admit his involvement until he testified in his own defense at trial after the State had presented its case-in-chief, and defendant's cross-examination on several occasions insinuated that his nephew was at least involved in the murder; and (2) even if the evidence was inadmissible to establish identity, defendant has failed to demonstrate prejudice when the evidence was admissible to show intent since defendant's attacks demonstrated that defendant was aware that the act of striking another individual with a beer bottle was a reckless and dangerous act that could cause serious injury.

8. Witnesses— expert—qualifications—bloodstain pattern interpretation

The trial court did not abuse its discretion in a capital first-degree murder case by qualifying a State Bureau of Investigation special agent as an expert in bloodstain pattern interpretation and by admitting his expert testimony, because: (1) the agent possessed sufficient knowledge, experience, and training in the field of bloodstain pattern interpretation to warrant his qualification as an expert in that field including his completion of two training sessions on bloodstain pattern interpretation, the fact that he had analyzed bloodstain patterns in dozens of cases, and the fact that he had previously testified in a homicide case as a bloodstain pattern interpretation expert; (2) the agent described in detail the difference between blood spatter and transfer stains and produced visual aids to illustrate his testimony, and the trial court reasonably could have determined that the agent was in a better position to have an opinion on bloodstain pattern interpretation than the trier of fact; and (3) contrary to defendant's contention, the agent's qualifications are not diminished by the fact that he has never written an article, lectured, or taken a college-level course on bloodstain or blood spatter analysis.

9. Homicide— first-degree murder—deliberation—sufficiency of evidence

The trial court did not err by denying defendant's motion to dismiss the charge of first-degree murder, because the evidence was sufficient to prove the killing was carried out deliberately including that: (1) defendant inflicted numerous stab and slash injuries to the victim over a period of time; (2) several of the victim's bones were broken, indicating that some of the blows were delivered with great force; and (3) defendant partially disrobed the victim during the assault and later returned to the scene and threatened to kill his nephew while brandishing a knife.

10. Criminal Law— first-degree murder—instruction—importance of evidence—burden of proof

The trial court's instruction to the jury in a first-degree murder case on deciding the importance of evidence did not impermissibly shift the burden of proof to defendant and was not plain error, because: (1) although the pertinent portion of the instruction is awkwardly phrased, it advises the jury that the State has the burden of proving its evidence beyond a reasonable doubt; (2) the trial court unquestionably instructed the jury correctly elsewhere as to the burden of proof; (3) after giving the instruction to which defendant objects, the trial court on several other occasions instructed the jury that the State bore the burden of proving its case beyond a reasonable doubt; and (4) even assuming arguendo that the pertinent portion of the instructions was improper, the jury would not have reached a different result given the compelling evidence of defendant's guilt.

11. Criminal Law— first-degree murder—instruction—consideration of evidence—unanimity

The trial court's instruction in a first-degree murder case that the jurors should "decide for yourselves collectively and unanimously what you're going to see fit to believe to the extent of beyond a reasonable doubt in accordance with what the State must prove" did not erroneously require the jurors unanimously to decide what evidence to believe beyond a reasonable doubt, because: (1) although defendant relies on *McKoy v. North Carolina*, 494 U.S. 433 (1990), to support his argument, that holding is not implicated since the alleged error in the case at bar occurred during the guilt phase of trial and not the sentencing phase; (2) the pertinent instruction did not suggest that individ-

ual jurors should surrender their own convictions; (3) the instruction restated both that the State bore the burden of proving every element of the offense beyond a reasonable doubt and that the jury must believe beyond a reasonable doubt that each element had been proven before it could convict; and (4) even assuming arguendo that the pertinent portion of the instructions was improper, the jury would not have reached a different result given the compelling evidence of defendant's guilt.

12. Criminal Law— first-degree murder—instruction—simply satisfied with evidence

The trial court did not commit plain error in a capital first-degree murder case by its instruction to the jury that allegedly stated the jury must be simply satisfied with defendant's evidence in order for it to be believed, because: (1) the trial court advised the jury that defendant has no burden to prove his innocence and repeatedly instructed the jury that the State bore the burden of proof; and (2) even assuming arguendo that the pertinent portion of the instructions was improper, the jury would not have reached a different result given the compelling evidence of defendant's guilt.

13. Sentencing— capital—evidence—defendant's prior life sentence

The trial court did not abuse its discretion in a capital first-degree murder case by admitting evidence of defendant's prior life sentence even though defendant contends it misled the jury into believing that he could again be paroled if sentenced to life in this case, because: (1) when a defendant chooses to testify, evidence of the time and place of a prior conviction, along with the sentence imposed, is admissible under N.C.G.S. § 8C-1, Rule 609(a) for the purpose of impeaching his credibility; and (2) the prosecutor's two-question impeachment of defendant as to this prior conviction did not exceed the permissible scope of inquiry.

14. Sentencing— capital—prosecutor's argument—life sentence

The prosecutor did not imply in a capital sentencing proceeding that defendant might become eligible for parole if given a life sentence based on his arguments that a life sentence would be a travesty of justice, that defendant could pose a danger to guards, inmates, and others within the prison, and by stating that there's only one way to keep that cold-blooded killer from killing again, because: (1) while defendant correctly points out that evi-

dence regarding parole eligibility is not a relevant consideration in a capital sentencing proceeding, our Supreme Court has held that it is not improper for a prosecutor to urge the jury to recommend death out of concern for the future dangerousness of the defendant; (2) the prosecutor's argument did not improperly interject defendant's prior parole eligibility to suggest that defendant would be eligible for parole if death was not imposed; and (3) the prosecutor never used the word "parole" and never mentioned the possibility that a life sentence could mean that defendant would eventually be released, but instead permissibly argued that defendant might endanger others if the jury did not recommend death.

15. Sentencing— capital—requested instruction—difference between life sentence for first-degree murder and second-degree murder

The trial court did not err in a capital sentencing proceeding case by rejecting defendant's proposed instruction relating to the difference between a life sentence for a first-degree murder conviction and a life sentence for a second-degree murder conviction, because the trial court's instructions mirrored the language contained in N.C.G.S. § 15A-2002, thus adequately informing the jury of the meaning of life imprisonment, i.e., life without parole.

16. Sentencing— capital—request to modify pattern jury instructions

The trial court did not err in a capital sentencing proceeding case by denying defendant's requests to modify the North Carolina Pattern Jury Instructions pertaining to capital sentencing, because: (1) the trial court used the pattern jury instructions to give in substance those of defendant's requested instructions which were correct in law; (2) the trial court properly declined to give those portions of defendant's requested instructions which were not supported by the law; and (3) defendant has not demonstrated that the instructions given were erroneous or prejudicial to him.

17. Sentencing— capital—aggravating circumstances—prior violent felony—second-degree murder

The trial court did not err in a capital sentencing proceeding by submitting defendant's prior conviction of second-degree murder in support of the aggravating circumstance under N.C.G.S. § 15A-2000(e)(3) that he had been previously convicted of a prior

violent felony, and defendant's motion for appropriate relief alleging ineffective assistance of counsel in his prior murder case is not properly before the Supreme Court.

18. Sentencing— capital—aggravating circumstances—prior violent felony—robbery in Georgia—use or threat of violence

The trial court did not err in a capital sentencing proceeding by submitting defendant's prior conviction of robbery by sudden snatch in Georgia in support of the aggravating circumstance under N.C.G.S. § 15A-2000(e)(3) that he had been previously convicted of a prior violent felony even though defendant contends there was insufficient evidence that this offense involved the use or threat of violence, because: (1) violence need not be an element of an offense in order for a prior conviction to be admissible under (e)(3), and the aggravating circumstance may be submitted where the use or threat of violence was actually involved in the commission of the crime; and (2) while the act of purse snatching may not invariably involve the use or threat of violence, an officer's testimony as to the circumstances surrounding defendant's prior felony was sufficient to prove that violence was actually used during the commission of the crime.

19. Appeal and Error— preservation of issues—motion for appropriate relief—ineffective assistance of counsel claims

Defendant in a capital first-degree murder case is entitled to assert in a subsequent motion for appropriate relief any ineffective assistance of counsel claims not apparent from the record.

20. Sentencing— death penalty—not disproportionate

The trial court did not err in a capital first-degree murder case by sentencing defendant to the death penalty, because: (1) the evidence indicated that defendant's attack on the victim was unprovoked, that defendant began the affray with a knife and then switched to a bottle to hit, stab, and slash the victim numerous times, and that at some point defendant had pulled down the victim's pants; (2) defendant was found guilty of first-degree murder on the basis of premeditation and deliberation which suggests a calculated and cold-blooded crime; (3) the jury found the N.C.G.S. § 15A-2000(e)(3) prior violent felony aggravating circumstance based upon defendant's prior convictions of second-degree murder and robbery by sudden snatch; and (4) the jury

found the N.C.G.S. § 15A-2000(e)(9) "especially heinous, atrocious, or cruel" aggravating circumstance, which has been held sufficient standing alone to affirm a death sentence.

Justice NEWBY did not participate in the consideration or decision of this case.

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of death entered by Judge James U. Downs on 8 July 1999 in Superior Court, Buncombe County, upon a jury verdict finding defendant guilty of first-degree murder. Heard in the Supreme Court 8 December 2003.

Roy Cooper, Attorney General, by David Roy Blackwell, Special Deputy Attorney General, and Robert C. Montgomery, Assistant Attorney General, for the State.

David G. Belser for defendant-appellant.

EDMUNDS, Justice.

On 5 January 1998, defendant James Lewis Morgan was indicted for the murder of Patrina Lynette King (King). He was convicted of first-degree murder on the basis of premeditation and deliberation. Following a capital sentencing proceeding, the jury recommended a sentence of death, and the trial court entered judgment accordingly.

The State's evidence at trial showed that defendant and his nephew, Kenneth Cato (Cato), were living at 13 Ridge Street in Asheville. On the evening of 25 November 1997, Cato arrived home around midnight to find defendant and King sitting in the living room. They appeared to him to have been smoking crack cocaine, and Cato heard defendant tell King that he wanted a "head job." When King refused and tried to depart, defendant started shouting and smacked her. Defendant also grabbed a beer bottle by the neck, threatened Cato with it, and ordered him to leave. Although Cato stepped out of the room, defendant continued hitting King. Cato told defendant to stop, then reentered the room and began to wrestle with defendant. During their struggle, defendant hit Cato on the head with the beer bottle, then chased Cato outside and around a vehicle parked on Ridge Street. According to Cato, defendant was holding a knife during the chase. Meanwhile, King emerged from the house and started down the street. When defendant began to follow her, Cato ran for

help to the home of defendant's brother, Richard Morgan (Rick), about a half mile away.

The two drove back to Ridge Street, where Cato saw a broken bottle in the street and King lying between two cars. Rick knocked on the door of Stacey Miller's home at 12 Ridge Street and asked him to call 911. Unable to comply because he did not have a telephone, Miller stepped outside to see what was happening. Defendant returned to the scene, carrying a knife. Miller saw defendant, Rick, and Cato standing together, engaged in conversation. Defendant said, "You-all are the reason why this happened to me," and chased Cato around the car shouting either "I'll kill you, too" or "I should have killed you." Someone called 911, and defendant walked away when police arrived at the scene.

Shortly before 2:00 a.m. on 26 November 1997, Sergeant Mike Hahn of the Asheville Police Department, driving a Chevrolet Blazer, responded to a call requesting police assistance on Ridge Street. As Sergeant Hahn approached the scene, he observed a black male in dark clothing walking in the opposite direction. Sergeant Hahn then came upon a Chevrolet Monte Carlo parked on the wrong side of the road. He exited his vehicle and found King lying on her stomach with her shoulders and head under the rear of the Monte Carlo. Her jeans and underwear were pulled down and a sheet or curtain partially covered her body. The entire area behind the car was covered with blood and broken glass, although no knife was found at the scene. As Sergeant Hahn began to assess King's condition, he noticed Cato and Rick and heard Cato say, "You just drove right by him." EMS personnel arrived at the scene and King was transported to a nearby hospital, where doctors performed emergency surgery in an unsuccessful attempt to save her life.

Forest Weaver, a detective in the Criminal Investigations Division of the Asheville Police Department, went to Ridge Street around 9:00 a.m. on 26 November 1997. He found defendant hiding in the basement of 20 Ridge Street. Once defendant emerged, he was handcuffed and transported to the Asheville Police Department.

Willie Albert Jones, an inmate at the Buncombe County Jail, shared dormitory space in the jail with defendant. Jones testified that defendant told everyone in earshot about the murder, saying the victim used his drugs but would not give him sex. Defendant also wrote and sang a rap song about the murder. Jones recalled that the words of the song were "You shouldn't have done what you done . . . smoke my rock, wouldn't give me none, you know, and I went and did what

I did . . . I told you once, I told you twice, that you are going to have to pay the sacrifice . . . with your life." Another inmate, Eddie Oglesby, similarly testified that defendant sang about the killing and told Oglesby that he slashed the victim. According to Oglesby, defendant told him that the victim would not give him oral sex after smoking defendant's cocaine and that, in frustration, defendant hit the victim on the back of the head with a bottle and stabbed her.

Donald Jason, M.D., the forensic pathologist who performed the autopsy on King, testified that she suffered a total of forty-eight wounds to the face, head, back, buttocks, and upper back of her legs. Dr. Jason was of the opinion that King bled to death because of multiple stab and incised wounds caused by "a sharp object. These wounds are not consistent with typical knife wounds. They are all different sizes, shapes, irregular, fairly shallow. But some other type of sharp object such as something made out of glass that has a broken, sharp edge, or broken sharp edges of varying sizes and shapes."

Defendant testified on his own behalf and claimed that he acted in self-defense. According to defendant, he and King drank beer and smoked cocaine the evening of 25 November 1997. When Cato arrived later that evening, he gave defendant some crumbs of crack cocaine. King, who wanted more, began "screaming and hollering" when defendant declined to share the crumbs. Cato offered to let King use his pipe, and then both she and Cato asked defendant to buy more cocaine. Defendant refused because he wanted to save the rest of his money for his daughter. Defendant pulled his money out of his pocket and Cato snatched it away from him. When defendant attempted to retrieve it, King hit defendant over the shoulder with a beer bottle. As defendant turned to grab the bottle away from King, Cato approached defendant from behind and put him in a choke hold. Defendant hit Cato with the beer bottle in an unsuccessful attempt to free himself. Cato pulled a .25 automatic pistol from his pocket, placed it against defendant's head, and pulled the trigger. When the gun failed to fire, defendant reached for a knife that was on the table in front of him and Cato ran out the door. Defendant followed Cato and chased him around a car but could not catch him. Defendant stopped to catch his breath, and King hit him from behind with a beer bottle. The two began to fight in the middle of the street. According to defendant, "[King] would swing the bottle, I would swing the knife. It was rough." Defendant claimed that the incident had nothing to do with sex and denied that he ever sang a song about the murder while in custody.

PRETRIAL ISSUES

Defendant raises several issues pertaining to the pretrial proceedings in his case. Because two of the issues are intertwined, we address them together. First, defendant argues that the trial court erred in denying his motion to continue the pretrial hearing held pursuant to Rule 24 of the General Rules of Practice for the Superior and District Courts and in denying his motion to continue his trial. Second, defendant contends the court improperly removed his second chair counsel, Carol Andres.

The record establishes that attorney Faye Burner was originally appointed to represent defendant. When the trial court was notified on 20 January 1998 that defendant would be tried capitally, Assistant Public Defender Calvin Hill was appointed to serve as cocounsel. On 10 March 1998, the trial court allowed motions to withdraw filed by both Hill and Burner and, to replace them, appointed attorney Stan Young as lead counsel and attorney Carol Andres as second chair counsel.

Defendant's Rule 24 hearing was set for 5 April 1999. Several weeks before the hearing, the State informed defendant of its intention to schedule the trial for 21 June 1999. On 1 April 1999, defendant filed a motion to continue the Rule 24 hearing and the trial. The motion stated that attorney Andres had recently undergone surgery to remove a pituitary tumor and would, in 30 days, begin five weeks of radiation therapy that could "cause some cognitive disruption that may affect [her] ability to engage in Defendant's serious and complicated case." During the 6 April 1999 hearing on that motion, lead counsel Young opposed appointment of a new second chair because attorney Andres had been involved in the case for over a year. Attorney Young asked the court instead to allow the motion to continue in anticipation that attorney Andres would be able to resume representation of defendant once the radiation regimen was completed. However, attorney Andres acknowledged that her treatment might result in short-term memory loss, which could cause additional issues to arise if the case had to be appealed. The court removed attorney Andres from the case and appointed attorney Bruce Elmore, Jr. as second chair. Because of the new appointment, the court recalendared the Rule 24 hearing for the following week and elected not to rule on the motion to continue the trial date.

On 13 April 1999, the rescheduled date for defendant's Rule 24 hearing, defendant filed a second motion to continue the hearing and

to continue the trial until late September or October 1999. The motion was based on the complexities of the case, attorney Elmore's unfamiliarity with the file and facts, and possible scheduling conflicts arising from attorney Elmore's civil practice. Attorney Elmore, however, consented to proceeding with the Rule 24 hearing as scheduled, and the court thereafter denied defendant's motion to continue the trial.

On 4 June 1999, defendant filed a third motion to continue. This motion cited attorney Elmore's prior trial obligations, including a malpractice suit that had been set peremptorily for 23 August 1999; a trial involving attorney Young that had been set peremptorily for the week of 7 June 1999; the inability of defense experts to conduct a thorough examination of both defendant and any forensic evidence by the date set for trial; and the State's failure to provide timely discovery to defendant. After considering the arguments of counsel, the court denied this motion on 7 June 1999. Defendant's case was called for trial on 21 June 1999.

[1] We first consider whether the trial court erred in denying defendant's motions to continue. Defendant contends the denial of these motions violated his federal and state constitutional rights to effective assistance of counsel, to compulsory process, to confront his accusers, and to due process of law. Defendant claims the error was prejudicial because attorney Elmore did not have sufficient time to prepare an adequate defense.

We review a trial court's resolution of a motion to continue for abuse of discretion. *State v. Searles*, 304 N.C. 149, 153, 282 S.E.2d 430, 433 (1981).

> When a motion to continue raises a constitutional issue, however, the trial court's ruling thereon involves a question of law that is fully reviewable on appeal by examination of the particular circumstances presented in the record. Even when the motion raises a constitutional issue, denial of the motion is grounds for a new trial only upon a showing that "the denial was erroneous and also that [defendant] was prejudiced as a result of the error." [*State v.*] *Branch*, 306 N.C. [101,] 104, 291 S.E.2d [653,] 656 [(1982)].

State v. Blakeney, 352 N.C. 287, 301-02, 531 S.E.2d 799, 811 (2000) (citations omitted) (first alteration in original), *cert. denied*, 531 U.S. 1117, 148 L. Ed. 2d 780 (2001).

Prejudice due to ineffective assistance of counsel "is presumed 'without inquiry into the actual conduct of the trial' when 'the likeli-

hood that any lawyer, even a fully competent one, could provide effective assistance' is remote." *State v. Tunstall*, 334 N.C. 320, 329, 432 S.E.2d 331, 336 (1993) (quoting *United States v. Cronic*, 466 U.S. 648, 659-60, 80 L. Ed. 2d 657, 668 (1984)). " 'To establish a constitutional violation, a defendant must show that he did not have ample time to confer with counsel and to investigate, prepare and present his defense.' " *State v. Rogers*, 352 N.C. 119, 125, 529 S.E.2d 671, 675 (2000) (quoting *Tunstall*, 334 N.C. at 329, 432 S.E.2d at 337).

While a defendant must be afforded a reasonable opportunity to prepare a defense, neither the United States Constitution nor the North Carolina Constitution guarantees a particular length of time for the preparation. The facts of each case are pertinent. For instance, in *Rogers*, a capital case, the defendant retained private counsel shortly after his first court appearance, then moved to dismiss that attorney one week before trial because he believed the attorney had not been preparing adequately and also may have had conflicting interests. The trial court allowed the motion, and the case was postponed for several weeks. However, the defendant was unable to retain other private counsel. With the rescheduled trial set to begin in thirty-four days, the court appointed lead counsel and, the next day, co-counsel. Once the defendant's newly appointed lawyers obtained the case file, they discovered that none of the witnesses had been interviewed. Nevertheless, despite two additional motions for a continuance, the trial was conducted as scheduled. On appeal, "[t]aking into account the unique factual circumstances" of that case, we held that the defendant had successfully established a presumption of ineffective assistance of counsel. *Id.* at 126, 529 S.E.2d at 676. This Court concluded that under the singular circumstances found in *Rogers*, it was unreasonable to think that any attorney could prepare adequately for a complex bifurcated capital trial in thirty-four days when little or no advance trial preparation had been conducted. *Id.* at 125, 529 S.E.2d at 675-76.

Rogers is distinguishable from the case at bar. Here, the trial court appointed attorney Young as lead counsel for defendant on 10 March 1998. By the time attorney Elmore was appointed as second chair, attorney Young had already been involved in the case for over a year. By contrast, in *Rogers*, both of the newly-assigned attorneys had barely more than one month to become familiar with the case and prepare a defense. In addition, despite attorney Elmore's hectic professional schedule, the record demonstrates that he effectively participated in defendant's trial as second chair counsel. He filed

numerous motions on defendant's behalf and met several times with the prosecutors while preparing a defense. During the guilt-innocence phase, attorney Elmore engaged in aggressive and informed cross-examination of several of the State's witnesses, conducted the direct examination of three out of the four defense witnesses, and gave defendant's final closing argument to the jury. After a careful review of the record, we are satisfied that attorneys Young and Elmore were given adequate time to prepare for the defense of this case. Defendant has not established that "he would have been better prepared had the continuance been granted." *State v. Williams*, 355 N.C. 501, 541, 565 S.E.2d 609, 632 (2002), *cert. denied*, 537 U.S. 1125, 154 L. Ed. 2d 808 (2003).

Defendant further claims that the trial court's denial of his motions to continue prevented his expert witness from conducting a thorough examination of a report of blood spatter (or, more formally, bloodstain patterns) that linked defendant to the crime. Defendant's clothes were seized at the time of his arrest in November 1997, and the State conducted blood spatter testing on the clothing. On 22 April 1999, defendant learned that preliminary blood spatter reports tied him to the murder. The State received its final report on this evidence on 28 April 1999, but did not provide a copy to defendant until 11 May 1999. Defendant's expert witness was unable to conduct her own examination until approximately one week before trial.

Defendant relies on *State v. Barlowe*, 157 N.C. App. 249, 578 S.E.2d 660, *disc. rev. denied*, 357 N.C. 462, 586 S.E.2d 100 (2003), in which the defendant was granted a new trial when the denial of her motion to continue precluded her from securing a blood spatter expert witness. In *Barlowe*, "the blood spatter evidence was critical to the State's case against defendant because it was the only physical evidence potentially placing [the defendant] at the scene at the time of the murder." *Id.* at 257, 578 S.E.2d at 665. We do not find *Barlowe* to be controlling. While the defendant in *Barlowe* was unable to obtain an expert in time for trial, defense counsel here stated at the 7 June 1999 motion hearing that he had retained an expert to review the State's blood spatter report. In addition, while the blood spatter evidence in *Barlowe* was key to proving the defendant's participation in the murder, in the case at bar, additional compelling evidence, including defendant's own statements, linked defendant to the murder.

Thus, defendant has failed to demonstrate he suffered material prejudice by the denial of his motions to continue. This assignment of error is overruled.

[2] We next consider whether the trial court erred in removing attorney Andres as second chair counsel and substituting attorney Elmore in her stead. Defendant argues that he was deprived of his constitutional right to effective assistance of counsel because the trial court did not have justifiable grounds to remove attorney Andres on its own motion.

The decision to substitute counsel rests solely in the discretion of the trial court. *State v. Robinson*, 290 N.C. 56, 66, 224 S.E.2d 174, 180 (1976). Moreover, "[a] trial court is constitutionally required to appoint substitute counsel whenever representation by counsel originally appointed would amount to denial of defendant's right to effective assistance of counsel." *State v. Thacker*, 301 N.C. 348, 352, 271 S.E.2d 252, 255 (1980).

Defendant cites *State v. Nelson*, 76 N.C. App. 371, 333 S.E.2d 499 (1985), *aff'd as modified*, 316 N.C. 350, 341 S.E.2d 561 (1986), to support his argument. In *Nelson*, counsel was appointed to represent the defendant at his trial. Thereafter, the defendant's family, without seeking approval from the defendant, retained private counsel. The trial court *ex mero motu* removed the defendant's court-appointed counsel and substituted the retained attorney. However, the Court of Appeals observed that private counsel had been retained only to "assist" appointed counsel and that no evidence existed to suggest that the defendant had lost his status as an indigent entitled to court-appointed counsel under the federal and state constitutions. *Id.* at 373-74, 333 S.E.2d at 501. Therefore, the Court of Appeals held that no justifiable cause existed to warrant the termination of the satisfactory attorney-client relationship and ordered a new trial. *Id.* In affirming, this Court addressed only the issue of the timeliness of the defendant's notice that he would mount an insanity defense. *Nelson*, 316 N.C. at 354-56, 341 S.E.2d at 564-65.

Unlike *Nelson*, the record here establishes beyond a doubt that the trial court had reason to question attorney Andres' competency as an advocate at the time of defendant's trial and was justified in removing her as second chair counsel. During the 6 April 1999 pretrial hearing on defendant's motion to continue, attorney Andres informed the trial court of her recent brain surgery and pending radiation therapy. She reported that the radiation therapy might result in short-term memory loss that could "interfere with [her] ability to prepare a serious and detailed and intensive case." She also acknowledged that "we'll be setting it up for some reason to appeal it if it

turned out that I did have some sort of memory loss." In response, the trial court stated:

> [I]n view of those circumstances I think the prudent thing to do would be to remove you from any further responsibility in this case. If anything, it may cause to complicate your own physical well[-]being by having to concern yourselves and worry yourself with it. I think that justice would require that we relieve you of any further responsibility . . . .

After removing attorney Andres, the trial court appointed attorney Elmore.

We are satisfied that the trial court, faced with the prospect of having an impaired or incapacitated second chair counsel representing defendant in a capital trial, reasonably understood that it was constitutionally required to remove attorney Andres. Realizing that attorney Andres' current medical condition could affect her ability to provide competent legal assistance and thereby interfere with defendant's constitutional right to effective assistance of counsel, the trial court justifiably and properly removed her. This assignment of error is overruled.

[3] Defendant next claims that the short-form indictment used to charge him violated his federal and state constitutional rights because it failed to allege every element of the offense and the aggravating circumstances on which the State intended to rely at sentencing. Citing *Ring v. Arizona*, 536 U.S. 584, 153 L. Ed. 2d 556 (2002), defendant argues that aggravating circumstances are elements of first-degree capital murder that must be included in the indictment and proved beyond a reasonable doubt. However, this Court has consistently held that the short-form indictment is sufficient to charge first-degree capital murder without the inclusion of aggravating circumstances. *See State v. Hunt*, 357 N.C. 257, 278, 582 S.E.2d 593, 607, *cert. denied*, 539 U.S. 985, 156 L. Ed. 2d 702 (2003). This assignment of error is overruled.

JURY SELECTION ISSUES

[4] Defendant argues that the trial court erred by refusing to excuse for cause prospective jurors May Trantham and Kevin Cutshaw. Defendant contends that each indicated during *voir dire* an intent always to vote for death upon finding first-degree murder.

We begin by considering the statutory requirements for preserving such a challenge. A trial court's refusal to grant a challenge for

cause is reversible on appeal only when a defendant has: "(1) Exhausted the peremptory challenges available to him; (2) Renewed his challenge as provided in subsection (i) of this section; and (3) Had his renewal motion denied as to the juror in question." N.C.G.S. § 15A-1214(h) (2003). This "statutory method for preserving a defendant's right to seek appellate relief when a trial court refuses to allow a challenge for cause is mandatory and is the only method by which such rulings may be preserved for appellate review." *State v. Sanders*, 317 N.C. 602, 608, 346 S.E.2d 451, 456 (1986).

Here, the record reveals that defendant failed to comply with this statutory requirement. Following questioning by defense counsel of prospective juror Trantham, the trial court denied defendant's challenge for cause. Consequently, defendant peremptorily struck this prospective juror. Later, after defendant exhausted his peremptory challenges, the trial court denied his motion to excuse prospective juror Cutshaw for cause. Defendant, however, never renewed his challenge for cause as to either prospective juror Trantham, as required by N.C.G.S. § 15A-1214(h)(2), or to prospective juror Cutshaw, as required by *id.* § 15A-1214 (i)(2). *See Sanders*, 317 N.C. at 607-08, 346 S.E.2d at 455-56; *State v. Johnson*, 317 N.C. 417, 432-33, 347 S.E.2d 7, 16-17 (1986).

Even if defendant had complied with statutory procedures, he would not be entitled to relief. A prospective juror can be challenged for cause when he or she "[a]s a matter of conscience, regardless of the facts and circumstances, would be unable to render a verdict with respect to the charge in accordance with the law of North Carolina." N.C.G.S. § 15A-1212(8) (2003). However, excusal of a prospective juror for cause is not mandatory when he or she is able to disregard any personal convictions, follow the laws of the state as provided by the trial court, and render a fair and impartial verdict based on the evidence. *State v. Jaynes*, 342 N.C. 249, 270-71, 464 S.E.2d 448, 461 (1995) (citing *State v. Green*, 336 N.C. 142, 166-67, 443 S.E.2d 14, 28-29, *cert. denied*, 513 U.S. 1046, 130 L. Ed. 2d 547 (1994)), *cert. denied*, 518 U.S. 1024, 135 L. Ed. 2d 1080 (1996).

The decision " '[w]hether to allow a challenge for cause in jury selection is . . . ordinarily left to the sound discretion of the trial court which will not be reversed on appeal except for abuse of discretion.' " *State v. Stephens*, 347 N.C. 352, 365, 493 S.E.2d 435, 443 (1997) (quoting *State v. Locklear*, 331 N.C. 239, 247, 415 S.E.2d 726, 731 (1992)), *cert. denied*, 525 U.S. 831, 142 L. Ed. 2d 66 (1998). An

appellate court should affirm a discretionary decision by the trial court that is supported by the record, *Wainwright v. Witt*, 469 U.S. 412, 434, 83 L. Ed. 2d 841, 858 (1985), and reverse only where the decision is " 'manifestly unsupported by reason' " and " 'so arbitrary that it could not have been the result of a reasoned decision.' " *State v. T.D.R.*, 347 N.C. 489, 503, 495 S.E.2d 700, 708 (1998) (quoting *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985)). Our review of the record satisfies us that the trial court did not abuse its discretion here.

When prospective juror Trantham was questioned by defense counsel, the following exchange ensued:

> Q. Can you think of any circumstance . . . under which you could give life rather than death? . . .
>
> A. That I would give life instead of death?
>
> Q. Yes, ma'am. Once you found First Degree Murder, aggravation, no mitigation.
>
> A. No.

Defense counsel later questioned prospective juror Cutshaw regarding his views on the death penalty. He responded as follows:

> Q. You will have found unanimously and beyond a reasonable doubt that one or more of these 11 aggravators exist, and you also will have found that no mitigating factors exist, or that the mitigating factors are not sufficient to outweigh the aggravating factors. At that point, would death be automatic to you?
>
> A. Only after—Yes, it would.

Defendant contends that these responses by prospective jurors Trantham and Cutshaw impart a "definite impression that [they] would be unable to faithfully and impartially apply the law," *Wainwright*, 469 U.S. at 426, 83 L. Ed. 2d at 852, requiring their excusal for cause. However, further questioning of both prospective jurors revealed that neither would automatically impose the death penalty regardless of the circumstances or the law. After giving the responses quoted above, prospective juror Trantham was asked additional questions by defense counsel:

> Q. Ma'am, you have found First Degree Murder and aggravating factors and mitigating, but they don't outweigh the aggravating

factor[s], could you then seriously consider the imposition of a life sentence?

A. Yes, I would abide by what the law said.

Additional questioning of prospective juror Cutshaw by defense counsel revealed that he too would consider the imposition of a life sentence:

Q Well, is there anything that you can think of right now that Mr. Young or I could say or present to you at that point, assuming you have found First Degree Murder, aggravators and no mitigators or that the aggravators outweigh the mitigators, is there anything that we can do to convince you to give a sentence of life without parole rather than death?

A. I would just have to hear the whole case. You know, I can't—I can't answer that right now.

. . . .

Q. Are your feelings about murder so strong that your ability to seriously consider a sentence of life in prison without parole rather than death by execution would be substantially impaired?

A. No, sir.

Q. Again, I guess my final question to you, I know you are going to go through these four steps as the law requires, each box has to be filled in. Would it just be going through the steps or going through the motions, or will you seriously consider all of these factors, including mitigating circumstances?

A. I would have to hear all of the factors.

Thus, both of these prospective jurors affirmed that they could set aside their personal opinions and reach a decision based on the law. Where a prospective juror initially expresses a belief that every convicted first-degree murderer should receive the death penalty, but later indicates he or she would follow the trial court's instructions with respect to recommending the appropriate sentence, a trial court's denial of a challenge for cause is not error. *State v. Walls*, 342 N.C. 1, 35, 463 S.E.2d 738, 754-55 (1995), *cert. denied*, 517 U.S. 1197, 134 L. Ed. 2d 794 (1996). The responses here were sufficient to support the decision by the trial court to deny the challenges for cause. *See State v. Rogers*, 355 N.C. 420, 430, 562 S.E.2d 859, 867 (2002) ("A judge who observes the prospective juror's demeanor as he or she

responds to questions and efforts at rehabilitation is best able to determine whether the juror should be excused for cause."). Therefore, the trial court did not err in denying the challenges for cause. This assignment of error is overruled.

[5] Next, defendant argues that the trial court improperly excused for cause thirty-six prospective jurors who expressed reservations about imposing the death penalty. Citing *Witherspoon v. Illinois*, defendant claims that none of the thirty-six prospective jurors were "irrevocably committed . . . to vote against the penalty of death regardless of the facts and circumstances." 391 U.S. 510, 522 n.21, 20 L. Ed. 2d 776, 785 n.21 (1968). He contends that the entire *voir dire* examination of each prospective juror indicates an ability to consider and impose the appropriate punishment, including death.

"[M]ere opposition to the death penalty does not disqualify a prospective juror if the juror can set aside his or her personal beliefs and follow the law." *State v. Berry*, 356 N.C. 490, 502, 573 S.E.2d 132, 141 (2002). The test is whether the views of a prospective juror on capital punishment " 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.' " *Wainwright*, 469 U.S. at 424, 83 L. Ed. 2d at 851-52 (quoting *Adams v. Texas*, 448 U.S. 38, 45, 65 L. Ed. 2d 581, 589 (1980)).

We have reviewed the record and transcript pertinent to each of these thirty-six prospective jurors. As to one prospective juror named by defendant, Thomas Morgan, our review indicates that he was excused because he was a reporter who was familiar with the case and whose professional responsibilities made him uncomfortable with the idea of serving as a juror. However, we have also considered the *voir dire* of another prospective juror, Robin Harwell, who was being questioned along with prospective juror Morgan and was excused for cause as being opposed to the death penalty. In addition, while defendant names prospective juror Sharon Norton in this assignment of error, the transcript pages cited by defendant contain the *voir dire* examination of prospective juror Shannon Fox, who was excused for cause. Accordingly, we have also considered the responses given by prospective juror Fox.

Our review reveals that each of the thirty-six prospective jurors involved in this assignment of error stated during *voir dire* that he or she possessed views on capital punishment that would "substantially impair" his or her ability to render a verdict in accordance with the law. For example, the prosecutor questioned prospective juror

Johanna Hensley about her religious and personal beliefs with respect to the death penalty. After she indicated that she has held a strong opposition to the death penalty since childhood, the following exchange took place:

> Q. Would you say that it's true that nothing I presented by way of aggravating circumstances would get you to change your beliefs?
>
> A. Well, I can differentiate, but it's going to make me sick to think—I mean, it's going to make me feel bad. I can follow the law and do what you say I should do, but it's going to make me personally feel upset. So, no, I can't. No, I cannot—
>
> Q. You would—
>
> A. —render death.
>
> Q. So no matter what I presented, you could not do that?
>
> A. No.
>
> Q. So would you indicate or state that your strong personal and religious beliefs would substantially impair your ability to render a verdict of death in this case?
>
> A. Yes.
>
> [PROSECUTOR]: The State moves for cause in Ms. Hensley's case.
>
> [DEFENSE COUNSEL]: Objection.
>
> THE COURT: Overruled.

Virtually identical responses were elicited from each of the other prospective jurors named by defendant. Each expressed an inability to impose the death penalty regardless of the facts and circumstances. Accordingly, the trial court did not abuse its discretion in excusing for cause these thirty-six prospective jurors. This assignment of error is overruled.

GUILT-INNOCENCE ISSUES

[6] Kenneth Cato was unavailable because he died before defendant's trial. Defendant contends that the trial court erroneously admitted three of Cato's out-of-court statements.

First, the trial court admitted Cato's statement to Rick Morgan. The evidence indicated that Cato arrived at Rick's house at approxi-

mately 1:30 a.m. on 26 November 1997. Rick testified that Cato said "he [Cato] wanted me to come with him, my brother was tripping."

Second, Sergeant Douglas Berner of the Asheville Police Department testified that he interviewed Cato at approximately 3:30 a.m. on 26 November 1997. At trial, over defendant's objection, Berner read aloud the notes he had taken from his interview of Cato. He related to the jury that Cato described how he had arrived home to find defendant and King apparently smoking crack, that King had refused to give defendant a "head job," that defendant slapped King and threatened Cato with a beer bottle, that Cato and defendant had fought, that defendant hit Cato with a beer bottle and chased him outside while wielding a knife, that defendant began to follow King, that Cato ran to Rick Morgan's house, then returned and saw King lying in the street, and that defendant, still carrying a knife, chased Cato again, shouting "I should have killed you."

Third, Cato also spoke with Detective Kevin Taylor of the Asheville Police Department. At a pretrial suppression hearing, the State agreed not to elicit from Detective Taylor any of Cato's statements to him, and no questions about the statements were asked during Detective Taylor's direct testimony at trial. However, during defense counsel's cross-examination of Detective Taylor, in an apparent effort to impeach Cato based on inconsistencies in his statements, counsel asked Detective Taylor whether he had interviewed Cato after the murder. In response, Detective Taylor testified that he attended part of the interview that Sergeant Berner conducted with Cato in which Cato told Sergeant Berner that defendant came out of the house with a knife and that defendant also hit him with a beer bottle. Detective Taylor provided additional cross-examination testimony to the effect that he conducted another interview with Cato, during which Cato said that King was carrying a beer bottle when she came out of the house. Detective Taylor also related that he took custody of Cato's overalls and jacket to have them tested for blood.

The trial court admitted all three statements pursuant to Rules 803(1) and 803(2) of the North Carolina Rules of Evidence, which respectively designate present sense impressions and excited utterances as hearsay exceptions. Defendant argues in his original brief that these statements did not fit within either exception and, therefore, were inadmissible hearsay under Rule 802. However, the case was tried and defendant's initial brief to this Court was filed before the United States Supreme Court issued its opinion in *Crawford v. Washington*, 541 U.S. 36, 158 L. Ed. 2d 177 (2004). In that case, the

Supreme Court held that the Confrontation Clause bars the admission of out-of-court testimonial statements unless the declarant is unavailable and the defendant had a prior opportunity to cross-examine him or her. *Id.* at ——, 158 L. Ed. 2d at 203. Because defendant had entered notice of appeal and his case was pending when *Crawford* was issued, that decision applies to defendant's case. *Griffith v. Kentucky*, 479 U.S. 314, 322-23, 93 L. Ed. 2d 649, 658 (1987). Accordingly, defendant filed a supplemental brief in which he argues that the admission of Cato's statements to Sergeant Berner and Detective Taylor violated his constitutional rights, as set out in *Crawford*.

We begin by considering the admissibility of Cato's statement to Rick Morgan. Because defendant does not argue that *Crawford* applies to this statement, our analysis focuses on whether it was properly admitted as a hearsay exception.

Hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." N.C.G.S. § 8C-1, Rule 801(c) (2003). As a general rule, hearsay is inadmissible at trial. *Id.* Rule 802 (2003). Rules 803 and 804, however, provide exceptions and permit the admission of hearsay statements under certain circumstances.

As to the specific exceptions invoked by the trial court in the case at bar, Rule 803(1) provides for the admissibility of present sense impressions. A present sense impression is "[a] statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter." *Id.* Rule 803(1) (2003). "The basis of the present sense impression exception is that closeness in time between the event and the declarant's statement reduces the likelihood of deliberate or conscious misrepresentation." *State v. Pickens*, 346 N.C. 628, 644, 488 S.E.2d 162, 171 (1997); *see also State v. Reid*, 322 N.C. 309, 315, 367 S.E.2d 672, 675 (1988). In addition, Rule 803(2) provides that "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition" is not excluded by Rule 802. N.C.G.S. § 8C-1, Rule 803(2) (2003). For a statement to fall under this excited utterance exception, " 'there must be (1) a sufficiently startling experience suspending reflective thought and (2) a spontaneous reaction, not one resulting from reflection or fabrication.' " *State v. Maness*, 321 N.C. 454, 459, 364 S.E.2d 349, 351 (1988) (quoting *State v. Smith*, 315 N.C. 76, 86, 337 S.E.2d 833, 841 (1985)).

Evidence presented at trial established that after wrestling with defendant at 13 Ridge Street, Cato fled to Rick's house, seeking help. Rick testified that Cato woke him up and explained that he needed help because defendant was "tripping." This statement, made to explain or describe a condition immediately after the declarant perceived the condition, is a typical example of a present sense impression. *Maness*, 321 N.C. at 458-59, 364 S.E.2d at 351. Although there is no *per se* definition of "immediately thereafter," prior holdings of this Court indicate that a brief lapse in time does not disqualify a statement from falling under Rule 803(1). *See Pickens*, 346 N.C. at 644-45, 488 S.E.2d at 171 (statements identifying the defendant as the person who shot the victim were made while perceiving the event, or immediately thereafter, because there was evidence that the defendant was still in the process of leaving the scene of the crime with a gun in hand when the statements were made); *State v. Cummings*, 326 N.C. 298, 314, 389 S.E.2d 66, 75 (1990) (statement made after having driven from Willow Springs to Raleigh was held sufficiently close to the event to be admissible); *State v. Odom*, 316 N.C. 306, 313, 341 S.E.2d 332, 336 (1986) (statement by an eyewitness to police, who arrived at the scene ten minutes after the event, is admissible as a present sense impression). Here, the lapse in time between defendant's behavior and Cato's description to Rick was the time it took to for him to reach Rick's house, just half a mile away. The likelihood that this time afforded Cato an opportunity deliberately to misrepresent defendant's condition is remote. Therefore, we conclude that Cato's statement was made sufficiently close to the event and was admissible as a present sense impression under Rule 803(1). Accordingly, we need not address whether this statement was also admissible as an excited utterance.

Next, we address the statements Cato made to Sergeant Berner and Detective Taylor. As detailed above, Detective Taylor testified about his interviews with Cato only when asked by defense counsel during cross-examination. Because defendant elicited Detective Taylor's testimony, he cannot object to its admission. N.C.G.S. § 15A-1443(c) (2003); *State v. Mitchell*, 342 N.C. 797, 806, 467 S.E.2d 416, 421 (1996). Consequently, defendant's argument that this evidence was inadmissible under *Crawford* fails.

We now turn to Cato's statements admitted through Sergeant Berner. Defendant contends that the trial court violated his constitutional right to confrontation because he never had an opportunity to cross-examine Cato. We agree that Cato's statement to Sergeant

Berner was testimonial in nature because it was "knowingly given in response to structured police questioning." *Crawford*, 541 U.S. at —— n.4, 158 L. Ed. 2d at 194 n.4. The record further reveals that defendant was never afforded a chance to cross-examine Cato regarding this statement. As a result, Cato's statement to Sergeant Berner was admitted in violation of defendant's Sixth Amendment right to confront his accuser.

However, a constitutional violation does not necessarily result in a new trial. "A violation of the defendant's rights under the Constitution of the United States is prejudicial unless the appellate court finds that it was harmless beyond a reasonable doubt." N.C.G.S. § 15A-1443(b) (2003). The State bears the burden of proving the error was harmless. *Id.* "[T]he presence of overwhelming evidence of guilt may render error of constitutional dimension harmless beyond a reasonable doubt." *State v. Autry*, 321 N.C. 392, 400, 364 S.E.2d 341, 346 (1988).

Defendant argues that he was prejudiced by the admission of this statement because it contradicted his testimony and undermined his contention that he acted in self-defense. Although defendant concedes there was ample evidence that he killed King, including his own testimony, he asserts that the State presented no evidence that the killing was premeditated or deliberate. Therefore, according to defendant, it is possible that, had Cato's statement to Sergeant Berner not been admitted, the jury could have returned a lesser verdict of second-degree murder or voluntary manslaughter.

After a review of the entire record in this case, we conclude that the erroneous admission of this testimony by the trial court was harmless in light of other overwhelming evidence that was properly admitted to establish defendant's guilt of first-degree murder, including blood spatter evidence, the broken bottle on the street beside King's body, the forty-eight wounds inflicted on King, *see State v. Skipper*, 337 N.C. 1, 35, 446 S.E.2d 252, 271 (1994) ("nature and number of the wounds and evidence that the murder[] w[as] done in a brutal manner are circumstances from which premeditation and deliberation can be inferred"), *cert. denied*, 513 U.S. 1134, 130 L. Ed. 2d 895 (1995), Stacey Miller's testimony that defendant chased Cato while yelling, "I'll kill you, too," and the testimony of inmates Jones and Oglesby that defendant composed and sang a rap song in which he said that King paid with her life for smoking defendant's crack and denying him sex. Accordingly, we are satisfied that the error in the admission of Cato's hearsay statement to Sergeant Berner

was harmless beyond a reasonable doubt. *See also Bell v. State*, 278 Ga. 69, 71-72, 597 S.E.2d 350, 353 (2004); *Cassidy v. State*, —— S.W.3d ——, 2004 Tex. App. LEXIS 4519, at *10-11 (May 20, 2004) No. 03-03-00098-CR, *disc. rev. refused*, 2004 Tex. Crim. App. LEXIS 1720 (Oct. 13, 2004). This assignment of error is overruled.

[7] In defendant's next assignment of error, he argues that the trial court erred in denying his motion to exclude evidence of two prior assaults he committed against Abraham Adams in 1992. The trial court admitted this evidence pursuant to Rule 404(b) of the North Carolina Rules of Evidence. Defendant contends that the evidence was irrelevant and was presented only to establish his bad character.

On *voir dire*, Adams testified that he had promised to give defendant a dollar in exchange for a ride. A few days later, on 28 July 1992, defendant demanded the dollar and threatened to jump on Adams if he did not pay up. Adams declined to pay and entered a nearby cafe. When Adams exited, defendant attacked him, then grabbed a beer bottle off a ledge and used it to hit Adams on the side of the head. Adams fell and defendant continued to kick him and hit him on the head with the bottle. The fight was eventually broken up by onlookers. The second assault occurred on 29 December 1992, when defendant again attacked Adams. As the two walked toward each other, defendant knocked Adams to the ground, and jumped on top of him. Defendant hit Adams, then grabbed trash from a nearby pile and began beating Adams with it. Although Adams could not recall just what defendant hit him with during the second fight, he knew there were bottles in the trash and that he was cut by glass. Defendant was charged with assault with a deadly weapon with intent to kill inflicting serious injury and with assault with a deadly weapon. At the conclusion of the *voir dire*, the trial court ruled that evidence of these assaults was admissible pursuant to Rule 404(b) to show proof of motive, opportunity, intent, identity, or absence of mistake. When Adams later testified before the jury, the trial court gave a limiting instruction.

Rule of Evidence 404(b) provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, prepara-

> tion, plan, knowledge, identity, or absence of mistake, entrapment or accident.

N.C.G.S. § 8C-1, Rule 404(b) (2003). Pursuant to this rule, evidence of prior bad acts is generally admissible if it tends to prove any relevant fact other than the defendant's propensity to commit the offense, *Berry*, 356 N.C. at 505, 573 S.E.2d at 143, unless the probative value of the evidence is substantially outweighed by its prejudicial effect, N.C.G.S. § 8C-1, Rule 403 (2003). *See State v. Artis*, 325 N.C. 278, 299-300, 384 S.E.2d 470, 481-82 (1989) (relevant prior incidents must be sufficiently similar and not so remote in time so as to run afoul of the balancing test set forth in Rule 403), *judgment vacated on other grounds*, 494 U.S. 1023, 108 L. Ed. 2d 604 (1990).

The State advised the trial court that it was tendering evidence of defendant's two prior assaults on Adams under Rule 404(b) for the purpose of proving the identity of King's assailant. Defendant asserts that this evidence was irrelevant because identity was not an issue. He admitted that he was responsible for King's death, and witnesses put him at the scene. However, defendant pled not guilty. *State v. Perry*, 275 N.C. 565, 570, 169 S.E.2d 839, 843 (1969) (defendant's plea of not guilty placed in issue every material allegation contained in the indictment, including his identity as the perpetrator). He did not make any pretrial statement and did not admit his involvement until he testified in his own defense at trial, after the State had presented its case-in-chief. In addition, defendant's cross-examination on several occasions insinuated that Cato was at least involved in the murder. As a result, we are unwilling to conclude that the identity of the perpetrator of the murder was not an issue at the time of Adams' testimony.

Moreover, even if the evidence were inadmissible to establish identity, defendant has failed to demonstrate prejudice. To establish prejudicial error, a defendant must show there was a reasonable possibility that a different result would have been reached had the evidence been excluded. N.C.G.S. § 15A-1443(a). Although the State offered the evidence specifically to show identity, the trial court admitted it for the multiple purposes of showing proof of motive, opportunity, intent, identity, or absence of mistake. "[W]here at least one of the [other] purposes for which the prior act evidence was admitted was [proper,]" there is no prejudicial error. *State v. Haskins*, 104 N.C. App. 675, 683, 411 S.E.2d 376, 382 (1991), *disc. rev. denied*, 331 N.C. 287, 417 S.E.2d 256 (1992). *See also State v. Bagley*,

321 N.C. 201, 206, 362 S.E.2d 244, 247 (1987) (even though testimony was inadmissible to show identity of the perpetrator, it was admissible for other purposes provided in Rule 404(b)), *cert. denied*, 485 U.S. 1036, 99 L. Ed. 2d 912 (1988).

One of the other purposes for which the trial court admitted the prior crime evidence was to prove intent. Intent is an element of first-degree murder, and evidence of prior crimes that tends to establish a particular mental state may be admitted into evidence. *See State v. Jones*, 353 N.C. 159, 172-73, 538 S.E.2d 917, 928 (2000) (evidence of pending charges admissible under 404(b) to establish element of malice); *State v. Rich*, 351 N.C. 386, 400, 527 S.E.2d 299, 306-07 (2000) (same result as to evidence of prior convictions). In his first assault against Adams, defendant beat him with a beer bottle. The bottle broke when defendant struck the left side of Adams' head, causing shards of glass to lodge in Adams' skin. In the second attack, Adams' clothes were cut as a result of defendant's hitting him with items found in a nearby trash pile that included cans and bottles. In the murder at bar, the forensic pathologist who performed the autopsy of King testified that she suffered forty-eight wounds caused by a "sharp object such as something made out of glass that has a broken, sharp edge." The evidence of defendant's attacks on Adams demonstrates that defendant was aware that the act of striking another individual with a beer bottle was a reckless and dangerous act that could cause serious injury. The trial court properly admitted this evidence under Rule 404(b) to show intent. This assignment of error is overruled.

[8] Defendant next argues that the trial court erred in qualifying State Bureau of Investigation Special Agent Mike Garrett as an expert in bloodstain pattern interpretation and in admitting his expert testimony. Defendant, relying upon *State v. Goode*, 341 N.C. 513, 461 S.E.2d 631 (1995), and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 125 L. Ed. 2d 469 (1993), contends that Agent Garrett's testimony was inherently unreliable because he lacked the requisite knowledge and credentials to permit his qualification as an expert.

Defendant filed his brief before we issued our opinion in *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 597 S.E.2d 674 (2004). In *Howerton*, we addressed the admissibility of expert testimony and concluded that North Carolina is not a *Daubert* state. *Id.* at 469, 597 S.E.2d at 693. This Court was concerned about the excessively mechanical application of the *Daubert* factors that seem to have evolved in the federal courts. *Id.* at 464-66, 597 S.E.2d at 690-91. We

were also uneasy about the potential interpretations and applications of *Daubert* that could strip the jury of its function as the ultimate finder of fact. *Id.* at 468, 597 S.E.2d at 692. Accordingly, we reiterated that under North Carolina law, a trial court that is considering whether to admit proffered expert testimony pursuant to North Carolina Rule of Evidence 702 must conduct a three-step inquiry to determine: (1) whether the expert's proffered method of proof is reliable, (2) whether the witness presenting the evidence qualifies as an expert in that area, and (3) whether the evidence is relevant. *Id.* at 458, 597 S.E.2d at 686 (citing *Goode*, 341 N.C. at 527-29, 461 S.E.2d at 639-41). In discussing the trial court's determination of the reliability of proffered expert evidence where "the trial court is without precedential guidance or faced with novel scientific theories, unestablished techniques, or compelling new perspectives on otherwise settled theories or techniques," we set out several "indices of reliability" that the trial court could consider. *Id.* at 460, 597 S.E.2d at 687 (citing *State v. Pennington*, 327 N.C. 89, 393 S.E.2d 847 (1990)). Because we did not intend to tie the hands of the State's able trial bench, we specifically stated that these indices were not exclusive. *Id.* A trial court is "afforded 'wide latitude of discretion when making a determination about the admissibility of expert testimony.' " *Id.* at 458, 597 S.E.2d at 686 (quoting *State v. Bullard*, 312 N.C. 129, 140, 322 S.E.2d 370, 376 (1984)). Accordingly, a trial court's rulings under Rule 702 will not be reversed on appeal absent an abuse of discretion. *Id.*

Turning to the case at bar, defendant does not contend that bloodstain pattern interpretation is not a sufficiently reliable area for expert testimony, and at any rate we have recognized this discipline to be "an appropriate area for expert testimony." *Goode*, 341 N.C. at 531, 461 S.E.2d at 641. In addition, defendant does not argue that the evidence is irrelevant. Defendant's contention is that Agent Garrett was not qualified in the field of bloodstain pattern interpretation. Accordingly, we will limit our analysis to this issue.

We have held that

> "[i]t is not necessary that an expert be experienced with the identical subject matter at issue or be a specialist, licensed, or even engaged in a specific profession. It is enough that the expert witness 'because of his expertise is in a better position to have an opinion on the subject than is the trier of fact.' "

Id. at 529, 461 S.E.2d at 640 (citations omitted). The record reveals that Agent Garrett possessed sufficient knowledge, experience, and

training in the field of bloodstain pattern interpretation to warrant his qualification as an expert in that field. Agent Garrett testified that he had completed two training sessions on bloodstain pattern interpretation, had analyzed bloodstain patterns in dozens of cases, and had previously testified in a homicide case as a bloodstain pattern interpretation expert. In addition, Agent Garrett described in detail to the judge and jury the difference between blood spatter and transfer stains and produced visual aids to illustrate his testimony.

Based on this testimony, the trial court reasonably could have determined that Agent Garrett was in a better position to have an opinion on bloodstain pattern interpretation than the trier of fact. There is more than one road to expertise that assists a jury in understanding the evidence or determining a fact at issue, and Agent Garrett's qualifications are not diminished, as defendant suggests, by the fact that he has never written an article, lectured, or taken a college-level course on bloodstain or blood spatter analysis. The trial court did not abuse its discretion in qualifying Agent Garrett as an expert. This assignment of error is overruled.

[9] Defendant next contends that the trial court erred in denying his motion to dismiss the first-degree murder charge. At the close of the State's case-in-chief, defendant moved to dismiss for insufficiency of the evidence. The motion was denied. Defendant asserts this ruling was erroneous because the evidence failed to establish that he acted with deliberation.

When considering a motion to dismiss, the trial court must view the evidence in the light most favorable to the State, giving the State the benefit of all reasonable inferences. *State v. Gladden*, 315 N.C. 398, 430, 340 S.E.2d 673, 693, *cert. denied*, 479 U.S. 871, 93 L. Ed. 2d 166 (1986). If substantial evidence exists to support each essential element of the crime charged and that defendant was the perpetrator, it is proper for the trial court to deny the motion. *State v. Malloy*, 309 N.C. 176, 178, 305 S.E.2d 718, 720 (1983).

> Premeditation and deliberation relate to mental processes and ordinarily are not readily susceptible to proof by direct evidence. Instead, they usually must be proved by circumstantial evidence. Among other circumstances to be considered in determining whether a killing was with premeditation and deliberation are: (1) want of provocation on the part of the deceased; (2) the conduct and statements of the defendant before and after the killing; (3) threats and declarations of the defendant before and

> during the course of the occurrence giving rise to the death of the deceased; (4) ill-will or previous difficulty between the parties; (5) the dealing of lethal blows after the deceased has been felled and rendered helpless; and (6) evidence that the killing was done in a brutal manner. We have also held that the nature and number of the victim's wounds are circumstances from which premeditation and deliberation can be inferred.

Gladden, 315 N.C. at 430-31, 340 S.E.2d at 693 (citations omitted).

Here, sufficient evidence was presented at trial to prove the killing was carried out deliberately. Defendant inflicted numerous stab and slash injuries to the victim over a period of time. According to the pathologist who performed the autopsy, several of the victim's bones were broken, indicating that some of the blows were delivered with great force. In addition, defendant partially disrobed the victim during the assault and later returned to the scene and threatened to kill Cato while brandishing a knife. Accordingly, the trial court properly denied defendant's motion to dismiss. This assignment of error is overruled.

Defendant assigns error to several of the trial court's instructions that were delivered at the conclusion of the guilt phase of the trial. He contends that the trial court's instructions impermissibly: (1) placed the burden of proof on defendant to satisfy the jury that his evidence was believable beyond a reasonable doubt; (2) required that the jurors unanimously believe the evidence beyond a reasonable doubt; and (3) instructed the jury that it must be "simply satisfied" with defendant's evidence for it to be believed. Defendant claims that the instructions violated his constitutional rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 19, 23, and 27 of the North Carolina Constitution. In addition, defendant claims that his trial counsel's failure to object to these instructions constituted ineffective assistance of counsel.

Rule (10)(b)(2) of the North Carolina Rules of Appellate Procedure states that "[a] party may not assign as error any portion of the jury charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict." N.C. R. App. P. 10(b)(2). Because defendant concedes that he did not object to any portion of the trial court's instructions, our review of these contentions is limited to plain error. *See id.* 10(c)(4). Plain error is applied only in exceptional cases where a review of the entire record

establishes that the erroneous instructions probably had an effect on the jury's finding of guilt. *State v. Odom*, 307 N.C. 655, 660-61, 300 S.E.2d 375, 378-79 (1983). *See also State v. Jones*, 355 N.C. 117, 125, 558 S.E.2d 97, 103 (2002).

> A charge must be construed contextually, and isolated portions of it will not be held prejudicial when the charge as a whole is correct. If the charge as a whole presents the law fairly and clearly to the jury, the fact that isolated expressions, standing alone, might be considered erroneous will afford no ground for a reversal. Furthermore, insubstantial technical errors which could not have affected the result will not be held prejudicial. The judge's words may not be detached from the context and the incidents of the trial and then critically examined for an interpretation from which erroneous expressions may be inferred.

State v. McWilliams, 277 N.C. 680, 684-85, 178 S.E.2d 476, 479 (1971) (citations omitted).

[10] We first address defendant's argument that the instructions impermissibly placed the burden of proof on him. Defendant takes exception to the following portion of the jury charge:

> In order to resolve whatever conflicts that exist in the testimony, in order to decide what evidence is of some degree of more importance than is some other aspect of the evidence, the jury under the law is empowered to do two things with regard to the evidence.
>
> First of all, decide what credibility you're going to give the witnesses that testified in this case. *And then once you decide the evidence is believable to the extent of beyond a reasonable doubt in accordance with what the State must prove, then decide what evidence is more important or of less importance to you as to some other aspect you deem to be believable.*

(Emphasis added.) Defendant contends that because this portion of the instructions made no distinction between the State's evidence and defendant's evidence, he was saddled with the burden of proving to the jury that his evidence was believable beyond a reasonable doubt. Defendant's contention is without merit. Although the quoted portion of the instruction is awkwardly phrased, it advises the jury that the State has the burden of proving its evidence beyond a reasonable doubt. We do not interpret this instruction as shifting any burden to defendant. Moreover, the trial court unquestionably instructed the

jury correctly elsewhere as to the burden of proof. Just before giving the instruction quoted above, the trial court advised the jury: "[Defendant] is presumed to be innocent. He has no burden to prove his innocence. The burden is upon the State, the party that has charged him, to satisfy you of his guilt to the crime charged or some lesser offense from the evidence . . . to the extent of beyond a reasonable doubt." In addition, after giving the instruction to which defendant objects, the trial court on several other occasions instructed the jury that the State bore the burden of proving its case beyond a reasonable doubt. When viewed in context, we are satisfied that the jury understood that defendant did not bear the burden of proof in this case.

[11] We next address defendant's contention that the trial court's instructions erroneously required the jurors unanimously to decide what evidence to believe beyond a reasonable doubt. The trial court instructed the jury as follows:

> During the course of your deliberations, after recalling each witness's testimony, which it is your duty to do, *decide for yourselves collectively and unanimously what you're going to see fit to believe to the extent of beyond a reasonable doubt in accordance with what the State must prove.* And then from that, you find the facts, and then apply the law to those facts.

(Emphasis added.) Defendant argues that this instruction deprived the jurors of their right individually to assess witness credibility and to decide what evidence was believable in determining whether the State met its burden. Although defendant relies on *McKoy v. North Carolina*, 494 U.S. 433, 108 L. Ed. 2d 369 (1990), to support his argument, that case is distinguishable. In *McKoy*, the United States Supreme Court invalidated North Carolina's requirement that a *sentencing* jury unanimously find the existence of mitigating circumstances. 494 U.S. at 444, 108 L. Ed. 2d at 381. Because the alleged error in the case at bar occurred during the guilt phase of trial, not the sentencing phase, the holding in *McKoy* is not implicated.

We do not believe that this instruction suggested that individual jurors should "surrender their own convictions." *State v. Ward*, 301 N.C. 469, 478, 272 S.E.2d 84, 90 (1980). While the wording of the instruction is infelicitous, we read it as restating both that the State bore the burden of proving every element of the offense beyond a reasonable doubt and that the jury must believe beyond a reasonable doubt that each element had been proven before it could convict. *See*

N.C. Const. art. I, § 24 ("No person shall be convicted of any crime but by the unanimous verdict of a jury . . . .").

[12] Defendant also argues that the trial court impermissibly instructed the jury that it must be "simply satisfied" with defendant's evidence in order for it to be believed. The trial court instructed as follows:

> There are three things, and three things only, that you use to come to whatever conclusion you come to in this case; the testimony from the mouths of the witnesses after they took some kind of oath, that is, as much of that testimony as you deem to be believable to the extent of beyond a reasonable doubt. And I'll remind you that the Defendant does not have to prove anything to the extent of beyond a reasonable doubt. *In order to believe his evidence, you must be just simply satisfied.* The State has the burden of proving to you its evidence to the extent of beyond a reasonable doubt.

(Emphasis added.) This Court addressed a similar issue in *State v. Roache*, where the trial court instructed the jury that "it must be 'simply satisfied' with defendant's evidence in order to find it believable." 358 N.C. 243, 302-03, 595 S.E.2d 381, 419 (2004). Unlike the case at bar, the defendant in *Roache* objected in time for the trial court to give a clarifying instruction the next day. We found no error in *Roache* because

> the trial court properly charged the jury as to the burden of proof at two separate points in the jury charge by specifically stating that defendant had no burden of proof and also that the jury was to decide the case using "as much of th[e] evidence as you see fit to believe, to the extent of beyond a reasonable doubt in accordance with what the State must prove."

Id. at 303, 595 S.E.2d at 419. Our review of the record shows that the trial court here similarly advised the jury that defendant "has no burden to prove his innocence" and repeatedly instructed the jury that the State bore the burden of proof, not defendant. Accordingly, we see no plain error in this instruction.

Where the instructions to the jury, taken as a whole, present the law fairly and clearly to the jury, we will not find error even if isolated expressions, standing alone, might be considered erroneous. *State v. Chandler*, 342 N.C. 742, 751-52, 467 S.E.2d 636, 641 (citing *McWilliams*, 277 N.C. at 684-85, 178 S.E.2d at 479), *cert. denied*, 519

U.S. 875, 136 L. Ed. 2d 133 (1996). The sentences and phrases highlighted here by defendant cannot be scrutinized out of context for inferential error. *Id.* Even assuming *arguendo* that these portions of the instructions were improper, we fail to see how the jury would have reached a different result. Compelling evidence of defendant's guilt was presented at trial, and the instructions, taken as a whole, were correct. This assignment of error is overruled.

SENTENCING ISSUES

[13] Defendant raises several issues relating to the jury's perception of possible sentences in this case. Before trial, defendant filed a motion *in limine* pursuant to Rule 403 of the North Carolina Rules of Evidence to exclude evidence of a prior life sentence on the ground that the jury might confuse the sentences of life imprisonment with the possibility of parole and life imprisonment without parole. The trial court denied defendant's motion. When defendant testified during the guilt-innocence phase of the trial, he acknowledged on cross-examination that previously he had been convicted of second-degree murder and received a life sentence.

Defendant asserts that the admission of his prior life sentence misled the jury into believing that, because he received parole in that earlier case, he could again be paroled if sentenced to life in this case. However, when a defendant chooses to testify, evidence of the time and place of a prior conviction, along with the sentence imposed, is admissible under Rule 609(a) of the North Carolina Rules of Evidence for the purpose of impeaching his or her credibility. *State v. Lynch*, 334 N.C. 402, 408-09, 432 S.E.2d 349, 352 (1993). The prosecutor's two-question impeachment of defendant as to this prior conviction did not exceed the permissible scope of inquiry.

[14] Defendant's next argument with respect to his prior murder conviction relates to remarks made by the prosecutor to the jury during the sentencing proceeding. The prosecutor argued that "[a] life sentence would be a travesty of justice" because defendant could write poems, play his guitar, and enjoy human contact. The prosecutor pointed out that, if given a life sentence, defendant could pose a danger to guards, inmates, and others within the prison. The prosecutor emphasized this argument by stating that "[t]here's only one way to keep that cold-blooded killer from killing again."

Defendant claims that the prosecutor improperly implied in these arguments that he might become eligible for parole if given a life sentence. However, while defendant correctly points out

that evidence regarding parole eligibility is not a relevant consideration in a capital sentencing proceeding, *State v. Conaway*, 339 N.C. 487, 520, 453 S.E.2d 824, 845, *cert. denied*, 516 U.S. 884, 133 L. Ed. 2d 153 (1995), this Court has held that "it is not improper for a prosecutor to urge the jury to recommend death out of concern for the future dangerousness of the defendant," *State v. Williams*, 350 N.C. 1, 28, 510 S.E.2d 626, 644, *cert. denied*, 528 U.S. 880, 145 L. Ed. 2d 162 (1999). *See also State v. McNeil*, 350 N.C. 657, 687, 518 S.E.2d 486, 504 (1999), *cert. denied*, 529 U.S. 1024, 146 L. Ed. 2d 321 (2000). Here, the prosecutor's argument did not "improperly interject[] defendant's *prior* parole eligibility" to suggest that defendant would be eligible for parole if death was not imposed. *State v. Cummings*, 352 N.C. 600, 629, 536 S.E.2d 36, 57 (2000), *cert. denied*, 532 U.S. 997, 149 L. Ed. 2d 641 (2001). In the case at bar, "the prosecutor never used the word 'parole' and never mentioned the possibility that a life sentence could mean that defendant would eventually be released." *Williams*, 350 N.C. at 28, 510 S.E.2d at 644. Instead, the prosecutor permissibly argued that defendant might endanger others if the jury did not recommend death. The prosecutor's argument was not improper.

[15] Defendant argues that the trial court erred in rejecting his proposed instruction relating to the difference between a life sentence for a first-degree murder conviction and a life sentence for a second-degree murder conviction. Prior to the sentencing proceeding, defendant moved the trial court to instruct the jury that "a sentence of life in prison is different for first-degree and for second-degree murder. I . . . instruct you that a sentence of life in prison in this case would be life in prison without parole." The trial court denied this motion and instructed the jury as follows:

> Now, members of the jury, having found the Defendant guilty of Murder in the First Degree, it is now your duty to decide whether to recommend to the Court whether the Defendant should be sentenced to death or to life in prison without parole. Your recommendation would be binding upon the Court. If you unanimously recommend that the Defendant is to be sentenced to death, the Court will impose the sentence of death. If you unanimously recommend a sentence of life imprisonment without parole, the Court will impose a sentence of life imprisonment without parole.

The jury recommended death.

Defendant contends the trial court's instructions to the jury did not correctly instruct that a life sentence means life without parole. N.C. Gen. Stat. § 15A-2002 provides:

> If the recommendation of the jury is that the defendant be sentenced to death, the judge shall impose a sentence of death in accordance with the provisions of Chapter 15, Article 19 of the General Statutes. If the recommendation of the jury is that the defendant be imprisoned for life in the State's prison, the judge shall impose a sentence of imprisonment for life in the State's prison, without parole.
>
> The judge shall instruct the jury, in words substantially equivalent to those of this section, that a sentence of life imprisonment means a sentence of life without parole.

N.C.G.S. § 15A-2002 (2003). In the instant case, the trial court's instructions mirrored the language contained in this statute. Therefore, the jury was adequately informed of the meaning of life imprisonment, i.e., life without parole. *See State v. Haselden*, 357 N.C. 1, 12, 577 S.E.2d 594, 601-02, *cert. denied*, —— U.S. ——, 157 L. Ed. 2d 382 (2003). *See also State v. Davis*, 353 N.C. 1, 41, 539 S.E.2d 243, 269 (2000) ("We find nothing in the statute that requires the judge to state 'life imprisonment without parole' every time he alludes to or mentions the alternative sentence."), *cert. denied*, 534 U.S. 839, 151 L. Ed. 2d 55 (2001); *State v. Steen*, 352 N.C. 227, 273-75, 536 S.E.2d 1, 28-29 (2000) (no error when the trial court refused to instruct the jury on how parole laws had changed), *cert. denied*, 531 U.S. 1167, 148 L. Ed. 2d 997 (2001). This assignment of error is overruled.

[16] Defendant next claims that the trial court erred in denying his requests to modify the North Carolina Pattern Jury Instructions pertaining to capital sentencing. Defendant argues that his proposals would address a tendency of jurors to favor the State and would correct juror misinterpretation of standard jury instructions, as alleged in several studies. *See, e.g.*, James Luginbuhl and Julie Howe, *Discretion in Capital Sentencing Instructions: Guided or Misguided*?, 70 Ind. L.J. 1161 (1995). Defendant further contends that the trial court's denial of his requests violated the Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections 19 and 27 of the North Carolina Constitution.

Defendant urged the trial court to make the following modifications to the sentencing instructions: substitute all references to the

jury "recommending" defendant's sentence with language indicating that it is their "duty" to sentence defendant either to death or to life imprisonment without parole; include the phrase "without parole" with every reference to life imprisonment; delete the language that requires the jury unanimously to find a sentence of life imprisonment without parole; and delete any portion of the instructions that placed the burden of proof on defendant to prove the existence of mitigating circumstances or that the mitigating circumstances outweighed the aggravating circumstances. The trial court sustained the State's objection to defendant's requests and instructed the jury in accordance with N.C. Gen. Stat. § 15A-2000 and the North Carolina Pattern Jury Instructions. *See* 1 N.C.P.I.—Crim. 150.10 (2004).

This Court has previously held that the trial court is not required to give the exact instructions requested by a defendant. *See State v. Monk*, 291 N.C. 37, 54, 229 S.E.2d 163, 174 (1976). Instead, requested instructions need only be given in substance if correct in law and supported by the evidence. *State v. Bell*, 338 N.C. 363, 391, 450 S.E.2d 710, 726 (1994), *cert. denied*, 515 U.S. 1163, 132 L. Ed. 2d 861 (1995). Here, the trial court used the pattern jury instructions to give in substance those of defendant's requested instructions which were correct in law. For instance, the trial court properly instructed that if the State did not prove that the mitigating circumstances were insufficient to outweigh the aggravating circumstances, it was the jury's "duty to recommend that the Defendant be sentenced to life imprisonment without parole." We have encouraged the trial court to utilize the pattern jury instructions "[g]iven the danger of distraction and prejudice and the desirability of uniform jury instructions for all trials, despite the unique features of each." *Artis*, 325 N.C. at 295, 384 S.E.2d at 479. In addition, the trial court correctly declined to give those portions of defendant's requested instructions which were not supported by the law. *See* N.C.G.S. §§ 15A-2000(b), -2002 (2003) (providing that the jury recommends a unanimous sentence that the trial judge then imposes); *Davis*, 353 N.C. at 41, 539 S.E.2d at 269 (trial judge need not add the phrase "without parole" to every reference to a life sentence); *State v. Johnson*, 298 N.C. 47, 76, 257 S.E.2d 597, 618 (1979) (requiring the defendant to prove mitigating circumstances by a preponderance of the evidence). Furthermore, defendant has not demonstrated that the instructions given were erroneous or prejudicial to him. He has presented no evidence that any juror misunderstood or failed to follow the court's instructions, misapplied the law, or reached the sentencing recommenda-

tion by inappropriate means. The court's instructions were correct and met both state and federal constitutional standards. This assignment of error is overruled.

[17] Defendant next contends that the trial court erred in submitting his prior conviction of second-degree murder in support of the aggravating circumstance that he had been previously convicted of a prior violent felony. N.C.G.S. § 15A-2000(e)(3) (2003). On 10 May 1976, defendant pled guilty to second-degree murder. On 7 May 1999, defendant filed a motion for appropriate relief (MAR) in which he claimed that the State obtained the 1976 conviction in violation of his constitutional right to effective assistance of counsel. The superior court judge who considered the MAR was not the judge who presided over the instant case. The MAR judge, without conducting an evidentiary hearing, examined the file of the 1976 case and determined that defendant had stated under oath in open court that he was pleading guilty "of [his] own free will" and was "satisfied with his [lawyer's] services." Based upon those declarations, the MAR judge denied defendant's motion. Defendant then, on 4 June 1999, filed in the case at bar a motion *in limine* to preclude the introduction of his prior murder conviction on the same basis as recited in his MAR. This motion was also denied.

The trial court properly submitted the prior murder conviction as an aggravating circumstance, pursuant to N.C. Gen. Stat. § 15A-2000(e)(3). *See State v. Prevatte*, 356 N.C. 178, 256, 570 S.E.2d 440, 483 (2002), *cert. denied*, 538 U.S. 986, 155 L. Ed. 2d 681 (2003). As to the resolution of his MAR, defendant concedes that this Court's holding in *State v. Wiley*, 355 N.C. 592, 565 S.E.2d 22 (2002), *cert. denied*, 537 U.S. 1117, 154 L. Ed. 2d 795 (2003), controls but asks that we reconsider our holding in that case. In *Wiley*, a capital case, the defendant filed a MAR alleging ineffective assistance of counsel in a juvenile matter that had occurred approximately seven years before the defendant's murder trial. The trial court denied the MAR, and the prior adjudication of delinquency was then used as a basis for submitting to the jury the prior violent felony aggravating circumstance in his capital murder case. Thereafter, when the defendant appealed his murder conviction to this Court, he also sought our review of the trial court's denial of his MAR. We denied the defendant's petition for writ of certiorari, *State v. Wiley*, 548 S.E.2d 158 (2001), and his motion to bypass the Court of Appeals, *id.*, and held that "the [ineffective assistance of counsel] claim aris[ing] from defendant's juvenile case . . . must be raised in a separate proceeding." 355 N.C. at 606,

565 S.E.2d at 34. Accordingly, defendant's MAR alleging ineffective assistance of counsel in his prior murder case is not properly before us. This assignment of error is overruled.

[18] Defendant next argues that the trial court erred in submitting his prior conviction in Georgia of robbery by sudden snatch to support the prior violent felony aggravating circumstance. N.C.G.S. § 15A-2000(e)(3). Defendant claims that the State failed to present sufficient evidence that this offense involved "the use or threat of violence." *Id.* He supports this argument with citations to Georgia statutes and Georgia case law which state that neither physical injury nor the threat of violence is an element of robbery by sudden snatch. However, we have held that violence need not be an element of an offense in order for a prior conviction to be admissible under (e)(3). *State v. McDougall*, 308 N.C. 1, 18, 301 S.E.2d 308, 319, *cert. denied*, 464 U.S. 865, 78 L. Ed. 2d 173 (1983). The aggravating circumstance may be submitted where the use or threat of violence was actually involved in the commission of the crime. *Id.*

Defendant relies on *State v. Robertson*, 138 N.C. App. 506, 531 S.E.2d 490 (2000), *cert. denied*, 560 S.E.2d 357 (2002), to support his contention that the act of snatching a purse involves neither actual nor constructive violence. In that case, a divided Court of Appeals vacated the defendant's robbery conviction because the defendant did not use violence, actual or constructive, to gain possession of the victim's purse. "[T]he only force used by defendant was that sufficient to remove her purse from her shoulder. Defendant never attempted to overpower her or otherwise restrain her. Rather, this was no more than a typical purse-snatching incident, which courts in other jurisdictions routinely have held to be larceny, not robbery." *Id.* at 509, 531 S.E.2d at 493.

Robertson is distinguishable from the instant case. Here, Gary Garner, a former employee of the Georgia Bureau of Investigation, testified at defendant's sentencing proceeding that in 1974 he saw defendant sprint up to a woman and snatch her purse. The victim "started screaming and holding onto her purse. And they fought over the purse, and he slung her down and snatched the purse, the lady was still screaming, and then he ran." On further questioning, Agent Garner confirmed that defendant forced the victim to her knees or to a sitting position as she tried to defend her purse. While the act of purse snatching may not invariably involve the use or threat of violence, Garner's testimony as to the circumstances surrounding this

prior felony was sufficient to prove that violence was actually used during the commission of the crime. Accordingly, the trial court's submission of the (e)(3) aggravating circumstance in this case was proper. This assignment of error is overruled.

PRESERVATION ISSUES

Defendant raises additional issues that he concedes have been decided against him by this Court. Defendant complains that the trial court erred in permitting the jury to be death qualified. We have repeatedly held that prospective jurors who express an unequivocal opposition to the death penalty may be excused without violating a defendant's constitutional rights. *See Gladden*, 315 N.C. at 438-39, 340 S.E.2d at 698; *State v. Young*, 312 N.C. 669, 686, 325 S.E.2d 181, 191 (1985); *State v. Avery*, 299 N.C. 126, 135-37, 261 S.E.2d 803, 809-10 (1980). Defendant argues that the trial court erred in submitting the aggravating circumstance that the murder "was especially heinous, atrocious, or cruel" because it is unconstitutionally vague. N.C.G.S. § 15A-2000(e)(9) (2003). We have previously held that this aggravating circumstance is constitutional. *State v. Syriani*, 333 N.C. 350, 388-92, 428 S.E.2d 118, 138-41, *cert. denied*, 510 U.S. 948, 126 L. Ed. 2d 341 (1993). Further, defendant contends that the trial court erred in instructing the jury that it must not consider any nonstatutory mitigating circumstance unless it is deemed to have mitigating value. This Court has upheld such instructions. *State v. Hill*, 331 N.C. 387, 417-18, 417 S.E.2d 765, 780 (1992), *cert. denied*, 507 U.S. 924, 122 L. Ed. 2d 684 (1993).

Defendant raises these issues for the purposes of urging this Court to reconsider its prior decisions and preserving his right to argue these issues on federal review. We have considered defendant's arguments on these additional issues and find no compelling reason to depart from our previous holdings.

These assignments of error are overruled.

[19] Lastly, defendant suggests that the record is insufficient to reveal potential ineffective assistance of counsel claims. Defendants are required to raise on direct review any ineffective assistance of counsel claims that are apparent from the record. *See* N.C.G.S. § 15A-1419(a)(3) (2003). If such apparent claims are not raised on direct appeal, they are subject to procedural default. *Id.* Accordingly, defendant is entitled to assert in a subsequent MAR any ineffective assistance of counsel claims not apparent from the record. *See State*

v. Long, 354 N.C. 534, 539-40, 557 S.E.2d 89, 93 (2001); *State v. Fair*, 354 N.C. 131, 166-67, 557 S.E.2d 500, 524-25 (2001), *cert. denied*, 535 U.S. 1114, 153 L. Ed. 2d 162 (2002); *State v. Kinch*, 314 N.C. 99, 106, 331 S.E.2d 665, 669 (1985).

PROPORTIONALITY REVIEW

[20] We now consider (1) whether the aggravating circumstances are supported by the record in this case; (2) whether the jury recommended the death sentence under the influence of passion, prejudice, or any other arbitrary factor; and (3) whether the death sentence "is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." N.C.G.S. § 15A-2000(d)(2) (2003).

The jury found the aggravating circumstances that "defendant had been previously convicted of a felony involving the use or threat of violence" on two occasions, *id.* § 15A-2000(e)(3); and that the murder "was especially heinous, atrocious, or cruel," *id.* § 15A-2000(e)(9). After a thorough review of the record, we conclude that the evidence supports both aggravating circumstances. In addition, nothing in the record suggests the death sentence was imposed under the influence of passion, prejudice, or any other arbitrary factor.

Finally, we must determine whether the death sentence was excessive or disproportionate by comparing the present case with other cases in which we have found the death sentence to be disproportionate. *State v. McCollum*, 334 N.C. 208, 240, 433 S.E.2d 144, 162 (1993), *cert. denied*, 512 U.S. 1254, 129 L. Ed. 2d 895 (1994). This Court has found the death sentence disproportionate on eight occasions. *State v. Kemmerlin*, 356 N.C. 446, 573 S.E.2d 870 (2002); *State v. Benson*, 323 N.C. 318, 372 S.E.2d 517 (1988); *State v. Stokes*, 319 N.C. 1, 352 S.E.2d 653 (1987); *State v. Rogers*, 316 N.C. 203, 341 S.E.2d 713 (1986), *overruled in part on other grounds by State v. Gaines*, 345 N.C. 647, 483 S.E.2d 396, *cert. denied*, 522 U.S. 900, 139 L. Ed. 2d 177 (1997), *and by State v. Vandiver*, 321 N.C. 570, 364 S.E.2d 373 (1988); *Young*, 312 N.C. 669, 325 S.E.2d 181 (1985); *State v. Hill*, 311 N.C. 465, 319 S.E.2d 163 (1984); *State v. Bondurant*, 309 N.C. 674, 309 S.E.2d 170 (1983); *State v. Jackson*, 309 N.C. 26, 305 S.E.2d 703 (1983). We conclude that this case is not substantially similar to any of these cases.

Several factors support the determination that the imposition of the death penalty in this case was neither excessive nor dispropor-

tionate. The evidence indicated that defendant's attack on the victim was unprovoked, that defendant began the affray with a knife and then switched to a bottle to hit, stab, and slash the victim numerous times, and that at some point defendant had pulled down the victim's pants. The jury found defendant guilty of first-degree murder on the basis of premeditation and deliberation, which suggests a "calculated and cold-blooded crime." *State v. Lee*, 335 N.C. 244, 297, 439 S.E.2d 547, 575, *cert. denied*, 513 U.S. 891, 130 L. Ed. 2d 162 (1994). In addition, the jury's finding of the (e)(3) aggravating circumstance was based upon defendant's prior convictions of second-degree murder and robbery by sudden snatch. We have never held that a death sentence was disproportionate where a jury found the (e)(3) aggravating circumstance. *State v. Peterson*, 350 N.C. 518, 538, 516 S.E.2d 131, 143-44 (1999), *cert. denied*, 528 U.S. 1164, 145 L. Ed. 2d 1087 (2000). Finally, the jury found the (e)(9) aggravating circumstance, which we have held is sufficient, standing alone, to affirm a death sentence. *Roache*, 358 N.C. at 330, 595 S.E.2d at 436 (citing *State v. Bacon*, 337 N.C. 66, 110 n.8, 446 S.E.2d 542, 566 n.8 (1994), *cert. denied*, 513 U.S. 1159, 130 L. Ed. 2d 1083 (1995)). Considering defendant's violent history and the brutal nature of the present crime, this case is more similar to cases in which we have found the sentence of death proportionate.

Based upon the foregoing, we conclude that defendant received a fair trial and capital sentencing proceeding, free of prejudicial error.

NO ERROR.

Justice NEWBY did not participate in the consideration or decision of this case.

CHRISTINE JANICE UBERTACCIO v. RICHARD UBERTACCIO

No. 5A04

(Filed 3 December 2004)

Divorce— equitable distribution—phantom stock grants—proceeds as divisible property

The opinion of the Court of Appeals in this equitable distribution case holding that the trial court did not err by requiring plaintiff wife to pay defendant a portion of the proceeds from the sale of stock she had received from her employer is affirmed for the reason stated in the concurring opinion that, although phantom stock grants to plaintiff were not vested or nonvested stock options so that the opinion in *Fountain v. Fountain*, 148 N.C. App. 328 (2002) and the coverture formula in N.C.G.S. § 50-20.1 do not apply, the trial court properly concluded that the proceeds from the stock grants constituted divisible property as set out in N.C.G.S. § 50-20(b)(4)(b) because the trial court found that the proceeds were acquired as the result of plaintiff's efforts during the marriage and before the date of separation and that the proceeds were received by plaintiff before the date of distribution.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 161 N.C. App. 352, 588 S.E.2d 905 (2003), affirming an equitable distribution judgment entered 25 June 2002 by Judge Victoria L. Roemer in District Court, Forsyth County. Heard in the Supreme Court 10 November 2004.

C.R. "Skip" Long, Jr. for plaintiff-appellant.

Morrow Alexander Tash Kurtz & Porter, PLLC, by Jon B. Kurtz and John F. Morrow, for defendant-appellee.

PER CURIAM.

For the reasons stated in Judge Levinson's concurring opinion, the decision of the Court of Appeals is affirmed.

AFFIRMED.

Justice NEWBY did not participate in the consideration or decision of this case.

KYLE & ASSOCS. v. MAHAN

[359 N.C. 176 (2004)]

KYLE & ASSOCIATES, INC. v. THOMAS MAHAN AND MICHAEL AUTEN

No. 655PA03

(Filed 3 December 2004)

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 161 N.C. App. 341, 587 S.E.2d 914 (2003), affirming an order denying a motion to strike a foreign judgment entered 24 September 2002 by Judge Timothy L. Patti in Superior Court, Gaston County. Heard in the Supreme Court 8 November 2004.

Arthurs & Foltz, by Douglas P. Arthurs, for plaintiff-appellee.

Brown & Associates, PLLC, by Donald M. Brown, Jr., for defendant-appellants.

PER CURIAM.

Affirmed.

Justice NEWBY did not participate in the consideration or decision of this case.

SUZANNE BEATENHEAD v. LINCOLN COUNTY, LINCOLN COUNTY BOARD OF EDUCATION, MARTIN EADDY, INDIVIDUALLY AND AS A MEMBER OF THE LINCOLN COUNTY BOARD OF EDUCATION

No. 105PA04

(Filed 3 December 2004)

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous, unpublished decision of the Court of Appeals, 162 N.C. App. 547, 591 S.E.2d 599 (2004), which in part affirmed an order entered on 18 June 2002 by Judge Forrest D. Bridges in Superior Court, Lincoln County denying summary judgment to defendant Eaddy on a malicious prosecution claim. Heard in the Supreme Court 9 November 2004.

Suzanne Beatenhead, pro se, plaintiff-appellee.

Cranfill, Sumner & Hartzog, L.L.P., by Ann S. Estridge and Meredith T. Black, for defendant-appellant Martin Eaddy.

PER CURIAM.

Justice NEWBY took no part in the consideration or decision of this case. The remaining members of the Court are equally divided, with three members voting to affirm and three members voting to reverse the decision of the Court of Appeals. Accordingly, the decision of the Court of Appeals is left undisturbed and stands without precedential value. See *Crawford v. Commercial Union Midwest Ins. Co.*, 356 N.C. 609, 572 S.E.2d 781 (2002); *Robinson v. Byrd*, 356 N.C. 608, 572 S.E.2d 781 (2002).

AFFIRMED.

STATE OF NORTH CAROLINA v. JAMES LEE TROXLER

No. 58PA04

(Filed 3 December 2004)

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous, unpublished decision of the Court of Appeals, 162 N.C. App. 182, 590 S.E.2d 333 (2004), finding no error in the judgment entered 24 July 2002 by Judge Howard R. Greeson, Jr. in Superior Court, Guilford County. Heard in the Supreme Court 9 November 2004.

Roy Cooper, Attorney General, by John F. Maddrey, Special Deputy Attorney General, for the State.

Ann B. Petersen for defendant-appellant.

PER CURIAM.

DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

Justice NEWBY did not participate in the consideration or decision of this case.

STATE OF NORTH CAROLINA v. ALVIN TERRILL FOSTER, JR.

No. 104PA04

(Filed 3 December 2004)

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 162 N.C. App. 665, 592 S.E.2d 259 (2004), reversing a judgment entered by Judge Charles H. Henry in Superior Court, Onslow County and remanding for a new trial. Heard in the Supreme Court 10 November 2004.

Roy Cooper, Attorney General, by John G. Barnwell, Assistant Attorney General, for the State-appellant.

George E. Kelly, III for defendant-appellee.

Moore & Van Allen PLLC, by James C. White, for American Civil Liberties Union of North Carolina Legal Foundation, Inc.

PER CURIAM.

Justice Newby took no part in the consideration or decision of this case. The remaining members of the Court are equally divided, with three members voting to affirm and three members voting to reverse the decision of the Court of Appeals. Accordingly, the decision of the Court of Appeals is left undisturbed and stands without precedential value. *See Crawford v. Commercial Union Midwest Ins. Co.*, 356 N.C. 609, 572 S.E.2d 781 (2002); *Robinson v. Byrd*, 356 N.C. 608, 572 S.E.2d 781 (2002).

AFFIRMED.

MURPHY FAMILY FARMS AND MURPHY FARMS, INC. D/B/A MURPHY FAMILY FARMS, PETITIONERS v. NORTH CAROLINA DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES, RESPONDENT

No. 558A03

(Filed 17 December 2004)

Environmental Law— hog waste—one violation of water quality standards

The decision of the Court of Appeals that eight civil penalties could be imposed on petitioner for violations of the dissolved oxygen water quality standards by discharging hog waste into the waters of this State is reversed for the reasons stated in the dissenting opinion that only one violation occurred when all of the waste from a lagoon was discharged in one day from a lagoon breach, and it was inappropriate to impose civil penalties based on the number of days DENR chose to test the waters.

Appeal by petitioners pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 160 N.C. App. 338, 585 S.E.2d 446 (2003), affirming in part and reversing in part a judgment entered on 15 May 2002 by Judge Benjamin G. Alford in Superior Court, Duplin County. On 5 February 2004, the Supreme Court granted petitioners' and respondent's petitions for discretionary review as to additional issues. Heard in the Supreme Court in the 1767 Chowan County Courthouse 8 October 2004.

Jordan Price Wall Gray Jones & Carlton, PLLC, by Henry W. Jones, Jr. and Brian S. Edlin, for petitioners-appellants/appellees.

Roy Cooper, Attorney General, by Jill B. Hickey and Francis W. Crawley, Special Deputy Attorneys General, for respondent-appellee/appellant.

PER CURIAM.

For the reasons stated in the dissenting opinion, we reverse the decision of the Court of Appeals as to the issue in petitioners' appeal relating to whether the breach and discharge constituted one separate violation, eight separate violations, or one eight-day continuous violation. Further, we hold respondent's petition for discretionary review was improvidently allowed. This case is remanded to the

Court of Appeals for further remand to Superior Court, Duplin County for reinstatement of the trial court's judgment.

REVERSED; DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

Justice NEWBY did not participate in the consideration or decision of this case.

JACQUELYNE JONES v. LAKE HICKORY R.V. RESORT, INCORPORATED

No. 113A04

(Filed 17 December 2004)

Agency— lessee association as agent of owner—sufficiency of evidence

The decision of the Court of Appeals that the trial court erred by submitting an issue of agency to the jury and instructing the jury that it could find a resort owner liable for injuries suffered in a parade conducted by a lessee association based on notice to the association is reversed for the reason stated in the dissenting opinion that there was sufficient evidence to support a jury finding that an agency relationship existed because the resort owner had a right to control the details of the association's activities.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 162 N.C. App. 618, 592 S.E.2d 284 (2004), remanding for a new trial a judgment entered 16 April 2002 and an order entered 3 June 2002 by Judge W. Robert Bell in Superior Court, Catawba County. Heard in the Supreme Court 6 December 2004.

Knott, Clark & Berger, L.L.P., by Michael W. Clark, Bruce W. Berger, and Joe Thomas Knott, III, for plaintiff-appellant.

Golding Holden & Pope, LLP, by John G. Golding, for defendant-appellee.

PER CURIAM.

For the reasons stated in the dissenting opinion, we reverse the decision of the Court of Appeals.

REVERSED.

Justice NEWBY did not participate in the consideration or decision of this case.

JAMES EDWARD IMES v. CITY OF ASHEVILLE, CCL MANAGEMENT, INC., AND ASHEVILLE CITY COACH LINES, INC.

No. 250A04

(Filed 17 December 2004)

Appeal by plaintiff pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 163 N.C. App. 668, 594 S.E.2d 397 (2004), affirming an order entered by Judge Dennis J. Winner on 30 October 2002 in Superior Court, Buncombe County, dismissing plaintiff's complaint for failure to state a claim upon which relief can be granted. Heard in the Supreme Court 7 December 2004.

The Sutton Firm, P.A., by April Burt Sutton and Emily Sutton Dezio, for plaintiff-appellant.

Curtis W. Euler for defendant-appellee City of Asheville.

Fred T. Hamlet for defendant-appellees CCL Management, Inc. and Asheville City Coach Lines, Inc.

Legal Aid Society of Northwest North Carolina, by Andrea S. Kurtz; Morrison & Foerster LLP, by James M. Bergin, Beth S. Brinkmann, Seth M. Galanter, and Timothy C. Lambert; and Legal Momentum, by Deborah A. Widiss and Beth S. Posner, for Legal Momentum, Peace at Work, The N.C. Coalition Against Domestic Violence, The N.C. Occupational Safety and Health Project, The Domestic Violence Advocacy Center, Legal Aid of North Carolina, Inc., Professor Deborah M. Weissman, The Family Violence Prevention Center of Orange County, and 20 Other National, Local, and Regional Organizations and Individuals Supporting Plaintiff Appellant and Urging Reversal,[1] *amici curiae.*

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1. The entities collectively referred to as "20 Other National, Local, and Regional Organizations and Individuals Supporting Plaintiff Appellant and Urging Reversal" are identified in *amici curiae*'s brief as: The Domestic Violence Legal Empowerment and Appeals Project, The National Association of Women Lawyers, The National Coalition

PER CURIAM.

AFFIRMED.

PAUL JOSEPH DANIEL AND LISA HORNE DANIEL v. JEFF G. MOORE, INDIVIDUALLY, JEFF G. MOORE ENTERPRISES, INC., THROUGH ITS REGISTERED AGENT JEFF G. MOORE, THE COUNTY OF WAYNE, THROUGH ITS MANAGER WILL R. SULLIVAN AND JOSEPH B. NASSEF, JR., INDIVIDUALLY AND IN HIS CAPACITY AS A BUILDING INSPECTOR FOR THE COUNTY OF WAYNE

No. 334A04

(Filed 17 December 2004)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, —— N.C. App. ——, 596 S.E.2d 465 (2004), vacating a consent judgment entered on 10 October 2002 and reversing an order denying plaintiffs' motion for a new trial entered on 8 January 2003 by Judge B. Jerry Braswell in Superior Court, Wayne County. Heard in the Supreme Court 8 December 2004.

Meredith P. Ezzell and Randolph M. James for plaintiff-appellees.

David M. Rouse for defendant-appellants Jeff G. Moore and Jeff G. Moore Enterprises, Inc.

PER CURIAM.

AFFIRMED.

Against Domestic Violence, The National Organization for Women Foundation, The National Center for Victims of Crime, The Sargent Shriver National Center on Poverty Law, The D.C. Employment Justice Center, The DV Initiative, The Domestic Violence Victim's Assistance Project, Family Violence Prevention Services, Inc., Jodi Finkelstein, The Hawaii State Coalition Against Domestic Violence, The New Hampshire Coalition Against Domestic and Sexual Violence, The Northwest Women's Law Center, Southeast Tennessee Legal Services in Chattanooga, The University of Southern California Law School Domestic Violence Clinic, Merle H. Weiner, Kelly Weisberg, The Women's Law Center of Maryland, Inc., and The Women's Law Project.

HENDERSON v HENDERSON

[359 N.C. 184 (2004)]

ANGELA MARIA HENDERSON (NOW ANGELA MARIA WHITE) v.
JAMES BRYANT HENDERSON

No. 430A04

(Filed 17 December 2004)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, —— N.C. App. ——, 598 S.E.2d 433 (2004), vacating in part and remanding a judgment entered 27 February 2003 by Judge Daniel F. Finch in District Court, Granville County. Heard in the Supreme Court 8 December 2004.

John M. Dunlow for plaintiff-appellee.

Currin & Dutra, LLP, by Amy R. Edge, for defendant-appellant.

PER CURIAM.

AFFIRMED.

STATE v. COOK

[359 N.C. 185 (2004)]

STATE OF NORTH CAROLINA v. JAMES ALLEN COOK

No. 272A04

(Filed 17 December 2004)

Appeal by defendant pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 164 N.C. App. 139, 594 S.E.2d 819 (2004), finding no error in the judgments entered by Judge John O. Craig, III on 16 December 2002 in Superior Court, Guilford County, upon a jury verdict finding defendant guilty of felony possession of cocaine and two counts of assault with a deadly weapon on a government official. Heard in the Supreme Court 7 December 2004.

Roy Cooper, Attorney General, by John P. Barkley, Assistant Attorney General, for the State.

Lynne Rupp for defendant-appellant.

PER CURIAM.

AFFIRMED.

AARON L. GREEN AND MILDRED GREEN PATE v. POLLY PATE WILSON, INDIVIDUALLY AND AS ADMINISTRATRIX OF THE ESTATE OF WADELL H. PATE, LYDIA P. DUGAN, JANET PATE HOLMES, DARIAN PATE, BRYAN PATE, AND LINDSEY PATE

No. 160PA04

(Filed 17 December 2004)

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 163 N.C. App. 186, 592 S.E.2d 579 (2004), reversing and vacating a stay order signed 14 May 2003 by Judge Kenneth Crow in Superior Court, New Hanover County. Heard in the Supreme Court 7 December 2004.[1]

Johnson, Lambeth & Brown, by Robert W. Johnson, Maynard M. Brown and Anna J. Averitt, for plaintiff-appellees.

Marshall, Williams & Gorham, LLP, by Charles D. Meier, for defendant-appellants Polly Pate Wilson, Janet Pate Holmes, and Darian Pate.

PER CURIAM.

DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

1. The names of the Messrs. Pate occur throughout the record as Wadell or Waddell and Darian or Darien.

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

Anson Cty. Child Support ex rel. McLain v. Howell Case below: 164 N.C. App. 227 (4 May 2004)	No. 258P04	1. Def's PDR Under N.C.G.S. § 7A-31 (COA03-678) (99CVD449) 2. Def's Alternative PWC to Review the Order of the District Court	1. Denied (12/02/04) 2. Denied (12/02/04)
Bak v. Cumberland Cty. Hosp. Sys., Inc. Case below: 165 N.C. App. 904	No. 458P04	1. Plts' PDR Under N.C.G.S. § 7A-31 (COA03-994) 2. Defs' (Cumberland County Hospital System, McLaurin and Hardle) Conditional PDR Under N.C.G.S. § 7A-31	1. Denied **10/08/04** 2. Dismissed as moot **10/08/04**
Brown v. Dodson Case below: 166 N.C. App. 279	No. 532P04	1. Defs' (Stephen Page and Buncombe County Board of Education) PDR Under N.C.G.S. § 7A-31 (COA03-954) 2. Plts' Motion to Dismiss Petition for Discretionary Review 3. Plts' Conditional PDR	1. Denied (12/02/04) 2. Dismissed as moot (12/02/04) 3. Dismissed as moot (12/02/04)
City of Burlington v. Boney Publishers, Inc. Case below: 166 N.C. App. 186	No. 518PA04	Plt's PDR (COA03-904)	Allowed (12/02/04)
Currituck Assocs.-Residential P'ship v. Hollowell ——————— Shallowbag Bay Dev. Co., LLC v. Currituck Assocs.-Residential P'ship Case below: 166 N.C. App. 17	No. 528A04	1. Appellants' (Hollowell and Shallowbag Bay Development Co.) Motion for Consolidation Pursuant to Rule 40 of the N.C. Rules of Appellate Procedure 2. Appellants' (Ray E. Hollowell, Jr. and Shallowbag Bay Development Co.) NOA (Dissent) (COA03-1082 and COA03-1085) 3. Appellants' (Ray E. Hollowell, Jr. and Shallowbag Bay Development Co.) PDR as to Additional Issues (COA03-1082)	1. Allowed (12/02/04) 2. —— 3. Denied (12/02/04)
Daniels-Leslie v. Laster Case below: 166 N.C. App. 763	No. 587A04	Plt's NOA Based Upon a Constitutional Question (COA03-1580)	Dismissed *ex mero motu* (12/02/04)

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

Diaz v. Division of Soc. Servs. Case below: 166 N.C. App. 209	No. 523PA04	Defs' Motion for Temporary Stay (COA03-1151)	Allowed Pending Determination of Defs' PDR **10/13/04**
Estate of Apple v. Commercial Courier Express, Inc. Case below: 165 N.C. App. 514	No. 446P04	Defs' PDR Under N.C.G.S. § 7A-31 (COA03-829)	Denied (12/02/04)
Ford v. Integon Nat'l Ins. Co. Case below: 164 N.C. App. 779	No. 421P04	Plt's PWC to Review the Decision of the COA (COA03-80)	Denied (12/02/04)
Guox v. Satterly Case below: 164 N.C. App. 578	No. 335P04	Def's PDR Under N.C.G.S. § 7A-31 (COA03-966)	Denied (12/02/04)
Hanson Aggregates Southeast, Inc. v. City of Raleigh Case below: 165 N.C. App. 705	No. 468P04	Plt's PDR Under N.C.G.S. § 7A-31 (COA03-1270)	Denied (12/02/04)
Harleysville Mut. Ins. Co. v. Nationwide Mut. Ins. Co. Case below: 165 N.C. App. 543	No. 444PA04	Def's (Nationwide) PDR Under N.C.G.S. § 7A-31 (COA03-1220)	Allowed (12/02/04)
Harris v. Tri-Arc Food Sys., Inc. Case below: 165 N.C. App. 495	No. 442P04	Plt's PDR Under N.C.G.S. § 7A-31 (COA03-1106)	Denied (12/02/04)
In re Appeal of Weaver Inv. Co. Case below: 165 N.C. App. 198	No. 396P04	1. Petitioner's PDR Under N.C.G.S. § 7A-31 (COA03-1226) 2. Respondent's Conditional Petition for Discretionary Review Under N.C.G.S. § 7A-31	1. Denied **12/01/04** 2. Dismissed as moot **12/01/04**

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

In re C.A.J., K.M.J. Case below: 164 N.C. App. 598	No. 336P04	Respondent's (Father) PDR Under N.C.G.S. § 7A-31 (COA03-564)	Denied (12/02/04)
In re E.N.S. Case below: 164 N.C. App. 146	No. 277P04	Respondent's (Mother) PDR (COA03-718)	Denied (12/02/04)
In re Hudson Case below: 165 N.C. App. 894	No. 460P04	1. Appellant's (Joseph Morton) NOA Based Upon a Constitutional Question (COA03-556) 2. Appellant's (Morton) PDR Under N.C.G.S. § 7A-31 3. Appellant's (Morton) PWC to Review the Decision of the COA	1. Dismissed *ex mero motu* (12/02/04) 2. Denied (12/02/04) 3. Denied (12/02/04)
In re M.C. & C.H. Case below: 165 N.C. App. 274	No. 543P04	Appellant's PWC to Review the Decision of the COA (COA03-1656)	Denied (12/02/04)
JPG, Inc. v. Dick Beck Prof'l Mktg., Inc. Case below: 166 N.C. App. 279	No. 530P04	Plt's PDR Under N.C.G.S. § 7A-31 (COA03-974)	Denied (12/02/04)
Kummer v. Lowry Case below: 165 N.C. App. 261	No. 359P04	Plt's PDR Under N.C.G.S. § 7A-31(c) (COA03-1079)	Denied **10/08/04**
L & M Transp. Servs., Inc. v. Morton Indus. Grp., Inc. Case below: 163 N.C. App. 606	No. 261P04	Def's PDR Under N.C.G.S. § 7A-31 (COA03-709)	Denied (12/02/04)
Leder v. Leder Case below: 166 N.C. App. 498	No. 509P04	Appellant's (Joseph Leder) PDR Under N.C.G.S. § 7A-31 (COA03-1007)	Denied (12/02/04)
Lee v. Scarborough Case below: 164 N.C. App. 357	No. 313P04	1. Def's (Scarborough) PDR Under N.C.G.S. § 7A-31 (COA02-1632-2) 2. Plt's PDR Under N.C.G.S. § 7A-31	1. Denied (12/02/04) 2. Denied (12/02/04)

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

Lee v. Tolson _____ Clark v. Tolson Case below: 166 N.C. App. 256	No. 527P04	Plts' (Lee and Clark) PDR Under N.C.G.S. § 7A-31 (COA03-1183)	Denied (12/02/04)
Lee v. Wake Cty. Case below: 165 N.C. App. 154	No. 418P04	Def's PDR Under N.C.G.S. § 7A-31 (COA03-1164)	Denied (12/02/04)
Livingston v. Adams Kleemeier Hagan Hannah & Fouts, P.L.L.C. Case below: 163 N.C. App. 397	No. 209P04	Plt's PDR Under N.C.G.S. § 7A-31 (COA03-22)	Denied (12/02/04) **Edmunds, J., recused**
Luhmann v. Hoenig Case below: 166 N.C. App. 279	No. 664A03-2	Defs' PDR Under N.C.G.S. § 7A-31 (COA03-23-2)	Denied (12/02/04)
McCollum v. Atlas Van Lines Case below: 166 N.C. App. 280	No. 521P04	Defs' PDR Under N.C.G.S. § 7A-31 (COA03-897)	Denied (12/02/04)
McCorquodale v. Franklin Baking Co. Case below: 166 N.C. App. 280	No. 533P04	Plt's PDR Under N.C.G.S. § 7A-31 (COA03-1321)	Denied (12/02/04)
Monteith v. Kovas Case below: 162 N.C. App. 545	No. 102PA04	Joint Motion to Withdraw PDR Under N.C.G.S. § 7A-31 (COA02-1493)	Allowed (12/02/04) **Martin, J., recused**

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

Moore's Ferry Dev. Corp. v. City of Hickory Case below: 166 N.C. App. 441	No. 545P04	1. Defs' (City of Hickory and Moore's Ferry Owners Association) PDR Under N.C.G.S. § 7A-31 (COA03-1271) 2. Plt's Conditional PDR Under N.C.G.S. § 7A-31	1. Denied (12/02/04) 2. Denied (12/02/04)
Northfield Dev. Co. v. City of Burlington Case below: 165 N.C. App. 885	No. 495P04	Plt's PDR Under N.C.G.S. § 7A-31 (COA03-1024)	Denied (12/02/04)
Reep v. Beck Case below: 164 N.C. App. 779	No. 345PA04	1. Defs' Petition for Writ of Supersedeas (COA03-961) 2. Defs' PDR Under N.C.G.S. § 7A-31	1. Allowed (12/02/04) 2. Allowed (12/02/04)
Revels v. Miss Am. Org. Case below: 165 N.C. App. 181	No. 415P04	Def's (Miss America Organization) PDR Under N.C.G.S. § 7A-31 (COA03-1194)	Denied **10/08/04**
State v. Barnhill Case below: 166 N.C. App. 228	No. 535P04	1. Def's NOA Based Upon a Constitutional Question (COA03-852) 2. Def's PDR Under N.C.G.S. § 7A-31 3. AG's Motion to Dismiss Appeal	1. —— 2. Denied (12/02/04) 3. Allowed (12/02/04)
State v. Bethea Case below: 165 N.C. App. 905	No. 454P04	Def's PDR Under N.C.G.S. § 7A-31 (COA03-1339)	Denied (12/02/04)
State v. Bingham Case below: 165 N.C. App. 335	No. 451P04	1. Def's PDR Under N.C.G.S. § 7A-31 (COA03-1137) 2. AG's Conditional PDR	1. Denied (12/02/04) 2. Dismissed as moot (12/02/04)

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

State v. Blackwell Case below: 166 N.C. App. 280	No. 490PA04	1. AG's Motion for Temporary Stay (COA03-793) 2. AG's Petition for Writ of Supersedeas 3. AG's PDR Under N.C.G.S. § 7A-31 4. Def's Motion to Dismiss PDR, Petition for Writ of Supersedeas and Motion for Temporary Stay 5. Def's NOA Based Upon a Constitutional Question 6. Def's PDR Under N.C.G.S. § 7A-31 7. AG's Motion to Dismiss Appeal	1. Allowed **09/23/04** 2. Allowed (12/02/04) 3. Allowed (12/02/04) 4. Denied (12/02/04) 5. —— 6. Denied (12/02/04) 7. Allowed (12/02/04)
State v. Blakeney Case below: Union County Superior Court	No. 203A98-2	1. Def's PWC to Review Order of the Superior Court (Union County) 2. Def's Motion to Supplement Petition for Writ of Certiorari 3. Def's Motion to Stay Proceedings Regarding PWC Until U.S. Supreme Court Issues a Decision in *Rompilla*	1. Denied (12/02/04) 2. Allowed (12/02/04) 3. Denied (12/02/04)
State v. Braxton Case below: 166 N.C. App. 515	No. 552P04	1. Def Foreman's PDR Under N.C.G.S. § 7A-31 (COA03-1010) 2. Def Braxton's NOA Pursuant to N.C.G.S. § 7A-30 3. AG's Motion to Dismiss Appeal	1. Denied (12/02/04) 2. —— 3. Allowed (12/02/04)
State v. Buckman Case below: 165 N.C. App. 706	No. 472P04	Def's PDR Under N.C.G.S. § 7A-31 (COA03-859)	Denied (12/02/04)
State v. Clark 165 N.C. App. 279	No. 383P04-2	Def's NOA (COA03-652)	Dismissed *ex mero motu* (12/02/04)
State v. Davis Case below: 165 N.C. App. 905	No. 492P04	Def's PDR Under N.C.G.S. § 7A-31 (COA03-910)	Denied (12/02/04)

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

State v. Douglas Case below: 166 N.C. App. 280	No. 540P04	Def's PWC to Review Decision of COA (COA03-329)	Denied (12/02/04)
State v. Farlow Case below: 161 N.C. App. 541	No. 001P04-2	Def's PWC to Review the Decision of the COA (COA03-123)	Denied (12/02/04)
State v. Feeney Case below: 165 N.C. App. 706	No. 469P04	Def's PDR Under N.C.G.S. § 7A-31 (COA02-1716)	Denied (12/02/04)
State v. Forrest Case below: 164 N.C. App. 272	No. 270A04	1. Def's NOA Based Upon a Dissent (COA03-806) 2. Def's PDR as to Additional Issues	1. —— 2. Denied (12/02/04)
State v. Foye Case below: 165 N.C. App. 276	No. 364P04	Def's PDR Under N.C.G.S. § 7A-31 (COA03-549)	Denied (12/02/04)
State v. Gary Case below: 164 N.C. App. 599	No. 330P04	Def's PDR Under N.C.G.S. § 7A-31 (COA03-1089)	Denied (12/02/04)
State v. Goodman Case below: 165 N.C. App. 865	No. 497P04	Def's PDR Under N.C.G.S. § 7A-31 (COA03-541)	Denied (12/02/04)
State v. Graham Case below: 163 N.C. App. 784	No. 254P04	Def's PDR Under N.C.G.S. § 7A-31 (COA03-788)	Denied (12/02/04)
State v. Harris Case below: 166 N.C. App. 386	No. 548A04	AG's Motion for Temporary Stay (COA03-1071)	Allowed **10/27/04**
State v. Hedgepeth Case below: 165 N.C. App. 321	No. 405P04	Def's PDR Under N.C.G.S. § 7A-31 (COA03-787)	Denied (12/02/04)

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

State v. Howard Case below: 165 N.C. App. 707	No. 473P04	Def's PDR Under N.C.G.S. § 7A-31 (COA03-780)	Dismissed (12/02/04)
State v. Huckabee Case below: 166 N.C. App. 281	No. 536A04	1. Def's NOA Based Upon a Constitutional Question (COA03-938) 2. AG's Motion to Dismiss Appeal	1. —— 2. Allowed (12/02/04)
State v. Hudson Case below: 159 N.C. App. 468	No. 379P04	Def's PWC to Review the Decision of the COA (COA02-684)	Denied (12/02/04)
State v. Johnson Case below: 164 N.C. App. 1	No. 269P04	1. Def's (Johnson) NOA Based Upon a Constitutional Question (COA03-686) 2. AG's Motion to Dismiss Appeal (Johnson) 3. Def's (Johnson) PDR Under N.C.G.S. § 7A-31 4. Def's (Whisonant) PDR Under N.C.G.S. § 7A-31	1. —— 2. Allowed 3. Denied (12/02/04) 4. Denied
State v. Johnson Case below: 160 N.C. App. 596	No. 547P04	Def's PWC to Review the Decision of the COA (COA02-1687)	Denied (12/02/04)
State v. Jones Case below: 165 N.C. App. 276	No. 399P04-2	1. Def's NOA Based Upon a Constitutional Question (COA03-590) 2. Def's Petition for the Supreme Court of N.C. to Create, Order or Pass a New General Statute or Make a New Law	1. Dismissed *ex mero motu* (12/02/04) 2. Dismissed (12/02/04)
State v. Jones Case below: 166 N.C. App. 281	No. 534P04	1. Def's NOA Based Upon a Constitutional Question (COA03-976) 2. Def's PDR Under N.C.G.S. § 7A-31 3. AG's Motion to Dismiss Appeal	1. —— 2. Denied (12/02/04) 3. Allowed (12/02/04)
State v. Kennedy Case below: 165 N.C. App. 276	No. 395P04	Def's PDR Under N.C.G.S. § 7A-31 (COA03-1448)	Denied (12/02/04)

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

State v. Lanier Case below: 165 N.C. App. 337	No. 449P04	Def's PDR Under N.C.G.S. § 7A-31 (COA03-476)	Denied (12/02/04)
State v. Lewis Case below: 166 N.C. App. 596	No. 558PA04	1. AG's Motion for Temporary Stay (COA03-785) 2. AG's Petition for Writ of Supersedeas 3. AG's NOA Based Upon a Constitutional Question 4. AG's PDR Under N.C.G.S. § 7A-31 5. Def's Motion to Dismiss Appeal	1. Allowed **11/01/04** 2. Allowed (12/02/04) 3. —— 4. Allowed (12/02/04) 5. Allowed (12/02/04)
State v. Lyons Case below: 165 N.C. App. 905	No. 489P04	Def's PDR Under N.C.G.S. § 7A-31 (COA03-792)	Denied (12/02/04)
State v. Macias Case below: 154 N.C. App. 743	No. 510P04	Def's PWC to Review the Decision of the COA (COA02-340)	Denied (12/02/04)
State v. McDonald Case below: 165 N.C. App. 237	No. 401P04	Def's PDR Under N.C.G.S. § 7A-31 (COA03-534)	Denied (12/02/04)
State v. Milton Case below: 166 N.C. App. 515	No. 555P04	Def's PDR Under N.C.G.S. § 7A-31 (COA03-1470)	Denied (12/02/04)
State v. Newsom Case below: 165 N.C. App. 277	No. 406P04	Def's PDR Under N.C.G.S. § 7A-31 (COA03-1403)	Denied (12/02/04)
State v. Pelham Case below: 164 N.C. App. 70	No. 279P04	1. Def's NOA Based Upon a Constitutional Question (COA03-636) 2. Def's PDR Under N.C.G.S. § 7A-31 3. AG's Motion to Dismiss Appeal	1. —— 2. Denied (12/02/04) 3. Allowed

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

State v. Ragland Case below: 165 N.C. App. 277	No. 423P04	1. Def's NOA (COA03-1163) 2. Def's PDR Under N.C.G.S. § 7A-31 3. AG's Motion to Dismiss Appeal for Lack of Sustanntial Constitutional Question	1. Dismissed *ex mero motu* (12/02/04) 2. Denied (12/02/04) 3. Allowed (12/02/04)
State v. Russell Case below: 163 N.C. App. 785	No. 263P04	Def's PDR Under N.C.G.S. § 7A-31 (COA03-723)	Denied (12/02/04)
State v. Singletary Case below: 163 N.C. App. 449	No. 431P04	Def's PWC to Review the Decision of the COA (COA03-172)	Denied (12/02/04)
State v. Speight Case below: 166 N.C. App. 106	No. 491PA04	1. Def's NOA Based on a Constitutional Question (COA03-776) 2. Def's PDR Under N.C.G.S. § 7A-31 3. AG's Motion to Dismiss Appeal	1. —— 2. Denied (12/02/04) 3. Allowed (12/02/04)
State v. Stafford Case below: 166 N.C. App. 118	No. 541P04	Def's PDR Under N.C.G.S. § 7A-31 (COA03-760)	Denied (12/02/04)
State v. Valladares Case below: 165 N.C. App. 598	No. 432P04	1. AG's Petition for Writ of Supersedeas 2. AG's PDR Under N.C.G.S. § 7A-31 3. Def's NOA Based Upon a Constitutional Question 4. Def's PDR Under N.C.G.S. § 7A-31 5. AG's Conditional PDR Under N.C.G.S. § 7A-31 6. AG's Motion to Dismiss Appeal	1. Denied (12/02/04) 2. Denied (12/02/04) 3. Dismissed (12/02/04) 4. Denied (12/02/04) 5. Dismissed as moot (12/02/04) 6. Allowed (12/02/04)

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

State v. Walker Case below: Guilford County Superior Court	No. 076A95-4	AG's Emergency Motion to Vacate Stay of Execution Entered by Superior Court of Guilford County	Denied (12/02/04)
State v. Ward Case below: Halifax County Superior Court	No. 068A99-2	1. Def's Motion for Temporary Stay 2. Def's Petition for Writ of Supersedeas 3. Def's PWC 4. Def's Petition for Writ of Mandamus	1. Denied **10/27/04** 2. Denied **10/27/04** 3. Denied **10/27/04** 4. Denied **10/27/04**
State v. Webb Case below: 153 N.C. App. 325	No. 506P04	1. Def's PDR Under N.C.G.S. § 7A-31 (COA01-1508) 2. Def's Alternative PWC to Review the Decision of the COA	1. Dismissed (12/02/04) 2. Dismissed (12/02/04)
State v. Whitfield Case below: 165 N.C. App. 547	No. 439P04	1. Def's NOA Based Upon a Constitutional Question (COA03-1088) 2. Def's PDR Under N.C.G.S. § 7A-31 3. AG's Motion to Dismiss Appeal	1. —— 2. Denied (12/02/04) 3. Allowed (12/02/04)
State v. Williams Case below: 163 N.C. App. 614	No. 387P04	1. Def's PWC to Review the Order of the COA (COA03-735) 2. Def's Petition for Writ of Mandamus	1. Denied (12/02/04) 2. Denied (12/02/04)
Stetser v. Tap Pharmaceutical Prods., Inc. Case below: 162 N.C. App. 518	No. 142PA04	Plts' PDR Under N.C.G.S. § 7A-31 (COA03-180)	Allowed (12/02/04)
Van Keuren v. Little Case below: 165 N.C. App. 244	No. 397P04	Plt's PDR Under N.C.G.S. § 7A-31 (COA03-1389)	Denied (12/02/04)
WMS, Inc. v. Weaver Case below: 166 N.C. App. 352	No. 578P04	Defs' (Alltel Communications, Inc. and Alltel Communications of the Carolinas, Inc.) PDR Under N.C.G.S. § 7A-31 (COA03-1063)	Denied (12/02/04)

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

PETITION TO REHEAR

Holcomb v. Colonial Assocs., L.L.C. Case below: 358 N.C. 501	No. 581A02	Def's (Colonial Associates) Petition for Rehearing (COA01-1067)	Denied (12/02/04)

STATE OF NORTH CAROLINA v. RECHE SMITH

No. 360A02

(Filed 4 February 2005)

1. Jury— selection—challenge for cause—deference to trial court's determination

The denial of a challenge for cause was not an abuse of discretion where the court questioned the juror about his feelings about drugs and whether he could follow the law, the questions were not leading, and deference must be paid to the trial judge, who can see and hear the prospective juror.

2. Jury— selection—additional peremptory challenge

The failure to grant an additional peremptory challenge after a seated juror was removed before the end of jury selection was not error. There is no general authority to grant additional peremptory challenges (although the trial court may grant an additional peremptory challenge if it reconsiders and grants a denied challenge for cause).

3. Appeal and Error— preservation of issues—randomness of jury selection—not raised at trial

Defendant waived review of an issue concerning the randomness of jury selection by not objecting at trial. Constitutional issues not raised and passed upon at trial are not ordinarily considered on appeal, and there are statutory procedures for challenging randomness which include raising the challenge at trial. N.C.G.S. § 15A-1211(c).

4. Evidence— expert—exclusion of basis of testimony

The basis of an expert's opinion is not automatically admissible. Here, the exclusion of the basis for a psychiatrist's opinion that a first-degree murder suspect was cocaine dependent with impaired thinking ability was excluded because it was based in part on self-serving statements defendant made to her and to his family about his drug use on the day of the murder. The trial court properly applied N.C.G.S. § 8C-1, Rule 403 to find that the probative value of the statements was outweighed by the danger of unfair prejudice.

5. Criminal Law— prosecutor's closing argument—opinions

There was no error in the guilt phase of a capital murder prosecution when the prosecutor argued that defendant had obtained a second psychologist because his first did not say the right things (in fact, a new psychologist was obtained only after the license of the first was suspended). The court sustained defendant's objection to the problematic remark and had instructed the jury at the beginning of the trial to disregard the question and answer when an objection was sustained. Moreover, the prosecutor was entitled to some latitude in responding to defendant's closing argument, which was based on the cocaine dependency conclusion of the second psychiatrist.

6. Sentencing— capital—aggravating circumstances—separate evidence for two circumstances

The trial court did not err in a capital sentencing proceeding by allowing the jury to find the aggravating circumstances that the murder was committed during a kidnapping and that it was committed during a robbery. Defendant robbed the victim by choking him until he lost unconsciousness, and kidnapped the victim by taking the additional steps of binding his wrists and ankles and taping his mouth. Defendant was free to steal what he wanted and leave after the victim was unconscious.

7. Sentencing— capital—instructions—use of same evidence for two aggravating circumstances

There was no prejudicial error in a capital sentencing proceeding where the court did not instruct the jury specifically that it should not use the same evidence to support the aggravating circumstances that the murder was committed during a robbery and that it was committed during a kidnapping, but the court's instruction on kidnapping included the requirement that the restraint be an act separate and independent from the robbery.

8. Sentencing— capital—mitigating evidence—feelings and conduct of third parties

While the trial court should allow the jury to consider any mitigating evidence related to a defendant's character and record or the circumstances of the crime, the feelings, actions and conduct of third parties have no mitigating value and are irrelevant in capital sentencing proceedings.

9. Sentencing— evidence—remorse—third party's feelings

The trial court did not err in a capital sentencing proceeding by excluding evidence of defendant's expression of remorse. The evidence was an irrelevant statement of a third party's feelings and was not relevant to defendant's character, his record, or his crime. Even if the evidence should have been admitted, there was no prejudice because other evidence to the same effect was admitted.

10. Sentencing— capital—defendant's feelings about suicide and family—irrelevant

Testimony in a capital sentencing proceeding about defendant's consideration of suicide and about his feelings for his family was irrelevant to his character, his record, and his crime.

11. Sentencing— capital—defendant's effect on other inmates—irrelevant

Evidence in a capital sentencing proceeding about the effect of defendant's conduct on other inmates was irrelevant and there was no error in its exclusion. The court allowed defendant to present evidence that defendant had made a good adjustment to jail.

12. Sentencing— capital—support of family members—irrelevant

Evidence in a capital sentencing proceeding that defendant had family members who would support him if he received a life sentence was not related to defendant's record, his character, or his crime, and is irrelevant.

13. Sentencing— capital—defendant's religious practices in jail—irrelevant

Evidence in a capital sentencing proceeding about defendant's religious practices in jail was properly excluded because it focused on the opinion of a third party rather than on defendant's character, his record, and his crime.

14. Sentencing— capital—prosecutor's argument—ensuring defendant will not walk out again

There was no plain error in a capital sentencing proceeding where the prosecutor argued that the death penalty was the only way to ensure defendant would not "walk out again." The prosecutor did not specifically mention defendant being paroled or

leaving prison; the jury could not have believed that defendant might one day leave prison after hearing both closing arguments in their entirety; and, if the jury followed the court's instructions as presumed, the only possible sentences were death or life without parole.

15. Sentencing— capital—aggravating circumstances—especially heinous, atrocious, or cruel—sufficiency of evidence

The aggravating circumstance that a murder was especially heinous, atrocious, and cruel was correctly submitted in a capital sentencing proceeding where defendant gained entry to the victim's house by preying on the victim's good samaritan instincts, and killed the victim in a manner that was agonizing, dehumanizing, conscienceless, pitiless, or unnecessarily torturous.

16. Sentencing— death sentence—proportionate

A death penalty was proportionate where defendant attacked a seventy-three-year-old victim in his own home, strangled him by the neck, bound him and wrapped tape around his face, and left him to struggle as he slowly died from asphyxiation.

Justice NEWBY did not participate in the consideration or decision of this case.

Justice BRADY concurring.

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of death entered by Judge Thomas D. Haigwood on 13 March 2002 in Superior Court, Washington County, upon a jury verdict of guilty of first-degree murder in a case in which defendant was tried capitally. Defendant's motion to bypass the Court of Appeals as to an additional judgment imposed for felony larceny was allowed on 22 July 2002. Heard in the Supreme Court 8 October 2004 by special session in the Old Chowan County Courthouse in the Town of Edenton pursuant to N.C.G.S. § 7A-10(a).[1]

Roy Cooper, Attorney General, by Joan M. Cunningham, Assistant Attorney General, for the State.

M. Gordon Widenhouse, Jr. for defendant-appellant.

1. This is the first case the Supreme Court has heard outside Raleigh in one hundred and forty-four years. This Court last heard cases outside Raleigh during its August 1860 term when it met in Morganton, North Carolina.

WAINWRIGHT, Justice.

On 8 March 2002, defendant Reche Smith was convicted of first-degree murder and felony larceny. The jury found defendant guilty of first-degree murder on the basis of malice, premeditation, and deliberation and under the felony murder rule. Following a capital sentencing hearing, the jury recommended a sentence of death for the murder. The trial court accordingly imposed a sentence of death for the murder and further imposed a sentence of fifteen to eighteen months imprisonment for the felony larceny.

The evidence at trial showed the following: At 6:00 a.m. on 10 March 2001, the victim, Charles King (King), was at his home in Plymouth, North Carolina, when defendant knocked on his door. King, wearing a bathrobe and thermal shirt and pants, answered the door, and defendant asked him for a glass of water. King invited defendant into his home and headed toward his kitchen to get the water. However, before King reached the kitchen, defendant grabbed King around his neck and choked him until he became unconscious. Defendant then bound King's wrists with clear packaging tape, went to another room in King's house, found a clock, and used the clock's extension cord first to bind King's wrists and then his ankles. Next defendant covered King's entire face, including his nose and mouth, with clear packaging tape and pushed King under a hospital bed. Defendant left King under the bed to die of asphyxiation while he searched King's house for something to steal. As King lay suffocating under his bed, defendant took $250 from an envelope in King's bedroom, $20 from King's wallet, King's cell phone, bank card, and car keys. After thirty minutes of searching King's house and stealing these items, defendant took King's car, drove to Williamston, North Carolina, rented a room at a motel, and bought crack cocaine.

The next day defendant drove King's car to a local Burger King, where he stole a woman's purse and drove away. A man at the restaurant saw the license plate number on King's car as defendant fled the restaurant. A Burger King cashier relayed the license plate number to a police officer.

A short while later, Corporal Scott McDougal of the Williamston Police Department spotted the car defendant was driving. Several officers, including Deputy Jason Branch of the Martin County Sheriff's Department, pursued defendant. Eventually, defendant stopped his car and fled into the woods, where Deputy Branch overtook him on foot and arrested him.

When Corporal McDougal arrived at the scene of the arrest, he examined the car defendant had been driving. Inside he found the purse defendant had just stolen, a set of keys, a cell phone, a knife, a homemade crack pipe, and a bank card bearing the name Charles King. Corporal McDougal also confirmed that the car defendant drove during the chase belonged to Charles King. The officers took defendant to the Martin County Sheriff's Department for questioning and later transported him to the Bertie-Martin Regional Jail.

Later on 11 March 2001, defendant called his wife, Rita Smith (Rita), from whom he was separated, and claimed he was in jail for snatching a purse. Defendant then began to cry and told his wife he would never get out of jail because he killed someone in Plymouth. Rita then asked defendant to let her speak to the sheriff. She asked the sheriff why defendant was in jail. The sheriff replied that defendant had stolen a woman's purse and fled in a car registered to Charles King. After talking with defendant and the sheriff, Rita relayed the story to her mother and speculated that defendant killed King. Rita knew King because she had bought cologne from him in the past. Rita and her mother attempted to call King at his home, but no one answered.

Two days after the murder, Rita relayed the contents of her conversation with defendant to her friend, Brenda Jackson. Rita and Jackson again called King's home, but no one answered. After receiving no reply from King, Rita and Jackson called Detective John Floyd, Chief of Police in Plymouth, North Carolina. Jackson relayed information to Chief Floyd about defendant's conversation with Rita. Jackson asked Floyd to go by King's house to check on King's whereabouts.

When Chief Floyd and Officer Heather Thompkins arrived at King's house, they knocked on the doors and received no answer. One officer gained entry to the house through a window and let the other one in through a door. Once inside, they noticed a bedroom had been ransacked. The officers discovered King's body under a hospital bed.

On 13 March 2001, Dr. Paul Spence, M.D., conducted an autopsy on King at Pitt County Memorial Hospital. The autopsy revealed only one significant external injury, a scratch on King's left shin. Internal injuries were consistent with manual choking: bruises and bleeding into the muscles surrounding the voice box and bits of hemorrhage inside the structure of the thyroid cartilage. King's hands were swollen and purple-red in color, indicating King was alive at the time

defendant bound him with the tape and electrical cord. Dr. Spence stated that King's death was caused by asphyxia resulting from blockage of the nose and mouth due to tape bound around the head. In Dr. Spence's estimation, once defendant placed tape on King's nose and mouth, King became brain dead in two to three minutes and his heart stopped after ten to twenty minutes. Dr. Spence also determined that King could have remained conscious for a portion of that time. Finally, Dr. Spence testified King could have regained consciousness after defendant choked him and been aware of his condition, but because of his lack of oxygen, King would have been unable to move.

Additional relevant facts will be presented when necessary to resolve specific assignments of error raised by defendant.

JURY SELECTION

[1] Defendant first argues the trial court erred by denying his challenge for cause to prospective juror Charles Hassell. During *voir dire*, Hassell indicated he was strictly against drug use. Defense counsel then asked Hassell the following question:

> [Y]our position is such concerning drug use and abuse that in the event evidence came out in this trial that drug use was involved, it would affect or impair—substantially impair your ability to be fair and impartial; is that correct?

Hassell replied "yes" to this question. Defendant then challenged Hassell for cause.

In response, the trial court engaged in the following colloquy with Hassell:

> THE COURT: Well let me—Mr. Hassell, let me ask you . . . just a couple of questions if I could. I don't mean to embarrass you. There are no right or wrong answers, and I want to make sure I understand what you're saying, and I'm trying to frame the question in a way that—are you saying to me, sir, that your personal feelings about the use or use [sic] of or possession of drugs is such that it would interfere or prevent you from following the law in this—as I would instruct you as it relates to this case?
>
> MR. HASSELL: Well, I could follow the law.
>
> THE COURT: All right. Now—and so I want to make sure what you're saying—you know, many people don't like drugs, don't approve of drugs, and I don't believe that's the question that [the

defense attorney] was asking you, and that may have been how—that may have been what you are saying. I don't know one way or the other.

I'm not trying to put words in your mouth, but I—I'm just making sure I understand that's what you were saying or whether what you were saying is you didn't like drugs or are you saying to me that your feeling is such—I'm asking you as to whether or not your personal feelings about particular crimes or particular types of conduct are such that it would overwhelm your reason and common sense and your ability to follow the law as I would instruct you on should we reach some aspect of the case that may relate to the consumption or use or possession of drugs?

MR. HASSELL: No. It wouldn't do that.

THE COURT: You would be able and could and would follow the law as I would instruct you on regardless of what your own personal feelings would be as it relates to the use or possession of or consumption of drugs; is that correct?

MR. HASSELL: Yes.

THE COURT: Are you sure of that answer, sir?

MR. HASSELL: Yeah.

THE COURT: All right. The Challenge for cause is denied.

Defendant properly preserved error by exhausting the peremptory challenges available to him, renewing his challenge to prospective juror Hassell, and having his renewed challenge denied. N.C.G.S. § 15A-1214(h) (2003). However, in addition to preserving error, defendant must show error by (1) demonstrating that the trial court abused its discretion in denying the challenge, and (2) showing defendant was prejudiced by this abuse of discretion. *State v. Grooms*, 353 N.C. 50, 68, 540 S.E.2d 713, 725 (2000), *cert. denied*, 534 U.S. 838, 151 L. Ed. 2d 54 (2001).

Defendant contends the trial court improperly rehabilitated Hassell with leading questions, despite the prohibition against reducing determinations of juror bias "to question-and-answer sessions which obtain results in the manner of a catechism." *Wainwright v. Witt*, 469 U.S. 412, 424, 83 L. Ed. 2d 841, 852 (1985). However, we conclude that the trial court did not lead Hassell to answer that he would follow the law. Rather, the trial court questioned Hassell in an effort

to determine whether, despite Hassell's feelings about drug use, he could follow the law.

We further conclude that the trial court did not abuse its discretion by denying defendant's challenge for cause. As the United States Supreme Court further stated in *Wainwright*:

> What common sense should have realized experience has proved: many veniremen simply cannot be asked enough questions to reach the point where their bias has been made "unmistakably clear"; these veniremen may not know how they will react when faced with imposing the death sentence, or may be unable to articulate, or may wish to hide their true feelings. Despite this lack of clarity in the printed record, however, there will be situations where the trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law. . . . [T]his is why deference must be paid to the trial judge who sees and hears the juror.

Id. at 424-26, 83 L. Ed. 2d at 852-53 (footnote omitted). Thus, we must give substantial weight to the trial court's determination that Hassell was not biased. We defer to the trial court who could see and hear Hassell, and we conclude that the trial court did not abuse its discretion by denying defendant's challenge for cause. Defendant's assignment of error is overruled.

[2] Next, defendant contends the trial court erred by failing to give him an additional peremptory challenge. Defendant claims he was entitled to an additional peremptory challenge because the trial court removed a seated juror for cause before the end of jury selection and after defendant had used all but one of his remaining peremptory challenges.

After both defendant and the prosecution accepted prospective juror Gloria Cox, Cox brought the trial court a note from her doctor recommending that she be excused from jury duty because serving as a juror would be too stressful for her. The trial court dismissed Cox for cause. Defendant then requested an additional peremptory challenge, stating that he had undergone a substantial portion of jury selection believing that Cox would be a juror. The trial court denied defendant's request.

Defendant contends the trial court erred by failing to use its inherent authority to restore a peremptory challenge to remedy a prejudicial development in jury selection. However, we disagree.

Although a trial court must grant a defendant an additional peremptory challenge if, upon reconsideration of the defendant's previously denied challenge for cause, "the judge determines that the juror should have been excused for cause," N.C.G.S. § 15A-1214(i) (2003), trial courts generally have no authority to grant additional peremptory challenges. *See*, *e.g.*, *State v. Barnes*, 345 N.C. 184, 208, 481 S.E.2d 44, 57 ("[T]he trial court ha[s] no authority to grant any additional peremptory challenges . . . ."), *cert. denied*, 522 U.S. 876, 139 L. Ed. 2d 134 (1997), and, *cert. denied*, 523 U.S. 1024, 140 L. Ed. 2d 473 (1998), and *State v. Hunt*, 325 N.C. 187, 198, 381 S.E.2d 453, 460 (1989) ("[T]he trial court ha[s] no authority to increase the number of peremptory challenges . . . . "). In fact, trial courts are "precluded from authorizing any party to exercise more peremptory challenges than specified by statute." *State v. Dickens*, 346 N.C. 26, 41, 484 S.E.2d 553, 561 (1997) (holding that the trial court did not err by refusing to grant the defendant an additional peremptory challenge following the reexamination and excusal for cause of a juror). Because the trial court had no authority to provide defendant with additional peremptory challenges, defendant's argument is without merit and we overrule this assignment of error.

[3] Next, defendant contends the trial court failed to comply with the N.C.G.S. § 15A-1214(a) requirement for random jury selection when it placed a prospective juror in a specific seat after that juror was randomly called to fill another seat. Prospective juror Jonas Simpson, who had been summoned in the initial group of venire members to be examined for fitness to serve, was not present when the clerk called his name. The trial court called another prospective juror in Simpson's place. The trial court then examined this prospective juror and two other prospective jurors. Following a recess, Simpson arrived at the courtroom. The trial court placed him in panel A, seat twelve, the panel and seat for which he was originally called. After the trial court and the prosecutor questioned Simpson, the trial court allowed the prosecutor's request to challenge Simpson for cause, finding that Simpson was unequivocally opposed to the death penalty.

Defendant contends the trial court violated the § 15A-1214(a) requirement for random jury selection when it placed Simpson in a specific seat. However, defendant has waived review of this issue for two reasons. First, defendant failed to object to Simpson's placement in a non-random seat on constitutional grounds. "Constitutional questions that are not raised and passed upon in the trial court will not

ordinarily be considered on appeal." *State v. Cummings*, 353 N.C. 281, 292, 543 S.E.2d 849, 856, *cert. denied*, 534 U.S. 965, 151 L. Ed. 2d 286 (2001). Therefore, defendant has waived review of any constitutional issues. Second, defendant failed to preserve his alleged statutory violation for review because he failed to follow the N.C.G.S. § 15A-1211(c) procedure for challenging the randomness of jury selection. Subsection 15A-1211(c) states that all such challenges "[m]ust be in writing," "[m]ust specify the facts constituting the ground of challenge," and "[m]ust be made and decided before any juror is examined." N.C.G.S. § 15A-1211(c)(2)-(4) (2003). These challenges must be made at the trial court level. *Id.* § 15A-1211(b) (2003). Defendant did not object to the trial court's placement of Simpson in a specific seat. Therefore, defendant has failed to preserve this issue for review, and we overrule his assignment of error.

GUILT-INNOCENCE PHASE

[4] Defendant contends the trial court violated his constitutional right to present evidence by excluding the bases for his expert witness's opinion that he lacked the specific intent and the requisite mental state to commit murder. Dr. Holly Rogers, M.D., a staff psychiatrist at Duke University, testified that she diagnosed defendant as having cocaine dependence. She further testified that defendant's dependency on cocaine impaired his ability to reason, plan, and think.

The trial court ruled that Dr. Rogers could not testify that she based her opinion partly on statements defendant made to her and statements defendant made to his family members about his drug use on the day of the murder. The trial court based its decision to exclude this testimony on Rule of Evidence 403, which allows a court to exclude relevant evidence "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." N.C.G.S. § 8C-1, Rule 403 (2003). The trial court found defendant's hearsay statements to Dr. Rogers and his family self-serving. Because the statements were the only evidence that defendant used cocaine the day of the murder, the trial court further found the jury would have difficulty following a limiting instruction and understanding that the statements were not offered for the truth of the matter. The court excluded the statements, finding that, pursuant to Rule 403, the danger of unfair prejudice, confusion of the issues, or misleading the jury outweighed the statements' probative value.

Defendant argues that this Court has consistently held that experts must be allowed to testify about the basis of their opinions. *See*, *e.g.*, *State v. Wade*, 296 N.C. 454, 458, 251 S.E.2d 407, 409 (1979) (holding that the trial court erred by failing to admit the basis for an expert's opinion). However, as we have repeatedly stated, the bases for an expert's opinion are not automatically admissible. *See*, *e.g.*, *State v. Workman*, 344 N.C. 482, 495, 476 S.E.2d 301, 308 (1996) (stating that the bases for an expert's opinion are not automatically admissible); and *State v. Baldwin*, 330 N.C. 446, 456-57, 412 S.E.2d 31, 37-38 (1992) (affirming the trial court's exclusion of defendant's self-serving hearsay statements to his psychologist, even though those statements were the basis for the psychologist's expert opinion). As in *Baldwin*, the trial court in this case found defendant's statements relevant to show the basis for an expert opinion, but that those statements were likely to confuse the jury. We conclude that the trial court properly applied Rule 403 to find that although relevant, the danger of the statements prejudicing, confusing, or misleading the jury outweighed the statements' probative value. Therefore, the trial court did not abuse its discretion by excluding the statements and we overrule defendant's assignment of error.

[5] Defendant next argues that the trial court erred in failing to intervene during the prosecutor's guilt-innocence phase closing argument when the prosecutor interjected opinions concerning information outside the record.

As a preliminary matter, we note that closing argument should not include the personal knowledge or beliefs of the arguing attorney, especially when the knowledge or beliefs involve matters not based on the evidence. *See State v. Flowers*, 347 N.C. 1, 36-37, 489 S.E.2d 391, 412 (1997), *cert. denied*, 522 U.S. 1135, 140 L. Ed. 2d 150 (1998); and *State v. Solomon*, 340 N.C. 212, 218, 456 S.E.2d 778, 783, *cert. denied*, 516 U.S. 996, 133 L. Ed. 2d 438 (1995). However, a prosecutor in a capital case has a duty to argue all the facts in evidence as well as all reasonable inferences stemming from these facts. *State v. McCollum*, 334 N.C. 208, 223 and 227, 433 S.E.2d 144, 152 and 154 (1993), *cert. denied*, 512 U.S. 1254, 129 L. Ed. 2d 895 (1994). While effectuating this duty, prosecutors should be granted wide latitude in their closing arguments. *Solomon*, 340 N.C. at 218, 456 S.E.2d at 783.

Defendant contends the prosecutor improperly insinuated that defendant obtained a different psychologist because his first court-appointed psychologist, Dr. Matthews, did not "say the right things."

In fact, defendant only obtained a different psychologist after Dr. Matthews' license was suspended.

During the prosecutor's guilt-innocence phase closing argument, he stated:

> There's not one shred of evidence—oh yes you have a Dr.—Dr. Rogers who came in at $200 an hour that says that he's got a cocaine dependency based on some information that she received from—from talking to the defendant, talking to some family members, and looking over some records. . . .

The prosecutor also told the jury that Dr. Rogers, defendant's expert, had first seen defendant nearly a year after the crime. Next, the prosecutor asked the jury, "[W]hat happened to Matthew, Dr. Matthew the one—one that saw him in September? Where's he? Didn't he say the right things?" The trial court sustained defendant's objection to the comment, "Didn't he say the right things?"

Hence, the trial court sustained defendant's objection to the problematic remark which suggested that defendant's first expert may not have provided a favorable opinion to the defense. Although defendant failed to request a curative instruction, the trial court had instructed the jury at the beginning of the trial that, "[w]hen [the trial court] sustain[s] an objection to a question, you as a juror must disregard the question and answer, if one has been given, and draw no inference from the question or answer."

Defendant further argues that the prosecutor's entire argument concerning Dr. Matthews was grossly improper. However, defendant's closing argument focused largely on Dr. Rogers' testimony that defendant's cocaine dependence and consumption on the day of the murder impeded defendant's ability to reason, plan, and think. Accordingly, the prosecutor was entitled to some latitude in responding to this argument. In any event, after thoroughly reviewing the prosecutor's argument, we conclude that the prosecutor was properly challenging the credibility of the opinion of defendant's expert. We thus find no error here and we overrule defendant's assignment of error.

CAPITAL SENTENCING PROCEEDING

[6] Defendant argues that the trial court erred in allowing the jury to find as aggravating circumstances that the murder was committed during a kidnapping and that the murder was committed during a rob-

bery. *See* N.C.G.S. § 15A-2000(e)(5) (2003). Defendant argues that these aggravating circumstances were based on the same evidence and were thus duplicative.

The following are the relevant aggravating circumstances submitted to the jury:

(1) Was this murder committed while the defendant was engaged in the commission of robbery?

(2) Was this murder committed while the defendant was engaged in the commission of kidnapping?

See id. ("The capital felony was committed while the defendant was engaged, or was an aider or abettor, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any homicide, robbery, rape or a sex offense, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb.").

Every aggravating circumstance submitted by the trial court in a capital sentencing proceeding must be supported by independent evidence. *State v. Quesinberry*, 319 N.C. 228, 239, 354 S.E.2d 446, 452-53 (1987), *judgment vacated on other grounds*, 494 U.S. 1022, 108 L. Ed. 2d 603 (1990). However, if there is separate substantial evidence to support each submitted aggravating circumstance, it is not error for some evidence supporting the aggravating circumstances to overlap. *State v. White*, 355 N.C. 696, 709, 565 S.E.2d 55, 64 (2002), *cert. denied*, 537 U.S. 1163, 154 L. Ed. 2d 900 (2003); *State v. Conaway*, 339 N.C. 487, 530, 453 S.E.2d 824, 851, *cert. denied*, 516 U.S. 884, 133 L. Ed. 2d 153 (1995). More specific to the present case, when separate and distinct evidence supports two aggravating circumstances within the same statutory subsection, submission of each aggravating circumstance is proper. *State v. Cheek*, 351 N.C. 48, 76, 520 S.E.2d 545, 561 (1999) (finding no error in the trial court's submission of separate aggravating circumstances under N.C.G.S. § 15A-2000 (e)(5) based on defendant's commission of a robbery and a kidnapping during the course of the murder), *cert. denied*, 530 U.S. 1245, 147 L. Ed. 2d 965 (2000); *State v. Bond*, 345 N.C. 1, 34-35, 478 S.E.2d 163, 181 (1996), *cert. denied*, 521 U.S. 1124, 138 L. Ed. 2d 1022 (1997) (same); *see also State v. Trull*, 349 N.C. 428, 454, 509 S.E.2d 178, 195 (1998) (no error to submit both rape and kidnapping as aggravating circumstances under subsection (e)(5)), *cert. denied*, 528 U.S. 835, 145 L. Ed. 2d 80 (1999). In short, aggravating circumstances may be submitted unless the supporting evidence completely over-

laps. *State v. Miller*, 357 N.C. 583, 595, 588 S.E.2d 857, 866 (2003), *cert. denied*, —— U.S. ——, 159 L. Ed. 2d 819 (2004); *State v. Moseley*, 338 N.C. 1, 54, 449 S.E.2d 412, 444 (1994), *cert. denied*, 514 U.S. 1091, 131 L. Ed. 2d 738 (1995). Accordingly, our analysis in the present case must begin with consideration of whether distinct evidence was presented to support a finding that defendant committed a robbery and a kidnapping during the course of the murder.

A robbery occurs when a defendant feloniously takes money or goods of any value from the person of another against that person's will, by violence or by putting that person in fear. *State v. Daniels*, 337 N.C. 243, 267, 446 S.E.2d 298, 313 (1994), *cert. denied*, 513 U.S. 1135, 130 L. Ed. 2d 895 (1995).

A kidnapping occurs when a defendant unlawfully confines, restrains, or removes from one place to another, any other person sixteen years of age or over without the person's consent, "for the purpose of . . . [f]acilitating the commission of any felony." N.C.G.S. § 14-39(a)(2) (2003). However, a defendant is not guilty of kidnapping if the only evidence of restraint is that restraint which is an inherent, inevitable feature of another felony. *State v. Beatty*, 347 N.C. 555, 559, 495 S.E.2d 367, 369 (1998). The defendant is guilty of kidnapping if the defendant takes acts that cause additional restraint of the victim or increase the victim's helplessness and vulnerability. *Id.* at 559, 495 S.E.2d at 370.

In the present case, separate evidence supported the kidnapping and the robbery. Defendant robbed the victim by grabbing the victim around the neck and rendering him unconscious. At this point, defendant was free to steal the items he wanted and leave. However, defendant took the additional steps of binding the victim's wrists and ankles and taping his mouth. This binding and taping was not an inherent, inevitable part of the robbery. Rather, these forms of restraint exposed the victim to a greater danger than that inherent in the robbery and constituted a kidnapping. Accordingly, separate and distinct evidence supported the existence of both aggravating circumstances. *See Cheek*, 351 N.C. at 54-55 and 76, 520 S.E.2d at 549-50 and 561 (finding no error in submission of two (e)(5) aggravating circumstances based on both robbery and kidnapping during murder when co-defendants forced victim out of her car with a gun, struck her in the head, tied her up and placed her in the backseat or trunk, drove the car to Wilmington, and burned the vehicle with the victim in the trunk); *Beatty*, 347 N.C. at 559, 495 S.E.2d at 370 (finding defendant's acts of putting duct tape on the victim's wrists, forcing

him to lie on the floor, and kicking him in the back twice were not inherent, inevitable parts of the robbery and thus constituted evidence supporting defendant's kidnapping conviction); *Bond*, 345 N.C. at 13 and 34-35, 478 S.E.2d at 168 and 181 (finding no error in submission of three (e)(5) aggravating circumstances based on a robbery and two kidnappings where defendants kidnapped two victims and forced them to drive around for hours while defendants forced one victim to assist them in several attempted robberies).

[7] We also note that defendant alludes to the trial court's failure to instruct the jury specifically that it should not use the same evidence to support a finding of both (e)(5) aggravating circumstances submitted. Indeed, a trial court's instructions should ensure that jurors will not use the same evidence to find more than one aggravating circumstance. *State v. Gay*, 334 N.C. 467, 495, 434 S.E.2d 840, 856 (1993). In the present case, the trial court's jury instruction, given pursuant to 1 N.C.P.I.—Crim. 210.25 (2001), provided that: "[K]idnapping is the unlawful restraint of another person without—without their consent for the purpose of facilitating the commission of robbery, *which restraint was a separate complete act independent of and apart from the robbery*." (Emphasis added). We must assume that the jury obeyed this instruction and identified evidence of separate restraint separate from the robbery. *See State v. Jennings*, 333 N.C. 579, 618, 430 S.E.2d 188, 208 (stating that jurors are assumed to follow a trial court's instructions in a criminal case), *cert. denied*, 510 U.S. 1028, 126 L. Ed. 2d 602 (1993). In any event, the trial court's jury instructions did not constitute prejudicial error.

We conclude this assignment of error is without merit.

[8] Next, defendant argues that the trial court erred in excluding the following mitigating evidence: defendant's expression of remorse that was offered via testimony from defendant's mother and a minister; defendant's adjustment to incarceration that was shown by defendant's behavior compared to other inmates and by defendant's willingness to take on responsibilities not given to other inmates; and defendant's practice of religion in a manner that helped other inmates; and defendant's support if given a life sentence via the expectation that various people would make regular visits to see defendant in prison.

While a trial court should allow the jury to consider any mitigating evidence related to a defendant's character and record or the circumstances of the crime, the feelings, actions, and conduct of third

parties have no mitigating value as to defendant and are irrelevant in capital sentencing proceedings. *State v. Locklear*, 349 N.C. 118, 160-61, 505 S.E.2d 277, 302 (1998), *cert. denied*, 526 U.S. 1075, 143 L. Ed. 2d 559 (1999). For example, *Locklear* held that the trial court properly excluded mitigating evidence attacking the character of the victim of one of the defendant's prior assaults because the evidence did not "shed[] light on defendant's age, character, education, environment, habits, mentality, propensities, or criminal record, or on the circumstances of the offense for which defendant was being sentenced". *Id.* at 159, 505 S.E.2d at 301.

[9] We turn first to defendant's proposed evidence revealing his remorse for the killings. In the present case, the trial court submitted a non-statutory mitigating circumstance that "the defendant has expressed remorse for the crime." Defendant argues that the trial court erred in refusing to allow presentation of certain evidence supporting this mitigating circumstance.

Defendant references the following exchange during the testimony of defendant's mother:

> [DEFENSE COUNSEL]: What have you actually observed and heard from him concerning this matter.
>
> [MOTHER]: He's very sorry. I know if it had not been for the crack—
>
> [PROSECUTOR]: Objection, if Your Honor please.
>
> THE COURT: Sustained.
>
> [DEFENSE COUNSEL]: Now don't tell me what you know, okay.
>
> [MOTHER]: Okay.
>
> [PROSECUTOR]: But you say he was—he's very sorry.
>
> [MOTHER]: Yes.

The trial court sustained an objection to defendant's mother's statement as to what she "know[s]." This testimony was clearly an irrelevant statement of a third party's feelings concerning punishment. *See Locklear*, 349 N.C. at 161, 505 S.E.2d at 302. Even assuming *arguendo* that the trial court erred in excluding the statement from defendant's mother, defendant was not prejudiced by this exclusion because defendant's mother immediately testified that defendant was sorry. *See State v. Jones*, 339 N.C. 114, 153-54, 451 S.E.2d 826, 847-48

(1994) (holding the trial court's exclusion of evidence of remorse was not prejudicial because the defendant was allowed to admit other evidence of his remorse), *cert. denied*, 515 U.S. 1169, 132 L. Ed. 2d 873 (1995).

[10] Defendant also argues that the trial court erred in excluding testimony from prison minister Christopher Bryant concerning defendant's remorse. Based on our review of the record, it appears Bryant was going to testify about defendant's consideration of suicide and his feelings about his children and mother. We conclude that such evidence is irrelevant to defendant's character and record or the circumstances of the crime. *See State v. Hardy*, 353 N.C. 122, 132-33, 540 S.E.2d 334, 343 (2000), *cert. denied*, 534 U.S. 840, 151 L. Ed. 2d 56 (2001).

[11] We turn next to defendant's evidence that he was adjusting well to life in prison. At defendant's request, the trial court submitted a nonstatutory mitigating circumstance that defendant had demonstrated good behavior while in jail awaiting trial. Defendant argues that the trial court improperly excluded testimony supporting this mitigating circumstance. Defendant was permitted to present testimony from John Wright, the chief jailer at the Washington County Jail, that defendant was given duties at the jail including buffing and waxing floors, that defendant is a good inmate who has helped the jail staff maintain order in the jail by calming inmates who are "fuss[ing]" or "quarrel[ling]" with each other, and that defendant has never caused problems or received a reprimand while in jail.

A capital defendant is permitted to introduce evidence from a disinterested witness that the defendant has adjusted well to confinement. *Skipper v. South Carolina*, 476 U.S. 1, 8, 90 L. Ed. 2d 1, 9 (1986). The Court in *Skipper* found such testimony to be especially warranted because the prosecutor in that case argued that the defendant could not be trusted to act appropriately if he were returned to prison. *Id.* at 8, 90 L. Ed. 2d at 9.

Similarly, in the present case, the prosecutor argued that the only way to insure that defendant would not kill again was for the jury to sentence defendant to death. However, the trial court appropriately allowed defendant to present mitigation evidence from John Wright that defendant had made a good adjustment to jail. This permitted the jury to infer that defendant would not kill again if given a life sentence. The trial court excluded only defendant's proposed evidence relating to how defendant's conduct and duties in jail related to other

inmates' conduct and duties. This evidence did not bear on whether defendant would kill again if given a life sentence. Moreover, the excluded evidence was irrelevant to defendant's character and record or the circumstances of defendant's crime. *See Locklear*, 349 N.C. at 160-61, 505 S.E.2d at 302.

[12] Defendant also refers in his brief to excluded evidence showing he had family members who would support him if he received a life sentence. Again, this evidence is not related to defendant's character and record or the circumstances of defendant's crime and is thus irrelevant for sentencing purposes.

[13] The Court next turns to defendant's proposed evidence concerning his religious beliefs. At defendant's request, the trial court submitted the following nonstatutory mitigating circumstance to the jury: "The defendant has exhibited religious beliefs and practices since incarcerated in the Washington County Jail while awaiting trial and sentencing on this matter." Defendant's brief appears to identify Christopher Bryant's proposed testimony concerning defendant's practice of ministering to other inmates as the critical excluded evidence on this issue. Our review of the record reveals that defendant was allowed to present Bryant's testimony that Bryant met defendant while ministering to inmates, that defendant willingly attended Friday night services at the jail for about one year, and that defendant approached Bryant during this time. The trial court excluded Bryant's testimony that defendant's involvement in the services was "dedicated because he didn't have to, but he did help other inmates." This testimony improperly focused on the opinion of a third party rather than defendant's character and record or the circumstances surrounding defendant's crime. *See id.* The trial court properly excluded this testimony.

This assignment of error is without merit.

[14] Defendant next argues that the trial court erred in failing to intervene during the prosecutor's sentencing phase closing argument when the prosecutor interjected opinions concerning information outside the record and made unfair emotional appeals to jurors.

Defendant assigns error to the following portion of the prosecutor's sentencing phase closing argument:

> I would say to you, if you choose not to exercise the option of the death penalty, can you guarantee that Reche Smith would not get a piece of tape, a cord sometime and kill again, can you? He's

> killed now. The only way to insure that he won't kill again is the death penalty.
>
> Justice—justice is making sure that Reche Smith is not ever going to do this again. You—you ladies and gentlemen, you are the only thing standing between the defendant. The only way that you can be sure that this man will never kill again, walk out again is to give him the death penalty.

Defendant suggests that this argument was improper because defendant could not "walk out again" if given a life sentence because defendant would never be eligible for parole.

We first note that defendant failed to object to this argument. " '[T]he impropriety of the argument must be gross indeed in order for this Court to hold that a trial judge abused his discretion in not recognizing and correcting *ex mero motu* an argument which defense counsel apparently did not believe was prejudicial when he heard it.' " *State v. Kemmerlin*, 356 N.C. 446, 470, 573 S.E.2d 870, 887 (2002) (quoting *State v. Johnson*, 298 N.C. 355, 369, 259 S.E.2d 752, 761 (1979)). In such a circumstance, the prosecutor's closing argument "is subject to appellate review for the existence of gross improprieties which make it plain that the trial court abused its discretion in failing to correct the prejudicial matters *ex mero motu*." *State v. Harris*, 319 N.C. 383, 387, 354 S.E.2d 222, 224 (1987).

While it would be improper for a prosecutor to argue that a defendant's parole eligibility should affect the jury's sentencing considerations, *see, e.g.*, *State v. Price*, 337 N.C. 756, 759-60, 448 S.E.2d 827, 829 (1994), *cert. denied*, 514 U.S. 1021, 131 L. Ed. 2d 224 (1995), a prosecutor may urge the jury to reach a death sentence based on a fear of the defendant's future dangerousness. *State v. Cummings*, 352 N.C. 600, 627, 536 S.E.2d 36, 55 (2000), *cert. denied*, 532 U.S. 997, 149 L. Ed. 2d 641 (2001). In the present case, the prosecutor momentarily mentioned that defendant might "walk out again," but the prosecutor never specifically mentioned defendant's being paroled or leaving prison. Further, defendant's closing argument in sentencing began with defendant's attorney informing the jury that its guilty verdict "assured that [defendant] will die in prison" and that the remaining question for sentencing was "will [defendant] die in prison when his [M]aker calls him or will [defendant] die in prison strapped to a gurney with a needle in his arm—." Accordingly, when both parties' closing arguments are read in their entirety, we cannot conclude that the jury believed that defendant might one day leave prison.

Moreover, our review of the record indicates that on at least four occasions, the trial court instructed the jury that if they did not recommend sentencing defendant to death, they must recommend sentencing him to "life imprisonment without parole." Additionally, the trial court instructed the jury that "[i]f [they] unanimously recommend a sentence of life imprisonment without parole, [the trial court] will impose a sentence of life imprisonment without parole." The trial court alluded to only two possible sentences, death or life imprisonment without parole. Therefore, if the jury followed these instructions, they knew of only these two possible sentences. We must presume that the jury followed these instructions. Accordingly, we cannot conclude that the prosecutor's statement constituted prejudicial error sufficient to require a new sentencing hearing.

This assignment of error is overruled.

[15] Next, defendant argues that the trial court erred in submitting the aggravating circumstance that the murder was especially heinous, atrocious, or cruel. *See* N.C.G.S. § 15A-2000(e)(9) (2003). Defendant contends that this aggravating circumstance was not supported by the evidence and is unconstitutionally vague.

Turning first to the evidence supporting the (e)(9) aggravating circumstance, we note that "[t]he trial court, in determining the sufficiency of the evidence to support the existence of an aggravating circumstance, must consider the evidence in the light most favorable to the State." *State v. Frogge*, 351 N.C. 576, 586, 528 S.E.2d 893, 900, *cert. denied*, 531 U.S. 994, 148 L. Ed. 2d 459 (2000). " 'The State is entitled to every reasonable inference to be drawn from the evidence, contradictions and discrepancies are for the jury to resolve, and all evidence admitted that is favorable to the State is to be considered.' " *Id.* (quoting *State v. Leary*, 344 N.C. 109, 119, 472 S.E.2d 753, 759 (1996)). "The (e)(9) aggravating circumstance can be submitted when the killing is agonizing or dehumanizing to the victim; when the killing is conscienceless, pitiless, or unnecessarily torturous to the victim; or when the murder shows the defendant's mind was unusually depraved, beyond the depravity normally present in first-degree murder." *State v. Prevatte*, 356 N.C. 178, 261, 570 S.E.2d 440, 486 (2002), *cert. denied*, 538 U.S. 986, 155 L. Ed. 2d 681 (2003).

The evidence in this case supports each of the situations described in *Prevatte*:

Expert testimony showed the victim was still alive when defendant bound his hands and feet. Defendant then covered King's head,

including King's nose and mouth, with tape and ultimately caused King to suffocate to death. The State's expert, Dr. Spence, estimated that once defendant placed tape on King's nose and mouth, King became brain dead in two to three minutes and his heart stopped beating after ten to twenty minutes. Dr. Spence further testified it was "certainly possible [the victim] could have been aware of his condition, but because of the—because of the injury to his neck, because of the taping around his face could not have the oxygen supply, the ability to—to actually move or to defend himself." This evidence shows the killing was agonizing or dehumanizing to the victim.

Additionally, evidence showed the victim was a seventy-three-year-old man who was attacked in his own home at the mercy of a younger, stronger attacker. *See State v. Quick*, 329 N.C. 1, 31-32, 405 S.E.2d 179, 197-98 (1991) (finding submission of especially heinous, atrocious, or cruel aggravating circumstance was proper when elderly victim was attacked in his own home). Defendant choked King until King became unconscious, then bound him, covered his face in tape, and left him to die under a hospital bed. This evidence shows the killing was conscienceless, pitiless, or unnecessarily torturous to the victim.

Finally, the evidence shows defendant's mind was unusually depraved, beyond the depravity normally present in first-degree murder. Defendant gained entry to the victim's house by preying upon King's Good Samaritan instincts. Defendant knocked on King's door and asked him for a glass of water. After King invited defendant into his home and went to get the water, defendant grabbed King and choked him around his neck until King became unconscious. After binding King and taping his face, defendant remained in the victim's home for thirty minutes, searching for items to steal while King suffocated and ultimately died under his bed with his arms and legs bound and his face covered in tape.

The above evidence shows that the facts of this case unquestionably supported submission of the (e)(9) especially heinous, atrocious, or cruel aggravating circumstance.

As to defendant's allegation that N.C.G.S. § 15A-2000 (e)(9) is unconstitutionally vague, this Court has previously held that the especially heinous, atrocious, or cruel aggravating circumstance in subsection (e)(9) is not unconstitutionally vague. *See State v. Syriani*, 333 N.C. 350, 388-92, 428 S.E.2d 118, 139-41, *cert. denied*, 510 U.S. 948, 126 L. Ed. 2d 341 (1993). Having reevaluated this prior holding, we

find no reason to depart from precedent, and we recognize again the constitutionality of the (e)(9) aggravating circumstance.

This assignment of error is overruled.

PRESERVATION ISSUES

Defendant raises nine additional issues which this Court has previously decided contrary to his position: (1) the trial court violated defendant's statutory and constitutional rights and committed plain error by telling the sentencing jury that it must be unanimous to answer "no" at Issues One, Three, and Four on the Issues and Recommendation sheet; (2) the trial court erred in instructing the jury that it had a duty to return a death sentence if it made certain findings; (3) the trial court's instructions defining the burden of proof applicable to mitigating circumstances violated defendant's constitutional rights because the court used the inherently ambiguous and vague terms "satisfaction" and "satisfy," thus permitting jurors to establish for themselves the legal standard to be applied to the evidence; (4) the trial court committed reversible error by instructing jurors to decide whether nonstatutory mitigating circumstances have mitigating value; (5) the trial court committed reversible error by instructing the jury on a definition of aggravation which was unconstitutionally broad; (6) the trial court committed reversible error by its use of the term "may" in sentencing issues Three and Four, thereby making consideration of proven mitigation discretionary with the sentencing jurors; (7) the trial court committed reversible error in its penalty phase instructions, which allowed each juror in deciding Issues Three and Four to consider only the mitigation found by that juror at Issue Two, thereby limiting the full and free consideration of mitigation required by the state and federal Constitutions; (8) the North Carolina death penalty statute is unconstitutional; and (9) the trial court erred by failing to dismiss the murder indictment where it unconstitutionally failed to allege all the elements of first-degree murder. Defendant makes these arguments to allow this Court to reexamine its prior holdings and to preserve these issues for any possible further judicial review. We have carefully considered defendant's arguments on these issues and find no compelling reason to depart from our prior holdings. Therefore, we overrule defendant's assignments of error.

PROPORTIONALITY REVIEW

[16] Having found no error in either the guilt-innocence phase or the sentencing proceeding of defendant's trial, we must determine: (1)

whether the evidence supports the aggravating circumstances found by the jury; (2) whether the jury's imposition of the death penalty was influenced by "passion, prejudice, or any other arbitrary factor"; and (3) whether the death sentence is "excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." N.C.G.S. § 15A-2000(d)(2) (2003).

In the present case, defendant was convicted of first-degree murder on the basis of malice, premeditation, and deliberation and under the first-degree felony murder rule. Following a capital sentencing proceeding, the jury found the following aggravating circumstances:

(1) This murder was committed while the defendant was engaged in the commission of robbery, *id.* § 15A-2000(e)(5);

(2) This murder was committed while the defendant was engaged in the commission of kidnapping, *id.*;

(3) This murder was especially heinous, atrocious, or cruel, N.C.G.S. § 15A-2000(e)(9).

The jury also found the existence of the following statutory mitigating circumstance submitted for consideration:

(1) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired, *id.* § 15A-2000(f)(6) (2003).

Additionally, of the thirteen nonstatutory mitigating circumstances submitted for consideration, the jury found the following four to exist:

(1) The defendant's mother, when he was a child, was not a positive influence in his life.

(2) The defendant, as a child, was raised in a dysfunctional and unstable environment.

(3) The defendant has a history of drug use and abuse.

(4) The defendant confessed at an early state of the investigation to John Floyd and Dwight Rawlings.

After reviewing the records, transcripts, briefs, and oral arguments, we conclude that the evidence supports these aggravating circumstances. Additionally, we conclude, based on a thorough review of the record, that the sentence of death was not imposed under the influence of passion, prejudice, or any other arbitrary

factor. Thus, the final statutory duty of this Court is to conduct a proportionality review.

The purpose of proportionality review is to "eliminate the possibility that a person will be sentenced to die by the action of an aberrant jury." *State v. Holden*, 321 N.C. 125, 164-65, 362 S.E.2d 513, 537 (1987), *cert. denied*, 486 U.S. 1061, 100 L. Ed. 2d 935 (1988). Proportionality review also acts "[a]s a check against the capricious or random imposition of the death penalty." *State v. Barfield*, 298 N.C. 306, 354, 259 S.E.2d 510, 544 (1979), *cert. denied*, 448 U.S. 907, 65 L. Ed. 2d 1137 (1980), (*overruled in part on other grounds by State v. Johnson*, 317 N.C. 193, 203-04, 344 S.E.2d 775, 782 (1986)). In conducting proportionality review, we compare the present case with other cases in which this Court concluded that the death penalty was disproportionate. *McCollum*, 334 N.C. at 240, 433 S.E.2d at 162.

We have found the death sentence disproportionate in eight cases. *Kemmerlin*, 356 N.C. at 489, 573 S.E.2d at 898-99; *State v. Benson*, 323 N.C. 318, 328, 372 S.E.2d 517, 523 (1988); *State v. Stokes*, 319 N.C. 1, 27, 352 S.E.2d 653, 668 (1987); *State v. Rogers*, 316 N.C. 203, 237, 341 S.E.2d 713, 733 (1986) (*overruled in part on other grounds by State v. Gaines*, 345 N.C. 647, 676-77, 483 S.E.2d 396, 414, *cert. denied*, 522 U.S. 900, 139 L. Ed. 2d 177 (1997), and *by State v. Vandiver*, 321 N.C. 570, 573-74, 364 S.E.2d 373, 375-76 (1988)); *State v. Young*, 312 N.C. 669, 691, 325 S.E.2d 181, 194 (1985); *State v. Hill*, 311 N.C. 465, 479, 319 S.E.2d 163, 172 (1984); *State v. Bondurant*, 309 N.C. 674, 694, 309 S.E.2d 170, 183 (1983); and *State v. Jackson*, 309 N.C. 26, 46, 305 S.E.2d 703, 717 (1983).

We conclude that this case is not substantially similar to any case in which this Court has found the death penalty disproportionate. Defendant was convicted on the basis of malice, premeditation, and deliberation and under the first-degree felony murder rule. "The finding of premeditation and deliberation indicates a more cold-blooded and calculated crime." *State v. Artis*, 325 N.C. 278, 341, 384 S.E.2d 470, 506 (1989), *judgment vacated on other grounds*, 494 U.S. 1023, 108 L. Ed. 2d 604 (1990). Further, this Court has repeatedly noted that "a finding of first-degree murder based on theories of premeditation and deliberation and of felony murder is significant." *State v. Bone*, 354 N.C. 1, 22, 550 S.E.2d 482, 495 (2001), *cert. denied*, 535 U.S. 940, 152 L. Ed. 2d 231 (2002).

Defendant attacked the seventy-three-year-old victim in the victim's own home. *See State v. Adams*, 347 N.C. 48, 77, 490 S.E.2d 220,

236 (1997) (noting that "[a] murder in the home 'shocks the conscience, not only because a life was senselessly taken, but because it was taken [at] an especially private place, one [where] a person has a right to feel secure' ") (alterations in original) (quoting *State v. Brown*, 320 N.C. 179, 231, 358 S.E.2d 1, 34, *cert. denied*, 484 U.S. 970, 98 L. Ed. 2d 406 (1987)), *cert. denied*, 522 U.S. 1096, 139 L. Ed. 2d 878 (1998). Defendant grabbed the victim around the neck and strangled him by pressing on the victim's neck with defendant's forearm. While the victim was still alive, defendant bound the victim's hands and legs and wrapped tape around the victim's face. There was testimony at trial that the victim did not die immediately but instead was forced to struggle helplessly to free himself even as he slowly died from asphyxiation. The facts of the present case clearly distinguish this case from those in which this Court has held a death sentence disproportionate.

We also compare this case with the cases in which this Court has found the death penalty to be proportionate. *McCollum*, 334 N.C. at 244, 433 S.E.2d at 164. Although we review all cases in the pool of "similar cases" when engaging in our statutorily mandated duty of proportionality review, "we will not undertake to discuss or cite all of those cases each time we carry out that duty." *Id.*; *accord State v. Gregory*, 348 N.C. 203, 213, 499 S.E.2d 753, 760, *cert. denied*, 525 U.S. 952, 142 L. Ed. 2d 315 (1998). After thoroughly analyzing the present case, we conclude that this case is more similar to cases in which we have found the sentence of death proportionate than to those in which we have found it disproportionate.

Whether a sentence of death is "disproportionate in a particular case ultimately rest[s] upon the 'experienced judgments' of the members of this Court." *State v. Green*, 336 N.C. 142, 198, 443 S.E.2d 14, 47, *cert. denied*, 513 U.S. 1046, 130 L. Ed. 2d 547 (1994). Therefore, based upon the crime defendant committed and the record of this case, we are convinced the sentence of death recommended by the jury and ordered by the trial court in the instant case is not disproportionate or excessive.

Accordingly, we conclude defendant received a fair trial and capital sentencing proceeding, free from prejudicial error. The judgment and sentence entered by the trial court must therefore be left undisturbed.

NO ERROR.

Justice NEWBY did not participate in the consideration or decision of this case.

Justice BRADY concurring.

A prosecutor's representations to a court or trier of fact should be accurate, trustworthy, and based upon a good faith understanding of the law and facts of a particular case. I write separately to emphasize the special responsibility of North Carolina prosecutors to promote justice and fair play in the criminal courts. I believe that portions of the prosecutor's closing argument in this case misrepresented the law and practice in North Carolina and were misleading to the jury. Notwithstanding this specific concern, I agree with the majority that defendant's trial and capital sentencing proceeding were free from prejudicial error.

Responsibility is an essential and unavoidable counterpart to authority. It is axiomatic that "[f]rom everyone to whom much has been given, much will be required; and from the one to whom much has been entrusted, even more will be demanded." *Luke* 12:48 (New Revised Standard Version). As I have noted in the past, North Carolina's district attorneys are vested with broad authority and discretion to try criminal actions in superior and district court. *See* N.C. Const. art. IV, § 18. "The district attorney decides who shall be initially charged, drafts criminal indictments for submission to the grand jury, prepares informations, decides which cases are ripe for dismissal, negotiates pleas (and does so in a majority of cases), and most recently, was given the statutory authority to decide which first-degree homicide cases warrant capital prosecution, N.C.G.S. § 15A-2004 (2002)." *State v. Spivey*, 357 N.C. 114, 129-30, 579 S.E.2d 251, 261 (2003) (Brady, J., dissenting). District attorneys, therefore, are entrusted by the State with unique authority in the criminal courts and possess a coordinate responsibility to exercise that authority with care.

District attorneys who neglect these responsibilities "risk inviting the legislature to scrutinize . . . and perhaps diminish" their authority. *State v. Mitchell*, 298 N.C. 549, 554, 259 S.E.2d 254, 257 (1979) (Carlton, J., concurring). Consider the recent legislative reformation which diminished North Carolina district attorneys' calendaring power. Until 1 January 2000, district attorneys enjoyed complete functional control over criminal court dockets. The district attorney decided which cases to set for trial and announced on the morning of court the order in which cases remaining on the calendar would be

heard. N.C.G.S. § 7A-49.3 (a), (a1) (1995). North Carolina was singular among the fifty states in granting this degree of control over criminal dockets to district attorneys. John Rubin, *1999 Legislation Affecting Criminal Law and Procedure*, *in* Administration of Just. Bull. (Inst. of Gov't, Chapel Hill, N.C., No. 99/05), Oct. 1999 at 9; *Affiliate News*, *in* 23 Champion No. 10 (Nat'l Ass'n of Crim. Def. Lawyers, Washington, D.C.), Dec. 1999, at 17, 70.

However, in recent decades, judges and members of the bar began expressing concern over perceived questionable calendaring practices of some district attorneys. *See generally*, *Simeon v. Hardin*, 339 N.C. 358, 451 S.E.2d 858 (1994); *Shirley v. North Carolina*, 528 F.2d 819 (4th Cir. 1975); N.C. Bar Ass'n Found. Admin. of Justice Study Comm., *Case Docketing and Calendaring and Rotation of North Carolina Superior Court Judges*, Final Report 54-65 (Final Report, Aug. 1978). In 1999, the General Assembly responded, repealing N.C.G.S. § 7A-49.3 and enacting N.C.G.S. § 7A-49.4 in its place. Act of July 15, 1999, ch. 428 secs. 1,2 1999 N.C. Sess. Laws 1722, 1722-1724. Section 7A-49.4 limits the authority of district attorneys and sets firm rules for the calendaring of criminal cases.

Presently, an administrative setting must be calendared in every felony case "within 60 days of [a defendant's] indictment or service of notice of indictment." N.C.G.S. § 7A-49.4(b) (2005). At that setting the trial judge must set administrative deadlines for discovery, arraignment, and motions. *Id.* If the parties do not agree on a trial date before the final administrative setting, the district attorney must propose a date at that time. *Id.* Additionally, the district attorney must publish the trial calendar at least ten working days before cases on the calendar are set for trial, and the calendar must list cases in the anticipated order that they will be tried. N.C.G.S. § 7A-49.4 (e) (2005). Section 7A-49.4(e) also cautions that the calendar "should not contain cases that the district attorney does not reasonably expect to be called for trial." *Id.* This response by the General Assembly is a signal to district attorneys in North Carolina that conduct which invites criticism of the criminal justice system or of the legal profession should be "zealously guard[ed] against." *Mitchell*, 298 N.C. at 554, 259 S.E.2d at 257 (Carlton, J., concurring).

Here, during defendant's 1999 capital sentencing proceeding, the prosecutor told the jury that "[t]he only way that you can be sure that [defendant] will never kill again, *walk out again* is to give him the death penalty." (Emphasis added.) This statement was

inaccurate, misleading, and unfounded in law. Criminal defendants who are convicted of first-degree murder do not "walk out" of the North Carolina Department of Correction, absent an unlikely pardon by the Governor.

In North Carolina, a defendant who is sentenced to life imprisonment remains confined to prison until the expiration of his natural life with no opportunity for parole. N.C.G.S. § 15A-2002 (2003). In fact, in 1998, the General Assembly repealed N.C.G.S. § 15A-1380.5, which had provided biennial review of a defendant's life sentence by a superior court judge after the defendant had served twenty-five years of imprisonment. Current Operations Appropriations and Capital Improvement Appropriations Act of 1998, ch. 212, sec. 19.4(q), 1998 N.C. Sess. Laws 937, 1232 (repealing Article 85B of Chapter 15A of the North Carolina General Statutes). Because North Carolina's General Statutes now require permanent imprisonment of criminal defendants who have been sentenced to life imprisonment without parole, the prosecutor's argument that jurors should recommend a death sentence to insure defendant never "walk[s] out" and harms another person was improper.

Moreover, I am unpersuaded by the State's recent assertion that the prosecutor's statement addressed defendant's ability to "walk out" of a prison cell and hurt another inmate. Immediately after asking jurors to "insure" that defendant would not "walk out again" by recommending a death sentence, the prosecutor stressed that jurors now had an opportunity to " 'do something about violence' " and asked jurors, " 'Why don't they do something about victim's rights?' " The prosecutor then told jurors that they were "the moral conscience of this community." After reviewing the transcript, I believe the prosecutor meant, and jurors understood, that defendant might "walk out" of prison into the community at large.

While I agree with the majority that defendant was not prejudiced by the prosecutor's improper argument, I encourage North Carolina prosecutors to heed the paramount responsibilities which accompany their authority. "A prosecutor has the responsibility of a minister of justice and not simply that of an advocate; the prosecutor's duty is to seek justice, not merely to convict." Rev. R. Prof. Conduct N.C. St. B. 3.8 (Special Responsibilities of a Prosecutor) cmt. [1], 2005 Ann. R. N.C. 755-56. To that end, prosecutors must carefully guard the truth and accuracy of their statements within the criminal courts—especially statements to a jury. In this way, prosecutors may remain faithful stewards of their authority and "the most responsible officer[s] of

the court . . . 'its right arm.' " *State v. McAfee*, 189 N.C. 320, 321, 127 S.E. 204, 205 (1925).

STATE OF NORTH CAROLINA v. DANNY DEAN FROGGE

No. 413A95-3

(Filed 4 February 2005)

Constitutional Law— effective assistance of counsel—strategic decision after sufficient investigation

The trial court erred in a first-degree murder case by determining that defendant did not receive effective assistance of counsel at his second capital sentencing proceeding based on the fact that defense counsel decided not to pursue evidence of defendant's organic brain damage through neurological testing but instead pursued a defense predicated on other grounds, and defendant's death sentence is reinstated, because: (1) defense counsel cannot be said to have acquired only rudimentary knowledge of defendant's history from a narrow set of sources when defense counsel interviewed defendant and his siblings and obtained defendant's school records, hospital records, correctional systems records, and psychological reports; (2) defense counsel had the benefit of watching the first trial unfold and seeing what worked and what did not, specifically noting that a defense which took defendant's head injury into account had been unsuccessful; and (3) defense counsel fully investigated defendant's social and medical history and provided that information to two experts, neither expert indicated to counsel a necessity for neurological testing, and counsel reasonably relied on their experts as they made the difficult but necessary choices as to which theory of defense to pursue.

Justice NEWBY did not participate in the consideration or decision of this case.

On writ of certiorari pursuant to N.C.G.S. § 7A-32(b) to review an order entered 29 October 2003 by Judge Lindsay R. Davis, Jr. in Superior Court, Forsyth County, granting defendant's motion for appropriate relief with regard to one claim of ineffective assistance of counsel. Heard in the Supreme Court 13 September 2004.

Roy Cooper, Attorney General, by Valárie B. Spalding, Special Deputy Attorney General, for the State-appellant.

Garland B. Baker and Don Willey for defendant-appellee.

William L. Osteen, Jr. for the North Carolina Academy of Trial Lawyers, amicus curiae.

Charles G. Monnett III and Associates, by Charles G. Monnett III, and Jeffrey B. Welty for the Brain Injury Association of North Carolina, amicus curiae.

EDMUNDS, Justice.

In this case, we review the trial court's determination that defendant did not receive effective assistance of counsel at his second capital sentencing proceeding. Because we find that defendant's trial counsel provided adequate assistance under the applicable standards established by the United States Supreme Court, we reverse the trial court and order the reinstatement of defendant's death sentence.

Defendant Danny Dean Frogge was tried twice for the murders of his father and stepmother. At the first trial, evidence was presented indicating that defendant was living with his father and his bedridden stepmother. On the night of 4 November 1994, defendant stabbed his father approximately ten times, then moved to his stepmother's bed and stabbed her approximately eleven times. Defendant was convicted of two counts of first-degree murder on the basis of malice, premeditation, and deliberation and under the felony murder rule. Details of the offenses are set out in *State v. Frogge*, 345 N.C. 614, 481 S.E.2d 278 (1997) (*Frogge I*).

At the sentencing proceeding in *Frogge I*, defendant testified that he had been drinking heavily the night of the killings. He claimed that he knifed his father only after his father hit him with an iron bar. He further testified that he must have stabbed his stepmother but had no recollection of doing so. The sentencing jury found two statutory mitigating circumstances: that defendant was under the influence of a mental or emotional disturbance at the time of the offense, N.C.G.S. § 15A-2000(f)(2) (2003); and that defendant suffered from an impaired capacity to conform his conduct to the requirements of the law, N.C.G.S. § 15A-2000(f)(6). The jury recommended a sentence of life imprisonment for the murder of defendant's father and a sentence of death for the murder of defendant's stepmother.

This Court reversed defendant's conviction because inadmissible hearsay had been introduced at the trial. *Frogge I*, 345 N.C. 614, 481 S.E.2d 278. Prior to the retrial, defendant additionally was indicted for robbery with a dangerous weapon based on allegations that he had stolen his father's wallet the night of the murders. Upon retrial, defendant again was convicted of two counts of first-degree murder. He was also convicted of robbery with a dangerous weapon. Because defendant had been sentenced to life imprisonment at the first trial for the murder of his father, the State sought the death penalty only for the murder of defendant's stepmother. The jury at the retrial found four aggravating circumstances, no statutory mitigating circumstances, and six out of ten submitted nonstatutory mitigating circumstances. The jury recommended a sentence of death for the murder of defendant's stepmother, and the trial court entered judgment accordingly. Defendant appealed, and this Court found no error. *State v. Frogge*, 351 N.C. 576, 528 S.E.2d 893 (2000) (*Frogge II*). The United States Supreme Court denied defendant's petition for writ of certiorari. *Frogge v. North Carolina*, 531 U.S. 994, 148 L. Ed. 2d 459 (2000).

Defendant thereafter filed a motion for appropriate relief (MAR). The trial court denied several of defendant's claims and, on 2 August 2002, conducted an evidentiary hearing on the remainder. On 29 October 2003, the trial court entered an order denying defendant's remaining claims, except one. As to that claim, the trial court determined that defendant had not received effective assistance of counsel pursuant to *Strickland v. Washington*, 466 U.S. 668, 80 L. Ed. 2d 674 (1984), and ordered a new sentencing hearing. On 1 April 2004, this Court allowed the State's petition for writ of certiorari to review the order of the trial court.

The record reveals that defendant was represented by lead counsel Danny Ferguson and associate counsel David Freedman at both *Frogge I* and *Frogge II*. Before the trial of *Frogge I*, they engaged investigator Homer Young. In preparing for that trial, investigator Young interviewed defendant's family members and submitted reports of those interviews to defense counsel. These reports included information that in April 1990 defendant had been beaten and suffered a significant head injury. At defendant's first sentencing proceeding, his sisters testified to changes they observed in defendant's personality after the beating.

Defense counsel retained Dr. Gary Hoover, a clinical psychologist, as an expert witness for *Frogge I*. During the sentencing pro-

ceeding, Dr. Hoover testified that he received training through the Reitan Neuropsychological Laboratory pertaining to neuropsychological assessment and thus possessed the "background and training that has to do with the diagnosis of brain behavior relationships vis-a-vis head injuries." However, Dr. Hoover also acknowledged that he was neither a neurologist nor a medical doctor and was not qualified to conduct a neurological assessment. Although Dr. Hoover had conducted neuropsychological evaluations on patients referred to him by psychologists and neurologists for assessment of head injuries, he did not conduct neurological or neuropsychological testing on defendant. Instead, Dr. Hoover carried out a forensic psychological evaluation in which he reviewed defendant's psychological records that resulted from his incarceration for murder in the 1980s; interviewed defendant in person three times over a period of several months; reviewed defendant's school records, hospital records, and correctional system records; reviewed the investigative reports of the instant murders prepared by police and by investigator Young; and interviewed defendant's family members, friends, and acquaintances.

Dr. Hoover's forensic evaluation also included consideration of Bowman Gray/Baptist Hospital Medical Center's records of defendant's 1990 treatment for his head injury. These records stated that defendant suffered from postconcussive disorder. Relying in part on the known correlation between residual behavior difficulties and head injuries, Dr. Hoover testified that while defendant presented no current evidence of a head injury, the 1990 trauma left defendant with residual mood difficulties. The injury also affected defendant's cognitive functions and intellectual skills to the extent that, over time, he suffered episodic seizures, slurred speech, disorientation, increased irritability, episodes of paranoia, and an increasingly withdrawn personality. In Dr. Hoover's expert opinion, defendant suffered from "[d]elirium due to multiple etiologies, substance intoxication delirium, alcohol and mood disorder due to postconcussive disorder." Specifically, Dr. Hoover was of the belief that the combination of defendant's heavy consumption of alcohol on the day of the murders and the mood disorder resulting from defendant's 1990 head injury "were responsible for the explosion into a rage that occurred when [defendant] was provoked by his father."

The prosecutor cross-examined Dr. Hoover vigorously as to the validity of his opinion that defendant was suffering from delirium when he killed his father and stepmother. Thereafter, the

State presented Stephen I. Kramer, M.D., a neuropsychiatrist, as a rebuttal expert. Dr. Kramer reviewed Dr. Hoover's preliminary forensic psychological examination of defendant, defendant's Department of Correction records, a State Bureau of Investigation report on the crime scene, medical records related to defendant's 1990 head injury, and the results of a 1990 CAT scan of defendant's brain; however, he did not interview defendant or his family before testifying.

Dr. Kramer was critical of Dr. Hoover's analysis of defendant's condition. He testified that Dr. Hoover's report contained no data to support Dr. Hoover's conclusions and that the evidence "argued against" defendant's being delirious at the time of the murders. In Dr. Kramer's expert opinion, Dr. Hoover "violated the rules of using the [Diagnostic and Statistical Manual of Mental Disorders] to make a psychiatric diagnosis and also misapplied the criteria sets of the individual disorders listed." According to Dr. Kramer, defendant's 1990 head injury could be characterized as "mild to moderate," and defendant's prognosis was good upon his release from the hospital after treatment for that injury. Therefore, Dr. Kramer would expect defendant to have recovered fully from his head injury after discharge.

During the State's redirect examination of Dr. Kramer, he was asked about Dr. Hoover's forensic psychological evaluation of defendant. The following exchange then occurred:

> Q. And are you aware of any data reviewed by Dr. Hoover or yourself that would suggest that residual symptoms of a head injury were involved in the stabbings on November 4th or 5th?
>
> A. I've seen none.
>
> Q. And would you form any or ask any psychological testing to be conducted to determine whether or not a head injury would be a contributing factor?
>
> A. Well, it can be done, yes.
>
> Q. And was it done in this case?
>
> A. No, it was not.
>
> Q. Are you aware of any justification for that not being done?
>
> A. None whatsoever.

Q. And is that the kind of thing you would expect to be done in a forensic evaluation?

A. That's correct.

As noted above, in *Frogge I* this Court reversed defendant's conviction. On retrial in *Frogge II*, defendant again was convicted of two counts of first-degree murder and a new capital sentencing proceeding was conducted for the murder of defendant's stepmother. Defendant's sisters recounted the testimony they had given at the first trial as to the nature, severity, and aftermath of defendant's 1990 head injury. Although these family members were not presented as experts, one of defendant's sisters was a nurse. She advised the jury that defendant suffered a blood clot on his brain due to the head injury. She added that during his resulting hospitalization, defendant had to be restrained, did not know who or where he was, and could barely recognize members of his family. In addition, she testified that defendant suffered permanent effects from the head injury, such as aphasia, diminished memory, and signs of paranoia. Although defendant recovered somewhat, his behavior changed and he seemed withdrawn and paranoid.

In preparation for the trial of *Frogge II*, defense counsel replaced Dr. Hoover with Dr. William Tyson as defendant's expert psychologist. Dr. Tyson testified that at the time of the homicides, defendant suffered from a "personality disorder . . . defined as a pervasive limitation to adult functioning that had been aggravated by long term substance abuse and dependence." As a result of this condition, "it was most likely [defendant] would have been acting on impulse with limited ability to reason."

Although the two statutory mitigating circumstances found by the jury in *Frogge I* were submitted to the sentencing jury in the *Frogge II* trial, the *Frogge II* jury did not find either one. The catchall mitigating circumstance, N.C.G.S. § 15A-2000(f)(9) (2003), was also submitted but not found. However, the *Frogge II* jury found six out of ten submitted nonstatutory mitigating circumstances. That jury also found four aggravating circumstances: that defendant had previously been convicted of a violent felony, N.C.G.S. § 15A-2000(e)(3) (2003); that the murder was committed during the course of an armed robbery, *id.* § 15A-2000(e)(5) (2003); that the murder was "especially heinous, atrocious, or cruel," *id.* § 15A-2000(e)(9) (2003); and that the murder was part of a course of conduct in which defendant engaged and which included the commission by

defendant of other crimes of violence against another person or persons, *id.* § 15A-2000(e)(11) (2003). Finding that the mitigating circumstances did not outweigh the aggravating circumstances, the jury recommended a sentence of death.

New counsel were appointed to represent defendant for his post-conviction proceedings. Defendant filed a MAR with the trial court in which he alleged, among other things, ineffective assistance of trial counsel (IAC). Specifically, he contended that trial counsel failed to investigate and offer evidence that, at the time of the murders, defendant was suffering permanent residual effects of his 1990 head injury. Defendant claimed that if trial counsel had arranged for neurological testing to determine the extent of damage resulting from his 1990 injury, they would have been led to a qualified expert who could testify that defendant's capacity to appreciate the criminality of his conduct and to conform his conduct to the requirements of the law was impaired as a result of defendant's head injury and his consumption of alcohol. Defendant argued that if such mitigating evidence had been pursued, there was a reasonable probability that the jury would have returned a different sentencing recommendation.

The trial court conducted an evidentiary hearing as to the issue of ineffective assistance of counsel. Defendant presented two experts to support his claim. The first was Dr. Claudia Coleman, who testified that she had earned both a Master's Degree and a Ph.D. from the University of Mississippi in clinical psychology. After detailing her career as a practitioner and a teacher, Dr. Coleman was accepted by the trial court as an expert in the fields of forensic psychology and neuropsychology. Dr. Coleman testified that she had reviewed a presentence diagnostic report prepared prior to defendant's sentencing in 1985 for second-degree murder, affidavits prepared by members of defendant's family, and the testimony of Drs. Hoover and Tyson. She also had met with defendant and administered such tests as the Wechsler Adult Intelligence Scale, the Wisconsin Card Sort Test, and the Stroop Color and Word Test. These tests measured defendant's various mental and intellectual qualities, including memory function, new learning, visual skills, verbal fluency, and brain trauma. She diagnosed defendant as having a cognitive disorder, not otherwise specified, that had existed since eighteen to twenty-four months after his 1990 head injury. She also separately diagnosed defendant as suffering from a personality change combining both paranoid and aggressive features, resulting from his head injury, and also as exhibiting polysubstance dependence. Dr. Coleman testified that the diagnosis

of a cognitive disorder could be substantiated through neuropsychological testing, but she was unable to predict whether the type of brain impairment she observed in defendant would be reflected in an MRI scan. In Dr. Coleman's expert opinion, defendant suffered from a diminished mental capacity such that he could not fully weigh and understand the consequences of his actions at the time he killed his father and stepmother. She also was of the opinion that defendant committed the murders while under the influence of an emotional or mental disturbance.

Defendant's second MAR expert was Dr. Thomas Hyde. Dr. Hyde had completed a joint M.D./Ph.D. program at the University of Pennsylvania. His Ph.D. was awarded in anatomy with a specialty in neuroscience. At the time of the hearing, he was board certified in general neurology and was both teaching and practicing behavioral neurology. He was accepted by the trial court as an expert in the fields of general medicine, neurology, and behavioral neurology. Before the hearing, Dr. Hyde interviewed and examined defendant. He also reviewed Dr. Coleman's report, some affidavits, records from defendant's 1990 hospitalization, and a portion of the transcript of *Frogge I*. He conceded that he had not reviewed the testimony of Dr. Hoover and had given only cursory review to the testimony of Drs. Tyson and Kramer.

Dr. Hyde was of the opinion that defendant had organic or structural brain damage that most likely resulted from his 1990 head injury. Although an MRI scan of defendant conducted on 11 February 2002 showed no anomalies, Dr. Hyde testified that many neurological disorders are not reflected on such scans and that brain damage can be diagnosed even when an MRI fails to reveal any abnormalities. When asked, Dr. Hyde recommended neuropsychological testing for any individual who has suffered a closed head injury. Ideally, this testing should be conducted by a neurologist, a neurosurgeon, a neuropsychologist, or a psychologist with training in traumatic brain injury. Dr. Hyde added that, speaking in general terms, defendant should have received such an examination. It was Dr. Hyde's professional opinion that, at the time of the 1994 murders, defendant suffered from a diminished mental capacity that prevented him from fully weighing and understanding the consequences of his actions. In addition, Dr. Hyde believed defendant was then under the influence of an emotional or mental disturbance.

Defendant's trial counsel also testified at the MAR hearing. Lead counsel Ferguson testified that he had tried approximately seven cap-

ital cases in Tennessee and acted as lead counsel on eight or nine capital cases in North Carolina. Associate defense counsel Freedman testified that he practices mainly criminal law and is a board certified specialist in that field.

Although the jury in *Frogge I* found the section 15A-2000 (f)(2) and (f)(6) mitigating circumstances, defense counsel testified that they had been dissatisfied with Dr. Hoover's performance in that trial. They perceived that he had fared poorly under the State's cross-examination, and attorney Freedman added, "I believe [Dr. Hoover] testified to some physiological damage, which was one of the reasons he was not found to be a credible witness." In addition, defense counsel felt that the testimony of the State's rebuttal expert had been damaging. According to attorney Freedman, "I felt that Doctor [K]ramer had better—had gotten the better of [Dr. Hoover] at the trial." As a result, defense counsel decided to retain Dr. Tyson as an expert psychologist for defendant's retrial. Attorney Freedman had worked with Dr. Tyson before defendant's retrial and held a favorable opinion of his abilities.

Attorney Freedman testified that

> I knew one of the reasons Doctor [K]ramer had gotten the better of [Dr. Hoover] was because [K]ramer had reviewed . . . the State's file; so I wanted to try and short-circuit that, and I provided everything I could to Doctor Tyson so he could review everything and be prepared on that.

Accordingly, while preparing for defendant's second trial, defense counsel provided Dr. Tyson with their entire discovery file; advised him as to defendant's head injury, the resulting perceived changes in his personality, and the significance that family members placed on the injury; and made available to him defendant's medical records. The material supplied to Dr. Tyson also included the testimony given at *Frogge I* by Drs. Hoover and Kramer, and attorney Freedman believed that Dr. Tyson testified in *Frogge II* that he had reviewed this testimony. Even possessing this information, Dr. Tyson advised attorney Ferguson that he would not change his diagnosis.

In deciding prior to the trial of *Frogge II* whether to pursue evidence of defendant's head injury as potentially mitigating evidence, defense counsel testified that they depended on Dr. Tyson's expertise. Although attorney Ferguson acknowledged during the MAR hearing that he knew Dr. Tyson was not a neurologist or neuropsychologist and could not render neurological opinions, he added, "I think he had

the ability to tell me that if it was significant where we should go next. And he didn't indicate that there was any significance, that [the head injury] was significant. So, I relied on what he said." When cross-examined, attorney Ferguson reaffirmed that he depended on Dr. Tyson's informed opinion:

> Q. Now, I think you made it clear this morning, I just want to be sure, that you advised Doctor Tyson, or discussed with him more than once, the concerns of the family members about the personality changes they observed in the Defendant after the beating in 1990, is that correct?
>
> A. Yes.
>
> Q. And you asked him whether that was significant, in his opinion?
>
> A. Yes.
>
> Q. And he was firm on saying no, it would not change my diagnosis, was he not?
>
> A. Yes.
>
> Q. And you felt entitled to rely on the superior knowledge of an expert?
>
> A. That's correct.

Attorney Ferguson reemphasized the point during a similar exchange later in the hearing:

> Q. Doctor Tyson did not specifically focus on the head injury, did he?
>
> A. No, and as I've said earlier, he was told about it, provided the information, and did not deem it significant.
>
> Q. Yes, sir. And yet he made that decision without [the] benefit of any type of neurological or neuropsychological testing?
>
> A. Yes, sir, I assume that he had the—at least the qualifications to make that decision, whether neurological testing might be needed; and he was much more qualified to make that decision than I was, and [w]e relied on his opinion.

All this testimony indicates that defense counsel relied both on Dr. Tyson's diagnosis of defendant's condition and on his informed opinion that additional testing or experts were not needed.

The trial court considered the evidence presented at the MAR hearing and also reviewed the evidence presented at both trials, including the sentencing proceedings. It then applied the two-part test set out by the United States Supreme Court in *Strickland v. Washington* to determine whether trial counsel had provided effective assistance to defendant. 466 U.S. 668, 80 L. Ed. 2d 674 (1984).

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Id. at 687, 80 L. Ed. 2d at 693. This Court adopted the *Strickland* test in *State v. Braswell*, 312 N.C. 553, 562-63, 324 S.E.2d 241, 248 (1985).

The United States Supreme Court considered *Strickland* in the context of counsel's responsibility to investigate and present mitigating evidence at a capital sentencing proceeding in *Wiggins v. Smith*, 539 U.S. 510, 156 L. Ed. 2d 471 (2003). In *Wiggins*, defense counsel elected to follow a strategy of continuing to deny the defendant's direct involvement in the murder in lieu of a strategy based on mitigation. Before making this decision, counsel obtained from a psychologist a report that revealed the defendant's IQ, his difficulty in coping with difficult situations, and that he "exhibited features of a personality disorder." *Id.* at 523, 156 L. Ed. 2d at 486. Defense counsel also obtained a copy of the defendant's presentence investigation report, which included a single page describing the defendant's personal history. This page spoke of the defendant's "misery as a youth" and the time he spent in foster care. *Id.* Finally, defense counsel had a copy of records maintained by the Baltimore City Department of Social Services (DSS) documenting the defendant's placements by that organization. *Id.*

The Supreme Court determined that the decision by Wiggins' counsel not to expand their investigation beyond these records failed to meet either the professional standards prevailing in Maryland at that time or the standards for capital defense work set out by the American Bar Association. *Id.* at 524-25, 156 L. Ed. 2d at 486. However, the Court took pains to point out that it was not second-guessing counsel's decision to pursue one strategy over another.

"[O]ur principal concern in deciding whether [defense counsel] exercised 'reasonable professional judgmen[t]' is not whether counsel should have presented a mitigation case. Rather, we focus on whether the investigation supporting counsel's decision not to introduce mitigating evidence of Wiggins' background *was itself reasonable*." *Id.* at 522-23, 156 L. Ed. 2d at 485-86 (citation omitted). The Supreme Court then observed that "counsel abandoned their investigation of [the defendant's] background after having acquired only rudimentary knowledge of his history from a narrow set of sources," *id.* at 524, 156 L. Ed. 2d at 487; that counsel's investigation failed to pursue information contained in the DSS report, even though nothing in that material suggested that a mitigation case would be counterproductive or that additional investigation would be useless, *id.* at 525, 156 L. Ed. 2d at 487; that counsel's focus on the strategy of contesting responsibility made them inattentive to other potential mitigating evidence, *id.* at 526, 156 L. Ed. 2d at 487; and that counsel ultimately did not follow their own announced strategy of focusing exclusively on the defendant's direct responsibility, *id.* at 526, 156 L. Ed. 2d at 488. Accordingly, the Supreme Court held that defense counsel "abandon[ed] their investigation [of a possible mitigation strategy] at an unreasonable juncture, making a fully informed decision with respect to sentencing strategy impossible." *Id.* at 527-28, 156 L. Ed. 2d at 489.

In the case at bar, after reviewing the evidence, the trial court found that

> [defense c]ounsel knew of Frogge's head injury, but did not investigate with the assistance of expert consultation the potential mitigation evidence of "organic brain damage" and its effects on his ability to control violent impulses. Counsel here had the "benefit" of Dr. [K]ramer's criticism of Dr. Hoo[v]er's testimony in the 1995 trial—the "roadmap" that post-conviction counsel now say was available. While true that the effects of Frogge's head injury include anti-social behavior that could be damaging to his case, trial counsel's failure to investigate was not influenced by that circumstance. Like trial counsel in Wiggins, Frogge's trial counsel turned their focus to other concerns, and were "inattentive" to the potential mitigating evidence arising out of the head injury. Frogge had the benefit of good lawyers with experience in capital cases, but Wiggins compels the conclusion that their failure to pursue the evidence of organic brain injury as has now been done in post-conviction proceedings was objectively unreasonable.

After determining that the performance of defendant's trial counsel was deficient, the trial court then turned to the question of whether defendant was prejudiced. The trial court noted that Dr. Hoover's opinion of defendant's mental state at the time of the murders included the effects of the 1990 head injury while Dr. Tyson's opinion did not, but concluded that the difference was insignificant because Dr. Hoover's direct and cross-examination testimony revealed that he "lacked the expertise and results of testing required to reach his conclusions." Accordingly, the trial court determined that "[t]he question is distilled . . . to whether the lack of expert testimony concerning the organic brain disorder in 1998 sufficiently undermines confidence that the jury would have reached the same result whether or not that evidence was presented." Concluding that, under the facts of this case, defendant had established that confidence in the fairness of the proceedings against him had been impaired, the trial court ordered a new sentencing proceeding.

When considering rulings on motions for appropriate relief, we review the trial court's order to determine "whether the findings of fact are supported by evidence, whether the findings of fact support the conclusions of law, and whether the conclusions of law support the order entered by the trial court." *State v. Stevens*, 305 N.C. 712, 720, 291 S.E.2d 585, 591 (1982). We begin with the trial court's finding that counsel's performance was deficient. We undertake this inquiry mindful of the admonitions in *Strickland* and *Wiggins* to review counsel's decisions in light of the information available to them at the time and not with the benefit of hindsight. *Wiggins*, 539 U.S. at 523, 156 L. Ed. 2d at 486; *Strickland*, 466 U.S. at 689, 80 L. Ed. 2d at 694. Accordingly, we observe that counsel had numerous pertinent factors to consider as they decided their strategy for defendant's second sentencing proceeding. First, defendant had committed a murder prior to suffering the head injury. Second, graphic lay evidence of defendant's 1990 head injury and its sequelae had been presented through his sisters and others close to him at the *Frogge I* trial and would be presented again. Third, at the *Frogge I* sentencing proceeding, Dr. Hoover had presented an expert psychological opinion that took into account both defendant's head injury and his background. The sentencing jury, having heard that evidence, returned a capital verdict. Fourth, Dr. Kramer criticized Dr. Hoover for failing to conduct additional psychological testing that might determine whether defendant's head injury was a contributing factor to the murders. However, Dr. Kramer went on to state that, in his opinion, the

1990 injury was of mild to moderate severity and defendant's prognosis on discharge was good, implying that the additional psychological testing was unlikely to bear fruit. Dr. Kramer did not indicate that in preparation for trial defendant should have been tested for organic brain damage or neurological harm resulting from the 1990 head injury. Fifth, defense counsel were dissatisfied with Dr. Hoover's performance in *Frogge I* and replaced him with Dr. Tyson, who had been an effective witness in the past for attorney Freedman. When supplied with defendant's medical and social histories and with transcripts of the proceedings in *Frogge I*, Dr. Tyson stood by his opinion that defendant suffered from a personality disorder and, at the time of the murders, was acting on impulse with limited ability to reason. In this context, we must now decide whether, under *Wiggins*, the trial court properly concluded that defense counsel's decision not to pursue evidence of organic brain damage through neurological testing was objectively unreasonable and undermined confidence in the verdict.

The test in *Wiggins* is whether a strategic decision was made after sufficient investigation, not whether that decision was later proven to be correct. Unlike counsel in *Wiggins*, who abandoned the idea of pursuing a defense based on mitigation after reviewing only a psychological report, DSS records, and a presentence investigation report, defense counsel here interviewed defendant and his siblings and obtained defendant's school records, hospital records, correctional systems records, and psychological reports. Thus, defendant's counsel cannot be said to have "acquired only rudimentary knowledge of [defendant's] history from a narrow set of sources." *Wiggins*, 539 U.S. at 524, 156 L. Ed. 2d at 487. Defendant's attorneys also had the benefit of watching the first trial unfold and seeing what worked and what did not. Specifically, a defense which took defendant's head injury into account had been unsuccessful. By the time defense counsel were preparing for defendant's second trial, they had consulted two mental health experts, Drs. Hoover and Tyson, both of whom had full access to defendant, his family, and the pertinent medical records of defendant's head injury, and neither of whom recommended neurological testing.

In addition, defense counsel testified that they depended on Dr. Tyson to advise them whether or not additional testing of defendant was needed but that, after receiving all the information from the first trial, Dr. Tyson stuck by his original diagnosis of defendant. This testimony indicates that defense counsel were prepared to seek such

testing if they had adequate reason to believe it was necessary or would be useful.

Although we have found no cases from this Court with facts paralleling those presented here, cases from other jurisdictions consistently have found no ineffective assistance of counsel under analogous circumstances.[1] Beginning with cases from the United States Fourth Circuit, we see that in *Tucker v. Ozmint*, the defendant received the death penalty at his first trial. 350 F.3d 433 (4th Cir. 2003), *cert. denied*, —— U.S. ——, 158 L. Ed. 2d 715 (2004). Thereafter, the South Carolina Supreme Court reversed the defendant's sentence. At the resentencing hearing, the defendant's forensic psychologist testified that the defendant had been abused as a child and that while the defendant understood the requirements of the law, he was unable to conform his behavior to those standards. *Id.* at 437. In rebuttal, the South Carolina prosecutors presented three expert witnesses, including a forensic psychiatrist and a clinical psychologist. The State's experts testified that the defendant's expert's diagnosis constituted a mere description of behavior, not a mental disease or defect. *Id.* at 437-38.

The defendant again was sentenced to death. He thereafter claimed IAC during his capital sentencing proceeding on the basis that his trial counsel unreasonably limited their investigation into the defendant's childhood abuse and failed to provide corroborating records to his expert. After observing that the defendant's expert had prepared to testify by interviewing the defendant several times, by considering the deposition of the doctor who testified in the defendant's first trial, and by reviewing the social history of the defendant prepared by a licensed social worker, the Fourth Circuit held that

> [c]ounsel's performance in preparing Tucker's mitigation case far surpassed the inadequate performance described in *Wiggins*. Counsel attended the previous trial, made reasoned judgments about which witnesses to call, and presented an expert psychologist who gave the jury a full picture of Tucker's disturbing social history. "Although counsel should conduct a reasonable investigation into potential defenses, *Strickland* does not impose a constitutional requirement that counsel uncover every scrap of evidence that could conceivably help their client."

1. While some of these cases predate *Wiggins*, we do not believe that the analysis and holding in *Wiggins* would dictate a different result.

Id. at 441-42 (quoting *Green v. French*, 143 F.3d 865, 892 (4th Cir. 1998), *cert. denied*, 525 U.S. 1090, 142 L. Ed. 2d 698 (1999), *abrogated on other grounds by Williams v. Taylor*, 529 U.S. 362, 146 L. Ed. 2d 389 (2000)) (footnote omitted).

In *United States v. Roane*, the defendants were convicted of multiple murders arising out of their drug-trafficking operations. 378 F.3d 382 (4th Cir. 2004). Evidence indicated that the IQ of one of the defendants was barely sufficient to prevent him from being classified as ineligible for the death penalty because of mental retardation. That defendant claimed his defense counsel was ineffective for failing to assert that IQ-score inflation may have boosted his score artificially. However, the psychologist who conducted the test also stated that he understood the implications of his findings and therefore had double-checked the result and consulted with colleagues. *Id.* at 409. Although the opinion does not reflect whether the psychologist testified as a witness for the prosecution or for the defendant, the Fourth Circuit held that defense counsel "was presented with a mental health report, and he was under no mandate to second-guess that report." *Id.* at 409. In reviewing a separate IAC claim that did not involve expert testimony, that court considered the efforts defense counsel had made to investigate the defendant's potential alibi and, rejecting the claim, stated that relief is usually granted only when defense counsel "has failed to investigate a defense *at all* or has performed an investigation so minimal that no strategic reason could be given for the failure to investigate further." *Id.* at 411; *see also Byram v. Ozmint*, 339 F.3d 203, 210 (4th Cir. 2003) ("[A] failure to 'shop around' for a favorable expert opinion after an evaluation yields little in mitigating evidence does not constitute ineffective assistance.") (quoting *Poyner v. Murray*, 964 F.2d 1404, 1419 (4th Cir.), *cert. denied*, 506 U.S. 958, 121 L. Ed. 2d 342 (1992)), *cert. denied*, 541 U.S. 947, 158 L. Ed. 2d 374 (2004); *Wilson v. Greene*, 155 F.3d 396, 403 (4th Cir.) ("[C]ounsel had received [the mental health expert's] report concluding that [the defendant] was not mentally ill at the time of the offense. To be reasonably effective, counsel was not required to second-guess the contents of this report. . . . Counsel thus made a diligent effort to pursue promising lines of investigation, and [the defendant's] present attempt to challenge his counsel's decision not to investigate mental health issues more fully is 'a product of hindsight and fails to address the facts reasonably relied upon by counsel at the time.' ") (quoting *Roach v. Martin*, 757 F.2d 1463, 1478 (4th Cir.), *cert. denied*, 474 U.S. 865, 88 L. Ed. 2d 154 (1985)), *cert. denied*, 525 U.S. 1012, 142

L. Ed. 2d 441 (1998) (citations omitted); *Poyner*, 964 F.2d at 1419 ("The mere fact that [the defendant's] counsel did not shop around for a psychiatrist willing to testify to the presence of more elaborate or grave psychological disorders simply does not constitute ineffective assistance.").

A similar pattern is apparent in state cases. In *State v. Steckel*, the defendant was convicted of murder when the victim died in a fire the defendant set in the victim's home after sexually assaulting her. 2001 Del. LEXIS 429 (Del. Super. Ct. Aug. 31, 2001) (No. 9409002147), *aff'd*, 795 A.2d 651 (Del. 2002). The defendant's trial counsel met with a psychiatrist before trial both to determine whether an insanity defense was possible and to assist in mitigation. After several consultations with the defendant, the psychiatrist was of the opinion that the defendant suffered from attention deficit hyperactivity disorder, substance abuse, and antisocial personality disorder. The expert further believed that none of these conditions constituted a legal defense. Before trial, defense counsel also consulted a neurologist to determine whether brain dysfunction could be used as a mitigating factor. During post-conviction proceedings in which the defendant alleged IAC, the defendant presented another expert who believed that the defendant's consistent exaggerations should have alerted defense counsel to the possibility that the defendant had a narcissistic personality disorder. The Delaware Superior Court denied relief, holding that "[c]ounsel is not required to continue to search for additional mental health professionals when it appears that the diagnosis given by those already retained would reasonably explain the conduct of the [d]efendant." *Id.* at *20.

In *State v. Hessler*, the defendant was convicted of six murders. 2002 Ohio LEXIS 3313 (Ohio Ct. App. June 27, 2002) (No. 01AP-1011), *appeal denied*, 97 Ohio St. 3d 1423, 777 N.E.2d 277 (2002). Defense counsel retained and used two expert clinical psychologists during the mitigation portion of the defendant's trial to testify about the defendant's mental illness and the effects of the inadequate treatment he had received at various mental health facilities. Later, during post-conviction proceedings, the defendant claimed that his trial counsel should have sought the services of an expert psychiatrist or an expert social worker. The Court of Appeals of Ohio denied relief, holding that " '[a] postconviction petition does not show ineffective assistance merely because it presents a new expert opinion that is different from the theory used at trial.' " *Id.* at *35 (quoting *State v. Combs*, 100 Ohio App. 3d 90, 103, 652 N.E.2d 205, 213 (1994)); *see also Ringo v.*

State, 120 S.W.3d 743, 749 (Mo. 2003) ("Where trial counsel has . . . made reasonable efforts to investigate the mental status of defendant and has concluded that there is no basis in pursuing a particular line of defense, counsel should not be held ineffective for not shopping for another expert to testify in a particular way."); *Asay v. State*, 25 Fla. L. Weekly S523, ––, 769 So. 2d 974, 985-86 (2000) (trial counsel who conducts a reasonable pretrial investigation into mental health mitigation evidence is not incompetent where the defendant secures a more favorable mental health expert during post-conviction proceedings); *Henry v. State*, 28 Fla. L. Weekly S753, ––, 862 So. 2d 679, 686 (2003) (In finding no IAC, reviewing court considered defense counsel's decision not to pursue on retrial a strategy that failed at the first trial.).

Thus, where the record demonstrates (1) defense counsel fully investigated defendant's social and medical history and provided that information to Drs. Hoover and Tyson, (2) neither expert indicated to counsel a necessity for neurological testing, and (3) counsel relied on their experts as they made the difficult but necessary choices as to which theory of defense to pursue, we are unwilling to find that the decisions of defendant's attorneys constituted ineffective assistance of counsel or represented inattention to other possible defenses. Accordingly, we conclude that defense counsel did not prematurely abandon a defense based on organic brain damage and that their election to pursue a defense predicated on other grounds constituted a " 'reasonable professional judgment[].' " *Wiggins*, 539 U.S. at 533, 156 L. Ed. 2d at 492 (quoting *Strickland*, 466 U.S. at 691, 80 L. Ed. 2d at 695).

Because defense counsel's performance was not "objectively unreasonable" and was adequate under *Strickland* and *Wiggins*, we do not need to consider whether defendant suffered prejudice. Therefore, for the reasons stated above, the order of the trial court is reversed and defendant's death sentence is reinstated.

REVERSED.

Justice NEWBY did not participate in the consideration or decision of this case.

STATE OF NORTH CAROLINA v. ROBERT DENNIS WEAVER, JR.

No. 613A03

(Filed 4 February 2005)

1. Embezzlement— aiding and abetting—sufficiency of evidence

The trial court erred by denying defendant's motion to dismiss the charges of embezzlement and conspiracy to embezzle both based on the theory that defendant aided and abetted embezzlement committed by his former wife, because: (1) defendant cannot be convicted of aiding and abetting embezzlement without proof that an embezzlement was committed; (2) the lawful possession or control element of the crime of embezzlement was not satisfied when an administrative employee took a corporate signature stamp without permission and wrote unauthorized corporate checks thereby misappropriating funds from her employer, and these facts appear to support the crime of larceny rather than embezzlement; (3) defendant's former wife was not her employer's agent and she never lawfully possessed the misappropriated funds; and (4) it is immaterial whether the former wife had actual or constructive possession of the misappropriated funds when her possession was not lawful, and thus, the crime of embezzlement has not occurred.

2. Appeal and Error— writ of certiorari—improvidently allowed

Defendant's petition for a writ of certiorari under N.C.G.S. § 7A-32(b) to review additional issues which were briefed and argued before the Court of Appeals but were not resolved in its opinion was improvidently allowed.

Justice NEWBY did not participate in the consideration or decision of this case.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 160 N.C. App. 613, 586 S.E.2d 841 (2003), reversing judgments entered 4 December 2001 by Judge Michael E. Helms in Superior Court, Buncombe County. On 5 February 2004, the Supreme Court allowed defendant's petition for writ of certiorari to review additional issues not resolved by the Court of Appeals. Submitted on 14 September 2004 for decision on

written briefs pursuant to Rule 30(d) of the North Carolina Rules of Appellate Procedure.

Roy Cooper, Attorney General, by David L. Elliott, Assistant Attorney General, for the State-appellant/appellee.

Cloninger, Lindsay, Hensley & Searson, P.L.L.C., by Stephen P. Lindsay, for defendant-appellee/appellant.

BRADY, Justice.

The dispositive issue presented for review on direct appeal is whether the lawful possession or control element of the crime of embezzlement was satisfied when an administrative employee took a corporate signature stamp without permission and wrote unauthorized corporate checks, thereby misappropriating funds from her employer. That employee's misappropriation is the basis of defendant's convictions for aiding and abetting embezzlement and conspiracy to embezzle. We conclude that the employee did not lawfully possess or control the misappropriated funds and therefore affirm the decision of the Court of Appeals which reversed defendant's convictions.

On 6 August 2001, defendant was charged pursuant to N.C.G.S. § 14-90 with two counts of aiding and abetting his wife, Kimberly Weaver, to embezzle funds from International Color and with nineteen counts of aiding and abetting Kimberly Weaver to embezzle funds from R&D Plastics, Inc. (R&D). Defendant was similarly charged pursuant to N.C.G.S. § 14-2.4 with a single count of conspiracy to commit embezzlement from International Color, L.L.C. (International Color) and R&D. Defendant was tried at the 26 November 2001 Criminal Session of Superior Court, Buncombe County before the Honorable Michael E. Helms. On 4 December 2001, a Buncombe County jury returned a verdict finding defendant guilty on all twenty-two counts and Judge Helms sentenced defendant to seven consecutive eight-to-ten month terms of imprisonment. Judge Helms also imposed suspended sentences of eight-to-ten months on fourteen convictions for aiding and abetting and a sentence of six-to-eight months for conspiracy to commit embezzlement.

Upon entry of judgment, defendant gave notice of appeal in open court. On 21 October 2003, a divided panel of the Court of Appeals reversed defendant's convictions on all counts. *State v. Weaver*, 160 N.C. App. 613, 622, 586 S.E.2d 841, 846 (2003). On 24 November 2003, the State filed a notice of appeal pursuant to N.C.G.S. § 7A-30(2).

FACTUAL BACKGROUND

The record reflects that several members of the Weaver family are involved in this factually complex case. Defendant's parents started R&D, a plastic injection molding corporation, in 1979. Defendant's father, Robert Dennis Weaver, Sr. (Dennis Weaver), was R&D's sole owner and CEO, while defendant's mother, Shirley Weaver, served as R&D's secretary-treasurer. In 1997 and 1998, defendant was employed at R&D as the plant manager and all R&D employees reported to him, with the exception of his parents and one other individual.

In 1996, defendant, his father Dennis Weaver, and two other individuals acquired International Color, a color compounding plant for plastic material. International Color was then relocated near the R&D site and treated by the Weavers as an extension of R&D.

Defendant married Kimberly Weaver, who was employed as a receptionist at R&D in 1986. In 1997 and 1998, when the misappropriation occurred, Kimberly Weaver was an employee of both R&D and International Color and was being trained by Shirley Weaver to become the accounting manager. Kimberly Weaver's duties at R&D included entering payables, making bank deposits, and entering data. Kimberly Weaver also "ran" the International Color office.

With respect to her duties, responsibilities, and authority at R&D, Kimberly Weaver testified:

> Normally I would write a check if we had a COD delivery come in. Or if we had something that we had to go pick up and we needed to pay for, I would call Shirley and ask her if it was all right if I ran a check, and she would authorize it, and I would run the check and use her stamp.

Both Shirley and Kimberly Weaver testified at defendant's trial that Kimberly had no authority to sign R&D or International Color checks. Kimberly Weaver testified that in order to write a check from either company's account she "had to have direct permission from either Shirley, and if Shirley was not available, Dennis Weaver." Shirley Weaver further testified that, except on a case-by-case basis, Kimberly did not have the authority to use the signature stamp, which was kept in a desk drawer in Shirley's office.

During 1997 and 1998, Kimberly Weaver and defendant were experiencing personal financial difficulty. According to Kimberly

Weaver, defendant began directing her to misappropriate R&D funds to solve their financial problems. At defendant's trial, Kimberly Weaver testified:

> [Defendant] came to me and said, "Let's"—There was something that needed to be done or he wanted done on the home, and the credit cards were to their maximum limit, and we did not have the funds to do whichever, I can't remember specifically, and he told me to borrow the money from R&D Plastics. And when I questioned him how, he said, "Well, just go upstairs and take the stamp out of Mom's drawer and just stamp the check and put it into Technicraft."

From January of 1997 through May of 1998, Kimberly Weaver misappropriated over $450,000 from R&D and International Color. She accomplished this by using counter checks, checks earmarked for shredding because they listed R&D's address incorrectly, or legitimate corporate checks. Kimberly Weaver would write the checks and then stamp them with Shirley Weaver's signature. According to Kimberly Weaver, the misappropriated funds were used by defendant or herself for various personal expenses, including credit card bills, household expenses such as electricity bills, season tickets to Alabama football games, hunting dog purchases and training, hunting and deep-sea fishing trips, various home improvements and landscaping, home furnishings and appliances, family vacations, and expenses incurred in buying or showing horses.

Kimberly Weaver testified at trial that defendant manipulated inventory records in an effort to cloak her activities. She further concealed her illegal activity by under-reporting deposits in company records, thereby misrepresenting R&D's actual cash inflow. Additionally, Kimberly Weaver wrote unauthorized checks from International Color to R&D to "make up a deficit in the deposit versus the checks that Shirley had run so we would not be overdrawn on the bank account."

It is undisputed that Kimberly Weaver also used a third company, Technicraft, Inc. (Technicraft), as a vehicle to conceal the misappropriation of R&D and International Color funds. Defendant founded Technicraft in 1996 to complete secondary work on plastic parts. Technicraft was physically located at the R&D plant site; however, its corporate records were kept on a computer at the home of defendant and Kimberly Weaver.

With respect to the discovery of Kimberly Weaver's illegal activities, Shirley Weaver testified that although she paid the company bills, Kimberly balanced the checkbook each month. Thus, Shirley Weaver testified:

> [As I started to pay the bills for the last pr]obably nine months, I knew that we had a problem with money. . . . We were making a good profit and should have had the cash there to pay the bills, and every week when I started to pay bills, the money wasn't there, it just wasn't there. And every week Kim would come up with a deposit that just didn't get recorded so that I could make the bills, but we still didn't have the money.

Shirley Weaver also testified that in December 1997 or January 1998, she and two R&D employees examined the company records to "make sure that Kim and [defendant] were not double or triple billing for the Technicraft things."

Shirley and Dennis Weaver first identified the breadth of accounting irregularities created by Kimberly Weaver on 29 May 1998. On that day, Shirley Weaver was notified that eleven International Color checks had been returned by the bank, stamped non-sufficient funds. When Shirley Weaver questioned Kimberly Weaver about the checks, Kimberly became hysterical and left the International Color business office. Kimberly Weaver testified that she was so distraught that she later attempted suicide.

On 6 August 2001, a Buncombe County grand jury indicted defendant for two counts of aiding and abetting Kimberly Weaver to embezzle funds from International Color, nineteen counts of aiding and abetting Kimberly Weaver to embezzle funds from R&D, and a single count of conspiracy to commit embezzlement from International Color and R&D. Defendant was arraigned on 10 September 2001 and entered not guilty pleas to each charge. The record on appeal suggests that Kimberly Weaver was similarly charged or was expected to be similarly charged; however, at defendant's trial Kimberly Weaver testified that she had no pending plea bargain with the District Attorney's Office in return for her cooperation and testimony. On 4 December 2001, a Buncombe County jury returned a verdict finding defendant guilty on all counts.

[1] This Court must now determine whether the funds Kimberly Weaver misappropriated from R&D and International Color were in her lawful possession or under her care and control such that defend-

ant's convictions of aiding and abetting embezzlement and conspiracy to embezzle may stand.

HISTORY AND ELEMENTS OF THE LAW OF EMBEZZLEMENT

The crime of embezzlement developed as, and continues to be, an important statutory counterpart to the common law crime of larceny. At common law, if an employee acquired his employer's property by trespass, meaning that the employee took the property against his employer's will with the intent to steal it, the employee was guilty of larceny, a felony.[1] 2 Joel Prentiss Bishop, *New Commentaries on The Criminal Law Upon a New System of Legal Exposition* §§ 799, 803 (Chicago, T.H. Flood & Co., 8th ed. 1892) [hereinafter 2 Bishop, *New Commentaries* (1892)]; *see also* 2 William Oldnall Russell, *A Treatise on Crimes and Indictable Misdemeanors* 102 (Philadelphia, P.H. Nicklin & T. Johnson, 3d ed. 1836) [hereinafter 2 Russell, *Treatise on Crimes*]. If an employee lawfully came into possession of his employer's property during the course of employment, but later took that property for his own personal benefit, the employee was guilty of the common law offense of breach of trust, a misdemeanor.[2] 2 Bishop, *New Commentaries* §§ 799, 803 (1892); *see also State v. Braden*, 2 Tenn. 466, 467-68, 2 Overt. 68, 69-70 (1805); Jerome Hall, *Theft, Law and Society* 34-40 (2d ed. 1952) [hereinafter Hall, *Theft*]. This distinction, based upon the premise that there could be no larceny without trespass, generated a multitude of cases before the English courts. *See, e.g.*, *Regina v. Creed*, 174 Eng. Rep. 714 (1843); *Rex v. Hart*, 172 Eng. Rep. 1166 (1833); *Cartwright v. Green*, 168 Eng. Rep. 574 (1803); *The King v. Pear*, 168 Eng. Rep. 208 (1780); *see also* 2 Russell, *Treatise on Crimes* 104 ("If, therefore, there be no trespass in taking goods, there can be no felony in carrying them away."). Notwithstanding early statutory attempts to eliminate this disparity in specific cases[3], difficult questions, similar to the question *sub judice*,

1. "A felony at common law was any crime which occasioned the forfeiture of lands and goods. This was usually accompanied by capital punishment, though not always; but, as capital punishment was usually inflicted, felonies came to include all crimes punishable by death." Wm. L. Clark, Jr., *Hand-Book of Criminal Law* 40 (Francis B. Tiffany ed., 2d ed. 1902) (footnotes omitted); *see also* 1 Joel Prentiss Bishop, *Commentaries on The Criminal Law* § 615 (Boston, Little, Brown, & Co., 6th ed. 1877).

2. " 'The word misdemeanor, in its usual acceptation, is applied to all those crimes and offences [sic] for which the law has not provided a particular name; and they may be punished, according to the degree of the offence [sic], by fine, or imprisonment, or both.' " Bishop, note 1, § 624 (citation omitted) (footnotes omitted).

3. *See* An Act to alter certain rates of postage, and to amend, explain, and enlarge several provisions in an act made in the ninth year of the reign of Queen Anne, and in

continued to arise regarding the relationship of parties to each other and to the stolen property.

The first "modern" embezzlement statute was enacted in England by Parliament in 1799. An Act to protect masters against embezzlements by their clerks or servants, 1799, 39 Geo. 3, c. 85 (Eng.); *see also* Hall, *Theft* 38-39. The purpose of the Act was to ensure uniform results in similar cases by extending the common law of larceny to most circumstances in which the defendant initially came to possess the stolen property without trespass. Wm. L. Clark, Jr., *Hand-Book of Criminal Law* 307-08 (Francis B. Tiffany ed., 2d ed. 1902) ("At common law, to constitute larceny, it is also necessary that the property be taken from the owner's possession by trespass, with intent to deprive him of his ownership; and therefore that crime is not committed by a bailee or other person who, after lawfully obtaining possession from the owner in good faith, appropriates it to his own use. It was to meet these cases that the embezzlement statutes were enacted."); 2 Bishop, *New Commentaries* § 800 (1892) ("It was to make punishable misappropriations without trespass that the embezzlement statutes were passed."). Although subsequent enactments of the English embezzlement statute expanded the class of persons deemed to be capable of embezzlement and the class of things capable of being embezzled, *see* An Act to make better Provision for the Punishment of Frauds committed by Trustees, Bankers, and other Persons intrusted with Property, 1857, 6 Geo. 4, c. 94 (Eng.); An Act for more effectually preventing the Embezzlement of Securities for Money and other Effects, left or deposited for safe Custody, or other special Purpose, in the Hands of Bankers, Merchants, Brokers, Attorn[ey]s or other Agents, 1812, 52 Geo. 3, c. 63 (Eng.), no subse-

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other acts relating to the revenue of the post office, 1765, 5 Geo. 3, c. 25, § 17 (Eng.) (governing embezzlement by employees of the post office); An Act for reducing the interest upon the capital stock of the South Sea Company, from the time and upon the terms herein mentioned; and for preventing of frauds committed by the officers and servants of the said company, 1751, 24 Geo. 2, c. 11, § 3 (Eng.) (governing embezzlement by officers and servants of the South Sea Company); An Act for establishing an agreement with the governor and company of the Bank of England, for advancing the sum of one million six hundred thousand pounds, towards the supply for the service of the year one thousand seven hundred and forty two, 1742, 15 Geo. 2, c. 13, § 12 (Eng.) (governing embezzlement by officers and servants of the Bank of England); Servants [e]mbezzelling their masters' goods to the value of forty shilling[s], or above, shall be punished as felons, 1529, 21 Hen. 8, c. 7 (Eng.) (governing embezzlement by servants given enumerated property *to keep* on behalf of their master); *see also* Hall, *Theft* 39 (listing three specific embezzlement statutes enacted in England prior to 1799); 2 Joel Prentiss Bishop, *Commentaries on The Criminal Law* §§ 319, 320 (Boston, Little, Brown, & Co., 7th ed. 1882) (noting the narrow language of 21 Hen. 8, c. 7)

quent enactment vitiated the distinction that the embezzlement statute criminalized non-trespassory takings and larceny remained the proper action in all other cases. Embezzlement remained a purely statutory offense, specifically tailored to criminalize as felonies acts which common law larceny did not govern.

In post-colonial North Carolina, the new state's common law and statutory traditions can be traced to its origin in English law. Because North Carolina's legal system was still in its infancy when North Carolina became the twelfth state on 21 November 1789, it is not surprising that the British common law crime of larceny and statutory crime of embezzlement were discussed by this Court in one of its first reported decisions, *State v. Higgins*, 1 N.C. 36, 1 Mart. 62 (1792) (vacating judgment of guilt under 21 Hen. 8, c. 7 because defendant was not a "servant" under that statute and because the acts charged, which did not include felonious taking, did not constitute larceny at common law).

As North Carolina's legal system matured, the first statute criminalizing embezzlement was enacted during the 1871-1872 session of the General Assembly. That legislation, titled "An Act to Define and Punish the Crime of Embezzlement," stated:

> If any officer, agent, clerk or servant of any corporation, or any clerk, agent or servant of any person or co-partnership, (except apprentices and other persons under the age of sixteen years,) shall embezzle or fraudulently convert to his own use or shall take, make away with or secrete, with intent to embezzle or fraudulently convert to his own use any money, goods, or other chattels, bank note, check or order for the payment of money . . . which shall have come into *his possession or under his care by virtue of such office or employment*, he shall be deemed guilty of felony, and upon conviction thereof, shall be punished as in cases of larceny.

Act of Feb. 8, 1872, ch. 145, 1871-72 N.C. Sess. Laws 223, 223-24 (emphasis added).

Minor substantive revisions to the statute have been made over the last 130 years, most notably those expanding the class of individuals who are capable of committing the offense of embezzlement. Act of Feb. 25, 1889, ch. 226, 1889 N.C. Sess. Laws 237 (adding consignees); Act of Feb. 28, 1891, ch. 188, 1891 N.C. Sess. Laws 164 (including "public officer[s], clerk[s] of the superior or other court,

sheriff[s] or other person[s] or officer[s] exercising a public trust or holding public office"); Act of Feb. 6, 1897, ch. 31, 1897 N.C. Sess. Laws 83 (extending the statute to guardians, administrators, and executors who misappropriate funds); Act of Mar. 21, 1931, ch. 158, 1931 N.C. Sess. Laws 221 (further extending the statute to trustees who embezzle from their beneficiaries); Act of Jan. 24, 1939, ch. 1, 1939 N.C. Sess. Laws 25 (incorporating any receiver and any other fiduciary under the statutory scheme); Act of Feb. 17, 1941, ch. 31, 1941 N.C. Sess. Laws 41 (adding bailees to the list of individuals subject to the statute); Act of June 20, 1967, ch. 819, 1967 N.C. Sess. Laws 1044 (broadening the statutory scope to cover embezzlement from any unincorporated association or organization); *see also State v. Ross*, 272 N.C. 67, 69-72, 157 S.E.2d 712, 713-15 (1967) (discussing and interpreting the 1939-1967 expansions in the embezzlement law); *State v. Whitehurst*, 212 N.C. 300, 302-03, 193 S.E. 657, 659 (1937) (detailing the evolution of the embezzlement statute from 1872 through 1937); George P. Fletcher, *The Metamorphosis of Larceny*, 89 Harv. L. Rev. 469, 471 (1976) ("Embezzlement has grown from an offense applicable to selected relationships of trust to a general offense applicable to everyone who has been entrusted with property . . . ." (footnotes omitted)).

As a result, N.C.G.S. § 14-90, the current statute defining embezzlement, now states:

> If any person exercising a public trust or holding a public office, or any guardian, administrator, executor, trustee, or any receiver, or any other fiduciary, or any officer or agent of a corporation, or any agent, consignee, clerk, bailee or servant, except persons under the age of 16 years, of any person, shall embezzle or fraudulently or knowingly and willfully misapply or convert to his own use, or shall take, make away with or secrete, with intent to embezzle or fraudulently or knowingly and willfully misapply or convert to his own use any money, goods or other chattels, bank note, check or order for the payment of money . . . belonging to any other person or corporation, unincorporated association or organization which shall have come into *his possession or under his care*, he shall be guilty of a felony.

N.C.G.S. § 14-90 (2003) (emphasis added).

Over the past century, this Court has examined embezzlement and its place in our jurisprudence on several occasions. For example, in a 1903 decision, this Court noted that the general aim of embezzle-

ment statutes in both England and North Carolina "was to *punish the misappropriation of property rightfully in the possession of the alleged wrongdoer*, who, though civilly liable for a conversion, could not be convicted of larceny, because there was no taking from the owner's possession by an act of trespass." *State v. McDonald*, 133 N.C. 680, 683, 45 S.E. 582, 583 (1903) (emphasis added).

More recently in *State v. Griffin*, 239 N.C. 41, 79 S.E.2d 230 (1953), this Court distinguished embezzlement from larceny, stating:

> While there is similarity in some respects between larceny and embezzlement, they are distinct offenses. Larceny is a common law offense not defined by statute; while embezzlement is a criminal offense created by statute to cover fraudulent acts which did not contain all the elements of larceny.
>
> Generally speaking, to constitute larceny there must be a wrongful taking and carrying away of the personal property of another without his consent, and this must be done with felonious intent . . . . The embezzlement statute makes criminal the fraudulent conversion of personal property by one occupying some position of trust or some fiduciary relationship as specified in the statute. The person accused must have been entrusted with and *received into his possession lawfully* the personal property of another, and thereafter with felonious intent must have fraudulently converted the property to his own use. Trespass is not a necessary element. *In embezzlement the possession of the property is acquired lawfully by virtue of the fiduciary relationship and thereafter the felonious intent and fraudulent conversion enter in to make the act of appropriation a crime* (citations omitted).[4]

4. After being charged with both larceny and embezzlement for the same transaction, the defendant in *State v. Griffin* moved that the prosecutor be required to elect the offense for which he should be tried. No election occurred, and defendant was found guilty of both offenses; however, the sentences imposed for both crimes ran concurrently, and this Court thus stated that "it would appear that the defendant has no cause for complaint that the court did not require an election." 239 N.C. at 46, 79 S.E. 2d at 233. Nonetheless, we also stated in *Griffin* that "we think the defendant's motion that the solicitor be required to elect whether the defendant [would be] put to trial for larceny or embezzlement should have been allowed." *Id.* at 45, 79 S.E.2d at 233. As we later noted in *State v. Speckman*, 326 N.C. 576, 391 S.E.2d 165 (1990), since *Griffin* was decided, the General Assembly has abrogated the election requirement as applied in that case. *Id.* at 579, 391 S.E.2d at 167 (citing a 1975 amendment to N.C.G.S. § 14-100, defining the felony of obtaining property by false pretenses). Even though the portion of *Griffin* relating to election of charges is no longer valid, we believe *Griffin* remains an accurate statement of the distinction between the crimes of larceny and embezzlement.

Id. at 44-45, 79 S.E.2d at 232-33 (emphasis added); *see also State v. Speckman*, 326 N.C. 576, 391 S.E.2d 165 (1990) (discussing and applying *Griffin*); *State v. Whitley*, 208 N.C. 661, 663, 182 S.E. 338, 340 (1935) (holding that the simple fact that the accused is an employee of the victim does not transform the crime from larceny to embezzlement, as the key distinction between the two crimes is lawful possession).

Historically, since the General Assembly codified the criminal offense of embezzlement in North Carolina, the criminal act has hinged on a defendant's misappropriation of property in his/her lawful possession or care due to employment or fiduciary capacity. As in English common law, misappropriation by trespass supports the offense of larceny, not embezzlement, in North Carolina. *Griffin*, 239 N.C. at 44-45, 79 S.E.2d at 232-33. Therefore, North Carolina courts have remained respectful of the separate and distinct nature of these crimes and restrained in their application of N.C.G.S. § 14-90. For the reasons discussed below, we decline to adapt N.C.G.S. § 14-90 to the facts *sub judice*.

APPLICATION OF THE LAW OF EMBEZZLEMENT
TO THE PRESENT CASE

In the instant case, it is undisputed that Kimberly Weaver had no independent authority to write checks from R&D accounts or to use Shirley Weaver's signature stamp. In fact, both Kimberly and Shirley Weaver testified that direct authorization from Shirley was required before Kimberly wrote each individual check. Although the record is unclear as to the exact location of each check used to misappropriate the company funds, the record indicates that the signature stamp was kept in a desk drawer in Shirley Weaver's office and that Kimberly Weaver could not access this stamp without Shirley Weaver's direct permission. While Kimberly Weaver had *access* to the checks and signature stamp by virtue of her status as an employee at R&D and International Color, we cannot say, based on these facts, that Kimberly Weaver's possession of this property was *lawful* nor are we persuaded that this property was under Kimberly Weaver's care and control as required by N.C.G.S. § 14-90. Because Kimberly Weaver never lawfully "possessed" the misappropriated funds and because the funds were not "under [her] care" we conclude that Kimberly Weaver did not commit the crime of embezzlement as defined in N.C.G.S. § 14-90.

" 'It is a rule of universal observance in the administration of criminal law that a defendant must be convicted, if convicted at all, of the particular offense charged in the bill of indictment. The allegation and proof must correspond.' " *State v. Watson*, 272 N.C. 526, 527, 158 S.E.2d 334, 335 (1968) (quoting *State v. Jackson*, 218 N.C. 373, 376, 11 S.E.2d 149, 151 (1940)). Here, defendant was indicted for two counts of aiding and abetting Kimberly Weaver to embezzle funds from International Color, nineteen counts of aiding and abetting Kimberly Weaver to embezzle funds from R&D, and a single count of conspiracy to commit embezzlement from International Color and R&D. Accordingly, the evidence presented by the State at trial must establish that Kimberly Weaver committed the crime of embezzlement to support defendant's convictions on these indictments. However, the State did not prove, and in actuality cannot establish, that Kimberly Weaver embezzled funds from these companies. Kimberly Weaver unlawfully used Shirley Weaver's signature stamp to come into possession of R&D and International Color funds; therefore, the facts appear to support the crime of larceny rather than embezzlement. Accordingly, the appropriate charges against defendant should have been aiding and abetting larceny and conspiracy to commit larceny. Because the State cannot make the "allegation[s] and proof correspond," the majority opinion of the Court of Appeals must be affirmed.

The State sets forth two main arguments in support of its position on appeal. First, the State argues that Kimberly Weaver was an agent of R&D Plastics and International Color; therefore, she gained access to the misappropriated funds lawfully. Second, the State argues that Kimberly Weaver "possessed" the currency she later embezzled and that the majority of the Court of Appeals' panel erred in "center[ing] on Kimberly Weaver's check writing authority rather than the dominion and control she had over the U.S. currency." We find both arguments unpersuasive for the reasons stated below.

The State primarily relies on *State v. Johnson*, 335 N.C. 509, 438 S.E.2d 722 (1994) to establish that Kimberly Weaver was her employer's agent. However, we find *Johnson* totally inapposite to the instant case. In *Johnson*, an attorney was hired for the express purpose of recovering money for damages his client incurred in an automobile accident. 335 N.C. at 510, 438 S.E.2d at 722. Thus, as we stated in *Johnson*, "The defendant was the agent of [his client] with authority to negotiate the settlement of her claim." *Id.* at 511, 438 S.E.2d at 723. The defendant subsequently negotiated and accepted a payment

from the liability carrier on his client's behalf. Although defendant told the adjuster that his client would accept the payment as full compensation for her injuries, defendant never informed his client that he had negotiated a settlement or received the draft transferring the funds. *Id.* at 510, 438 S.E.2d at 722. Subsequently, defendant or someone in his law office forged the client's signature on the required paperwork, and defendant deposited the money in his personal account. *Id.* Defendant was later convicted of embezzlement. *Id.* The Court of Appeals reversed the judgment, and this Court reversed and remanded the case to the trial court for reinstatement of the sentence. 335 N.C. at 512, 438 S.E.2d at 723.

Johnson has no bearing on the present case. In *Johnson* there was no dispute that defendant was his client's agent for purposes of negotiating a settlement and obtaining payment in compensation for his client's injuries. In his capacity as an attorney representing his client, defendant acquired the insurance proceeds meant for his client in a lawful manner. Thus, he was properly charged with embezzlement when he later misappropriated those funds.

In contrast, Kimberly Weaver does not meet the legal definition of an agent. Two essential elements of an agency relationship are: (1) the authority of the agent to act on behalf of the principal, and (2) the principal's control over the agent. *Holcomb v. Colonial Assocs.*, 358 N.C. 501, 509, 597 S.E.2d 710, 716 (2004). Additionally, both parties must consent that the agent will act on behalf of the principal in a particular capacity. *Ellison v. Hunsinger*, 237 N.C. 619, 628, 75 S.E.2d 884, 891 (1953). Agency is a relationship "which cannot be forced on a person *in invitum*." *Johnson v. Orrell*, 231 N.C. 197, 201, 56 S.E.2d 414, 417 (1949).

As stated above, it is undisputed that Kimberly Weaver *did not have authority* to take the signature stamp or to write any check without specific permission from Shirley Weaver. The State's reliance on Kimberly Weaver's ongoing training to become accounting manager and "the fact that Kimberly Weaver was her supervisor's 'best friend' " is insufficient to overcome this dispositive fact. Unlike the defendant in *Johnson*, Kimberly Weaver was not her employer's agent and she never lawfully possessed the misappropriated funds, initially or otherwise. Therefore, *Johnson* does not support the State's argument that Kimberly Weaver embezzled the misappropriated funds.

We now address the State's argument to the effect that the Court of Appeals' majority erred in "center[ing] on Kimberly Weaver's

check-writing authority rather than the dominion and control she had over the U.S. currency." This argument seeks to support the elements of embezzlement which require that the person who misapplied the funds have "received," and thus come into possession of, the employer's property "by the terms of his employment" and "in the course of his employment." As possession of property can be actual or constructive, the Court of Appeals' majority considered whether possession could be supported on either theory, noting that:

> The State correctly cites the rule that possession of property may be actual or constructive. However, "[a]lthough defendant's possession of the entrusted property may be actual or constructive, even constructive possession of property requires 'an intent and capability to maintain control and dominion' over it.[]"

Weaver, 160 N.C. App. at 619, 586 S.E.2d at 844-45 (quoting *State v. Jackson*, 57 N.C. App. 71, 76, 291 S.E.2d 190, 194, *disc. rev. denied*, 306 N.C. 389, 294 S.E.2d 216 (1982)), *quoted in State v. Bonner*, 91 N.C. App. 424, 426, 371 S.E.2d 773, 775 (alterations in original) (citations omitted).

The State's argument fails because it is immaterial whether Kimberly Weaver had actual or constructive possession of the misappropriated funds. Because her possession, if any, was not lawful, the crime of embezzlement has not occurred. *See Speckman*, 326 N.C. at 578, 391 S.E.2d at 166 ("This Court has held that to constitute embezzlement, the property in question initially must be acquired lawfully, pursuant to a trust relationship, and then wrongfully converted.").

For the foregoing reasons, we conclude that the evidence presented at trial does not support defendant's conviction for the crime of embezzlement. Accordingly, the decision of the Court of Appeals is affirmed as to the issue on direct appeal. Defendant's convictions for aiding and abetting embezzlement and conspiracy to embezzle are reversed.

[2] Defendant also petitioned this Court pursuant to N.C.G.S. § 7A-32(b) for a writ of certiorari to review additional issues which were briefed and argued before the Court of Appeals but were not resolved in its opinion. We allowed certiorari on 5 February 2004; however, we now conclude that certiorari was improvidently allowed. Therefore, the decision of the Court of Appeals is affirmed.

AFFIRMED; WRIT OF CERTIORARI IMPROVIDENTLY ALLOWED.

Justice NEWBY did not participate in the consideration or decision of this case.

WILLIAM JAMES, AN ELECTOR, FOR HIMSELF AND OTHERS SIMILARLY SITUATED; WILLIAM "BILL" FLETCHER, CANDIDATE FOR SUPERINTENDENT OF PUBLIC INSTRUCTION; AND TRUDY WADE, CANDIDATE FOR GUILFORD COUNTY COMMISSIONER AT LARGE v. GARY O. BARTLETT, AS EXECUTIVE DIRECTOR OF THE NORTH CAROLINA STATE BOARD OF ELECTIONS; LARRY LEAKE, ROBERT CORDLE, GENEVIEVE C. SIMS, LORRAINE G. SHINN, AND CHARLES WINFREE, IN THEIR OFFICIAL CAPACITY AS MEMBERS OF THE STATE BOARD OF ELECTIONS; THE STATE BOARD OF ELECTIONS; AND ROY COOPER, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF THE STATE OF NORTH CAROLINA; AND JUNE S. ATKINSON AND W. BRITT COBB, INTERVENORS

IN RE ELECTION PROTEST OF BILL FLETCHER IN THE NOVEMBER 2, 2004, GENERAL ELECTION FOR SUPERINTENDENT OF PUBLIC INSTRUCTION

IN RE ELECTION PROTEST OF DR. TRUDY WADE IN THE NOVEMBER 2, 2004, GENERAL ELECTION FOR GUILFORD COUNTY COMMISSIONER AT LARGE

No. 602PA04-2

(Filed 4 February 2005)

1. Jurisdiction— subject matter—election challenge

The North Carolina Supreme Court had subject matter jurisdiction to consider an election protest and declaratory judgment action by a candidate for Superintendent of Public Instruction, an office established by Article III of the North Carolina Constitution. The North Carolina Supreme Court is vested by the North Carolina Constitution with the jurisdiction to review any decision of the courts below and the comprehensive statutory scheme to resolve election protests contemplates appellate review of the Wake County Superior Court. Although the North Carolina Constitution mandates that a contested election for an Article III office be determined by the General Assembly "in the manner prescribed by the law," the General Statutes require only that the General Assembly determine the outcome of those Article III elections with a numerical tie (not the case here). N.C. Const. art. VI § 5; N.C.G.S. § 147-4.

2. Elections— challenge to provisional ballots—timely

A challenge to the acceptance of out-of-precinct provisional ballots after an election was timely because plaintiffs did not have adequate notice before the election that these ballots would be counted. Out-of-precinct provisional ballots have not been counted in the past and a letter from the Board of Elections on the subject before the election stated that the Board would enforce North Carolina law. This did not indicate that the ballots would be counted.

3. Elections— provisional ballots—out-of-precinct—improperly accepted

The State Board of Elections improperly accepted provisional ballots cast on election day at precincts in which the voters did not reside. North Carolina statutes unambiguously require voters to cast their ballots in the precincts of residence, and the precinct system is woven throughout the fabric of the election laws. Voters are eligible to cast a provisional ballot only if they are absent from the records of the precinct where they reside because those records are incomplete or inaccurate; voters who reside outside the precinct at which they attempt to vote must be directed to their proper voting place. N.C.G.S. § 163-55.

Justices PARKER and EDMUNDS did not participate in the consideration or decision of this case.

On discretionary review pursuant to N.C.G.S. § 7A-31, prior to a determination by the Court of Appeals, of orders entered on 17 December 2004 by Judge Henry W. Hight, Jr. in Superior Court, Wake County. Heard in the Supreme Court 18 January 2005.

Tharrington Smith, L.L.P., by Michael Crowell, and Hunter, Higgins, Miles, Elam and Benjamin, P.L.L.C., by Robert N. Hunter, Jr., for plaintiff-appellants and for petitioner-appellants Bill Fletcher and Trudy Wade.

Roy Cooper, Attorney General, by Christopher G. Browning, Jr., Solicitor General, and Susan K. Nichols and Alexander McC. Peters, Special Deputy Attorneys General, for defendant-appellees.

Wallace, Nordan & Sarda, L.L.P., by John R. Wallace and Joseph A. Newsome, for intervenor-defendant-appellees and for respondent-appellees June S. Atkinson and John Parks.

Anita S. Earls for Rodney J. Sumler, Aljihad Shabazz, Democracy North Carolina, League of Women Voters of North Carolina, North Carolina Fair Share, Southeastern Church Action for Safe and Just Communities, and Winston-Salem Voting Rights Coalition, amici curiae.

Marshall Hurley, PLLC, by Marshall Hurley, and Respess & Jud, by W. Wallace Respess, Jr., for Steven W. Troxler, amicus curiae.

WAINWRIGHT, Justice.

This case involves election disputes between plaintiff Bill Fletcher and defendant-intervenor June Atkinson, candidates for North Carolina Superintendent of Public Instruction, and plaintiff Trudy Wade and respondent John Parks, candidates for Guilford County Commissioner at large.[1]

The overriding issue that has been thrust upon this Court in the present case, and the concern of this Court, is *not* the ultimate outcome of the two elections involved. Rather, the sole issue and concern for this Court in this matter is whether these two elections were conducted in accord with the will of the people of North Carolina, as expressed by them in their Constitution and in their statutes as enacted by their representatives.

The instant case involves three separate election challenges[2]

1. We note that Fletcher, like Wade, is a plaintiff in the declaratory judgment action brought by William James and a petitioner in his protest. For convenience, we refer to Fletcher and Wade only as plaintiffs. Additionally, we note that Atkinson is both a defendant-intervenor in the declaratory judgment action and a respondent in Fletcher's election protest. For convenience, we refer to Atkinson only as defendant-intervenor.

2. The three challenges are as follows: (1) An election protest filed with the North Carolina State Board of Elections by Bill Fletcher, candidate for the office of North Carolina Superintendent of Public Instruction. His opponent, June Atkinson, is a party to this case. (2) An election protest filed with the North Carolina State Board of Elections by Trudy Wade, candidate for Guilford County Commissioner at large. Her opponent, John Parks, is a party to this case. (3) A declaratory judgment action filed in Wake County Superior Court by Fletcher, Wade, and William James, a Mecklenburg County voter. Plaintiffs in this case requested the trial court to determine the constitutionality of out-of-precinct provisional voting. Additionally, plaintiffs unsuccessfully sought a temporary restraining order and injunction barring the State Board from counting out-of-precinct provisional votes. Defendants in this case are the North Carolina State Board of Elections, Gary O. Bartlett, Executive Director of the State Board, members of the State Board, and the Attorney General. The trial court allowed motions to intervene in this matter filed by Atkinson and Britt Cobb, candidate for North Carolina Agriculture Commissioner. However, the trial court did not rule on a

which revolve around one substantive central issue: whether a provisional ballot cast on election day at a precinct other than the voter's correct precinct of residence may be lawfully counted in final election tallies.[3] Additionally, we address the following procedural issues raised by defendants and defendant-intervenors: (1) whether this Court has subject matter jurisdiction over Fletcher's election protest and (2) whether plaintiffs filed their claims in a timely manner.

Subject Matter Jurisdiction

[1] We first address defendant-intervenor Atkinson and respondent Parks' contention that subject matter jurisdiction for Fletcher's election protest lies exclusively with the General Assembly because Article VI, Section 5 of the North Carolina Constitution gives the General Assembly exclusive jurisdiction to decide "contested election[s]" for offices established by Article III of the Constitution, which includes the office of Superintendent of Public Instruction.[4]

Article VI, Section 5 of the North Carolina Constitution mandates that "[a] contested election for any office established by Article III of this Constitution shall be determined by joint ballot of both houses of the General Assembly in the manner prescribed by law."

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motion to intervene filed by Steve Troxler, also a candidate for North Carolina Agriculture Commissioner.

Fletcher and Wade appealed their election protests to Superior Court. These appeals were consolidated with the declaratory judgment action and assigned to Wake County Superior Court Judge Henry W. Hight, Jr. Defendants and defendant-intervenors filed motions to dismiss the declaratory judgment action pursuant to N.C.G.S. § 1A-1, Rule 12(b)(6) (2003). The trial court treated the motion to dismiss as a motion for summary judgment and entered an order granting summary judgment in favor of defendants and defendant-intervenors. Additionally, the trial court entered an order affirming the State Board's denial of Fletcher's election protest and entered an order affirming the denial of Wade's election protest. Plaintiffs have appealed these orders to this Court.

3. According to plaintiffs, approximately 75,000 provisional ballots were cast during the 2004 general election. Defendants maintain that 44,843 persons voted provisionally in the race for Superintendent of Public Instruction. According to defendants, only 11,310 of these persons who voted provisionally "are categorized as having voted in the 'incorrect precinct' in the final SEIMS report" and thus constitute the provisional ballots at issue in the Superintendent of Public Instruction election dispute. Plaintiffs contend 441 out-of-precinct votes were counted in the Guilford County Commissioner at large race, and thus there are 441 disputed votes in that race.

4. We note that "the question of subject matter jurisdiction may be raised at any time, even in the Supreme Court." *Lemmerman v. A.T. Williams Oil Co.*, 318 N.C. 577, 580, 350 S.E.2d 83, 85 (1986); *see also* N.C.G.S. § 1A-1, Rule 12(h)(3) (2003). Therefore, defendant-intervenor and respondent properly raised this defense on appeal.

N.C. Const. art. VI, § 5. The phrase "contested election" is undefined in our Constitution and in our case law. Article VI, Section 5 specifically vests the General Assembly with authority to determine "contested election[s]" only "*in the manner prescribed by law*." *Id.* (emphasis added).

The General Statutes describe only one situation that requires the General Assembly to determine an election dispute "by joint ballot of both houses of the General Assembly." *Id.* Section 147-4 provides that when two or more candidates for an Article III office receive the exact same number of votes, "one of them shall be chosen by joint ballot of both houses of the General Assembly." N.C.G.S. § 147-4 (2003). Because the instant case does not present a numerical tie, section 147-4 is inapplicable to this case.

The General Assembly has enacted a comprehensive statutory scheme to resolve "election protests" filed in any state or national election. *See id.* §§ 163-182.9 to 182.15 (2003). Under this statutory scheme, election protests may be filed with the County Board of Elections by any registered voter or candidate in the election according to the timetable set out in N.C.G.S. § 163-182.9. If the County Board determines that there is probable cause to believe that "a violation of election law or irregularity or misconduct has occurred," the County Board must conduct a formal evidentiary hearing and adjudicate the dispute in a quasi-judicial capacity. *Id.* § 163-182.10. After the County Board enters its final order, the party who filed the protest, or any candidate adversely affected by the County Board's decision, may appeal to the State Board of Elections. *Id.* § 163-182.11. An "aggrieved party" may appeal the State Board of Election's final decision to Wake County Superior Court for judicial review. *Id.* § 163-182.14; *see also id.* § 163-182.15(b)(2) (which governs election protests and clearly contemplates appellate review of the Wake County Superior Court decision by providing that when the decision of the State Board has been appealed to Wake County Superior Court, and that court has stayed certification of the election, the certificate shall be issued five days after the entry of the court's final order, "unless that court *or an appellate court* orders otherwise" (emphasis added)).

More importantly, our election statutes, including N.C.G.S. § 163-182.14, must comport with the scope of the judicial power established by the people of North Carolina in Article IV of the State Constitution. The North Carolina Constitution vests the Supreme Court with "jurisdiction to review upon appeal *any* decision of the courts below, upon *any* matter of law or legal inference." N.C. Const.

art. IV, § 12 (emphasis added). N.C.G.S. § 163-182.14, which vests the Wake County Superior Court with jurisdiction to entertain appeals from rulings of the State Board of Elections, must be construed consistently, if at all possible, with this constitutional provision. *See Mitchell v. N.C. Indus. Dev. Fin. Auth.*, 273 N.C. 137, 143, 159 S.E.2d 745, 750 (1968) (stating that "all doubts" must be resolved in favor of the constitutionality of a statute). Because Article IV, Section 12 of our state constitution grants this Court authority to exercise appellate review of "*any* decision of the courts below," the Supreme Court possesses jurisdiction to review orders of the Wake County Superior Court issued in election protests. Accordingly, Atkinson and Parks' argument that this Court does not have subject matter jurisdiction is without merit. Plaintiffs' appeal from the trial court orders in Fletcher's election protest and declaratory judgment action is properly before this Court.

Timeliness

[2] Defendants contend, along with defendant-intervenor Atkinson and respondent Parks, that plaintiffs' failure to challenge the counting of out-of-precinct provisional ballots before the 2 November 2004 election renders plaintiffs' action untimely and precludes this Court from determining whether the State Board erred by counting those ballots. Defendants allege that plaintiffs knew or should have known the State Board would count out-of-precinct provisional ballots, but nonetheless chose to await the outcome of the election before challenging the results. The facts do not support defendants' allegations.

The 2004 election cycle was the first time in North Carolina history that State election officials counted out-of-precinct provisional ballots. Before the 2004 general election, plaintiff James wrote the State Board of Elections and specifically asked whether the Board planned to count such ballots. The Board's general counsel responded that "North Carolina law is clear on this issue. We have and will continue to enforce and administer the provisions as to provisional voting as set out in North Carolina law." The response of the Board's general counsel failed to indicate that the State Board of Elections would count out-of-precinct provisional ballots. This response, coupled with the absence of any clear statutory or regulatory directive that such action would be taken, failed to provide plaintiffs with adequate notice that election officials would count the 11,310 ballots now at issue. Plaintiffs' action was timely filed.

In-Precinct Voting Requirement

[3] We next turn to the substantive issue presented in the present case: whether, in the November 2004 general election, the Board of Elections properly counted provisional ballots cast on election day at precincts in which voters did not reside.

At the outset, we note that the arguments presented within the parties' briefs are primarily devoted to the constitutional issue of whether the State Board's counting of out-of-precinct provisional ballots violated Article VI, Section 2 of the North Carolina Constitution. However, appellate courts must "avoid constitutional questions, even if properly presented, where a case may be resolved on other grounds." *Anderson v. Assimos*, 356 N.C. 415, 416, 572 S.E.2d 101, 102 (2002); *see also Union Carbide Corp. v. Davis*, 253 N.C. 324, 327, 116 S.E.2d 792, 794 (1960) ("Courts must pass on constitutional questions when, but only when, they are squarely presented and necessary to the disposition of a matter then pending and at issue."); *State v. Blackwell*, 246 N.C. 642, 644, 99 S.E.2d 867, 869 (1957) ("[A] constitutional question will not be passed on even when properly presented if there is also present some other ground upon which the case may be decided."); *State v. Muse*, 219 N.C. 226, 227, 13 S.E.2d 229, 229 (1941) (an appellate court will not decide a constitutional question "unless it is properly presented, and will not decide such a question even then when the appeal may be properly determined on a question of less moment."). Applying this longstanding principle, we decline to reach plaintiffs' constitutional arguments, as the present case may be resolved on purely statutory grounds.

Section 163-55 of the North Carolina General Statutes sets forth the general rule that voters must cast ballots in their precincts of residence. This section, titled "Qualifications to vote; exclusion from electoral franchise," provides, in pertinent part:

> Every person born in the United States, and every person who has been naturalized, and who shall have *resided* in the State of North Carolina and *in the precinct* in which he offers to register and vote for 30 days next preceding the ensuing election, shall, if otherwise qualified as prescribed in this Chapter, be *qualified to register and vote in the precinct in which he resides*: Provided, that removal from *one precinct* to another in this State shall not operate to deprive any person of the *right to vote in the precinct* from which he has removed until 30 days after his removal.

N.C.G.S. § 163-55 (2003) (emphasis added). The plain language of the statute clearly and unambiguously states that a voter is "qualified to register *and vote in the precinct in which he resides*." *Id.* (emphasis added). Furthermore, N.C.G.S. § 163-55 refers three separate times to "*the* precinct" and one additional time to "one precinct." Had the General Assembly intended that each voter be permitted to cast a ballot at his precinct of choice, this statute would surely have employed the phrase "*any* precinct" or "*a* precinct." "Where the language of a statute is clear and unambiguous, there is no room for judicial construction and the courts must construe the statute using its plain meaning." *Burgess v. Your House of Raleigh, Inc.*, 326 N.C. 205, 209, 388 S.E.2d 134, 136 (1990). The plain meaning of section 163-55 is that voters must cast ballots on election day in their precincts of residence.[5]

The precinct voting system is woven throughout the fabric of our election laws. *See, e.g.*, N.C.G.S. § 163-128 (2003) (stating that counties shall be divided into precincts for the purpose of voting); N.C.G.S. § 163-82.15 (2003) (requiring that a voter report a move to a new precinct and vote in that precinct); N.C.G.S. § 163-85(c)(3) (2003) (allowing that any voter may be challenged on the basis that he does not live in the precinct where he attempts to vote); N.C.G.S. § 163-87 (2003) (providing that on the day of a primary or election, at the time a registered voter offers to vote, any other registered voter of that precinct may challenge); N.C.G.S. § 163-88 (2003) (requiring that a challenged voter prove his continued residency in the precinct and that the challenge shall be heard by the chief judge and judges of election of the precinct).

The conclusion that a provisional ballot must be cast in a voter's precinct of residence is supported by other regulatory and statutory provisions concerning the use of provisional ballots. In 2003, the General Assembly ratified N.C.G.S. § 163-166.11, which addresses voters who appear at a precinct polling place on election day but are not listed on the registration records for that precinct. Pursuant to section 163-166.11, such voters may cast a provisional ballot at the precinct and later have their ballots counted if it is determined that the voter was eligible to vote. Section 163-166.11 was created in response to Congress' passage of the Help America Vote Act (HAVA) of 2002, 42 U.S.C. §§ 15481-15485 (2002), which mandated that such

5. Absentee voting (N.C.G.S. §§ 163-227.2, -231, -248 (2003)) and election day voting at specially created "[o]ut-of-precinct" voting places (N.C.G.S. § 163-130.1 (2003)) are not at issue in the present case.

provisional ballots be made available for federal elections beginning in January 2004. Act of June 11, 2003, ch. 226, sec. 1, 2003 N.C. Sess. Laws 341, 353-54. HAVA, which does not apply to state and local elections, was initiated in the wake of allegations of irregularity and fraud in the 2000 presidential election. 42 U.S.C. § 15482(a) (2004) (stating that HAVA applies only in "election[s] for Federal office"). In our review, we have found no indication that Congress' intent in passing HAVA, or our state legislature's intent in passing N.C.G.S. § 163-166.11, was to enable voters to cast valid ballots outside their precincts of residence when such a vote would not otherwise be supported by state law.

Additionally, the precise circumstances under which provisional ballots may be cast are set out in Subchapter 10B of Title 8 of the North Carolina Administrative Code. The pertinent code section provides that a

> person is eligible to vote an official provisional ballot *if the person resides in the precinct* and either:
>
> (1) is a registered voter in the county and has moved into the precinct 30 days or more prior to the election and has not reported the change to the board of elections; or
>
> (2) claims to have applied for voter registration in the county but there is no record of the person's name on the registration records; or
>
> (3) was removed from the list, but the person maintains continuous eligibility within the county; or
>
> (4) disputes the voting districts (and ballots) to which the person has been assigned.

8 NCAC 10B .0103(d) (Supp. 2004) (emphasis added). Subchapter 10B further provides that if a voter does not appear on the list of registered voters for that precinct "and the responsible judge of election learns from the person that the person resides in a different precinct, the responsible judge *shall provide the person with adequate information in order to direct the person to the proper voting place*." *Id.* 10B .0103(e) (Supp. 2004) (emphasis added).

Thus, according to the State Board of Elections' own rules, a voter is "eligible" to cast an "official provisional ballot" only if he *resides in the precinct* and is absent from the registration records because those records are incomplete or inaccurate. Also, under the

Board's own regulations, when election officials are aware that a voter resides outside the precinct where he has presented himself to vote, those officials must direct the voter to his "proper voting place." "The procedural rules of an administrative agency 'are binding upon the agency which enacts them as well as upon the public.' " *Humble Oil & Ref. Co. v. Bd. of Aldermen*, 284 N.C. 458, 467, 202 S.E.2d 129, 135 (1974) (citations omitted).

These administrative regulations, as issued by the State Board of Elections pursuant to its rulemaking authority under N.C.G.S. § 163-22, are consistent with the statutory scheme set forth in N.C.G.S. § 163-82.15, which details the procedures election officials must follow when voters dispute registration records or present themselves at an incorrect precinct because of unreported moves prior to an election. Subsection 163-82.15(e), titled "Unreported Move to Another Precinct Within the County," concerns the procedures election officials must follow when a voter has moved to another precinct more than thirty days before the election but has failed to notify the county board of elections of that move as required by N.C.G.S. § 163-82.15(a). Under section 163-82.15(e), the precise procedure to be followed depends in part on whether the voter presents himself to vote in the correct precinct, *i.e.*, his current precinct of residency, or the incorrect precinct, *i.e.*, the precinct of his former residence. When the voter presents himself at the "new precinct" following an unreported move within the same county, section 163-82.15(e) provides that the county board "shall permit" the voter to cast a provisional ballot at that precinct upon written affirmation of the new address. If the voter appears at the "old precinct," however, section 163-82.15(e) mandates that "precinct officials there *shall* send the registrant to the new precinct, or, if the registrant prefers, to [a central location in the county to be determined by the county board]." N.C.G.S. § 163-82.15(e) (2003) (emphasis added). Like 8 NCAC 10B .0103(e), section 163-82.15(e) does *not* permit voters to cast provisional ballots outside their precincts of residence. Therefore, the State Board of Elections improperly counted provisional ballots cast outside voters' precincts of residence on election day in the 2004 general election.

It is indeed unfortunate that the statutorily unauthorized actions of the State Board of Elections denied thousands of citizens the right to vote on election day. It is well settled in this State that "the right to vote on equal terms is a fundamental right." *Northampton Cty. Drainage Dist. No. One v. Bailey*, 326 N.C. 742, 746, 392 S.E.2d 352,

355 (1990); *State ex rel. Martin v. Preston*, 325 N.C. 438, 454, 385 S.E.2d 473, 481 (1989); *Texfi Indus., Inc. v. City of Fayetteville*, 301 N.C. 1, 12, 269 S.E.2d 142, 149 (1980). "But the right to vote is the right to participate in an electoral process that is necessarily structured to maintain the integrity of the democratic system." *Burdick v. Takushi*, 504 U.S. 428, 441, 119 L. Ed. 2d 245, 258 (1992). This Court is without power to rectify the Board's unilateral decision to instruct voters to cast provisional ballots in a manner not authorized by State law. To permit unlawful votes to be counted along with lawful ballots in contested elections effectively "disenfranchises" those voters who cast legal ballots, at least where the counting of unlawful votes determines an election's outcome. Mindful of these concerns, and attendant to our unique role as North Carolina's court of last resort, we cannot allow our reluctance to order the discounting of ballots to cause us to shirk our responsibility to "say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177, 2 L.E.d 60, 72 (1803).

Additionally, we note that our State's statutory residency requirement provides protection against election fraud and permits election officials to conduct elections in a timely and efficient manner. *See People ex rel. Van Bokkelen v. Canaday*, 73 N.C. 198, 223 (1875) (holding that "every voter must register in the ward and in the precinct where he lives, and in no other, and must vote where he registers, the object being to prevent fraud by 'repeating.' "); 25 Am. Jur. 2d *Elections* § 3 (2004). The General Assembly recognized in ratifying N.C.G.S. § 163-55 that without a precinct residency requirement, there would be a generous magnification of the potential for mischief in the form of one person voting in numerous precincts.

In North Carolina, where most voters are not required to show identification before voting, a tremendous task is already placed upon precinct officials to ensure that potential voters are legitimately eligible and properly registered to vote. *See* N.C.G.S. § 163-166.12 (requiring voters to show identification only when they have "registered to vote by mail on or after January 1, 2003, and ha[ve] not previously voted in an election that includes a ballot item for federal office in North Carolina"). If voters could simply appear at any precinct to cast their ballot, there would be no way under the present system to conduct elections without overwhelming delays, mass confusion, and the potential for fraud that robs the validity and integrity of our elections process. Indeed, as the U.S. Court of Appeals for the Sixth Circuit has stated:

> The advantages of the precinct system are significant and numerous: it caps the number of voters attempting to vote in the same place on election day; it allows each precinct ballot to list all of the votes a citizen may cast for all pertinent federal, state, and local elections, referenda, initiatives, and levies; it allows each precinct ballot to list only those votes a citizen may cast, making ballots less confusing; it makes it easier for election officials to monitor votes and prevent election fraud; and it generally puts polling places in closer proximity to voter residences.

Sandusky Cty. Democratic Party v. Blackwell, 387 F.3d 565, 569 (6th Cir. 2004) (per curiam).

We conclude that it is but a perfunctory requirement that voters identify their proper precinct and appear within that precinct on election day to cast their ballots. Voters may identify their precinct via mail, telephone, Internet, or in person at their local boards of elections. Election officials are expected to work with voters to help them locate their correct precinct. Indeed, when a voter appears at the wrong polling place, election officials have a statutory duty to assist the voter in finding the correct precinct in which to vote. N.C.G.S. § 163-82.15(e).

In sum, North Carolina law does not permit out-of-precinct provisional ballots to be counted in state and local elections. Accordingly, we reverse the orders of the superior court and remand this case to that court for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

Justices PARKER and EDMUNDS did not participate in the consideration or decision of this case.

WILLIAM JAMES, AN ELECTOR, FOR HIMSELF AND OTHERS SIMILARLY SITUATED; WILLIAM "BILL" FLETCHER, CANDIDATE FOR SUPERINTENDENT OF PUBLIC INSTRUCTION; AND TRUDY WADE, CANDIDATE FOR GUILFORD COUNTY COMMISSIONER AT LARGE,	)	
PLAINTIFFS	)	
v.	)	ORDER
GARY O. BARTLETT, AS EXECUTIVE DIRECTOR OF THE NORTH CAROLINA STATE BOARD OF ELECTIONS; LARRY LEAKE, ROBERT CORDLE, GENEVIEVE C. SIMS, LORRAINE G. SHINN, AND CHARLES WINFREE, IN THEIR OFFICIAL CAPACITY AS MEMBERS OF THE STATE BOARD OF ELECTIONS; THE STATE BOARD OF ELECTIONS; and ROY COOPER, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF THE STATE OF NORTH CAROLINA;	)	
DEFENDANTS	)	
AND	)	
JUNE S. ATKINSON and W. BRITT COBB;	)	
INTERVENORS-DEFENDANTS	)	

No. 602P04

Upon consideration of the motion to accept discretionary review prior to consideration by the North Carolina Court of Appeals, and to suspend the Rules of Appellate Procedure to allow expedited review, filed by plaintiffs on the 30th day of November 2004 in this matter pursuant to N.C.G.S. § 7A-31 (discretionary review), the motion is allowed for the purpose of entering the following order:

The motion for injunctive relief, petition for writ of mandamus, petition for writ of prohibition, petition for writ of supersedeas, and motion for temporary stay filed on the 30th day of November 2004 by plaintiffs in this matter are hereby denied without prejudice to plaintiffs' rights to proceed expeditiously as plaintiffs may elect in the superior court.

This is remanded to the Superior Court, Wake County, by order of the Court in Conference, this 3rd day of December, 2004.

Newby, J.
For the Court

WILLIAM JAMES, AN ELECTOR, FOR HIMSELF AND OTHERS SIMILARLY SITUATED, WILLIAM "BILL" FLETCHER, CANDIDATE FOR SUPERINTENDENT OF PUBLIC INSTRUCTION; AND TRUDY WADE, CANDIDATE FOR GUILFORD COUNTY COMMISSIONER AT LARGE	)	
PLAINTIFFS	)	
v.	)	ORDER
GARY O. BARTLETT, AS EXECUTIVE DIRECTOR OF THE NORTH CAROLINA STATE BOARD OF ELECTIONS; LARRY LEAKE, ROBERT CORDLE, GENEVIEVE C. SIMS, LORRAINE G. SHINN, AND CHARLES WINFREE, IN THEIR OFFICIAL CAPACITY AS MEMBERS OF THE STATE BOARD OF ELECTIONS; THE STATE BOARD OF ELECTIONS; and ROY COOPER, iN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF THE STATE OF NORTH CAROLINA	)	
DEFENDANTS	)	
AND	)	
JUNE S. ATKINSON AND W. BRITT COBB;	)	
INTERVENORS-DEFENDANTS	)	
IN RE ELECTION PROTEST OF BILL FLETCHER IN THE NOVEMBER 2, 2004, GENERAL ELECTION FOR SUPERINTENDENT OF PUBLIC INSTRUCTION	)	
IN RE ELECTION PROTEST OF DR. TRUDY WADE IN THE NOVEMBER 2, 2004, GENERAL ELECTION FOR GUILFORD COUNTY COMMISSIONER AT-LARGE	)	

No. 602P04-2

This matter is before the Court upon the following petitions and motions filed by Plaintiffs-Appellants on 20 December 2004: (1) Plaintiffs' Motion to Accept Discretionary Review Before Consideration by the Court of Appeals, and to Suspend the Rules to

Allow Expedited Review and (2) Motion to Plaintiffs-Appellants for Writ of Supersedeas and Temporary Stay.

Upon consideration, this Court enters the following order:

(1) Plaintiffs' petition for discretionary review prior to determination by the Court of Appeals is allowed.

(2) Plaintiffs' petition for Writ of Supersedeas and motion for temporary stay to preserve the status quo pending a determination of this appeal are allowed.

(3) Plaintiffs' motion under Rule 2 for an expedited briefing and argument is allowed. Plaintiffs shall file their brief(s) by 3 January 2005 and defendants shall file their brief(s) by 13 January 2005. Oral argument is scheduled for 18 January 2005 at 9:30 a.m. in the courtroom of the North Carolina Court of Appeals.

By Order of the Court in conference, this 22nd day of December 2004.

Justices PARKER and EDMUNDS recused.

Newby, J.
For the Court

STATE OF NORTH CAROLINA	)	
	)	
v.	)	ORDER
	)	
JEFFREY BOWES	)	

No. 394A03

Upon consideration of the petition filed on the 30th day of July 2004 by Plaintiff in this matter for discretionary review the decision of the North Carolina Court of Appeals pursuant to G.S. 7A-31, the following order was entered and is hereby certified to the North Carolina Court of Appeals:

> On 30 July 2004, this Court retained the Division of Motor Vehicles' notice of appeal based on substantial constitutional questions. That same date the Court denied both the Division of Motor Vehicles' petition for discretionary review and defendant's petition for discretionary review. Upon consideration of the briefs filed with the Court, and after hearing oral arguments, this Court has determined that it should allow the Division's petition for discretionary review as to issues VI, VII, VIII, IX, and X as set forth on pages nine and ten of the Division's petition for discretionary review heretofore filed with this Court. In responding to the Division's issue number IX, defendant will be permitted to argue his position as to whether the limited driving privilege issued by the trial court to defendant was proper under the applicable statutes.
>
> Accordingly, it is ordered that the Division of Motor Vehicles and defendant shall file with this Court briefs as to these issues. The Division of Motor Vehicles shall have forty-five days from the date of this order to file its brief, and defendant shall have forty-five days thereafter to file his responsive brief. Pursuant to North Carolina Rule of Appellate Procedure 30(f), no further oral argument will be held in this case unless required by further order of the Court.

By order of the Court in conference, this the 16th day of December 2004.

Justices MARTIN and WAINWRIGHT are recused.

Newby, J.
For the Court

STATE OF NORTH CAROLINA	)	
	)	
PLAINTIFF	)	
v.	)	ORDER
	)	
PHILIP MORRIS USA, INC., F/K/A PHILIP MORRIS INCORPORATED; R.J. REYNOLDS TOBACCO COMPANY, INDIVIDUALLY AND AS SUCCESSOR TO R.J. REYNOLDS TOBACCO COMPANY AND BROWN & WILLIAMSON TOBACCO CORPORATION; AND LORILLARD TOBACCO COMPANY,	)	
	)	
DEFENDANTS	)	

No. 2P05

After consideration of petitioners', JP Morgan Chase Bank, N.A., as trustee of the National Tobacco Grower Settlement Trust, the Georgia Tobacco Community Development Board, the Kentucky Tobacco Settlement Trust Corporation, the State of Maryland Certification Entity, the North Carolina Phase II Tobacco Certification Entity, Inc., the Pennsylvania Certification Entity, the Tennessee Tobacco Farmers' Certifying Board, and the Virginia Tobacco Trust Certification Board, Inc. (herein "petitioner-appellants") petition and motions, filed 5 January 2005, and respondents', Philip Morris USA Inc., R.J. Reynolds Tobacco Company (successor to R.J. Reynolds Tobacco Co. and Brown & Williamson Tobacco Corp.), and Lorillard Tobacco Company (herein "respondent-appellees") responses thereto, filed 12 January 2005, the Court orders as follows:

1. Petitioner-appellants' petition for discretionary review prior to determination in the Court of Appeals is allowed.

2. Petition-appellants' motions to suspend appellate rules to expedite decision on petition in public interest are allowed as follows:

a. The proposed record on appeal shall be served on or before 27 January 2005; objections to the proposed record on appeal shall be served within 20 (twenty) days from service of the proposed record on appeal; judicial settlement of the record on appeal, if necessary, shall occur within 30 (thirty) days from the date objections must filed; and the record on appeal shall be filed with the Clerk of the Supreme Court within 15 (fifteen) days after settlement of the record on appeal.

b. Petitioner-appellants' brief shall be filed and served within 30 (thirty) days after service of the printed record by the Clerk of the Supreme Court; respondent-appellees' brief shall be filed and served within 30 (thirty) days after service of petitioner-appellants' brief; and any permitted reply brief shall be filed and served within 14 (fourteen) days after service of respondent-appellees' brief.

3. Petitioner-appellants' motions to shorten time for response are dismissed as moot inasmuch as respondent-appellees responded on 7 and 12 January 2005.

Justice Wainwright is recused and took no part in the consideration or determination of the petition and motions.

By order of the Court in Conference, this 20th day of January 2005.

Brady, J.
For the Court

STATE v. STUART

[359 N.C. 279 (2005)]

STATE OF NORTH CAROLINA	)	
	)	
v.	)	ORDER
	)	
JERRY LYNN STUART, JR.	)	

No. 627P04

The Emergency Petition for Writ of Certiorari to the Superior Court of Alamance County is allowed for the limited purpose of entering the following order:

The Order of the Superior Court denying petitioner's motion to continue is reversed and the Superior Court is instructed on remand to enter an order continuing petitioner's trial for a period of not less than ninety (90) days from the date of this Order.

By order of the Court in Conference this 22nd day of December 2004.

Newby, J.
For the Court

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

Adams v. Overcash Case below: 166 N.C. App. 763	No. 610P04	Defs' Petition for Discretionary Review Under N.C.G.S. § 7A-31 (COA04-109)	Denied 02/03/05
A.H. Beck Found. Co. v. Jones Bros., Inc. Case below: 166 N.C. App. 672	No. 614P04	1. Def's and Third Party Plaintiff's (Jones Bros., Inc.) Notice of Appeal Based Upon a Constitutional Question (COA03-1431) 2. Def's and Third Party Plaintiff's (Jones Bros., Inc.) Petition for Discretionary Review Under N.C.G.S. § 7A-31	1. Dismissed ex mero motu 02/03/05 2. Denied 02/03/05
Chatfield v. Wilmington Housing Fin. & Dev., Inc. Case below: 166 N.C. App. 703	No. 609P04	1. Plts' Petition for Discretionary Review Under N.C.G.S. § 7A-31 (COA04-44) 2. Def's Conditional Petition for Discretionary Review Under N.C.G.S. § 7A-31	1. Denied 02/03/05 2. Dismissed as moot 02/03/05
Clark v. Wal-Mart Case below: 163 N.C. App. 686	No. 321PA04	1. Defs' Petition for Discretionary Review Under N.C.G.S. § 7A-31 (COA03-435) 2. Defs' Motion to Amend Petition for Discretionary Review	1. Allowed 02/03/05 2. Allowed 02/03/05
Cunningham v. Sams Case below: 167 N.C. App. 653	No. 064P05	Def's Motion for Temporary Stay (COA03-1719)	Allowed **02/01/05**
Elliott v. County of Halifax Case below: 166 N.C. App. 279	No. 590PA04	Def's Petition for Discretionary Review Under N.C.G.S. § 7A-31 (COA03-1055)	Allowed 02/03/05
Hill v. Hill Case below: 166 N.C. App. 279	No. 419P03-2	1. Plt's Notice of Appeal Based Upon a Constitutional Question (COA03-970) 2. Plt's Petition for Discretionary Review Under N.C.G.S. § 7A-31 3. Defs' Motion to Dismiss Appeal	1. —- 2. Denied 02/03/05 3. Allowed 02/03/05 **Martin, J. Recused**

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

Home Savings Bank v. Colonial Am. Cas. & Surety Co. Case below: 165 N.C. App. 189	No. 505P04	1. Def's (Colonial American Casualty) Petition for Discretionary Review Under N.C.G.S. § 7A-31 (COA03-1110) 2. Plt's Conditional Petition for Discretionary Review Under N.C.G.S. § 7A-31	1. Denied 02/03/05 2. Dismissed as moot 02/03/05
In re A.N.B. Case below: 165 N.C. App. 705	No. 428PA04	Petitioner's (Mother) PDR Under N.C.G.S. § 7A-31 (COA03-501)	Allowed 02/03/05
In re J.L.K. Case below: 165 N.C. App. 311 359 N.C. 68	No. 402P04	1. Respondent's (G.K.) PDR Under N.C.G.S. § 7A-31 (COA03-421) 2. Respondent's Motion to Reconsider PDR	1. Denied **10/06/04** 2. Dismissed 02/03/05
In re Petition of Cent. Tel. Co. Case below: 167 N.C. App. 14	No. 632P04	1. Petitioner's (Central Telephone Co.) Notice of Appeal Based Upon a constitutional Question (COA03-1313) 2. Respondent's (Secretary of Revenue, Tolson) Motion to Dismiss Appeal 3. Petitioner's (Central Telephone Co.) Petition for Discretionary Review Under N.C.G.S. § 7A-31	1. —— 2. Allowed 02/03/05 3. Denied 02/03/05
In re R.A.C. Case below: 166 N.C. App. 759	No. 586P04	Respondent's (Mother) Petition for Discretionary Review Under N.C.G.S. § 7A-31 (COA03-1463)	Denied 02/03/05
In re T.E.F. Case below: 167 N.C. App. 1	No. 608A04	AG's NOA (Dissent) (COA03-1128) 1. AG's Motion for Temporary Stay 2. AG's Petition for Writ of Supersedeas	 1. Allowed **12/06/04** 2. Allowed **02/1/05**
Johnson v. News & Observer Publ'g Co. Case below: 167 N.C. App. 86	No. 630P04	Defs' (N&O, McClatchy and Smithfield Herald) PDR Under N.C.G.S. § 7A-31 (COA03-1386)	Denied 02/03/05
Loar v. Chavez Case below: 166 N.C. App. 763	No. 626P04	1. Def's Petition for Writ of Supersedeas (COA03-1212) 2. Def's PDR Under N.C.G.S. § 7A-31	1. Denied 02/03/05 2. Denied 02/03/05

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Manning v. County of Halifax Case below: 166 N.C. App. 279	No. 589PA04	Def's PDR Under N.C.G.S. § 7A-31 (COA03-1118)	Allowed 02/03/05
McCollum v. Atlas Van Lines Case below: 166 N.C. App. 280 359 N.C. 190	No. 521P04	Defs' Motion to Withdraw December 17, 2004 Motion for Reconsideration of Denial of Petition Filed by Defendant for Discretionary Review (COA03-897)	Allowed 02/03/05
McHam v. N.C. Mut. Life Ins. Co. Case below: 141 N.C. App. 350 357 N.C. 658	No. 597P03	Plt's Motion for Reconsideration of Denial of PWC (COA99-1458)	Dismissed 02/03/05 **Edmunds, J., recused**
Morgan v. Black Mountain Ctr./N.C. Dep't of Health & Human Servs. Case below: 165 N.C. App. 904	No. 476P04	1. Plt's Notice of Appeal Based Upon a Constitutional Question (COA03-555) 2. Plt's Petition for Discretionary Review Under N.C.G.S. § 7A-31	1. Dismissed ex mero motu 02/03/05 2. Denied 02/03/05
Satorre v. New Hanover Cty. Bd. of Comm'rs Case below: 165 N.C. App. 173	No. 404P04	1. Plt's PDR Under N.C.G.S. § 7A-31 (COA03-648) 2. Intervenor's (N.C. Counties and Property Insurance Pool Fund) Conditional PDR Under N.C.G.S. § 7A-31	1. Denied **01/21/05** 2. Dismissed as moot **01/21/05**
Sisk v. Tar Heel Capital Corp. Case below: 166 N.C. App. 631	No. 593P04	Plt's Petition for Discretionary Review Under N.C.G.S. § 7A-31 (COA04-45)	Denied 02/03/05
State v. Alexander Case below: 167 N.C. App. 79	No. 622A04	Attorney General's NOA (Dissent) (COA04-259) 1. AG's Motion for Temporary Stay 2. AG's Petition for Writ of Supersedeas	 1. Allowed **12/15/04** 2. Allowed **12/15/04**
State v. Bailey Case below: 165 N.C. App. 706	No. 465A04	Def's NOA Based Upon a Constitutional Question (COA03-338)	Dismissed ex mero motu 02/03/05

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State v. Blackstock Case below: 165 N.C. App. 50	No. 410P04	1. Def's NOA Based Upon a Substantial Constitutional Question (COA03-732) 2. AG's Motion to Dismiss Appeal 3. Def's PDR Under N.C.G.S. § 7A-31	1. —- 2. Allowed 02/03/05 3. Denied 02/03/05
State v. Carrillo Case below: 164 N.C. App. 204	No. 267P04	1. Def's Notice of Appeal Based Upon a Substantial Constitutional Question (COA03-725) 2. Def's Petition for Discretionary Review Under N.C.G.S. § 7A-31	1. Dismissed ex mero motu 02/03/05 2. Denied 02/03/05
State v. Carrothers Case below: 164 N.C. App. 411	No. 312P04	Def's Petition for Discretionary Review Under N.C.G.S. § 7A-31 (COA03-275)	Denied 02/03/05
State v. Chance Case below: 167 N.C. App. 655	No. 035P05	1. Def's NOA Based Upon a Constitutional Question (COA04-606) 2. AG's Motion to Dismiss Appeal 3. Def's Petition for Discretionary Review Under N.C.G.S. § 7A-31	1. —- 2. Allowed 02/03/05 3. Denied 02/03/05
State v. Ellis 167 N.C. App. 276	No. 638P04	AG's Motion for Temporary Stay (COA03-1065)	1. Allowed pending determination of the AG's PDR **12/23/04**
State v. Engleburt 167 N.C. App. 371	No. 019P05	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA03-1550) 2. State's Motion to Dismiss Appeal 3. Def's Petition for Discretionary Review Under N.C.G.S. § 7A-31	1. —- 2. Allowed 02/03/05 3. Denied 02/03/05
State v. Fessler Case below: 166 N.C. App. 515	No. 550P04	Def's PDR Under N.C.G.S. § 7A-31 (COA03-1246)	Denied 02/03/05
State v. Garza Case below: 167 N.C. App. 656	No. 006P05	Defendant-Appellant's Petition for Discretionary Review Under N.C.G.S. § 7A-31 (COA03-1330)	Denied 02/03/05

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State v. Gattis Case below: 166 N.C. App. 1	No. 524A04	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA03-452) 2. AG's Motion to Dismiss Appeal	1. —- 2. Allowed 02/03/05
State v. Hamrick Case below: 164 N.C. App. 412	No. 291P04	Def's Petition for Writ of Certiorari to Review the Decision of the COA (COA03-402)	Denied 02/03/05
State v. Harris Case below: 165 N.C. App. 905	No. 462P04	1. AG's Motion for Temporary Stay (COA03-916) 2. AG's Petition for Writ of Supersedeas 3. AG's PDR Under N.C.G.S. § 7A-31	1. Allowed **09/02/04** Stay Dissolved **02/03/05** 2. Denied 02/03/05 3. Denied 02/03/05
State v. Helton Case below: 164 N.C. App. 412	No. 283P04	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA03-824) 2. AG's Motion to Dismiss Appeal 3. Def's Petition for Discretionary Review Under N.C.G.S. § 7A-31	1. —- 2. Allowed 02/03/05 3. Denied 02/03/05
State v. Hines Case below: 166 N.C. App. 761	No. 563P04	Def's PDR Under N.C.G.S. § 7A-31 (COA03-1637)	Denied 02/03/05
State v. Hyatt Case below: Buncombe County Superior Court	No. 402A00-2	Def's Petition for Writ of Certiorari to Review the Order of the Superior Court	Denied 02/03/05
State v. Jackson Case below: 165 N.C. App. 546	No. 424P04	Def's Petition for Discretionary Review Under N.C.G.S. § 7A-31 (COA03-357)	Denied 02/03/05
State v. Johnson Case below: 167 N.C. App. 372	No. 645P04	Def's Petition for Discretionary Review Under N.C.G.S. § 7A-31 (COA04-282)	Denied 02/03/05
State v. Jones Case below: 166 N.C. App. 761	No. 595P04	Def's PDR Under N.C.G.S. § 7A-31 (COA03-951)	Denied 02/03/05

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State v. Jordon Case below: 138 N.C. App. 711	No. 637P04	Def's Petition for Writ of Certiorari to Review the Decision of the COA (COA99-970)	Denied 02/03/05
State v. Locklear Case below: 165 N.C. App. 905	No. 498P04	1. Def's NOA Based Upon a Constitutional Question (COA03-1260) 2. AG's Motion to Dismiss Appeal 3. Def's PDR Under N.C.G.S. § 7A-31 4. Def's Motion to Strike	1. —- 2. Allowed 02/03/05 3. Denied 02/03/05 4. Dismissed ex mero motu 02/03/05
State v. McAdoo Case below: 165 N.C. App. 222	No. 400A04	1. Def's Notice of Appeal Based Upon a Substantial Constitutional Question (COA03-1061) 2. AG's Motion to Dismiss Appeal	1. —- 2. Allowed 02/03/05
State v. McQueen Case below: 165 N.C. App. 454	No. 420P04	Def's Petition for Discretionary Review Under N.C.G.S. § 7A-31 (COA03-1251)	Denied 02/03/05
State v. Nixon Case below: 166 N.C. App. 761	No. 623P04	Def's PDR, or Alternatively, PWC (COA04-28)	Denied 02/03/05
State v. Oakley Case below: 167 N.C. App. 318	No. 021P05	Def's Petition for Discretionary Review Under N.C.G.S. § 7A-31 (COA03-1709)	Denied 02/03/05
State v. Peterson Case below: 164 N.C. App. 600	No. 319P04	1. Def's NOA Based Upon a Constitutional Question (COA03-948) 2. Def's PDR Under N.C.G.S. § 7A-31	1. Dismissed ex mero motu 02/03/05 2. Denied 02/03/05
State v. Scott Case below: 166 N.C. App. 518	No. 570P04	Def's PDR Under N.C.G.S. § 7A-31 (COA04-134)	Denied 02/03/05

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State v. Strobel Case below: 164 N.C. App. 310	No. 311P04	1. Def's NOA Based Upon a Constitutional Question (COA03-566) 2. AG's Motion to Dismiss Appeal 3. Def's PDR Under N.C.G.S. § 7A-31	1. —— 2. Allowed 02/03/05 3. Denied 02/03/05
State v. Warren Case below: Guilford County Superior Court	No. 116A96-3	Def's PWC to Review Superior Court of Guilford County	Denied 02/03/05 **Newby, J., Recused**
State v. Wilkerson Case below: 167 N.C. App. 372	No. 008P05	Defendant's-Appellant's Petition for Discretionary Review Under N.C.G.S. § 7A-31 (COA03-1665)	Denied 02/03/05
State v. Xanonh Case below: 167 N.C. App. 373	No. 020P05	Def's Petition for Discretionary Review Under N.C.G.S. § 7A-31 (COA03-1583)	Denied 02/03/05
Stephenson v. Bartlett Case below: Wake County Superior Court	No. 094P02-4	Plts' Motion to Allow Direct Appeal and Review	Denied 02/03/05 **Martin, J., Recused**
Stetser v. TAP Pharm. Prods., Inc. Case below: 162 N.C. App. 518	No. 142PA04	1. Plts' Amended Motion to Withhold Plaintiff Appellants' Brief from the Public (COA03-180) 2. Def's (Takada Chemical Industries, Ltd.) Motion to Seal Selected Portions of Plaintiff Appellant's Brief and Related Document	1. Denied **01/18/05** 2. Allowed 02/03/05
White v. Consolidated Planning, Inc. Case below: 166 N.C. App. 283	No. 579P04	Def's (Consolidated Planning, Inc.) Petition for Discretionary Review Under N.C.G.S. § 7A-31 (COA03-483)	Denied 02/03/05

PETITION TO REHEAR

Young v. Great Am. Ins. Co. of New York Case below: 359 N.C. 58	No. 054A04	Defs' (April S. Wortham, Ophelia Pechie and Shannon Steck Peele) Petition for Rehearing (COA02-1491)	Denied 02/03/05

STATE OF NORTH CAROLINA v. RONALD LEE POINDEXTER,
A/K/A RONALD LEE PUGH, A/K/A SAM PUGH

No. 563A99-2

(Filed 4 March 2005)

1. Constitutional Law— effective assistance of counsel—failure to present diminished capacity defense—trial strategy

Although the trial court properly vacated defendant's death sentence and ordered a new capital sentencing hearing based on ineffective assistance of defendant's trial counsel during his 2002 sentencing proceeding for first-degree murder, defendant did not receive ineffective assistance of counsel based on his attorneys' failure to present a diminished capacity defense during the guilt-innocence phase of defendant's 2002 capital trial, because: (1) diminished capacity is a means of negating the ability to form the specific intent to kill required for a first-degree murder conviction on the basis of premeditation and deliberation and as such is inconsistent with defendant's claim of innocence; and (2) although defense counsel pursued a defense of insanity, rather than insanity and diminished capacity, decisions concerning which defenses to pursue are matters of trial strategy and are not generally second-guessed by our Supreme Court.

2. Criminal Law— motion for appropriate relief—adjudicating defendant mentally retarded—jurisdiction

The superior court did not err by concluding that it lacked jurisdiction in a first-degree murder case to conduct an evidentiary hearing with respect to defendant's motion for appropriate relief (MAR) to adjudicate defendant mentally retarded under N.C.G.S. § 15A-2005, because: (1) the General Assembly did not intend for superior courts to make post-conviction determinations of mental retardation outside the confines of N.C.G.S. § 15A-2006; and (2) the one-year window for post-conviction determinations of mental retardation under N.C.G.S. § 15A-2006 has expired, and N.C.G.S. § 15A-2005 allows only for pretrial and sentencing determinations of mental retardation.

Justice NEWBY did not participate in the consideration or decision of this case.

On certification of an order entered 18 November 2003 by Judge Clarence E. Horton, Jr. in Superior Court, Randolph County, vacating

defendant's death sentence and ordering a new sentencing hearing, pursuant to this Court's 22 May 2003 order remanding defendant's motion for appropriate relief (MAR) to the trial court. On 28 May 2004, this Court allowed defendant's motion for supplemental briefing and oral argument on issues related to the MAR and resulting order. Heard in the Supreme Court 8 November 2004.

Roy Cooper, Attorney General, by Ellen B. Scouten and Valérie B. Spalding, Special Deputy Attorneys General, for the State.

Staples Hughes, Appellate Defender, by Janet Moore, Assistant Appellate Defender, for defendant-appellant.

BRADY, Justice.

This Court must address two dispositive issues: (1) whether the failure of defendant's attorneys to present a diminished capacity defense during the guilt-innocence phase of defendant's 2002 capital trial for first-degree murder constituted ineffective assistance of counsel, and (2) whether the superior court lacked jurisdiction to conduct the evidentiary hearing with respect to defendant's motion for appropriate relief (MAR) to adjudicate defendant mentally retarded under N.C.G.S. § 15A-2005. We determine that defendant's 2002 trial counsel was not constitutionally ineffective and that the procedures established in N.C.G.S. § 15A-2005 are the only avenues by which a defendant may be adjudicated mentally retarded by a superior court. Therefore, determinations of mental retardation must be made either initially by the superior court in a pretrial proceeding or during a subsequent sentencing proceeding by a jury.

PROCEDURAL HISTORY

On 17 December 1997, defendant Ronald Lee Poindexter, also known as Ronald Lee Pugh and Sam Pugh, drove to his niece's home where, unbeknownst to defendant, the Randolph County Sheriff's Department was investigating a 911 emergency telephone call. As defendant exited the car, the officers present noted that defendant was covered in blood and that a woman's partially-clothed body was slouched in the front seat of the vehicle. The law enforcement officers determined that the woman, whom defendant identified as Wanda Coltrane, was deceased. An autopsy later revealed that Ms. Coltrane died from multiple knife wounds to the neck inflicted by a serrated blade.

Defendant was indicted for the first-degree murder of Wanda Coltrane by a Randolph County grand jury on 23 February 1998. On 18 November 1999, a Randolph County jury found defendant guilty of first-degree murder based on malice, premeditation and deliberation and under the felony murder rule, with the underlying felony being attempted rape. The jury recommended a sentence of death and, on 30 November 1999, the Honorable Howard R. Greeson, Jr. entered judgment accordingly. Defendant entered a direct appeal and, on 4 May 2001, this Court ordered that defendant receive a new trial due to juror misconduct during the guilt-innocence phase. *State v. Poindexter*, 353 N.C. 440, 444, 545 S.E.2d 414, 416 (2001).

Defendant was retried during the 14 January 2002 Criminal Session of Randolph County Superior Court and was represented by the same attorneys as during his 1999 trial. On 24 January 2002, a second jury found defendant guilty of the first-degree murder of Wanda Coltrane based on malice, premeditation and deliberation and under the felony murder rule. On 29 January 2002, the jury recommended that defendant be sentenced to death, and Judge Greeson again imposed a capital sentence. Defendant immediately filed notice of appeal and received new appointed appellate counsel. On 21 May 2002, this Court stayed defendant's execution until his second direct appeal was resolved.

On 28 April 2003, while defendant's second direct appeal was still pending, defendant filed a MAR with this Court pursuant to N.C.G.S. § 15A-1418. On 22 May 2003, this Court allowed defendant's MAR for the limited purpose of remanding the motion to the Randolph County Superior Court for a determination of whether "[i]neffective assistance of trial counsel requires that defendant receive a new trial or, in the alternative, that his death sentence be vacated and the case remanded for the [superior] court either to impose a sentence of life imprisonment without parole, or to hold a new sentencing hearing." Further, this Court directed the superior court to determine whether "[t]he trial court lacked jurisdiction to impose a death sentence upon [defendant], a person with mental retardation . . . ." *State v. Poindexter*, 357 N.C. 248, 248, 581 S.E.2d 762, 762 (2003). In allowing defendant's motion, this Court ordered that the superior court transmit its order from the evidentiary hearing to "this Court so that it may proceed with the [second direct] appeal or enter such other appropriate order as required." *Id.*

An evidentiary hearing with respect to defendant's MAR was held during the 3 November 2003 session of Randolph County Superior

Court. On 18 November 2003, the court entered an order denying both defendant's request to be adjudicated mentally retarded and to receive a new trial on the grounds of ineffective assistance of counsel during the guilt-innocence phase of his second capital trial. However, the court's order did vacate defendant's death sentence and order a new capital sentencing hearing due to ineffective assistance of defendant's trial counsel during his 2002 sentencing proceeding. Consistent with this Court's 22 May 2003 order allowing defendant's MAR, we now review the trial court's order resolving the issues raised by defendant in his MAR.

As a preliminary matter, we note that the State does not challenge the trial court's conclusion that defendant received ineffective assistance of counsel during the 2002 sentencing proceeding. Accordingly, the two issues before this Court are: (1) whether defendant's trial counsel rendered ineffective assistance of counsel during the guilt-innocence phase of defendant's 2002 trial, and (2) whether the superior court erred in concluding that it lacked jurisdiction during a post-conviction MAR evidentiary hearing to adjudicate defendant mentally retarded. In reviewing the superior court's order, we are mindful that

> [f]indings of fact made by the trial court pursuant to hearings on motions for appropriate relief are "binding upon the [defendant] if they were supported by evidence." *State v. Stevens*, 305 N.C. 712, 719-20, 291 S.E.2d 585, 591 (1982). "Our inquiry therefore, is to determine whether the findings of fact are supported by evidence, whether the findings of fact support the conclusions of law, and whether the conclusions of law support the order entered by the trial court." *Stevens*, 305 [N.C.] at 720, 291 S.E.2d at 591; *see also* [] *State v. Morganherring*, 350 N.C. 701, 714, 517 S.E.2d 622, 630 (1999), *cert. denied*, 529 U.S. 1024, 146 L. Ed. 2d 322 (2000).

State v. Matthews, 358 N.C. 102, 105-06, 591 S.E.2d 535, 538 (2004).

INEFFECTIVE ASSISTANCE OF COUNSEL

[1] We find no error in the superior court's 18 November 2003 determination that the failure of defendant's 2002 trial counsel to present a diminished capacity defense during the guilt-innocence phase of defendant's trial does not constitute constitutionally ineffective assistance of counsel. To establish ineffective assistance of counsel a defendant must first show that his defense counsel's

performance was deficient. *Strickland v. Washington*, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 693 (1984). Next, a defendant must establish that this deficiency prejudiced his defense. *Id.* "[T]o establish prejudice, a 'defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.' " *Wiggins v. Smith*, 539 U.S. 510, 534, 156 L. Ed. 2d 471, 493 (2003) (quoting *Strickland*, 466 U.S. at 694, 80 L. Ed. 2d at 698).

The superior court's findings of fact establish that in preparation for the 1999 trial, defense counsel retained Dr. Nathan Strahl, a licensed psychiatrist, to perform a "mental status examination" of defendant. Dr. Strahl was specifically retained to assess defendant's limited intelligence and cocaine abuse as these factors related to a potential diminished capacity defense. However, Dr. Strahl concluded that defendant's substance abuse and intelligence quotient did not meet the legal definition of diminished capacity; thus, Dr. Strahl was not called to testify until the sentencing phase of the 1999 trial. Similarly, Dr. Strahl was not called as a witness during the guilt-innocence phase of defendant's 2002 capital trial nor did he testify during the sentencing phase.

The superior court also found that defendant did not testify during his 1999 trial. However, during defendant's 2002 trial, he "elected to testify in support of a defense that unknown assailants killed Ms. Coltrane, a defense inconsistent with a diminished capacity defense." Defendant now claims that the failure of his trial counsel to assert a diminished capacity defense during the guilt-innocence phase of his 2002 trial amounts to ineffective assistance of counsel because the defense of diminished capacity does not "undermine[] [defendant's] claim of innocence."

However, defendant's argument ignores the reality that "[d]iminished capacity is a means of negating the 'ability to form the specific intent to kill required for a first-degree murder conviction on the basis of premeditation and deliberation,' " *State v. Roache*, 358 N.C. 243, 282, 595 S.E.2d 381, 407 (2004) (quoting *State v. Page*, 346 N.C. 689, 698, 488 S.E.2d 225, 231 (1997), *cert. denied*, 522 U.S. 1056, 139 L. Ed. 2d 651 (1998)), and as such is clearly inconsistent with a claim of innocence.

Furthermore, in addressing whether trial counsel was constitutionally ineffective because a defense of insanity, rather than insanity

and diminished capacity, was pursued at trial, this Court has indicated that "[d]ecisions concerning which defenses to pursue are matters of trial strategy and are not generally second-guessed by this Court." *State v. Prevatte*, 356 N.C. 178, 236, 570 S.E.2d 440, 472 (2002), *cert. denied*, 538 U.S. 986, 155 L. Ed. 2d 681 (2003). Because we find that the superior court's findings of fact are clearly supported by the evidence presented and those findings of fact adequately support the superior court's conclusion of law that defendant's trial attorneys were not constitutionally ineffective during the guilt-innocence phase of the trial, we decline to second-guess the strategic reasons of defense counsel for not pursuing a diminished capacity defense in defendant's second trial. Accordingly, we find no error.

SUBJECT MATTER JURISDICTION OF SUPERIOR COURT TO ADJUDICATE DEFENDANT MENTALLY RETARDED

[2] Similarly, we find no error in the superior court's conclusion that it lacked jurisdiction to adjudicate defendant mentally retarded. In *Atkins v. Virginia*, 536 U.S. 304, 321, 153 L. Ed. 2d 335, 350 (2002), the United States Supreme Court held that executing mentally retarded individuals violates the Eighth Amendment to the United States Constitution prohibition against excessive punishment. However, that Court also stated:

> To the extent there is serious disagreement about the execution of mentally retarded offenders, it is in determining which offenders are in fact retarded. In this case, for instance, the Commonwealth of Virginia disputes that Atkins suffers from mental retardation. *Not all people who claim to be mentally retarded will be so impaired as to fall within the range of mentally retarded offenders about whom there is a national consensus.* As was our approach in *Ford v. Wainwright*, 477 U.S. 399, [91 L. Ed. 2d 335] (1986), with regard to insanity, "*we leave to the State[s] the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences*."

Id. at 317, 153 L. Ed. 2d at 347-48 (emphasis added) (footnote and citations omitted). Thus, the United States Supreme Court left the implementation of *Atkins* entirely to state legislatures.

The North Carolina statute prohibiting execution of mentally retarded individuals and defining mental retardation for that purpose, codified at N.C.G.S. § 15A-2005, was enacted in 2001 and

thus antedates the *Atkins* decision. However, it is noteworthy that the legal definition of mental retardation set forth in N.C.G.S. § 15A-2005(a) was referenced by the United States Supreme Court when it handed down its holding in *Atkins*. *Id.* at 308 n.3, 314-15 & 317 n.22, 153 L. Ed. 2d at 342 n.3, 346 & 348 n.22.

With respect to mental retardation, our General Assembly has stated that "no defendant who is mentally retarded shall be sentenced to death." N.C.G.S. § 15A-2005(b) (2003). The General Assembly further clarified that:

> (a) (1) The following definitions apply in this section:
>
> a. Mentally retarded.—Significantly subaverage general intellectual functioning, existing concurrently with significant limitations in adaptive functioning, both of which were manifested before the age of 18.
>
> b. Significant limitations in adaptive functioning.—Significant limitations in two or more of the following adaptive skill areas: communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure skills and work skills.
>
> c. Significantly subaverage general intellectual functioning.—An intelligence quotient of 70 or below.
>
> (2) The defendant has the burden of proving significantly subaverage general intellectual functioning, significant limitations in adaptive functioning, and that mental retardation was manifested before the age of 18. An intelligence quotient of 70 or below on an individually administered, scientifically recognized standardized intelligence quotient test administered by a licensed psychiatrist or psychologist is evidence of significantly subaverage general intellectual functioning; however, it is not sufficient, without evidence of significant limitations in adaptive functioning and without evidence of manifestation before the age of 18, to establish that the defendant is mentally retarded.

N.C.G.S. § 15A-2005(a) (2003).

Procedurally, under the statute, a defendant may seek a pretrial determination of mental retardation. *Id.* § 15A-2005(c) (2003). Should the State consent to such a hearing, a defendant must carry "the burden of production and persuasion to demonstrate mental retardation

by clear and convincing evidence." *Id.* If the trial court determines that a defendant is mentally retarded, the case may only proceed noncapitally. *Id.* However, if the trial court determines that a defendant is not mentally retarded, the defendant may still seek a jury determination of mental retardation during the sentencing hearing. N.C.G.S. § 15A-2005(e) (2003). Thus, under N.C.G.S. § 15A-2005, determinations of mental retardation must be made either initially by the superior court in a pretrial proceeding, or subsequently during a sentencing proceeding by the jury.

In the case *sub judice*, defendant argues that N.C.G.S. §§ 15A-1411 to 1422, which govern resolution of MAR proceedings, empowered the superior court to determine that he is mentally retarded. Defendant further argues that N.C.G.S. § 15A-2005 is relevant to MAR proceedings only to the extent that it provides a standard by which a superior court judge must determine whether a particular defendant is mentally retarded and thereby not subject to imposition of the death penalty under North Carolina law.

Critical to our determination, we note that N.C.G.S. § 15A-2006 (2001), which expired 1 October 2002 pursuant to Act of July 25, 2001, ch. 346, sec. 4, 2001 N.C. Sess. Laws 1038, 1041, specifically provided a window of opportunity from 1 October 2001 to 1 October 2002 for post-conviction determinations of mental retardation for those defendants who had already been sentenced to death and were therefore unable to avail themselves of the procedures established in N.C.G.S. § 15A-2005. Therefore, N.C.G.S. § 15A-2006 established an interim procedure for post-conviction determinations of mental retardation subject to the MAR procedures established in N.C.G.S. § 15A-1420. *See State v. Anderson*, 355 N.C. 136, 149-50, 558 S.E.2d 87, 96 (2002) (applying N.C.G.S. § 15A-2006). N.C.G.S. § 15A-2006 stated:

> In cases in which the defendant has been convicted of first-degree murder, sentenced to death, and is in custody awaiting imposition of the death penalty, the following procedures apply:
>
> (1) *Notwithstanding any other provision or time limitation contained in Article 89 of Chapter 15A, a defendant may seek appropriate relief from the defendant's death sentence upon the ground that the defendant was mentally retarded*, as defined in G.S. 15A-2005(a), at the time of the commission of the capital crime.

(2) *A motion seeking appropriate relief from a death sentence on the ground that the defendant is mentally retarded*, shall be filed:

a. On or before January 31, 2002, if the defendant's conviction and sentence of death were entered prior to October 1, 2001.

b. Within 120 days of the imposition of a sentence of death, if the defendant's trial was in progress on October 1, 2001. For purposes of this section, a trial is considered to be in progress if the process of jury selection has begun.

(3) *The motion, seeking relief from a death sentence upon the ground that the defendant was mentally retarded, shall comply with the provisions of G.S. 15A-1420. The procedures and hearing on the motion shall follow and comply with G.S. 15A-1420.*

N.C.G.S. § 15A-2006 (2001) (emphasis added).

Both parties concede that N.C.G.S. § 15A-2006 does not apply in this case; however, N.C.G.S. § 15A-2006 is instructive because it clearly establishes that the drafters of N.C.G.S. §§ 15A-2005 and 15A-2006 considered adjudication of mental retardation through motions for appropriate relief. Although N.C.G.S. § 15A-2006 specifically allows adjudication of mental retardation via motions for appropriate relief, such provisions are conspicuously absent from N.C.G.S. § 15A-2005. This absence necessitates the conclusion that the General Assembly did not intend for superior courts to make post-conviction determinations of mental retardation outside the confines of N.C.G.S. § 15A-2006.

Thus, we conclude that N.C.G.S. § 15A-1417 of the Criminal Procedure Act, which was enacted in 1977 and allows a trial court to fashion "any other appropriate relief," must be read *in pari materia* with the more recently enacted N.C.G.S. §§ 15A-2005 and 15A-2006 of the Criminal Procedure Act. Therefore, because the one-year window for post-conviction determinations of mental retardation under N.C.G.S. § 15A-2006 has expired and because N.C.G.S. § 15A-2005 allows only for pretrial and sentencing determinations of mental retardation, superior courts are without jurisdiction to adjudicate criminal defendants mentally retarded via a motion for appropriate relief proceeding. Accordingly, we find no error in the superior

court's order and note that defendant will have the opportunity to be fully heard on the issue of mental retardation in his upcoming resentencing proceeding.

For the reasons stated herein, we affirm the order of the superior court vacating defendant's death sentence and ordering a new capital sentencing hearing. We further affirm the order of the superior court which denied defendant's request for a new trial and denied defendant's request that the superior court adjudicate him mentally retarded.

Inasmuch as this Court has affirmed the trial court's resolution of defendant's MAR, this Court cannot proceed further with defendant's direct appeal until defendant is resentenced and the appropriate appellate jurisdiction is established.

AFFIRMED; REMANDED FOR NEW SENTENCING PROCEEDING.

Justice NEWBY did not participate in the consideration or decision of this case.

ASSOCIATED INDUSTRIAL CONTRACTORS, INC. v. FLEMING ENGINEERING, INC.

No. 107A04

(Filed 4 March 2005)

Construction Claims— negligence—error in surveying construction work

The trial court did not err in a negligence case arising out of a dispute over surveying construction work performed on a building by inferring that defendant company, who conducted an electronic survey and identified the points where the wall columns for the addition should be erected, was more likely than not the source of error because: (1) the evidence showed the south wall was parallel to the north wall but not at the correct angle, and it is unlikely that defendant properly plotted the points in a straight parallel line but that plaintiff then incorrectly placed the columns on different points which created a skewed but nonetheless straight line; (2) if plaintiff's negligence caused the line to be

skewed it is highly probable that the line also would not be straight; and (3) the evidence does not show defendant checked the survey points to ensure the north and south walls of the addition would form parallel straight lines.

Justice EDMUNDS dissenting.

Justice PARKER joins in the dissenting opinion.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 162 N.C. App. 405, 590 S.E.2d 866 (2004), affirming a judgment entered 31 May 2002 and an order entered 17 June 2002 by Judge John O. Craig, III in Superior Court, Rockingham County. Heard in the Supreme Court 6 December 2004.

Parker, Poe, Adams & Bernstein L.L.P., by R. Bruce Thompson II, for plaintiff-appellee.

Hedrick, Eatman, Gardner & Kincheloe, L.L.P., by C.J. Childers, for defendant-appellant.

WAINWRIGHT, Justice.

The present case stems from a dispute over surveying construction work performed on a building in Swepsonville, North Carolina.

Honda Manufacturing hired plaintiff, Associated Industrial Contractors, Inc., to build an addition to Honda's die cast facility. The addition was planned to be eighty feet wide and one hundred twenty feet long and sit on the west side of the die cast facility. The building plans required a ten ton bridge crane to run from the existing Honda building through the addition on the same runway. To accommodate this crane, the addition had to be perfectly square with the die cast facility. Existing buildings surrounding the location prohibited plaintiff from using traditional surveying methods to identify the points for the addition's columns. Moreover, windy conditions at the site prevented plaintiff from surveying the column points with a plumb bob (a weight attached to a line used for verifying true vertical alignment). Because of these complications, plaintiff hired defendant Fleming Engineering, Inc. to conduct an electronic survey and identify the points where the wall columns for the addition should be erected.

On 22 December 2000, Johnnie Register, Jr., one of defendant's employees, conducted the electronic survey. Lanny Joyce, plaintiff's

superintendent for the Honda addition, told Register that the survey had to set points that were square to the existing die cast building. Register testified that he conducted the survey with an electronic transit. According to Register, this device has a scope that allows the operator to see string lines on a plumb bob a "couple of hundred feet away." The device also has an LCD screen that reports the angle that the person has rotated and distances that are being measured. Register's assistant, John Davis, operated the electronic transit while Register marked both the center points for the columns and offset points with nails. Register testified that he "did look back through the [electronic transit] to confirm straight lines through most of these points."

Following defendant's completion of the survey, plaintiff began excavation of the site. Based on the points set by defendant's survey, plaintiff set "hubs" where the footings should be placed. Plaintiff then dug the footings. Plaintiff used "batter boards" to mark the exact location of the columns. Batter boards are offset lines which mark survey points by stringing a line diagonally from each corner of the batter boards. Plaintiff then erected the columns in accordance with the points set by defendant's survey.

In February 2001 plaintiff discovered that the south line of the addition was not properly aligned with the north line of the addition. The south line was straight but was skewed from west to east and was not square with the rest of the addition. On 28 June 2001, plaintiff filed suit, alleging that defendant negligently failed to survey two parallel straight lines. A bench trial was conducted during the 13 May 2002 term of Rockingham County Superior Court. The trial court denied defendant's N.C.G.S. § 1A-1, Rule 41(b) motions for dismissal at the close of plaintiff's evidence and at the close of all the evidence. On 31 May 2002, the trial court entered judgment in favor of plaintiff and awarded $23,000.00 in damages. The court deducted $436.00 (the amount plaintiff owed defendant for defendant's professional services) as a setoff from plaintiff's award and entered judgment for plaintiff in the amount of $22,564.00. On 17 June 2002, the trial court denied defendant's motions for a new trial and for judgment notwithstanding the verdict.

The Court of Appeals affirmed the trial court's judgment and award. *Associated Indus. Contr'rs, Inc. v. Fleming Eng'g Inc.*, 162 N.C. App. 405, 590 S.E.2d 866 (2004). The Court of Appeals majority identified the central issue at trial as "whether [defendant] Fleming negligently misidentified the location for the columns or whether

[plaintiff] AIC [Associated Industrial Contractors] improperly placed the columns after the center points for the columns had been correctly set by [defendant] Fleming." *Id.* at 407, 590 S.E.2d at 868. The Court of Appeals held that "the record contains sufficient evidence to support the trial court's determination that [defendant] Fleming was the negligent party." *Id.* However, the dissent concluded that "plaintiff failed to establish the applicable standard of care and the trial court improperly denied defendant's motion to dismiss." 162 N.C. App. at 419, 590 S.E.2d at 876.

Pursuant to N.C.G.S. § 7A-30, this Court now considers the issue raised by the dissent. After thoroughly reviewing the record and briefs in this case, we are unable to discern any error by the trial court in its handling of the present case.

In response to plaintiff's complaint, defendant alleged in its answer that plaintiff negligently "failed to heed the generally accepted standards of construction with regards to placement of anchor bolts in the erection of steel at the site of the construction in question." Further, at trial, defendant's surveyor, Johnnie Register, agreed that the south line of columns was straight, but skewed in relation to the rest of the addition by as much as six inches. The parties agree that either plaintiff or defendant was responsible for the south line of columns being skewed. Accordingly, the critical issue at trial was not whether an error occurred which caused the south line to be skewed, but which party, plaintiff or defendant, committed the error which caused the line to be skewed. Specifically, the trial court had to consider whether the south line was skewed because defendant failed to set the points properly during the survey or because plaintiff did not set the columns on the points identified during the survey. At trial, plaintiff argued that defendant improperly placed the column points. Defendant argued that it properly placed the column points, but that those points became misaligned when plaintiff's employees moved a batter board and recreated the column points.

The context for our consideration of this issue is whether there was competent evidence to support the trial court's verdict. In this case, the trial court acted as the trier of the facts. "The findings of fact made by the trial judge are conclusive on appeal if supported by competent evidence, even if, *arguendo*, there is evidence to the contrary." *Lumbee River Elec. Membership Corp. v. City of Fayetteville*, 309 N.C. 726, 741, 309 S.E.2d 209, 219 (1983).

Two facts support the trial court's verdict. First, the fact that the south line was skewed, but still formed a straight line, supports the trial court's judgment. The evidence presented at trial showed that the south line was straight, but skewed rather than parallel to the north line. It is unlikely that defendant properly plotted the points in a straight, parallel line, but plaintiff then incorrectly placed the columns on different points which created a skewed but nonetheless straight line. In fact, plaintiff's project manager for the job, Curtis Flanigan, testified that if plaintiff's employees had improperly placed the columns, and if they had "just placed the columns willy-nilly, [Flanigan would] expect one column to be up, one to be down, another one to be down, another one to be back up." Instead, as Flanigan testified, all the columns in the south line were in a straight line. Simply put, if plaintiff's negligence caused the line to be skewed, it is highly probable that the line also would not be straight. Because all four columns on the south wall formed a straight line, the evidence supported the trial court's conclusion that defendant was responsible for the south wall's misalignment.

Second, the evidence does not show defendant checked the survey points to ensure the north and south walls of the addition would form parallel, straight lines. Register testified that his assistant, John Davis, ran the transit instrument while Register set the points. Although Register testified that he "look[ed] back through the [transit] instrument to confirm straight lines through *most* of [the] points," Register did not confirm all of the points. Specifically, Register did not testify that he confirmed the south line was properly aligned with the north line. Davis, who was responsible for confirming the lines and angles of the survey points, did not testify. Thus, the record does not show Register, or anyone else, confirmed that the south line of columns was properly aligned.

The trial court was entitled to infer that defendant was more likely than not the source of error from (1) the evidence showing the south wall was parallel to the north wall but not at the correct angle, and (2) the absence of evidence showing defendant confirmed the alignment of the south wall. The evidence presented in this case supports the trial court's finding that defendant was negligent. Therefore, the trial court's finding is supported by competent evidence and is conclusive on appeal. *Id.* at 741-42, 309 S.E.2d at 218-19.

We fail to find any legal error in the trial of the present matter. Accordingly, we affirm the decision of the Court of Appeals.

AFFIRMED.

Justice EDMUNDS dissenting.

The majority concludes that the trial court correctly determined that, between the two parties, the evidence supported finding defendant responsible for the error. However, a finding of responsibility does not necessarily imply a finding of negligence. The majority identifies but never addresses the issue raised in Chief Judge Eagles' dissent in the Court of Appeals, that is, whether plaintiff was required to present expert evidence as to the standard of care required of defendant. Absent such evidence, the finder of fact had no basis for concluding that defendant was negligent.

The practice in North Carolina is to require expert testimony as to the applicable standard of care whenever a negligence action is brought against a professional or other individual who works in an area where the standard of care involves "highly specialized knowledge with respect to which a layman can have no reliable information." *Mazza v. Huffaker*, 61 N.C. App. 170, 175, 300 S.E.2d 833, 837 (quoting *Jackson v. Mountain Sanitarium & Asheville Agric. Sch.*, 234 N.C. 222, 227, 67 S.E.2d 57, 61 (1951)), *disc. rev. denied*, 309 N.C. 192, 305 S.E.2d 734 (1983); *see also* David A. Logan & Wayne A. Logan, *North Carolina Torts* § 11.10 (2d ed. 2004). An exception to this rule, on which the majority apparently relies, arises where the "common knowledge and experience of the [fact finder] is sufficient to evaluate compliance with a standard of care." *Delta Envtl. Consultants of N.C., Inc. v. Wysong & Miles Co.*, 132 N.C. App. 160, 168, 510 S.E.2d 690, 695, *disc. rev. denied*, 350 N.C. 379, 536 S.E.2d 70 (1999). This exception applies when professional conduct is so grossly negligent that lay knowledge is sufficient to "make obvious the shortcomings of the professional." *Id.* at 168, 510 S.E.2d at 696; *see also McGill v. French*, 333 N.C. 209, 218, 424 S.E.2d 108, 113 (1993); *Groce v. Myers*, 224 N.C. 165, 170, 29 S.E.2d 553, 557 (1944).

I do not believe that this "common knowledge" exception applies in the instant case to relieve plaintiff of its duty to provide expert testimony as to the standard of care that defendant was required to meet. As detailed in the majority opinion, the evidence shows that Honda planned to add to an existing building an extension that was to be 80 feet wide by 120 feet long. Because it would tie into an existing crane, the extension had to be in the precise shape of a rectangle with 90 degree angles at each corner. Defendant made the measure-

ments. Once construction began, however, the 120 foot long south wall was found to be straight but not parallel to the 120 foot long north wall. At its far end, the south wall deviated 5.75 inches from the path it would have followed had it been perfectly parallel to the north wall. Using this information, straightforward trigonometric analysis reveals that the angle at the southern corner where the extension met the existing building was 90 degrees 13 minutes 12 seconds (or 90.2288 degrees) rather than 90 degrees exactly.[1]

While this small error had large consequences, those consequences may not be dispositive as to whether any actionable negligence occurred when defendant measured the angle. Large effects can result from a minuscule initial cause, as in the classic example where a kicked pebble triggers a landslide. While we hope for perfection among professionals, we do not require it. The record is devoid of any evidence as to the tolerances those in the surveying profession observe in carrying out their responsibilities. Nor does the evidence suggest whether a surveying error is judged on the basis of the magnitude of the mistake in the original measurement, on the basis of the results of the mismeasurement, or on both. Without such evidence, the fact finder had insufficient grounds on which to decide whether defendant was negligent. Therefore, plaintiff had the burden of introducing expert testimony as to the standard of care required of a surveyor, especially where, as here, conditions challenged or confounded usual surveying techniques. Accordingly, I respectfully dissent.

Justice PARKER joins in this dissenting opinion.

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1. To recreate this calculation, draw a horizontal line representing the south wall as it should have been, parallel to the north wall and 1,440 inches (120 feet) long. Draw down from the left end of the horizontal line a vertical line that is 5.75 inches long, the amount by which the far end of the south wall deviated from being parallel with the north wall. These two lines meet at a 90-degree angle. Connect the ends of these two lines to make a right triangle. The hypotenuse of the triangle is the path the south wall actually followed. The remaining characteristics of the triangle can be derived from the known right angle and the two known sides.

DAVID N. v. JASON N.

[359 N.C. 303 (2005)]

DAVID N. AND DEBORAH N. v. JASON N. AND CHARLA B.

No. 294A04

(Filed 4 March 2005)

Child Support, Custody, and Visitation— custody—fitness of parent—waiver of constitutionally protected status as natural parent

The trial court's finding that defendant biological father is a fit and proper person to care for his minor child did not preclude it from making the conclusion of law that defendant waived his constitutionally protected status as a natural parent based upon his conduct of abandonment and neglect, thus allowing the trial court to grant joint or paramount custody to plaintiff paternal grandparents, because a natural parent may lose his constitutionally protected right to the control of his children by a finding of unfitness of the natural parent or where the natural parent's conduct is inconsistent with his or her constitutionally protected status. However, the trial court failed to apply the clear and convincing evidence standard as set forth in *Adams v. Tessener*, 354 N.C. 57 (2001), and the case is remanded for findings of fact consistent with this standard of evidence.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 164 N.C. App. 687, 596 S.E.2d 266 (2004), reversing and remanding a judgment entered on 10 June 2002 by Judge Peter L. Roda in District Court, Buncombe County. Heard in the Supreme Court 8 December 2004.

Mary Elizabeth Arrowood for plaintiff-appellants.

The Sutton Firm, P.A., by April Burt Sutton, for defendant-appellee Jason N.

LAKE, Chief Justice.

In this custody case, the question presented for review is whether the trial court's finding that defendant Jason N. is a fit and proper person to care for the minor child, J.L.N., precludes its conclusion of law that defendant waived his constitutionally protected status as a natural parent based upon his conduct of abandonment and neglect.

The Court of Appeals' majority reversed the trial court, holding that the trial court's "finding of [defendant's] fitness is inconsistent with the conclusion of law that he not be afforded his constitutional right to parent his child." *David N. v. Jason N.*, 164 N.C. App. 687, 690, 596 S.E.2d 266, 268 (2004). The Court of Appeals remanded the case to the trial court for it to make findings of fact supporting its conclusions of law. *Id.* Judge Wynn dissented, arguing that a finding by the trial court of "fitness" of a natural parent "does not exclude a determination that the parent acted in a manner inconsistent with his constitutionally protected status as a parent." *Id.* at 691, 596 S.E.2d at 269.

Plaintiffs appeal to this Court as of right based on the dissenting opinion of Judge Wynn. After careful review, we reverse the decision of the Court of Appeals and remand the case to the Court of Appeals for further remand to the trial court for findings of fact consistent with the principles and standard of evidence set forth in this opinion.

J.L.N. was born on 2 July 1992. Defendant Jason N. is the biological father of J.L.N. Defendant Charla B., the biological mother of J.L.N., abandoned the child and has never participated in this action. Plaintiff David N. is the paternal grandfather of J.L.N. and plaintiff Deborah N. is the paternal step-grandmother of J.L.N.

When J.L.N. was approximately ten months of age, he began living with plaintiffs. Defendant would infrequently visit with J.L.N. and did not have a parent-child relationship with J.L.N. Plaintiffs enrolled J.L.N. in kindergarten, and he has thrived in school while under plaintiffs' care. Defendant has never been active in J.L.N.'s life, has not attended sporting events in which J.L.N. participated, and has never financially supported J.L.N. Plaintiffs have taken care of all of J.L.N.'s medical and dental care since he was ten months old. Defendant has had no involvement in providing for J.L.N.'s medical needs.

In March 2000, plaintiffs contacted defendant asking for custody of J.L.N. so that plaintiffs could add J.L.N. to their health insurance policy and arrange for a surgical procedure which J.L.N. needed. Defendant refused this request, and plaintiffs filed for custody of J.L.N.

At trial, J.L.N.'s therapist testified that it would be contrary to the best interest of J.L.N. to remove him from plaintiffs' primary care and custody. The trial court found that both plaintiffs and defendant were fit and proper persons to have the care and custody of J.L.N., but that

it would be in the best interest of J.L.N. to continue to reside primarily with plaintiffs and to have visitation with defendant. The trial court concluded as a matter of law that defendant's conduct toward or relationship with J.L.N. was "inconsistent with his preferred status as the biological parent of the minor child in that those acts are tantamount to abandonment, neglect, abuse or other acts inconsistent with [a] natural parent's constitutionally protected interest." The trial court went on to conclude that the "best interest of the child" test prescribed in N.C.G.S. § 50-13.2(a) applied and that "[i]t is in the best interest of the minor child that he be placed in the joint custody and control of both parties, with the primary placement in the plaintiffs subject to the father's visitation."

The Court of Appeals reversed the decision of the trial court, holding that the finding of fitness of defendant precluded the trial court from concluding that defendant had lost his constitutional right to parent his child based on his conduct towards that child. Judge Wynn dissented, contending that "natural parents may forfeit their constitutionally protected status by a finding of either (1) unfitness, *or* (2) acting in a manner that is inconsistent with their constitutionally protected status." *David N.*, 164 N.C. App. at 691-92, 596 S.E.2d at 269.

This Court has recognized the paramount right of parents to the custody, care, and control of their children. *See Petersen v. Rogers*, 337 N.C. 397, 400, 445 S.E.2d 901, 903 (1994). In *Petersen*, this Court held that "absent a finding that parents (i) are unfit or (ii) have neglected the welfare of their children, the constitutionally-protected paramount right of natural parents to custody, care, and control of their children must prevail." *Id.* at 403-04, 445 S.E.2d at 905.

In *Price v. Howard*, 346 N.C. 68, 484 S.E.2d 528 (1997), this Court refined the holding in *Petersen*. *Price*, as in the case at bar, involved a custody dispute between a natural parent and a third party who was not a natural parent. *Id.* at 72, 484 S.E.2d at 530. This Court reaffirmed the position that natural parents have a constitutionally protected right in the care, custody, and control of their children, but noted, however, that while a fit and suitable parent is " 'entitled to the custody of his child, it is equally true that where fitness and suitability are absent he loses this right.' " *Id.* at 75, 484 S.E.2d at 532 (quoting *Wilson v. Wilson*, 269 N.C. 676, 677, 153 S.E.2d 349, 351 (1967)).

> Where there are unusual circumstances and the best interest of the child justifies such action, a court may refuse to award cus-

> tody to either the mother or father and instead award the custody of the child to grandparents or others. There may be occasions where even "a parent's love must yield to another if after judicial investigation it is found that the best interest of the child is subserved thereby."

Wilson, 269 N.C. at 677-78, 153 S.E.2d at 351 (quoting 3 Robert E. Lee, *North Carolina Family Law* § 224 (4th ed. 1981)); *see also Holmes v. Sanders*, 246 N.C. 200, 201, 97 S.E.2d 683, 684 (1957).

This Court, in *Price*, further expounded as follows:

> A natural parent's constitutionally protected paramount interest in the companionship, custody, care, and control of his or her child is a counterpart of the parental responsibilities the parent has assumed and is based on a presumption that he or she will act in the best interest of the child. Therefore, the parent may no longer enjoy a paramount status if his or her conduct is inconsistent with this presumption or if he or she fails to shoulder the responsibilities that are attendant to rearing a child.

Price, 346 N.C. at 79, 484 S.E.2d at 534 (citations omitted).

In *Adams v. Tessener*, this Court reviewed the earlier principles set forth in *Petersen* and *Price* and stated:

> *Petersen* and *Price*, when read together, protect a natural parent's paramount constitutional right to custody and control of his or her children. The Due Process Clause ensures that the government cannot unconstitutionally infringe upon a parent's paramount right to custody solely to obtain a better result for the child. As a result, the government may take a child away from his or her natural parent only upon a showing that the parent is unfit to have custody *or* where the parent's conduct is inconsistent with his or her constitutionally protected status.

354 N.C. 57, 62, 550 S.E.2d 499, 503 (2001) (emphasis added) (citations omitted).

Based on the principles set forth in the cases discussed above, we disagree with the Court of Appeals' determination that the trial court's finding of fitness is inconsistent with its conclusion of law that defendant acted in a manner inconsistent with his constitutionally protected status as a parent.

It is clear from the holdings of *Petersen*, *Price*, and *Adams* that a natural parent may lose his constitutionally protected right to the control of his children in one of two ways: (1) by a finding of unfitness of the natural parent, or (2) where the natural parent's conduct is inconsistent with his or her constitutionally protected status. Therefore, we hold that the trial court's finding of defendant's fitness in the instant case did not preclude it from granting joint or paramount custody to plaintiffs, based upon its finding that defendant's conduct was inconsistent with his constitutionally protected status.

However, a determination that a natural parent has acted in a way inconsistent with his constitutionally protected status must be supported by clear and convincing evidence. As this Court stated in *Adams*, "[T]he decision to remove a child from the custody of a natural parent must not be lightly undertaken. Accordingly, a trial court's determination that a parent's conduct is inconsistent with his or her constitutionally protected status must be supported by clear and convincing evidence." *Adams*, 354 N.C. at 63, 550 S.E.2d at 503 (citing *Santosky v. Kramer*, 455 U.S. 745, 747-48, 71 L. Ed. 2d 599, 603 (1982)). In the case at bar, the trial court concluded defendant was fit to be a father, but that his conduct was inconsistent with his preferred status as a natural parent and was "tantamount to abandonment, neglect, abuse or other acts inconsistent with [a] natural parent's constitutionally protected interest." The trial court, however, failed to apply the clear and convincing evidence standard as set forth in *Adams* in making this determination, and therefore this case must be remanded for findings of fact consistent with this standard of evidence.

The decision of the Court of Appeals is reversed, and this case is remanded to the Court of Appeals for further remand to the trial court for proceedings in accord with this opinion.

REVERSED AND REMANDED.

IN RE HILL

[359 N.C. 308 (2005)]

IN RE: INQUIRY CONCERNING A JUDGE, NOS. 02-114, 03-24, 03-32
EVELYN W. HILL, RESPONDENT

No. 546A04

(Filed 4 March 2005)

Judges— censure—unprofessional comments

A superior court judge is censured by the Supreme Court for conduct prejudicial to the administration of justice that brings the judicial office into disrepute based upon her injudicious and unprofessional remarks during a probation revocation hearing, her suggestion to defense counsel during a criminal trial that he use his "big boy voice" when addressing the jury, and her questioning of a witness's description of a weapon during the criminal trial by asking the witness, "Was it a Bradley tank? . . . With you I'm just checking."

This matter is before the Court pursuant to N.C.G.S. § 7A-376 upon a recommendation by the Judicial Standards Commission entered 6 October 2004 that respondent Evelyn W. Hill, a Judge of the General Court of Justice, Superior Court Division, Tenth Judicial District of the State of North Carolina, be censured for conduct in violation of Canons 1, 2A, 3A(2), and 3A(3) of the North Carolina Code of Judicial Conduct and for conduct prejudicial to the administration of justice that brings the judicial office into disrepute in violation of N.C.G.S. § 7A-376. Calendered in the Supreme Court 7 February 2005 and considered on the record without oral argument or submission of briefs.

No counsel for Judicial Standards Commission or respondent.

ORDER OF CENSURE

In a letter dated 31 July 2002, the Judicial Standards Commission (Commission) notified Judge Evelyn W. Hill (respondent) that it had ordered a preliminary investigation to determine whether formal proceedings under Commission Rule 9 should be instituted against her. The subject matter of the investigation involved allegedly unprofessional comments made by respondent during a probation revocation hearing on 12 July 2001. A second letter was sent to respondent on 21 February 2003 notifying her of additional allegations under preliminary investigation, including: (1) in early March 2001, during a trial and in the presence of the jury, respondent commented to defense counsel that if he asked a particular question again, he would "prob-

ably see 13 collective people throwing up"; (2) in July 2002, during a trial and in the presence of the jury, respondent suggested that defense counsel use his "big boy voice" when addressing the jury, and she questioned a witness' description of a weapon, asking "[w]as it a Bradley tank? . . . With you I'm just checking"; and (3) in January 2001, during respondent's first trial as a judge and in the presence of the jury, respondent commented on an attorney's physical appearance and referred to the attorney as "Ally McBeal" several times. A third letter was sent to respondent on 8 May 2003 notifying her of another incident under preliminary investigation. That investigation concerned the allegation that on 14 January 2003, respondent pushed and yelled at an individual while riding in the elevator at the Wake County Courthouse.

On 13 May 2004, special counsel for the Commission filed a complaint alleging in pertinent part:

> 3. The respondent has engaged in conduct inappropriate to her judicial office on the following occasions:
>
> a. The respondent, on January 14, 2003, while riding an elevator in the Wake County Courthouse, pushed and yelled at Alison P. Garrett, as Garrett entered, rode and exited the elevator.
>
> b. During a probation revocation hearing on July 12, 2001, in *State v. Earl Terry*, Alamance County file number 00 CRS 51533, the respondent made injudicious and unprofessional remarks.
>
> c. In the jury's presence during the trial of *State v. Tyrone Michael Brinkley*, Durham County file no. 99 CRS 064949, in early March of 2001, the respondent told defense counsel, Mark Simeon, that if he persisted in asking a particular question again, "you'll probably see 13 collective people throwing up."
>
> d. In the jury's presence during the trial of *State v. Michael Lamont Mack*, Wake County file no. 99 CRS 77922, on July 10 and 11, 2002, the respondent suggested to defense counsel, Andrew McCoppin, that he use his "big boy voice" when addressing the jury. The respondent also questioned a witness' description of a weapon by asking the witness, "Was it a Bradley tank? . . . With you I'm just checking."

> e. In the jury's presence during the trial of *State v. William McQuaig*, in Durham County in January 2001, the respondent[] commented on attorney Shannon Tucker's physical appearance and referred to her as "Ally McBeal" three (3) times.
>
> 4. The actions of the respondent on all of the occasions described in paragraphs 3.a., 3.b., 3.c., 3.d. and 3.e. above, constitute conduct prejudicial to the administration of justice that brings the judicial office into disrepute and are in violation of Canons 1, 2A, 3A(2) and 3A(3) of the North Carolina Code of Judicial Conduct.

On 16 July 2004, the Commission served respondent with a notice of formal hearing concerning the charges alleged. The Commission scheduled the hearing for 9 September 2004, at which time respondent waived a formal hearing and stipulated to conducting herself as alleged in paragraphs 3.b. and 3.d. of the complaint.[1] Respondent further stipulated that such conduct was prejudicial to the administration of justice such that it could bring the judicial office into disrepute, and that the conduct violated Canons 1, 2A, 3A(2), and 3A(3) of the Code of Judicial Conduct.

On 6 October 2004, the Commission issued its recommendation, concluding on the basis of clear and convincing evidence that respondent's conduct constituted:

> 1. conduct in violation of Canons 1, 2A, 3A(2) and 3A(3) of the North Carolina Code of Judicial Conduct; [and]
>
> 2. conduct prejudicial to the administration of justice that brings the judicial office into disrepute in violation of N.C.G.S. § 7A-376.

The Commission recommended that this Court censure respondent. In reviewing the Commission's recommendations pursuant to N.C.G.S. §§ 7A-376 and 7A-377, this Court acts as a court of original jurisdiction, rather than in its usual capacity as an appellate court. *See In re Peoples*, 296 N.C. 109, 147, 250 S.E.2d 890, 912 (1978), *cert. denied*, 442 U.S. 929, 61 L. Ed. 2d 297 (1979). Moreover, the Commission's recommendations are not binding upon this Court. *In re Nowell*, 293 N.C. 235, 244, 237 S.E.2d 246, 252 (1977). We consider

1. The charges set forth in paragraphs 3.a., 3.c., and 3.e. of the complaint were dismissed.

the evidence and then exercise independent judgment as to whether this Court should censure, remove, or decline to do either. *Id.*

The quantum of proof in proceedings before the Commission is proof by clear and convincing evidence. *See id.* at 247, 237 S.E.2d at 254. Such proceedings are not meant "to punish the individual but to maintain the honor and dignity of the judiciary and the proper administration of justice." *Id.* at 241, 237 S.E.2d at 250. After thoroughly examining the evidence presented to the Commission, and upon consideration of respondent's stipulation, we conclude the Commission's findings of fact are supported by clear and convincing evidence and adopt them as our own. *See In re Harrell*, 331 N.C. 105, 110, 414 S.E.2d 36, 38 (1992).

In light of the foregoing, we conclude that respondent's actions constitute conduct in violation of Canons 1, 2A, 3A(2) and 3A(3) of the North Carolina Code of Judicial Conduct. Therefore, pursuant to N.C.G.S. §§ 7A-376 and 7A-377 and Rule 3 of the Rules for Supreme Court Review of Recommendations of the Judicial Standards Commission, it is ordered that respondent, Judge Evelyn W. Hill, be and she is hereby, CENSURED for conduct prejudicial to the administration of justice that brings the judicial office into disrepute.

By order of the Court in Conference, this the 3rd day of March, 2005.

Newby, J.
For the Court

STATE OF NORTH CAROLINA v. DARREN WILLIAM DENNISON

No. 179A04

(Filed 4 March 2005)

Appeal and Error— preservation of issues—failure to object—failure to allege plain error

Defendant waived his right to appellate review of the admission of evidence of defendant's prior acts of violence because he failed to object when the witness testified and failed specifically and distinctly to allege plain error.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 163 N.C. App. 375, 594 S.E.2d 82 (2004), reversing a judgment entered upon defendant's conviction for first-degree murder by Judge A. Moses Massey on 20 May 2002 in Superior Court, Guilford County, and awarding defendant a new trial. On 6 October 2004, the Supreme Court allowed the State's petition for discretionary review as to additional issues. Heard in the Supreme Court 7 February 2005.

Roy Cooper, Attorney General, by Steven M. Arbogast, Special Deputy Attorney General, for the State-appellant.

Daniel Shatz for defendant-appellee.

PER CURIAM.

In this case, the Court of Appeals held that defendant was prejudiced when evidence of prior violent acts he committed against his former girlfriend, Melanie Tellado, was admitted at trial. However, even assuming *arguendo* that the admission of this evidence was error, defendant waived his right to appellate review of this issue because he failed to object when Tellado testified. *See* N.C. R. App. P. 10(b)(1) (a party must timely object to preserve a question for appellate review); *see also State v. Roache*, 358 N.C. 243, 292, 595 S.E.2d 381, 413 (2004) (A motion *in limine* fails to preserve for appeal an issue of admissibility of evidence if the defendant does not object at the time the evidence is admitted at trial.); *State v. Valentine*, 357 N.C. 512, 525, 591 S.E.2d 846, 856-57 (2003) (where the trial court sustained the defendant's earlier objection but later admitted the same evidence without objection, the benefit of the earlier objection is lost). Moreover, because defendant did not "specifically and dis-

tinctly" allege plain error as required by North Carolina Rule of Appellate Procedure 10(c)(4), defendant is not entitled to plain error review of this issue. N.C. R. App. P. 10(c)(4). Accordingly, the decision of the Court of Appeals is reversed and this case is remanded to that court for consideration of defendant's remaining assignments of error.

REVERSED AND REMANDED.

ELIZABETH EDMONDS, EMPLOYEE v. FRESENIUS MEDICAL CARE, EMPLOYER, SELF-INSURED (CNA CLAIM PLUS, SERVICING AGENT)

No. 487A04

(Filed 4 March 2005)

Workers' Compensation— renal problems—exacerbation by drugs for back injury—failure of proof

The decision of the Court of Appeals in this case upholding an award of compensation to plaintiff for reduced renal function was reversed for the reason stated in the dissenting opinion that plaintiff failed to prove that her pre-existing kidney problems were exacerbated by nonsteroidal anti-inflammatory drugs taken as part of her treatment for a compensable back injury.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals,—— N.C. App. ——, 600 S.E.2d 501 (2004), affirming an opinion and award entered by the North Carolina Industrial Commission on 5 May 2003. Heard in the Supreme Court 7 February 2005.

Randy D. Duncan for plaintiff-appellee.

Hedrick Eatman Gardner & Kincheloe, LLP, by Mel J. Garofalo and Shannon P. Herndon, for defendant-appellant Fresenius Medical Care.

PER CURIAM.

For the reasons stated in the dissenting opinion, the decision of the Court of Appeals is reversed.

REVERSED.

JONES v. DAVIS

[359 N.C. 314 (2005)]

HOWARD C. JONES, II; FRANKIE HAYES SOUTHARD; JIMMY ROY ROGERS AND WIFE, MADILYN KAY ROGERS; GREGORY E. BOWERS AND WIFE, NATALIE W. BOWERS; AND DANIEL RAY SAMMONS AND WIFE, SHARON P. SAMMONS V. ROBERT WAYNE DAVIS AND WIFE, GLENDA K. DAVIS; JERRY ALLAN ALLRED AND WIFE, YVONNE DAVIS ALLRED, AND SURRY COUNTY

No. 232A04

(Filed 4 March 2005)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 163 N.C. App. 628, 594 S.E.2d 235 (2004), affirming a judgment entered on 11 February 2003 by Judge John O. Craig, III in Superior Court, Surry County. On 6 October 2004, the Supreme Court allowed defendant Surry County's petition for writ of certiorari pursuant to N.C.G.S. § 7A-32(b) to review the Court of Appeals' disposition of an order entered on 10 February 2003 by Judge Craig in Superior Court, Surry County. Heard in the Supreme Court 8 February 2005.

Horton and Gsteiger, P.L.L.C., by Elizabeth Horton and Urs R. Gsteiger, and Howard C. Jones, II for plaintiff-appellants/appellees.

Folger and Folger, by Fred Folger, Jr., for defendant-appellee/appellant Surry County.

Finger, Parker, Avram & Roemer, L.L.P., by Raymond A. Parker, for defendant-appellees Robert Wayne Davis and wife, Glenda K. Davis, and Jerry Allan Allred and wife, Yvonne Davis Allred.

PER CURIAM.

As to the appeal of right based on the dissenting opinion, we affirm the majority decision of the Court of Appeals. We conclude that the petition for writ of certiorari was improvidently allowed.

AFFIRMED; CERTIORARI IMPROVIDENTLY ALLOWED.

TEJAL VYAS, LLC AND DR. P.K. VYAS v. CARRIAGE PARK LIMITED PARTNERSHIP, VILAS DEVELOPMENT CORP., GANESAN VISVABHARATHY, AND STONESAN VISVABHARATHY

No. 513A04

(Filed 4 March 2005)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals,—— N.C. App. ——, 600 S.E.2d 881 (2004), affirming an order entered on 13 May 2003 by Judge Evelyn W. Hill in Superior Court, Wake County. Heard in the Supreme Court 7 February 2005.

Herring McBennett Mills & Finkelstein, PLLC, by Mark A. Finkelstein, for plaintiff-appellants.

Holt York McDarris & High, LLP, by Colleen Kochanek and Claudia McClinton, for defendant-appellees.

PER CURIAM.

AFFIRMED.

LARKIN v. LARKIN

[359 N.C. 316 (2005)]

ERNEST W. LARKIN, III v. MARY JO TATUM LARKIN

No. 452A04

(Filed 4 March 2005)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, —– N.C. App. —–, 598 S.E.2d 651 (2004), affirming in part and remanding in part a judgment and order entered on 3 January 2003 by Judge P. Gwynett Hilburn in District Court, Pitt County. Heard in the Supreme Court 8 February 2005.

McCotter, Ashton & Smith, P.A., by Rudolph A. Ashton, III and Terri W. Sharp, for plaintiff-appellee.

Ward and Smith, P.A., by Cindi M. Quay and John M. Martin, for defendant-appellant.

PER CURIAM.

The decision of the Court of Appeals is affirmed. However, we specifically disavow the language in footnote four of the Court of Appeals opinion.

MODIFIED AND AFFIRMED.

CAMERON v. MERISEL, INC.

[359 N.C. 317 (2005)]

TOMMY DAVIS NATHAN CAMERON, AND WIFE LISA CAMERON v. MERISEL, INC., MERISEL PROPERTIES, INC., MERISEL AMERICAS, INC., AND BRIAN GOLDSWORTHY

No. 227PA04

(Filed 4 March 2005)

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 163 N.C. App. 224, 593 S.E.2d 416 (2004), affirming in part and reversing and remanding in part an order entered on 19 August 2002 by Judge Narley L. Cashwell in Superior Court, Wake County. On 12 August 2004, the Supreme Court allowed plaintiffs' conditional petition for discretionary review as to additional issues. Heard in the Supreme Court 8 February 2005.

Hunton & Williams LLP, by Steven B. Epstein, for plaintiff-appellees/appellants.

Cranfill, Sumner & Hartzog, L.L.P., by William W. Pollock, for defendant-appellants/appellees.

PER CURIAM.

DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

IN THE MATTER OF:	)	
	)	
I.S., DOB 10/1/85	)	
S.S., DOB 3/20/89	)	
T.S., DOB 8/24/90	)	
R.S., DOB 4/14/92	)	ORDER
S.S., DOB 3/1/94	)	
M.S., DOB 8/24/95	)	
M.S., DOB 9/6/96	)	
S.S., DOB 10/28/97	)	
L.S., DOB 7/2/99	)	
Minor Children	)	

No. 480P04

ORDER

The petition for writ of certiorari filed by Jack S. Stratton, III and Kathy Stratton is allowed for the limited purpose of entering the following order:

The Order of the Court of Appeals dated 26 August 2004, which denied petitioners' motion for an extension of time to prepare their record on appeal, is reversed and this case is remanded to that Court for entry of an order granting petitioners an extension of time for a period of not less than 60 days in order to prepare and submit their record on appeal. Petitioners' motion to amend their petition for writ of certiorari is allowed. Respondent's motion to deny the petition for writ of certiorari and respondent's second motion to deny the petition for writ of certiorari are dismissed as moot. Petitioners' motion to dismiss respondent's response is dismissed as moot.

By order of the Court in Conference, this 4th day of March, 2005.

s/Newby, J.
For the Court

STATE v. ROYSTER

[359 N.C. 319 (2005)]

STATE OF NORTH CAROLINA	)	
	)	
v.	)	ORDER
	)	
RICKY KENARD ROYSTER	)	

No. 58P05

ORDER

The Emergency Petition for Writ of Certiorari to the Superior Court of Forsyth County is allowed for the limited purpose of entering the following order:

The Order of the Superior Court denying petitioner's motion to continue is reversed and the Superior Court is instructed on remand to enter an order continuing petitioner's trial to commence on an appropriate date after Monday, March 21, 2005.

By Order of the Court in Conference, this 10th day of February, 2005.

s/Brady
For the Court

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

A&F Trademark, Inc v. Tolson Case below: 167 N.C. App. 150	No. 023P05	1. Petitioners' (A&F, Trademark, et al) NOA Based Upon a Constitutional Question (COA03-1203) 2. Respondent's (Sec. of Revenue) Motion to Dismiss Appeal 3. Petitioners' (A&F Trademark, et al) PDR Under N.C.G.S. § 7A-31	1. — 2. Allowed (03/03/05) 3. Denied (03/03/05)
Bennett v. News & Observer Publ'g Co. Case below: 167 N.C. App. 370	No. 025A05	Plt's NOA Based Upon a Constitutional Question (COA04-105)	Dismissed ex mero motu (03/03/05)
Bryson v. Cooper Case below: 166 N.C. App. 759	No. 640P04	Plts' NOA Based Upon a Constitutional Question (COA03-1484)	Dismissed ex mero motu (03/03/05)
Cook v. Watson Elec. Constr. Co. Case below: 166 N.C. App. 279	No. 525P04	1. Plts' PDR Under N.C.G.S. § 7A-31 (COA03-456) 2. Plts' Alternative PWC	1. Denied (03/03/05) 2. Denied (03/03/05)
Craven v. VF Corp. Case below: 167 N.C. App. 612	No. 099P05	1. Defs' PDR Under N.C.G.S. § 7A-31 (COA03-1688) 2. Defs' Motion for Temporary Stay 3. Defs' Petition for Writ of Supersedeas	1. Denied (03/03/05) 2. Allowed **02/17/05** Stay Dissolved **03/03/05** 3. Denied (03/03/05)
Cunningham v. Sams Case below: 167 N.C. App. 653	No. 064P05	1. Def's Motion for Temporary Stay (COA03-1719) 2. Def's PDR Under N.C.G.S. § 7A-31	1. Stay Dissolved **03/03/05** 2. Denied (03/03/05)
Diaz v. Division of Soc. Servs. Case below: 166 N.C. App. 209	No. 523PA04	1. Respondent's Petition for Writ of Supersedeas (COA03-1151) 2. Respondent's PDR Under N.C.G.S. § 7A-31 3. Petitioner's Conditional PDR	1. Allowed (03/03/05) 2. Allowed (03/03/05) 3. Allowed (03/03/05)

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

Eckard v. Smith Case below: 166 N.C. App. 312	No. 573A04	Plt's (Eunice C. Eckard) NOA (Dissent) (COA02-1379) 1. Plt's (Eunice C. Eckard) PDR as to Additional Issues	 1. Denied (03/03/05)
Eddings v. Southern Orthopaedic & Musculoskeletal Assocs., P. A. Case below: 167 N.C. App. 469	No. 059P05	1. Plt's NOA Based Upon a Constitutional Question (COA03-1298) 2. Plt's PDR Under N.C.G.S. § 7A-31	1. Dismissed ex mero motu (03/03/05) 2. Denied (03/03/05)
In re Adoption of Anderson Case below: 165 N.C. App. 413	No. 448PA04	1. Petitioners' (unidentified adoptive parents) PDR Under N.C.G.S. § 7A-31 (COA03-651) 2. Respondent's (Father) Conditional PDR	1. Allowed (03/03/05) 2. Allowed (03/03/05)
In re F.M.L.W. & F.J.S. Case below: 167 N.C. App. 370	No. 066P05	Respondent's (Michelle Smith) PWC to Review the Decision of the COA (COA04-18)	Denied (03/03/05)
In re M.A.L. Case below: 167 N.C. App. 806	No. 074P05	1. Respondent's (R.L.) PDR Under N.C.G.S. § 7A-31 (COA04-614) 2. Respondent's (S.L.) PDR Under N.C.G.S. § 7A-31	1. Denied (03/03/05) 2. Denied (03/03/05)
In re M.R.D.C. Case below: 166 N.C. App. 693	No. 607P04	Petitioner's (Wilkes County Department of Social Services) PDR Under N.C.G.S. § 7A-31 (COA04-2)	Denied (03/03/05)
In re R.H. Case below: 167 N.C. App. 654	No. 055P05	Respondent's (A.B.) PDR Under N.C.G.S. § 7A-31 (COA04-486)	Denied (03/03/05)
Jones v. Davis Case below: 163 N.C. App. 628	No. 232A04	Defs' (Mr & Mrs. Davis and Mr. & Mrs. Allred) Motion to Dismiss Appeal (COA03-594)	Dismissed as moot **03/03/05**
LaValley v. LaValley Case below: 167 N.C. App. 806	No. 043P05	Plt's PDR Under N.C.G.S. § 7A-31 (COA04-227)	Denied (03/03/05)

N.C. Dep't of Transp. v. Stagecoach Village Case below: 166 N.C. App. 272	No. 529PA04	Plt's PDR Under N.C.G.S. § 7A-31 (COA03-1026)	Allowed (03/03/05)
Owens v. Wal-Mart Stores, Inc. Case below: 165 N.C. App. 705	No. 471P04	Defs' PDR Under N.C.G.S. § 7A-31 (COA03-975)	Denied (03/03/05)
Production Sys., Inc. v. Amerisure Ins. Co. Case below: 167 N.C. App. 601	No. 083P05	1. Plt's PDR Under N.C.G.S. § 7A-31 (COA04-580) 2. Def's (Amerisure Insurance Co.) Conditional PDR Under N.C.G.S. § 7A-31 3. Def's (Union Insurance Co.) Conditional PDR Under N.C.G.S. § 7A-31	1. Denied (03/03/05) 2. Dismissed as moot (03/03/05) 3. Dismissed as moot (03/03/05)
Reynolds v. M&M Contr'g Case below: 167 N.C. App. 109	No. 072P05	Plt's PDR Under N.C.G.S. § 7A-31 (COA03-1015)	Denied (03/03/05)
Robertson v. Zoning Bd. of Adjust. for the City of Charlotte Case below: 167 N.C. App. 531	No. 065P05	Plts' PDR Under N.C.G.S. § 7A-31 (COA04-166)	Denied (03/03/05)
Robinson v. Gardner Case below: 167 N.C. App. 763	No. 073P05	Defs'(Gardner and Pike Electric) PDR Under N.C.G.S. § 7A-31 (COA03-1477) & (03-1478)	Denied (03/03/05)
Smith v. Barbour Case below: 167 N.C. App. 371	No. 024P05	Def Staci Day Barbour's PDR under N.C.G.S. 7A-31 (COA02-1396)	Denied (03/03/05)

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

State v. Adams Case below: 167 N.C. App. 806	No. 076P05	1. Def's NOA Based Upon a Constitutional Question (COA03-1004) 2. AG's Motion to Dismiss Appeal 3. Def's PDR Under N.C.G.S. § 7A-31	1. —— 2. Allowed (03/03/05) 2. Denied (03/03/05)
State v. Burke Case below: 167 N.C. App. 806	No. 089A05	1. Def's NOA Based Upon a Constitutional Question (COA03-1557) 2. AG's Motion to Dismiss Appeal	1. —— 2. Allowed (03/03/05)
State v. Burrell Case below: 165 N.C. App. 134	No. 365P04	1. Def's (Anthony) NOA Based Upon a Constitutional Question (COA03-989) 2. AG's Motion to Dismiss Appeal 3. Def's (Anthony) PDR Under N.C.G.S. § 7A-31 4. Def's (Rodney) PDR Under N.C.G.S. § 7A-31	1. —— 2. Allowed (03/03/05) 3. Denied (03/03/05) 4. Denied (03/03/05)
State v. Coleman Case below: 167 N.C. App. 656	No. 044P05	1. Def's NOA Based Upon a Constitutional Question (COA04-490) 2. AG's Motion to Dismiss Appeal 3. Def's PDR Under N.C.G.S. § 7A-31	1. —— 2. Allowed (03/03/05) 2. Denied (03/03/05)
State v. Cornett Case below: 167 N.C. App. 656	No. 056P05	Def's PDR Under N.C.G.S. § 7A-31 (COA04-85)	Denied (03/03/05)
State v. Dawkins Case below: 167 N.C. App. 807	No. 046P05	Def's PDR Under N.C.G.S. § 7A-31 (COA04-342)	Denied (03/03/05)
State v. Dickens Case below: 161 N.C. App. 742	No. 015P04-2	Def's Motion for Belated Appeal (COA02-1395)	Dismissed (03/03/05)
State v. Felton Case below: 167 N.C. App. 807	No. 091P05	Def's PDR Under N.C.G.S. § 7A-31 (COA04-832)	Denied (03/03/05)

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

State v. Gibson Case below: 167 N.C. App. 372	No. 013P05	1. Def's NOA Based Upon a Constitutional Question (COA04-66) 2. AG's Motion to Dismiss Appeal 3. Def's PDR Under N.C.G.S. § 7A-31	1. —— 2. Allowed (03/03/05) 3. Denied (03/03/05)
State v. Head Case below: 167 N.C. App. 372	No. 012P05	1. Def's NOA Based Upon a Constitutional Question (COA03-1307) 2. AG's Motion to Dismiss Appeal 3. Def's PDR Under N.C.G.S. § 7A-31	1. —— 2. Allowed (03/03/05) 3. Denied (03/03/05)
State v. Hill Case below: 168 N.C. App. 391	No. 093P05	Def's PDR Under N.C.G.S. § 7A-31 (COA04-867)	Denied (03/03/05)
State v. Jarrett Case below: 167 N.C. App. 336	No. 034P05	Def's PWC to Review the Decision of the COA (COA03-1248)	Denied (03/03/05)
State v. Larry Case below: Forsyth County Superior Court	No. 189A95-3	1. Def's PWC to Review the Order of the Superior Court 2. Def's Alterative Motion to Defer Consideration of the PWC Pending Resolution of Similar Issues in the Direct Appeal of *State v. Walters* 3. Def's Motion to Defer Consideration of the PWC Pending Resolution of Similar Issues in the Direct Appeal of *State v. Poindexter* 4. Def's Motion to Supplement PWC	1. Denied (03/03/05) 2. Denied (03/03/05) 3. Denied (03/03/05) 4. Allowed (03/03/05)
State v. Odom Case below: 166 N.C. App. 761	No. 549P04	1. Def's NOA Based Upon a Constitutional Question (COA03-600) 2. Def's PDR Under N.C.G.S. § 7A-31	1. Dismissed ex mero motu (03/03/05) 2. Denied (03/03/05)
State v. Patrick Case below: 167 N.C. App. 657	No. 061P05	Def's PDR Under N.C.G.S. § 7A-31 (COA03-1320)	Denied (03/03/05)

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

State v. Roberts Case below: 166 N.C. App. 649	No. 591P04	1. Def's NOA Based Upon a Constitutional Question (COA03-1424) 2. AG's Motion to Dismiss Appeal for Lack of Substantial Constitutional Question 3. Def's PDR Under N.C.G.S. § 7A-31	1. —— 2. Allowed (03/03/05) 3. Denied (03/03/05)
State v. Simmons Case below: 167 N.C. App. 512	No. 045P05	1. Def's NOA Based Upon a Constitutional Question (COA03-1272) 2. AG's Motion to Dismiss Appeal 3. Def's PDR Under N.C.G.S. § 7A-31	1. —— 2. Allowed (03/03/05) 3. Denied (03/03/05)
State v. Simmons Case below: 167 N.C. App. 807	No. 090P05	Def's PDR Under N.C.G.S. § 7A-31 (COA04-731)	Denied (03/03/05)
State v. Spellman Case below: 167 N.C. App. 374	No. 049P05	1. Def's NOA Based on a Constitutional Question (COA03-1526) 2. Def's PDR Under N.C.G.S. § 7A-31	1. Dismissed ex mero motu (03/03/05) 2. Denied (03/03/05)
State v. Staton Case below: 167 N.C. App. 808	No. 096P05	Def's PDR Under N.C.G.S. § 7A-31 (COA04-655)	Dismissed (03/03/05)
State v. Steele Case below: 167 N.C. App. 372	No. 018P05	1. Def's NOA Based Upon a Constitutional Question (COA03-1481) 2. AG's Motion to Dismiss Appeal 3. Def's PDR Under N.C.G.S. § 7A-31	1. —— 2. Allowed (03/03/05) 2. Denied (03/03/05)
State v. Steele Case below: 166 N.C. App. 762	No. 032P05	Def's PWC to Review the Decision of the COA (COA04-173)	Denied (03/03/05)

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

State v. Sutton Case below: 167 N.C. App. 242	No. 015PO5	1. Def's NOA Based Upon a Constitutional Question (COA03-1351) 2. AG's Motion to Dismiss Appeal 2. Def's PDR Under N.C.G.S. § 7A-31	1. —— 2. Allowed (03/03/05) 2. Denied (03/03/05)
State v. Whittenburg Case below: 167 N.C. App. 109	No. 631P04	1. Def's NOA Based Upon a Constitutional Question (COA03-1267) 3. AG's Motion to Dismiss Appeal 2. Def's PDR Under N.C.G.S. § 7A-31	1. —— 3. Allowed (03/03/05) 2. Denied (03/03/05)
State v. Williams Case below: 167 N.C. App. 372	No. 011P05	Def's PDR Under N.C.G.S. § 7A-31 (COA03-1691)	Denied (03/03/05)
State v. Young Case below: 167 N.C. App. 401	No. 577P04	Def's PDR Under N.C.G.S. § 7A-31 (COA03-257)	Denied (03/03/05)
Stilwell v. General Ry. Servs., Inc. Case below: 167 N.C. App. 291	No. 017P05	1. Def's PDR Under N.C.G.S. § 7A-31 (COA04-107) 2. Plt's Motion to Allow Filing of Opposition to Def's PDR	1. Denied (03/03/05) 2. Allowed (03/03/05)
Tubiolo v. Abundant Life Church, Inc. Case below: 167 N.C. App. 324	No. 029P05	1. Def's NOA (Constitutional Question) (COA03-471) 2. Def's PDR Under N.C.G.S. § 7A-31	1. Dismissed ex mero motu (03/03/05) 2. Denied (03/03/05)
Ward v. Wake Cty. Bd. of Educ. Case below: 166 N.C. App. 726	No. 611P04	Def's (Wake Co. Board of Education) PDR Under N.C.G.S. § 7A-31 (COA03-1578)	Denied (03/03/05)
Whitehead v. Pillowtex Case below: 166 N.C. App. 763	No. 040P05	Plt's PDR Under N.C.G.S. § 7A-31 (COA03-1536)	Denied (03/03/05)

Williams v. Scotland Cty. Case below: 167 N.C. App. 105	No. 009P05	Def's (The City of Laurinburg) PDR Under N.C.G.S. § 7A-31 (COA03-1624)	Denied **03/02/05**

PETITION TO REHEAR

Beatenhead v. Lincoln Cty. Case below: 359 N.C. 177	No. 105PA04	Def's (Martin Eddy) Petition for Rehearing (COA02-1610-2)	Denied (03/03/05)

STATE v. CHAPMAN

[359 N.C. 328 (2005)]

STATE OF NORTH CAROLINA v. LEMORRIS J. CHAPMAN, A/K/A LAMORRIS J. CHAPMAN

No. 146A02

(Filed 7 April 2005)

1. Jury— capital selection—peremptory challenges—*Batson* claim

The trial court did not err in a capital first-degree murder, attempted first-degree murder, and discharging a firearm into occupied property case by allowing the State's exercise of its peremptory challenges against two African-American prospective jurors even though defendant alleged racial discrimination, because: (1) the shared race of the involved parties tended to contradict an inference of purposeful discrimination by prosecutors; (2) one of the prospective jurors expressed serious reservations about recommending the death penalty and two of the other prospective juror's children were prosecuted for serious offenses by the same district attorney office; and (3) responses elicited from one prospective juror were in a manner that was similar to the questioning of all other prospective jurors and from the other prospective juror in a manner tailored to address her unique circumstances.

2. Jury— capital selection—voir dire—views on death penalty—hypothetical questions—sympathy for defendant—passing judgment on defendant

The trial court did not abuse its discretion in a capital trial by concluding that the prosecutor did not ask improper questions during voir dire regarding how jurors would vote during the sentencing phase, whether jurors' decisions would be based upon the law or their personal feelings, whether jurors had sympathy for defendant, and whether jurors understood they were not being asked to pass judgment on defendant, because: (1) the prosecutor's general questions represented a legitimate attempt to elicit prospective jurors' personal views on capital punishment, did not tend to commit prospective jurors to a specific future course of action, and helped to clarify whether the prospective jurors' personal beliefs would substantially impair their ability to follow the law; (2) although the form of some of the prosecutor's questions were hypothetical, these questions also did not commit jurors to a specific future course of action in

defendant's case, the questions were not aimed at indoctrinating jurors with views favorable to the State, and the questions were simple and clear without a propensity for confusing jurors; (3) the prosecutor's questions did not address definable qualities of defendant's appearance or demeanor, and in fact the pertinent question concerned jurors' feelings toward defendant notwithstanding his courtroom appearance or behavior; and (4) in regard to the prosecutor's statement that the jurors were not being asked to pass judgment upon defendant, our Supreme Court has declined to extend application of the plain error doctrine to situations where a party has failed to object to statements made by the other party during jury voir dire.

3. Evidence— photographs—testimony—physical evidence

The trial court did not abuse its discretion in a capital first-degree murder, attempted first-degree murder, and discharging a firearm into occupied property case by admitting into evidence an autopsy photograph of the victim, two photographs of the car in which the victim was shot, and the victim's clothing, nor did the trial court commit plain error by admitting blood-stained seat material seized from the car and testimony of three law enforcement officers describing the car's interior and the victim's wounds, because: (1) the trial court admitted each photograph for illustrative purposes only, and two witnesses used the photographs to explain relevant portions of their testimony; (2) the autopsy photograph tended to explain and support a witness's expert opinion as to the cause of the victim's death, and the photographs of the car's interior corroborated an officer's testimony describing the crime scene and showed the location at which the victim sustained the gunshot wound; (3) an officer's testimony carried significant probative value tending to show the location and circumstances of the victim's death, and the probative value was not outweighed by danger of unfair prejudice; (4) the testimony of a former evidence and crime scene technician concerning the fabric swatch was introduced by prosecutors solely to inform the jury that stains on the car's rear seat had been tested for blood and that the stains were in fact blood, the evidence was probative of the location and circumstances of the victim's death, and the probative value was not outweighed by danger of unfair prejudice; (5) the victim's clothing was not published to the jury and was minimally discussed during the direct examination of a former evidence and crime

scene technician whose testimony served to authenticate the items, and the technician's testimony that he picked up the victim's clothing from the gurney that the victim was lying on was relevant and admissible for authentication purposes; and (6) a detective's testimony describing the victim's body in the hospital emergency room was probative of the cause and nature of the victim's death, and its probative value was not outweighed by danger of unfair prejudice.

4. Evidence— hearsay—not offered for truth of matter asserted—course of conduct

The trial court did not err in a capital first-degree murder, attempted first-degree murder, and discharging a firearm into occupied property case by admitting alleged hearsay evidence during the direct examination of a detective who testified from his notes concerning his interview with defendant, because: (1) defendant did not preserve an assignment of constitutional error for review; (2) defendant's statement to the detective was admissible as the statement of a party opponent; (3) the words of an unidentified caller contained within defendant's statement to the detective were not hearsay since they were not offered to prove the truth of the matter asserted, but instead the phone call was admitted to show defendant's response to receiving the call; and (4) the testimony was relevant to explain defendant's course of conduct following the shooting and the statement was not unfairly prejudicial.

5. Evidence— prior consistent statements—corroboration

The trial court did not err in a capital first-degree murder, attempted first-degree murder, and discharging a firearm into occupied property case by admitting a detective's testimony that he overheard defendant's coparticipant tell his mother that he was tired of lying and he was going to tell the police the truth during a phone call that the coparticipant made from the police interview room, because: (1) the testimony was admissible to corroborate the coparticipant's earlier testimony as a State's witness; and (2) the testimony was admissible as a prior consistent statement which tended to strengthen the coparticipant's credibility regarding his testimony that although he initially lied to law enforcement, he decided to tell the truth after speaking to his mother.

6. Evidence— hearsay—caught in lie—not offered for truth of matter asserted

The trial court did not err in a capital first-degree murder, attempted first-degree murder, and discharging a firearm into occupied property case by admitting three statements made by a detective on direct examination about his interview with defendant's coparticipant concerning officers checking out the coparticipant's story about staying with two ladies and finding the statement to be true, that there were statements made at the ladies' apartment that the coparticipant was aware of the pertinent shooting, and that officers had information that the coparticipant stayed the night with the two ladies, because: (1) the central purpose for offering the detective's statements was to show the coparticipant's response to being caught in a lie during his second police interview; (2) the statements challenged by defendant were not offered to prove the truth of the matter asserted; and (3) defendant's constitutional assignment of error on this matter has been waived.

7. Evidence— testimony—witness testified truthfully—testimony of witness's attorney

The trial court did not err or commit plain error in a capital first-degree murder, attempted first-degree murder, and discharging a firearm into occupied property case by admitting the statements of defendant's coparticipant that he testified truthfully during direct and redirect examinations after his credibility was attacked, by admitting the coparticipant's testimony that he was represented and advised by counsel during the formalization of a plea agreement related to the victim's death, and by admitting the testimony of the coparticipant's attorney that the coparticipant was represented by counsel during plea negotiations on charges related to the victim's death, because: (1) it cannot be said that the coparticipant's responses probably altered the outcome of the trial; (2) the coparticipant's redirect testimony was properly allowed to explain impeaching evidence elicited by defense counsel on cross-examination; and (3) the coparticipant's attorney was properly called to corroborate the coparticipant's testimony after he was impeached on cross and recross-examinations, and the attorney's testimony substantially corroborated the coparticipant's testimony by explaining why he pled guilty to second-degree murder.

8. Appeal and Error— preservation of issues—failure to raise constitutional issues at trial

Although defendant contends the trial court violated his Fifth, Sixth, Eighth, and Fourteenth Amendment rights in a capital first-degree murder, attempted first-degree murder, and discharging a firearm into occupied property case by admitting a detective's testimony that defendant surrendered to law enforcement officers in the presence of his family and his attorney, and that after taking defendant into custody the detective did not conduct an interview with defendant, this assignment of error is overruled because constitutional error will not be considered for the first time on appeal.

9. Criminal Law— prosecutor's arguments—right to remain silent—personal belief on truthful witnesses—misstatement of law—hypothetical factual scenario

The trial court did not err by failing to intervene ex mero motu in a capital first-degree murder, attempted first-degree murder, and discharging a firearm into occupied property case by admitting during opening and closing arguments the prosecutors' statements that defendant contends commented on defendant's right to remain silent, asserted that the State's witnesses were truthful, and misstated the law regarding felony murder, nor did it err by allowing the prosecutor to argue an alleged irrelevant hypothetical factual scenario to the jury, because: (1) the prosecutor's closing argument explained the circumstantial nature of evidence tending to show premeditation and deliberation without encouraging jurors to infer guilt from defendant's silence, any reference to defendant's failure to testify was indirect, and there was no reference to defendant's decision to exercise his right to silence during the prosecutor's opening statements; (2) under the circumstances where defense counsel impeached each witness with a prior inconsistent statement and also elicited information from each witness which supported an inference of bias, prosecutors were entitled to argue why and how the witnesses came to tell law enforcement various versions of events and that the sequence of events advanced by the State should be credited by the jury; (3) although the prosecutor's argument applying the law of felony murder to the facts of defendant's case was oversimplified, the prosecutor's statements were not inaccurate or confusing to a degree requiring ex mero motu intervention by the trial court; and (4) the prosecutor's hypothetical example accurately illustrated the law of felony murder.

10. Homicide— attempted first-degree murder—first-degree murder—motion to dismiss—sufficiency of evidence

The trial court did not err by denying defendant's motion to dismiss the attempted first-degree murder and first-degree murder charges at the close of all the evidence, because the State presented substantial evidence to support a conclusion that defendant acted with premeditation, deliberation, and specific intent to kill including evidence of: (1) defendant's motive, preparation, and conduct and statements during the events surrounding the shooting; (2) the multiple gunshots fired by defendant; (3) the total lack of provocation for defendant's actions; and (4) defendant's attempt to conceal his involvement in the shooting.

11. Homicide— first-degree murder—failure to instruct on lesser-included offense of second-degree murder

The trial court did not err in a capital first-degree murder case by refusing to instruct the jury on second-degree murder, because: (1) the State presented sufficient evidence to prove premeditation, deliberation, and specific intent to kill; (2) defendant's statement that he was going to shoot the car and the fact that these shots were fired at night and between two moving vehicles in no way negated the State's evidence of mens rea; (3) there was no indication from the State's evidence that defendant was intoxicated to a degree sufficient to negate mens rea; and (4) defendant did not present evidence during the guilt-innocence phase of borderline mental retardation or any mental or emotional disturbance, and common sense compels that evidence which is not presented until the capital sentencing proceeding cannot serve as the basis of a trial court's ruling during the guilt-innocence phase.

12. Homicide— first-degree murder—instruction—specific intent to kill

The trial court did not err in a capital first-degree murder and attempted first-degree murder case by refusing to supplement its specific intent to kill instruction with defendant's special requested instruction that "it is not enough that defendant merely committed an intentional act that resulted in the victim's death" because this requested instruction was unsupported by the evidence when there was no evidence presented at trial to negate the State's evidence of mens rea.

13. Homicide— first-degree murder—instructions—three theories—submission of not guilty verdict

The trial court did not fail to submit a not guilty verdict in its instructions on first-degree murder where the court submitted three separate theories of first-degree murder to the jury: (1) malice, premeditation and deliberation, (2) felony murder based upon attempted first-degree murder, and (3) felony murder based upon discharging a firearm into occupied property; the trial court omitted language after its instruction for felony murder based upon attempted first-degree murder that if the jury did not find certain matters, then jurors should not return a verdict of guilty under that theory; and at the conclusion of the trial court's mandate on all three theories of first-degree murder, the court instructed the jurors that if they did not find defendant guilty of first-degree murder on the basis of malice, premeditation and deliberation and if they did not find defendant guilty of first-degree murder under the felony murder rule, it would be their duty to return a verdict of not guilty.

14. Homicide— felony murder—discharging firearm into occupied vehicle—motion to dismiss—sufficiency of evidence

The trial court did not err by denying defendant's motion to dismiss the charge of first-degree felony murder based upon the felony of discharging a firearm into an occupied vehicle, because the State presented sufficient evidence of defendant's intent to kill an occupant of the vehicle.

15. Sentencing— death penalty vacated—defendant under eighteen years old

Defendant's death sentence in a first-degree murder case is vacated pursuant to the United States Supreme Court's recent decision in *Roper v. Simmons*, —— U.S. ——, —— L. Ed. 2d —— (2005), because defendant was not yet eighteen years old at the time he murdered the victim.

Justice NEWBY did not participate in the consideration or decision of this case.

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of death entered by Judge Jerry Cash Martin on 2 November 2001 in Superior Court, Johnston County, upon a jury verdict finding defendant guilty of first-degree murder. On 21 February 2003, this Court allowed defendant's motion to bypass

the Court of Appeals as to his appeal of additional judgments. On 1 April 2004, this Court allowed defendant's motion to hold decision pending the United States Supreme Court's decision in *Roper v. Simmons*, 112 S.W.3d 397 (Mo. 2003), *cert. granted*, 540 U.S. 1160, 157 L. Ed. 2d 1204 (2004). Heard in the Supreme Court of North Carolina 17 November 2003.

Roy Cooper, *Attorney General*, *by Robert C. Montgomery*, *Assistant Attorney General*, *for the State.*

Staples Hughes, *Appellate Defender*, *by Daniel R. Pollitt*, *Assistant Appellate Defender and Kelly D. Miller*, *Assistant Appellate Defender*, *for defendant-appellant.*

BRADY, Justice.

Seleana Ceana Nesbitt was fatally shot in the head on 9 July 2000, while riding with her friend, Brandy Raquel Smith, in the back seat of a car on the way home from a nightclub. On 24 July 2000, a Johnston County grand jury indicted defendant LeMorris J. Chapman for the first-degree murder of Ms. Nesbitt and attempted first-degree murder of Ms. Smith. On 9 July 2001, a second Johnston County grand jury returned an additional indictment against defendant for discharging a firearm into occupied property.

Defendant was tried capitally before a jury at the 8 October 2001 Criminal Session of the Johnston County Superior Court. On 29 October 2001, a jury returned a verdict of guilty of first-degree murder on the basis of malice, premeditation, and deliberation and under the felony murder rule. The jury also found defendant guilty of attempted first-degree murder and discharging a firearm into occupied property. On 2 November 2001, following a capital sentencing proceeding, the jury recommended a sentence of death for the first-degree murder conviction, and the trial court entered judgment accordingly. The trial court also sentenced defendant to consecutive prison terms of 157 months to 198 months for attempted first-degree murder and 25 to 39 months for discharging a firearm into occupied property.

Defendant appealed his death sentence to this Court, and on 21 February 2003, the Court allowed defendant's motion to bypass the Court of Appeals as to his appeal of the noncapital convictions and judgments. This Court heard oral argument in defendant's case on 17 November 2003. On 1 April 2004, the Court allowed defendant's motion to hold decision pending the United States Supreme Court's

decision in *Roper v. Simmons*, 112 S.W.3d 397 (Mo. 2003), *cert. granted*, 540 U.S. 1160, 157 L. Ed. 2d 1204 (2004). The United States Supreme Court issued its opinion in *Roper* on 1 March 2005. —— U.S. ——, —— L. Ed. 2d ——, 2005 U.S. LEXIS 2200 (Mar. 1, 2005) (No. 03-633). After consideration of the assignments of error raised by defendant on appeal and a thorough review of the transcript, record on appeal, briefs, oral arguments, and *Roper v. Simmons*, we find no error in the guilt-innocence phase of defendant's trial but vacate defendant's death sentence as "cruel and unusual" consistent with *Roper*.

FACTUAL BACKGROUND

Evidence presented by the State at trial tended to show that on 7 July 2000, defendant's ex-girlfriend Alecia Doughty drove past an apartment where defendant was attending a cookout. Doughty was driving a Nissan Sentra that belonged to Greg Brooks, and Brooks was riding in the passenger seat. Later that night defendant spoke to Doughty by phone and asked about Brooks. Defendant then told Doughty to come pick him up. Doughty did so, and defendant and Doughty spent the night together. On the following day, Doughty dropped defendant off at another house, where defendant called Doughty on the phone and told her, "I ain't f———-g with you no more."

On 8 July 2000, defendant and five of his friends decided to go to Club 39, a nightclub near Mudcat Stadium in Wake County. The group included Lee Green, DaJuan Morgan, Jared Clemmons, Donald Lamont Dennis, and Shamarh McNeil. Because they could not all fit into defendant's Honda, the group decided to borrow a vehicle from another friend, Garry Yarborough. Clemmons, McNeil, and Dennis drove defendant's Honda to Yarborough's home in Wilson Mills to exchange it with Yarborough's white Cadillac Seville. There the group talked with Yarborough's wife Mya, as well as defendant's brother, Chris Chapman, and Chris' fiancée, Shenita. Before the group left, Yarborough gave Clemmons a loaded Soviet era SKS Carbine, semi-automatic rifle "for protection in case something happens at the club tonight." Clemmons handed the rifle to McNeil, who placed it in the trunk of Yarborough's Cadillac.

That evening Clemmons drove defendant, Green, Dennis, Morgan and McNeil to Club 39 in the Cadillac. As they approached the club, the group saw security guards stopping vehicles in the club's driveway and checking for weapons. Clemmons turned the car around and

defendant told Clemmons to drive into the nearby Mudcat Stadium parking lot. Clemmons testified that upon their arrival at the stadium, defendant called his brother Chris. The group waited, and after approximately fifteen minutes, Chris Chapman arrived at the stadium parking lot. Defendant got out of the Cadillac and spoke with Chris. When defendant returned to the Cadillac, he handed Dennis a brown McDonald's bag containing a black .45 caliber ACP, semi-automatic handgun. McNeil testified that he was not surprised to see Chris Chapman in the stadium parking lot because the meeting had been pre-arranged.

On the way back to the club, defendant instructed Clemmons to stop the car. Then defendant and Dennis stepped out of the vehicle, opened the trunk, and removed the SKS rifle. Defendant and Dennis concealed the rifle and handgun in a ditch beside a light pole in a wooded area. Thereafter, the group proceeded to Club 39, arriving sometime after 10:00 p.m.

Defendant saw Doughty at the club and tried unsuccessfully to speak with her. Brooks, who was also at the club, had not previously met defendant, but spoke with him and shook his hand. Defendant and his friends stayed at the club until after it closed at 3:00 a.m. Brooks, his cousin Lavires Richardson, Seleana Nesbitt, and Brandy Smith left at the same time in Brooks' blue Nissan Sentra. Green testified at trial that he did not speak to Ms. Nesbitt at the club because he knew she was with Brooks. Green also testified that he knew Brooks drove a Nissan Sentra and that he had seen Seleana standing next to that car in the parking lot before leaving the club.

On the way home from the club, defendant and his friends stopped to retrieve the hidden SKS rifle and handgun, placing both weapons in the passenger area. Clemmons drove; defendant rode in the front passenger seat, and Green, Morgan, Dennis, and McNeil sat in the back. After they reached Highway 39, defendant instructed Clemmons to speed up and to pass certain vehicles. As they approached Brooks' car from behind, one of the passengers said, "[T]hat's them right there." Defendant replied, "[L]et's get that m——rf——r." Then defendant told Clemmons not to pass Brooks' car. While the Cadillac was behind Brooks' vehicle, defendant called his brother and instructed him not to pass the car in front of them because defendant was "about to shoot up this car." Defendant began firing the SKS rifle out of the front passenger side window while DaJuan Morgan fired the handgun out of the rear left window. Defendant shot the rifle six to eight times, and Morgan fired the hand-

gun three to four times. Then defendant boasted to his friends that "we wet the car up, the m——rf——r."

After the shooting, defendant told Clemmons to park the Cadillac at Percy Flowers' store, where defendant had seen Garry Yarborough sitting outside. Defendant and his friends, who appeared excited, told Yarborough what had just happened. Defendant and Dennis hid the rifle and handgun in Yarborough's yard and after riding together briefly, the group went their separate ways.

Seleana Nesbitt and Brandy Smith, who were back seat passengers in Brooks' car, were both shot. Brooks immediately drove to Johnston Memorial Hospital in Smithfield, where Ms. Smith was treated for her wounds and Ms. Nesbitt was pronounced dead.

Additional relevant facts will be presented when necessary to resolve specific assignments of error raised by defendant.

JURY SELECTION

[1] In his first argument, defendant assigns error to the State's exercise of peremptory challenges against prospective jurors, Linda Thorne Barbour and Amanda Flonard, in violation of *Batson v. Kentucky*, 476 U.S. 79, 90 L. Ed. 2d 69 (1986). Defendant objected to both peremptory challenges during *voir dire*. In ruling on each *Batson* objection, the trial court concluded that "there has not been a prima facie showing by the defendant that the State is exercising a peremptory challenge to exclude jurors on account of race." Defendant contends that the *prima facie* requirement was met and requests a new trial or, alternatively, an evidentiary hearing. We affirm the trial court's ruling as to both prospective jurors.

In *Batson v. Kentucky*, the United States Supreme Court reaffirmed the principle first announced in *Strauder v. West Virginia*, 100 U.S. 303, 25 L. Ed. 664 (1880), that purposeful exclusion of African-Americans from participation as jurors solely on account of race violates a defendant's rights under the Equal Protection Clause of the United States Constitution. *Batson*, 476 U.S. at 85-86, 90 L. Ed. 2d at 80. The Court defined a three-part test for determining whether a juror has been impermissibly excused on the basis of race. *Id.* at 96-98, 90 L. Ed. 2d at 87-89. To establish a viable *Batson* challenge, a defendant must first show that he is a member of a "cognizable racial group" and that the prosecutor has exercised peremptory challenges to remove members of the defendant's race from the jury panel. *Id.* at 96, 90 L. Ed. 2d at 87. If such a showing is made, "the bur-

den shifts to the prosecutor to articulate a race-neutral explanation for striking the jurors in question." *Hernandez v. New York*, 500 U.S. 352, 358-59, 114 L. Ed. 2d 395, 405 (1991). To prevail, "the defendant must show that these facts and *any other relevant circumstances* raise an inference that the prosecutor used that practice to exclude the [prospective jurors] . . . on account of their race." *Batson*, 476 U.S. at 96, 90 L. Ed. 2d at 87-88 (emphasis added). In making this showing, a defendant is "entitled to rely on the fact" that peremptory challenges "permit[] 'those to discriminate who are of a mind to discriminate.' " *Id.* at 96, 90 L. Ed. 2d at 87 (quoting *Avery v. Georgia*, 345 U.S. 559, 562, 97 L. Ed. 1244, 1247-48 (1953)). Moreover, "relevant circumstances" may include, but are not limited to, the race of the defendant and the victim(s), the race of key witnesses, a " 'pattern' of strikes" against African-American jurors, and a "prosecutor's questions and statements during *voir dire* examination and in exercising his challenges." *Id.* at 97, 90 L. Ed. 2d at 88; *see also State v. Barden*, 356 N.C. 316, 343-44, 572 S.E.2d 108, 126-27 (2002), *cert. denied*, 538 U.S. 1040, 155 L. Ed. 2d 1074 (2003); *State v. King*, 353 N.C. 457, 468-69, 546 S.E.2d 575, 586 (2001), *cert. denied*, 534 U.S. 1147, 151 L. Ed. 2d 1002 (2002). "The trial court must [then] determine whether the defendant has carried his burden of proving purposeful discrimination." *Hernandez*, 500 U.S. at 359, 114 L. Ed. 2d at 405 (citing *Batson*, 476 U.S. at 98, 90 L. Ed. 2d at 88-89); *King*, 353 N.C. at 469-70, 546 S.E.2d at 586-87.

Trial judges, who are "experienced in supervising voir dire," and who observe the prosecutor's questions, statements, and demeanor firsthand, are well qualified to "decide if the circumstances concerning the prosecutor's use of peremptory challenges create[] a prima facie case of discrimination against black jurors." *Batson*, 476 U.S. at 97, 90 L. Ed. 2d at 88. The trial court's findings will be upheld on appeal unless the " 'reviewing court on the entire evidence [would be] left with the definite and firm conviction that a mistake ha[d] been committed.' " *Hernandez*, 500 U.S. at 369, 114 L. Ed. 2d at 412 (quoting *United States v. United States Gypsum Co.*, 333 U.S. 364, 395, 92 L. Ed. 746, 766 (1948)). Thus, the standard of review is whether the trial court's findings are clearly erroneous. *State v. Barnes*, 345 N.C. 184, 210, 481 S.E.2d 44, 58 (1997), *cert. denied*, 523 U.S. 1024, 140 L. Ed. 2d 473 (1998); *King*, 353 N.C. at 470, 546 S.E.2d at 587.

The record in the case *sub judice* indicates that Ms. Barbour is an African-American female who was the seventh prospective juror peremptorily challenged by the State. At the time of Ms.

Barbour's challenge, the prosecutor had exercised five peremptory challenges against prospective Caucasian jurors and two peremptory challenges against prospective African-American jurors. Apart from Ms. Barbour, only one other prospective African-American juror had not been excused for cause, but that juror was excused peremptorily by the State after he expressed personal beliefs in opposition to capital punishment.

During *voir dire*, the prosecutor asked Ms. Barbour questions that were similar to those asked of other prospective jurors. When questioned about her feelings regarding the death penalty, Ms. Barbour answered that she doesn't "believe in the death penalty" and has felt that way all her life. Ms. Barbour described her feelings as "[p]retty strong," but she stated that she could vote to recommend a death sentence if the law required. Shortly thereafter, the prosecutor exercised peremptory challenges as to Ms. Barbour and a Caucasian individual who had also indicated apprehension over recommending a death sentence.

Following the prosecutor's exercise of a peremptory challenge against Ms. Barbour, defendant made a motion pursuant to *Batson*. In support of a *prima facie* showing defendant noted the following: (1) Ms. Barbour identified herself as African-American on her jury questionnaire, (2) defendant is African-American, (3) defendant is entitled to rely on a presumption that peremptory challenges "permit those to discriminate who are of a mind to discriminate," and (4) Ms. Barbour's responses were the same or similar to those of prospective Caucasian jurors whom the prosecution did not challenge.

The trial court found that defendant and Ms. Barbour are African-American, as were the decedent Seleana Nesbitt, and the other three victims present in Brooks' car when the shootings occurred. The court also found the State had exercised seven peremptory challenges, five as to prospective Caucasian jurors and one as to a prospective African-American juror. Finally, the trial court stated:

> The [c]ourt does not find that there's anything about the manner in which the jurors have been selected which would tend to indicate discrimination as to race. The [c]ourt finds that there has not been a repeated use of preemptory [sic] challenge[s] against a black prospective juror, that it tends to establish a pattern of strikes against blacks in the venire.
>
> . . . .

> The [c]ourt concludes that the defendant has not shown any relevant circumstances to raise an inference that the prosecuting attorney is using preemptory [sic] challenges to exclude veniremen on this jury on account of their race.

With regard to Ms. Flonard, the record indicates that she is an African-American female who was the next prospective juror peremptorily challenged by the prosecutor following Ms. Barbour. During *voir dire* Ms. Flonard was also asked questions that were similar to the questions asked of other prospective jurors. However, Ms. Flonard was questioned in greater detail about her children, two of whom were incarcerated at the time of defendant's trial. One of them had been previously prosecuted by the same district attorney's office that was currently prosecuting defendant, and the other one had been charged with a crime in the area. The prosecutor asked Ms. Flonard whether she remembered that he had prosecuted one of her sons for robbery. Ms. Flonard was also asked specifically about her other son's criminal history and where he had been incarcerated, and about the locations and occupations of her remaining children. Ms. Flonard stated that she felt her family had been treated fairly by law enforcement and the court system and that she would be able to set aside her past experiences in deciding defendant's case. Thereafter, the State peremptorily challenged Ms. Flonard.

Following the prosecution's peremptory challenge of Ms. Flonard, defendant made a second motion pursuant to *Batson*. In support of a *prima facie* showing, defendant stated that (1) this was the prosecution's third exercise of a peremptory challenge against a prospective African-American juror, (2) the only African-American jurors who were not removed for cause were challenged by the prosecution peremptorily, (3) Ms. Flonard's responses during *voir dire* were similar to those of prospective Caucasian jurors who were not challenged, and (4) no prospective Caucasian jurors were questioned in detail as to their family members' criminal records. The State responded that it had exercised five peremptory challenges against individuals who were not minorities and that "there's not been another juror like Ms. Flonard in that it appears that we have prosecuted both of her sons in this county for very serious charges."

The trial court found that

> there has not been a disproportionate use of peremptory challenges to excuse jurors. As to whether the excuse [sic] by peremptory challenge of three black jurors when only three black

jurors have been in the jury panel who were not excused by cause establishes a pattern, the court is of the view that there is no pattern of strikes of minority or black jurors.

If there is a pattern it's certainly not evident by the matter brought forward in the voir dire, nor the manner of selection including the questions and statements used by the prosecuting attorney.

The court concludes at this point that there has not been a prima facie showing by the defendant that the State is exercising a peremptory challenge to exclude jurors on account of race.

We acknowledge, as did the trial court, that no African-American was selected to serve on defendant's jury and that the three African-American jurors who were not excused for cause were challenged peremptorily by the State. However, numerical analysis that may be interpreted to show a pattern of challenges against African-American jurors is just one of many relevant circumstances to be considered in determining the existence of a *prima facie* case of discrimination. *Barden*, 356 N.C. at 344, 572 S.E.2d at 127 (emphasizing that numerical analysis is "not necessarily dispositive" when determining whether a defendant has established a *prima facie* showing of discrimnation). Numbers do not tell the whole story. After a thorough review of the jury selection process and careful examination of all relevant facts and circumstances, we cannot say that the trial court's findings were "clearly erroneous."

Although defendant and the challenged prospective jurors were African-American, the victims and several of the State's key witnesses were African-American as well. For this reason, the shared race of the involved parties tends to contradict an inference of purposeful discrimination by prosecutors. *See State v. Blakeney*, 352 N.C. 287, 309, 531 S.E.2d 799, 815 (2000), *cert. denied*, 531 U.S. 1117, 148 L. Ed. 2d 780 (2001) (noting "both defendant and the victim in this case were African-Americans, 'thus diminishing the likelihood that "racial issues [were] inextricably bound up with the conduct of the trial" ' ") (quoting *State v. Robbins*, 319 N.C. 465, 491, 356 S.E.2d 279, 295, *cert. denied*, 484 U.S. 918, 98 L. Ed. 2d 226 (1987)), *quoted in State v. Davis*, 325 N.C. 607, 620, 386 S.E.2d 418, 424 (1989), *cert. denied*, 496 U.S. 905, 110 L. Ed. 2d 268 (1990) (alteration in original).

Moreover, this Court has held that responses of prospective jurors during *voir dire* are relevant circumstances which may be con-

sidered to determine whether a defendant has established a *prima facie* showing under *Batson*. *State v. Nicholson*, 355 N.C. 1, 23, 558 S.E.2d 109, 126, *cert. denied*, 537 U.S. 845, 154 L. Ed. 2d 71 (2002). Here, Ms. Barbour expressed serious reservations about recommending the death penalty and two of Ms. Flonard's children were apparently prosecuted for serious offenses by the Johnston County District Attorney's Office. While these circumstances proved insufficient to support challenges for cause, they provided obvious non-racial reasons for peremptory challenge. Finally, these responses were elicited from Ms. Barbour in a manner that was similar to the questioning of all other prospective jurors and from Ms. Flonard in a manner tailored to address her unique circumstances. In summary, we find no indication in the record before us of questions, comments, or other conduct by prosecutors during *voir dire* that would lead to an inference of discrimination.

For these reasons, we affirm the trial court's ruling as to both prospective jurors and conclude from a review of all facts and relevant circumstances that defendant's argument to the trial court did not give rise to an inference of purposeful discrimination by prosecutors. Thus, defendant did not establish a *prima facie* case as defined and required by *Batson*. This assignment of error is overruled.

[2] In his second assignment of error, defendant argues that the prosecutor asked prospective jurors four types of improper questions during *voir dire*: (1) how jurors would vote during the sentencing phase, (2) whether jurors' decisions would be based upon the law or their personal feelings, (3) whether jurors had sympathy for defendant, and (4) whether jurors understood they were not being asked to pass judgment on defendant. Defendant contends that these questions were "improper, inaccurate, and misleading" and that the questions were prejudicial to his defense. Therefore, defendant requests a new trial.

Because *voir dire* is a continuous dialogue the meaning and effect of an individual question upon prospective jurors is best determined in consideration of counsel's entire *voir dire*. *See* N.C.G.S. § 15A-1214(c) (2003) (providing that each party "may personally question prospective jurors individually concerning their fitness and competency to serve as jurors in the case to determine whether there is a basis for a challenge for cause or whether to exercise a peremptory challenge"). Accordingly, this Court reviews counsel's questions during *voir dire* in context. *State v. Jones*, 347 N.C. 193, 203, 491 S.E.2d

641, 647 (1997). We consider the prosecutor's questions seriatim and conclude that, when reviewed in context, the questions were permissible in this case.

First, defendant argues that the prosecutor improperly asked two prospective jurors, Ms. Herring and Mr. Geiger, "Do you know right now how you would vote for punishment in this case?," and a third prospective juror, Ms. Matheny, "Do you feel like in any particular case you are more likely to return a verdict of life imprisonment or the death penalty?" Although defendant objected to all three questions at trial, the trial court overruled defendant's objections. Defendant contends that "[t]hese questions could not possibly have elicited pertinent information about juror qualifications" and that the questions "explicitly asked jurors how they would vote for punishment in this case."

The record reveals that Ms. Herring was questioned at length by both parties, after which defendant challenged Ms. Herring for cause on the grounds that her personal beliefs regarding capital punishment would substantially interfere with her ability to apply the law as instructed by the judge. The trial judge acknowledged that throughout *voir dire* Ms. Herring had "slowly evolve[d] in [her] understanding" of capital punishment. The judge stated, "I see a conflict, as well, between the questions—or her responses to the questions asked of her" and then offered each party an opportunity to further question Ms. Herring. The exchange challenged by defendant occurred during the prosecutor's attempt to rehabilitate Ms. Herring.

Mr. Geiger stated similar reservations about recommending a death sentence, explaining, "It's a pretty likelihood [sic] that I would not be able to follow the law." Shortly thereafter, the prosecutor asked Mr. Geiger to think about "that part of the law that talks about being fairly able to consider the death penalty" and inquired, "As you sit here now, do you know how you would vote at the penalty phase . . . regardless of the facts or circumstances in the case?" Mr. Geiger responded, "I can't say I know with a hundred percent certainty, but I think a good probability."

With regard to Ms. Matheny, the prosecutor asked, "Do you feel like in any particular case you are more likely to return a verdict of life imprisonment or the death penalty?" Ms. Matheny responded that she "probably would lean more" towards recommending a sentence of life in prison. Shortly before asking this question, the prosecutor

explained to Ms. Matheny, "No one is trying to ask you what you will do because no one knows," adding, "It's not a fair question." In response, Ms. Matheny stated that she was "not sure" whether she could equally consider capital punishment and life imprisonment as possible sentences.

"Both the defendant and the State have the right to question prospective jurors about their views on capital punishment." *State v. Brogden*, 334 N.C. 39, 43, 430 S.E.2d 905, 908 (1993). Such questions are appropriate when they test a prospective juror's ability to follow the law as instructed by a trial judge notwithstanding that juror's personal opinions concerning the propriety of capital punishment. *Wainwright v. Witt*, 469 U.S. 412, 424, 83 L. Ed. 2d 841, 851-52 (1985); *State v. Brown*, 327 N.C. 1, 14, 394 S.E.2d 434, 442 (1990). While a party may not ask questions which tend to "stake out" the verdict a prospective juror would render on a particular set of facts, *Jones*, 347 N.C. at 201-04, 491 S.E.2d at 646-48, counsel may seek to identify whether a prospective juror harbors a general preference for a life or death sentence or is resigned to vote automatically for either sentence, N.C.G.S. § 9-15 (2003) (counsel is entitled to "make direct oral inquiry of any prospective juror as to the fitness and competency of any person to serve as a juror"). A juror who is predisposed to recommend a particular sentence without regard for the unique facts of a case or a trial judge's instruction on the law is not fair and impartial. *Wainwright*, 469 U.S. at 424, 83 L. Ed. 2d at 851-52.

Here, the prosecutor's questions, when viewed in context, represent a legitimate attempt to elicit prospective jurors' personal views on capital punishment. These general questions did not tend to commit prospective jurors to a specific future course of action. Instead, the questions helped to clarify whether the prospective jurors' personal beliefs would substantially impair their ability to follow the law. Such inquiry is not only permissible, it is desirable to safeguard the integrity of a fair and impartial jury for the benefit of both the prosecution and the defense. Accordingly, this assignment of error is overruled.

Second, defendant contends that the prosecutor improperly asked prospective jurors, "Can you imagine a set of circumstances in which . . . your personal beliefs conflict with the law? In that situation, what would you do?" The prosecutor asked these questions, to which defendant objected, after several prospective jurors stated personal beliefs against the death penalty. Defendant argues that these are "purely speculative hypothetical questions" through which the

prosecutor "was attempting to 'fish' without any basis" and that the questions tended to " 'stake out' " prospective jurors.

Regulation of the form of *voir dire* questions is vested within the sound discretion of the trial court, and "[t]he exercise of such discretion constitutes reversible error only upon a showing by the defendant of harmful prejudice and clear abuse of discretion by the trial court." *Jones*, 347 N.C. at 203, 491 S.E.2d at 647. Hypothetical questions are generally prohibited because they may be " 'confusing to the average juror' " and " 'tend to "stake out" the juror and cause him to pledge himself to a future course of action.' " *Id.* at 202, 491 S.E.2d at 647 (quoting *State v. Vinson*, 287 N.C. 326, 336, 215 S.E.2d 60, 68 (1975), *death sentence vacated*, 428 U.S. 902, 49 L. Ed. 2d 1206 (1976)). This Court has explained that "[c]ounsel may not pose hypothetical questions designed to elicit in advance what the juror's decision will be under a certain state of the evidence or upon a given state of facts." *Vinson*, 287 N.C. at 336, 215 S.E.2d at 68. "Hypothetical questions that seek to indoctrinate jurors regarding potential issues before the evidence has been introduced and before jurors have been instructed on applicable principles of law are similarly impermissible." *Jones*, 347 N.C. at 203, 491 S.E.2d at 647.

Although the form of the prosecutor's questions was hypothetical, these questions did not tend to commit jurors to a specific future course of action in defendant's case, nor were the questions aimed at indoctrinating jurors with views favorable to the State. The questions, "Can you imagine a set of circumstances in which . . . your personal beliefs conflict with the law?" and "In that situation, what would you do?," do not advance any particular position. Rather, the inquiry is designed to prompt one of two answers: (1) "I would follow the law," or (2) "I would follow my personal beliefs." Because jurors must be able to apply the law as instructed, sometimes *despite* their own personal views, the prosecutor's question addresses a key criterion of juror competency. Finally, the questions are simple and clear, without a propensity for confusing jurors. For these reasons, we determine that the trial judge did not abuse his discretion in overruling defendant's objections. This assignment of error is overruled.

Third, defendant contends that the prosecutor improperly asked prospective jurors, "Would you feel sympathy towards the defendant simply because you would see him here in court each day of the trial?" Defendant argues that this question improperly tended to " 'stake out' " jurors to believe that they "could not consider defendant's appearance and humanity in capital sentencing."

In *State v. Brown*, 320 N.C. 179, 199, 358 S.E.2d 1, 15, *cert. denied*, 484 U.S. 970, 98 L. Ed. 2d 406 (1987), this Court stated that jurors may consider a defendant's demeanor in recommending a sentence. However, we cannot agree with defendant that this *voir dire* question posed by the prosecutor "improperly tended to 'stake out' jurors to believe that they could not consider defendant's appearance and humanity in capital sentencing." The prosecutor's question does not address definable qualities of defendant's appearance or demeanor. The question concerns jurors' feelings toward defendant, *notwithstanding* his courtroom appearance or behavior. This Court has upheld challenges to similar *voir dire* questions in *State v. Walls*, 342 N.C. 1, 38-39, 463 S.E.2d 738, 757 (1995), *cert. denied*, 517 U.S. 1197, 134 L. Ed. 2d 794 (1996) and *State v. Smith*, 328 N.C. 99, 128-29, 400 S.E.2d 712, 728-29 (1991). We see no compelling reason to depart from our previous holdings. Accordingly, this assignment of error is overruled.

Fourth, defendant contends that the trial court should have intervened *ex mero motu* when the prosecutor asked prospective jurors, "Do you understand as a juror you're not being asked to judge or pass judgment upon the defendant?" Our review reveals that the complete question actually posed by the prosecutor was:

> At this time, I would just ask, does everyone on the jury panel understand that, as a juror, you're not being asked to pass judgment upon the defendant. Do you understand that your role is to sit and listen and observe the evidence, compare that evidence with the definitions of the crime that the Judge will give you, and then see if you're satisfied, beyond a reasonable doubt, that a crime was committed, and that the defendant is the person responsible for those crimes? Does everyone understand that that's your role as a juror?

The prosecutor repeatedly asked prospective jurors this question during *voir dire*, but defendant did not object and now asserts plain error. However, this Court has "decline[d] to extend application of the plain error doctrine to situations where a party has failed to object to statements made by the other party during jury *voir dire*." *State v. Cummings*, 352 N.C. 600, 613, 536 S.E.2d 36, 47 (2000), *cert. denied*, 532 U.S. 997, 149 L. Ed. 2d 641 (2001). Accordingly, we determine that defendant failed to preserve this issue for appellate review.

For the reasons stated above, defendant's second argument which assigns error to four types of *voir dire* questions is hereby overruled.

GUILT-INNOCENCE PHASE

[3] In his third argument, defendant assigns error to the trial court's admission into evidence of an autopsy photograph of the victim Seleana Nesbitt, two photographs of the Nissan Sentra in which Ms. Nesbitt was shot, testimony of three law enforcement officers describing the Nissan's interior and Ms. Nesbitt's wounds, blood-stained seat material seized from the Nissan, and Ms. Nesbitt's clothing. Defendant argues that he is entitled to a new trial because the testimony, photographs, and physical evidence were irrelevant and unfairly prejudicial.

At trial, defendant objected to admission of the photographs and Ms. Nesbitt's clothing but did not object to the testimony of the law enforcement officers or the admission of seat material taken from the Nissan. We hold that the trial court properly overruled defendant's objections and properly admitted the otherwise unchallenged testimony and evidence.

" 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C.G.S. § 8C-1, Rule 401 (2003). Relevant evidence is generally admissible, but "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." *Id.* § 8C-1, Rules 402, 403 (2003). " ' "Unfair prejudice," as used in Rule 403, means "an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, as an emotional one." ' " *State v. Cagle*, 346 N.C. 497, 506, 488 S.E.2d 535, 542 (1997), *cert. denied*, 522 U.S. 1032, 139 L. Ed. 2d 614 (1997) (quoting N.C.G.S. § 8C-1, Rule 403 cmt. (Supp. 1985)), *quoted in State v. DeLeonardo*, 315 N.C. 762, 772, 340 S.E.2d 350, 357 (1986).

Rulings under North Carolina Rule of Evidence 403 are discretionary, and a trial court's decision on motions made pursuant to Rule 403 are binding on appeal, unless the dissatisfied party shows that the trial court abused its discretion. *State v. Garcia*, 358 N.C. 382, 417, 597 S.E.2d 724, 749 (2004), *cert. denied*, —— U.S. ——, 161 L. Ed. 2d 122, 73 U.S.L.W. 3495 (2005). The test for abuse of discretion is whether the trial court's "ruling was 'manifestly unsupported by reason or [was] so arbitrary that it could not have been the result of a

reasoned decision.' " *State v. Hyde*, 352 N.C. 37, 55, 530 S.E.2d 281, 293 (2000), *cert. denied*, 531 U.S. 1114, 148 L. Ed. 2d 775 (2001) (quoting *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988)) (alteration in original). However, our review of those matters to which defendant did not object at trial is limited to plain error. N.C. R. App. P. 10(b)(1), (c)(4); *Cummings*, 352 N.C. at 613, 536 S.E.2d at 47 (explaining that plain error review will be applied only to matters of evidence and jury instructions); *see also State v. Greene*, 351 N.C. 562, 566, 528 S.E.2d 575, 578 (2000). Plain error is error " 'so fundamental as to amount to a miscarriage of justice or which probably resulted in the jury reaching a different verdict than it otherwise would have reached.' " *State v. Parker*, 350 N.C. 411, 427, 516 S.E.2d 106, 118 (1999), *cert. denied*, 528 U.S. 1084, 145 L. Ed. 2d 681 (2000) (quoting *State v. Bagley*, 321 N.C. 201, 213, 362 S.E.2d 244, 251 (1987), *cert. denied*, 485 U.S. 1036, 99 L. Ed. 2d 912 (1988)). Accordingly, we review admission of the photographs and Ms. Nesbitt's clothing for abuse of discretion and admission of the seat material and the law enforcement officers' testimony for plain error.

First, defendant challenges an autopsy photograph (State's exhibit no. 2) that was admitted during the testimony of forensic pathologist Robert L. Thompson, M.D. and two photographs of Greg Brooks' Nissan (State's exhibits nos. 11 and 12) that were admitted during the testimony of Bobby W. Massey, a former Special Agent with the North Carolina State Bureau of Investigation. Dr. Thompson testified that State's exhibit no. 2 was a fair and accurate depiction of Seleana Nesbitt's body at the time of the autopsy. Agent Massey testified that State's exhibits nos. 11 and 12 were fair and accurate depictions of the interior of the Nissan Sentra in which Ms. Nesbitt was a passenger when she was shot. Both witnesses also testified that using the photographs would help illustrate their testimony to the jury, but defendant objected to admission of each photograph on the ground that the photographs were irrelevant and unfairly prejudicial. In overruling defendant's objection as to the autopsy photograph, the trial court gave a limiting instruction, stating that the photograph was admissible only "to explain and illustrate the testimony of [Dr. Thompson]." The trial court further instructed jurors, "You may not consider [this] photograph[] for any other purpose." Likewise, the trial court admitted photographs of the Nissan into evidence for "illustrative purposes" only.

Dr. Thompson, who performed the autopsy on Seleana Nesbitt, testified that State's exhibit no. 2 showed the back of Ms. Nesbitt's

head and illustrated the path of the bullet. From this photograph, Dr. Thompson pointed out the location of the entry of the bullet, the track of the bullet, the final location of the bullet, and the overall wound from which he recovered bullet fragments. Thereafter, Dr. Thompson gave his expert opinion that the cause of Ms. Nesbitt's death was this "gunshot wound of the head."

Special Agent Massey's responsibility was to collect bullet fragments and blood samples from the Nissan in which Ms. Nesbitt was riding at the time she was shot. Agent Massey testified that he took the two photographs of the vehicle's interior that are challenged by defendant. Both photographs depict the rear passenger seat behind the driver's seat and were taken from the front passenger side door. During publication of the photographs to the jury, Agent Massey testified that State's exhibit no. 11 showed the driver's side rear seat cushion and floor, including several music tapes and other items which had accumulated there. State's exhibit no. 12 also showed the rear passenger seat cushion, but with the tapes and other items removed. Large blood stains were visible in both photographs. Earlier in his testimony, Agent Massey described the Nissan's interior as "relatively clean" except for "what appeared to be apparent blood and brain tissue . . . heavy in and around the driver side rear seat and floor area."

" 'Photographs of a homicide victim may be introduced even if they are gory, gruesome, horrible or revolting, so long as they are used for illustrative purposes and so long as their excessive or repetitious use is not aimed *solely* at arousing the passions of the jury.' " *Blakeney*, 352 N.C. at 309-10, 531 S.E.2d at 816 (quoting *Hennis*, 323 N.C. at 284, 372 S.E.2d at 526) (emphasis added). In particular, photographs may be used "to illustrate testimony regarding the manner of killing so as to prove circumstantially the elements of murder in the first degree." *Hennis*, 323 N.C. at 284, 372 S.E.2d at 526; *see also Blakeney*, 352 N.C. at 310, 531 S.E.2d at 816. In the past, this Court has affirmed a trial court's admission of autopsy photographs which corroborated the cause of death, *see State v. Goode*, 350 N.C. 247, 259, 512 S.E.2d 414, 421-22 (1999), and admission of crime scene photographs which show the location and circumstances of death, *see State v. Haselden*, 357 N.C. 1, 14-15, 577 S.E.2d 594, 603, *cert. denied*, 540 U.S. 988, 157 L. Ed. 2d 382 (2003).

After thorough review of the exhibits and transcript, we conclude that the trial court did not abuse its discretion by admitting the autopsy photograph of Ms. Nesbitt and two photographs of the

Nissan's interior. The trial court admitted each photograph for illustrative purposes only, and both Dr. Thompson and Agent Massey used the photographs to explain relevant portions of their testimony. In particular, the autopsy photograph tended to explain and support Dr. Thompson's expert opinion as to the cause of Seleana Nesbitt's death. The photographs of the Nissan's interior corroborated Agent Massey's testimony describing the crime scene and showed the location at which Ms. Nesbitt sustained the gunshot wound. Thus, the record demonstrates that the challenged photographs were not introduced *solely* to inflame the passions of the jury.

We determine that each photograph carried significant probative value to illustrate and corroborate a witness's testimony. Because this probative value was not substantially outweighed by danger of unfair prejudice, we affirm the trial court's rulings admitting these photographs into evidence. This assignment of error is overruled.

Second, defendant assigns plain error to Agent Massey's statements that "blood and brain tissue was heavy in and around the driver side rear seat and floor area" of the Nissan and that the Nissan's rear seat was blood-stained "to the point it has soaked through the cloth itself to where if you pushed it, it would just come back out, like a sponge." Agent Massey further stated, "And, of course, all these items, tapes, et cetera, are covered with the same red stains." Agent Massey made these statements in connection with State's exhibits nos. 11 and 12, while describing those images to the jury. Like the corresponding photographs, we find that these statements carry significant probative value tending to show the location and circumstances of Seleana Nesbitt's death. Similarly, this probative value is not outweighed by danger of unfair prejudice. For these reasons, the admission of Agent Massey's testimony was not error, much less plain error. We affirm the trial court's admission of Agent Massey's testimony.

Third, defendant challenges the testimony of former evidence and crime scene technician Monroe Enzor and the trial court's admission of blood-stained seat cushion fabric from the Nissan. Mr. Enzor testified that on 9 July 2000, he was employed by the Johnston County Sheriff's Office, where his responsibilities were to "observe, collect and preserve, [and] store" evidence. Mr. Enzor further testified that he collected "blood stain material . . . from the driver side rear vertical seat corner" while processing the Nissan with Agent Massey. Mr. Enzor identified State's exhibit no. 33 as seat cushion fabric which he received from Agent Massey, bagged, and labeled. Agent

Massey later testified that he removed the fabric from the seat cushion as a "blood sample[]." When the State moved to introduce exhibit no. 33 into evidence, defendant did not object; therefore, defendant may prevail only upon a showing of plain error. N.C. R. App. P. 10(b)(1), (c)(4).

Our review of the record indicates that the fabric swatch was introduced by prosecutors solely to inform the jury that stains on the Nissan's rear seat had been tested for blood and that the stains were in fact blood. We find this evidence to be probative of the location and circumstances of Seleana Nesbitt's death and further find that this probative value is not outweighed by danger of unfair prejudice. Accordingly, admission of Mr. Enzor's statement that he collected "blood stain material" and admission of the material itself was not error, plain or otherwise.

Fourth, defendant challenges Mr. Enzor's testimony that he "went by the morgue to collect some items of clothing from the gurney that Ms. Nesbitt was laying on." Mr. Enzor stated that he placed Ms. Nesbitt's clothing in a sealed box which was then stored in an evidence room. Defendant objected to Mr. Enzor's opening of the box in front of the jury and to admission of Ms. Nesbitt's clothing into evidence. The trial court heard counsel's arguments outside the presence of the jury and permitted the State to conduct *voir dire* during which Mr. Enzor opened the box, identified the articles of clothing contained therein, and affixed a label to each item. Following *voir dire* the prosecutor moved to introduce Ms. Nesbitt's clothes into evidence without publishing them to the jury. The trial court ruled that the State had laid sufficient foundation for admissibility, that the clothing was relevant under this Court's decision in *State v. Gaines*, 345 N.C. 647, 483 S.E.2d 396, *cert. denied*, 522 U.S. 900, 139 L. Ed. 2d 177 (1997), and that the clothing's probative value was not outweighed by the danger of unfair prejudice. Thereafter, the jury returned to the courtroom, and at the State's request, Mr. Enzor briefly listed the labeled items without removing them from the box.

In *State v. Gaines*, this Court held that the trial court did not abuse its discretion by admitting a victim's bloody police uniform, gun, and radio into evidence. 345 N.C. at 665-66, 483 S.E.2d at 407. In doing so, the Court stated, " 'Bloody clothing of a victim that is corroborative of the State's case, is illustrative of the testimony of a witness, or throws any light on the circumstances of the crime is relevant and admissible evidence at trial.' " *Id.*, 345 N.C. at 666,

483 S.E.2d at 407 (quoting *State v. Knight*, 340 N.C. 531, 559, 459 S.E.2d 481, 498 (1995)). Moreover, it is well established that " '[a]rticles of clothing identified as worn by the victim at the time the crime was committed are competent evidence.' " *State v. Lloyd*, 354 N.C. 76, 100, 552 S.E.2d 596, 615 (2001) (quoting *State v. Rogers*, 275 N.C. 411, 430, 168 S.E.2d 345, 356 (1969), *cert. denied*, 396 U.S. 1024, 24 L. Ed. 2d 518 (1970)) (alteration in original).

We hold that the clothing worn by Seleana Nesbitt at the time of her death is relevant and admissible under our prior case law. Here, the clothing was not published to the jury and was minimally discussed during the direct examination of Mr. Enzor, whose testimony served to authenticate the items. Under these circumstances danger of unfair prejudice does not substantially outweigh the probative value of the clothing. Accordingly, the trial court did not abuse its discretion in admitting Ms. Nesbitt's clothing and we affirm the trial court's ruling.

Defendant also assigns plain error to Mr. Enzor's testimony that he picked up Ms. Nesbitt's clothing "from the gurney that Ms. Nesbitt was laying on." This testimony tends to identify the clothing in question as belonging to Ms. Nesbitt and as being worn by Ms. Nesbitt at the time of her death. Accordingly, Mr. Enzor's testimony was relevant and admissible for authentication purposes. We do not find the statement to be unfairly prejudicial under North Carolina Rule of Evidence 403. Therefore, the trial court did not err by admitting Mr. Enzor's statement.

Fifth, defendant challenges the testimony of Detective Wayne Sinclair of the Johnston County Sheriff's Department that he observed Seleana Nesbitt's body in the hospital emergency room at 5:00 a.m. on 9 July 2000, where Nesbitt "had a cervical collar around her neck . . . [and an] incubating [sic] tube down—entering her mouth." Detective Sinclair described Nesbitt's injury as "a gaping head wound with brain matter showing." However, defendant did not object to Detective Sinclair's description at trial.

Again, this evidence is probative of the cause and nature of Ms. Nesbitt's death. Because we do not find that the testimony's probative value is substantially outweighed by danger of unfair prejudice, we find no error, much less plain error, in its admission.

For the reasons stated above, we affirm the trial court's rulings admitting an autopsy photograph of Seleana Nesbitt, two pho-

tographs of the Nissan's interior, and the clothing worn by Ms. Nesbitt on the night of her death. We further conclude that the trial court did not err by admitting the challenged testimony of Agent Massey, Mr. Enzor, and Detective Sinclair or by admitting a blood-stained fabric swatch removed from the Nissan. Accordingly these assignments of error are overruled.

[4] In his fourth argument, defendant assigns error to the trial court's admission of hearsay evidence during the direct examination of State's witness Detective Wayne Sinclair. Detective Sinclair testified that he interviewed defendant on 12 July 2000. Detective Sinclair then read a statement made by defendant during that interview to the jury. Defendant contends that Detective Sinclair's testimony contained hearsay within hearsay, which violated North Carolina Rules of Evidence 802 and 805. Defendant further contends that the testimony was irrelevant and unfairly prejudicial in violation of North Carolina Rules of Evidence 401, 402, and 403. Also, defendant argues for the first time on direct appeal that admission of the testimony violated the Sixth, Eighth, and Fourteenth Amendments to the Constitution of the United States. We conclude that the challenged portion of Detective Sinclair's testimony is relevant and that it does not contain impermissible hearsay and is not unfairly prejudicial. We further conclude that defendant did not preserve an assignment of constitutional error for review. *Lloyd*, 354 N.C. at 86-87, 552 S.E.2d at 607 ("Constitutional issues not raised and passed upon at trial will not be considered for the first time on appeal."); *Cummings*, 352 N.C. at 613, 536 S.E.2d at 47 (explaining that plain error review is limited to matters of evidence and jury instruction). Accordingly, we affirm the trial court's ruling allowing Detective Sinclair to read defendant's statement in full.

" 'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." N.C.G.S. § 8C-1, Rule 801 (c) (2003). " 'If a statement is offered for any purpose other than that of proving the truth of the matter stated, it is not objectionable as hearsay.' " *State v. Irick*, 291 N.C. 480, 498, 231 S.E.2d 833, 844-45 (1977) (quoting 1 *Stansbury's N.C. Evidence* § 141 (Brandis Rev. 1973) at 467-71). Additionally, a defendant's own statement is admissible when offered against him at trial as an exception to the hearsay rule. N.C.G.S. § 8C-1, Rule 801(d) (2003).

On direct examination, Detective Sinclair testified from his notes of defendant's interview. During the interview, defendant told

Detective Sinclair that he and Lee Green stayed at an apartment in Selma with two females named Candy and Keama on the night of the shooting. The following morning, defendant and Mr. Green went to the home of Garry Yarborough, where defendant slept. When Detective Sinclair read a part of defendant's statement that an unknown individual called Mr. Yarborough's house around noon on the day following the shooting, defendant objected and asked to be heard outside the presence of the jury. The trial court directed that Detective Sinclair read the remainder of defendant's statement into the record: "Around noon, somebody called and said they were going to kill whoever was in the house over Seleana Nesbitt's death. Mr. Chapman then left and went to [Lee] Green's house."

Defendant's attorney conceded that "[t]he statement of the defendant, obviously, is not hearsay," but argued that "what somebody else said, I believe, is hearsay and does not come under any exceptions." The trial court overruled defendant's objection, finding defendant's own statement to be admissible as the statement of a party-opponent and further finding that the unidentified caller's statement fell within an exception to the hearsay rules. The trial court then requested for the jury to return, and Detective Sinclair completed his testimony regarding the phone call.

"Hearsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule." *Id.* § 8C-1, Rule 805 (2003). Here, the statement of defendant to Detective Sinclair is clearly admissible as the statement of a party opponent. *Id.* § 8C-1, Rule 801(d). Further, words of the unidentified caller contained within defendant's statement to Detective Sinclair are not hearsay because they were not offered to prove the truth of the matter asserted. *Irick*, 291 N.C. at 498, 231 S.E.2d at 844. Evidence of the phone call was admitted to show defendant's response to receiving the call, not to prove that the caller would actually harm the people in Mr. Yarborough's house. Thus, the phone call was admissible to explain defendant's subsequent conduct in leaving Mr. Yarborough's house. Because neither portion of defendant's statement contains inadmissible hearsay, we affirm the trial court's ruling admitting Detective Sinclair's testimony.

Defendant also contends that the challenged portions of Detective Sinclair's testimony were irrelevant and unfairly prejudicial under North Carolina Rules of Evidence 401 and 403. However, defendant did not base his objection before the trial court on grounds

of irrelevancy or unfair prejudice. Moreover, defendant devotes no more than one sentence to this argument in his brief, stating in conclusory fashion that "the evidence was irrelevant under Evidence Rules 401-403 because what the caller said on July 9 did not have any tendency to make the existence of any consequential fact in this case more or less probable and was unfairly prejudicial." *Cf.* N.C. R. App. P., Rule 28(a) (2005) ("Questions raised by assignments of error in appeals from trial tribunals but not then presented and discussed in a party's brief, are deemed abandoned"). Under these circumstances, we conclude that Detective Sinclair's testimony was relevant to explain defendant's course of conduct following the shooting and that the statement was not unfairly prejudicial.

For the reasons stated above, defendant's fourth argument and all assignments of error contained therein are overruled.

[5] In his fifth argument, defendant assigns error to Detective Sinclair's testimony that he overheard Lee Green tell his mother, "I'm tired of lying and I'm going to tell them the truth" during a phone call that Green made from the police interview room. Defendant contends that the testimony in question was noncorroborative and prejudicial. We determine that Detective Sinclair's testimony was admissible to corroborate the earlier testimony of State's witness, Lee Green, and affirm the trial court's ruling admitting Detective Sinclair's statement.

Detective Sinclair interviewed each passenger of the Cadillac Seville on 12 July 2000, including defendant and Lee Green. Defendant told Detective Sinclair that he and Green had stayed with two females named Candy and Keama on the night of the shooting. Based upon this and other information, Detective Sinclair asked Detective Tommy Beasley, who was also assigned to the investigation, to drive to Selma and confirm defendant's statements. Detective Beasley traveled to Selma while Detective Sinclair completed Green's interview. During the interview Green gave a statement denying any knowledge of the shooting.

Detective Beasley returned from Selma with Candy and Keama at the same time Detective Sinclair finished his interview with Green. Green was left alone in the interview room while Detective Sinclair went to confer with Detective Beasley. Green testified that he believed Detective Sinclair had gone to speak with Candy and Keama. In response to the prosecutor's questions, Detective Sinclair testified to the following exchange, which occurred when he re-entered the interview room:

Q. What did you tell Mr. Green?

A. I reapproached Mr. Green. I told Mr. Green that that was very true what he had told me in the interview, that he had stayed the night with two young ladies, because we had checked that out. And, also, there were statements made at that house that night of him being aware of the shooting that occurred on—

[DEFENSE COUNSEL]: Objection.

A. —on 39 highway.

THE COURT: Objection overruled, then.

Q. And what, if any, reaction did you observe in Mr. Green?

A. Mr. Green got upset and started to cry.

Q. Had he exhibited this type of emotional state up until that point?

A. No, sir, he had not.

Q. What happened next?

A. Mr. Green was allowed to use the telephone.

Q. How did that subject come up?

A. Mr. Green asked me if he could use the telephone.

Q. Did he tell you who he wanted to call?

A. Mr. Green told me he wanted to call his mother.

Thereafter, Detective Sinclair testified that he was able to hear Green's portion of the phone conversation. Detective Sinclair also confirmed that his interview with Green continued "as a result of that phone call."

When the prosecutor asked Detective Sinclair, "What did you hear in terms of Mr. Green's end of the conversation?," defendant objected. The trial court initially sustained defendant's objection but agreed to hear arguments from counsel outside the presence of the jury at the State's request. The prosecutor argued that the challenged testimony was being offered "to corroborate prior testimony of Mr. Green" and that the testimony was alternatively admissible as a present sense impression, excited utterance, or then existing mental, emotional, or physical condition. The trial judge requested an offer of proof to determine whether the statements were corroborative,

which the State provided. During the offer of proof, Detective Sinclair testified that he heard Green say, "[M]ama . . . I'm tired of lying. I'm going to tell them the truth."

Defense counsel responded, conceding that the statement "probably does come under the [hearsay] exceptions of the present sense or then existing mental state" and that "[i]t might even be a statement against penal interest." Then defense counsel clarified, "Our objection was based upon his offer of corroboration, not the other." The trial court overruled defendant's objection, ruling "the statement of Detective Sinclair concerning what Lee Green stated to him is admissible for corroboration." Before Detective Sinclair's testimony continued, the trial court issued a limiting instruction to the jury, explaining that the statement in question could be considered "together with all other facts and circumstances bearing upon the witness[], Lee Green['s], truthfulness, in deciding whether you will believe or disbelieve his testimony at trial." Following this limiting instruction, Detective Sinclair testified that during the phone call he heard Mr. Green say, "I'm tired of lying and I'm going to tell them the truth."

Corroboration is the " 'process of persuading the trier of facts that a witness is credible.' " *State v. Burton*, 322 N.C. 447, 449, 368 S.E.2d 630, 632 (1988) (quoting 1 Henry Brandis, Jr., *Brandis on North Carolina Evidence* § 49 (2d ed. 1982)). Corroborative evidence " 'tends to strengthen, confirm, or make more certain the testimony of another witness.' " *Lloyd*, 354 N.C. at 103, 552 S.E.2d at 617 (quoting *State v. Rogers*, 299 N.C. 597, 601, 264 S.E.2d 89, 92 (1980)). Prior consistent statements of a witness are admissible to corroborate the testimony of a witness whose truthfulness has been impeached. *State v. Gell*, 351 N.C. 192, 204, 524 S.E.2d 332, 340, *cert. denied*, 531 U.S. 867, 148 L. Ed. 2d 110 (2000). It is "well established that the corroborative testimony may contain 'new or additional information when it tends to strengthen and add credibility to the testimony which it corroborates.' " *Burton*, 322 N.C. at 450, 368 S.E.2d at 632 (citation omitted). We determine that Detective Sinclair's testimony that he overheard Green state "I'm tired of lying and I'm going to tell them the truth" is admissible as a prior consistent statement which tends to strengthen Green's credibility.

Earlier during the trial, the State called Lee Green to testify. Green described his interviews at the police station and stated that he had given an initial statement to Detective Beasley, but that statement had been a lie. Green said that in this first statement, "I told

them what I was told to say, everything but the shooting." After waiting for a short time, Detective Sinclair entered the room and asked to question Green a second time. Green testified that during this second interview, "At first I was still lying . . . . I told the first story that I made about everything but the shooting."

Green further explained:

> And then I think Keama and Candy walked in. And I think Sinclair, he told me to wait, to hold on a minute.
>
> . . . .
>
> I guess they had to talk to Keama or something, Keama and Candy, and then he came back to me. And that's when I broke down and asked to call my mom, and I told the truth.

Green stated, "I told [my mother] that I knew something about the shooting. And she told me—well, she just told me to tell what I know, so I did."

Detective Sinclair's testimony adds "strength and credibility" to Green's testimony that, although he initially lied to law enforcement, he decided to tell the truth after speaking to his mother. For this reason, we agree with the trial court that Detective Sinclair's testimony was "generally corroborative of Lee Green's testimony" and affirm the trial court's ruling admitting Green's statement. This assignment of error is overruled.

[6] In his sixth argument, defendant assigns error to three statements made by Detective Sinclair about his interview with Green on direct examination: (1) that law enforcement had "checked . . . out" Green's story about staying with Candy and Keama and found it to be "very true," (2) that "there were statements made" at Candy and Keama's apartment that Green was "aware of the shooting that occurred on . . . 39 highway," and (3) law enforcement had information that Green "stayed the night with" Candy and Keama. Defendant contends that Detective Sinclair's testimony contained inadmissible hearsay and violated the Sixth Amendment to the United States Constitution.

As explained above, " '[A] statement . . . offered for any purpose other than that of proving the truth of the matter stated . . . is not objectionable as hearsay.' " *Irick*, 291 N.C. at 498, 231 S.E.2d at 844

(citation omitted). Here, the central purpose for offering Detective Sinclair's statements was to show Green's response to being caught in a lie during his second police interview. Whether Detective Sinclair actually confirmed the information he shared with Green was tangential to the State's case. The record reveals that upon hearing Detective Sinclair's statements, Green "broke down" in tears and asked to call his mother, after which Green told law enforcement a different story. Because we conclude that the statements challenged by defendant were not offered "to prove the truth of the matter asserted," we find that Detective Sinclair's testimony was not hearsay and was, therefore, properly admitted.

Finally, defendant states in his brief that admission of the challenged portions of Detective Sinclair's testimony violated the Sixth Amendment of the United States Constitution. However, the record reflects that defendant did not state a constitutional basis for his objections at trial. As discussed above, constitutional arguments will not be considered for the first time on appeal. *Lloyd*, 354 N.C. at 86-87, 552 S.E.2d at 607; *Cummings*, 352 N.C. at 613, 536 S.E.2d at 47 (explaining that plain error review will be applied only to matters of evidence and jury instructions). Accordingly, we determine that defendant's constitutional assignment of error on this matter has been waived. For the reasons stated above, defendant's sixth argument is overruled.

[7] In his seventh argument, defendant assigns error to the State's witness Jared Clemmons' statements that he testified truthfully during direct and redirect examinations. Defendant contends that these statements were irrelevant and unfairly prejudicial and thus inadmissible. Also, in his eighth argument, defendant assigns error to admission of Clemmons' testimony that he was represented and advised by counsel during the formalization of a plea agreement related to Seleana Nesbitt's death. Defendant further assigns error to admission of the testimony of State's witness Thomas Manning, Clemmons' attorney, arguing that evidence Clemmons was represented by counsel during plea negotiations on charges related to Nesbitt's death is "totally irrelevant to any substantive issue in these cases" and constitutes "improper 'vouching' for Clemmons' credibility." Because our resolution of defendant's seventh and eighth arguments is dependent upon the same facts, we address these issues together.

On direct examination, Jared Clemmons testified that he drove the Cadillac Seville from which defendant and DaJuan Morgan fired their weapons on the night of Seleana Nesbitt's death. Clemmons

further testified that on 10 April 2001, he pled guilty to the second-degree murder of Ms. Nesbitt in exchange for imposition of a sentence in the range of eight to twenty years. Clemmons stated that he was not sentenced on 10 April 2001, rather the court entered a prayer for judgment to be continued until the State's cases against defendant and Morgan were resolved. The terms of Clemmons' plea agreement required that "[i]f called upon, [Clemmons] shall testify truthfully in State v. LaMorris Chapman . . . . The presiding trial judge in these matters shall be the arbiter as to the truthfulness of [Clemmons'] testimony. In exchange for his truthful testimony, [Clemmons] shall receive an active sentence in the court's discretion." Clemmons confirmed he understood the need to testify truthfully to uphold the terms of his plea agreement and that he had been truthful during his interview with Detective Sinclair and during his testimony before the trial court.

During cross-examination, defense counsel devoted considerable effort to impeaching Clemmons' credibility, implying that Clemmons lied to the court by pleading guilty to second-degree murder, even though Clemmons did not believe he had committed that crime. Counsel's questioning on this point fills at least seven pages of trial transcript, and the most pointed exchange follows:

> Q. According to your testimony, you didn't do anything wrong, did you?
>
> A. No, I didn't?
>
> Q. You didn't?
>
> A. No, I didn't.
>
> Q. But you pled guilty to second-degree murder?
>
> A. Yeah. Because I was told if I took it to trial I would have lost.
>
> Q. Well, you were asked specifically by the judge, according to [your plea agreement], are you, in fact, guilty. And you said yes, I am guilty.
>
> A. I had to say that.
>
> Q. Beg your pardon.
>
> A. I had to say that. If I took it to trial, I would have lost.
>
> Q. But that wasn't true, was it? I mean, you're not even guilty, are you?

A. You know what I'm saying, I'm charged with first-degree murder, but I didn't kill anybody.

Q. Well, I understand that. But you don't believe you're guilty of murder, do you?

A. No, I do not.

Q. Well, then, when the judge specifically asked you on this plea transcript are you in fact, guilty, you said yes. You weren't telling the truth, were you?

A. Because I had to pled [sic] guilty to that.

Q. You had to pled [sic] guilty to that. You had to say that on this so that it would benefit you; isn't that right?

A. Yes.

Q. Likewise, you have to testify according to what they want you to testify to, be truth, and say it's truthful, otherwise, it won't benefit you?

. . . .

A. I'm telling you the truth.

Q. Were you telling the judge the truth on April 10?

A. I had to be forced to say I was guilty.

Q. The question was, sir, were you telling the judge the truth on April 10?

A. Yeah. Telling the truth about what?

Q. That you were, in fact, guilty?

A. I had to say I was guilty. I had to.

Q. So, I mean, you did not tell the judge the truth?

A. I didn't say that. I said I had to go plead guilty to second-degree murder or else I went to trial and lost at trial.

Q. And you would be facing the death penalty?

A. Could of been, or life without parole.

Q. So you're willing to tell the judge on April 10 something that wasn't true so that you would get the deal that you got, right?

A. No.

Q. Well, then, why did you not tell the judge the truth on April 10?

A. What do you mean, I didn't tell him the truth?

Q. Right.

A. I had to plead guilty to that. I had no choice but to plead guilty to that.

Defense counsel posed similar questions on re-cross-examination.

On redirect, the prosecutor sought to rehabilitate Clemmons by asking, "Did your lawyer advise you on this plea?" and later, "So you had an understanding after you had talked to your lawyer why you were pleading guilty?" The prosecutor also asked Clemmons, "Have you told the truth since you've taken the stand?" to which Clemmons responded, "Yes, I have."

Later, the State called Clemmons' attorney, Mr. Thomas Manning, to "explain why [Clemmons] says I didn't do anything wrong, but I had to plead guilty." The record reflects that Clemmons waived attorney-client privilege as to this issue. On direct examination, Mr. Manning testified to his legal background, including the length of his practice, his field of specialization, and his "AV" Martindale-Hubbell rating. Mr. Manning also stated in general terms that he discussed with Clemmons the elements of crimes for which Clemmons had been charged and the theories of law concerning those crimes, as well as possible punishments and plea offers made by the State. Mr. Manning testified that he advised Clemmons on a course of action based upon his professional knowledge and experience. We conclude Clemmons' testimony that he had testified truthfully was not plain error and that Clemmons' testimony regarding his legal representation, as well as the testimony of Mr. Manning, was permissible in defendant's case.

"The question of whether a witness is telling the truth is a question of credibility and is a matter for the jury alone." *State v. Solomon*, 340 N.C. 212, 221, 456 S.E.2d 778, 784, *cert. denied*, 516 U.S. 996, 133 L. Ed. 2d 438 (1995). In *State v. Skipper*, 337 N.C. 1, 39, 446 S.E.2d 252, 273 (1994), *cert. denied*, 513 U.S. 1134, 130 L. Ed. 2d 895 (1995), this Court affirmed the trial court's ruling sustaining a prosecutor's objection to defense counsel's question on direct examina-

tion, "Are you telling this jury the truth?" The following year, this Court affirmed trial court rulings sustaining objections to two analogous questions also posed by defense counsel: (1) whether the defendant "had accurately pointed out to the prosecutor all the places in his prior statements that were untrue," and (2) whether a witness "knew she was under oath." *Solomon*, 340 N.C. at 220-21, 456 S.E.2d at 784. Therefore, under our prior case law it is improper for defense counsel to ask a witness (who has already sworn an oath to tell the truth) whether he has in fact spoken the truth during his testimony.

However, unlike the above-mentioned cases, the error cited by defendant involves the prosecutor's questions to the State's witness after that witness's credibility had been attacked. Moreover, defendant did not object to the prosecutor's questions concerning Clemmons' truthfulness at trial; thus, defendant must show plain error to prevail on appeal. N.C. R. App. P. 10(b)(1), (c)(4). As stated earlier, plain error is error " 'so fundamental as to amount to a miscarriage of justice or which probably resulted in the jury reaching a different verdict than it otherwise would have reached.' " *Parker*, 350 N.C. at 427, 516 S.E.2d at 118 (citation omitted). After thorough review of the record, we cannot say that Clemmons' responses probably altered the outcome of the trial.

First, Clemmons' statements that his testimony was true were plainly self-serving. The interested nature of Clemmons' averment of truth is especially apparent in light of the terms of Clemmons' plea agreement and defense counsel's impeachment of Clemmons on cross-examination. In addition to constituting the separate crime of perjury, false testimony by Clemmons would void the terms of his plea agreement. Second, inasmuch as Clemmons testified only after taking an oath or affirmation to tell the truth in accordance North Carolina Rule of Evidence 603, the challenged testimony was redundant. Under these circumstances, the admission of Clemmons' testimony was not plain error.

We next consider Clemmons' testimony that he was represented and advised by counsel during entry of his guilty plea to second-degree murder and the testimony of Mr. Manning, Clemmons' attorney. Defendant acknowledges that "where evidence of bias is elicited on cross-examination the witness is entitled to explain, if he can, on redirect examination, the circumstances giving rise to bias so that the witness may stand in a fair and just light before the jury." *State v. Patterson*, 284 N.C. 190, 196, 200 S.E.2d 16, 20 (1973). Here, defend-

ant impeached Clemmons on cross-examination, asking questions which tended to show that Clemmons lied during the entry of his plea and that Clemmons had a motive to lie again while testifying at defendant's trial. Clemmons' redirect testimony that Mr. Manning had advised him regarding the guilty plea and that he understood he bore some responsibility for Ms. Nesbitt's death because he was driving the Nissan, counterbalances the impeachment. We determine that Clemmons' redirect testimony was properly allowed to explain impeaching evidence elicited by defense counsel on cross-examination. Accordingly, the trial court did not err by admitting the challenged testimony.

We further conclude that Mr. Manning was properly called to corroborate Clemmons' testimony after Clemmons was impeached on cross and re-cross-examinations. In *State v. Westbrook*, 279 N.C. 18, 181 S.E.2d 572 (1971), *sentence vacated on other grounds by*, 408 U.S. 939, 33 L. Ed. 2d 761 (1972), this Court affirmed the trial court's admission of a police officer's testimony under similar circumstances. In that case, the defendant was tried and convicted of first-degree murder. *Id.* at 23, 181 S.E.2d at 575. Evidence presented at trial showed that the defendant acted in concert with a man named Johnny Frazier. *Id.* at 33, 41, 181 S.E.2d at 581, 586. The State called Frazier to testify during its case-in-chief, and on direct examination, Frazier described his and the defendant's course of conduct before, during, and after the murder. *Id.* at 23, 33-34, 181 S.E.2d at 575, 581. On cross-examination, defense counsel impeached Frazier with a prior inconsistent statement which recounted a different series of events. *Id.* at 34-35, 181 S.E.2d at 581-82. Thereafter, the State called a police officer to whom Frazier made statements consistent with his trial testimony. *Id.* at 35, 181 S.E.2d at 582. This Court affirmed the trial court's admission of the police officer's testimony, finding that the testimony tended to corroborate Frazier's statements during direct examination and that there was no error in permitting the jury to consider whether the testimony corroborated the statements in question. *Id.* In so doing, the Court held that "[w]here the testimony offered to corroborate a witness does so substantially, it is not rendered incompetent by the fact that there is some variation." *Id.*

Here, defendant argues that Mr. Manning's testimony "did *not* meet defendant's impeachment and was *not* probative of Clemmons' truthfulness; accordingly, it was irrelevant and inadmissible." While we agree that rehabilitative evidence must correspond directly to the impeaching inference raised by the opposing party, our decision in

Westbrook makes clear that the test for admissibility is not rigid—rehabilitative evidence need not correlate fact-to-fact with impeaching evidence. Because we conclude that Mr. Manning's testimony *substantially* corroborates Clemmons' testimony by explaining why Clemmons pled guilty to second-degree murder, we affirm the trial court's ruling admitting Mr. Manning's statements.

[8] In his ninth argument, defendant assigns error to the testimony of State's witness Detective Wayne Sinclair that defendant surrendered to law enforcement officers in Benson on 14 July 2000 "in the presence of his family and his attorney, Gerald Hayes" and that after taking defendant into custody, Detective Sinclair "did not conduct an interview with the defendant." Although defendant did not object to Detective Sinclair's testimony at trial, defendant now contends that these statements violated the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

Again, constitutional error will not be considered for the first time on appeal. *Lloyd*, 354 N.C. at 86-87, 552 S.E.2d at 607; *Cummings*, 352 N.C. at 613, 536 S.E.2d at 47 (explaining that plain error review will be applied only to matters of evidence and jury instructions). Because defendant did not raise these constitutional issues at trial, he has failed to preserve them for appellate review and they are waived. Accordingly, this assignment of error is overruled.

[9] In his tenth argument, defendant assigns error to four classes of statements made by prosecutors during guilt-phase opening statement and closing argument. Specifically, defendant contends that prosecutors improperly (1) commented on defendant's right to remain silent, (2) asserted that the State's witnesses were truthful, (3) misstated the law, and (4) argued an irrelevant "hypothetical factual scenario and an equally hypothetical application of law to that scenario." Defendant further contends that prosecutors' statements were prejudicial error and that he is entitled to a new trial.

Defendant did not object at trial to the first three classes of statements that he now challenges on appeal. "When a defendant fails to object to an allegedly improper closing argument, the standard of review is whether the argument was so grossly improper that the trial court erred in failing to intervene *ex mero motu*." *State v. Roseboro*, 351 N.C. 536, 546, 528 S.E.2d 1, 8, *cert. denied*, 531 U.S. 1019, 148 L. Ed. 2d 498 (2000). " '[T]he trial court is not required to intervene *ex mero motu* unless the argument strays so far from the bounds of pro-

priety as to impede defendant's right to a fair trial.' " *State v. Smith*, 351 N.C. 251, 269, 524 S.E.2d 28, 41, *cert. denied*, 531 U.S. 862, 148 L. Ed. 2d 100 (2000) (quoting *State v. Atkins*, 349 N.C. 62, 84, 505 S.E.2d 97, 111 (1998), *cert. denied*, 526 U.S. 1147, 143 L. Ed. 2d 1036 (1999)). The same standard applies when a defendant fails to object to an opening statement. *State v. Gladden*, 315 N.C. 398, 417, 340 S.E.2d 673, 685, *cert. denied*, 479 U.S. 871, 93 L. Ed. 2d 166 (1986). We consider the prosecutor's challenged statements seriatim and determine that each was permissible in this case.

First, defendant argues that prosecutors made improper references to defendant's exercise of the right to remain silent during opening and closing statements. With regard to opening statements, defendant assigns error to the prosecutor's forecast that jurors would "hear from the three occupants of the Cadillac—Lee Green, Shamarh McNeil and Jared Clemmons, three occupants of the Cadillac—I point out to you, three friends of the defendant." With regard to closing argument, defendant assigns error to two prosecutors' explanations of the elements of premeditation, deliberation, and specific intent to kill. In particular, defendant challenges one prosecutor's argument that

> premeditation and deliberation are generally established from the circumstances of a killing, such as vicious or brutal killing. And you may infer premeditation and deliberation from the circumstances of the killing. Why? Because premeditation and deliberation are something which the State can seldom ever prove directly. *It would be nice if you could have a piece of evidence with the defendant coming up here and saying yes, I intended to kill him and then he shoots him. We don't have that statement from the defendant where he said that to somebody or that he's admitted to that.* You've heard all the evidence.

Also, defendant challenges a second prosecutor's request that jurors

> [l]isten closely. Intent is a mental attitude seldom provable by direct evidence. Again, as [my co-counsel] said, *it's not every day you have somebody that says to everybody within the sound of my voice, I'm letting it be known I'm going to kill that person.* It just doesn't happen. It must ordinarily be proved by circumstances from which it may be inferred. An intent to kill may be inferred from the nature of the assault, the manner in which it was made, the conduct of the parties and other relevant circumstances.

Defendant contends that through these three statements, "the prosecutor promised the jury it would 'hear' from interested State witnesses Green, Clemmons, and McNeil and then repeatedly urged the jury to credit Green, Clemmons, and McNeil because it had 'heard' and 'seen' them testify 'on that witness stand in this courtroom in this case.' " Moreover, defendant contends that these statements contain direct and indirect comments on defendant's constitutional right to remain silent.

Section 8-54 of the North Carolina General Statutes states that "[i]n the trial of all indictments, complaints, or other proceedings against persons charged with the commission of crimes, offenses or misdemeanors, the person so charged is, at his own request, but not otherwise, a competent witness, and his failure to make such request shall not create any presumption against him." N.C.G.S. § 8-54 (2003). This Court has consistently interpreted section 8-54 to prohibit the State from referring to or commenting upon a defendant's failure to testify at trial. *State v. Taylor*, 289 N.C. 223, 228, 221 S.E.2d 359, 363 (1976); *Gragg v. Wagner*, 77 N.C. 186, 187-88 (1877). However, within the confines of section 8-54, counsel for both sides are entitled to argue "the whole case as well of law as of fact" to the jury. N.C.G.S. § 7A-97 (2003); *State v. Thomas*, 350 N.C. 315, 354, 514 S.E.2d 486, 510, *cert. denied*, 528 U.S. 1006, 145 L. Ed. 2d 388 (1999).

Here, the prosecutor's closing argument explains that the State may seek to prove premeditation and deliberation by circumstantial evidence because direct proof of those elements of first-degree murder and first-degree attempted murder is often unavailable. This accurate statement of law, *State v. Smith*, 357 N.C. 604, 616, 588 S.E.2d 453, 461 (2003), *cert. denied*, —— U.S. ——, 159 L. Ed. 2d 819 (2004) ("Premeditation and deliberation, both processes of the mind, must generally be proven by circumstantial evidence"), was directly relevant to the State's theory of prosecution in defendant's case. Although a juror might infer that defendant had exercised his right to remain silent from the prosecutor's statements, that inference is tangential to the State's clear purpose in making this argument.

As this Court determined in *State v. Taylor*, when challenged portions of closing argument "taken in context" do not "encourage the jury to infer guilt from the defendant's silence, . . . they [do] not amount to gross impropriety requiring the trial court to intervene *ex mero motu*." 337 N.C. 597, 614, 447 S.E.2d 360, 371 (1994) (citation omitted). Further, in *State v. Prevatte*, we concluded that "if a prose-

cutor's comment on a defendant's failure to testify was not extended or was a 'slightly veiled, indirect comment on [a] defendant's failure to testify,' there was no prejudicial violation of the defendant's rights." 356 N.C. 178, 248, 570 S.E.2d 440, 479 (2002), *cert. denied*, 538 U.S. 986, 155 L. Ed. 2d 681 (2003) (quoting *State v. Mitchell*, 353 N.C. 309, 326, 543 S.E.2d 830, 841, *cert. denied*, 534 U.S. 1000, 151 L. Ed. 2d 389 (2001)) (alterations in original). Because the prosecutor's argument in the case *sub judice* simply explained the circumstantial nature of evidence tending to show premeditation and deliberation without encouraging jurors to infer guilt from defendant's silence and because any reference to defendant's failure to testify was indirect, we conclude that the trial court did not err by failing to intervene *ex mero motu* during the prosecutor's closing arguments. Accordingly, this assignment of error is overruled.

Further, with regard to the prosecutor's opening statement, we find no reference, "veiled" or otherwise, to defendant's decision to exercise his right to silence. For the reasons stated above, we determine that the challenged statements do not constitute reversible error.

Second, defendant asserts that the prosecutor improperly told jurors that State's witnesses Green, McNeil, and Clemmons would "tell the truth" at trial and that these witnesses in fact "told the truth." During opening statement, the prosecutor introduced Green, McNeil, and Clemmons saying:

> The detectives talked to several occupants of the Cadillac—Lee Green, Jared Clemmons and Shamarh McNeil. Initially, these three all stick to their story. They admit to being together and going to Club 39 and going to Selma, but they deny any knowledge of a shooting on Highway 39.
>
> . . .
>
> Three days after the shooting, the hard, tireless work of the Johnston County Sheriff's Department pays off. Lee Green is the first occupant of the Cadillac to add to his story, to tell the whole story *and to tell the truth*. He does that on July 12. Shamarh McNeil is the next occupant of the Cadillac to add to his story, to tell the whole story *and to tell the truth* about what happened . . . .
>
> . . . .

> . . . Jared Clemmons, you will hear, has added to his story and told the whole story *and told the truth. Just as did Lee Green and just as did Shamarh McNeil.*

(Emphasis added.)

During closing argument the prosecutor stated:

> After the fine investigation of the Johnston County Sheriff's Department got well underway, you see a different side of these young people. You see the youth of Lee, Shamarh and Jared. You see a group of scared kids. Scared because of what happened and scared because of what might happen to them, but they also know what is right and they know what is wrong. And despite the strongest amount of peer pressure, these three young people *came to tell not just part [] of the story, but they came to tell the whole story and they came to tell the truth. They told the truth* when confronted with the reality of life and when confronted with the reality of death.

(Emphasis added.) Defendant contends that these portions of the prosecutor's opening and closing statements improperly expressed the prosecutor's personal opinion that the State's witnesses had given truthful statements to law enforcement and testified truthfully at trial.

"During a closing argument to the jury an attorney may not . . . express his personal belief as to the truth or falsity of the evidence." N.C.G.S. § 15A-1230 (2003). "An attorney may, however, on the basis of his analysis of the evidence, argue any position or conclusion with respect to a matter in issue." *Id.*

Here, defendant placed the credibility of State's witnesses Green, McNeil, and Clemmons in issue during cross-examination. Defense counsel's trial strategy was to show that Green, McNeil, and Clemmons were interested witnesses who were present during the shooting and who might benefit from a jury verdict convicting defendant as a shooter. Defense counsel also sought to portray the witnesses as perpetually untruthful, giving multiple false statements to law enforcement. For example, defense counsel asked Green:

> Q. How many statements have you given to Detective Sinclair here that weren't true?
>
> A. I'm not for sure.

Q. There was more than one, wasn't it?

A. Yes, sir.

Q. More than two, wasn't it?

A. Yes, sir.

Q. More than three, actually, wasn't it?

A. Yes, sir. But the third one was the truth. I didn't tell everything. I started remembering things.

Q. The third statement you gave you say was the truth?

A. If I can recall, it was the truth, but I didn't tell him everything.

Q. Well, now, in the third statement didn't you say that Jared Clemmons stopped in front of the club and let me out while they left to go do something.

A. Yes, I did.

Q. That wasn't true, was it?

A. No, it wasn't.

Defense counsel impeached each witness with a prior inconsistent statement and also elicited information from each witness which supported an inference of bias. Under these circumstances, prosecutors were entitled to argue why and how the witnesses came to tell law enforcement a second, or in Green's case a third, version of events. The prosecutor was also entitled to argue that, among the numerous statements, the sequence of events advanced by the State should be credited by the jury.

This Court affirmed similar prosecutorial argument in *State v. Wiley*, 355 N.C. 592, 565 S.E.2d 22 (2002), *cert. denied*, 537 U.S. 1117, 154 L. Ed. 2d 795 (2003). In *Wiley*, prosecutors responded to the defendant's "attacks" on a witness by arguing that the witness "came forward and began to tell the truth and has told pretty much the truth." *Wiley*, 355 N.C. at 621, 565 S.E.2d at 43. Likewise, we determine that the prosecutor's statements were permissible in the case *sub judice*.

Third, defendant contends that the prosecutor improperly misstated the law of felony murder when he told jurors:

> If you find that the defendant shot into that Nissan Sentra and that it was occupied and that Seleana Nesbitt was killed, then that is felony murder. You don't have to find premeditation, deliberation. You don't have to find malice. Like robbery, discharging a weapon into an occupied vehicle as well as attempted murder are underlying felonies upon which consideration of first-degree [murder] may be predicated.

Defendant argues that the prosecutor's description "completely omitted to state many essential elements of felony murder." Although we agree with defendant that the prosecutor's argument applying the law of felony murder to the facts of defendant's case was oversimplified, we conclude that the prosecutor's statements were not inaccurate or confusing to a degree requiring *ex mero motu* intervention by the trial court.

Finally, defendant contends that the prosecutor argued an irrelevant hypothetical example to the jury, stating:

> This theory of law under the felony murder rule might be a little easier to understand if you could consider the example of a murder committed during the course of another, one of the enumerated felonies under the felony murder rule. Let's take the felony of armed robbery, for example.
>
> I walk into the local Dash Inn. I've taken a gun with me. I enter and pull the gun out of my coat, point it at the clerk. I demand that the clerk give me all the money in the cash register, the clerk does so, and then suddenly I pull the trigger and kill the clerk. I am guilty of first-degree murder. . . . under the felony murder rule, and under the felony murder rule even the driver of my get-a-way [sic] car outside at the Dash Inn is guilty of first-degree murder so long as the driver of that car shared in the specific intent of robbing the store.

Defendant contends that the prosecutor "traveled far outside the record" and argued facts not in evidence by presenting this hypothetical example to the jury. We note at the outset that hypothetical examples, by their very nature, are fictional and do not purport to contain facts of record or otherwise. Thus, it is unlikely that jurors were misled to believe that the robbery events recited by the prosecutor were perpetrated by defendant.

Moreover, "[i]n jury trials the whole case as well of *law* as of fact may be argued to the jury." N.C.G.S. § 7A-97 (emphasis added).

As this Court has noted in the past, "[t]he origins of this provision are obscure but in *State v. Miller*, 75 N.C. 73, 74 (1876), Justice Reade said:

> Some twenty[]five years ago a circuit judge restrained a lawyer from arguing the *law* to the *jury*, suggesting that the argument of the law ought to be addressed to the court, as the jury had to take the law from the court. Umbrage was taken at that, and the Legislature passed an act allowing counsel to argue both the law and the facts to the jury."

State v. McMorris, 290 N.C. 286, 287, 225 S.E.2d 553, 554 (1976) (alteration in original).

Here, by analogy, the prosecutor's example accurately illustrated the law of felony murder. We have allowed a similar presentation of legal argument as reflected in previous cases permitting counsel to support his view of the applicable law with reported decisions of this Court. *Thomas*, 350 N.C. at 355, 514 S.E.2d at 510; *Wilcox v. Glover Motors, Inc.*, 269 N.C. 473, 479, 153 S.E.2d 76, 81 (1967); *Horah v. Knox*, 87 N.C. 443, 445-46, 87 N.C. 483, 486-87 (1882). Consistent with our previous case law and because the prosecutor's remarks were accurate statements directly explaining the law of felony murder, an offense with which defendant was charged, we determine that the prosecutor's statements were permissible in this case.

Defendant's tenth argument and all assignments of error contained therein are overruled.

[10] In his eleventh argument, defendant assigns error to the trial court's denial of his motion to dismiss the attempted first-degree murder and first-degree murder charges at the close of all guilt-phase evidence. In support of his motion, defendant argued to the trial court that the State had presented insufficient evidence of specific intent to kill, premeditation, and deliberation to support his convictions on these charges.

The trial court denied defendant's motion to dismiss and instructed the jury on three theories of first-degree murder: (1) malice, premeditation, and deliberation; (2) felony murder based upon the attempted first-degree murder of Brandi Smith; and (3) felony murder based on discharging a firearm into an occupied vehicle. The trial court also instructed the jury on the attempted first-degree murder of Brandi Smith, on acting in concert, and on transferred intent. We affirm the trial court's denial of defendant's motion to dismiss.

In reviewing the trial court's ruling on a defendant's motion to dismiss a charge of first-degree murder, this Court evaluates the evidence presented at trial in the light most favorable to the State. *State v. Walters*, 275 N.C. 615, 623, 170 S.E.2d 484, 490 (1969). The Court considers whether the State presented "substantial evidence" in support of each element of the charged offense. "Substantial evidence is that evidence which a reasonable mind might accept as adequate to support a conclusion." *State v. King*, 343 N.C. 29, 36, 468 S.E.2d 232, 237 (1996). Such evidence may be direct, circumstantial, or both. *Id.* Circumstantial evidence alone " 'may withstand a motion to dismiss and support a conviction even when the evidence does not rule out every hypothesis of innocence.' " *State v. Warren*, 348 N.C. 80, 102, 499 S.E.2d 431, 443, *cert. denied*, 525 U.S. 915, 142 L. Ed. 2d 216 (1998) (quoting *State v. Stone*, 323 N.C. 447, 452, 373 S.E.2d 430, 433 (1988)).

Here, defendant challenges the sufficiency of evidence presented to support two elements of first-degree murder: premeditation and deliberation. Defendant also challenges the sufficiency of the evidence presented to support a finding that he had the specific intent to kill a passenger in the Nissan Sentra.

Premeditation and deliberation are "processes of the mind" which are generally proved by circumstantial evidence. *Smith*, 357 N.C. at 616, 588 S.E.2d at 461. " 'Premeditation means that [the] defendant formed the specific intent to kill the victim for some length of time, however short, before the actual killing.' " *Cagle*, 346 N.C. at 508, 488 S.E.2d at 543 (quoting *State v. Arrington*, 336 N.C. 592, 594, 444 S.E.2d 418, 419 (1994)) (alteration in original). " 'Deliberation' means that the defendant formed the intent to kill in a cool state of blood and not as a result of a violent passion due to sufficient provocation." *State v. Truesdale*, 340 N.C. 229, 234, 456 S.E.2d 299, 302 (1995). "Specific intent to kill is an essential element of first degree murder, but it is also a necessary constituent of the elements of premeditation and deliberation." *State v. Jones*, 303 N.C. 500, 505, 279 S.E.2d 835, 838-39 (1981). "Thus, proof of premeditation and deliberation is also proof of intent to kill." *Id.*, at 505, 279 S.E.2d at 838-39. After thorough review of the transcript and for the reasons stated below, we conclude that the State presented substantial evidence to support a conclusion that defendant acted with premeditation, deliberation, and specific intent to kill.

First, the State presented evidence from which jurors could conclude that defendant was upset by seeing his ex-girlfriend, Alecia

Doughty, with Greg Brooks in Brooks' car; thus, defendant had a motive to harm Brooks. While evidence of motive is not essential to a determination of premeditation and deliberation, evidence of motive for the commission of a crime is relevant to that determination and is admissible. *State v. Alston*, 307 N.C. 321, 328, 298 S.E.2d 631, 637 (1983). Moreover, the prosecution may offer evidence of motive to help prove its case when " 'the existence of a motive is . . . a circumstance tending to make it more probable that the person in question did the act.' " *State v. White*, 340 N.C. 264, 292, 457 S.E.2d 841, 857, *cert. denied*, 516 U.S. 994, 133 L. Ed. 2d 436 (1995) (quoting 1 Henry Brandis, Jr., *Brandis on North Carolina Evidence* § 83 (3d ed. 1988)) (alterations in original), *quoted in State v. Hightower*, 331 N.C. 636, 642, 417 S.E.2d 237, 240-41 (1992).

Second, the State presented evidence that defendant acquired one firearm, the .45 caliber handgun, at a pre-arranged meeting with his brother, Chris Chapman, and that defendant and his friend Dennis concealed the handgun, together with an SKS rifle, near the roadside before entering Club 39. On the way home defendant and his friends stopped to retrieve the hidden SKS rifle and handgun; thus, defendant's actions in acquiring firearms show preparation to commit a violent crime. "A defendant's conduct before . . . the killing is a circumstance to be considered in determining whether he acted with premeditation and deliberation." *State v. Leary*, 344 N.C. 109, 121, 472 S.E.2d 753, 760 (1996). As described above, defendant's conduct on the evening of 8 July 2000 supports an inference of premeditation and deliberation. Just hours before the shooting, defendant hid and later retrieved the murder weapons. The close proximity in time between obtaining these firearms and committing the shooting tends to show that defendant sought out the rifle and handgun with the purpose of shooting the occupants of Brooks' Nissan.

Third, the State presented evidence that defendant saw Doughty at Club 39 and tried to speak with her. Brooks, who was also at the club, had not met defendant before, but spoke with him and shook his hand. Although defendant met Brooks at The club, no one in Brooks' vehicle did anything to provoke the attack from defendant or Morgan. This Court has consistently held that " '[lack] of provocation' " is a "[c]ircumstance[] from which premeditation and deliberation may be inferred." *State v. Robinson*, 355 N.C. 320, 337, 561 S.E.2d 245, 256, *cert. denied*, 537 U.S. 1006, 154 L. Ed. 2d 404 (2002) (quoting *Gladden*, 315 N.C. at 430-31, 340 S.E.2d at 693) (alteration in original), *quoted in State v. Keel*, 337 N.C. 469, 489, 447 S.E.2d 748, 759

(1994), *cert. denied*, 513 U.S. 1198, 131 L. Ed. 2d 147 (1995). Accordingly, defendant's prior peaceful interaction with Brooks on the night of the shooting supports an inference of premeditation and deliberation.

Fourth, the State presented evidence that, upon leaving the club, defendant instructed Clemmons to pass several vehicles but not to pass Brooks' Nissan Sentra. At some point, one of the passengers said, "[T]hat's them right there." As Greg Brooks drove by, defendant replied, "[L]et's get that m——rf——r." When the Cadillac was behind Brooks' car, defendant called his brother and told him not to pass the car in front of them because he was "about to shoot up this car."

" '[D]eclarations of the defendant before and during the . . . occurrence giving rise to the death of the deceased' " are also "[c]ircumstances from which premeditation and deliberation may be inferred." *Robinson*, 355 N.C. at 337, 561 S.E.2d at 256 (quoting *Gladden*, 315 N.C. at 431, 340 S.E.2d at 693) (alterations in original), *quoted in Keel*, 337 N.C. at 489, 447 S.E.2d at 759. In the case *sub judice*, the exclamation "that's them right there" gives rise to a reasonable inference that defendant and his friends had found a specific vehicle, Greg Brooks' blue Nissan Sentra. Defendant's response, "[L]et's get that m——rf——r," supports an inference that defendant intended harm to an occupant of the Nissan. This is further evidence from which jurors could find that defendant acted with premeditation and deliberation.

Fifth, the State presented evidence that defendant fired the SKS rifle at Brooks' Nissan six to eight times. Premeditation and deliberation may be inferred from the multiple shots fired by defendant. *State v. Ruof*, 296 N.C. 623, 637, 252 S.E.2d 720, 729 (1979); *State v. Smith*, 290 N.C. 148, 164, 226 S.E.2d 10, 20, *cert. denied*, 429 U.S. 932, 50 L. Ed. 2d 301 (1976).

Sixth, the State presented evidence that after the shooting, defendant and Dennis hid the rifle and handgun in Yarborough's yard. "A defendant's conduct . . . after the killing is a circumstance to be considered in determining whether he acted with premeditation and deliberation." *Leary*, 344 N.C. at 121, 472 S.E.2d at 760. Here, defendant's attempt to cover up his participation in the shooting by hiding the rifle and handgun is evidence from which premeditation and deliberation may be inferred. *State v. Trull*, 349 N.C. 428, 448, 509 S.E.2d 178, 191-92 (1998), *cert. denied*, 528 U.S. 835, 145 L. Ed. 2d 80

(1999) ("[A]ttempts to cover up involvement in the crime are among other circumstances from which premeditation and deliberation can be inferred.").

After a thorough review of the transcript, we determine that the State made a sufficient showing to support inferences of defendant's premeditation, deliberation, and specific intent to kill by presenting evidence of: defendant's motive, preparation, and conduct and statements during the events surrounding the shooting; the multiple gunshots fired by defendant; the total lack of provocation for defendant's actions, and defendant's attempt to conceal his involvement in the shooting. Accordingly, we affirm the trial court's denial of defendant's motion to dismiss the charges of first-degree murder and attempted first-degree murder. This assignment of error is overruled.

[11] In his twelfth argument, defendant assigns error to the trial court's refusal to instruct the jury on second-degree murder.

"An instruction on a lesser-included offense must be given only if the evidence would permit the jury rationally to find defendant guilty of the lesser offense and to acquit him of the greater." *State v. Millsaps*, 356 N.C. 556, 561, 572 S.E.2d 767, 771 (2002). If the State's evidence

> is sufficient to fully satisfy the State's burden of proving each and every element of the offense of murder in the first degree, including premeditation and deliberation, *and there is no evidence to negate these elements other than defendant's denial that he committed the offense*, the trial judge should properly exclude from jury consideration the possibility of a conviction of second degree murder.

State v. Strickland, 307 N.C. 274, 293, 298 S.E.2d 645, 658 (1983), *overruled in part on other grounds by State v. Johnson*, 317 N.C. 193, 344 S.E.2d 775 (1986).

Defendant contends that the State did not present sufficient evidence to prove premeditation, deliberation, and specific intent to kill. However, this Court has determined that the State met its burden as to those elements. Accordingly, the only remaining consideration is whether there is evidence to negate the State's case on these points.

Defendant contends that there is substantial contrary evidence, arguing that his statement about shooting "the car" shows that he was not thinking about the people inside the car and did not intend

to kill a human being. Defendant also argues that he "had not had prior difficulty with" the occupants of the blue Nissan, and that the shooting occurred at night, between two moving vehicles at some distance. Defendant states that he was intoxicated at the time of the shooting, that he is borderline mentally retarded, and that he has had many mental and emotional disturbances.

We find defendant's arguments unconvincing. All the evidence presented at trial tended to show that defendant obtained, hid, and retrieved the murder weapons, stalked Brooks by searching out his vehicle on Highway 39, and stated an intent to "get that m——r-f——r." Then defendant fired six to eight shots from an SKS rifle into the confined space of Brooks' occupied vehicle. Defendant's statement that he was going to shoot "the car" and the fact that these shots were fired at night and between two moving vehicles in no way negate the State's evidence of *mens rea*.

Although defendant elicited evidence during the State's case-in-chief that he was intoxicated on the night of the shooting,

> [a] defendant who wishes to raise an issue for the jury as to whether he was so intoxicated by the voluntary consumption of alcohol that he did not form a deliberate and premeditated intent to kill has the burden of producing evidence, or relying on evidence produced by the [S]tate, of his intoxication. *Evidence of mere intoxication, however, is not enough to meet defendant's burden of production. He must produce substantial evidence which would support a conclusion by the judge that he was so intoxicated that he could not form a deliberate and premeditated intent to kill.*

State v. Mash, 323 N.C. 339, 346, 372 S.E.2d 532, 536 (1988) (emphasis added).

As described above, voluntary intoxication is an affirmative defense and the burdens of production and persuasion as to each element of that defense are on the defendant. *Id.* at 346, 372 S.E.2d at 536. However, defendant elected not to put on evidence during the guilt-innocence phase of trial, and there is no indication from the State's evidence that defendant was intoxicated to a degree sufficient to negate *mens rea*.

This Court affirmed a trial court's refusal to submit instructions on second-degree murder under similar circumstances in *State v. Hunt*, 345 N.C. 720, 483 S.E.2d 417 (1997). In *Hunt*, the defendant

consumed beer and liquor, smoked marijuana, and became "pretty high" before killing the victim. Under those circumstances, this Court held that "[e]ven viewed in the light most favorable to defendant, [the] evidence tended to show only that defendant was intoxicated; and it was insufficient to show that defendant was ' "utterly incapable of forming a deliberate and premeditated purpose to kill." ' " *Id.* at 727-28, 483 S.E.2d at 422 (quoting *State v. Medley*, 295 N.C. 75, 79, 243 S.E.2d 374, 377 (1978)), *quoted in State v. Strickland*, 321 N.C. 31, 41, 361 S.E.2d 882, 888 (1987). As in *Hunt*, we conclude that evidence of defendant's voluntary intoxication was insufficient to negate the State's evidence of *mens rea*.

Finally, defendant did not present evidence during the guilt-innocence phase of borderline mental retardation or any mental or emotional disturbance. Common sense compels that evidence which is not presented until the capital sentencing proceeding cannot serve as the basis of a trial court's ruling during the guilt-innocence phase. For the reasons stated above, the trial court properly denied defendant's request for submission of a second-degree murder charge to the jury. This assignment of error is overruled.

[12] In his thirteenth argument, defendant assigns error to the trial court's refusal to instruct the jury with a special requested instruction defining specific intent to kill. Defendant moved the trial court to supplement the "specific intent to kill" instruction with the following language: "[I]t is not enough that the defendant merely committed an intentional act that resulted in the victim's death." The trial court denied defendant's request and instructed the jurors with the pattern jury instruction instead.

"[I]f a 'request be made for a [special] instruction, which is correct in itself and supported by evidence, the court must give the instruction at least in substance.' " *State v. Lamb*, 321 N.C. 633, 644, 365 S.E.2d 600, 605-06 (1988) (quoting *State v. Hooker*, 243 N.C. 429, 431, 90 S.E.2d 690, 691 (1956)) (alteration in original). The State concedes that defendant's requested instruction was correct in law, but argues there was no evidence presented from which the jury could have found defendant "merely committed an intentional act that resulted in the victim's death." Because we have concluded that there was no evidence presented at trial to negate the State's evidence of *mens rea*, it follows that this requested instruction was also unsupported by the evidence. Accordingly, the trial court did not err in refusing to grant the special instruction. This assignment of error is overruled.

[13] In his fourteenth argument, defendant assigns error to the trial court's jury instruction on first-degree murder. Defendant contends that he is entitled to a new trial because the trial court "fail[ed] to submit a not-guilty verdict in the jury instruction mandate in the first-degree [] felony murder case." We find that the trial court did submit the not-guilty verdict; thus, we affirm the trial court's instructions.

Every criminal jury must be "instructed as to its right to return, and the conditions upon which it should render, a verdict of not guilty." *State v. Howell*, 218 N.C. 280, 282, 10 S.E.2d 815, 817 (1940). Such instruction is generally given during the final mandate after the trial court has instructed the jury as to elements it must find to reach a guilty verdict. *State v. Ward*, 300 N.C. 150, 156-57, 266 S.E.2d 581, 585-86 (1980).

Here, the trial court submitted three separate theories of first-degree murder to the jury: (1) malice, premeditation and deliberation, (2) felony murder based upon attempted first-degree murder, and (3) felony murder based upon discharging a firearm into occupied property. While it is true that the trial court omitted language after its instruction for felony murder based upon attempted first-degree murder, the omitted language did not contain circumstances under which the jury should find defendant not guilty. Instead, the omitted language stated that if the jury does not find certain matters, then jurors should not return a verdict of guilty under that theory. At the conclusion of the trial court's mandate on all three theories of first-degree murder, the trial judge instructed the jurors as follows: "If you do not find the defendant guilty of first-degree murder on the basis of malice, premeditation and deliberation and if you do not find the defendant guilty of first-degree murder under the felony murder rule, it would be your duty to return a verdict of not guilty."

Because defendant confuses the trial court's instructions on the three separate theories of first-degree murder with instructions on first-degree murder itself, and because the trial court gave a proper mandate at the closure of the first-degree murder instruction, we determine that the trial court instructed the jury that it could find defendant not guilty of first-degree murder. Accordingly, this assignment of error is overruled.

[14] In his fifteenth argument, defendant assigns error to the trial court's denial of his motion to dismiss the charge of first-degree felony murder based upon the felony of discharging a firearm into an occupied vehicle. Defendant contends that there was

insufficient evidence from which reasonable jurors could infer that he had the specific intent to shoot "into" the vehicle, rather than simply "at" the vehicle. After a thorough examination of the record, and in light of our earlier determination that the State presented sufficient evidence of defendant's intent to kill an occupant of the vehicle, we conclude that this argument is meritless. This assignment of error is overruled.

CAPITAL SENTENCING PROCEEDING

[15] On 26 January 2004, the United States Supreme Court issued a writ of certiorari to review the question of whether imposition of the death penalty on a person who commits a murder at age seventeen is "cruel and unusual punishment" and thus barred by the Eighth and Fourteenth Amendments to the United States Constitution. *Roper v. Simmons*, 112 S.W.3d 397 (Mo. 2003), *cert. granted*, 540 U.S. 1160, 157 L. Ed. 2d 1204 (2004). Defendant LeMorris Chapman, who was 17 years and 210 days old at the time he murdered Ms. Nesbitt, raised the same issue in his written brief to this Court and also filed a motion to hold this Court's decision pending the United States Supreme Court's decision in *Roper*. This Court allowed defendant's motion on 1 April 2004.

On 1 March 2005, the United States Supreme Court issued its opinion, *Roper v. Simmons*, ––– U.S. –––, ––– L. Ed. 2d –––, 2005 U.S. LEXIS 2200 at *1 (Mar. 1, 2005) (No. 03-633). Applying *Trop v. Dulles*, 356 U.S. 86, 2 L. Ed. 2d 630 (1958) (plurality opinion), the Court considered " 'evolving standards of decency that mark the progress of a maturing society' to determine which punishments are so disproportionate as to be cruel and unusual." *Roper*, 2005 U.S. LEXIS 2200 at *18 (quoting *Trop*, 356 U.S. at 101, 2 L. Ed. 2d at 642). The United States Supreme Court held that the Eighth and Fourteenth Amendments to the United States Constitution prohibit the states from imposing a death sentence on offenders who were younger than eighteen years of age when they committed their crime. *Id.* at *43. Because defendant was not yet eighteen years old at the time he murdered Ms. Nesbitt, we vacate defendant's death sentence pursuant to the United States Supreme Court's recent decision in *Roper v. Simmons*.

CONCLUSION

For the reasons stated above, we find no error in the guilt-innocence phase of defendant's trial and remand this case to

Johnston County Superior Court for imposition of a sentence consistent with this opinion.

NO ERROR IN GUILT-INNOCENCE PHASE; DEATH SENTENCE VACATED; REMANDED FOR NEW SENTENCING PROCEEDING.

Justice NEWBY did not participate in the consideration or decision of this case.

IN RE THE ESTATE OF CANDICE LEIGH LUNSFORD, DECEASED

No. 362A01-3

(Filed 7 April 2005)

1. Intestate Succession— willful abandonment of child— findings sufficient

The trial court's findings of fact amply supported its conclusion that a father wilfully abandoned his child within the meaning of N.C.G.S. § 31A-2, and therefore could not inherit from her estate, where the parents were divorced while the child was an infant, the husband admitted that he had been alcoholic and immature, he seldom visited his daughter (perhaps eleven times from 1982 to 1995, coinciding with lulls in his alcoholism), he provided less than $100 in support (although the mother refused his offers of more), but he had attended his daughter's high school graduation shortly before her death and made plans with her to further their relationship. A child's needs are constant and a parent's duties cannot be discharged on an intermittent basis. Moreover, "care and maintenance" as used in the statute represents a single, indivisible concept and the argument that a parent may inherit if he abandons maintenance but not care is rejected.

2. Intestate Succession— abandonment of child—exception for court order—not applicable

A divorced father seeking to inherit from his daughter's estate did not qualify for the N.C.G.S. § 31A-2(2) exception to the prohibition on inheritance by parents who abandon their children. That exception applies to those who are deprived of custody by court order and who substantially comply with support orders; here, the divorce decree did not order that support be

paid and the failure to provide an adequate level of care and support did not result from compliance with that order.

Justice NEWBY did not participate in the consideration or decision of this case.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 160 N.C. App. 125, 585 S.E.2d 245 (2003), reversing a judgment entered 16 April 2002 by Judge L. Todd Burke in Superior Court, Surry County. On 5 February 2004, the Supreme Court granted appellant's petition for discretionary review as to additional issues. Heard in the Supreme Court 14 September 2004.

Royster and Royster, by Stephen G. Royster and Michael D. Beal, for petitioner-appellant.

Law Offices of Jonathan S. Dills, P.A., by Jonathan S. Dills and Daniel B. Anthony, for respondent-appellee.

MARTIN, Justice.

This appeal concerns the distribution of the estate of Candice Leigh Lunsford (Candice), who died intestate in an automobile accident on 30 June 1999, just nine days after her eighteenth birthday. Petitioner Dawn Collins Bean (Bean), Candice's mother and the administratrix of her estate, contends that Candice's father, respondent Randy Keith Lunsford (Lunsford), wilfully abandoned Candice during Candice's infancy and thus is not entitled to share in her estate under N.C.G.S. § 31A-2 (2003). Lunsford claims that he did not abandon his daughter and that even if he did, he is still entitled to inherit from Candice because he was "deprived of the custody" of Candice by a court of competent jurisdiction and has "substantially complied with all orders of the court requiring contribution to the support of the child" under the meaning of N.C.G.S. § 31A-2(2).

Bean (then named Dawn Collins) and Lunsford were married on 1 November 1980, and Candice was born on 21 June 1981. The couple separated on 20 November 1982. On 30 January 1985, a Forsyth County district court entered a decree of absolute divorce dissolving the bonds of matrimony between Bean and Lunsford and awarding Bean sole "care, custody and control" of Candice. On 30 June 1999, Candice died intestate in an automobile accident. Bean was named administratrix of the estate. Pursuant to a wrongful death claim filed

on behalf of Candice, the proceeds of a $100,000.00 liability insurance policy were tendered to her estate.

On 31 August 1999, Candice's estate sought a hearing before the Clerk of Superior Court of Surry County to determine if Lunsford was legally entitled to share in the distribution of the estate. After hearing and considering the evidence presented, the Clerk concluded that Lunsford was precluded from inheriting from Candice under N.C.G.S. § 31A-2 on the ground that he had wilfully abandoned Candice during her minority.

Lunsford appealed for a trial *de novo* in Superior Court, which conducted its own evidentiary hearing. Among the evidence introduced at the hearing was Lunsford's admission that he was a diagnosed alcoholic who "got in some trouble" and "[w]asn't ready to grow up" at the time he married Bean. Bean testified that Lunsford visited Candice "[n]o more than four or five times" between November 1982 and March 1985, "no[t] at all" between March 1985 and 1990 and "[m]aybe five or six times" between 1990 and 1999. She also testified that Lunsford paid her under $100.00 in support over the course of Candice's entire life. The trial court reached the same conclusion as the Clerk of Superior Court in an order filed 3 March 2000.

On appeal, the Court of Appeals affirmed, with Chief Judge Eagles dissenting on the ground that N.C.G.S. § 31A-2 should not apply because Candice was not a minor at the time of her death.[1] *In re Estate of Lunsford*, 143 N.C. App. 646, 547 S.E.2d 483 (2001). On further appeal to this Court, we vacated and remanded for further remand to the trial court for additional findings as to whether Lunsford abandoned Candice and, if so, whether Lunsford "resumed care and maintenance" of Candice at least one year prior to her death or substantially complied "with all orders of the trial court requiring contribution to the support of the child." *In re Estate of Lunsford*, 354 N.C. 571, 571, 556 S.E.2d 292, 292 (2001).

On remand, the trial court conducted an in-chambers hearing during which the parties stipulated that the court would make additional findings of fact based solely on the transcript recorded at the

1. Subsequent to Lunsford's first appeal, this Court held in *McKinney v. Richitelli* that N.C.G.S. § 31A-2 precludes an abandoning parent from inheriting from a child of any age, provided the child was initially abandoned during his or her infancy and neither statutory exception applied to the facts at hand. *McKinney v. Richitelli*, 357 N.C. 483, 586 S.E.2d 258 (2003).

prior evidentiary hearing. In compliance with this Court's order, the trial court made the following findings of fact relevant to Lunsford's care and maintenance of Candice:

> 3. Bean and Lunsford separated from each other [o]n November 20, 1982.
>
> 4. Lunsford was an alcoholic and too immature for responsibilities of family life and Bean did not want Lunsford to remain in the same household with their little daughter, [Candice].
>
> 5. Lunsford agreed with Bean and honored Bean's request to leave.
>
> . . . .
>
> 11. Bean subsequently married Gary Bean (hereinafter "Gary") on March 30, 1985.
>
> 12. From the date of separation of Bean and Lunsford, Lunsford visited with [Candice] sporadically on his own initiative.
>
> 13. Sometimes, . . . Lunsford's mother, who had an established relationship with [Candice], occasionally picked up her granddaughter for a visit, and . . . Lunsford would occasionally spend time with his daughter then.
>
> 14. As [Candice] grew older, either [Candice] or Lunsford would initiate phone calls, visits, or other relational contact.
>
> 15. These limited visits between [Candice] and Lunsford usually coincided with lulls in [Lunsford's] alcoholism and/or an increase in the emotional stability of his private life.
>
> 16. Just before [Candice's] untimely death, Lunsford attended [Candice's] high school graduation and both had initiated plans for furthering their father-daughter relationship.
>
> 17. Throughout [Candice's] minority, Lunsford occasionally offered to pay Bean for some of the care and maintenance of [Candice]. However, Bean refused all such offers.
>
> 18. At one point, after one such request, Bean did suggest Lunsford buy [Candice] some clothes [Candice] wanted, to which Lunsford readily complied.
>
> 19. However, since the marriage of Bean to Gary, Gary has assisted Bean with the support of [Candice]; and they almost exclusively paid for [Candice's] necessaries.

Based on these findings, the trial court concluded that Lunsford had wilfully abandoned Candice under the meaning of N.C.G.S. § 31A-2 and that neither of the two exceptions to N.C.G.S. § 31A-2 applied. Accordingly, the trial court entered an order on 16 April 2002 stating that Lunsford was barred from sharing in the proceeds of Candice's estate.

On appeal from the 16 April 2002 order, the Court of Appeals reversed, holding that Lunsford did not wilfully abandon Candice and was therefore not precluded from inheriting from her under N.C.G.S. § 31A-2. *In re Estate of Lunsford*, 160 N.C. App. 125, 126, 585 S.E.2d 245, 247 (2003) (*Lunsford II*). The Court of Appeals further stated that even if Lunsford had wilfully abandoned Candice, he was nevertheless entitled to inherit under the second of the two statutory exceptions to N.C.G.S. § 31A-2, which provides that an abandoning parent may inherit from the abandoned child if the parent " 'has been deprived of the custody of his or her child under an order of a court of competent jurisdiction and the parent has substantially complied with all orders of the court requiring contribution to the support of the child.' " *Id.* at 132-34, 585 S.E.2d at 250-51 (quoting N.C.G.S. § 31A-2(2)). Judge Bryant dissented, *id.* at 134-37, 585 S.E.2d at 251-53, and Candice's estate filed a notice of appeal based on the dissent. This Court subsequently allowed Bean's petition for discretionary review as to the additional issue of whether Lunsford falls within the scope of the second of the two statutory exceptions to N.C.G.S. § 31A-2. *In re Estate of Lunsford*, 358 N.C. 154, 592 S.E.2d 556 (2004). The two issues currently before this Court are therefore (1) whether Lunsford wilfully abandoned Candice under the meaning of N.C.G.S. § 31A-2 and (2) if so, whether Lunsford is nonetheless entitled to inherit from Candice because he was "deprived of the custody" of Candice by the 1985 divorce judgment and "has substantially complied with all orders of the court requiring contribution to the support of the child." N.C.G.S. § 31A-2(2).

I.

Under the Intestate Succession Act, a parent may inherit from a deceased child if the child dies without a surviving spouse or lineal descendants. N.C.G.S. § 29-15(3) (2003). If both parents survive the child under such circumstances, the child's estate is divided equally between them. *Id.* Under N.C.G.S. § 31A-2, however, a parent who has "wilfully abandoned the care and maintenance of his or her child" is barred from inheriting any portion of the child's estate unless the parent meets one of two statutory exceptions. N.C.G.S. § 31A-2.

Specifically, an abandoning parent may still inherit if (1) "the abandoning parent resumed its care and maintenance at least one year prior to the death of the child and continued the same until its death," or (2) "[the] parent has been deprived of the custody of his or her child under an order of a court of competent jurisdiction and the parent has substantially complied with all orders of the court requiring contribution to the support of the child." N.C.G.S. § 31A-2(1), (2). Our wrongful death statute mandates that wrongful death proceeds be distributed "as provided in the Intestate Succession Act," and they are therefore subject to N.C.G.S. § 31A-2. N.C.G.S. § 28A-18-2(a) (2003); *Williford v. Williford*, 288 N.C. 506, 508-09, 219 S.E.2d 220, 222 (1975).

[1] We first address whether the Court of Appeals erred in reversing the trial court's determination that Lunsford wilfully abandoned the care and maintenance of Candice under the meaning of N.C.G.S. § 31A-2. Because neither party has assigned error to the trial court's findings of fact, our review is limited to Lunsford's contention that the trial court's findings of fact do not support its conclusion of law. *See* N.C. R. App. P. 10(a); *see also Stephenson v. Bartlett*, 357 N.C. 301, 309, 582 S.E.2d 247, 252 (2003); *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982).

For purposes of the Intestate Succession Act, parental abandonment has been defined as " 'wil[l]ful or intentional conduct on the part of the parent which evinces a settled purpose to forego all parental duties and relinquish all parental claims to the child.' " *McKinney*, 357 N.C. at 489, 586 S.E.2d at 263 (quoting *Pratt v. Bishop*, 257 N.C. 486, 501, 126 S.E.2d 597, 608 (1962)) (alteration in original). If a parent " 'withholds his presence, his love, his care, the opportunity to display filial affection, and wil[l]fully neglects to lend support and maintenance,' " such parent is deemed to have relinquished all parental claims and to have abandoned the child. *Id.* at 489-90, 586 S.E.2d at 263 (alteration in original) (quoting *Pratt*, 257 N.C. at 501, 126 S.E.2d at 608). Abandonment has also been defined as " 'wil[l]ful neglect and refusal to perform the natural and legal obligations of parental care and support.' " *Id.* at 489, 586 S.E.2d at 263 (alteration in original) (quoting *Pratt*, 257 N.C. at 501, 126 S.E.2d at 608). "Wilful intent is an integral part of abandonment and this is a question of fact to be determined from the evidence." *Pratt*, 257 N.C. at 501, 126 S.E.2d at 608.

In the instant case, the trial court's findings of fact support its conclusion that Lunsford wilfully abandoned the care and mainte-

nance of Candice under the meaning of N.C.G.S. § 31A-2. Even assuming that Candice refused to accept Lunsford's occasional offers of financial assistance, the trial court could reasonably have concluded that Lunsford's sporadic contacts with his daughter over a seventeen-year period failed to reflect the degree of "presence," "love," "care," and "opportunity to display filial affection" that defines non-abandoning parents. *McKinney*, 357 N.C. at 489-90, 586 S.E.2d at 263.

In re Young, 346 N.C. 244, 485 S.E.2d 612 (1997), an appeal arising out of an action to terminate parental rights, is relevant to this discussion. In *Young*, we held that a non-custodial mother who had only limited contact with her child over a period of six months had not abandoned her child. *Id.* at 251-52, 485 S.E.2d at 616-17. *Young*, however, is factually and procedurally distinguishable from the instant case.

First, the record in *Young* indicated that members of the father's family who were caring for the child during the six-month period at issue had a hostile relationship with the non-custodial mother and that, for at least part of this time, the mother may not have known the location of her child. *Id.* In addition, the record included testimony regarding the mother's surgical treatment for breast cancer during the period of alleged abandonment, including testimony that she asked to see the child before her surgery and that the child's father denied this request. *Id.* In the present case, by contrast, Lunsford admittedly had only sporadic contacts with Candice over the last seventeen years of her life, as opposed to a mere six months, and the major factors preventing Lunsford from participating more fully in his daughter's life were his own alcoholism and immaturity.

Moreover, the issue of abandonment in *Young* arose not from a dispute over inheritance rights, but in the context of an action to terminate parental rights. Thus, the father's burden of proof to show that the mother abandoned her child was not the "preponderance of the evidence" standard applicable in most civil actions, *see, e.g.*, *Wyatt v. Queen City Coach Co.*, 229 N.C. 340, 342, 49 S.E.2d 650, 652 (1948), but the heightened evidentiary standard of "clear, cogent, and convincing evidence," *Young*, 346 N.C. at 247, 485 S.E.2d at 614 (citing N.C.G.S. § 7A-289.30(d), (e) (1995)). Thus, *Young* does not control our resolution of the present action.

In his brief, Lunsford argues that while the facts found by the trial court may support a conclusion that he provided little towards the

maintenance of Candice, they do not support a conclusion that he intended to abandon her *care*. Because N.C.G.S. § 31A-2 mandates that a parent who abandons the "care *and* maintenance" of a child loses the right to inherit from that child, Lunsford contends, the abandonment of either "care" or "maintenance" alone is insufficient to trigger the statute. N.C.G.S. § 31A-2 (emphasis added).

In support of his argument, Lunsford cites our decision in *McKinney*, where we held that a parent must "resume both the 'care *and* maintenance' of the child" to fall within the first exception to section 31A-2. *McKinney*, 357 N.C. at 491, 586 S.E.2d at 264 (quoting N.C.G.S. § 31A-2(1)). Admittedly, *McKinney* describes the duty of "care" as pertaining primarily to "love and concern for the child," and the duty to provide "maintenance" as referring more specifically to the "financial support of a child during minority." *Id.* A broader view of our cases, however, suggests that these parental duties are interrelated components of a parent's overall responsibilities for his or her minor children. *See*, *e.g.*, *Price v. Howard*, 346 N.C. 68, 76, 484 S.E.2d 528, 533 (1997) (stating that the " 'custody, care and nurture of the child reside first in the parents' " (quoting *Prince v. Massachusetts*, 321 U.S. 158, 166, 88 L. Ed. 645, 652 (1944))); *Pratt*, 257 N.C. at 501, 126 S.E.2d at 608 (referring to the parental duties of "love," "care," "affection," "support," and "maintenance"); *Wells v. Wells*, 227 N.C. 614, 618, 44 S.E.2d 31, 34 (1947) (" '[P]arents are, regardless of any statute, under a legal as well as a moral duty to support, maintain, and care for their minor children.' " (citation omitted)). Thus, we do not read *McKinney* to suggest that the duties of "care" and "maintenance" are distinct and severable for purposes of the definition of abandonment in section 31A-2.

The decision of the Court of Appeals in *Davis v. MacMillan* bolsters this conclusion. *See Davis v. MacMillan*, 148 N.C. App. 248, 558 S.E.2d 210, *disc. rev. denied*, 355 N.C. 490, 563 S.E.2d 564 (2002). *Davis* construed N.C.G.S. § 97-40, a statute which prohibits the distribution of workers' compensation death benefits to "a parent who has willfully abandoned the care and maintenance of his or her child." *Id.* at 253, 558 S.E.2d at 214 (quoting N.C.G.S. § 97-40 (1987)). In *Davis*, the plaintiff argued that he was entitled to receive such benefits even if he had abandoned the "care" of his minor child prior to the child's death because he continued to pay child support and thus did not abandon the child's "maintenance." *Id.* at 252-53, 558 S.E.2d at 213-14. The Court of Appeals rejected this argument, holding that "the words 'care and maintenance' are not to be read separately but

instead combined to define a parent's overall responsibilities." *Id.* at 253, 558 S.E.2d at 214. In support of this construction, the Court of Appeals looked to the phrasing of the exception in N.C.G.S. § 97-40, which provides that an abandoning parent may receive workers' compensation benefits if the parent " 'resumed [his or her] care and maintenance' " and continued the same for at least one year until the child's death or majority. *Id.* (quoting N.C.G.S. § 97-40). The Court of Appeals reasoned that if the abandonment of two independent duties were required to bar a parent from sharing in workers' compensation death benefits, "the renewed assumption of *either* care or maintenance" for a year prior to the child's death or majority "would necessarily rehabilitate the parent." *Id.* (emphasis added). Thus, the Court of Appeals concluded, the fact that the same "care and maintenance" language was employed in both parts of the statute demonstrates that "the words are indivisible, representing a single concept." *Id.*

We believe this reasoning is persuasive and applicable to the case at bar. The operative language in N.C.G.S. § 31A-2 is nearly identical to that in N.C.G.S. § 97-40. Both statutes provide that a parent who has abandoned the "care and maintenance" of a child loses the right to receive a specified benefit upon the child's death. And both provide an exception when the parent has resumed the "care and maintenance" of the child at least one year prior to the child's death or majority. Accordingly, we reject Lunsford's argument that a parent is not precluded from inheriting under N.C.G.S. § 31A-2 if that parent abandons the "maintenance" but not the "care" of his or her child.

Lunsford next argues that under the *Pratt* definition of abandonment, even sporadic and occasional contacts with a child foreclose a determination that a parent possessed "a settled purpose to forego all parental duties and relinquish all parental claims to the child." *McKinney*, 357 N.C. at 489, 586 S.E.2d at 263 (quoting *Pratt*, 257 N.C. at 501, 126 S.E.2d at 608). According to Lunsford, abandonment requires "the cessation of meaningful relations, obstinate refusal and outright neglect of legal obligations," and a parent who has made "some effort" to care or provide for the child cannot be said to have abandoned that child.

Such a definition appears nowhere in our case law and overstates the threshold for abandonment as defined in *Pratt*. Indeed, *Pratt* expressly held that abandonment requires neither continuous absence nor an utter lack of concern on the part of the abandoning

parent. *Pratt*, 257 N.C. at 503, 126 S.E.2d at 609. As explained in *Pratt*, a child's physical and emotional needs are constant, and a parent's duties to care for and maintain a child cannot be discharged on an *ad hoc*, intermittent basis. *Id.* at 502, 126 S.E.2d at 608-09. Thus, the fact that Lunsford and Candice had "some relationship" during lulls in Lunsford's alcoholism and had formulated plans to develop their relationship does not foreclose a determination of abandonment. Abandonment is not an " 'ambulatory thing the legal effects of which a delinquent parent may dissipate at will by the expression of a desire for the return of the discarded child.' " *Id.* at 502, 126 S.E.2d at 609 (quoting *In re Adoption of Bair*, 393 Pa. 296, 307, 141 A.2d 873, 879 (1958) (citation omitted)).

Thus, the trial court's findings of fact amply support its conclusion that Lunsford wilfully abandoned Candice within the meaning of N.C.G.S. § 31A-2.

II.

[2] We next address whether Lunsford falls within the second statutory exception to N.C.G.S. § 31A-2. This exception applies when an abandoning parent (1) "has been deprived of the custody of his or her child under an order of a court of competent jurisdiction" and (2) "has substantially complied with all orders of the court requiring contribution to the support of the child." N.C.G.S. § 31A-2(2).

In the instant case, the trial court determined on remand that N.C.G.S. § 31A-2(2) was inapplicable because Lunsford failed to meet the requirements of the second prong of the exception. The trial court found that the 1985 divorce decree "considered the issue of child support" but "made no order whether child support was to be paid by either parent." Reasoning that Lunsford could not substantially comply with all orders "requiring contribution" to the support of his child because "no order to pay child support was issued," the trial court concluded that the statutory exception was inapplicable to the instant facts. The Court of Appeals reversed, stating that because the district court "considered" the issue of child support, Lunsford "complied with the only order in existence addressing the question of child support" and thus fell within the scope of the exception. *Lunsford II*, 160 N.C. App. at 134, 585 S.E.2d at 251.

It is well settled that "[w]here the language of a statute is clear and unambiguous, there is no room for judicial construction and the courts must construe the statute using its plain meaning."

Burgess v. Your House of Raleigh, Inc., 326 N.C. 205, 209, 388 S.E.2d 134, 136 (1990). Here, N.C.G.S. § 31A-2(2) provides that an abandoning parent may inherit from an abandoned child if the parent has "substantially complied with all orders of the court *requiring contribution* to the support of the child." N.C.G.S. § 31A-2(2) (emphasis added). By its express language, therefore, the statutory exception may not be invoked where a court order has not "requir[ed]" the payment of child support.

Our construction of the statute is consistent with the intent of the legislature in enacting N.C.G.S. § 31A-2. The primary rule of statutory construction is to effectuate the intent of the legislature. *Quick v. United Benefit Life Ins. Co.*, 287 N.C. 47, 56, 213 S.E.2d 563, 569 (1975); *Buck v. United States Fid. & Guar. Co.*, 265 N.C. 285, 290, 144 S.E.2d 34, 37 (1965). In *McKinney*, this Court examined the common law background and legislative history of N.C.G.S. § 31A-2 and concluded that "the legislative intent behind N.C.G.S. § 31A-2 was both to discourage parents from shirking their responsibility of support to their children and to prevent an abandoning parent from reaping an undeserved bonanza." *McKinney*, 357 N.C. at 489, 586 S.E.2d at 263. We also stated that the General Assembly had demonstrated its "unwillingness to allow an abandoning parent to take from an abandoned adult child as the result of a mechanical application of the rules of intestate succession." *Id.* at 492, 586 S.E.2d at 265.

In analyzing the legislative intent behind the N.C.G.S. § 31A-2(2) exception, the Court of Appeals reached the eminently reasonable conclusion that "[t]he exception essentially states that . . . a parent should not be denied the right to participate in intestate succession if he limits his role in his child's life to the parameters set out by a court." *Lunsford II*, 160 N.C. App. at 133, 585 S.E.2d at 251. We agree, at least when the abandoning parent complies with the express terms of a court order *requiring* contribution to the support of the child. An exception to the general rule of disinheritance is justified under such circumstances, because the legislative intent underlying section 31A-2 is not effectuated by the disinheritance of a non-custodial parent who provides the court-ordered level of material support. Put simply, a parent who "limits his role in his child's life to the parameters set out by a court" has not "shirk[ed] [his] responsibility" to that child. Thus, our construction of N.C.G.S. § 31A-2(2) effectuates the legislative intent behind that exception.

We acknowledge that it would be inequitable to permit a parent who has complied with a child support order to inherit, while disin-

heriting a parent who has voluntarily supplied the same degree of support. *Cf. Wells*, 227 N.C. at 618, 44 S.E.2d at 34 (noting that " 'parents are, regardless of any statute, under a legal as well as a moral duty to support, maintain, and care for their minor children' " (citation omitted)). We do not believe, however, that N.C.G.S. § 31A-2 would support such an incongruous result. If a parent voluntarily provides adequate "care and maintenance" for purposes of N.C.G.S. § 31A-2, that parent cannot be said to have abandoned the child in the first instance. As an exception to the general rule of disinheritance, N.C.G.S. § 31A-2(2) comes into play only when a parent has *failed* to provide care and support of his or her own volition. As the Court of Appeals correctly noted, the exception provides that a parent should not be penalized for his or her failure to exceed the terms of a judicial child support order. *Lunsford II*, 160 N.C. App. at 133, 585 S.E.2d at 251. Accordingly, the statute should not be applied to the disadvantage of a parent who voluntarily provides adequate care and support. Such a parent can hardly be deemed in law to have abandoned his or her child.

Applying these principles to the case at bar, Lunsford is subject to disinheritance and does not qualify to inherit from his deceased child under the statutory exception. Lunsford did not voluntarily provide Candice with an adequate level of care and support and therefore abandoned the child under N.C.G.S. § 31A-2. Because he did not comply with the terms of a court order requiring support to be paid, Lunsford may not invoke the N.C.G.S. § 31A-2(2) exception.

In conclusion, the trial court's findings of fact provide ample support for its conclusion of law that Lunsford wilfully abandoned Candice under the meaning of N.C.G.S. § 31A-2, and neither of the statutory exceptions to section 31A-2 applies to the instant case. Lunsford is not entitled to share in any part of Candice's estate. Accordingly, we reverse the decision of the Court of Appeals.

REVERSED.

Justice NEWBY did not participate in the consideration or decision of this case.

STATE OF NORTH CAROLINA v. ROBERT CHARLES SINAPI

No. 274A04

(Filed 7 April 2005)

Search and Seizure–search warrant for house–marijuana in curbside garbage–criminal history–probable cause

Magistrates are entitled to draw reasonable inferences from the material supplied to them and their determination of probable cause is entitled to great deference. Here, the trial court erred by suppressing evidence seized from inside defendant's house pursuant to a search warrant that was based on marijuana plants in a garbage bag taken from defendant's curb, defendant's drug-related criminal history, and information that defendant was linked to a heroin sale and overdose.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 164 N.C. App. 56, 596 S.E.2d 822 (2004), affirming an order entered 13 March 2003 by Judge Howard E. Manning, Jr. in Superior Court, Wake County. Heard in the Supreme Court 8 December 2004.

Roy Cooper, Attorney General, by William B. Crumpler, Assistant Attorney General, for the State-appellant.

John T. Hall and Kyle S. Hall for defendant-appellee.

Patterson Harkavy LLP, by Ann Groninger, for American Civil Liberties Union of North Carolina Legal Foundation, Inc., amicus curiae.

BRADY, Justice.

The issue before the Court is whether a search warrant issued for defendant Robert C. Sinapi's residence was sufficiently supported by probable cause such that the fruits of the resulting search were admissible at defendant's trial for violations of the North Carolina Controlled Substances Act. In particular, this Court must determine whether an affidavit alleging: (1) a single garbage bag containing eight wilting marijuana plants recovered by the Raleigh Police Department from defendant's front yard, (2) defendant's prior criminal history, and (3) information linking defendant to a heroin sale and overdose was sufficient to support the finding of probable cause

made by an impartial magistrate who then issued a search warrant for defendant's residence. We determine that the affidavit was sufficient to allow the magistrate to make a threshold finding of probable cause; therefore, we reverse the decision of the Court of Appeals affirming the superior court's grant of defendant's motion to suppress the evidence obtained pursuant to the search warrant in question.

BACKGROUND

On 30 September 2002, Detective J.G. Hobby of the Raleigh Police Department submitted a search warrant application to a Wake County magistrate for defendant's residence at 3300 Pinecrest Drive in Raleigh, North Carolina. The application was supported by the affidavit of Detective Hobby, which reflected that on 5 September 2002, he was assigned to "follow-up" on a drug inquiry involving a heroin overdose in which defendant was implicated as the seller of the heroin. Detective Hobby began an investigation by conducting a criminal records check of defendant, which revealed that defendant had previously been arrested twice for drug-related offenses, once for possession of marijuana and once for possession of methaqualone. The affidavit also stated that, according to North Carolina Division of Motor Vehicles records, defendant resided at 3300 Pinecrest Drive.

According to Detective Hobby's affidavit, after he finished gathering this information, he and Detective J.D. Cherry, also of the Raleigh Police Department proceeded to defendant's residence. They arrived at 3300 Pinecrest Drive at approximately 8:00 a.m. on 26 September 2002 and performed "a trash pick-up . . . . [which] was made during the normal trash day and time." Pursuant to this "trash pick-up":

> A single, white plastic garbage bag was recovered from the front yard/curb line area at 3300 Pinecrest Drive, beside . . . the driveway. Inside of the garbage bag [Detective Hobby] located eight marijuana plants. The plants appeared to be somewhat dried up and wilted. The marijuana weighed approximately 5½ ounces. The marijuana was field tested with a positive result for marijuana. Based on [Detective Hobby's] training and experience, this activity is consistent with a possible marijuana grow operation and illegal drugs sales.

Detective Hobby then concluded in the affidavit that:

> This investigation has included a recent drug investigation where Robert Sinapi is believed to be involved in the sell/delivery of an

> illicit drug, heroin. Criminal records indicate that he has prior arrests for possession of marijuana and methaqualone. An abundance of marijuana was recovered as a result of a trash pick-up at the residence. Based on the facts described above and my training and experience, I believe that there is probable cause to believe that the items to be seized, controlled substances in violation of G.S. [§] 90-95 and other items herein, are in the premises and on the person to be searched.

On 30 September 2002, in accordance with our Founding Fathers' preference for search warrants, Detective Hobby presented his affidavit and application for search warrant to a Wake County magistrate. That impartial magistrate determined that probable cause existed and issued a search warrant for defendant's residence at 3300 Pinecrest Drive. On 1 October 2002, Detective Hobby executed the search warrant and seized from defendant's home, *inter alia*, approximately 5 grams of heroin, approximately 62.4 grams of cocaine, approximately 3.8 grams of marijuana, and three marijuana plants. As a result of the seizure, on 6 January 2003, defendant was indicted by a Wake County grand jury for manufacturing marijuana, trafficking in marijuana by possession, trafficking in heroin by possession, trafficking in cocaine by possession, and maintaining a dwelling used for keeping and/or selling controlled substances.

On 27 January 2003, defendant filed a pretrial motion to suppress all evidence obtained as a result of the 1 October 2002 search of 3300 Pinecrest Drive. At the 5 February 2003 Criminal Session of Wake County Superior Court a hearing was conducted on defendant's motion to determine whether the magistrate properly concluded that probable cause was established.

During the suppression hearing, Detective Hobby testified that the refuse collection truck was in defendant's neighborhood, but the truck had not yet proceeded to Pinecrest Drive. When asked about the location of the garbage bag, Detective Hobby stated that "[t]he bag was approximately three to four feet from the driveway at the corner of the lot . . . approximately four to five feet off the roadway. So it's kind of sitting in the corner between the driveway and the road, just like someone were to walk out on the road and put their trash out." However, Detective Hobby stated that he did not see the garbage bag being placed on defendant's lawn. Detective Hobby also testified that, although there was "general household garbage" in the garbage bag, there was nothing inside the bag, such as mail or docu-

ments, physically linking the garbage bag to 3300 Pinecrest Drive. On cross-examination, Detective Hobby acknowledged that the City of Raleigh had "back yard pick-up of garbage" at that time but emphasized that, notwithstanding the City's policy, several other residences in the neighborhood also had "garbage sitting out by the curb."

After the hearing, the superior court judge orally entered an order granting defendant's motion to suppress all evidence seized as a result of the 1 October 2002 search of defendant's residence. On 13 March 2003, the superior court issued a written order, that contained the following conclusions of law:

1. The discovery of marijuana in a garbage bag located near the curb of the street and adjacent to the driveway at 3300 Pinecrest Drive on a normal garbage pick up day without any documentation linking the bag to the residence or the defendant and without any showing as to how, when and by whom it was placed along the curb, does not implicate the residence located at 3300 Pinecrest Drive and provides no reasonable basis to believe that controlled substances would be found therein or on the defendant.

2. The affidavit portion of the search warrant herein did not provide sufficient facts and circumstances to establish probable cause to believe that the items sought were located upon the premises of 3300 Pinecrest Drive.

. . . .

4. The evidence obtained as a result of the search conducted on September 30, 2002 at 3300 Pinecrest Drive, together with the fruits of that search, are inadmissable at the trial of the defendant.

The State appealed the order, and on 4 May 2004, a majority of the Court of Appeals affirmed the superior court's order, with Judge McCullough dissenting. *State v. Sinapi*, 164 N.C. App. 56, 596 S.E.2d 822 (2004). On 7 June 2004, the State filed notice of appeal to this Court based upon Judge McCullough's dissent.

ANALYSIS

This Court must now determine whether the information contained in the affidavit prepared by Detective Hobby presented sufficient information to enable a magistrate to make a threshold determination of probable cause. In so doing, we note that the parties do

not challenge the superior court's findings of fact. Therefore, the scope of our inquiry is limited to the superior court's conclusions of law, which "are fully reviewable on appeal." *State v. Smith*, 346 N.C. 794, 797, 488 S.E.2d 210, 212 (1997).

As this Court acknowledged in *State v. Beam*, when addressing whether a search warrant is supported by probable cause, a reviewing court must consider the "totality of the circumstances." 325 N.C. 217, 220-21, 381 S.E.2d 327, 329 (1989); *see also Illinois v. Gates*, 462 U.S. 213, 238, 76 L. Ed. 2d 527, 548 (1983); *State v. Riggs*, 328 N.C. 213, 219-20, 222, 400 S.E.2d 429, 433-34 (1991); *State v. Arrington*, 311 N.C. 633, 641, 319 S.E.2d 254, 259 (1984). In applying the totality of the circumstances test, this Court has stated that an affidavit is sufficient if it establishes "reasonable cause to believe that the proposed search . . . probably will reveal the presence upon the described premises of the items sought and that those items will aid in the apprehension or conviction of the offender. Probable cause does not mean actual and positive cause nor import absolute certainty." *Arrington*, 311 N.C. at 636, 319 S.E.2d at 256 (citations omitted). Thus, under the totality of the circumstances test, a reviewing court must determine "whether the evidence as a whole provides a substantial basis for concluding that probable cause exists." *Beam*, 325 N.C. at 221, 381 S.E.2d at 329; *see also Gates*, 462 U.S. at 238-39, 76 L. Ed. 2d at 548 (concluding that "the duty of a reviewing court is simply to ensure that the magistrate had a 'substantial basis' " to conclude that probable cause existed) (citation omitted).

In adhering to this standard of review, we are cognizant that "great deference should be paid a magistrate's determination of probable cause and that after-the-fact scrutiny should not take the form of a *de novo* review." *Arrington*, 311 N.C. at 638, 319 S.E.2d at 258. We are also mindful that:

> "A grudging or negative attitude by reviewing courts toward warrants" is inconsistent with the Fourth Amendment's strong preference for searches conducted pursuant to a warrant; "courts should not invalidate warrant[s] by interpreting affidavit[s] in a hypertechnical, rather than a commonsense, manner. [T]he resolution of doubtful or marginal cases in this area should be largely determined by the preference to be accorded to warrants."

Riggs, 328 N.C. at 222, 400 S.E.2d at 434-35 (alterations in original) (citations omitted).

Most importantly, we note that a magistrate is entitled to draw reasonable inferences from the material supplied to him by an applicant for a warrant. *Id.* at 221, 400 S.E.2d at 434. To that end, it is well settled that whether probable cause has been established is based on " 'factual and practical considerations of everyday life on which reasonable and prudent [persons], not legal technicians, act.' " *Id.* at 219, 400 S.E.2d at 433 (quoting *Brinegar v. United States*, 338 U.S. 160, 175, 93 L. Ed. 1879, 1890 (1949)) (alteration in original), quoted in *Gates*, 462 U.S. at 231, 76 L. Ed. 2d at 544. "*Probable cause is a flexible, common-sense standard.* It does not demand any showing that such a belief be correct or more likely true than false. A practical, nontechnical probability is all that is required." *State v. Zuniga*, 312 N.C. 251, 262, 322 S.E.2d 140, 146 (1984) (emphasis added).

Here, the magistrate was entitled to rely on his personal experience and knowledge related to residential refuse collection to make a practical, threshold determination of probable cause. Based on the facts before him, the magistrate was entitled to infer that the garbage bag in question came from defendant's residence and that items found inside that bag were probably also associated with that residence. This conclusion is particularly bolstered by the location of the garbage bag and the fact that Detective Hobby retrieved it from defendant's yard at approximately 8:00 a.m. on the regularly scheduled garbage collection day in defendant's neighborhood.

The marijuana plants gathered from the garbage bag, taken in conjunction with defendant's drug-related criminal history and the information obtained by the Raleigh Police Department linking defendant to a heroin sale and overdose established, based on "the factual and practical considerations of everyday life," that there was a fair probability that contraband and evidence of a crime would be found in defendant's residence. Thus, the information contained in Detective Hobby's affidavit constituted a "substantial basis" for the magistrate to find probable cause sufficient to issue a search warrant for defendant's residence.

For the reasons stated above, the superior court's conclusion is inconsistent with the jurisprudence of this State, which establishes that a magistrate's "[r]easonable inferences from the available observations, particularly when coupled with common or specialized experience, long have been approved in establishing probable cause." *Riggs*, 328 N.C. at 221, 400 S.E.2d at 434. As a result, the search warrant was properly issued and the superior court erred in granting

defendant's motion to suppress the evidence of the 1 October 2002 search of his residence.

Accordingly, the decision of the Court of Appeals is reversed. This case is remanded to the Court of Appeals for further remand to the Wake County Superior Court for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

CLAUDE M. VIAR, JR., CO-ADMINISTRATOR OF THE ESTATE OF MEGAN RAE VIAR, DECEASED, AND CO-ADMINISTRATOR OF THE ESTATE OF MACEY LAUREN VIAR, DECEASED v. NORTH CAROLINA DEPARTMENT OF TRANSPORTATION

No. 109A04

(Filed 7 April 2005)

Appeal and Error— failure to comply with Appellate Procedure Rules—dismissal of appeal

The Court of Appeals should have dismissed plaintiff's appeal in an action under the Tort Claims Act for failure to comply with Rules 10 and 28(b) of the Rules of Appellate Procedure. The majority opinion in the Court of Appeals erred by applying Rule 2 of the Rules of Appellate Procedure to suspend the Rules and address the issue, not raised or argued by plaintiff, which was the basis of the Industrial Commission's decision.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 162 N.C. App. 362, 590 S.E.2d 909 (2004), reversing and remanding a decision and order entered by the North Carolina Industrial Commission on 20 August 2002. Heard in the Supreme Court 6 December 2004.

DeVore, Acton & Stafford, P.A., by Fred W. DeVore, III, for plaintiffs-appellees.

Roy Cooper, Attorney General, by William H. Borden, Special Deputy Attorney General, Robert T. Hargett, Special Deputy Attorney General, and Ann Reed, Senior Deputy Attorney General, for the defendant-appellant.

PER CURIAM.

On appeal to this Court, defendant contends that plaintiff's appeal should be dismissed in accordance with Judge Tyson's dissenting opinion in the Court of Appeals for violation of the Rules of Appellate Procedure. We agree.

The North Carolina Rules of Appellate Procedure are mandatory and "failure to follow these rules will subject an appeal to dismissal." *Steingress v. Steingress*, 350 N.C. 64, 65, 511 S.E.2d 298, 299 (1999). In the instant case, plaintiff has failed to comply with Rule 10 and Rule 28(b). With respect to assignments of error, Rule 10(c) provides the following:

> (1) *Form; Record References*. A listing of the assignments of error upon which an appeal is predicated shall be stated at the conclusion of the record on appeal in short form without argument, and shall be separately numbered. Each assignment of error shall so far as practicable, be confined to a single issue of law; and shall state plainly, concisely and without argumentation the legal basis upon which error is assigned. An assignment of error is sufficient if it directs the attention of the appellate court to the particular error about which the question is made, with clear and specific record or transcript references. Questions made as to several issues or findings relating to one ground of recovery or defense may be combined in one assignment of error, if separate record or transcript references are made.

N.C. R. App. P. 10(c)(1). In this case, plaintiff presented two assignments of error, neither of which was numbered or made specific record references. Moreover, the second stated assignment of error did not "state plainly, concisely and without argumentation the legal basis upon which error [was] assigned."

With respect to an appellant's brief, Rule 28(b) requires the following:

> (6) An argument, to contain the contentions of the appellant with respect to each question presented. Each question shall be separately stated. Immediately following each question shall be a reference to the assignments of error pertinent to the question, identified by their numbers and by the pages at which they appear in the printed record on appeal. Assignments of error not set out in the appellant's brief, or in support of which no

> reason or argument is stated or authority cited, will be taken as abandoned.

N.C. R. App. P. 28(b)(6). Plaintiff made no argument as to the first stated assignment of error in his brief to the Court of Appeals. Thus, this assignment of error is deemed abandoned under Rule 28(b)(6). Nevertheless, plaintiff's brief in the Court of Appeals refers to assignment of error one and then to the pages of the record containing the dissenting opinion in the Industrial Commission. Moreover, plaintiff's second stated assignment of error purports to challenge the Industrial Commission's conclusion of law, but the arguments in plaintiff's brief in the Court of Appeals do not address the issue upon which the Industrial Commission's conclusion of law was based.

The majority opinion in the Court of Appeals, recognizing the flawed content of plaintiff's appeal, applied Rule 2 of the Rules of Appellate Procedure to suspend the Rules. The majority opinion then addressed the issue, not raised or argued by plaintiff, which was the basis of the Industrial Commission's decision, namely, the reasonableness of defendant's decision to delay installation of the median barriers. The Court of Appeals majority asserted that plaintiff's Rules violations did not impede comprehension of the issues on appeal or frustrate the appellate process. *Viar v. N.C. Dep't of Transp.*, 162 N.C. App. 362, 375, 590 S.E.2d 909, 919 (2004). It is not the role of the appellate courts, however, to create an appeal for an appellant. As this case illustrates, the Rules of Appellate Procedure must be consistently applied; otherwise, the Rules become meaningless, and an appellee is left without notice of the basis upon which an appellate court might rule. *See Bradshaw v. Stansberry*, 164 N.C. 284, 164 N.C. 356, 79 S.E. 302 (1913).

For the reasons stated herein and in that portion of the dissenting opinion in the Court of Appeals addressing plaintiff's violation of the Rules of Appellate Procedure, plaintiff's appeal should have been dismissed by the Court of Appeals. The decision of the Court of Appeals is vacated and plaintiff's appeal is dismissed.

DISMISSED.

ALEXANDER V. WAL-MART STORES, INC.

[359 N.C. 403 (2005)]

JOHN ALEXANDER, EMPLOYEE V. WAL-MART STORES, INC., EMPLOYER, AMERICAN HOME ASSURANCE COMPANY, CARRIER

No. 588A04

(Filed 7 April 2005)

Workers' Compensation— ruptured disc—causal relation to workplace accident

The decision of the Court of Appeals in this workers' compensation case is reversed for the reason stated in the dissenting opinion that competent medical evidence supported the Industrial Commission's finding that plaintiff's ruptured disc was caused by his workplace accident when a forklift ran over his left foot.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 166 N.C. App. ——, 603 S.E.2d 552 (2004), reversing in part an opinion and award entered by the North Carolina Industrial Commission on 24 March 2003 and remanding to the Commission. Heard in the Supreme Court 14 March 2005.

Brumbaugh, Mu & King, P.A., by Nicole D. Wray and Charles R. Hassell Jr. for plaintiff-appellant.

Young Moore and Henderson P.A., by Zachary C. Bolen and Dawn Dillon Raynor, for defendant-appellees.

Kathleen Shannon Glancy, Counsel for the North Carolina Academy of Trial Lawyers, amicus curiae.

PER CURIAM.

For the reasons stated in the dissenting opinion, we reverse the decision of the Court of Appeals.

REVERSED.

STATE v. EVANS

[359 N.C. 404 (2005)]

STATE OF NORTH CAROLINA v. ALVIS LUTHER EVANS AND SURETY ROBERT L. McQUEEN

No. 562A04

(Filed 7 April 2005)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 166 N.C. App. 432, 601 S.E.2d 877 (2004), affirming an order entered 10 March 2003 by Judge E. Lynn Johnson in Superior Court, Cumberland County. Heard in the Supreme Court 16 March 2005.

David Phillips for appellee Cumberland County Board of Education.

Parish & Cooke, by James R. Parish, for the surety-appellant.

PER CURIAM.

AFFIRMED.

IN RE T.D.P.

[359 N.C. 405 (2005)]

IN THE MATTER OF: T.D.P.

No. 310A04

(Filed 7 April 2005)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 164 N.C. App. 287, 595 S.E.2d 735 (2004), affirming an order entered 1 April 2002 by Judge Edward A. Pone in District Court, Cumberland County. Heard in the Supreme Court 14 March 2005.

Womble Carlyle Sandridge & Rice, PLLC, by Stuart A. Brock, for appellee Guardian ad Litem.

Katharine Chester for respondent-appellant.

PER CURIAM.

AFFIRMED.

STATE OF NORTH CAROLINA v. MONICA D. BRANCH

No. 95PA04

(Filed 7 April 2005)

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 162 N.C. App. 707, 591 S.E.2d 923 (2004), reversing an order denying a motion to suppress entered 29 August 2002 by Judge Anthony M. Brannon in Superior Court, Rockingham County. Heard in the Supreme Court 10 November 2004.

Roy Cooper, *Attorney General*, *by William P. Hart*, *Special Deputy Attorney General*, *for the State-appellant.*

Staples S. Hughes, *Appellate Defender*, *by Barbara S. Blackman*, *Assistant Appellate Defender*, *for defendant-appellee.*

PER CURIAM.

DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

Justice NEWBY did not participate in the consideration or decision of this case.

STATE v. CRUZ

[359 N.C. 407 (2005)]

STATE OF NORTH CAROLINA v. DAVID RENE CRUZ AND ROBERT L. MCQUEEN

No. 561A04

(Filed 7 April 2005)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 166 N.C. App. ——, 601 S.E.2d 886 (2004), affirming an order entered 10 March 2003 by Judge E. Lynn Johnson in Superior Court, Cumberland County. Heard in the Supreme Court 16 March 2005.

David Phillips for appellee Cumberland County Board of Education.

Parish & Cooke, by James R. Parish, for the surety-appellant.

PER CURIAM.

AFFIRMED.

STATE v. FISHER

[359 N.C. 408 (2005)]

STATE OF NORTH CAROLINA v. MARTINEZ TERRELL FISHER AND SURETY ROBERT L. McQUEEN

No. 559A04

(Filed 7 April 2005)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 166 N.C. App. ——, 601 S.E.2d 887 (2004), affirming an order entered 10 March 2003 by Judge E. Lynn Johnson in Superior Court, Cumberland County. Heard in the Supreme Court 16 March 2005.

David Phillips for appellee Cumberland County Board of Education.

Parish & Cooke, by James R. Parish, for the surety-appellant.

PER CURIAM.

AFFIRMED.

STATE v. McFAYDEN

[359 N.C. 409 (2005)]

STATE OF NORTH CAROLINA v. BILLY LEE McFAYDEN, JR. AND SURETY ROBERT L. McQUEEN

No. 560A04

(Filed 7 April 2005)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 166 N.C. App. ——, 601 S.E.2d 888 (2004), affirming an order entered 10 March 2003 by Judge E. Lynn Johnson in Superior Court, Cumberland County. Heard in the Supreme Court 16 March 2005.

David Phillips for appellee Cumberland County Board of Education.

Parish & Cooke, by James R. Parish, for the surety-appellant.

PER CURIAM.

AFFIRMED.

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

Adams v. Bank United of Texas FSB Case Below: 167 N.C. App. 395	No. 060P05	Plt's PDR Under N.C.G.S. § 7A-31 (COA03-1423)	Denied 03/16/05 **Lake, CJ & Martin, J recused**
Barham v. Hawk Case Below: 165 N.C. App. 708 (17 August 2004)	No. 461PA04	Defs' PDR Under N.C.G.S. § 7A-31 (COA02-1393)	Allowed 04/06/05
Baxley v. Jackson Case Below: 166 N.C. App. 515	No. 551P04	Defs' PDR Under N.C.G.S. § 7A-31 (COA03-1155)	Denied 04/06/05
Charlotte Eastland Mall, LLC v. Sole Survivor, Inc. Case Below: 166 N.C. App. 659	No. 592P04	Defs' PDR Under N.C.G.S. § 7A-31 (COA03-1422)	Denied 03/16/05
Citifinancial, Inc. v. Messer Case Below: 167 N.C. App. 742	No. 084P05	1. Third Party Defs' NOA Based Upon a Constitutional Question (COA04-261) 2. Def and Third Party Plt's Motion to Dismiss Appeal 3. Third Party Defs' PDR Under N.C.G.S. § 7A-31	1. —— 2. Allowed 04/06/05 3. Denied 04/06/05
Drewry v. N.C. Dep't of Transp. Case Below: 168 N.C. App. 332	No. 116P05	Plt's PDR Under N.C.G.S. § 7A-31 (COA03-1390)	Denied 04/06/05
Eastway Wrecker Serv., Inc. v. City of Charlotte Case Below: 165 N.C. App. 639	No. 467A04	1. Plt's NOA Based Upon a Dissent (COA03-399) 2. Plt's PDR As to Additional Issues	1. — 2. Denied 04/06/05
Hayes v. Town of Fairmont Case Below: 167 N.C. App. 522	No. 062P05	Plts' PDR Under N.C.G.S. § 7A-31 (COA03-1562)	Denied 04/06/05

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

In re Estate of Best Case Below: 165 N.C. App. 705	No. 434P04	Charles M. Best's PDR Under N.C.G.S. § 7A-31 (COA02-1449)	Denied 04/06/05
In re Estate of Lunsford Case Below: 160 N.C. App. 125	No. 362A01-3	Petitioner's (Dawn Bean) Motion to Strike (COA02-904)	Allowed **04/06/05**
In re J.F.M. & T.J.B. Case Below: 168 N.C. App. 143	No. 113P05	1. Respondent's (T.J.B.) NOA (Constitutional Question) (COA04-183) 2. AG's Motion to Dismiss Appeal 3. Respondent's (T.J.B.) PDR Under N.C.G.S. § 7A-31	1. —— 2. Allowed 04/06/05 3. Denied 04/06/05
In re L.G. Case Below: 167 N.C. App. 654	No. 057P05	Respondents' (parents of minor child) PDR Under N.C.G.S. § 7A-31 (COA04-456)	Denied 04/06/05
In re Wachovia Shareholders Litigation Case Below: 168 N.C. App. 135	No. 106P05	Plts' (Wachovia Shareholders) PDR Under N.C.G.S. § 7A-31 (COA04-402)	Denied 04/06/05
In re Will of Mason Case Below: 168 N.C. App. 160	No. 105P04	Caveator's (Lucinda Lewis Mason) PDR Under N.C.G.S. § 7A-31 (COA04-318)	Denied 04/06/05
Javurek v. Tax Review Bd. Case Below: 165 N.C. App. 834 (17 August 2004)	No. 464A04	1. Petitioner's NOA Based Upon a Constitutional Question (COA03-1016) 2. Respondent's Motion to Dismiss Appeal	1. —— 2. Allowed 04/06/05
Johnson v. Wornom Case Below: 167 N.C. App. 789	No. 048P05	Def's (Samuel J. Wornom, III) PDR Under N.C.G.S. § 7A-31 (COA04-356)	Denied 04/06/05
Parker v. Willis Case Below: 167 N.C. App. 625	No. 054P05	Def's PDR Under N.C.G.S. § 7A-31 (COA03-1711)	Denied 04/06/05

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

Pompano Masonry Corp. v. HDR Architecture, Inc. Case Below: 165 N.C. App. 401	No. 450PA04	Def Appellant's (with consent of Plt) Consent Motion to Withdraw Appeal (COA03-43)	Allowed **03/09/05**
State v. Ayala Case Below: 165 N.C. App. 544	No. 443P04	1. Def's NOA (Constitutional Question COA03-1449) 2. AG's Motion to Dismiss Appeal 3. Def's PDR Under N.C.G.S. § 7A-31	1. —— 2. Allowed 04/06/05 3. Denied 04/06/05
State v. Chapman Case Below: Johnston County Superior Court	No. 146A02	Def's Motion to Dissolve Hold of Decision (Johnston County)	Dismissed as moot 04/06/05
State v. Crawford Case Below: 167 N.C. App. 777	No. 080P05	Def's PDR Under N.C.G.S. § 7A-31 (COA04-286)	Denied 04/06/05
State v. Davis Case Below: 168 N.C. App. 321	No. 133P05	1. AG's Application for Stay of Execution of the Mandate (COA03-1718) 2. AG's Petition for Writ of Supersedeas 3. AG's PDR Under N.C.G.S. § 7A-31	1. Denied **04/04/05** 2. Denied 04/06/05 3. Denied 04/06/05
State v. Dennison Case Below 163 N.C. App. 375	No. 179A04	Def's Motion for Temporary Stay of the Mandate, for Withdrawal and Correction of Opinion, and for Other Relief	Denied **03/22/05**
State v. Dyson Case Below: 165 N.C. App. 648	No. 470P04	Def's PDR (COA03-1046)	Denied 04/06/05
State v. Ewell Case Below: 168 N.C. App. 98	No. 108P05	AG's PDR Under N.C.G.S. § 7A-31 (COA04-372)	Denied 04/06/05
State v. Ford Case Below: 162 N.C. App. 722	No. 539P03-2	Def's PWC to Review Decision of COA (COA03-140)	Denied 04/06/05

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

State v. Howard Case Below: 165 N.C. App. 707	No. 459P04	1. Def's NOA Based Upon a Constitutional Question (COA02-1728) 2. State's Motion to Dismiss Appeal 3. Def's PDR Under N.C.G.S. § 7A-31	1. —— 2. Allowed 04/06/05 3. Denied 04/06/05
State v. Huang Case Below: 168 N.C. App. 241	No. 109P05	Def's PDR Under N.C.G.S. § 7A-31 (COA03-1716)	Denied 04/06/05
State v. Ingram Case Below: 168 N.C. App. 596	No. 155P05	Def's PDR (COA03-1668)	Denied 04/06/05
State v. Lawrence Case Below: 165 N.C. App. 548	No. 457PA04	1. AG's Motion for Temporary Stay (COA03-614) 2. AG's Petition for Writ of Supersedeas 3. AG's PDR Under N.C.G.S. § 7A-31 4. Def's Conditional PDR Under N.C.G.S. § 7A-31	1. Allowed pending determination of the State's PDR **09/01/04** 2. Allowed 04/06/05 3. Allowed 04/06/05 4. Denied 04/06/05
State v. Pope Case Below: 168 N.C. App. 592	No. 159P05	Def's PDR (COA04-251)	Denied 04/06/05
State v. Powell Case Below: Cleveland County Superior Court	No. 190A03	1. Def's Petition for Writ of Supersedeas and Motion for Temporary Stay. (Cleveland County) 2. Def's Application for Habeas Corpus 3. Def's PWC	1. Denied 03/09/05 2. Denied 03/09/05 3. Denied 03/09/05
State v. Silas Case Below: 168 N.C. App. 627	No. 171P05	AG's Motion for Temporary Stay (COA04-367)	Allowed **03/29/05**

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

State v. Sneed Case Below: 167 N.C. App. 657	No. 601P03-2	1. Def's NOA Based Upon a Constitutional Question (COA02-1746-2) 3. AG's Motion to Dismiss Appeal 2. Def's PDR Under N.C.G.S. § 7A-31	1. —— 2. Allowed 04/06/05 3. Denied 04/06/05
State v. Tillman Case Below: 166 N.C. App. 762	No. 594P04	Def's PDR Under N.C.G.S. § 7A-31 (COA03-1427)	Denied 04/06/05
State v. Wagner Case Below: 166 N.C. App. 282	No. 526P04	Def's PDR Under N.C.G.S. § 7A-31 (COA03-943)	Denied 04/06/05
State v. Williams Case Below: 168 N.C. App. 409	No. 125P05	1. Def's NOA Based Upon a Constitutional Question (COA04-680) 2. AG's Motion to Dismiss Appeal 3. Def's PDR Under N.C.G.S. § 7A-31 4. Def's Petition for Supersedeas and Motion for Temporary Stay	1. —— 2. Allowed **03/16/05** 3. Denied **03/16/05** 4. Denied **03/16/05**
State ex rel. Utils. Comm'n v. Carolina Water Serv., Inc. Case Below: 165 N.C. App. 163	No. 408P04	Intervenor's (Monteray Shores and DeGabrielle) PDR Under N.C.G.S. § 7A-31 (COA03-896)	Denied 04/06/05
Whitley v. Horton Case Below: 168 N.C. App. 597	No. 150P05	Plt's PDR Under N.C.G.S. § 7A-31 (COA03-1459)	Denied 04/06/05
Williams v. Bell Case Below: 167 N.C. App. 674	No. 086P05	Plts' PDR Under N.C.G.S. § 7A-31 (COA03-1538)	Denied 04/06/05

IN RE HARRISON

[359 N.C. 415 (2005)]

IN RE: INQUIRY CONCERNING A JUDGE, NOS. 02-223 AND 03-80
PATTIE S. HARRISON, RESPONDENT

No. 3A05

(Filed 5 May 2005)

Judges— removal from office—mental and physical incapacities

A district court judge is officially removed from office for mental and physical incapacities caused by stress and diabetes which interfere with the performance of her duties and are likely to become permanent. N.C.G.S. § 7A-376.

This matter is before the Court pursuant to N.C.G.S. § 7A-376 upon a recommendation by the Judicial Standards Commission entered 18 November 2004 that respondent Pattie S. Harrison, an Emergency Judge of the General Court of Justice, District Court Division, Judicial District Nine A of the State of North Carolina, be removed for mental and physical incapacities interfering with the performance of her duties, which are likely to become permanent. Calendered for argument in the Supreme Court 20 April 2005; determined on the record without oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure and Rule 2(c) of the Rules of Supreme Court Review of Recommendations of the Judicial Standards Commission.

No counsel for Judicial Standards Commission or respondent.

PER CURIAM.

The issue before this Court, as a result of the recommendation of the North Carolina Judicial Standards Commission (Commission), is whether respondent, Pattie S. Harrison, should be removed from office for mental and physical incapacities interfering with the performance of her duties, which are likely to become permanent, pursuant to N.C.G.S. § 7A-376.

The facts which led to the Commission's recommendation that respondent be removed from office are not in dispute. Special Counsel for the Commission and counsel for respondent stipulated to the following evidence at a 28 October 2004 Commission hearing in Raleigh:

1. The Respondent gave answers to inquiries from newspapers seeking interviews regarding the grievance filed with the North Carolina State Bar and then those newspapers published the accusations that certain named lawyers and judges . . . had conspired and attempted to have the Respondent assassinated. Also, the accusation was made that the named lawyers and two judges, conspired to file over 200 false complaints against the Respondent with the Judicial Standards Commission and that the same individuals conspired to create a racially intimidating atmosphere thereby violating the Respondent's civil rights. The Respondent should have known that there was insufficient nor credible evidence to support these assertions and should have foreseen the harm that would be caused by giving credence to such inaccurate claims.

2. The Respondent presided over a custody matter entitled Webb v. Webb, Rockingham County, 99 CVD 697. In June 2002, while this matter was pending in the North Carolina Court of Appeals, the Respondent wrote a letter that was prominently featured in the Courier Times Newspaper on Saturday, June 29, 2002. In her letter, the Respondent discussed the case at length and listed the findings of fact that she had made. Upon proper reflection by the Respondent, she now acknowledges that she should not have written anything while the matter was pending in the Appellate Court.

3. The Respondent, while serving in the capacity of an Emergency District Court Judge, filed complaints to the North Carolina State Bar and to the United States Department of Justice requesting investigations and alleging that certain attorneys and judges practicing before her had conspired and attempted to have the Respondent assassinated and had conspired to have over 200 false complaints about the Respondent filed with the Judicial Standards Commission. The Respondent also made note of the fact that of the 200 complaints that had been filed, the Judicial Standards Commission had taken no action against the Respondent. The Respondent should have known that there was insufficient evidence to support these claims and she should not have filed these claims for that reason.

4. The Respondent's Campaign Committee as a part of the Respondent's 2002 judicial election campaign, organized and

advertised a raffle which the Respondent knew or should have known that such conduct was in violation of N.C.G.S. § 14-309.15. In addition, the Respondent acknowledges she was responsible for the supervision of her campaign staff on these matters and that her failure to properly exercise that supervisory control would amount to conduct that was considered a violation of the aforementioned General Statute.

5. The Respondent acknowledges that she has been under a great deal of physical and emotional stress and in addition to that also suffers from diabetes, and that this combination of physical and mental stress along with her medical condition (diabetes) has interfered with her ability to perform the duties of her office and that this is likely to become a permanent situation. The Respondent admits that on these occasions that upon proper reflection she would have handled these matters in an entirely different manner. The Respondent acknowledges that the conduct admitted in this Stipulation would be conduct prejudicial to the administration of justice that could bring the judicial office into disrepute. It is further acknowledged that such conduct could be interpreted to be in violation of Canons 1, 2A, 3A(6) of the North Carolina Code of Judicial Conduct; and could further be interpreted to be in violation of Canon 7(B)(2) of the North Carolina Code of Judicial Conduct that was in force at the time these events occurred.

6. The Respondent agrees to enter the Stipulation to bring closure to this matter and because of her concern for protecting the integrity of the court system.

7. The Respondent hereby waives formal hearing of these matters and agreed to accept a Recommendation from the Commission, to the Supreme Court, that the Respondent be removed from any further holding court in any judicial capacity, including an Emergency Judge due to the existence of the mental and physical stress in addition to her diabetic condition, as previously stated which interfere with her performance of her duties, and which is likely to become permanent.

The Commission concluded: (1) Respondent's conduct violated Canons 1, 2A, and 3A(6) of the North Carolina Code of Judicial Conduct in effect both at the time the events occurred and as amended 2 April 2003, and Canon 7B(2) of the Code of Judicial

Conduct that was in effect at the time the events occurred; (2) Respondent's conduct was prejudicial to the administration of justice and brings the judicial office into disrepute in violation of N.C.G.S. § 7A-376; and (3) Respondent's conduct was the result of mental and physical incapacities caused by stress and diabetes, which conditions are likely to become permanent. Based upon the stipulated and documentary evidence and oral arguments from counsel and the conclusions related thereto, the Commission recommended on 18 November 2004 that "the Supreme Court remove the respondent for mental and physical incapacity interfering with the performance of her duties, which is likely to become permanent, pursuant to N.C.G.S. § 7A-376."

This Court concludes that the Commission's findings of fact were supported by the findings of fact stipulated to by respondent and the other evidence in the record before us. Therefore, we accept the Commission's findings and adopt them as our own. Based upon those findings and the recommendation of the Commission, we conclude and adjudge that respondent should be removed for mental and physical incapacities caused by stress and diabetes, which conditions are likely to become permanent.

Now, therefore, it is ordered by the Supreme Court of North Carolina in conference that the respondent, Pattie S. Harrison, be, and she is hereby, officially removed from office as a judge of the General Court of Justice, District Court Division, Judicial District Nine A, for mental and physical incapacities interfering with the performance of her duties, which are likely to become permanent.

TINYA CHERNEY v. NORTH CAROLINA ZOOLOGICAL PARK

No. 606A04

(Filed 5 May 2005)

Tort Claims Act— care of tree at State Zoo—State employees involved—negligence of employees not specifically named

The decision of the Court of Appeals in a Tort Claims case affirming a decision by the Industrial Commission that plaintiff is not entitled to recover for injuries received from a falling ficus tree in the African Pavilion of the State Zoo because she failed to show negligence by the two employees named in her affidavit (the chief gardener and the horticulture curator) is reversed for the reasons stated in the dissenting opinion in the Court of Appeals that plaintiff's affidavit provided sufficient notice to allow defendant to narrow its investigation to those involved in the maintenance of the ficus tree, including the personnel supervised by the horticulture curator, and that the Commission should have considered whether any of the persons supervised by the curator were negligent in their care and maintenance of the tree.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 166 N.C. App. 684, 603 S.E.2d 842 (2004), affirming a decision and order entered by the North Carolina Industrial Commission on 28 July 2003. Heard in the Supreme Court 19 April 2005.

Knott, Clark & Berger, L.L.P., by Michael W. Clark, Kenneth R. Murphy, III, and Joe Thomas Knott, for plaintiff-appellant.

Roy Cooper, Attorney General, by William H. Borden, Special Deputy Attorney General, for defendant-appellee.

PER CURIAM.

For the reasons stated in the dissenting opinion, the decision of the Court of Appeals is reversed.

REVERSED.

Justice NEWBY did not participate in the consideration or decision of this case.

STATE OF NORTH CAROLINA v. BRIAN FRANK GONZALES

No. 339PA04

(Filed 5 May 2005)

On writ of certiorari pursuant to N.C.G.S. § 7A-32(b) of a unanimous decision of the Court of Appeals, 164 N.C. App. 512, 596 S.E.2d 297 (2004), reversing an order entered by Judge Ernest B. Fullwood on 2 January 2003 in Superior Court, New Hanover County. Heard in the Supreme Court 18 April 2005.

Roy Cooper, Attorney General, by William B. Crumpler, Assistant Attorney General, for the State.

Crossley, McIntosh, Prior & Collier, by Samuel H. MacRae, for defendant-appellant.

PER CURIAM.

AFFIRMED.

HARLEYSVILLE MUTUAL INSURANCE COMPANY v. NATIONWIDE MUTUAL INSURANCE COMPANY AND ATLANTIC INDEMNITY COMPANY

No. 444PA04

(Filed 5 May 2005)

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous, unpublished decision of the Court of Appeals, 165 N.C. App. 543, 600 S.E.2d 901 (2004), affirming an order granting summary judgment entered 27 June 2003 by Judge Howard E. Manning, Jr. in Superior Court, Wake County. Heard in the Supreme Court 18 April 2005.

McDaniel & Anderson, L.L.P., by John M. Kirby and William E. Anderson, for plaintiff-appellee.

George L. Simpson, III for defendant-appellant Nationwide Mutual Insurance Company.

PER CURIAM.

DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

CITY OF BURLINGTON, A MUNICIPAL CORPORATION v. BONEY PUBLISHERS, INC., D/B/A *THE ALAMANCE NEWS*

No. 518PA04

(Filed 5 May 2005)

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 166 N.C. App. 186, 600 S.E.2d 872 (2004), reversing an order entered by Judge James C. Spencer, Jr. on 20 November 2002 in Superior Court, Alamance County. Heard in the Supreme Court 19 April 2005.

Thomas, Ferguson & Mullins, L.L.P., by Jay H. Ferguson, and Robert M. Ward, City Attorney, for plaintiff-appellant.

Everett, Gaskins, Hancock & Stevens, LLP, by Hugh Stevens and C. Amanda Martin, for defendant-appellee.

Andrew L. Romanet, Jr., General Counsel, and Gregory F. Schwitzgebel, III, Senior Assistant General Counsel, North Carolina League of Municipalities, amicus curiae.

Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., by Charles F. Marshall, for North Carolina Press Association and North Carolina Association of Broadcasters, amici curiae.

Ellis & Winters, LLP, by Julia F. Youngman, for American Civil Liberties Union of North Carolina Legal Foundation, and Hunter, Higgins, Miles, Elam & Benjamin, PLLC, by Robert N. Hunter, Jr., for John Locke Foundation, amici curiae.

PER CURIAM.

DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

STATE OF NORTH CAROLINA v. JERRY DELANE JENKINS

No. 31A05

(Filed 5 May 2005)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, —— N.C. App. ——, 606 S.E.2d 430 (2005), finding no error in a judgment entered 28 May 2003 by Judge James M. Webb in Superior Court, Montgomery County. Heard in the Supreme Court 20 April 2005.

Roy Cooper, *Attorney General*, *by Jane T. Hautin*, *Special Deputy Attorney General*, *for the State.*

Karlene Scott-Turrentine for defendant-appellant.

PER CURIAM.

AFFIRMED.

STATE OF NORTH CAROLINA v. WILLIE FORREST, III

No. 270A04

(Filed 5 May 2005)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 164 N.C. App. 272, 596 S.E.2d 22 (2004), finding no error in judgments entered 7 March 2003 by Judge W. Osmond Smith in Superior Court, Wake County. Heard in the Supreme Court 18 April 2004.

Roy Cooper, Attorney General, by Kevin Anderson, Assistant Attorney General, for the State.

Irving Joyner for defendant-appellant.

Robert P. Mosteller, Cooperating Attorney, for the American Civil Liberties Union of North Carolina and the North Carolina Academy of Trial Lawyers, amici curiae.

PER CURIAM.

AFFIRMED.

STATE OF NORTH CAROLINA v. LEVAR JAMEL ALLEN

No. 485PA04

(Filed 1 July 2005)

1. Appeal and Error— general supervisory authority—review of Court of Appeals' decision on motion for appropriate relief

The Supreme Court exercised its general supervisory authority and accepted the State's petition for discretionary review of a Court of Appeals decision resolving a motion for appropriate relief in the Court of Appeals, despite N.C.G.S. § 15A-1422(f), because a prompt and definitive resolution of the constitutionality of North Carolina Structured Sentencing Act was necessary to the fair and effective administration of North Carolina's criminal courts.

2. Sentencing— structured—facts increasing punishment—jury finding beyond a reasonable doubt—indictment allegation not required

Applied to North Carolina's structured sentencing scheme, the rule of *Apprendi v. New Jersey*, 530 U.S. 466, and *Blakely v. Washington*, 542 U.S. 296, is that any fact other than a prior conviction that increases the penalty beyond the presumptive range must be submitted to a jury and proved beyond a reasonable doubt. The language of *State v. Lucas*, 353 N.C. 568, which defines "statutory maximum" in a manner inconsistent with this opinion is overruled, along with language requiring sentencing factors which might lead to a sentencing enhancement to be alleged in an indictment.

3. Sentencing— aggravating factors—jury finding beyond a reasonable doubt

The Sixth Amendment of the U.S. Constitution is violated by those portions of N.C.G.S. § 15A-1340.16(a), (b), and (c) which require trial judges to consider evidence of aggravating factors not found by a jury or admitted by the defendant and which permit imposition of an aggravated sentence upon judicial findings of such aggravating factors by a preponderance of the evidence. However, this ruling affects only those portions of the Structured Sentencing Act which require the sentencing judge to consider aggravating factors not admitted by defendant or found by a jury;

those portions of N.C.G.S. § 15A-1340.16 which govern a sentencing judge's finding of mitigating factors and which permit the judge to balance aggravating factors otherwise found to exist are not implicated and remain unaffected.

4. Sentencing— *Blakely* errors—structural—reversible *per se*

Blakely v. Washington errors arising under North Carolina's Structured Sentencing Act are structural and therefore reversible *per se*. The harmless error rule does not apply because the jury's findings have been vitiated in total. This holding applies to cases in which the defendants have not been indicted as of the certification date of this opinion and to cases that are now pending on direct review or are not yet final.

Justice MARTIN concurring in part and dissenting in part.

Chief Justice LAKE and Justice NEWBY join in the concurring and dissenting opinion.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 166 N.C. App. 139, 601 S.E.2d 299 (2004), finding no error in trial but remanding for resentencing after consideration of defendant's motion for appropriate relief from a judgment entered 31 January 2003 by Judge J. Gentry Caudill in Superior Court, Gaston County. On 8 February 2005, defendant filed a motion for appropriate relief in this Court. Heard in the Supreme Court 15 March 2005.

Roy Cooper, Attorney General, by Robert C. Montgomery, Assistant Attorney General, for the State-appellant.

Richard E. Jester for defendant-appellee.

BRADY, Justice.

The primary question presented for review is whether sentencing errors which violate a defendant's Sixth Amendment right to jury trial pursuant to the recent United States Supreme Court decision in *Blakely v. Washington*, 542 U.S. 296, 159 L. Ed. 2d 403 (2004), may be deemed harmless. We conclude that *Blakely* errors are structural and modify and affirm the decision of the Court of Appeals remanding defendant's case to Gaston County Superior Court for resentencing.

Preliminarily, this Court must also examine the effect of *Blakely* on criminal sentencing in North Carolina. We conclude that *Blakely*

applies to North Carolina's Structured Sentencing Act and that N.C.G.S. § 15A-1340.16, which is a part of that Act, violates the Sixth Amendment as interpreted in *Blakely*.

These holdings apply to cases "in which the defendants have not been indicted as of the certification date of this opinion and to cases that are now pending on direct review or are not yet final." *State v. Lucas*, 353 N.C. 568, 598, 548 S.E.2d 712, 732 (2001). *See State v. Hinnant*, 351 N.C. 277, 523 S.E.2d 663 (2000); *Griffith v. Kentucky*, 479 U.S. 314, 93 L. Ed. 2d 649 (1987).

FACTUAL BACKGROUND

On 3 December 2001, defendant Levar Jamel Allen was indicted for child abuse inflicting serious bodily injury, a Class C felony. The indictment alleged that on 7 November 2001, defendant intentionally and severely burned his nine month old son, thereby causing serious injury to the child. Defendant pleaded not guilty to the offense and was tried by jury at the 28 January 2003 term of Gaston County Superior Court before Judge J. Gentry Caudill. On 31 January 2003, the jury unanimously found defendant guilty of felony child abuse inflicting serious bodily injury.

During the sentencing proceeding, Judge Caudill calculated that defendant had a prior record level of II, based upon one previous Class 1 misdemeanor conviction and one previous Class A1 misdemeanor conviction. Judge Caudill made additional findings of aggravating and mitigating factors. In aggravation, Judge Caudill found by a preponderance of the evidence that defendant's abuse of his son was especially heinous, atrocious, or cruel. In mitigation, Judge Caudill found three factors by a preponderance of the evidence: (1) "the defendant has been a person of good character or has had a good reputation in the community," (2) "the defendant has a support system in the community," and (3) "the defendant was punished emotionally." Judge Caudill determined that "factors in aggravation outweigh the factors in mitigation and that an aggravated sentence is justified." Finally, Judge Caudill imposed an aggravated sentence of 115 months minimum to 147 months maximum imprisonment. Defendant's maximum aggravated sentence is eighteen months longer than the maximum presumptive sentence permitted by statute for a Class C felony, prior record level II.

Defendant appealed to the North Carolina Court of Appeals, contesting, among other assignments of error, the sufficiency of evi-

dence supporting Judge Caudill's finding of the especially heinous, atrocious, or cruel aggravating factor. On 29 June 2004, while his direct appeal was pending in the Court of Appeals, defendant filed a motion for appropriate relief in that Court. In his motion, defendant argued that the Sixth Amendment to the United States Constitution required the especially heinous, atrocious, or cruel aggravating factor to be proved to a jury beyond a reasonable doubt. Because Judge Caudill found that aggravating factor by a preponderance of the evidence, defendant requested a new sentencing proceeding. In support of his motion, defendant cited the United States Supreme Court's decision in *Blakely v. Washington*, —— U.S. ——, 159 L. Ed. 2d 403 (2004), which applied the Court's earlier holding in *Apprendi v. New Jersey*, 530 U.S. 466, 147 L. Ed. 2d 435 (2000), to invalidate Washington State's "exceptional" sentencing system. On 7 September 2004, a unanimous panel of the Court of Appeals issued an opinion finding no error in defendant's trial, but remanded defendant's case for resentencing pursuant to *Blakely* and this Court's 1983 decision in *State v. Ahearn*, 307 N.C. 584, 300 S.E.2d 689 (1983).

PROCEDURAL POSTURE

[1] This matter is before the Court on the State's petition for discretionary review, allowed 23 September 2004. Defendant contends that this Court lacks subject matter jurisdiction to review the Court of Appeals' decision because he raised the question of *Blakely* error in the Court of Appeals by a motion for appropriate relief. In support of his argument, defendant cites N.C.G.S. § 15A-1422(f), which states that "[d]ecisions of the Court of Appeals on motions for appropriate relief that [are made more than ten days after entry of judgment] are final and not subject to further review by appeal, certification, writ, motion, or otherwise."

We agree that N.C.G.S. § 15A-1422(f) bars this Court's review of Court of Appeals' decisions on most motions for appropriate relief from noncapital judgments and convictions. *See State v. Barrett*, 307 N.C. 126, 302 S.E.2d 632 (1982) (dismissing the defendant's appeal of the Court of Appeals decision denying his motion for appropriate relief). This restriction has the desirable effect of imparting finality to post-conviction proceedings and freeing limited judicial resources for attention to cases on direct review, which involve capital or constitutional questions, and questions in dispute among the members of the Court of Appeals as reflected by a dissenting opinion. N.C.G.S. §§ 7A-27(a), 30 (2003). Collateral review of noncapital judg-

ments and convictions is, in general, not a core function of the Supreme Court of North Carolina.

However, collateral review is proper in certain rare circumstances, as when the Court of Appeals applies a new federal constitutional rule of widespread effect on the administration of justice throughout the state. *Cf. In re Brownlee*, 301 N.C. 532, 548, 272 S.E.2d 861, 870 (1981) ("Under exceptional circumstances this [C]ourt will exercise power under [Article IV, Section 12, Clause 1 of the North Carolina Constitution] in order to consider questions which are not presented according to our rules of procedure; and this [C]ourt will not hesitate to exercise its general supervisory authority when necessary to promote the expeditious administration of justice.") (citations omitted); *State v. Stanley*, 288 N.C. 19, 26, 215 S.E.2d 589, 594 (1975) ("This Court will not hesitate to exercise its rarely used general supervisory authority when necessary to promote the expeditious administration of justice. Under unusual and exceptional circumstances [the Court] will exercise this power to consider questions which are not properly presented according to [its] rules.") (citations omitted). Read broadly, the Court of Appeals' decision in *Allen*, applying *Blakely*, calls into question the constitutionality of North Carolina's Structured Sentencing Act and identifies a new type of structural error which is reversible *per se*. For these reasons *Allen* and *Blakely* have the potential to affect a significant number of criminal sentences in North Carolina.

Because a prompt and definitive resolution of this issue is necessary to ensure the continued fair and effective administration of North Carolina's criminal courts, we exercise the supervisory authority of this Court, which is embodied in Article IV, Section 12, Clause 1 of the North Carolina Constitution, and review the opinion of the Court of Appeals. In so doing, we note that N.C.G.S. § 15A-1422(f) cannot restrict this Court's constitutionally granted power to "issue any remedial writs necessary to give it general supervision and control over the proceedings of the other courts." N.C. Const. art. IV, § 12, cl. 1; *see also id.* art. IV, § 1 ("The General Assembly shall have no power to deprive the judicial department of any power or jurisdiction that rightfully pertains to it as a co-ordinate department of the government . . . .").

For the reasons stated above, we determine that the State's petition for discretionary review of the decision of the Court of Appeals resolving defendant's motion for appropriate relief is properly before this Court. We now consider the effect of *Blakely v.*

Washington on North Carolina's Structured Sentencing Act and the proper standard of review to be applied when *Blakely* error is identified in a defendant's case.

NORTH CAROLINA STRUCTURED SENTENCING

In 1979 the North Carolina General Assembly enacted presumptive sentencing legislation, commonly known as the "Fair Sentencing Act," in "response to a perceived need for certainty in sentencing, to a perceived evil of disparate sentencing, and to a perceived problem in affording trial judges and parole authorities unbridled discretion in imposing sentences." *Ahearn*, 307 N.C. at 594, 300 S.E.2d at 695; An Act to Establish a Fair Sentencing System in North Carolina Criminal Courts, ch. 760, 1979 N.C. Sess. Laws 850. Before enactment of this legislation, North Carolina, like most other states, utilized "typical indeterminate sentencing law." Stevens H. Clarke, *Law of Sentencing, Probation and Parole in North Carolina* 39-40 (Inst. of Gov't, Univ. of N.C. at Chapel Hill 1991) [hereinafter, Clarke, *Sentencing*]. "Ranges of prison terms were wide for broadly defined crimes," and "[n]o criteria for sentencing were set by statute, court decision, or court rules." *Id.* at 40.

North Carolina's Fair Sentencing Act was revised several times before it went into effect on 1 July 1981. *See* N.C.G.S. § 15A-1340.1 (1995). The act stated that

> [t]he primary purposes of sentencing a person convicted of a crime are to impose a punishment commensurate with the injury the offense has caused, taking into account factors that may diminish or increase the offender's culpability; to protect the public by restraining offenders; to assist the offender toward rehabilitation and restoration to the community as a lawful citizen; and to provide a general deterrent to criminal behavior.

Id. § 15A-1340.3 (Supp. 1981).

In 1993 the General Assembly further reformed North Carolina's criminal sentencing system, enacting legislation commonly known as the "Structured Sentencing Act" in response to rising prison populations. Clarke, *Sentencing* 1-4 (Supp. 1994). Structured sentencing, which classifies convicted criminal defendants for sentencing purposes based upon the severity of their crime (offense class) and gravity of their prior criminal record (prior record level), became effective on 1 October 1994 and is still in effect today. An Act To Provide for Structured Sentencing in North Carolina Consistent with the

Standard Operating Capacity of the Department of Correction and Local Confinement Facilities and To Redefine State and County Responsibilities for the Confinement of Misdemeanants, ch. 538, 1993 N.C. Sess. Laws 2299-2313 (codified as amended at N.C.G.S. ch. 15A, art. 81B (2003) (effective date Oct. 1, 1994)). The Structured Sentencing Act repealed the Fair Sentencing Act and remedied many of the perceived weaknesses of that earlier legislation, including that the Fair Sentencing Act "applied only to felonies, did not control the sentence disposition (leaving judges free to impose probation unless forbidden by other statutes), and set only a presumptive prison/jail term." Clarke, *Sentencing* 9 (Supp. 1994). Repealing Chapter 15A, Article 85A of the North Carolina General Statutes, the Structured Sentencing Act abolished parole for certain convicted felons and ensured that new felony offenders serve their entire sentence. Ch. 538, sec. 24, 1993 N.C. Sess. Laws at 2341.

Pursuant to the Structured Sentencing Act, sentencing judges must impose both a minimum and maximum active, intermediate, or community punishment for felony convictions. N.C.G.S. § 15A-1340.13 (2003). Separate statutory punishment charts dictate a defendant's minimum and maximum sentence. *See id.* § 15A-1340.17 (2003). The length of term imposed depends upon the offense class, the defendant's prior record level, and the presence of aggravating or mitigating factors. *Id.* at §§ 15A-1340.13, -1340.14, -1340.16, -1340.17 (2003).

The statutory punishment chart for minimum sentences consists of a grid on which offense classes and prior record levels are the axes. *Id.* § 15A-1340.17(c).[1] Ranges of possible minimum sentences, which are set forth for every combination of offense class and prior record level, are either presumptive, as in a typical case; mitigated, as in less severe cases; or aggravated, as in the worst cases. *Id.* Maximum sentences corresponding to every possible minimum sentence are listed in separate tables.[2] *Id.* § 15A-1340.17(d), (e), (e1).

Before selecting a convicted criminal defendant's minimum sentence, the sentencing judge must consider whether aggravating and mitigating factors are present, weigh any existing factors, and decide upon a mitigated, presumptive, or aggravated punishment range. *Id.* § 15A-1340.16(a)-(c). The State carries the burden of proving by a preponderance of the evidence that an aggravating factor exists

1. See Figure 1; N.C.G.S. § 15A-1340.17(c).

2. See Figure 2; N.C.G.S. § 15A-1340.17(d), (e), (e1).

and the defendant carries a corresponding burden to prove that a mitigating factor exists. *Id.* § 15A-1340.16(a). Statutory aggravating and mitigating factors are enumerated in section 15A-1340.16(d) and (e); however, this list is not exclusive and both the prosecutor and defendant are entitled to present evidence of any other "factor reasonably related to the purposes of sentencing." *Id.* § 15A-1340.16(d)(20), (e)(21). The judge may impose an aggravated or mitigated sentence whenever he finds aggravating or mitigating factors to exist, but the decision to depart from the presumptive range is wholly within the trial court's discretion. *Id.* § 15A-1340.16 (a), (b).

RIGHT TO JURY TRIAL

The right to jury trial is the only constitutional guarantee preserved both in the body of the Constitution and the Bill of Rights. U.S. Const. art. III, § 2, cl. 3; *id.* amend. VI; *Duncan v. Louisiana*, 391 U.S. 145, 152-53, 20 L. Ed. 2d 491, 498 (1968).[3] Article III, Section 2, Clause 3 of the United States Constitution states that "[t]he trial of all crimes, except in cases of impeachment, shall be by jury." The Sixth Amendment to the Constitution of the United States further provides that "[i]n all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed." As observed by Sir William Blackstone, the right to jury trial instills public trust in determinations of a defendant's guilt or innocence because "the truth of every accusation . . . [must] be confirmed by the unanimous suffrage of twelve of his equals and neighbours." 4 William Blackstone, *Commentaries* *349-50, *quoted in Duncan*, 391 U.S. at 151-52, 20 L. Ed. 2d at 497, and *Blakely*, 542 U.S. at ——, 159 L. Ed. 2d at 412 (alterations in original).

In 2000, however, the United States Supreme Court held that the right to jury trial also requires that jurors find *sentencing facts* which increase the penalty for a crime "beyond the prescribed statutory maximum." *Apprendi v. New Jersey*, 530 U.S. 466, 490, 147 L. Ed. 2d 435, 455 (2000). Four years later, the Court defined "statutory maximum" as the maximum sentence permitted by the jury's verdict or

3. The right to jury trial, which has been classified as a "fundamental right" by the United States Supreme Court was also secured by the constitutions of the original thirteen states, including North Carolina, and the constitution of every state subsequently entering the Union. *Duncan*, 391 U.S. at 153, 157-58, 20 L. Ed. 2d at 498, 501. *See* N.C. Const. of 1776, A Declaration of Rights, § 9 (right of jury trial in criminal cases).

admitted by the defendant, without additional judge-made findings of fact. *Blakely*, 542 U.S. at ——, 159 L. Ed. 2d at 413-14.

This Court must now determine whether North Carolina's Structured Sentencing Act is *Blakely* compliant. After thorough review of United States Supreme Court precedent, including *Apprendi v. New Jersey* and *Blakely v. Washington*, and this Court's intervening opinion in *State v. Lucas*, we conclude that those portions of N.C.G.S. § 15A-1340.16 which require trial judges to consider evidence of aggravating factors not found by a jury or admitted by the defendant and which permit imposition of an aggravated sentence upon judicial findings of such aggravating factors by a preponderance of the evidence are unconstitutional.

In *Apprendi v. New Jersey*, the United States Supreme Court granted certiorari to review a New Jersey law which authorized an "extended term" of imprisonment for defendants whose crimes were classified as "hate crimes." 530 U.S. at 468-69, 147 L. Ed. 2d at 442. This "hate crime" enhancement, which did not criminalize conduct in and of itself, was designed to augment the maximum sentence imposed for any separate complete offense. *Id.* Under the New Jersey statute, a trial judge was permitted to impose a longer sentence than the sentence set forth in the provision defining an underlying offense if the judge found by a preponderance of the evidence that "[t]he defendant in committing the crime acted with a purpose to intimidate an individual or group of individuals because of race, color, gender, handicap, religion, sexual orientation or ethnicity." *Id.*

The defendant in *Apprendi* pleaded guilty to second-degree possession of a firearm for an "unlawful purpose," an offense punishable in New Jersey by five to ten years imprisonment. *Id.* at 469-70, 147 L. Ed. 2d at 442-43. During sentencing, the State requested, and the trial judge conducted, an evidentiary hearing on the defendant's "purpose" for unlawful possession. *Id.* at 470, 147 L. Ed. 2d at 443. Following the hearing, the judge found by a preponderance of the evidence that the defendant's actions were " 'motivated by racial bias' " and committed " 'with a purpose to intimidate.' " *Id.* at 471, 147 L. Ed. 2d at 443. Thereafter, the judge sentenced the defendant to a twelve-year "extended term" of imprisonment. *Id.*

On appeal, the defendant argued that the Due Process Clause of the United States Constitution requires that findings of "bias" and "purpose to intimidate"—the two factors upon which his "extended term" was based—must be proved to a jury beyond a reasonable

doubt. *Id.* The United States Supreme Court agreed, holding that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Id.* at 490, 147 L. Ed. 2d at 455. The Court concluded: "The New Jersey procedure challenged in this case is an *unacceptable departure from the jury tradition* that is an indispensable part of our criminal justice system." *Id.* at 497, 147 L. Ed. 2d at 459 (emphasis added). Granting relief to the defendant, the United States Supreme Court reversed the judgment of the Supreme Court of New Jersey and remanded the case for further proceedings not inconsistent with its opinion. *Id.*

The following year, in *State v. Lucas*, this Court applied *Apprendi* to the sentencing of a defendant whose first-degree burglary and second-degree kidnapping sentences were enhanced pursuant to N.C.G.S. § 15A-1340.16A, which required that sixty months be added to a defendant's minimum sentence upon a judicial finding that the defendant "used, displayed, or threatened to use or display a firearm." 353 N.C. at 592-93, 548 S.E.2d at 728. Section 15A-1340.16A applied to defendants convicted of Class A, B1, B2, C, D, or E felonies. *Id.* Like the New Jersey statute challenged in *Apprendi*, section 15A-1340.16A lengthened the actual sentence imposed for an underlying offense, but did not criminalize the conduct itself. *Id.* at 592-93, 548 S.E.2d at 728-29.

In *Lucas*, a jury convicted the defendant of first-degree burglary, a Class D felony, and second-degree kidnapping, a Class E felony. *Id.* at 593, 548 S.E.2d at 729. During sentencing, the trial court determined that the defendant had a prior record level of I. *Id.* Referring to the appropriate statutory punishment chart, the sentencing judge selected minimum sentences at the high end of the presumptive range: sixty-four months minimum imprisonment for first-degree burglary and twenty-five months minimum imprisonment for second-degree kidnapping. *Id.* Thereafter, the judge added sixty months to each minimum sentence in accordance with section 15A-1340.16A, before determining the corresponding maximum sentences. *Id.*

Reviewing the defendant's motion for appropriate relief, this Court considered the meaning of "statutory maximum" as employed by *Apprendi*. *Id.* at 596, 548 S.E.2d at 730-31. The Court defined "statutory maximum" for *Apprendi* purposes as the maximum sentence that a trial judge could properly impose by reference to the statutory punishment charts, including an aggravated sentence. *Id.* at 596, 548 S.E.2d at 731. The Court explained that the maximum

sentence authorized by the North Carolina Structured Sentencing Act results from:

> (1) findings that the defendant falls into the highest criminal history category for the applicable class offense *and that the offense was aggravated*, followed by (2) a decision by the sentencing court to impose the highest possible corresponding minimum sentence from the ranges presented in the chart found in N.C.G.S. § 15A-1340.17(c).

Id. (emphasis added).

This holding appeared consistent with *Apprendi*, in which, following a historical discussion of common law sentencing jurisprudence, the United States Supreme Court cautioned:

> We should be clear that nothing in this history suggests that it is impermissible for judges to exercise discretion—taking into consideration various factors relating both to offense and offender—in imposing a judgment *within the range* prescribed by statute. We have often noted that judges in this country have long exercised discretion of this nature in imposing sentence[s] *within statutory limits* in the individual case.

530 U.S. at 481, 147 L. Ed. 2d at 449.

Under the straightforward approach developed by *Lucas*, most criminal sentences in North Carolina were considered *Apprendi* compliant. In a small number of cases, as in *Lucas*, separate statutory enhancement provisions had the potential to increase a defendant's actual sentence beyond the statutory maximum.

As calculated in *Lucas*, the maximum enhanced sentence for a Class D felony pursuant to N.C.G.S. § 15A-1340.16A was 301 months—seventy-two months longer than the authorized statutory maximum sentence defined by this Court. 353 N.C. at 597, 548 S.E.2d at 731. Applying *Apprendi*, this Court held that facts supporting such an enhanced sentence under N.C.G.S. § 15A-1340.16A must be submitted to a jury and proved beyond a reasonable doubt. *Id.* at 597-98, 548 S.E.2d at 731. The Court further held that "in every instance where the State seeks an enhanced sentence pursuant to N.C.G.S. § 15A-1340.16A, it must allege the statutory factors supporting the enhancement in an indictment." *Id.* For the reasons stated above, this Court found that the State must "meet the requirements set out in . . . *Apprendi* in order to apply the enhancement provisions of

the statute."[4] *Id.* at 598, 548 S.E.2d at 732. Granting relief, the Court vacated the defendant's enhanced sentences and remanded his case to the trial court for further proceedings consistent with its opinion. *Id.* at 599, 548 S.E.2d at 732.

In *Blakely v. Washington*, the United States Supreme Court addressed the meaning of "statutory maximum" with respect to an "exceptional" sentence imposed on a criminal defendant pursuant to Washington State's Sentencing Reform Act. 542 U.S. at ——, ——, 159 L. Ed. 2d at 410, 413. The defendant pleaded guilty to second-degree kidnapping involving domestic violence and use of a firearm, an offense punishable by imprisonment within a "standard range" of forty-nine to fifty-three months under Washington state law. *Id.* at ——, 159 L. Ed. 2d at 410-11. Washington statutes provided, however, that a judge may impose a sentence above the "standard range" upon finding "substantial and compelling reasons justifying an exceptional sentence." *Id.* at ——, 159 L. Ed. 2d at 411. "Substantial and compelling reasons" deemed to support an exceptional sentence were listed in Washington's Sentencing Reform Act. *Id.* at ——, 159 L. Ed. 2d at 411. The trial judge found as an aggravating factor that defendant had acted with "deliberate cruelty" in kidnapping his wife. *Id.* at ——, 159 L. Ed. 2d at 411. The judge then sentenced the defendant to an exceptional sentence of ninety months—thirty-seven months longer than the maximum sentence recommended by prosecutors and authorized by Washington's kidnapping statute. *Id.* at ——, 159 L. Ed. 2d at 411.

On appeal, the defendant argued that Washington's Sentencing Reform Act, which permits judges to impose "exceptional sentences" based upon judicial findings of aggravating sentencing factors, "deprived him of his federal constitutional right to have a jury determine beyond a reasonable doubt all facts legally essential to his sentence." *Id.* at ——, 159 L. Ed. 2d at 412. The United States Supreme Court agreed, reaffirming the *Apprendi* rule. *Id.* at ——, 159 L. Ed. 2d

4. In 2003, the North Carolina General Assembly revised N.C.G.S. § 15A-1340.16A by An Act to Amend the Law Regarding Enhanced Sentences as Recommended by the Sentencing Commission and to Make Conforming Changes. Ch. 378, sec. 2, 2003 N.C. Sess. Laws 1078, 1078. Applicable to all offenses occurring on or after 1 August 2003, revised section 15A-1340.16A corrects the constitutional defect identified by this Court in *Lucas* and complies with this Court's holdings in that case. As amended, section 15A-1340.16A requires that facts supporting an enhanced sentence for firearm use be alleged in the indictment and proved to a jury beyond a reasonable doubt. Trial judges are no longer permitted to find facts supporting an enhanced sentence pursuant to section 15A-1340.16A.

at 412, 415-16. The Court further clarified that the "statutory maximum" referred to by *Apprendi* is not the maximum sentence authorized by statute, but "the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*." *Id.* at ——, 159 L. Ed. 2d at 413. The jury's verdict or the defendant's admissions, standing alone, must authorize the sentence imposed. *Id.* at ——, 159 L. Ed. 2d at 413-14.

Applying this definition to the defendant, the United States Supreme Court concluded that the ninety month "exceptional sentence" imposed under Washington's Sentencing Reform Act exceeded the "statutory maximum" by more than three years. *Id.* at ——, 159 L. Ed. 2d at 413-14, 420. Accordingly, the Court held that the Sixth Amendment required the facts supporting the defendant's "exceptional sentence," specifically that the defendant acted with "deliberate cruelty," to be proved to a jury beyond a reasonable doubt. *Id.* at ——, 159 L. Ed. 2d at 420. Granting the defendant relief, the United States Supreme Court reversed the judgment of the Washington Court of Appeals and remanded his case for further proceedings not inconsistent with its opinion. *Id.*

[2] The United States Supreme Court decision in *Blakely* and the North Carolina Court of Appeals decision in *Allen* prompt this Court to revisit its prior holding in *Lucas* defining "statutory maximum." After *Blakely*, it is clear that the "statutory maximum" to which *Apprendi* applies is not the maximum sentence authorized by statute; rather, for *Apprendi* purposes, "statutory maximum" means the maximum sentence authorized by the jury verdict or the defendant's admissions. Applied to North Carolina's structured sentencing scheme, the rule of *Apprendi* and *Blakely* is: Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed presumptive range must be submitted to a jury and proved beyond a reasonable doubt. *See Blakely*, —— U.S. at ——, 159 L. Ed. 2d at 413-14; *Apprendi*, 530 U.S. at 490, 147 L. Ed. 2d at 455; N.C.G.S. §§ 15A-1340.13, -15A-1340.14, -15A-1340.16; -15A-1340.17. Accordingly, we overrule that language of *State v. Lucas* which defines "statutory maximum" in a manner inconsistent with this opinion.

On 8 February 2005, defendant filed a motion for appropriate relief in this Court, arguing that "*Blakely* and the surviving portion of *Lucas*" require "aggravating factors that are used to increase a sentence beyond the top of the presumptive range . . . be alleged in an indictment." As indicated in *Lucas*, 353 N.C. at 597-98, 548 S.E.2d at

731, a requirement that the State "allege the statutory factors supporting the [N.C.G.S. § 15A-1340.16A] enhancement in an indictment" might be inferred from the United States Supreme Court's statement in *Apprendi* that

> 'under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt.' The Fourteenth Amendment commands the same answer in this case involving a state statute.

530 U.S. at 476, 147 L. Ed. 2d at 446 (quoting *Jones v. United States*, 526 U.S. 227, 243 n.6, 143 L. Ed. 2d 311, 326 n.6 (1999)).

However, in footnote three of the *Apprendi* opinion, the Court clarified that "[the defendant] has not here asserted a constitutional claim based on the omission of any reference to sentence enhancement or racial bias in the indictment. . . . We thus do not address the indictment question separately today." Subsequent United States Supreme Court decisions in *Ring v. Arizona* and *Blakely*, which applied *Apprendi* to aggravating factors supporting capital and noncapital sentences respectively, were based solely on the Sixth Amendment right to jury trial, without reference to the Fifth Amendment's indictment guarantee. *Ring v. Arizona*, 536 U.S. 584, 597, 609, 153 L. Ed. 2d 556, 569, 576-77 (2002); *Blakely*, 542 U.S. at ——, 159 L. Ed. 2d at 415-16. Although "[d]ue process and notice requirements under the Sixth Amendment inure[] to state prosecutions," this Court recently recognized "to this date, the United States Supreme Court has not applied the Fifth Amendment indictment requirements to the states." *State v. Hunt*, 357 N.C. 257, 272-73, 582 S.E.2d 593, 603-04, *cert. denied*, 539 U.S. 985, 156 L. Ed. 2d 702 (2003). Indeed, in *Hunt* this Court concluded that "the Fifth Amendment would not require aggravators, even if they were fundamental equivalents of elements of an offense, to be pled in a state-court indictment." *Id.* at 272, 582 S.E.2d at 603. Accordingly, we also overrule that language of *Lucas*, requiring sentencing factors which might lead to a sentencing enhancement to be alleged in an indictment.

[3] For the reasons stated above, we determine that those portions of N.C.G.S. § 15A-1340.16 (a), (b), and (c) which require trial judges to consider evidence of aggravating factors not found by a jury

or admitted by the defendant and which permit imposition of an aggravated sentence upon judicial findings of such aggravating factors by a preponderance of the evidence violate the Sixth Amendment to the United States Constitution. Standing alone, N.C.G.S. § 15A-1340.16(d), which lists statutory aggravating factors, can be given effect as if the unconstitutional provisions had not been enacted. *See, e.g.*, *Pope v. Easley*, 354 N.C. 544, 548, 556 S.E.2d 265, 268 (2001) ("The test for severability is whether the remaining portion of the legislation can stand on its own and whether the General Assembly would have enacted the remainder absent the offending portion."). For example, under *Blakely* the judge may still sentence a defendant in the aggravated range based upon the defendant's admission to an aggravating factor enumerated in N.C.G.S. § 15A-1340.16(d).

We emphasize that *Blakely*, which is grounded in the Sixth Amendment right to jury trial, affects only those portions of the Structured Sentencing Act which require the sentencing judge to consider the existence of aggravating factors not admitted to by a defendant or found by a jury and which permit the judge to impose an aggravated sentence after finding such aggravating factors by a preponderance of the evidence. Those portions of N.C.G.S. § 15A-1340.16 which govern a sentencing judge's finding of mitigating factors and which permit the judge to balance aggravating and mitigating factors otherwise found to exist are not implicated by *Blakely* and remain unaffected by our decision in this case.

COURT OF APPEALS OPINION BELOW

Having identified error in defendant's sentence, this Court must now determine whether that error is subject to harmless error review, and if so, whether harmless error exists in this case. The Court of Appeals concluded that the harmless-error rule does not apply, citing *State v. Ahearn*, 307 N.C. 584, 300 S.E.2d 689, which held that a defendant's case must be remanded for resentencing whenever the trial judge has imposed an aggravated sentence based upon a sentencing factor which is not supported by the evidence. *Allen*, 166 N.C. App. at 149-50, 601 S.E.2d at 306. The State argues, and we agree, that *Ahearn* is not controlling.

In *State v. Ahearn*, this Court considered the effect of one aggravating factor, which was later determined to be unsupported by the evidence, on a sentencing judge's balancing of all sentencing factors present in the case. 307 N.C. at 599-602, 300 S.E.2d at 698-701. The

defendant in *Ahearn* was convicted of felonious child abuse and voluntary manslaughter in connection with the death of his girlfriend's two-year old son. *Id.* at 585-87, 300 S.E.2d at 690-91. During sentencing, the trial judge found three aggravating factors and five mitigating factors. *Id.* at 592-93, 300 S.E.2d at 694-95. The judge weighed the aggravating and mitigating factors, determined that " 'the aggravating factors although few in number are substantially more dominant than the mitigating factors,' " and imposed aggravated sentences of sixteen years for voluntary manslaughter and five years for felonious child abuse. *Id.* at 585, 592, 300 S.E.2d at 690-91, 694. On appeal, the Court of Appeals and this Court determined that the trial judge's finding of the aggravating factor that the defendant's crime was especially heinous, atrocious or cruel was based upon insufficient evidence. *Id.* at 599, 300 S.E.2d at 698. Because "[r]eliance on a factor in aggravation determined to be erroneous may or may not have affected the balancing process which resulted in the decision to deviate from the presumptive sentence," this Court remanded the defendant's case for resentencing. *Id.* at 602, 608, 300 S.E.2d at 700, 704.

This Court's holding in *Ahearn* rested on the inability of an appellate court to determine how removing one aggravating factor would affect the sentencing judge's balancing of the remaining aggravating and mitigating factors present in the defendant's case. *Id.* at 602, 300 S.E.2d at 700-01. *Ahearn* did not address whether the finding of an aggravating factor by the wrong entity is subject to harmless error review. Because *Blakely* does not concern the actual combination of aggravating and mitigating factors found by a jury, but instead safeguards the participation of jurors in sentencing, *Ahearn* does not control the case *sub judice*. Our analysis of this separate question is guided by the reasoning of *Blakely v. Washington*, the evolution of harmless error review, and United States Supreme Court case law defining structural error.

STRUCTURAL ERROR

The State argues that for purposes of *Apprendi* and *Blakely*, sentencing factors are functionally equivalent to the elements of a criminal offense. Citing *Neder v. United States*, 527 U.S. 1, 144 L. Ed. 2d 35 (1999), the State reasons that failure to submit sentencing factors to a jury should receive the same degree of scrutiny as failure to submit an element of a criminal offense to the jury—harmless error review. We disagree, concluding instead that complete removal of aggravating factors from jury consideration during sentencing is structural error similar to the structural error identified by the United

States Supreme Court in *Sullivan v. Louisiana*, 508 U.S. 275, 124 L. Ed. 2d 182 (1993).

Structural error is a rare form of constitutional error resulting from a "defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself." *Arizona v. Fulminante*, 499 U.S. 279, 310, 113 L. Ed. 2d 302, 337 (1991). Such errors "deprive defendants of 'basic protections,' without which . . . 'no criminal punishment may be regarded as fundamentally fair.' *Neder*, 527 U.S. at 8-9, 144 L. Ed. 2d at 46-47 (quoting *Rose v. Clark*, 478 U.S. 570, 577-78, 92 L. Ed. 2d 460, 470 (1986)). The United States Supreme Court first defined structural error in 1991 and has identified six instances of structural error to date: (1) complete deprivation of right to counsel, *Johnson v. United States*, 520 U.S. 461, 468, 137 L. Ed. 2d 718, 728 (1997) (citing *Gideon v. Wainwright*, 372 U.S. 335, 9 L. Ed. 2d 799 (1963)); (2) a biased trial judge, *Tumey v. Ohio*, 273 U.S. 510, 71 L. Ed. 749 (1927); (3) the unlawful exclusion of grand jurors of the defendant's race, *Vasquez v. Hillery*, 474 U.S. 254, 88 L. Ed. 2d 598 (1986); (4) denial of the right to self-representation, *McKaskle v. Wiggins*, 465 U.S. 168, 79 L. Ed. 2d 122 (1984); (5) denial of the right to a public trial, *Waller v. Georgia*, 467 U.S. 39, 81 L. Ed. 2d 31 (1984); and (6) constitutionally deficient jury instructions on reasonable doubt, *Sullivan*, 508 U.S. 275, 124 L. Ed. 2d 182. *See Johnson*, 520 U.S. at 468-69, 137 L. Ed. 2d at 728 (identifying the six cases in which the United States Supreme Court has found structural error).

Structural errors are said to "defy" harmless error review because they are "so intrinsically harmful as to require automatic reversal (*i.e.*, 'affect substantial rights') without regard to their effect on the outcome." *Neder*, 527 U.S. at 7, 144 L. Ed. 2d at 46. For this reason, a defendant's remedy for structural error is not dependant upon harmless error analysis; rather, structural errors are reversible *per se*. *Id.*

Most constitutional errors are not structural. *Rose*, 478 U.S. at 578, 92 L. Ed. 2d at 471. On appeal, a reviewing court applies the harmless-error rule to determine whether these nonstructural errors were prejudicial to the defendant or harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18, 24, 17 L. Ed. 2d 705, 710-11 (1967). Errors that have prejudiced a defendant will be remedied by the appellate court, *id.* at 24, 26, 17 L. Ed. 2d at 710-11; N.C.G.S. § 15A-1442, -1443, -1447 (2003), and a constitutional error is presumed to be prejudicial unless the State can show that the error

was harmless beyond a reasonable doubt, meaning that "the error complained of did not contribute to the verdict obtained," *Chapman*, 386 U.S. at 24, 17 L. Ed. 2d at 710.

Since the United States Supreme Court first introduced harmless error review in 1946, that Court has employed one of two tests to determine whether an error "contribute[d] to the verdict obtained." *Id.* First, the Court has considered the "impact of the thing done wrong on the minds of [the jury]." *Kotteakos v. United States*, 328 U.S. 750, 764, 90 L. Ed. 1557, 1566 (1946). The Court applied this test, which evaluates the "effect [the error] had upon the guilty verdict in the case at hand," in *Sullivan v. Louisiana*, 508 U.S. at 279, 280-82, 124 L. Ed. 2d at 189, 190-91. Second, the United States Supreme Court has applied harmless error review after determining that evidence of the defendant's guilt presented at trial was "overwhelming." *Harrington v. California*, 395 U.S. 250, 254, 23 L. Ed. 2d 284, 287-88 (1969). The Court applied the "overwhelming" evidence standard in *Neder v. United States*, 527 U.S. at 16-17, 144 L. Ed. 2d at 51-52.

Sullivan, in which the United States Supreme Court found structural error, and *Neder*, in which the Court found error to be harmless beyond a reasonable doubt, guide this Court's decision in the case *sub judice*. Both *Sullivan* and *Neder* address the proper appellate court response to constitutional errors made during the guilt-innocence portion of a trial. The United States Supreme Court has not defined which standard, harmless or structural error, should be applied to state sentencing errors pursuant to *Blakely*; however, the imposition of a constitutional punishment is just as important to a criminal defendant and to society as is a constitutional determination of the defendant's guilt or innocence.

In *Sullivan v. Louisiana*, the United States Supreme Court considered whether harmless error review applied to constitutionally deficient jury instructions on reasonable doubt, which were submitted to the jury in a defendant's first-degree murder trial. 508 U.S. at 276-77, 124 L. Ed. 2d at 187. Except for the testimony of one eyewitness (who identified the defendant on direct examination, but was unable to identify either the defendant or his accomplice during a physical lineup), the State's evidence at trial was circumstantial. *Id.* at 276, 124 L. Ed. 2d at 187. Although defense counsel contended during closing argument that reasonable doubt existed as to whether the defendant was the shooter, the defendant was convicted of first-degree murder. *Id.* at 276-77, 124 L. Ed. 2d at 187. On appeal, the State

conceded that the trial judge had improperly defined "reasonable doubt" while instructing the jury, but argued that the error was harmless. *Id.* at 277, 124 L. Ed. 2d at 187.

Applying the "effect on the jury" standard, the United States Supreme Court considered "the basis on which 'the jury *actually rested* its verdict.' " *Id.* at 279-80, 124 L. Ed. 2d at 189-90. Because the jury had not returned a "verdict of guilty-beyond-a-reasonable-doubt," the Court reasoned that the harmless-error inquiry "whether the *same* verdict of guilty-beyond-a-reasonable-doubt would have been rendered absent the constitutional error is utterly meaningless." *Id.* at 280, 124 L. Ed. 2d at 189-90. The Court explained that there was "no *object*, so to speak, upon which harmless-error scrutiny can operate." *Id.* at 280, 124 L. Ed. 2d at 190. Stating that consequences of the defective verdict were "necessarily unquantifiable and indeterminate," the Court declared the error to be "structural" and remanded the defendant's case for further proceedings not inconsistent with its opinion. *Id.* at 281-82, 124 L. Ed. 2d at 191.

Six years later in *Neder v. United States*, the United States Supreme Court affirmed the conviction of a defendant who filed a false tax return even though the trial court erred in refusing to submit to the jury the question of whether defendant's false statements were material. 527 U.S. at 6, 25, 144 L. Ed. 2d at 45, 57. The Court found that harmless error is the proper standard of review when a single element of a criminal offense is omitted from the jury instructions. *Id.* at 15, 144 L. Ed. 2d at 51.

In *Neder*, the United States Supreme Court noted that evidence of the materiality of the defendant's false statements was "overwhelming." *Id.* at 16-17, 144 L. Ed. 2d at 52. In fact, the defendant did not even argue at trial that his false statements could be found immaterial. *Id.* at 16, 144 L. Ed. 2d at 51-52. Because the question of materiality was not in dispute at trial, the jury considered "all of the evidence and argument in respect to [the defendant's] defense against the tax charges," notwithstanding the trial judge's failure to instruct on that element of the offense. *Id.* at 9, 144 L. Ed. 2d at 47. Moreover, the defendant's guilt or innocence was "tried before an impartial judge, under the correct standard of proof and with the assistance of counsel." *Id.* On these facts, the United States Supreme Court reasoned that "an instruction that omits an element of the offense does not *necessarily* render a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence." *Id.* Distinguishing *Sullivan*, the United States Supreme Court empha-

sized that omission of one element, materiality, from the jury instructions cannot be said to "vitiate[] *all* the jury's findings," *id.* at 11, 144 L. Ed. 2d at 48; thus, the Court concluded that the harmless-error rule applied and remanded the defendant's case for a determination of whether the instructional error was, in fact, harmless. *Id.* at 25, 144 L. Ed. 2d at 57.

[4] The United States Supreme Court has made clear that the Sixth Amendment requires aggravating sentencing factors, like elements, to be found by a jury beyond a reasonable doubt. *Blakely*, —— U.S. at ——, ——, 159 L. Ed. 2d at 413-14, 420.[5] However, under North Carolina's current structured sentencing scheme, aggravating factors are *completely withheld* from jury review and are determined by a judge by a preponderance of the evidence. N.C.G.S. § 15A-1340.16. No impartial jury considers a defendant's evidence, arguments, and defenses during sentencing, *id.*, even when the aggravating factors advanced by the State are highly subjective in nature or disputed by the defendant. Moreover, aggravating factors are found to exist by a low standard of proof: a preponderance of the evidence. *Id.*; *see In re Winship*, 397 U.S. 358, 364, 25 L. Ed. 2d 368, 375 (1970) (" 'There is always in litigation a margin of error, representing error in factfinding,' " which the beyond a reasonable doubt standard is designed to " 'reduce.' ") (quoting *Speiser v. Randall*, 357 U.S. 513, 525, 2 L. Ed. 2d 1460, 1472 (1958)). For these reasons, we cannot agree with the State that the logic of *Neder* applies to defendant's case. Because, as in *Sullivan*, the jury's findings have been vitiated in total, the harmless-error rule does not apply. We hold that *Blakely* errors arising under North Carolina's Structured Sentencing Act are structural and, therefore, reversible *per se*.

This conclusion is supported by the strong language of *Blakely* itself. Writing for the majority, Justice Scalia explained that *Blakely* "reflects . . . the need to give intelligible content to the right of jury trial." 542 U.S. at ——, 159 L. Ed. 2d at 415. Justice Scalia emphasized that the Sixth Amendment right to jury trial is

> *no mere procedural formality, but a fundamental reservation of power in our constitutional structure.* Just as suffrage ensures the people's ultimate control in the legislative and exec-

5. As stated above, this condition applies only when the defendant is sentenced beyond the statutory maximum defined by *Blakely* and does not implicate facts to which a defendant has admitted or the fact of a prior conviction. For purposes of structured sentencing in North Carolina, the statutory maximum is the highest presumptive sentence imposed pursuant to N.C.G.S. §§ 15A-1340.16 and -1340.17.

> utive branches, jury trial is meant to ensure their control in the judiciary.

Id. at ——, 159 L. Ed. 2d at 415 (emphasis added).[6]

Moreover, the Sixth Amendment expressly secures the participation of an impartial jury in all criminal prosecutions; thus, a trial judge is prohibited from entering a judgment of conviction or directing a guilty verdict against a defendant "*regardless of how overwhelmingly* the evidence may point in that direction." *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 572-73, 51 L. Ed. 2d 642, 652 (1977) (emphasis added); s*ee also Rose*, 478 U.S. at 578, 92 L. Ed. 2d at 471 ("[H]armless-error analysis presumably would not apply if a court directed a verdict for the prosecution in a criminal trial by jury."). The error resulting from a directed verdict is that "the wrong entity judged the defendant guilty." *Rose*, 478 U.S. at 578, 92 L. Ed. 2d at 471; *see also State v. Staley*, 292 N.C. 160, 169-70, 232 S.E.2d 680, 686 (1977) (" 'In view of the place of importance that trial by jury has in our Bill of Rights, it is not to be supposed that Congress intended to substitute the belief of appellate judges in the guilt of an accused . . . for ascertainment of guilt by a jury.' ") (quoting *Bollenbach v. United States*, 326 U.S. 607, 615, 90 L. Ed. 350, 356 (1946)). Without trial by jury, the "strong . . . barrier . . . between the liberties of the people and the prerogative of the crown" is compromised. 4 William Blackstone, *Commentaries* *349.

Through *Apprendi* and *Blakely*, the United States Supreme Court has extended the Sixth Amendment right to jury trial to mandatory fact-finding proceedings which result in a criminal sentence above the statutory maximum. When a trial judge, not an impartial jury,

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6. Interestingly, this language underpinning the United States Supreme Court's holding in *Blakely* is strikingly similar in tone and content to Justice Scalia's dissent in *Neder*, in which Justice Scalia describes the right to jury trial as the "spinal column of American democracy." *Neder*, 527 U.S. at 30, 144 L. Ed. 2d at 60 (Scalia, J., dissenting). In that dissent, Justice Scalia strongly disagreed with the logic and constitutional soundness of applying an "overwhelming evidence" harmless error standard to the defendant's conviction, arguing that no matter how great the evidence against a criminal defendant, he is entitled to the benefit of certain basic constitutional rights including the right to counsel, the right to an impartial judge, and the right "to have the jury determine his guilt of the crime charged." *Id.* at 30-34, 144 L. Ed. 2d at 60-62. Justice Scalia concluded, "The very premise of structural-error review is that even convictions reflecting the 'right' result are reversed for the sake of protecting a basic right." *Id.* at 34, 144 L. Ed. 2d at 62. Similarly, writing for the majority in *Crawford v. Washington*, Justice Scalia recently stated that "[d]ispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty. This is not what the Sixth Amendment prescribes." 541 U.S. 36, 62, 158 L. Ed. 2d 177, 199 (2004).

finds the existence of all aggravating factors, the resulting sentence shares the same defect as a directed verdict on the defendant's guilt or innocence. "[T]he wrong entity has judged the defendant guilty." *Rose*, 478 U.S. at 578, 92 L. Ed. 2d at 471.

In *United States v. Booker*, the United States Supreme Court considered the constitutionality of the Federal Sentencing Guidelines with respect to *Apprendi* and *Blakely*. —— U.S. ——, 160 L. Ed. 2d 621 (2005). The Court determined that "the Sixth Amendment as construed in *Blakely* does apply to the Sentencing Guidelines," but the Court created a statutory remedy for the violation by invalidating 18 U.S.C. § 3553(b)(1), a section of the Sentencing Reform Act of 1984 which made " 'the [Federal Sentencing Guidelines] . . . mandatory and impose[d] binding requirements on all sentencing judges.' " *Id.* at ——, 160 L. Ed. 2d at 639, 659. Determining that one additional statutory provision was inseparable from section 3553(b)(1), the Court also severed this provision from the Sentencing Reform Act. *Id.* at ——, 160 L. Ed. 2d at 659-60. Because federal trial judges were no longer obligated to adhere to Federal Sentencing Guidelines during sentencing, the Court reasoned that *Blakely* did not apply to the remaining Sentencing Reform Act provisions. *Id.* at ——, 160 L. Ed. 2d at 643, 659 ("[E]veryone agrees that the constitutional issues presented by these cases would have been avoided entirely if Congress had omitted from the [Sentencing Reform Act] the provisions that make the [Federal Sentencing] Guidelines binding on district judges."). In conclusion, the Court acknowledged,

> Ours, of course, is not the last word: The ball now lies in Congress' court. The National Legislature is equipped to devise and install, long-term, the sentencing system, compatible with the Constitution, that Congress judges best for the federal system of justice.

Id. at ——, 160 L. Ed. 2d at 663.

We recognize that dicta in Justice Breyer's "remedial" opinion in *Booker* suggests that lower federal courts may "apply ordinary prudential doctrines," such as plain and harmless error, when a defendant challenges on direct review a sentence imposed under the Federal Sentencing Guidelines, *id.* at ——, 160 L. Ed. 2d at 665; however, we conclude from context that Justice Breyer's comment refers to appellate review of *statutory error*, which results when a sentencing judge applies the Federal Sentencing Guidelines as mandatory, rather than advisory as required by the Court's severability holding.

Constitutional error arising from a Sixth Amendment violation is not the subject of Justice Breyer's remark. For these reasons, *Booker* does not control the standard of review applied by North Carolina appellate courts to constitutional *Blakely* errors arising under North Carolina's Structured Sentencing Act.

Our interpretation is supported by the parallel structure of *Booker* itself, through which constitutional error and statutory error are identified in two separate majority opinions. Justice Stevens' majority opinion identifies constitutional error, concluding that "the Sixth Amendment as construed in *Blakely* does apply to the [Federal] Sentencing Guidelines." *Id.* at ——, 160 L. Ed. 2d at 639. Justice Breyer's separate majority opinion, which contains the dicta in question, identifies statutory error, concluding that "two provisions of the Sentencing Reform Act of 1984 (SRA) that have the effect of making the Guidelines mandatory must be invalidated in order to allow the statute to operate in a manner consistent with congressional intent." *Id.* at ——, 160 L. Ed. 2d at 639. Justice Breyer's suggestion that "application of the harmless-error doctrine" may determine "whether resentencing is warranted" is expressly limited to "*cases not involving a Sixth Amendment violation*." *Id.* at ——, 160 L. Ed. 2d at 665 (emphasis added). Thus, the United States Supreme Court has not yet established a remedy for Sixth Amendment *Blakely* error in the state courts.

This Court is not the first state supreme court to order resentencing in response to *Blakely* error.[7] Most recently, in *State v.*

7. However, until this Court's decision in *Allen* today, no two state supreme courts have resolved *Blakely* issues in the same manner. *See People v. Black*, 35 Cal.4th 1238, 1244, 113 P.3d 534, 536 (2005) (concluding that "the judicial fact finding that occurs when a judge exercises discretion to impose an upper term sentence under California law does not implicate a defendant's *Sixth Amendment* right to a jury trial"); *Lopez v. Colorado*, 113 P.3d 713, 726, 730, 2005 Colo. LEXIS 504 at **41-42, 55 (Colo. May 23, 2005) (stating "we need not find [Colorado's aggravated sentencing statute] is unconstitutional because aggravated sentences can be based on *Blakely*-compliant or *Blakely*-exempt facts," and concluding that the facts in the case *sub judice* were *Blakely* compliant); *Smylie v. State*, 823 N.E.2d 679, 685-86 (Ind. 2005) (severing only those "minimal portions" of Indiana's sentencing system, which mandated a fixed term and permitted judicial discretion in finding aggravating or mitigating circumstances to deviate from the fixed term, from the statute and holding that "the sort of facts envisioned by *Blakely* as necessitating a jury finding must be found by a jury under Indiana's existing sentencing laws"); *State v. Dilts*, 337 Or. 645, 654-56, 103 P.3d 95, 100-01 (2004) (holding that the Oregon sentencing guidelines are not facially unconstitutional; thus severability is inapplicable, and remanding to the trial court for implementation of the sentencing guidelines consistent with *Blakely*); *State v. Gomez*, 163 S.E.3d 632, 648, 661, 2005 Tenn. LEXIS 350 at **1, 49-50, 66 (Tenn. Apr. 15, 2005) (applying plain error review in determining that Tennessee's statutory sen-

Hughes, the Supreme Court of Washington held that *Blakely* sentencing errors are structural errors. *State v. Hughes*, 154 Wash. 2d 118, 110 P.3d 192 (2005). That court based its holding on an exhaustive review of the harmless error doctrine, noting that many harmless error proponents misconstrue *United States v. Cotton*, 535 U.S. 625, 152 L. Ed. 2d 860 (2002), which applied plain, not harmless, error to *Apprendi* violations. *Id.* at 145, 110 P.3d at 206 *5. The Washington Supreme Court further observed that, at present, the federal circuits "appear inconsistent in whether they will apply harmless error analysis to *Apprendi/Blakely* violations." *Id.* at *9 147, 110 P.3d at 207.

Distinguishing *Neder*, the court stated,

> Although *Neder* involved the situation where a jury did not find facts supporting every element of the crime, it still returned a guilty verdict. Like traditional harmless error analysis cases, the reviewing court could ask whether but for the omission in the jury instruction, the jury would have returned the same verdict. Where *Blakely* violations are at issue, however, the jury necessarily did not return a special verdict or explicit findings on the aggravating factors supporting the exceptional sentence. The reviewing court asks whether but for the error, the jury would have made different or new findings. This situation is analogous to *Sullivan*—there is no basis upon which to conduct a harmless error analysis.

Id. at *1 148, 110 P.3d at 207-08. Because "speculat[ion] on what juries would have done if they had been asked to find different facts" is impermissible, the Washington Supreme Court concluded, as do we, that "[h]armless error analysis cannot be conducted on *Blakely* Sixth Amendment violations." *Id.*

CONCLUSION

Although this Court might envision several measures which would cure the constitutional defect present in N.C.G.S. § 15A-1340.16, we are in agreement that the choice of remedy is properly within the province of the General Assembly. "The punish-

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tencing procedures do not violate *Blakely*, in spite of the State's concession that such violations had occurred, because the Tennessee Criminal Sentencing Reform Act of 1989 is " 'an indeterminate,' non-mandatory, advisory sentencing scheme which merely requires judges to consider enhancement factors, along with other information, when exercising their discretion to select an appropriate sentence within the statutory range").

ment to be inflicted for any crime is left entirely to the General Assembly." *State v. Lytle*, 138 N.C. 738, 743, 51 S.E. 66, 68 (1905). And this Court has " 'absolutely no authority to control or supervise the power vested by the Constitution in the General Assembly as a coordinate branch of the government.' " *State v. Smith*, 352 N.C. 531, 553, 532 S.E.2d 773, 787 (2000) (quoting *Person v. Bd. of State Tax Comm'rs*, 184 N.C. 499, 503, 115 S.E. 336, 339 (1922), *quoted in In re Alamance Cty. Court Facils.*, 329 N.C. 84, 95, 405 S.E.2d 125, 130 (1991)), *cert. denied*, 532 U.S. 949, 149 L. Ed. 2d 360 (2001).

Having identified the source and nature of the constitutional defect present in N.C.G.S. § 15A-1340.16, we refrain from unwarranted interference in the legislative revision of North Carolina's structured sentencing scheme. In so doing, we note that the General Assembly has mandated that the North Carolina Sentencing and Policy Advisory Commission "study the North Carolina Structured Sentencing Act in light of the United States Supreme Court's decision in *Blakely*" and "report its findings and recommendations, including any proposed legislation, to the 2005 General Assembly upon its convening." The Studies Act of 2004, ch. 161, sec. 44.1, 2004 N.C. Sess. Laws 161, 195. The Commission submitted its report, including draft legislation, to the General Assembly in January 2005. N.C. Sentencing & Policy Advisory Comm'n, *Rep. on Study of Structured Sentencing Act in Light of Blakely v. Washington Pursuant to Sess. Law 2004-161, Sec. 44.1* (2005). On 21 June 2005 the General Assembly ratified An Act to Amend State Law Regarding the Determination of the Aggravating Factors in a Criminal Case to Conform with the United States Supreme Court Decision in *Blakely v. Washington*. H. 822, 146th Gen. Assem., 2005 Sess. (N.C. 2005) (ratified), *available at* http://www.ncga.state.nc.us/Sessions/2005/Bills/House/HTML/H822v3.html. This legislation was submitted to the Governor for his signature on 22 June 2005. *Id.*

For the reasons stated above, we deny defendant's motion for appropriate relief filed in this Court 8 February 2005. We affirm the decision of the Court of Appeals remanding defendant's case for resentencing and hold that, to the extent N.C.G.S. § 15A-1340.16 (a), (b), and (c) require trial judges to find aggravating factors by a preponderance of the evidence section 15A-1340.16 violates *Blakely*. We further hold that the harmless-error rule does not apply to sentencing errors which violate a defendant's Sixth Amendment right to jury trial pursuant to *Blakely*. Such errors are structural and, therefore, reversible *per se*.

As stated at the outset, these holdings apply to cases "in which the defendants have not been indicted as of the certification date of this opinion and to cases that are now pending on direct review or are not yet final." *Lucas*, 353 N.C. at 598, 548 S.E.2d at 732; *see Hinnant*, 351 N.C. 277, 523 S.E.2d 663; *Griffith*, 479 U.S. 314, 93 L. Ed. 2d 649. Accordingly, we modify and affirm the decision of the Court of Appeals and remand defendant's case to that Court for further remand to Gaston County Superior Court for imposition of a sentence consistent with this opinion.

MODIFIED AND AFFIRMED.

Figure 1

N.C.G.S. § 1340.17(c) (2003)

	PRIOR RECORD LEVEL						
	I 0 Pts	II 1-4 Pts	III 5-8 Pts	IV 9-14 Pts	V 15-18 Pts	VI 19+ Pts	
A	Life Imprisonment Without Parole or Death as Established by Statute						
	A	A	A	A	A	A	DISPOSITION
	240-300	288-360	336-420	384-480	Life Imprisonment Without Parole		Aggravated
B1	192-240	230-288	269-336	307-384	346-433	384-480	PRESUMPTIVE
	144-192	173-230	202-269	230-307	260-346	288-384	Mitigated
	A	A	A	A	A	A	DISPOSITION
	157-196	189-237	220-276	251-313	282-353	313-392	Aggravated
B2	125-157	151-189	176-220	201-251	225-282	251-313	PRESUMPTIVE
	94-125	114-151	132-176	151-201	169-225	188-251	Mitigated
	A	A	A	A	A	A	DISPOSITION
	73-92	100-125	116-145	133-167	151-188	168-210	Aggravated
C	58-73	80-100	93-116	107-133	121-151	135-168	PRESUMPTIVE
	44-58	60-80	70-93	80-107	90-121	101-135	Mitigated
	A	A	A	A	A	A	DISPOSITION
	64-80	77-95	103-129	117-146	133-167	146-183	Aggravated
D	51-64	61-77	82-103	94-117	107-133	117-146	PRESUMPTIVE
	38-51	46-61	61-82	71-94	80-107	88-117	Mitigated
	I/A	I/A	A	A	A	A	DISPOSITION
	25-31	29-26	34-42	46-58	53-66	59-74	Aggravated
E	20-25	23-29	27-34	37-46	42-53	47-59	PRESUMTIVE
	15-20	17-23	20-27	28-37	32-42	35-47	Mitigated
	I/A	I/A	I/A	A	A	A	DISPOSITION
	16-20	19-24	21-26	25-31	34-42	39-49	Aggravated
F	13-16	15-19	17-21	20-25	27-34	31-39	PRESUMPTIVE
	10-13	11-15	13-17	15-20	20-27	23-31	Mitigated
	I/A	I/A	I/A	I/A	A	A	DISPOSITION
	13-16	15-19	16-20	20-25	21-26	29-36	Aggravated
G	10-13	12-15	13-16	16-20	17-21	23-29	PRESUMPTIVE
	8-10	9-12	10-13	12-16	13-17	17-23	Mitigated
	CI/A	I/A	I/A	I/A	I/A	A	DISPOSITION
	6-8	8-10	10-12	11-14	15-19	20-25	Aggravated
H	5-6	6-8	8-10	9-11	12-15	16-20	PRESUMPTIVE
	4-5	4-6	6-8	7-9	9-12	12-16	Mitigated
	C	C/I	I	I/A	I/A	I/A	DISPOSTION
	6-8	6-8	6-8	8-10	9-11	10-12	Aggravated
I	4-6	4-6	5-6	6-8	7-9	8-10	PRESUMPTIVE
	3-4	3-4	4-5	4-6	5-7	6-8	Mitigated

Figure 2
N.C.G.S. § 15A-1340.17 (d), (e) (2003)

(d) Maximum Sentences Specified for Class F through Class I Felonies.—Unless provided otherwise in a statute establishing a punishment for a specific crime, for each minimum term of imprisonment in the chart in subsection (c) of this section, expressed in months, the corresponding maximum term of imprisonment, also expressed in months, is as specified in the table below for Class F through Class I felonies. The first figure in each cell in the table is the minimum term and the second is the maximum term.

3-4	4-5	5-6	6-8	7-9	8-10	9-11	10-12
11-14	12-15	13-16	14-17	15-18	16-20	17-21	18-22
19-23	20-24	21-26	22-27	23-28	24-29	25-30	26-32
27-33	28-34	29-35	30-36	31-38	32-39	33-40	34-41
35-42	36-44	37-45	38-46	39-47	40-48	41-50	42-51
43-52	44-53	45-54	46-56	47-57	48-58	49-59	

(e) Maximim Sentences Specified for Class B1 through Class E Felonies for Minimum Terms up to 339 Months.—Unless provided otherwise in a statute establishing a punishment for a specific crime, for each minimum term of imprisonment in the chart in subsection (c) of this section, expressed in months, the corresponding maximum term of imprisonment, also expressed in months, is as specified in the table below for Class B1 through Class E felonies. The first figure in each cell of the table is the minimum term and the second in the maximum term.

15-27	16-29	17-30	18-31	19-32	20-33	21-35	22-36
23-37	24-38	25-39	26-41	27-42	28-43	29-44	30-45
31-47	32-48	33-49	34-50	35-51	36-53	37-54	38-55
39-56	40-57	41-59	42-60	43-61	44-62	45-63	46-65
47-66	48-67	49-68	50-69	51-71	52-72	53-73	54-74
55-75	56-77	57-78	58-79	59-80	60-81	61-83	62-84
63-85	64-86	65-87	66-89	67-90	68-91	69-92	70-93
71-95	72-96	73-97	74-98	75-99	76-101	77-102	78-103
79-104	80-105	81-107	82-108	83-109	84-110	85-111	86-113
87-114	88-115	89-116	90-117	91-119	92-120	93-121	94-122
95-123	96-125	97-126	98-127	99-128	100-129	101-131	102-132
103-133	104-134	105-135	106-137	107-138	108-139	109-140	110-141
111-143	112-144	113-145	114-146	115-147	116-149	117-150	118-151
119-152	120-153	121-155	122-156	123-157	124-158	125-160	126-161
127-162	128-163	129-164	130-165	131-167	132-168	133-169	134-170
135-171	136-173	137-174	138-175	139-176	140-177	141-179	142-180
143-181	144-182	145-183	146-185	147-186	148-187	149-188	150-189
151-191	152-192	153-193	154-194	155-195	156-197	157-198	158-199
159-200	160-201	161-203	162-204	163-205	164-206	165-207	166-209
167-210	168-211	169-212	170-213	171-215	172-216	173-217	174-218
175-219	176-221	177-222	178-223	179-224	180-225	181-227	182-228
183-229	184-230	185-231	186-233	187-234	188-234	189-236	190-237
191-239	192-240	193-241	194-242	195-243	196-245	197-246	198-247
199-248	200-249	201-251	202-252	203-253	204-254	205-255	206-257
207-258	208-259	209-260	210-261	211-263	212-264	213-265	214-266
215-267	216-269	217-270	218-271	219-272	220-273	221-275	222-276
223-277	224-278	225-279	226-281	227-282	228-283	229-284	230-285
231-287	232-288	233-289	234-290	235-291	236-293	237-294	238-295
239-296	240-297	241-299	242-300	243-301	241-302	245-303	246-305
247-306	248-307	249-308	250-309	251-311	252-312	253-313	254-314
255-315	256-317	257-318	258-319	259-320	260-321	261-323	262-324
263-325	264-326	265-327	266-329	267-330	268-331	269-332	270-333
271-335	272-336	273-337	274-338	275-339	276-341	277-342	278-343
279-344	280-345	281-347	282-348	283-349	284-350	285-351	286-353
287-354	288-355	289-356	290-357	291-359	292-360	293-361	294-362
295-363	296-365	297-366	298-367	299-368	300-369	301-371	302-372
303-373	304-374	305-375	306-377	307-378	308-379	309-380	310-381
311-383	312-384	313-385	314-386	315-387	316-380	317-390	318-391
319-392	320-393	321-395	322-396	323-397	324-398	325-399	326-401
327-402	328-403	329-404	330-405	331-407	332-408	333-409	334-410
335-411	336-413	337-414	338-415	339-416			

(e1) Maximum Sentences Specified for Class B1 through Class E Felonies for Minimum Terms of 340 Months or More.—Unless provided otherwise in a statute establishing a punishment for a specific crime, when the minimum sentence is 340 months or more, the corresponding maximum term of imprisonment shall be equal to the sum of the minimum term of imprisonment and twenty percent (20%) of the minimum term of imprisonment, rounded to the next highest month, plus nine additional months. (1993, c. 538, s. 1; 1994, Ex. Sess., c. 14, ss 20, 21; c. 22, s. 7; c. 24, s. 14(b); 1995, c. 507, s. 19.5(*l*); 1997-80, s.3.)

Justice MARTIN, concurring in part and dissenting in part.

The issue of whether *Blakely* errors are subject to harmless-error analysis is governed by federal law. *See Connecticut v. Johnson*, 460 U.S. 73, 81 n.9, 74 L. Ed. 2d 823, 830 n.9 (1983) (stating that "whether a federal constitutional error can be harmless is a federal question"). Accordingly, this Court should follow controlling precedents of the United States Supreme Court to hold that *Blakely* errors, like most other errors that may occur during a state criminal trial, should be analyzed for harmlessness on direct review. Nonetheless, because the *Blakely* error in the present case is not harmless beyond a reasonable doubt, I agree that defendant's case should be remanded for a new sentencing hearing at which a jury determines whether the offense in question was "especially heinous, atrocious, or cruel."

I.

To fully appreciate the importance of the harmless-error doctrine in American criminal jurisprudence, it is necessary to understand the historical evolution of the doctrine. Harmless-error review first appeared in Anglo-American jurisprudence with the passage of England's Judicature Act of 1873, which sought to mitigate the excesses of that country's Exchequer Rule. Wayne R. LaFave & Jerold H. Israel, *Criminal Procedure* § 27.6(a), at 1160 (2d ed. 1992) [hereinafter LaFave & Israel, *Criminal Procedure*]. Over the course of the nineteenth century, the Exchequer Rule had evolved into a rule of nearly automatic reversal of convictions for even the most technical trial errors. *Id.* Recognizing the inefficiency and impracticability of such a rule, the Judicature Act instructed appellate courts "to look to the actual impact of the error upon the outcome of the proceeding, and not simply . . . assume that every error . . . was per se prejudicial." *Id.*

Throughout the late nineteenth and early twentieth centuries, American courts lagged behind their English counterparts and continued to apply—and even expand—a version of England's Exchequer Rule. *Id.*; Roger J. Traynor, *The Riddle of Harmless Error* 13 (1970) [hereinafter Traynor, *Harmless Error*]. Numerous cases were decided on the basis of trivial technical errors, and pointless new trials with predetermined outcomes became a staple of the criminal law. Harry T. Edwards, *To Err Is Human, But Not Always Harmless: When Should Legal Error Be Tolerated?*, 70 N.Y.U. L. Rev. 1167, 1174 (1995) (noting that without harmless-error review, numerous cases were decided on the basis of trivial technical errors).

Eventually, the harmless-error doctrine took root in America, born "out of widespread and deep [public concern] over the general course of appellate review in . . . criminal causes." *Kotteakos v. United States*, 328 U.S. 750, 759, 90 L. Ed. 1557, 1563 (1946). In response to this perception, the federal government and all fifty states adopted some form of statutory harmless-error rule by the mid-1960s. LaFave & Israel, *Criminal Procedure* § 27.6, at 1161; Traynor, *Harmless Error*, at 14. North Carolina adopted its statutory harmless-error rule for civil cases in 1967, and its corresponding rule for criminal cases in 1977. N.C.G.S. § 1A-1, Rule 61 (2003) (civil), N.C.G.S. § 15A-1443 (2003) (criminal).

For many years, it was presumed that harmless-error analysis could not be applied to constitutional errors. *Johnson*, 460 U.S. at 82, 74 L. Ed. 2d at 831 (plurality opinion). In *Chapman v. California*, however, the United States Supreme Court held that a federal constitutional error could be harmless, provided an appellate court could "declare a belief that [the error] was harmless beyond a reasonable doubt." *Chapman v. California*, 386 U.S. 18, 24, 17 L. Ed. 2d 705, 710-11 (1967); *cf.* N.C.G.S. § 15A-1443(b) (2003) (providing that constitutional error "is prejudicial unless the appellate court finds that it was harmless beyond a reasonable doubt"). Following *Chapman*, as the majority notes, the United States Supreme Court appeared to apply two "tests" for analyzing whether a constitutional error was harmless. *See*, *e.g.*, Jeffrey O. Cooper, *Searching for Harmlessness: Method and Madness in the Supreme Court's Harmless Constitutional Error Doctrine*, 50 Kan. L. Rev. 309, 311-12 (2002) [hereinafter Cooper, *Searching for Harmlessness*]. Under one test, most recently applied in *Sullivan v. Louisiana*, an appellate court is to focus on the "effect [the error] had upon the guilty verdict in the case at hand." *Sullivan v. Louisiana*, 508 U.S. 275, 279, 124 L. Ed. 2d 182, 189 (1993). As articulated in *Sullivan*, this test asks "not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in *this* trial was surely unattributable to the error." *Id.* Under the other test, most recently articulated in *Neder v. United States*, an appellate court is to engage in a counter-factual inquiry, asking whether, in light of all the evidence properly presented at trial, it is "clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error." *Neder v. United States*, 527 U.S. 1, 18, 144 L. Ed. 2d 35, 53 (1999); *see also Harrington v. California*, 395 U.S. 250, 254, 23 L. Ed. 2d 284, 287-88 (1969). In

applying this standard, a court must consider, in part, whether the jury verdict was supported by "overwhelming evidence, such that the jury verdict would have been the same" had the error not occurred. *Neder*, 527 U.S. at 17, 144 L. Ed. 2d at 52.

The majority treats these two distinct approaches to harmless-error analysis as equally viable alternatives between which this Court may freely choose. In *Neder*, however, the United States Supreme Court expressly rejected the *Sullivan* test in favor of the counter-factual "overwhelming evidence" formulation for constitutional harmless-error analysis. *Id.* at 17, 144 L. Ed. 2d at 52. Specifically, the Court rejected the defendant's argument that *Sullivan* precluded a court applying harmless-error analysis from considering "overwhelming record evidence of [his] guilt," stating that the "proper mode of analysis" was to ask whether it was "clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error." *Id.* at 17-18, 144 L. Ed. 2d at 52-53. There is, therefore, only *one* test at this juncture to determine whether a federal constitutional error is harmless—the test set forth in *Neder*.

II.

Now an anchor of our appellate jurisprudence, harmless-error review effectuates several important public policies. First, the doctrine conserves judicial resources by preventing costly, time-consuming, and unnecessary new trials. *See Chapman*, 386 U.S. at 22, 17 L. Ed. 2d at 709 (stating that the doctrine "block[s] setting aside convictions for small errors or defects that have little, if any, likelihood of having changed the result of the trial"); Traynor, *Harmless Error*, at 14. Second, it promotes public confidence in the criminal justice system by reducing the risk that guilty defendants may go free. *See Johnson v. United States*, 520 U.S. 461, 470, 137 L. Ed. 2d 718, 729 (1997) (" 'Reversal for error, regardless of its effect on the judgment, encourages litigants to abuse the judicial process and bestirs the public to ridicule it.' " (quoting Traynor, *Harmless Error*, at 50); *Arizona v. Fulminante*, 499 U.S. 279, 308, 113 L. Ed. 2d 302, 330 (1991) (stating that the doctrine " 'promotes public respect for the criminal process by focusing on the underlying fairness of the trial rather than on the virtually inevitable presence of immaterial error' "). Third, it reduces delays in the criminal process resulting from unnecessary remands, thus promoting the constitutional right to a "speedy trial." Traynor, *Harmless Error*, at 51. Fourth, it promotes fundamental fairness in criminal proceedings by helping to ensure that criminal cases are decided on the merits, and not on

the basis of minor technical defects that have no bearing on guilt or innocence. *See*, *e.g.*, *Fulminante*, 499 U.S. at 308, 113 L. Ed. 2d at 330 (stating that "the harmless-error doctrine is essential to preserve the 'principle that the central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence' "). And fifth, it promotes stability in the criminal law by reducing the risk that judges may bend or adapt substantive and procedural rules in order to avoid unwarranted reversals. *See* Cooper, *Searching for Harmlessness*, at 314.

The majority correctly notes that the right to jury trial in criminal cases is "no mere procedural formality, but a fundamental reservation of power in our constitutional structure." *Blakely v. Washington*, ––– U.S. –––, –––, 159 L. Ed. 2d 403, 415 (2004). It " 'was designed "to guard against a spirit of oppression and tyranny on the part of rulers," and "was from very early times insisted on by our ancestors in the parent country, as the great bulwark of their civil and political liberties." ' " *Neder*, 527 U.S. at 19, 144 L. Ed. 2d at 53 (quoting *United States v. Gaudin*, 515 U.S. 506, 510-11, 132 L. Ed. 2d 444, 450 (1995)). I agree wholeheartedly with this description of the vital role played by the jury in our constitutional system of government. Nonetheless, deciding whether a particular type of Sixth Amendment violation may be reviewed for harmlessness requires courts to strike a "balance between 'society's interest in punishing the guilty [and] the method by which decisions of guilt are to be made.' " *Id.* at 18, 144 L. Ed. 2d at 53 (quoting *Connecticut v. Johnson*, 460 U.S. at 86, 74 L. Ed. 2d at 834 (plurality opinion) (alterations in original)). In *Neder v. United States*, for example, the United States Supreme Court conducted just such a balancing of interests, concluding that when a trial court erroneously fails to instruct the jury on an essential element of the crime, harmless-error review "does not fundamentally undermine the purposes of the jury trial guarantee." *Id.* at 19, 144 L. Ed. 2d at 53. The Court concluded that when an appellate court can readily discern from a "thorough examination of the record" that a jury would surely have found the fact in question based on the evidence presented at trial, "holding the error harmless does not 'reflec[t] a denigration of the constitutional rights involved.' " *Id.* (quoting *Rose v. Clark*, 478 U.S. 570, 577, 92 L. Ed. 2d 460, 470 (1986) (alteration in original)).

III.

But determining whether a particular type of constitutional error is subject to harmless-error analysis is not simply a matter of balancing interests or assessing the importance of any particular constitu-

tional provision. All constitutional rights are important; none should be denied or abridged. Yet the United States Supreme Court has recognized that those constitutional errors that defy harmless-error review "are the exception and not the rule," *Rose v. Clark*, 478 U.S. at 578, 92 L. Ed. 2d at 471, and that "most constitutional errors can be harmless," *Arizona v. Fulminante*, 499 U.S. at 306, 113 L. Ed. 2d at 329. Significantly, the Supreme Court has declared that if a criminal defendant is represented by competent counsel before an impartial judge, there is a "*strong presumption*" that any error that occurs in the course of the trial is subject to harmless-error analysis. *Rose*, 478 U.S. at 579, 92 L. Ed. 2d at 471 (emphasis added). Indeed, even the majority in the present appeal concedes, as it must, that exceptions to harmless error review in federal constitutional law are "rare."

The test for determining whether an error may be reviewed for harmlessness is set forth in *Arizona v. Fulminante*. In *Fulminante*, the United States Supreme Court surveyed its prior cases in which constitutional errors *were* reviewed for harmlessness, concluding that "[t]he common thread connecting these cases is that each involved 'trial error'—error which occurred during the presentation of the case to the jury, and which may therefore be quantitatively assessed in the context of other evidence presented in order to determine whether its admission was harmless." 499 U.S. at 307-08, 113 L. Ed. 2d at 330. The *Fulminante* Court identified at least sixteen such "trial errors," including:

> unconstitutionally overbroad jury instructions at the sentencing stage of a capital case; admission of evidence at the sentencing stage of a capital case in violation of the Sixth Amendment Counsel Clause; jury instruction containing an erroneous conclusive presumption; jury instruction misstating an element of the offense; jury instruction containing an erroneous rebuttable presumption; erroneous exclusion of defendant's testimony regarding the circumstances of his confession; restriction on a defendant's right to cross-examine a witness for bias in violation of the Sixth Amendment Confrontation Clause; denial of a defendant's right to be present at trial; improper comment on defendant's silence at trial, in violation of the Fifth Amendment Self-Incrimination Clause; [a] statute improperly forbidding [the] trial court's giving a jury instruction on a lesser included offense in a capital case in violation of the Due Process Clause; failure to instruct the jury on the presumption of innocence; admission of identification evidence in violation of the Sixth Amendment

> Confrontation Clause; admission of the out-of-court statement of a nontestifying codefendant in violation of the Sixth Amendment Confrontation Clause; confession obtained in violation of *Massiah v. United States*; admission of evidence obtained in violation of the Fourth Amendment; [and] denial of counsel at a preliminary hearing in violation of the Sixth Amendment Counsel Clause.

Id. at 306-07, 113 L. Ed. 2d at 329-30 (citations and parentheses omitted).

In contrast, the limited class of cases in which harmless-error analysis does not apply involve rare "structural defects in the constitution of the trial mechanism" by which the "entire conduct of the trial from beginning to end [was] obviously affected." *Id.* at 309-10, 113 L. Ed. 2d at 331. As distinguished from mere "trial errors," each of these constitutional violations "is a similar structural defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself." *Id.* at 310, 113 L. Ed. 2d at 331. To date, only six constitutional errors have been deemed "structural defects": (1) complete denial of the right to counsel, (2) denial of the right to an impartial judge, (3) racial discrimination in grand jury selection (4) denial of the right to self-representation at trial, (5) denial of the right to a public trial, and (6) defective reasonable-doubt instructions. *Neder*, 527 U.S. at 8, 144 L. Ed. 2d at 46.

On a theoretical level, there are at least three reasons why such "structural defects" require automatic reversal. First, in each of the examples listed above, a case-by-case assessment of harmlessness would be grossly inefficient because it "is so likely" that any particular error had a prejudicial effect in any individual case "that case-by-case inquiry into prejudice is not worth the cost." *Strickland v. Washington*, 466 U.S. 668, 692, 80 L. Ed. 2d 674, 696 (1984). Second, the effect of each of these errors on the outcome of the trial is inherently "unquantifiable and indeterminate," such that an appellate court could not readily discern from the record whether any individual error caused actual prejudice. *Sullivan*, 508 U.S. at 282, 124 L. Ed. 2d at 191. Finally, and most importantly, when any of these constitutional rights are denied, " 'a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence, and no criminal punishment may be regarded as fundamentally fair.' " *Fulminante*, 499 U.S. at 310, 113 L. Ed. 2d at 331 (quoting *Rose*, 478 U.S. at 577-78, 92 L. Ed. 2d at 470 (citation omitted)).

Together, these reasons inform the federal constitutional rule that so long as a criminal defendant was represented by counsel before an impartial judge, there is a "strong presumption" that any other error is subject to harmless-error analysis. *Rose*, 478 U.S. at 579, 92 L. Ed. 2d at 471. When a criminal defendant is tried without counsel or before a biased judge, it is almost impossible to gauge the effect of the error on the outcome of the trial, and the likelihood of prejudice is so high that a rule of automatic reversal is more efficient than a case-by-case inquiry into harmlessness. *Id.* at 577-79, 92 L. Ed. 2d at 470-71. But when a defendant is competently represented before an impartial tribunal, the adversarial process will generally provide a record from which an appellate court can adequately gauge the prejudicial effect of any errors. *Id.* at 579-80, 92 L. Ed. 2d at 471-72 (noting that unconstitutional burden-shifting, unlike the denial of counsel or judicial bias, does not affect composition of the record and thus is amenable to harmless-error review). Under such circumstances, appellate review will adequately ensure that criminal convictions are factually accurate and that criminal punishments are fundamentally fair. *Id.* at 579, 92 L. Ed. 2d at 471 ("Where a reviewing court can find that the record developed at trial establishes guilt beyond a reasonable doubt, the interest in fairness has been satisfied and the judgment should be affirmed.").

Applying these principles, it is clear that *Blakely* error is more analogous to the larger class of "trial errors" than it is to the limited class of "structural defects." First, it can hardly be said that a judge "is so likely" to find facts a jury would not find that "case-by-case inquiry" into harmlessness "is not worth the cost." *Strickland*, 466 U.S. at 692, 80 L. Ed. 2d at 696. Although there may be individual cases in which a judge finds facts a jury would not, there is no reason to presume that such a discrepancy would be so common that harmless-error review is inefficient as a general rule.[8] To the contrary, it can be expected that in most cases, a rational jury will reach the

8. Of course, any fact-finder—judge or jury—is more likely to find a given sentencing factor when applying the "preponderance" standard than when applying the "beyond a reasonable doubt" standard as required by *Blakely*. But there is no empirical evidence to suggest that it is "so likely" that *Blakely* violations result in sentencing enhancements that would not otherwise be found that "case-by-case inquiry" into harmlessness "is not worth the cost." *Strickland*, 466 U.S. at 692, 80 L. Ed. 2d at 696. Nor is there any reason to presume that appellate courts would, as a general matter, have difficulty reviewing the record evidence under a more stringent, *Blakely*-compliant burden of proof. After all, careful application of the correct standard of review is a hallmark of appellate adjudication. *See* 5 Am. Jur. 2d *Appellate Review* § 559 (1995) (stating that "the standard of review is the keystone of appellate decisionmaking").

same factual determinations as a rational judge, based on the evidence presented and arguments of adversarial counsel. As the United States Supreme Court stated in *Schriro v. Summerlin*, a case decided the same day as *Blakely*, it is "implausible" to suggest "that judicial factfinding so 'seriously diminishe[s]' accuracy as to produce an ' "impermissibly large risk" ' of injustice." *Schriro v. Summerlin*, ––– U.S. –––, –––, 159 L. Ed. 2d 442, 451 (2004) (alteration in original) (citation omitted). Second, the effect of a *Blakely* error is not inherently "unquantifiable and indeterminate," *Sullivan*, 508 U.S. at 282, 124 L. Ed. 2d at 191, as an appellate court can ordinarily discern from the record whether the evidence against the defendant was so "overwhelming" and "uncontroverted" that any rational fact-finder would have found the disputed aggravating factors beyond a reasonable doubt, *Neder*, 527 U.S. at 9, 18, 144 L. Ed. 2d at 47, 53. Third, when an appellate court can readily determine that a jury would have found an aggravating factor beyond a reasonable doubt, the criminal process has served its primary function " 'as a vehicle for determination of guilt or innocence,' " and the punishment imposed in light of the aggravating factors must be considered " 'fundamentally fair.' " *Fulminante*, 499 U.S. at 310, 113 L. Ed. 2d at 331 (citations omitted).

IV.

The foregoing analysis demonstrates that application of the harmless-error doctrine to *Blakely* errors comports with the theoretical contours of that doctrine. But determining whether *Blakely* error is a "trial error" or a "structural defect" does not depend entirely on the application of presumptions, policy considerations, or abstract principles. Rather, clearly established precedent of the United States Supreme Court mandates the inescapable conclusion that *Blakely* errors are "trial errors" subject to harmless-error review.

In *Neder v. United States*, the United States Supreme Court held that the trial court's unconstitutional failure to submit an essential element of the crime to the jury was subject to harmless-error analysis. 527 U.S. at 4, 144 L. Ed. 2d at 44. Although the omission of the element from the jury instructions impermissibly "infringe[d] upon the jury's factfinding role" in violation of the Sixth Amendment's jury trial guarantee, *id.* at 18, 144 L. Ed. 2d at 52, the Court held that the error was not a "structural" one that "*necessarily* render[ed] a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence." *Id.* at 9, 144 L. Ed. 2d at 47. Accordingly, the Court reviewed the Sixth Amendment violation in Neder's case for harmlessness. *Id.* at 15-20, 144 L. Ed. 2d at 51-53. The Court con-

cluded "that the omitted element was uncontested and supported by overwhelming evidence, such that the jury verdict would have been the same absent the error." *Id.* at 17, 144 L. Ed. 2d at 52. Thus, the Court concluded, the constitutional error was "properly found to be harmless." *Id.* at 17, 144 L. Ed. 2d at 52.

Admittedly, the instant case deals with the failure to submit an *aggravating factor*, as opposed to an *essential element*, for jury determination. But this distinction provides no viable basis for distinguishing *Neder*, as the *Blakely* line of cases[9] firmly establishes the principle that aggravating factors are the "functional equivalent" of essential elements of the crime for purposes of the Sixth Amendment right to jury trial. *Apprendi v. New Jersey*, 530 U.S. 466, 494 n.19, 147 L. Ed. 2d 435, 457 n.19 (2000) ("[W]hen the term 'sentence enhancement' is used to describe an increase beyond the maximum authorized statutory sentence, it is the *functional equivalent* of an element of a greater offense than the one covered by the jury's guilty verdict.") (emphasis added); *see also Blakely*, —— U.S. at ——, 159 L. Ed. 2d at 415-16; *Ring v. Arizona*, 536 U.S. 584, 602, 153 L. Ed. 2d 556, 572 (2002). *Neder*, therefore, is controlling here, and *Blakely* errors are subject to harmless-error analysis.[10]

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9. What is now referred to as the *Blakely* rule had its genesis in *Jones v. United States*, 526 U.S. 227, 143 L. Ed. 2d 311 (1999), was first articulated in *Apprendi v. New Jersey*, 530 U.S. 466, 147 L. Ed. 2d 435 (2000), and has been applied in *Ring v. Arizona*, 536 U.S. 584, 153 L. Ed. 2d 556 (2002) and *United States v. Booker*, —— U.S. ——, 160 L. Ed. 2d 621 (2005). Succinctly stated, the *Blakely* rule provides that a criminal defendant has a constitutional "right to have the jury find the existence of ' "any particular fact" ' that the law makes essential to his punishment." *Booker*, —— U.S. at ——, 160 L. Ed. 2d at 642 (citing *Apprendi*, *Ring*, and *Blakely* (internal citations omitted)); *see also Blakely*, —— U.S. at ——, 159 L. Ed. 2d at 420 ("As *Apprendi* held, every defendant has the *right* to insist that the prosecutor prove to a jury all facts legally essential to the punishment."). In examining a criminal sentence for a *Blakely* violation, the dispositive question "is one not of form, but of effect." *Apprendi*, 530 U.S. at 494, 147 L. Ed. 2d at 457. Thus, "[i]f a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact—*no matter how the State labels it*—must be found by a jury beyond a reasonable doubt." *Ring*, 536 U.S. at 602, 153 L. Ed. 2d at 572 (emphasis added); *see also Blakely*, —— U.S. at ——, 159 L. Ed. 2d at 415 (rejecting the argument that "the jury need only find whatever facts the legislature chooses to label elements of the crime, and that those it labels sentencing factors—no matter how much they may increase the punishment—may be found by the judge").

10. This application of *Neder* may be summarized by the following syllogism: (1) Under *Neder*, the failure to submit an essential element of the crime to the jury, though violative of the Sixth Amendment right to jury trial, is subject to harmless-error analysis; (2) The *Blakely* line of cases establishes that aggravating factors are the "functional equivalent" of essential elements for purposes of the right to jury trial; (3) Therefore, the failure to submit an aggravating factor for jury determination is also subject to harmless-error inquiry. At least three of the appellate courts to have directly

The majority contends that *Sullivan v. Louisiana*, rather than *Neder*, controls our disposition of the harmless-error issue. I acknowledge that there is language in *Sullivan* that appears to support the majority's position. But subsequent decisions of the United States Supreme Court establish that the holding of *Sullivan* is more limited than some of its language suggests, and that *Neder*, not *Sullivan*, is dispositive here.

In *Sullivan*, the United States Supreme Court held that the trial court's defective reasonable-doubt instruction was a "structural defect" not subject to harmless-error inquiry. 508 U.S. at 281-82, 124 L. Ed. 2d at 190-91. The Court emphasized that the trial court's "misdescription of the burden of proof" had "vitiate[d] *all* the jury's findings," such that a proper jury verdict "was never in fact rendered." *Id.* at 279, 281, 124 L. Ed. 2d at 189, 190. Because there was no jury finding of guilty-beyond-a-reasonable-doubt of *any* fact essential to the defendant's punishment, an appellate court could "only engage in pure speculation" as to "what a reasonable jury would have done." *Id.* at 281, 124 L. Ed. 2d at 190. Under such circumstances, the Court concluded, "to hypothesize [on appellate review] a guilty verdict that was never in fact rendered . . . would violate the jury-trial guarantee." *Id.* at 279, 124 L. Ed. 2d at 189.

In the instant case, the majority reasons that harmless-error analysis does not apply to *Blakely* errors "[b]ecause, as in *Sullivan*, the jury's findings have been vitiated in total," as "aggravating factors are *completely withdrawn* from jury review" by our structured sentencing system. This analysis, however, misapprehends the holding of *Sullivan*, ignores subsequent opinions clarifying that holding, and essentially recapitulates an argument expressly rejected by the United States Supreme Court in *Neder*.

The defendant in *Neder* cited *Sullivan* in support of his argument that the failure to submit *one essential element* of the crime for

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considered application of the harmless-error doctrine to *Blakely* errors have followed this reasoning in holding that *Blakely* errors may be reviewed for harmlessness. *See, e.g.*, *State v. Henderson*, 209 Ariz. 300, ——, 100 P.3d 911, 917-21 (Ct. App. 2004), *disc. rev. granted in part*, 2005 Ariz. LEXIS 36 (Mar. 23, 2005) (No. 1 CA-CR 03-0920); *State v. McDonald*, 136 N.M. 417, ——, 99 P.3d 667, 669-70 (2004); *State v. Walters*, 2004 WL 2726034, at **22-24 (Tenn. Crim. App. Nov. 30, 2004) (No. M2003-03019-CCA-R3CD) (unpublished). If there is a flaw in this rather straight-forward analysis, I would expect the majority to shed some light on it. But nowhere in its opinion does the majority respond directly to this argument, which is clearly and forcefully articulated in the state's brief. Rather, the majority summarily "disagree[s]" with the state's argument before embarking on its own independent analysis of the question presented.

jury determination was not subject to harmless-error review. *Neder*, 527 U.S. at 11, 144 L. Ed. 2d at 48. Specifically, the defendant argued that "where the constitutional error . . . prevents the jury from rendering a 'complete verdict' on *every* element of the offense. . . . the basis for harmless-error review' " is simply absent." ' " *Id.* (quoting Brief for Petitioner at 7). The United States Supreme Court rejected this argument and distinguished *Sullivan*, stating that "the absence of a 'complete verdict' on every element of the offense" establishes a violation of the Sixth Amendment right to jury trial, but does not address "whether the error is subject to harmless-error analysis." *Id.* at 12, 144 L. Ed. 2d at 49. Although it acknowledged that it "would not be illogical to extend the reasoning of *Sullivan* . . . to a failure to instruct on an element of the crime," the Court declined to "veer away from settled precedent to reach such a result." *Id.* at 15, 144 L. Ed. 2d at 50-51.

In *Mitchell v. Esparza*, the Court further clarified the jurisprudential relationship between *Sullivan* and *Neder*. The Court explained that in *Neder* it "explicitly distinguished *Sullivan* because the error in *Sullivan*—the failure to instruct the jury that the State must prove the elements of an offense beyond a reasonable doubt—' "vitiate[d] *all* the jury's findings," ' whereas, the trial court's failure to instruct the jury on one element of an offense did not." *Mitchell v. Esparza*, 540 U.S. 12, 16, 157 L. Ed. 2d 263, 270 (2003) (per curiam) (citations omitted). Thus, in *Neder*, "[w]here the jury was precluded from determining only one element of an offense, [the Court] held that harmless-error review is feasible." *Id.*

In light of *Mitchell*, it is clear that *Neder*, not *Sullivan*, controls with respect to the application of harmless-error doctrine to *Blakely* errors. Here, as in *Neder*, the constitutional error consisted in the *partial* infringement of the right to jury trial. Like the constitutional error in *Neder*, the failure to submit one aggravating factor to the jury for determination did not "vitiate[] *all* the jury's findings," and thus does not constitute a structural defect requiring automatic reversal under *Sullivan*. *Sullivan*, 508 U.S. at 281, 124 L. Ed. 2d at 190.

By unanimous jury verdict, the defendant in the instant case was convicted of felonious child abuse inflicting serious bodily injury[11]

11. "Serious bodily injury" is defined as "bodily injury that creates a substantial risk of death, or that causes serious permanent disfigurement, coma, a permanent or protracted condition that causes extreme pain, or permanent or protracted loss or impairment of the function of any bodily member or organ, or that results in prolonged hospitalization." N.C.G.S. § 14-318.4(a3) (2003).

under N.C.G.S. § 14-318.4. Thus, the following essential elements were necessarily found by a jury beyond a reasonable doubt: (1) that defendant was a "parent or any other person providing care to or supervision of [the victim]," (2) that the victim was a "child less than 16 years of age" at the time of the assault, (3) that the defendant "inflict[ed] serious bodily injury" on the child, and (4) that the defendant did so "intentionally." N.C.G.S. § 14-318.4(a3) (2003). It makes no sense to maintain that these jury findings were "vitiated in total" by the trial court's failure to submit the one aggravating factor in this case for jury determination. Although that failure undoubtedly infringed upon defendant's Sixth Amendment right to jury trial, four of the five facts essential to the punishment he received (the four elements of the crime) *were* found by a jury beyond a reasonable doubt. Like the defendant in *Neder*, the defendant in the instant case "was tried before an impartial judge, under the correct standard of proof and with the assistance of counsel," and "a fairly selected, impartial jury was instructed to consider all of the evidence and argument in respect to [his] defense" against the charges presented. 527 U.S. at 9, 144 L. Ed. 2d at 47. Thus, as in *Neder*, the unconstitutional failure to submit one factual issue to the jury—in this case, the aggravating factor—"did not render [the defendant's] trial 'fundamentally unfair.' " *Id.*

As a general matter, a defendant alleging *Blakely* error has ordinarily received a jury trial in which a jury found most of the facts essential to punishment—the designated "elements" of the crime. As the Arizona Court of Appeals aptly stated in a recent opinion, "*Blakely* error is much more akin to the error in *Neder* than the error in *Sullivan*," because a defendant alleging *Blakely* error "has already had a trial in which a jury has determined beyond a reasonable doubt that he or she is guilty." *State v. Henderson*, 209 Ariz. 300, ——, 100 P.3d 911, 920 (Ct. App. 2004) (relying on *Mitchell* in holding that *Neder*, not *Sullivan*, applies to *Blakely* errors). *Blakely* error is "closer to failing to properly instruct on *one element* of an offense (which casts doubt on that one element) than it is to failing to properly instruct on the burden of proof as to *every element* of the offense (which casts doubt on the entire verdict)." *Id.* Accordingly, the failure to submit an aggravating factor for jury determination, like the failure to submit an essential element for jury determination, is subject to harmless-error review.[12]

12. This analysis is entirely consistent with the United States Supreme Court's decision in *Rose v. Clark*, 478 U.S. 570, 92 L. Ed. 2d 460 (1986), which is cited several times by the majority. In *Rose*, the Court stated that when the Sixth Amendment right

V.

The majority's reluctance to apply the harmless-error doctrine to *Blakely* errors, apparently born out of a healthy respect for the role of the jury, is understandable but ultimately misguided. First, contrary to the majority's opinion, the application of harmless-error principles to *Blakely* errors does not constitute impermissible "speculation" as to what a jury might have done. To be sure, "any time an appellate court conducts harmless-error review it necessarily engages in some speculation as to the jury's decisionmaking process; for in the end no judge can know for certain what factors led to the jury's verdict." *Sullivan*, 508 U.S. at 284, 124 L. Ed. 2d at 192 (Rehnquist, C.J., concurring). But this "speculation" is restrained by rigorous judicial standards and an exacting burden of proof: an appellate court reviewing for harmless error must "conduct a thorough examination of the record" to determine whether a constitutional error was harmless "beyond a reasonable doubt." *Neder*, 527 U.S. at 19, 144 L. Ed. 2d at 53. If the reviewing court "cannot conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error—for example, where the defendant contested the [factual determination at issue] and raised evidence sufficient to support a contrary finding—it should not find the error harmless." *Id.*

Second, neither *Blakely* error itself nor the application of the harmless-error doctrine to *Blakely* errors presents, in the majority's words, "the same defect as a directed verdict on the defendant's guilt or innocence." It is well settled that a trial court may not direct a verdict against a criminal defendant, " 'regardless of how overwhelming[] the evidence' " against him, and that such an error may not be reviewed for harmlessness. *Rose*, 478 U.S. at 578, 92 L. Ed. 2d at 471 (quoting *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 572-73, 51 L. Ed. 2d 642, 652 (1977)). As the United States Supreme Court explained in *Rose*, when the right to a jury trial is "altogether denied, the State cannot contend that the deprivation was harmless

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to jury trial is "*altogether denied*, the State cannot contend that the deprivation was harmless because the evidence established the defendant's guilt; the error in such a case is that the wrong entity judged the defendant guilty." 478 U.S. at 578, 92 L. Ed. 2d at 471 (emphasis added). As noted above, however, in a typical *Blakely* case, the jury has already determined most, if not all, of the facts essential to punishment. Hence, the Sixth Amendment right to jury trial has not been "altogether" denied, and harmless-error analysis is presumptively applicable under *Rose* itself. *See id.* at 579, 92 L. Ed. 2d at 471 (discussing the "strong presumption" that a federal constitutional error is subject to harmless-error analysis).

because . . . the error in such a case is that the wrong entity judged the defendant guilty." *Id.* Thus, the Sixth Amendment does not permit a judge to completely usurp the role of the jury by directing a verdict for the state. *Id.* As the United States Supreme Court later clarified in *Neder*, however, the *partial* deprivation of the right to jury trial does *not* implicate the rule set out in *Rose* and *is* subject to harmless-error analysis. *Neder*, 527 U.S. at 17 n.2, 144 L. Ed. 2d at 52 n.2. Because *Blakely* errors, like *Neder* errors, do not involve total deprivation of the right to a jury trial, they are *not* tantamount to directed verdicts for the state.

Nor is the application of harmless-error review particularly problematic in the context of *Blakely* errors. In *Neder*, the United States Supreme Court noted that an appellate court's application of harmless-error review does not implicate the same Sixth Amendment concerns as a trial judge's usurpation of the jury's role in the first instance. *Id.* at 17, 144 L. Ed. 2d at 52 (rejecting the defendant's argument that application of harmless-error analysis to the trial court's erroneous reasonable-doubt instruction would "dispense with trial by jury and allow judges to direct a guilty verdict"). The Court explained that a court applying the harmless-error doctrine does not " 'become in effect a second jury to determine whether the defendant is guilty.' " *Id.* at 19, 144 L. Ed. 2d at 53 (quoting Traynor, *Harmless Error*, at 21); *cf. Smith v. Dixon*, 14 F.3d 956, 978 (4th Cir.) ("No authority relied on by [the defendant] supplies support for the proposition that harmless-error analysis involves a weighing of factual evidence that this court is not authorized to conduct."), *cert. denied*, 513 U.S. 841, 130 L. Ed. 2d 72 (1994). Rather, an appellate court, "in typical appellate-court fashion, asks whether the record contains evidence that could rationally lead to a contrary finding with respect to the [factual determination at issue]. If the answer to that question is 'no,' holding the error harmless does not 'reflect a denigration of the constitutional rights involved.' " *Neder*, 527 U.S. at 19, 144 L. Ed. 2d at 53 (quoting *Rose*, 478 U.S. at 577, 92 L. Ed. 2d at 470). In short, when an appellate court engages in harmless-error review, it does not unconstitutionally usurp the role of the jury or otherwise undermine the spirit of the Sixth Amendment.

VI.

The majority relies heavily on *State v. Hughes*, —— Wash. 2d ——, 110 P.3d 192 (2005), a recent case in which the Washington Supreme Court held that *Blakely* errors are not subject to harmless-

error review. As noted in the majority's opinion, the *Hughes* court relied on *Sullivan* to reach its holding that *Blakely* errors cannot be reviewed for harmlessness. *Hughes*, ––– Wash. 2d at –––, 110 P.3d at –––. Specifically, *Hughes* relied on *Sullivan's* reasoning that harmless-error review cannot be applied to any constitutional error that prevents the jury from returning a verdict of guilty-beyond-a-reasonable-doubt, since the inquiry " 'whether the *same* verdict of guilty-beyond-a-reasonable doubt would have been rendered absent the constitutional error is utterly meaningless.' " *Id.* at –––, 110 P.3d at ––– (quoting *Sullivan*, 508 U.S. at 280, 124 L. Ed. 2d at 189-90). Quoting extensively from *Sullivan*, the *Hughes* court further stated that the " 'illogic' " of applying harmless-error analysis in the absence of an " 'actual finding of guilty beyond a reasonable doubt' " was evident: " '[t]here is no *object*, so to speak, upon which harmless-error scrutiny can operate.' " *Id.* at –––, 110 P.3d at ––– (quoting *Sullivan*, 508 U.S. at 280, 124 L. Ed. 2d at 189-90). Applying these principles, the court concluded that it would be equally "illogical" to apply the harmless-error doctrine to *Blakely* errors. *Id.* at –––, 110 P.3d at –––.

Admittedly, the above-quoted language from *Sullivan* lends logical support for the *Hughes* court's holding on the harmless-error issue. That language, however, was *specifically disavowed* in *Neder*. In *Neder*, the United States Supreme Court unequivocally stated that this "strand of the reasoning in *Sullivan* . . . cannot be squared with [the Court's] harmless-error cases." 527 U.S. at 11, 144 L. Ed. 2d at 48. Noting that the Court had previously applied harmless-error review in at least three cases "where the jury did not render a 'complete verdict' on every element of the offense," the Court repudiated the "alternative reasoning" in *Sullivan* that precludes application of harmless-error analysis where there has not been an "*actual*" jury verdict on every element of the crime. *Id.* at 11-13, 144 L. Ed. 2d at 48-49. It is now settled, under *Neder*, that a *partial deprivation* of the right to jury trial *may* be reviewed for harmlessness. *Id.* at 8-9, 144 L. Ed. 2d at 46-47; *see also id.* at 36, 144 L. Ed. 2d at 64 (Scalia, J., dissenting) (accusing the majority of "casting *Sullivan* aside"). And *Sullivan* has been limited to its primary rationale: that defective reasonable-doubt instructions cannot be reviewed for harmlessness because they "vitiate[] *all* the jury's findings." *Sullivan*, 508 U.S. at 281, 124 L. Ed. 2d at 190.

Perhaps for this reason, *Hughes* appears to be an outlier among appellate court decisions addressing the *Blakely*/harmless-error issue. My research reveals that the majority of courts to have

considered this issue have agreed that *Blakely* errors *are* subject to harmless-error review.[13]

Moreover, in *United States v. Cotton*, the United States Supreme Court expressly rejected the argument that unpreserved *Apprendi* errors are "structural errors" requiring automatic reversal.[14] *United*

13. *See United States v. Riccardi*, 405 F.3d 852, 875 (10th Cir. 2005) (concluding that Sixth Amendment *Blakely/Booker* error was harmless in light of "overwhelming" evidence supporting the sentencing judge's fact-finding); *United States v. Paz*, 405 F.3d 946 (11th Cir. 2005) (per curiam) (applying harmless-error doctrine to *Blakely* error); *United States v. Ameline*, 400 F.3d 646, 652 (9th Cir.) (noting that under *Booker* "not all cases would warrant a new sentencing hearing because any error might be harmless"), *vacated and reh'g en banc granted*, 401 F.3d 1007 (9th Cir. 2005); *United States v. Coumaris*, 399 F.3d 343, 351 (D.C. Cir. 2005) (stating that *Booker* challenge was "governed by the harmless error standard appropriate for constitutional error"); *United States v. Sharpley*, 399 F.3d 123, 127 (2d Cir. 2005) (describing *Blakely* and *Booker* error as a "prototypical example of harmless error" where defendant received a "statutory mandatory minimum" sentence); *United States v. Pittman*, 388 F.3d 1104, 1109 (7th Cir. 2004) (analyzing *Blakely* claim for plain error and adding in dictum that the claim "would fall short under harmless error review as well"), *vacated on other grounds and cert. granted by* —— U.S. ——, 161 L. Ed. 2d 764 (2005); *United States v. Mincey*, 380 F.3d 102, 105 (2d Cir. 2004) (per curiam) (reviewing a "*Blakely*-type claim" for harmless error), *vacated and cert. granted by Ferrell v. United States*, —— U.S. ——, 160 L. Ed. 2d 1053 (2005); *State v. Henderson*, 209 Ariz. 300, ——, 100 P.3d 911, 920-22 (Ct. App. 2004) (holding that *Blakely* errors are subject to harmless-error analysis and citing other cases in support of that proposition), *disc. rev. granted in part*, 2005 Ariz. LEXIS 36 (Mar. 23, 2005) (No. 1 CA-CR-03-0920); *State v. Martinez*, 209 Ariz. 280, ——, 100 P.3d 30, 32 (Ct. App. 2004) ("Further, we hold that *Blakely* error is subject to harmless error or fundamental error analysis and may or may not require reversal based on the facts of a particular case."), *disc. rev. granted*, 2005 Ariz. LEXIS 16 (Feb. 8, 2005) (No. 1 CA-CR-03-0728); *People v. Amons*, 22 Cal. Rptr. 3d 908, 916-17, 125 Cal. App. 4th 855, 867-68 (Ct. App. 2005) (holding that *Blakely* errors are subject to harmless-error analysis and citing numerous cases), *disc. rev. denied*, 2005 Cal. LEXIS 4345 (Apr. 20, 2005) (No. A105374); *Padilla v. State*, 822 N.E.2d 288, 291 (Ind. Ct. App. 2005) (applying harmless error analysis to *Blakely* claim); *Holden v. State*, 815 N.E.2d 1049, 1059-60 (Ind. Ct. App. 2004) (applying harmless-error analysis to *Blakely* claim); *State v. Lowery*, 160 Ohio App. 3d 138, 154, 826 N.E.2d 340, 352-53 (2005) (applying harmless-error analysis to *Blakely* claim); *State v. Ginn*, 2005 Tenn. Crim. App. LEXIS 313, at **24, 32-33 (Mar. 31, 2005) (No. M2003-02330-CCA-R3-CD) (unpublished) (stating that *Blakely* error is subject to harmless-error review); *State v. Walters*, 2004 Tenn. Crim. App. LEXIS 1053, at *62 (Nov. 30, 2004) (No. M2003-03019-CCA-R3-CD) (unpublished) (holding that *Blakely* error is subject to harmless-error review), *appeal denied*, 2005 Tenn. LEXIS 264 (Mar. 21, 2005).

14. The Court in *Cotton* went on to apply harmless-error principles in the course of its plain-error review, noting that even though the grand jury's indictment did not allege the amount of drugs involved in the crimes charged, "[t]he evidence that the conspiracy involved at least 50 grams of cocaine base was 'overwhelming' and 'essentially uncontroverted.' " 535 U.S. at 633, 152 L. Ed. 2d at 869 (quoting *Johnson*, 520 U.S. at 470, 137 L. Ed. 2d at 729). In light of the overwhelming evidence presented at trial, the Court concluded that "[s]urely the grand jury, having found that the conspiracy existed, would have also found that the conspiracy involved at least 50 grams of cocaine base." *Id.* Admittedly, *Cotton* applied harmless-error principles to the *grand*

States v. Cotton, 535 U.S. 625, 632-34, 152 L. Ed. 2d 860, 868-69 (2002). Similarly, every federal circuit, along with many state appellate courts, has held that *Apprendi* errors are subject to harmless-error review.[15] Given that *Blakely* was at most an *extension*, if not merely a *direct application* of *Apprendi*, *see Blakely v. Washington*, —— U.S. at ——, 159 L. Ed. 2d at 412, the only logical conclusion is that *Blakely* errors, like *Apprendi* errors, are also subject to both plain-

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jury's failure to find facts belonging in an indictment. *Id.* It is not much of a stretch, however, to extend *Cotton* to the situation where a *petit jury* has not found facts essential to the punishment. *See State v. Sepahi*, 206 Ariz. 321, 324 n.3, 78 P.3d 732, 735 n.3 (2003) (relying on *Cotton* in determining that *Apprendi* error is subject to harmless-error review). *See generally* Joshua A.T. Fairfield, *To Err is Human: The Judicial Conundrum of Curing Apprendi Error*, 55 Baylor L. Rev. 889, 953 (2003) (following a discussion of *Cotton*, concluding that "in both the harmless error and plain error settings, there is no reason to treat the failure to present an element of a crime to a grand jury any differently than a failure to present an element of a crime to a petit jury").

15. *See, e.g.*, *United States v. Higgs*, 353 F.3d 281, 304-06 (4th Cir. 2003), *cert. denied*, —— U.S. ——, 160 L. Ed. 2d 456 (2004); *United States v. Perez-Ruiz*, 353 F.3d 1, 17 (1st Cir. 2003), *cert. denied*, 541 U.S. 1005, 158 L. Ed. 2d 522 (2004); *United States v. Lafayette*, 337 F.3d 1043, 1052 (D.C. Cir. 2003); *United States v. Zidell*, 323 F.3d 412, 433-34 (6th Cir.), *cert. denied*, 540 U.S. 824, 157 L. Ed. 2d 46 (2003); *United States v. Matthews*, 312 F.3d 652, 665 (5th Cir. 2002), *cert. denied*, 538 U.S. 938, 155 L. Ed. 2d 341 (2003); *United States v. Stewart*, 306 F.3d 295, 322-23 (6th Cir. 2002); *United States v. Friedman*, 300 F.3d 111, 127-28 (2d Cir. 2002), *cert. denied*, 538 U.S. 981, 155 L. Ed. 2d 672 (2003); *United States v. Samuel*, 296 F.3d 1169, 1171-72 (D.C. Cir.), *cert. denied*, 537 U.S. 1078, 154 L. Ed. 2d 578 (2002); *United States v. Sanchez-Cervantes*, 282 F.3d 664, 670 (9th Cir.), *cert. denied*, 537 U.S. 939, 154 L. Ed. 2d 243 (2002); *United States v. Henry*, 282 F.3d 242, 251-52 (3d Cir. 2002); *United States v. Wheat*, 278 F.3d 722, 739-42 (8th Cir. 2001) (applying harmless-error principles in the context of plain-error review and concluding that "any *Apprendi* error is harmless"), *cert. denied*, 537 U.S. 850, 154 L. Ed. 2d 81 (2002); *United States v. Prentiss*, 273 F.3d 1277, 1278-79 (10th Cir. 2001); *United States v. Vazquez*, 271 F.3d 93, 103 (3d Cir. 2001), *cert. denied*, 536 U.S. 963, 153 L. Ed. 2d 845 (2002); *United States v. Bailey*, 270 F.3d 83, 88-90 (1st Cir. 2001); *United States v. Candelario*, 240 F.3d 1300, 1307 (11th Cir.), *cert. denied*, 533 U.S. 922, 150 L. Ed. 2d 705 (2001), *overruled in part on other grounds by United States v. Sanchez*, 269 F.3d 1250, 1277-80 (11th Cir. 2001), *cert. denied*, 535 U.S. 942, 152 L. Ed. 2d 234 (2002); *United States v. Anderson*, 236 F.3d 427, 429 (8th Cir.), *cert. denied*, 534 U.S. 956, 151 L. Ed. 2d 270 (2001); *United States v. Nance*, 236 F.3d 820, 825 (7th Cir. 2000), *cert. denied*, 534 U.S. 832, 151 L. Ed. 2d 43 (2001); *United States v. Garcia-Guizar*, 234 F.3d 483, 488-89 (9th Cir. 2000), *cert. denied*, 532 U.S. 984, 149 L. Ed. 2d 490 (2001); *United States v. Nealy*, 232 F.3d 825, 829-30 (11th Cir. 2000), *cert. denied*, 534 U.S. 1023, 151 L. Ed. 2d 428 (2001); *State v. Garcia*, 200 Ariz. 471, 475, 28 P.3d 327, 331 (Ct. App. 2001); *People v. Sengpadychith*, 26 Cal. 4th 316, 327, 27 P.3d 739, 746 (2001); *State v. Davis*, 255 Conn. 782, 796 & n.14, 772 A.2d 559, 568 & n.14 (2001); *State v. Price*, 61 Conn. App. 417, 423-25, 767 A.2d 107, 112-13, *appeal denied*, 255 Conn. 947, 769 A.2d 64 (2001); *People v. Thurow*, 203 Ill. 2d 352, 368, 786 N.E.2d 1019, 1028 (2003); *State v. Burdick*, 2001 ME 143, ¶¶22-34, 782 A.2d 319, 326-29 (2001), *cert. denied*, 534 U.S. 1145, 151 L. Ed. 2d 998 (2002).

error and harmless-error review.[16] *See State v. Henderson*, 209 Ariz. at ——, 100 P.3d at 917.

VII.

Although I disagree with the majority's reasoning, I agree with its ultimate disposition in this particular case: defendant is entitled to a new sentencing hearing in which a jury, not a judge, must make a factual determination as to whether the offense was "especially heinous, atrocious, or cruel." I reach this result because, applying the harmless-error standard of *Neder* to the facts presented, I conclude that the *Blakely* violation in the instant case was not harmless beyond a reasonable doubt.

As an initial matter, the somewhat subjective nature of the N.C.G.S. § 15A-1340.16(d)(7) "heinous, atrocious, or cruel" aggravating factor may, depending on the specific facts of each case, render application of the harmless-error standard problematic. Plainly, it is more difficult for an appellate court, reviewing a cold record, to determine beyond a reasonable doubt that a jury would have found an offense "especially heinous" than it is for an appellate court to determine that the defendant "knowingly created a great risk of death to more than one person by means of a weapon or device which would normally be hazardous to the lives of more than one person," N.C.G.S. § 15A-1340.16(d)(8) (2003), or "committed the offense while on pretrial release on another charge," N.C.G.S. § 15A-1340.16(d)(12). This is not to say, however, that a judicial finding that an offense was "heinous, atrocious, or cruel" can *never* be harmless beyond a reasonable doubt. Even in the context of capital sentencing proceedings, we have never held that the subjectivity of the "heinous, atrocious, or cruel" aggravator precluded appellate courts from considering whether the evidence was sufficient to support findings of that factor. *See, e.g.*, *State v. Golphin*, 352 N.C. 364, 479-81, 533 S.E.2d 168, 242-43 (2000), *cert. denied*, 532 U.S. 931, 149 L. Ed. 2d 305 (2001);

16. *Ring v. Arizona*, 536 U.S. 584, 153 L. Ed. 2d 556 (2002), a precursor to *Blakely* that applied the *Apprendi* rule in the context of capital sentencing, lends further support to this position. In a footnote in *Ring*, the United States Supreme Court declined to reach "the [s]tate's assertion that any error was harmless" because "this Court ordinarily leaves it to lower courts to pass on the harmlessness of error in the first instance." *Id.* at 609 n.7, 153 L. Ed. 2d at 577 n.7. If the Court did not agree that *Ring* (or *Apprendi*) errors were generally subject to harmless-error review, it would not have directed the lower federal courts to pass on such matters "in the first instance." In addition, the Arizona Supreme Court held on remand in *Ring III* that the failure to submit aggravating factors to the jury in capital cases was subject to harmless-error review. *State v. Ring*, 204 Ariz. 534, 65 P.3d 915, 933 (2003).

State v. Huffstetler, 312 N.C. 92, 115-16, 322 S.E.2d 110, 124-25 (1984), *cert. denied*, 471 U.S. 1009, 85 L. Ed. 2d 169 (1985); *State v. Oliver*, 309 N.C. 326, 342-49, 307 S.E.2d 304, 316-20 (1983). Certainly in some cases the facts speak for themselves, such that no rational juror would fail to find the offense was "especially heinous, atrocious, or cruel." *Cf. State v. Perkins*, 345 N.C. 254, 288-89, 481 S.E.2d 25, 40-41 (defendant raped and murdered a seven-year-old girl in front of the girl's grandmother and three-year-old brother; no plain error in trial court's failure to give a limiting instruction on the "heinous, atrocious, or cruel" aggravator), *cert. denied*, 522 U.S. 837, 139 L. Ed. 2d 64 (1997). Indeed, this Court and the United States Court of Appeals for the Fourth Circuit have both previously applied harmless-error analysis to uphold the "heinous, atrocious, or cruel" aggravator in capital sentencing proceedings. *Smith v. Dixon*, 14 F.3d at 981 (holding that an unconstitutionally vague jury instruction on the "especially heinous, atrocious, or cruel" (e)(9) aggravator was harmless in light of the "overwhelming force of the evidence"); *State v. Burr*, 341 N.C. 263, 309, 461 S.E.2d 602, 627 (1995) ("Based on the overwhelming amount of evidence that the killing was especially heinous, atrocious, or cruel, assuming *arguendo* the admission of this statement was error, any such error was necessarily harmless beyond a reasonable doubt."), *cert. denied*, 517 U.S. 1123, 134 L. Ed. 2d 526 (1996); *cf. State v. Fletcher*, 354 N.C. 455, 482, 555 S.E.2d 534, 551 (2001) (rejecting argument that counsel's admission of the (d)(7) aggravator rendered his performance deficient because "[g]iven the overwhelming evidence that this murder was especially heinous, atrocious, or cruel, counsel could reasonably have decided upon a strategy of conceding this aggravating circumstance to gain credibility with the jury"), *cert. denied*, 537 U.S. 846, 154 L. Ed. 2d 73 (2002). Accordingly, I believe that the "especially heinous, atrocious, or cruel" (d)(7) aggravator is, as a general proposition, subject to harmless-error review.

Reviewing this particular aggravating factor for harmlessness, however, I believe that the evidence presented was neither "uncontroverted" nor "overwhelming" and thus that the *Blakely* error in the instant case was not harmless *beyond a reasonable doubt.* First, the evidence presented by the state in support of its contention that defendant intentionally burned his child—the basis for the "heinous, atrocious, or cruel" aggravator—was far from "uncontroverted." There were no eyewitnesses to the events in question, and the state's evidence consisted mainly of testimony from a physician assistant that the burns did not appear to be accidental.

Defendant, however, strenuously maintained his innocence throughout his arrest, interrogation, and every stage of these proceedings.[17] A jury was certainly entitled to disregard defendant's testimony. But as we have often stated, issues of witness credibility are uniquely the province of the jury. *See, e.g.*, *State v. Hyatt*, 355 N.C. 642, 666, 566 S.E.2d 61, 77 (2002), *cert. denied*, 537 U.S. 1133, 154 L. Ed. 2d 823 (2003).

Second, the state's evidence in support of the (d)(7) aggravator, while sufficient to sustain a guilty verdict, was far from "overwhelming." The evidence against the defendant consisted primarily of the testimony of Thomas McLaughlin, P.A. (McLaughlin), the physician assistant who treated the victim's burns. McLaughlin had approximately twenty-seven years of experience as a physician assistant and had worked at the hospital emergency room for six years. He did not possess a license to practice medicine or a medical degree. Although he had no specialized burn training, McLaughlin found that the child had either second- or third-degree burns on his hand, wrist, stomach, and knee. Based on the severity of the burns and his belief that a person would not hold on to a hot object long enough to cause burns that deep, McLaughlin opined that the burns were caused by someone holding an object against the child's skin. He also opined that the shapes of the burns were not consistent with a burn suffered from grabbing a curling iron. Because the burns were round and not linear in shape, McLaughlin concluded that they were most likely caused by a round object.

While this testimony certainly supports the inference that defendant intentionally inflicted multiple burns on his child—the factual predicate for the (d)(7) aggravator in this case—the evidence in support of that factor is far from "overwhelming." Had the *Blakely* error not occurred, a jury could certainly have decided to reject all or part of McLaughlin's testimony in light of (1) his relative inexperience with burns, (2) his lack of a medical degree or license to practice medicine, and (3) defendant's consistent and strenuous testimony that he did not harm the child. In addition, a jury could rationally have determined that defendant's bandaging of the child's hand suggested he was unaware of the other burns on the child's body and that he acted compassionately, not in an "especially heinous, atrocious, or cruel" manner.

17. Defendant did, however, accept responsibility for the accidental burning, acknowledging that if he had been more vigilant in watching the child, the injury would not have occurred.

Moreover, the "heinous, atrocious, or cruel" aggravator is complicated by the requirement that the offense be "*especially*" heinous, atrocious, or cruel. N.C.G.S. § 15A-1340.16(d)(7) (2003) (emphasis added). As we have previously explained, the aggravator applies only if "the facts of the case disclose *excessive* brutality, or physical pain, psychological suffering, or dehumanizing aspects *not normally present in [the] offense*." *State v. Blackwelder*, 309 N.C. 410, 414, 306 S.E.2d 783, 786 (1983). Because the offense of felonious child abuse inflicting serious injury *inherently* involves "brutality, . . . physical pain, . . . [and] dehumanizing aspects," it is particularly difficult to apply this standard in the instant case. Indeed, a comparison of this state's appellate precedents demonstrates that application of the *Blackwelder* standard often requires fine distinctions that do not readily lend themselves to harmless-error analysis. *See, e.g.*, *State v. Ahearn*, 307 N.C. 584, 599, 300 S.E.2d 689, 698 (1983) (evidence that baby had been struck on at least three occasions, tied to his crib, and placed under a mattress factually supported defendant's guilty plea of felonious child abuse, but "f[ell] short of supporting a finding that the offense was especially heinous, atrocious or cruel"); *State v. Newton*, 82 N.C. App. 555, 560, 347 S.E.2d 81, 84-85 (1986) (defendant's repeatedly striking his wife in the presence of their child and refusal to get her medical attention supported his conviction for assault with a deadly weapon with intent to kill inflicting serious injury, but did not "represent brutality beyond that found in other [such] assaults"), *disc. rev. denied*, 318 N.C. 699, 351 S.E.2d 756 (1987).

Based upon the evidence of record, the (d)(7) aggravator could be found in the instant case by a rational jury applying the beyond-a-reasonable-doubt standard. However, on the facts presented here, I cannot conclude that this particular *Blakely* error was harmless beyond a reasonable doubt. Therefore, and on these grounds only, I agree that the instant case should be remanded to the Court of Appeals for further remand to the trial court with instructions to submit the (d)(7) aggravating factor for determination by a jury.

Although, undoubtedly, judicial fact-finding of aggravating factors violates the federal constitutional rule enunciated in *Blakely v. Washington*, United States Supreme Court precedent also compels application of the harmless-error doctrine to *Blakely* violations. I have no doubt that my colleagues in the majority are motivated by the noblest of intentions. Nevertheless, the majority's invocation of

"structural error" to *Blakely* violations is erroneous under federal constitutional principles which govern *Blakely* violations.

Moreover, the public record reflects that 75 "*Blakely* cases" are now pending for disposition in our 15-member intermediate appellate court, the North Carolina Court of Appeals. To put this in perspective, the Court of Appeals has issued a total of 738 opinions so far in 2005. And the burden on our legal and judicial system does not end there. Each improvident "*Blakely* remand" to the trial court, in North Carolina and every other state, necessarily entails the application of additional prosecutorial, legal, and other "justice system" resources. Where the *Blakely* error in any such case is "harmless beyond a reasonable doubt," these resources are, in turn, potentially unavailable to redress prejudicial legal error.

With that said, I fully concur in our remand order based on the particular facts of the instant case. But taxing our already overburdened judicial and legal resources through indiscriminate application of a categorical rule accomplishes nothing from a practical perspective, elevates form over substance, and unnecessarily undermines the salutary objectives that are undeniably effectuated by application of harmless-error review. Accordingly, I dissent from the majority's holding that *Blakely* errors are categorically unamenable to harmless-error review. In all other respects, I concur in the majority opinion.

Chief Justice LAKE and Justice NEWBY join in this concurring and dissenting opinion.

NORTH CAROLINA SCHOOL BOARDS ASSOCIATION; WAKE COUNTY BOARD OF EDUCATION; DURHAM PUBLIC SCHOOLS BOARD OF EDUCATION; JOHNSTON COUNTY BOARD OF EDUCATION; BUNCOMBE COUNTY BOARD OF EDUCATION; EDGECOMBE COUNTY BOARD OF EDUCATION; AND LENOIR COUNTY BOARD OF EDUCATION v. RICHARD H. MOORE, STATE TREASURER; ROBERT POWELL, STATE CONTROLLER; DAVID MCCOY, STATE BUDGET OFFICER; PHILLIP J. KIRK, JR., CHAIRMAN OF THE STATE BOARD OF EDUCATION; MICHAEL E. WARD, STATE SUPERINTENDENT OF PUBLIC INSTRUCTION; ROY COOPER, ATTORNEY GENERAL OF NORTH CAROLINA; E. NORRIS TOLSON, SECRETARY OF THE NORTH CAROLINA DEPARTMENT OF REVENUE; LYNDO TIPPETT, SECRETARY OF THE NORTH CAROLINA DEPARTMENT OF TRANSPORTATION; CAROL HOWARD, NORTH CAROLINA COMMISSIONER OF MOTOR VEHICLES; MOLLY CORBETT BROAD, PRESIDENT OF THE UNIVERSITY OF NORTH CAROLINA; JAMES MOESER, CHANCELLOR OF THE UNIVERSITY OF NORTH CAROLINA AT CHAPEL HILL; MARYE ANNE FOX, CHANCELLOR OF NORTH CAROLINA STATE UNIVERSITY AT RALEIGH; WILLIAM G. ROSS, JR., SECRETARY OF THE NORTH CAROLINA DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES; JIM FAIN, SECRETARY OF THE NORTH CAROLINA DEPARTMENT OF COMMERCE; CARMEN HOOKER BUELL, SECRETARY OF THE NORTH CAROLINA DEPARTMENT OF HEALTH AND HUMAN SERVICES; L. THOMAS LUNSFORD, II, EXECUTIVE DIRECTOR OF THE NORTH CAROLINA STATE BAR; RAYMOND W. GOODMAN, JR., CHAIRMAN OF THE NORTH CAROLINA EMPLOYMENT SECURITY COMMISSION; SANDRA O'BRIEN, EXECUTIVE SECRETARY OF THE NORTH CAROLINA BOARD OF EXAMINERS OF PLUMBING, HEATING AND FIRE SPRINKLER CONTRACTORS; ROBERT L. BROOKS, EXECUTIVE DIRECTOR OF THE NORTH CAROLINA BOARD OF EXAMINERS OF ELECTRICAL CONTRACTORS; DOUGLAS H. VAN ESSEN, EXECUTIVE SECRETARY OF THE NORTH CAROLINA BOARD OF COSMETIC ART EXAMINERS; EACH OF WHOM IS SUED IN HIS OR HER OFFICIAL CAPACITY ONLY

No. 569A03

(Filed 1 July 2005)

1. Penalties, Fines, and Forfeitures— payments for late filings, underpayments, and failure to comply with Revenue Act

The Court of Appeals erred by holding that payments collected by the Department of Revenue under N.C.G.S. §§ 105-113.89, -163.8, -163.15, -163.41, and -236 for late filings, underpayments, and failure to comply with various provisions of the North Carolina Revenue Act were not subject to Article IX, Section 7 of the North Carolina Constitution, because: (1) Article IX, Section 7 applies to the penal laws of the State, meaning those statutes imposing a monetary payment for their violation and which are punitive rather than remedial in nature; (2) interpretation of our state statutes is not governed by the interpretation of a federal statute by a federal court; (3) the collection of the penalty as an additional tax is not determinative that the penalty is remedial; (4) the purpose of interest on deficient or delinquent

tax payments is to reimburse for loss of use of money during the period of delinquency, and the enabling legislation for Article IX, Section 7 permits retention of actual costs of collection up to ten percent of the amount of the penalties collected; (5) payments attributable to the general costs of investigation and prosecution of a citizen's unlawful conduct may not be considered "remedial" for purposes of Article IX, Section 7; and (6) penalties assessed pursuant to Chapter 105 of the General Statutes are imposed as a monetary payment for a taxpayer's noncompliance with a mandate of the Revenue Act.

2. Penalties, Fines, and Forfeitures— monies collected for unauthorized substances tax

The Court of Appeals did not err by holding that monies collected pursuant to Article 2D of Chapter 105, entitled "Unauthorized Substances Taxes," were not required to be paid to public schools under Article IX, Section 7 of the North Carolina Constitution, because: (1) Article IX, Section 7 applies to the penal laws of the State, meaning those statutes imposing a monetary payment for their violation and which are punitive rather than remedial in nature; and (2) the excise tax on unauthorized substances is not a penalty subject to the provisions of Article IX, Section 7 although penalties collected for late or otherwise improper payments of the unauthorized substances tax are properly classified as penalties to be disbursed to the public school systems pursuant to Article IX, Sextion 7.

3. Penalties, Fines, and Forfeitures— funds collected by state universities—traffic and parking violations

The Court of Appeals erred by holding that funds collected by the institutions in the University of North Carolina system for traffic and parking violations pursuant to N.C.G.S. § 116-44.4(h) do not accrue to the Civil Penalty Fund, because: (1) the fact that the University has opted to collect the penalty for violation of the parking and traffic ordinances as civil penalties recoverable in a civil action for indebtedness does not change the nature of the offense committed for which the penalty is imposed; and (2) civil penalties collected pursuant to N.C.G.S. § 116-44.4 are punitive in nature.

4. Penalties, Fines, and Forfeitures— payments collected at University campuses—loss, damage, or late return of materials from campus libraries

The Court of Appeals did not err by holding that payments collected by the trustees of each University of North Carolina campus for loss, damage, or late return of materials borrowed from campus libraries are not subject to Article IX, Section 7 of the North Carolina Constitution, because: (1) Article IX, Section 7 applies to the penal laws of the State, meaning those statutes imposing a monetary payment for their violation and which are punitive rather than remedial in nature; (2) the funds received are used exclusively for the costs associated with the replacement of the items lost or damaged by the user; (3) the payment is remedial in nature since the funds are collected to repair harm done by the offending party; and (4) the late fee is in the nature of a user fee designed to manage the collection, as opposed to a penalty.

5. Penalties, Fines, and Forfeitures— proceeds collected by Department of Transportation—overweight vehicles

The Court of Appeals did not err by concluding that proceeds of payments collected by the North Carolina Department of Transportation pursuant to N.C.G.S. § 20-118(e) are subject to Article IX, Section 7 of the North Carolina Constitution and belong to the public schools based on the fact that penalties assessed against owners of overweight vehicles are reimbursement for damages or are a tax, because: (1) the fact that a violation is not punishable as a crime does not establish that the penalty is not penal in nature; (2) nothing in the record supports a conclusion that a correlation exists between the graduated scale for the penalties and the cost of repair to the highways; (3) funds deposited in the Highway Fund are used for purposes other than repair and maintenance of roadways damaged by overweight vehicles; (4) our Supreme Court has recognized restitution in the context of Article IX, Section 7 only when the damages were specifically quantified; and (5) these penalties are not a safeguard to protect the State's revenues nor is there evidence that punishment of the owners of overweight vehicles entails extensive investigation or litigation.

6. Penalties, Fines, and Forfeitures— monies collected by Department of Transportation—lapses in insurance coverage

The Court of Appeals did not err by holding that monies collected as civil penalties under N.C.G.S. § 20-309(e) by the Department of Transportation for lapses in insurance coverage are subject to Article IX, Section 7 of the North Carolina Constitution and belong to the public schools, because: (1) the fifty dollar civil penalty paid by the owner for lapsed coverage is not voluntary and the purpose of the penalty is to penalize the owner of a vehicle who violates the statutes requiring financial responsibility to cover injury and damage occurring in the operation of an automobile on the highways of North Carolina; and (2) defendants have not shown that the penalty is designed to compensate for particular damages incurred by the State or an individual victim.

7. Penalties, Fines, and Forfeitures— monies collected by Employment Security Commission—overdue employer contributions, late reports, and returned checks

The Court of Appeals erred by reversing the trial court's judgment that monies collected by the Employment Security Commission under Chapter 96 of the General Statutes (Employment Security Act) for overdue employer contributions, late reports, and returned checks were subject to Article IX, Section 7 of the North Carolina Constitution, because: (1) the payments are penalties imposed for violation of the statutory requirements; (2) neither defendants nor the Court of Appeals cite to specific language in the statute defining the employer contributions as taxes; (3) the General Assembly has designated each of these payments as a penalty; (4) the statute requires that interest be assessed on all contributions that are paid late, and the interest, which compensates for lost revenues, is tallied separately from any additional penalty that is assessed; (5) interest and penalties collected on late contributions are placed in the Special Employment Security Administration Fund (SESAF), not the Unemployment Insurance Fund, and the SESAF may be used for, among other things, extensions, repairs, enlargements and improvements to buildings, and the enhancement of the work environment in buildings used for Commission business; (6) nothing in the statute suggests that the penalty is in any way remedial or intended to preserve the integrity of the

Unemployment Security Fund, but instead the penalty is assessed in addition to interest to penalize an employer for noncompliance with a statutory mandate; and (7) the threat of a hefty penalty may deter noncompliance, but this deterrence factor does not transform the penalty into a remedial tax.

8. Penalties, Fines, and Forfeitures— monies collected by state agencies and licensing boards—late renewal of licenses or late payment of license fees

The Court of Appeals did not err by holding that payments collected by state agencies and licensing boards for the late renewal of licenses or the late payment of licensing fees are not subject to Article IX, Section 7 of the North Carolina Constitution, because: (1) in the statutes under N.C.G.S. §§ 88B-20 and 88B-21, 84-34, 87-44, and 87-22, the use of the term "fee" to describe the payments collected by the Cosmetic Arts Board, the State Bar, the Electrical Contractors Board, and the Plumbing Contractors Board after 6 July 2001 manifests the legislature's intent that these payments be remedial rather than punitive; (2) the penalty is a revocation or suspension of the license and whatever sanctions the statute may authorize for a person's continued practice of the trade or profession during the period of revocation or suspension; (3) the fee, or in the case of plumbing and heating contractors the nonpayment penalty, is an administrative charge to cover the costs of collecting the license fees; and (4) the late fees collected often do not cover the expense incurred in attempting to collect the license fees.

9. Penalties, Fines, and Forfeitures— payment by environmental violator to fund supplemental environmental project

The Court of Appeals did not err by affirming the trial court's ruling that payments by an environmental offender to fund a Supplemental Environmental Project (SEP) in lieu of paying a portion of a civil penalty assessed by DENR, including the money paid by the City of Kinston to Lenoir Community College, are subject to Article IX, Section 7 of the North Carolina Constitution, because: (1) the fact that the payment was made to a third party pursuant to a SEP incorporated into a settlement agreement does not change the nature of the payment as punitive; (2) the payment is this case was triggered by an environmental violation for which the General Assembly authorized DENR to punish the violator; (3) the statutory authorization may not be

changed in form by the unilateral action of DENR; and (4) the terms and descriptions DENR and a violator use to refer to a payment are not determinative.

10. Penalties, Fines, and Forfeitures— civil penalty fund— school technology fund

The Court of Appeals did not err by holding that the General Assembly's statutory scheme for distribution of monies gathered pursuant to Article IX, Section 7 of the North Carolina Constitution codified in Article 31A of Chapter 115C is constitutional, because: (1) Article IX, Section 7 is not a self-executing provision, and thus, the General Assembly's actions in specifying how the provision's goals are to be implemented must be held to be constitutional unless the statutory scheme runs counter to the plain language of or the purpose behind Article IX, Section 7; (2) Article 31A of Chapter 115C merely specifies details which are omitted from the broad language of Article IX, Section 7; (3) by directing that funds subject to Article IX, Section 7 be remitted to the Civil Penalty Fund and returned to the county school systems, the General Assembly has fully complied with the mandate embodied in the phrase "belong to and remain in the several counties;" and (4) implementation of technology plans in local public school systems is within the purview of the provision's broad mandate.

11. Penalties, Fines, and Forfeitures— civil penalties paid by public schools—Civil Penalty Fund

The Court of Appeals erred by holding that civil penalties paid by the State's public school systems should not be paid into the Civil Penalty Fund for distribution back to school systems, because: (1) under the plain language of Article IX, Section 7 of the North Carolina Constitution and the enabling statutes, N.C.G.S. §§ 115C-457.1 through -457.3, monies paid by local public school systems as civil penalties must be remitted to the Civil Penalty Fund for return to all of the public schools in the manner dictated by N.C.G.S. § 115C-457.3; and (2) neither the State Constitution nor the statutory scheme makes any exception for schools which committed wrongdoing.

Appeal by defendants Tippett and Howard pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 160 N.C. App. 253, 585 S.E.2d 418 (2003), affirming in part and reversing in part an order of summary judgment entered 14

December 2001 by Judge Abraham Penn Jones in Superior Court, Wake County. On 5 February 2004, the Supreme Court allowed discretionary review of additional issues as to all plaintiffs and as to defendants Howard and Ross. Heard in the Supreme Court 11 May 2004.

Tharrington Smith, L.L.P., by Michael Crowell, and Roberts & Stevens, P.A., by Cynthia Grady; for plaintiff-appellants/appellees.

Roy Cooper, Attorney General, by W. Dale Talbert, Special Deputy Attorney General, for defendant-appellants/appellees Tippett, Howard, and Ross and defendant-appellees Moore, Powell, McCoy, Kirk, Ward, Cooper, Tolson, Broad, Moeser, Fox, Fain, Buell, Lunsford, Goodman, and Van Essen.

Young Moore and Henderson, P.A., by John N. Fountain and Reed N. Fountain, for defendant-appellees O'Brien and Brooks.

Allen and Pinnix, P.A., by Noel L. Allen, for North Carolina Board of Architecture and North Carolina Board of Funeral Service, amici curiae.

Bailey & Dixon, L.L.P., by Carson Carmichael, III, and Anna Baird Choi, for North Carolina Licensing Board for General Contractors and North Carolina Board of Pharmacy, amici curiae.

PARKER, Justice.

The Court in this appeal considers the proper implementation of the constitutional mandate in Article IX, Section 7 of the North Carolina Constitution, which provides:

> All moneys, stocks, bonds, and other property belonging to a county school fund, and the clear proceeds of all penalties and forfeitures and of all fines collected in the several counties for any breach of the penal laws of the State, shall belong to and remain in the several counties, and shall be faithfully appropriated and used exclusively for maintaining free public schools.

N.C. Const. art. IX, § 7.[1] The specific issues before the Court in this declaratory judgment proceeding are: (i) whether certain monetary

1. Article IX, Section 7 was amended effective 1 January 2005. As amended the section now reads:

payments to state agencies are being remitted to the State's General Fund or being retained by those agencies in violation of Article IX, Section 7; (ii) whether monies paid by environmental violators to fund, directly or indirectly, Supplemental Environmental Projects in lieu of civil penalties should be subject to Article IX, Section 7; (iii) whether the statutory scheme set out at N.C.G.S. §§ 115C-457.1 through -457.3 violates Article IX, Section 7 of the North Carolina Constitution by directing that the clear proceeds of civil penalties and forfeitures be remitted to the State Civil Penalty and Forfeiture Fund ("Civil Penalty Fund") rather than remain in the several counties where collected and by directing that the funds be used for school technology purposes rather than spent in the discretion of the local board of education of the county where collected; and (iv) whether civil penalties collected from the local school systems themselves are to be returned to the school systems pursuant to Article IX, Section 7.

Plaintiffs, the North Carolina School Boards Association and the school boards from Wake, Durham, Johnston, Buncombe, Edgecombe, and Lenoir Counties, instituted this action on 14 December 1998. On 18 December 2000, plaintiffs moved for summary judgment on all claims. All defendants except defendants O'Brien and Brooks also moved for summary judgment. After a hearing on the respective summary judgment motions, the trial court on 14 December 2001 entered summary judgment for plaintiffs on all issues. The trial court further stayed operation and enforcement of the order pending appeal.

Sec. 7. County school fund; State fund for certain moneys.

(a) Except as provided in subsection (b) of this section, all moneys, stocks, bonds, and other property belonging to a county school fund, and the clear proceeds of all penalties and forfeitures and of all fines collected in the several counties for any breach of the penal laws of the State, shall belong to and remain in the several counties, and shall be faithfully appropriated and used exclusively for maintaining free public schools.

(b) The General Assembly may place in a State fund the clear proceeds of all civil penalties, forfeitures, and fines which are collected by State agencies and which belong to the public schools pursuant to subsection (a) of this section. Moneys in such State fund shall be faithfully appropriated by the General Assembly, on a per pupil basis, to the counties, to be used exclusively for maintaining free public schools.

Act of July 18, 2003, ch. 423, sec. 1, 2003 N.C. Sess. Laws 1284, 1284. The amendment does not, however, apply to this litigation instituted on 14 December 1998. *Smith v. Mercer*, 276 N.C. 329, 337-38, 172 S.E.2d 489, 494-95 (1970).

Defendants filed timely notice of appeal from the trial court's order. On 16 September 2003, the Court of Appeals issued an opinion affirming in part and reversing in part the trial court's order. *N.C. Sch. Bds. Ass'n v. Moore*, 160 N.C. App. 253, 585 S.E.2d 418 (2003). The Court of Appeals' opinion may be broken down into five discrete sections. The Court of Appeals first reversed the trial court's conclusion that the General Assembly's plan prescribed in N.C.G.S. §§ 115C-457.1 through -457.3 for distributing the money collected pursuant to Article IX, Section 7 is unconstitutional. *Id.* at 266, 585 S.E.2d at 427. The Court of Appeals noted that Article IX, Section 7 is not self-executing and requires legislation to provide for its enforcement. *Id.* at 265, 585 S.E.2d at 426. Thus, the Court of Appeals held that the "General Assembly, by enacting Article 31A of Chapter 115C, has properly legislated the details necessary to effectuate the general proposition laid down by Article IX, Section 7 that the clear proceeds of civil penalties be set aside and used exclusively for the support of our State's public schools" and that the provisions of the statutes were in keeping with the framers' intent manifested by Article IX, Section 7. *Id.* at 266, 585 S.E.2d at 427.

The Court of Appeals next considered the trial court's ruling that all the payments to state agencies referenced in plaintiffs' complaint are to be distributed to the public schools pursuant to Article IX, Section 7. The Court of Appeals affirmed the trial court's ruling with respect to the following payments: (i) payments collected by the Department of Transportation from owners of overweight vehicles pursuant to N.C.G.S. § 20-118, and (ii) payments collected by the Department of Transportation for lapses in insurance coverage pursuant to N.C.G.S. § 20-309. *Id.* at 268-70, 585 S.E.2d at 428-30. The Court of Appeals reversed the trial court's holding that the following payments are subject to Article IX, Section 7: (i) payments collected by the Department of Revenue for failure to comply with regulatory or statutory tax provisions pursuant to N.C.G.S. §§ 105-113.89, -163.15, -163.41, -164.14, -231, and -236; (ii) payments collected by the Employment Security Commission from employers for overdue contributions to the unemployment insurance fund, late filing of wage reports, and tendering a worthless check pursuant to N.C.G.S. § 96-10(a), (g), and (h); (iii) payments collected by the boards of trustees of the Consolidated University of North Carolina campuses for violation of ordinances regulating traffic, parking, and vehicle registration pursuant to N.C.G.S. § 116-44.4(h); (iv) payments collected by the boards of trustees of the Consolidated University of North

Carolina campuses for loss, damage, or late return of materials borrowed from university libraries pursuant to N.C.G.S. § 116-33; (v) payments collected by the Department of Revenue from persons dealing in unauthorized substances pursuant to N.C.G.S. §§ 105-113.105 through -113.113; and (vi) payments collected by state agencies and licensing boards for licensees' failure to comply in a timely manner with licensing requirements pursuant to N.C.G.S. §§ 87-22, 87-44, 88B-6 and -21, and 84-34. *Id.* at 270-78, 282-83, 585 S.E.2d at 430-34, 437. In making these determinations, the Court of Appeals followed this Court's precedent by employing an analysis which classifies each of these payments as either punitive, in which case the payment accrues to the public schools under Article IX, Section 7, or remedial, in which case it remains under the dominion of the collecting agency. *Id.* at 266-68, 585 S.E.2d at 427-28.

The Court of Appeals also considered whether monies paid by an environmental violator to perform or to fund a third party's performance of a Supplemental Environmental Project ("SEP") in lieu of paying a civil penalty to the Department of Environment and Natural Resources ("DENR") pursuant to N.C.G.S. §§ 143-215.6A, -215.114A, and -215.3(a)(9) were subject to Article IX, Section 7. *Id.* at 278-81, 585 S.E.2d at 434-36. The Court of Appeals analyzed this issue in light of this Court's precedent in *Craven Cty. Bd. of Educ. v. Boyles*, 343 N.C. 87, 468 S.E.2d 50 (1996), in which we held that an environmental violator's payments pursuant to a settlement agreement subsequent to a civil penalty assessment by the Department of Environment, Health and Natural Resources were subject to Article IX, Section 7. The Court of Appeals held that "payments by an environmental violator, including [a specific violator for whom payments are in question], to support a SEP as part of a settlement agreement are 'still paid because of a civil penalty assessed against the [environmental violator]' and as such are punitive in nature and therefore subject to Article IX, Section 7." *N.C. Sch. Bds. Ass'n*, 160 N.C. App. at 280, 585 S.E.2d at 435 (quoting *Craven Cty. Bd. of Educ.*, 343 N.C. at 91, 468 S.E.2d at 52).

Next, the Court of Appeals turned to the question of civil penalties paid by local public school systems to state agencies. Acknowledging the trial court's holding that these payments are within the clear purview of Article IX, Section 7, the Court of Appeals nevertheless held that monies raised from school systems' own penalties should not be returned to those same school systems. *Id.* at 281-82, 585 S.E.2d at 436-37. The Court of Appeals reasoned that were

the schools permitted to utilize the funds remitted by them as civil penalties, "the offending unit will receive back from the School Technology Fund a portion of the fine or penalty assessed against the unit." *Id.* at 282, 585 S.E.2d at 436. The Court of Appeals concluded that such a reversion violated the public policy of this State that a malfeasor not be permitted to benefit from his own bad acts. *Id.* As a result the Court of Appeals held that money paid by the schools as civil penalties should remain with the collecting State agency. *Id.*

Finally, the Court of Appeals considered the trial court's conclusion that the three-year statute of limitations in N.C.G.S. § 1-52 should apply to plaintiffs' claims. *Id.* at 283-84, 585 S.E.2d at 437-38. Defendants contended that this case is governed by N.C.G.S. § 1-54(2), which provides for a one-year statute of limitations. The Court of Appeals reasoned that, although appellate courts have held that section 1-54(2) applies to actions to collect civil penalties and forfeitures, this action is not to collect unpaid penalties but instead to recover for public schools the penalties already collected by the various State agencies. *Id.* at 284, 585 S.E.2d at 438. The Court of Appeals affirmed the trial court on this issue, holding that "the trial court correctly applied the three-year limitations period provided in N.C. Gen. Stat. § 1-52 (2001) for 'an action . . . [u]pon a liability created by statute' or '[a]gainst a public officer, for a trespass, under color of his office.' " *Id.* (quoting N.C.G.S. § 1-52 (2001)).

The dissenting judge in the Court of Appeals concluded that payments collected by the Department of Transportation pursuant to N.C.G.S. § 20-118(e) from owners of vehicles which exceed axle-weight limits are not within the purview of Article IX, Section 7 and should remain with the collecting agency. *Id.* at 285, 585 S.E.2d at 438. The dissenting judge concurred with the majority's analysis classifying payments as remedial or punitive, but would have held that "[t]he weight penalties collected pursuant to N.C. Gen. Stat. § 20-118(e) are remedial in nature and, therefore, do not belong to the public schools" on the basis that they are "intended to compensate the state for the deterioration of its highways due to operation of overweight vehicles thereon and are thus remedial in nature." *Id.* at 286, 585 S.E.2d at 439.

The dissenting judge also opined that penalties paid by local school boards to state agencies should be remitted to the Civil Penalty Fund pursuant to Article IX, Section 7. *Id.* at 287, 585 S.E.2d at 440. The dissenting judge would apply the same case-by-case remedial/punitive analysis to payments made by school systems as to

payments by other persons or entities. *Id.* at 288, 585 S.E.2d at 440. However, the dissenter would exclude the offending school system from the distribution of the funds received as a result of the system's wrongdoing. *Id.* at 288-89, 585 S.E.2d at 440-41.

We note initially that defendants did not petition for review of the Court of Appeals' determination that plaintiffs' claims will be subject to a three-year statute of limitations. Thus, under the Rules of Appellate Procedure, defendants have abandoned the assignment of error relative to the proper statute of limitations, and this Court will not consider it. N.C. R. App. P. 28(a).

I. Law Governing Proper Disposition of Payments Made to State Agencies and Claimed by Plaintiffs

Plaintiffs and defendants each except to certain determinations by the Court of Appeals that payments made to the various state agencies do or do not fall within the purview of Article IX, Section 7. All parties agree as to the basic precedent which governs this Court's consideration of these payments. The parties' arguments, however, diverge on how this precedent should be applied in this case. Plaintiffs argue that the precedents hold that any civil penalties paid for violation of a penal law of the State and accruing to the State are necessarily punitive and must be paid to the public schools. Defendants, on the other hand, argue that any penalty paid to the State to compensate it for an injury, damage, or loss above normal operating costs falls outside the scope of Article IX, Section 7.

In *Mussallam v. Mussallam*, 321 N.C. 504, 364 S.E.2d 364 (1988), an action to recover the proceeds of a civil appearance bond which had been forfeited, this Court interpreted Article IX, Section 7 as providing two categories of monies. In *Mussallam* the Court stated:

> These are (1) the clear proceeds of all penalties and forfeitures in all cases, regardless of their nature, so long as they accrue to the state; and (2) the clear proceeds of all fines collected for any breach of the criminal laws. In the second category, it is quite apparent from the words of section 7 that the clear proceeds of all fines collected for the violation of the criminal laws are to be used for school purposes. One could not legitimately argue that the violation of a criminal law is not a "breach of the penal laws." While its intent as to the first category is less obvious, the wording of the entire section 7 makes its meaning clear. The term "penal laws," as used in the context of article IX, section 7, means

> laws that impose a monetary payment for their violation. The payment is punitive rather than remedial in nature and is intended to penalize the wrongdoer rather than compensate a particular party. *See* D. Lawrence, *Fines, Penalties, and Forfeitures: An Historical and Comparative Analysis*, 65 N.C.L. Rev. 49, 82 (1986). Thus, in the first category, the monetary payments are penal in nature and accrue to the state regardless of whether the legislation labels the payment a penalty, forfeiture or fine or whether the proceeding is civil or criminal.

Id. at 509, 364 S.E.2d at 366-67. The Court then held that the purpose of the forfeiture was to punish the defendant if he did not appear in court and noted that the bond specifically made its proceeds payable to the State of North Carolina. *Id.* at 509, 364 S.E.2d at 367. Thus, the Court held that the bond fell within the scope of the first category. *Id.* Citing *Katzenstein v. Raleigh & Gaston R.R. Co.*, 84 N.C. 688 (1881), and *State ex rel. Hodge v. Marietta & N. Ga. R.R.*, 108 N.C. 17, 108 N.C. 24, 12 S.E. 1041 (1891), the Court rejected the plaintiff's argument that the proceeds were payable to her, saying, "the distinction lies in the nature of the penalty or forfeiture, i.e., whether it was designed to penalize the wrongdoer or to compensate a particular party." *Id.* at 510, 364 S.E.2d at 367.

In *State ex rel. Thornburg v. House & Lot*, 334 N.C. 290, 432 S.E.2d 684 (1993), an action involving the proceeds of the sale of a house forfeited pursuant to Chapter 75D of the General Statutes, the State's Racketeer Influenced and Corrupt Organizations ("RICO") Act, this Court explained the Court's reliance on *Hodge* and *Katzenstein* in *Mussallam*. The Court noted that in *Katzenstein* this Court concluded that the constitutional provision applied only to penalties and forfeitures that accrued to the State; thus, plaintiff, a private company, could sue and recover for violation of the statute in question because that right was given by the statute to " 'any person suing for the same.' " *Id.* at 295, 432 S.E.2d at 687 (quoting *Katzenstein*, 84 N.C. at 689). In *Hodge*, however, the statute specifically required the penalty " 'be sued for in the name of the State of North Carolina.' " *Id.* (quoting *Hodge*, 108 N.C. at 18, 108 N.C. at 25, 12 S.E. at 1041). The Court concluded that "[t]he RICO Act provides that the proceeds from the sale of RICO forfeited property accrue to the State. Such proceeds must therefore be paid to the public school fund." *Id.* The Court noted that while alternative dispositions of forfeited property were permitted under the RICO Act, the Act "in every instance, requir[ed] that the proceeds of any sale of such property

'shall be paid to the State Treasurer.' §§ 75D-5(j)(1-7)." *Id.* at 294, 432 S.E.2d at 686.

Although this Court has said in previous cases that the label attached to the money is not controlling, *Cauble v. City of Asheville*, 301 N.C. 340, 271 S.E.2d 258 (1980); *State v. Rumfelt*, 241 N.C. 375, 85 S.E.2d 398 (1955); *Cty. Bd. of Sch. Dirs. v. City of Asheville*, 128 N.C. 185, 128 N.C. 249, 38 S.E. 874 (1901), and *Bd. of Educ. v. Town of Henderson*, 126 N.C. 439, 126 N.C. 689, 36 S.E. 158 (1900), this language arose in the determination of whether a particular assessment was a "fine" or a "penalty," usually in the context of a municipal ordinance that had been declared by statute a violation of the state's penal laws. In *Town of Henderson* the Court said:

> A "fine" is the sentence pronounced by the court for a violation of the criminal law of the State; while a "penalty" is the amount recovered—the penalty prescribed for a violation of the statute law of the State or the ordinance of a town. This penalty is recovered in a civil action of debt.

126 N.C. at 440, 126 N.C. at 691, 36 S.E. at 159. Then in *City of Asheville*, the Court, utilizing the law explicated in *Town of Henderson*, held that Article IX, Section 5 (now 7) applied

> also to "penalties," the collection of which is enforceable by proceedings before a Justice of the Peace or municipal officers empowered by law to enforce the collection of such penalty in a criminal action under section 3820 of The Code, for, in such cases, though the word "penalty" is used, it is really a "fine."

128 N.C. at 187, 128 N.C. at 251, 38 S.E. at 875. In *Shore v. Edmisten*, 290 N.C. 628, 227 S.E.2d 553 (1976), the Court, in determining whether money payments imposed by a trial judge as a condition of probation were fines or restitution, said, "In determining whether a given payment is a fine or restitution, the label given by the judge (or the legislature) is not determinative." *Id.* at 633, 227 S.E.2d at 558. The Court explained that "[a] state or a local agency can be the recipient of restitution where the offense charged results in particular damage or loss to it over and above its normal operating costs." *Id.* at 633-34, 227 S.E.2d at 559. The Court specifically held that a suspended sentence could not be conditioned on payment of money for continued law enforcement. *Id.* at 638-39, 227 S.E.2d at 562. As the Court further noted, the trial court must identify whether the payment is restitution, and a showing must be made that the money

is to compensate an aggrieved party for damages suffered; otherwise, the payment is subject to Article IX, Section 7. *Id.* at 633-34, 227 S.E.2d at 559.

We do not, however, understand these rulings, that the label affixed by either a legislative body or the judge is not determinative, to undermine or negate the canons of construction. In matters of statutory construction the task of the Court is to determine the legislative intent, and the intent is ascertained in the first instance "from the plain words of the statute." *Elec. Supply Co. v. Swain Elec. Co.*, 328 N.C. 651, 656, 403 S.E.2d 291, 294 (1991). The words used to describe the payment are, thus, to be considered in deciding whether the payment made on account of a violation comes within the purview of Article IX, Section 7.

In the instant case, all the payments in question fall into the first category identified in *Mussallam*. Thus, the determinative question under *Mussallam* is whether the "civil penalty" is punitive or remedial in nature. The word "remedial" means "affording a remedy." *Black's Law Dictionary* 1293 (6th ed. 1990). The critical issue is whether the penalty mandated for violation of the statute is imposed as punishment to deter noncompliance or to measure the damages accruing to an individual or class of individuals resulting from the breach. *Id.* at 1294. This determination can only be made by examining each of the statutory penalties challenged in plaintiffs' complaint.

II. Monies Collected by the Department of Revenue for Late Filings, Underpayments, and Failure to Comply with Statutory or Regulatory Tax Provisions

[1] Plaintiffs assert that the Court of Appeals erred in holding that payments collected by the Department of Revenue under N.C.G.S. §§ 105-113.89, -163.8, -163.15, -163.41, and -236 for late filings, underpayments, and failure to comply with various provisions of the North Carolina Revenue Act were not subject to Article IX, Section 7. We agree.

The Court of Appeals relied on federal case law which, in the context of the Fifth Amendment Double Jeopardy Clause or the Eighth Amendment Excessive Fines Clause, determined that additions to tax under the Internal Revenue Code were remedial in nature in that " '[t]hey are provided primarily as a safeguard for the protection of the revenue and to reimburse the Government for the heavy expense of investigation and the loss resulting from the taxpayer's fraud.' "

N.C. Sch. Bds. Ass'n, 160 N.C. App. at 271, 585 S.E.2d at 430 (quoting *Helvering v. Mitchell*, 303 U.S. 391, 401, 82 L. Ed. 917, 923 (1938)).[2]

The Court of Appeals' reliance on *Mitchell* is misplaced. Interpretation of our state statutes is not governed by the interpretation of a federal statute by a federal court. *Sharpe v. Park Newspapers of Lumberton, Inc.*, 317 N.C. 579, 584, 347 S.E.2d 25, 29 (1986); *Worthington v. Bynum*, 305 N.C. 478, 485, 290 S.E.2d 599, 604 (1982). Although the label used in a statute does not determine whether the payment is a penalty within the meaning of the constitution, in discerning the intent of the General Assembly, we look first to the "plain words of the statute." *Elec. Supply Co.*, 328 N.C. at 656, 403 S.E.2d at 294. The payments claimed by plaintiffs under Chapter 105 are denominated "penalties" and are imposed for the taxpayer's failure to file a return or pay a tax as required by the statute. The statutes provide as follows:

> N.C.G.S. § 105-163.8(a) (2003): "A withholding agent who fails to withhold the amount of income taxes required by this Article or who fails to pay withheld taxes by the due date for paying the taxes is subject to the penalties provided in Article 9 of this Chapter."
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> N.C.G.S. § 105-163.15(a) (2003): "In the case of any underpayment of the estimated tax by an individual, the Secretary shall assess a penalty in an amount determined by applying the applicable annual rate established under G.S. 105-241.1(i) to the amount of the underpayment for the period of the underpayment."
>
> N.C.G.S. § 105-163.41(a) (2003): "Except as provided in subsection (d), if the amount of estimated tax paid by a corporation during the taxable year is less than the amount of tax imposed upon the corporation under Article 4 of this Chapter for the taxable year, the corporation must be assessed an additional tax as a penalty in an amount determined . . . ."
>
> N.C.G.S. § 105-236 (2003): "Penalties assessed by the Secretary under this Subchapter are assessed as an additional tax. Except as otherwise provided by law, and subject to the provisions of G.S. 105-237, the following penalties shall be applicable:
>
> . . . .

2. Inadvertently called *Helvering v. Mountain Producers Corp.*, though citing to *Helvering v. Mitchell*.

"(3) Failure to File Return.—In case of failure to file any return on the date it is due, determined with regard to any extension of time for filing, the Secretary shall assess a penalty equal to five percent (5%) of the amount of the tax if the failure is for not more than one month, with an additional five percent (5%) for each additional month, or fraction thereof, during which the failure continues, not exceeding twenty-five percent (25%) in the aggregate, or five dollars ($5.00), whichever is the greater.

"(4) Failure to Pay Tax When Due.—In the case of failure to pay any tax when due, without intent to evade the tax, the Secretary shall assess a penalty equal to ten percent (10%) of the tax, except that the penalty shall in no event be less than five dollars ($5.00). . . .

"(5) Negligence.—

a. Finding of negligence.—For negligent failure to comply with any of the provisions to which this Article applies, or rules issued pursuant thereto, without intent to defraud, the Secretary shall assess a penalty equal to ten percent (10%) of the deficiency due to the negligence.

. . . .

"(6) Fraud.—If there is a deficiency or delinquency in payment of any tax because of fraud with intent to evade the tax, the Secretary shall assess a penalty equal to fifty percent (50%) of the total deficiency."

Defendants contend that the Court of Appeals was correct in its analysis and emphasize that the penalties under N.C.G.S. § 105-236 are "assessed as an additional tax" and that the definitions section of the Revenue Act states that "[u]nless the context clearly requires otherwise, the terms 'tax' and 'additional tax' include penalties and interest as well as the principal amount." N.C.G.S. § 105-228.90(b)(7) (2003). Defendants cite numerous federal cases which relied on *Helvering v. Mitchell* and urge this Court to adopt the remedial analysis in *Mitchell*. We are not persuaded, however, that the collection of the penalty as an additional tax is determinative that the penalty is remedial. N.C.G.S. § 105-241.1 provides:

(a) Proposed Assessment.—If the Secretary discovers that any tax is due from a taxpayer, the Secretary must notify the tax-

> payer in writing of the kind and amount of tax due and of the Secretary's intent to assess the taxpayer for the tax. The notice must describe the basis for the proposed assessment and identify the amounts of any tax, interest, additions to tax, and penalties included in the proposed assessment.
>
> . . . .
>
> (i) Interest.—All assessments of tax, exclusive of penalties assessed on the tax, shall bear interest at the rate established pursuant to this subsection from the time the tax was due until paid.

Thus, the principal tax, interest, and penalties are treated discretely, and, as with interest, "it is only for purposes of assessment, collection and payment that [penalties] should be treated in the same manner as taxes." *Holt v. Lynch*, 307 N.C. 234, 239, 297 S.E.2d 594, 597 (1982).

Defendants' argument, implicit in its reliance on *Mitchell*, that the penalties are to safeguard the revenue and to reimburse the government for the expense of investigating noncompliance with the revenue laws of the State must also fail. The purpose of interest on deficient or delinquent tax payments is to reimburse for loss of use of the money during the period of delinquency. Further, the enabling legislation for Article IX, Section 7, permits retention of actual costs of collection up to ten percent (10%) of the amount of the penalties collected. N.C.G.S. § 115C-457.2 (2003). Finally, in *Shore v. Edmisten*, this Court held that payments attributable to the general costs of investigation and prosecution of a citizen's unlawful conduct may not be considered "remedial" for purposes of Article IX, Section 7. The Court stated that

> [a] state or a local agency can be the recipient of restitution where the offense charged results in particular damage or loss to it over and above its normal operating costs. . . . It would not however be reasonable to require the defendant to pay the State's overhead attributable to the normal costs of prosecuting him.

290 N.C. at 633-34, 227 S.E.2d at 559 (citations omitted).

Based on the foregoing, we conclude that the penalties assessed pursuant to Chapter 105 of the General Statutes are imposed as a monetary payment for a taxpayer's noncompliance with a mandate of the Revenue Act and that under this Court's decision in *Mussallam*, they are subject to Article IX, Section 7.

III. Monies Collected by the Secretary of Revenue under the State Unauthorized Substances Excise Tax

[2] Plaintiffs contend that the Court of Appeals erred in holding that monies collected pursuant to Article 2D of Chapter 105, entitled "Unauthorized Substances Taxes," were not required to be paid to public schools under Article IX, Section 7. The unauthorized substances tax is an excise tax on certain substances, including controlled substances and illicit spiritous liquor possessed by dealers. N.C.G.S. § 105-113.107 (2003). One definition of "dealer" is someone who "actually or constructively possesses more than 42.5 grams of marijuana, seven or more grams of any other controlled substance that is sold by weight, or 10 or more dosage units of any other controlled substance that is not sold by weight." *Id.* § 105-113.106(3)(a). (2003). The tax rate varies with the substance and ranges from forty cents for each gram of harvested marijuana to two hundred dollars for each gram of any controlled substance other than marijuana or cocaine that is sold by weight. *Id.* § 105-113.107(a)(1), (2). Dealers are required to pay the amount due under the statute within forty-eight hours after receipt of the substance. *Id.* § 105-113.109 (2003). After payment the dealer is issued a revenue stamp to be affixed to the substance to show that the tax has been paid. *Id.* § 105-113.108(a) (2003). Dealers are not required to give their name, address, social security number, or other identifying information. *Id.* Information obtained in collecting the unauthorized substances tax is confidential and may not be disclosed or used in a criminal prosecution, except for prosecution for violation of Article 2D of Chapter 105. N.C.G.S. § 105-113.112 (2003). "Once the tax due on an unauthorized substance has been paid, no additional tax is due under [Article 2D] even though the unauthorized substance may be handled by other dealers." *Id.* § 105-113.109. The statute also permits the Secretary of Revenue to impose any applicable penalties and interest authorized by Article 9 of Chapter 105 on any person who fails to timely pay the unauthorized substance excise tax. N.C.G.S. § 105-113.110A (2003).

Plaintiffs argue that, when considered in light of this Court's construction of the term "penal laws" in *Mussallam*, the tax is a penalty for purposes of Article IX, Section 7. Plaintiffs also contend that the criteria set forth in *Dep't of Revenue v. Kurth Ranch*, 511 U.S. 767, 128 L. Ed. 2d 767 (1994), and applied in *Lynn v. West*, 134 F.3d 582 (4th Cir.), *cert. denied*, 525 U.S. 813, 142 L. Ed. 2d 36 (1998), should be applied in determining whether the tax is more in the nature of a penalty. We disagree.

The section titled "Purpose" in Article 2D states:

> The purpose of this Article is to levy an excise tax to generate revenue for State and local law enforcement agencies and for the General Fund. Nothing in this Article may in any manner provide immunity from criminal prosecution for a person who possesses an illegal substance.

N.C.G.S. § 105-113.105 (2003).

In a previous decision construing the predecessor statute, the North Carolina Controlled Substance Tax, N.C.G.S. §§ 105-113.105 through -113.113 (1992), which contained the same essential provisions as the current statute, this Court affirmed the opinion of the Court of Appeals, which held that the same excise tax at issue in this case was not a penalty and collection of the tax did not bar subsequent prosecution under the Double Jeopardy Clause of the United States Constitution or the Law of the Land Clause of the North Carolina Constitution. *State v. Ballenger*, 123 N.C. App. 179, 472 S.E.2d 572 (1996), *aff'd per curiam*, 345 N.C. 626, 481 S.E.2d 84, *cert. denied*, 522 U.S. 817, 139 L. Ed. 2d 29 (1997). In *Ballenger*, the Court of Appeals analyzed the provisions of Chapter 105, Article 2D in light of the factors enunciated in *Kurth Ranch* and noted that the North Carolina tax did not have either of the "unusual features" which the Supreme Court considered significant in concluding that the Montana tax on dangerous drugs constituted punishment for double jeopardy purposes. *Id.* at 183, 472 S.E.2d at 574. Specifically, the North Carolina tax does not require that the person in possession of the substances be arrested, "nor is [the tax] assessed on property that necessarily has been confiscated or destroyed." *Id.* The Court of Appeals concluded that "the North Carolina statute is a legitimate and remedial effort to recover revenue from those persons who would otherwise escape taxation when engaging in the highly profitable, but illicit and sometimes deadly activity of possessing, delivering, selling or manufacturing large quantities of controlled drugs." *Id.* at 184, 472 S.E.2d at 575. Today we reaffirm this holding as it applies to the North Carolina Unauthorized Substances Taxes law.

Plaintiffs are correct that Article IX, Section 7 applies to both civil and criminal penalties. However, the test is whether the tax is "intended to penalize the wrongdoer rather than compensate a particular party." *Mussallam*, 321 N.C. at 509, 364 S.E.2d at 367. Applying the test established in *Mussallam*, we hold that the excise tax on unauthorized substances is not a penalty subject to the provisions of

Article IX, Section 7 and affirm the decision of the Court of Appeals on this issue.

We do note, however, that the unauthorized substances tax is subject to the same penalties and interest payments as applied to other taxes collected by the Department of Revenue. N.C.G.S. § 105-113.110A. Thus, penalties collected for late or otherwise improper payments of the unauthorized substances tax must be treated in the same manner as penalties discussed in Section II of this opinion. Such payments are properly classified as penalties to be disbursed to public school systems pursuant to Article IX, Section 7.

IV. Monies Collected by the Board of Trustees of the Consolidated University of North Carolina Campuses for Violation of Ordinances Adopted by the Trustees for the Regulation of Traffic and Parking and the Registration of Vehicles

[3] Plaintiffs next contend that the Court of Appeals erred in holding that the funds collected by the institutions in the University of North Carolina system for traffic and parking violations pursuant to N.C.G.S. § 116-44.4(h) do not accrue to the Civil Penalty Fund. We agree.

The North Carolina Constitution provides that the General Assembly "may enact laws necessary and expedient for the maintenance and management of The University of North Carolina and the other public institutions of higher education." N.C. Const. art. IX, § 8. The General Assembly has enacted section 116-44.4, which allows the board of trustees for each of the sixteen constituent universities of the University of North Carolina system to adopt ordinances to regulate parking and traffic on university property. The statute provides two alternative mechanisms which trustees may select for the enforcement of the ordinances enacted under the statute: (i) violation of an ordinance is by default "an infraction as defined in G.S. 14-3.1 and is punishable by a [monetary] penalty," N.C.G.S. § 116-44.4(g) (2003); or (ii) boards of trustees may explicitly provide that the violation of an ordinance "subjects the offender to a civil penalty" which may be collected "by civil action in the nature of debt," *Id.* § 116-44.4(h) (2003). All parties agree that the monies collected under the first of these two categories are subject to Article IX, Section 7; the only issue for consideration here is the disposition of the proceeds of the "civil penalties" collected pursuant to the latter procedure.

Citing section 116-44.4(m), which directs that monies collected under the statute be placed in a trust fund for certain specified uses related to parking, traffic, and transportation on university property, the Court of Appeals held that the civil penalties authorized by section 116-44.4(h) were intended for remedial uses rather than to penalize individuals violating university parking and traffic ordinances. *N.C. Sch. Bds. Ass'n*, 160 N.C. App. at 274-75, 585 S.E.2d at 432. The Court of Appeals further held that section 116-44.4 was constitutional inasmuch as it was enacted pursuant to a constitutional grant of authority under Article IX, Section 8, a co-equal provision with Article IX, Section 7. *Id.* at 275, 585 S.E.2d at 432.

Defendants contend that the payments collected by the constituent institutions for violation of parking, traffic, and vehicle registration ordinances are not civil penalties collected for breach of the State's penal laws and, therefore, do not belong to the public schools pursuant to Article IX, Section 7. Defendants concede that penalties collected as an infraction pursuant to N.C.G.S. § 116-44.4(g) would come within the purview of Article IX, Section 7, and defendants acknowledge that civil penalties that are punitive in nature, that is, intended to punish the violator, go to the public schools. Defendants assert, however, that the civil penalties collected pursuant to N.C.G.S. § 116-44.4(h) for these same violations are remedial in that they are imposed to compensate the institutions as aggrieved parties. The underlying premise of defendants' argument is that the institutions are injured in the form of lost revenue for which the civil penalties partially compensate and that the statutory restrictions on the use of the civil penalties collected under N.C.G.S. § 116-44.4(h) confirm that the character of these penalties is remedial.

In an analogous case involving parking meter violations which the City of Asheville permitted the offender to pay voluntarily, though being subject to criminal prosecution if not paid, the City claimed that the voluntary payments were civil penalties, not fines, and, thus, belonged to the City, not the public schools. *Cauble v. City of Asheville*, 301 N.C. 340, 342, 271 S.E.2d 258, 259 (1980). In distinguishing between fines and civil penalties, this Court stated:

> [W]e have often stated that the label attached to the money does not control. Neither does the heart of the distinction rest in whether there has been an actual criminal prosecution resulting in a "sentence pronounced by the court." The crux of the distinction lies in the *nature* of the *offense* committed, and not in the

method employed by the municipality to collect fines for commission of the offense.

Id. at 344, 271 S.E.2d at 260 (citations omitted). The fact that the University has opted to collect the penalty for violation of the parking and traffic ordinances as civil penalties recoverable in a civil action for indebtedness does not change the nature of the offense committed for which the penalty is imposed. Notwithstanding defendants' protestations to the contrary, the gist of defendants' contention is that the intended use of the payments pursuant to N.C.G.S. § 116-44.4(m) renders them remedial, not punitive. Defendants are correct that this Court has not explicitly stated that the intended use of the payments cannot be considered in determining whether the payment is remedial, but this analysis is not required when the determinative factor is whether the purpose of the civil penalty is punitive in nature or is intended to compensate a party for its loss. *Mussallam*, 321 N.C. at 509, 364 S.E.2d at 367.

In the instant case, the conclusion is inescapable that the penalty imposed is to deter future violations and to extract retribution from the violator for illegally parking, failing to obtain a registration decal, or violating some other traffic ordinance designed to regulate and monitor the flow of traffic on the University campuses.

Defendants urge this Court to accept the analysis recognized by the United States Supreme Court in *United States v. Halper*, 490 U.S. 435, 104 L. Ed. 2d 487 (1989), *overruled in part by Hudson v. United States*, 522 U.S. 93, 139 L. Ed. 2d 450 (1997), in determining whether a civil penalty assessed under a federal statute was remedial or punitive for purposes of the Double Jeopardy Clause's prohibition against punishment twice for the same offense. In *Halper* the United States Supreme Court considered whether the amount of the civil penalty bore a rational relationship to the actual damages sustained by the government and acknowledged that rough justice, not absolute precision, was sufficient in evaluating the amount of damages so long as the amount of the penalty was not severely disproportionate. *Id.* at 449-50, 104 L. Ed. 2d at 502-03. As noted earlier, however, this Court has held that limitations exist as to the purposes for which monies may be used and still be considered "remedial." In *Shore v. Edmisten*, in analyzing whether payments made to the State by criminal defendants were punitive or remedial, we stated that a defendant may not be required "to pay the State's overhead attributable to the normal costs of prosecuting him." 290 N.C. at 634, 227 S.E.2d at 559. *See also Cauble v. City of Asheville*, 314 N.C. 598, 606, 336 S.E.2d 59, 64

(1985). Here, the purposes authorized for the parking penalties under section 116-44.4(m), with the possible exception of subdivision (1), are not legitimate "remedial" purposes under our Article IX, Section 7 analysis. Subdivision (1) of N.C.G.S. § 116.44.4(m) "[t]o defray the cost of administering and enforcing ordinances adopted under this Part," could be a legitimate remedial purpose, but in this situation this use is not sufficient to declare the payment remedial in that this purpose is already accounted for in the definition of "clear proceeds" under § 115C-457.2. The "actual costs of collection" up to ten percent of the total amount collected may be deducted from the funds received. N.C.G.S. § 115C-457.2. Accordingly, we hold that "civil penalties" collected pursuant to N.C.G.S.§ 116-44.4(h) are punitive in nature and must be remitted by the University system to the Civil Penalty Fund.

Finally, we note with respect to the Court of Appeals' discussion of the applicability of Article IX, Section 8, that plaintiffs have not challenged the constitutionality of N.C.G.S. § 116-44.4, but merely the disposition of penalties collected under N.C.G.S. § 116-44.4(h) into a trust account under N.C.G.S. § 116-44.4(m). The authority of the constituent campus boards of trustees to enact ordinances and to charge fees for parking, registration, bus rides, and any other transportation-related services is not in question. What is in question are civil penalties collected under N.C.G.S. § 116-44.4(h), and they belong to the public schools under Article IX, Section 7. Accordingly, the Court of Appeals' decision on this issue is reversed.

V. Monies Collected by the Boards of Trustees of the Consolidated University of North Carolina Campuses for Loss, Damage, or Late Return of Materials Borrowed from University Libraries.

[4] Plaintiffs assert that the Court of Appeals erred in holding that payments collected by the trustees of each University campus for loss, damage, or late return of materials borrowed from campus libraries are not subject to Article IX, Section 7. Section 116-1(b) of the North Carolina General Statutes, under the heading "Purpose," sets out the mission of the University and states: "[t]hat mission is to discover, create, transmit, and apply knowledge to address the needs of individuals and society . . . . Teaching and learning constitute the primary service that the university renders to society. Teaching, or instruction, is the primary responsibility of each of the constituent institutions." N.C.G.S. § 116-1(b) (2003). To assist in achieving this mission, N.C.G.S. § 116-33 directs that

> [e]ach board of trustees shall promote the sound development of the institution within the functions prescribed for it, helping it to serve the State in a way that will complement the activities of the other institutions and aiding it to perform at a high level of excellence in every area of endeavor.

This broad grant of authority enables the board of trustees to establish and maintain a library collection, an integral and necessary asset in the achievement of the University's mission.

The Court of Appeals held that this fee was not subject to Article IX, Section 7 for two reasons. *N.C. Sch. Bds. Ass'n*, 160 N.C. App. at 275-76, 585 S.E.2d at 432-33. First, the Court of Appeals determined that the fee was primarily remedial in nature. *Id.* at 276, 585 S.E.2d at 433. Second, the Court of Appeals held that the statute was passed pursuant to Article IX, Section 9 of the North Carolina Constitution, which mandates that the General Assembly provide higher education to North Carolina citizens "as far as practicable . . . free of expense," N.C. Const. art. IX, § 9. *Id.* Since this provision is separate from and co-equal to Article IX, Section 7, the Court of Appeals reasoned that a statute passed pursuant to Article IX, Section 9 would not be subject to the mandate of Article IX, Section 7. We affirm the Court of Appeals' holding that these library fees are not subject to Article IX, Section 7.

As noted earlier, Article IX, Section 7 applies to the penal laws of the State, meaning those statutes imposing a monetary payment for their violation and which are punitive rather than remedial in nature. *Mussallam*, 321 N.C. at 508-09, 364 S.E.2d at 366-67. In this instance the authorizing statute provides a broad grant of power, but does not specifically authorize the fees charged by the University libraries. However, defendants' answers to interrogatories reveal that the fees collected for lost and damaged materials are calculated from the replacement cost of the book, plus an additional twenty-five dollar fee for "reacquisition and recataloging." Thus, the funds received are used exclusively for the costs associated with the replacement of the items lost or damaged by the user. This payment is remedial in nature since the funds are collected to repair harm done by the offending party. *See Shore*, 290 N.C. at 633-34, 227 S.E.2d at 559. Similarly, the money collected for late return of a book compensates the institution for the additional costs necessary to have sufficient quantities of materials for all users, a need which arises when a patron retains materials longer than the allocated time.

Plaintiffs contend that the late fee collected for an overdue book is no different from a parking fine for over-parking. However, the fee collected for an overdue book differs from a parking penalty in that the patron, usually a student or faculty member, has the privilege of using the book without cost for the designated period; and the fees are normally assessed based upon daily or hourly overage. To the contrary, a person who uses a parking space without depositing money in the meter has violated the law; and if ticketed, the penalty is a set amount whether the person parked for two minutes or for two hours. Moreover, the library patron is usually entitled to borrow the book free of charge for an additional period by renewing the check-out. Hence, the late fee is in the nature of a user fee designed to manage the collection, as opposed to a penalty. We conclude, therefore, that the monies collected for library materials are remedial and, thus, not subject to Article IX, Section 7.

Having determined that these library charges are not subject to Article IX, Section 7, we do not address defendants' argument related to Article IX, Section 9 or the Court of Appeals' reliance thereon. For the reasons stated herein, we affirm the decision of the Court of Appeals on this issue.

VI. Monies Collected by the Department of Transportation for Violations of Axle Weight Limits

[5] Based on the dissenting opinion in the Court of Appeals, defendants Tippett and Howard appealed the issue of whether the clear proceeds of payments collected by the North Carolina Department of Transportation ("DOT") pursuant to N.C.G.S. § 20-118(e) are subject to Article IX, Section 7. The majority in the Court of Appeals determined that the penalties were assessed for unlawful conduct under N.C.G.S. § 20-115 and were, thus, payable to the public schools. *N.C. Sch. Bds. Ass'n*, 160 N.C. App. at 269, 585 S.E.2d at 429. The dissenting judge agreed with defendants that the penalties were assessed to compensate the State for damage caused to the highways by the operation of overweight vehicles and were not payable to the public schools. The dissenting judge further concluded that the annual registration fee and penalties for overweight vehicles are " 'compensatory taxes for the use and privileges of the public highways of this State' " which are paid into the Highway Fund to finance the maintenance of roads, and are, accordingly, remedial not punitive. *Id.* at 285-87, 585 S.E.2d at 438-40 (quoting N.C.G.S. § 20-97 (2001)).

On appeal to this Court, defendants contend that the majority of the Court of Appeals erred and argue that the penalties assessed against the owners of overweight vehicles are reimbursement for damages or are a tax. We disagree.

For purposes of licensing, the weight of a self-propelled property-carrying vehicle is determined by the empty weight and the heaviest load to be carried as declared by the owner or operator, with limitations and calculations specified in the statute. N.C.G.S. § 20-88(a) (2003). A vehicle driven with a weight in excess of its declared gross weight is subject to axle-group weight penalties under N.C.G.S. § 20-118(e) as determined by the amount the actual gross weight exceeds the declared gross weight. *Id.* § 20-88(k) (2003). Section 118(b) establishes axle weight limitations, and subsection (e) of section 118, entitled "Penalties," prescribes "civil penalties" for operating a vehicle in violation of the axle weight limits, calculated on a graduated scale based on the pounds in excess of the limit. *Id.* § 20-118(b) and (e) (2003). This penalty is assessed against the owner or registrant of the vehicle. *Id.* § 20-118(e). Finally, N.C.G.S. § 20-115 declares that "[i]t shall be unlawful for any person to drive or move or for the owner to cause or knowingly permit to be driven or moved on any highway any vehicle or vehicles of a size or weight exceeding the limitations stated in this title."

Defendants first argue that the Court of Appeals erred in finding the conduct unlawful pursuant to N.C.G.S. § 20-115. Defendants base this assertion on their contention that N.C.G.S. § 20-115 is directed to the driver of the vehicle, while N.C.G.S. § 20-118(e) is directed to the owner or registrant of the vehicle. Defendants next argue that, since pursuant to N.C.G.S. § 20-118(e) a violation of section 118 is not punishable under N.C.G.S. § 20-176 as an infraction or violation of the criminal law, the penalty for violation of the weight limit is not punitive in nature. Neither of these arguments has merit. By its plain language N.C.G.S. § 20-115 is directed at both the driver and the owner of the vehicle. Further, the law is well settled that Article IX, Section 7 applies to both civil and criminal penalties. *Mussallam*, 321 N.C. at 508-09, 364 S.E.2d at 366-67. Thus, the fact that a violation is not punishable as a crime does not establish that the penalty is not penal in nature.

Defendants also argue that the "civil penalty" is remedial in nature in that the payments compensate the State for damages to the highways caused by overweight vehicles. Defendants rely heavily on the affidavit of the Deputy Chief for Operations of the DOT,

who opined that "[a]lthough many other factors contribute to road failures, in my opinion overweight vehicles accelerate the deterioration of pavements which causes premature failures of the roadways in this state which the Department of Transportation repairs." Defendants argue that the use of a graduated scale based on excess pounds to calculate the penalty signifies that the penalty has a reasonable relationship to the injury caused and that because these funds are deposited in the Highway Fund, the penalty is remedial rather than punitive. We do not find these arguments persuasive.

As plaintiffs note, nothing in the record supports a conclusion that a correlation exists between the graduated scale for the penalties and the cost of repair to the highways. The scale is a measure of the degree of the violation. Moreover, funds deposited in the Highway Fund are used for purposes other than repair and maintenance of roadways damaged by overweight vehicles. As noted earlier, this Court has recognized restitution in the context of Article IX, Section 7 only when the damages were specifically quantified. *Shore*, 290 N.C. at 633-34, 227 S.E.2d at 559.

We similarly reject defendants' argument that the penalty is a tax. As plaintiffs observe, the underlying premise to defendants' argument is that the licensing and registration fee imposed in N.C.G.S. § 20-88(a) is a tax although the statute makes no mention of a tax. Defendants then argue that N.C.G.S. § 20-97 supports the claim that the registration fee is a tax, but N.C.G.S. § 20-97 does not suggest that registration fees are taxes. Furthermore, the statutes cited by defendants, namely, N.C.G.S. §§ 20-88, 20-85, and 20-87, refer to fees and are contained in Part 7 of Article 3 entitled "Title and Registration Fees." Section 20-85(b) directs that all but one of the title and registration fees collected under the statute are to be paid into the Highway Trust Fund, not the Highway Fund, as provided for the taxes referenced in N.C.G.S. § 20-97. Defendants' reliance on *Helvering v. Mitchell* is also misplaced in that *Mitchell* dealt with the issue of whether a tax penalty under the Internal Revenue Code constituted criminal punishment for purposes of the Double Jeopardy Clause. 303 U.S. at 398-99, 82 L. Ed. at 921. Moreover, the underlying rationale of the United States Supreme Court's decision is not applicable in the context of penalties collected under N.C.G.S. § 20-118(e). These penalties are not a safeguard to protect the State's revenues nor is there evidence that punishment of the owners of overweight vehicles entails extensive investigation or litigation. *Id.* at 401, 82 L. Ed. at 923.

Throughout Article 3, the General Assembly referred to the penalties in N.C.G.S. § 20-118(e) as a civil penalty. The language chosen manifests the legislature's intent that the penalty be imposed to punish those who own motor vehicles operating on the highways of the State while carrying loads that exceed the statutory weight limitations, conduct which violates the State's motor vehicle laws and is deemed unlawful. N.C.G.S. § 20-115 (2003). That the violation causes harm supplies the rational basis for imposing the penalty but does not undermine the intent of the legislature to punish those who cause the harm. We hold, therefore, that payments under N.C.G.S. § 20-118(e) are subject to Article IX, Section 7 and belong to the public schools.

VII. Payments Collected by the Department of Transportation for Lapses in Insurance Coverage

[6] This Court allowed the petition for discretionary review filed by defendants Howard and Ross on the issue of whether the Court of Appeals erred in holding that monies collected as civil penalties under section 20-309(e) are subject to Article IX, Section 7. Section 20-309(e) provides:

> The Division [of Motor Vehicles], upon receiving notice of a lapse in insurance coverage, shall notify the owner of the lapse in coverage, and the owner shall, to retain the registration plate for the vehicle registered or required to be registered, within 10 days from date of notice given by the Division either:
>
> (1) Certify to the Division that he had financial responsibility effective on or prior to the date of such termination; or
>
> (2) In the case of a lapse in financial responsibility, pay a fifty dollar ($50.00) civil penalty; and certify to the Division that he now has financial responsibility effective on the date of certification. . . .

N.C.G.S. § 20-309(e) (2003). Additionally, section 20-309(e) requires, subject to certain conditions, that the insurer notify the Division of the termination of a policy providing financial responsibility within twenty business days of the termination. *Id.* "Any person, firm or corporation failing to give notice of termination shall be subject to a civil penalty of two hundred dollars ($200.00) to be assessed by the Commissioner of Insurance upon a finding by the Commissioner of Insurance that good cause is not shown for such failure to give notice of termination to the Division." *Id.*

Defendants argue that the payment by the owner is voluntary. We disagree. Subsequent language in the same subsection demonstrates that the fifty dollar civil penalty paid by the owner for lapsed coverage is not voluntary. *Id.* The statute further provides that if the owner fails to make the required certification, the registration is automatically revoked for thirty days if the registration plate has not been surrendered to the Division of Motor Vehicles before the termination date; and in order to reregister the vehicle, the owner must pay a restoration fee of fifty dollars plus the appropriate fee for a new registration plate. *Id.* Thus, the fifty dollar civil penalty for lapsed coverage is not a convenience to the owner as defendants contend. The purpose of the penalty is to penalize the owner of a vehicle who violates the statutes requiring financial responsibility to cover injury and damage occurring in the operation of an automobile on the highways of North Carolina.

With respect to the payment by the insurer for failure to give the required notice of termination of insurance, defendants argue that because the purpose of the Financial Responsibility Act is remedial, this civil penalty imposed against the insurer is also remedial. We are not persuaded. This Court has previously held that:

> the General Assembly appears to have intended that the civil penalty be the exclusive sanction for failure to give DMV the required notice of termination. This interpretation is bolstered by the title to the chapter enacting the civil penalty: "AN ACT TO REWRITE G.S. 20-309(E) TO PROVIDE FOR NOTICE OF TERMINATION RATHER THAN INTENT TO TERMINATE BY CARRIERS OF MOTOR VEHICLE LIABILITY INSURANCE COVERAGE *AND PENALTY FOR NONCOMPLIANCE*." 1975 N.C. Sess. Laws, ch. 302, § 1 (emphasis added).

Allstate Ins. Co. v. McCrae, 325 N.C. 411, 417, 384 S.E.2d 1, 4-5 (1989). Moreover, defendants have not shown that the penalty is designed to compensate for particular damages incurred by the State or an individual victim. *See Shore*, 290 N.C. at 633-34, 227 S.E.2d at 559. We hold that the penalties imposed under N.C.G.S. § 20-309(e) are subject to Article IX, Section 7 and belong to the public schools.

Plaintiffs in their argument on this issue also raise the issue of monies collected by DOT for the misuse of dealer license plates pursuant to N.C.G.S. § 20-79(e). The trial court ruled that these collections were subject to Article IX, Section 7. Although defendants

assigned error to this issue, they did not make it the basis of an argument in the Court of Appeals. Therefore, the assignment of error is deemed abandoned. N.C. R. App. P. 28(a), (b)(6).

VIII. Payments Collected by the Employment Security Commission for Overdue Employer Contributions, Late Reports, and Returned Checks

[7] Plaintiffs also contend that the Court of Appeals erred in reversing the trial court's judgment that monies collected by the Employment Security Commission ("ESC") under Chapter 96 of the General Statutes (Employment Security Act) were subject to Article IX, Section 7. At the outset, we note that plaintiffs alleged in their complaint and the trial court ruled that the public schools were entitled to the proceeds of penalties collected by the ESC pursuant to section 96-10 for overdue employer contributions, for late filing of required reports, and for a check returned for insufficient funds. These penalties are prescribed in sections 96-10(a), (g), and (h). In their new brief to this Court, plaintiffs now include the penalty collected by the ESC pursuant to section 96-9(a)(7) for an employer's failure to file wage reports as required by statute. Since the trial court had no opportunity to consider the applicability of Article IX, Section 7 to section 96-9(a)(7), consideration of this provision is not properly before the Court, and our holding is limited to those statutory provisions on which the trial court and the Court of Appeals ruled.

The Court of Appeals accepted defendants' contention that N.C.G.S. § 96-10 "defines employers' contribution to the Unemployment Insurance Fund as a 'tax,' " and construed the penalties paid pursuant to section 96-10 as part of the "taxes" or "additional taxes." *N.C. Sch. Bds. Ass'n*, 160 N.C. App. at 272-73, 585 S.E.2d at 431. The Court of Appeals concluded that these "additional taxes" were remedial rather than punitive in nature, citing the United States Supreme Court's holding in *Mitchell*, 303 U.S. at 401, 82 L. Ed. at 923. 160 N.C. App. at 273, 585 S.E.2d at 431.

All parties agree that these payments to the ESC should be treated in the same manner as payments to the Department of Revenue for failure to comply with the tax provisions in Chapter 105. The parties disagree, however, as to how these payments and those under Chapter 105 should be treated for purposes of Article IX, Section 7. Plaintiffs contend that the payments are penalties imposed for violation of the statutory requirements and are, therefore, payable to the public schools. We agree.

Neither defendants nor the Court of Appeals cites to specific language in the statute defining the employer contributions as taxes. The definitions section of Chapter 96 characterizes the payments made to the Unemployment Insurance Fund as "contributions." N.C.G.S. § 96-8(3) (2003). Admittedly, certain statutes use the term "tax" interchangeably with the word "contribution," for example, N.C.G.S. § 96-10(a), but these isolated references do not compel the conclusion that the payments made as penalties are likewise to be classified as taxes. The General Assembly has designated each of these payments as a penalty: (i) "[a]n additional penalty in the amount of ten percent (10%) of the taxes due shall be added," *Id.* § 96-10(a); (ii) "[a]n employer who fails to file a report within the required time shall be assessed a late filing penalty of five percent . . . ," *Id.* § 96-10(g); and (iii) "[w]hen any uncertified check is tendered in payment of any contributions to the Commission and such check shall have been returned unpaid . . . a penalty shall be payable to the Commission . . . ," *Id.* § 96-10(h).

The statute requires that interest be assessed on all contributions that are paid late, and the interest, which compensates for lost revenues, is tallied separately from the "additional penalty" that is assessed. *Id.* § 96-10(a). Further, of note, interest and penalties collected on late contributions are placed in the Special Employment Security Administration Fund, not the Unemployment Insurance Fund. *Id.* The Special Employment Security Administration Fund may be used for, among other things, "extensions, repairs, enlargements and improvements to buildings, and the enhancement of the work environment in buildings used for Commission business." *Id.* § 96-5(c) (2003). Nothing in the statute suggests that the penalty is in any way remedial or intended to preserve the integrity of the Unemployment Insurance Fund. Rather, the penalty is assessed, in addition to interest, to penalize an employer for noncompliance with a statutory mandate. As with any other punishment, the threat of a hefty penalty may deter noncompliance, but this deterrence factor does not transform the penalty into a remedial tax.

We hold that the penalties collected under N.C.G.S. § 96-10 are subject to Article IX, Section 7 and are payable for the benefit of the public schools. Accordingly, we reverse the decision of the Court of Appeals on this issue.

IX. Monies Collected by State Agencies and Licensing Boards for Late Renewal of Licenses or Late Payment of License Fees

[8] Plaintiffs further assert that the Court of Appeals erred by holding that payments collected by state agencies and licensing boards for the late renewal of licenses or the late payment of licensing fees are not subject to Article IX, Section 7. The Court of Appeals reasoned that the record revealed that the payments were intended to "compensate the collecting agency for additional operating expenses incurred in collecting money due or compelling performance of a licensing requirement." *N.C. Sch. Bds. Ass'n*, 160 N.C. App. at 283, 585 S.E.2d at 437. The Court of Appeals discerned no punitive intent given the small amount of the fees specified by the authorizing statutes. *Id.* For the reasons articulated below, we affirm the Court of Appeals as to this issue.

Payments to four different licensing boards are at issue in this case. Sections 88B-20 and 88B-21 authorize the North Carolina Board of Cosmetic Art Examiners ("Cosmetic Arts Board") to collect a "late fee" from the holder of a license for late renewal of the license and for reinstatement of an expired license. N.C.G.S. §§ 88B-20, -21 (2003). The North Carolina State Bar ("State Bar") collects a "late fee" pursuant to section 84-34 from members of the State Bar who fail to pay an annual membership fee by a certain date. *Id.* § 84-34 (2003). Similarly, the State Board of Examiners of Electrical Contractors ("Electrical Contractors Board") is authorized to assess an "administrative fee" under section 87-44 from any licensed electrical contractor who fails to renew his or her license by the expiration date established by the Electrical Contractors Board. *Id.* § 87-44 (2003).[3] Finally, under the current version of section 87-22, the State Board of Examiners of Plumbing, Heating, and Fire Sprinkler Contractors ("Plumbing Contractors Board") shall "increase the license fee by twenty-five dollars" for the late renewal of a license. *Id.* § 87-22 (2003). We note, however, that in the version of Section 87-22 in effect when this litigation was commenced and until 6 July 2001, a person or entity who failed to renew a license in a timely fashion was charged a "penalty for nonpayment" in the amount of ten percent (10%) of the annual licensing fee for each month the payment was delayed, but the "penalty for nonpayment [could] not exceed the amount of the annual fee." *Id.* § 87-22 (1999).

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3. In the version of this statute in effect at the time plaintiffs' complaint was filed, this fee was termed a "late renewal fee." N.C.G.S. § 87-44 (1999).

This Court has recognized that payments to state agencies may be remedial when the payment is for "particular damage or loss to it over and above its normal operating costs." *Shore*, 290 N.C. at 633-34, 227 S.E.2d at 559. In the statutes under consideration, the use of the term "fee" to describe the payments collected by the Cosmetic Arts Board, the State Bar, the Electrical Contractors Board, and the Plumbing Contractors Board after 6 July 2001 manifests the legislature's intent that these payments be remedial rather than punitive. *See Mussallam*, 321 N.C. at 509, 364 S.E.2d at 367. The penalty is a revocation or suspension of the license and whatever sanctions the statute may authorize for a person's continued practice of the trade or profession during the period of revocation or suspension. *See*, *e.g.*, N.C.G.S. §§ 87-23, 87-47, 88B-24, and 88B-29. The fee, or in the case of plumbing and heating contractors the nonpayment penalty, is an administrative charge to cover the costs of collecting the license fees. As the record reflects, these boards are dependent upon the revenue generated from fees to perform their statutorily mandated services. As illustrated by answers to interrogatories, the late fees collected often do not cover the expense incurred in attempting to collect the license fees. Inasmuch as these late fees or penalties are not intended to punish the licensee, they are not subject to Article IX, Section 7.

Defendants also argue in their brief before this Court that payments made to the Department of Commerce by credit unions for failing to file timely reports pursuant to N.C.G.S. § 54-109.15(b) and payments made to the Department of Environment and Natural Resources for the untimely payment of food and lodging establishment inspection fees pursuant to N.C.G.S. § 130A-248(d) and for the untimely payment of an annual underground storage tank operating fee pursuant to N.C.G.S. § 143-215.94C(e) are remedial. Although defendants briefed these issues in the Court of Appeals, neither the majority nor the dissent in the Court of Appeals addressed them; and defendants did not petition for discretionary review of these issues in this Court. Accordingly, these issues are not properly before this Court, N.C. R. App. P. 16(a), and we decline to address them.

X. Payments by an Environmental Violator to Fund a "Supplemental Environmental Project"

[9] On discretionary review, defendants contend the Court of Appeals erred in affirming the trial court's ruling that payments by an environmental offender to fund a Supplemental Environmental

Project in lieu of paying a portion of a civil penalty assessed by DENR are subject to Article IX, Section 7. Defendants also contend the Court of Appeals erred in holding that payments by the City of Kinston to fund a specific SEP establishing a water resources training program at Lenoir Community College were subject to Article IX, Section 7.

DENR is authorized to assess civil penalties against any person or entity violating various environmental provisions set out in Chapter 143 of the General Statutes. N.C.G.S. §§ 143-215.6A, -215.88A, and -215.114A (assessing civil penalties for violations of, respectively, water quality laws, oil and hazardous substances storage laws, and air pollution control laws). Each of these statutes provides that "the clear proceeds of civil penalties provided for in this section shall be remitted to the Civil Penalty and Forfeiture Fund in accordance with G.S. 115C-457.2." *Id.* §§ 143-215.88A(c) (2003); *see also id.* §§ 143-215.6A(h1) and -215.114A(h) (2003).

The dispute over the penalty in this case arises out of a policy memorandum issued by DENR in April 1998 creating an alternative enforcement mechanism whereby some portion of an assessed civil penalty may be applied to a SEP. The memorandum states:

> Current statutory requirements dictate that civil penalties collected through the enforcement process be set-aside [sic] for educational purposes. Although public education is a very important and a sincere use of these funds, the process returns very little to the environment which often suffers as a result of these environmental violations. This policy will set up a mechanism to provide opportunities for environmental benefit as a result of negotiated settlements where some portion of the settlement agreement may be in the form of a Supplemental Environmental Project (SEP).
>
> Supplemental Environmental Projects are defined as projects that are beneficial to the environment and/or to public health that a defendant agrees to perform as part of a settlement to an enforcement action. . . . During development of potential settlement arrangements, staff may introduce the possibility of a SEP but should leave the final decision of whether or not to perform a SEP entirely up to the defendant. The SEP should bear some relationship, or nexus, to the violation.

Defendants argue that because the payments to the SEP are voluntary, are made to a third party, and are remedial in nature, the pay-

ments do not accrue to the State and are not subject to Article IX, Section 7. Defendants also assert that the Court of Appeals construed this Court's decision in *Craven Cty. Bd. of Educ. v. Boyles* too broadly. We disagree.

In *Craven County*, the board of education instituted a declaratory judgment action to recover proceeds paid by the Weyerhaeuser Company to the Department of Environment, Health and Natural Resources under a settlement agreement entered into after the Department assessed a civil penalty against the company for violation of the air pollution laws. 343 N.C. 87, 468 S.E.2d 50. The settlement agreement provided that the payments did " 'not constitute, nor shall they be construed as forfeitures, fines, penalties or payments in lieu thereof.' " *Id.* at 89, 468 S.E.2d at 51. In holding that the payment was subject to Article IX, Section 7, this Court stated:

> In the instant case, it is not determinative that the monies were collected by virtue of a settlement agreement, nor is it determinative that defendants and Weyerhaeuser stated that the payment not be construed as a penalty. The monies were paid to settle the assessment of a penalty for violations of environmental standards. As we said in *Cauble*, it is neither "the label attached to the money" nor "the [collection] method employed," but "the nature of the offense committed" that determines whether the payment constitutes a penalty.

Id. at 92, 468 S.E.2d at 53.

Similarly, in the present case, that the payment was made to a third party pursuant to a SEP incorporated into a settlement agreement does not change the nature of the payment. The payment would not have been made had DENR not assessed a civil penalty against the City of Kinston for violating a water quality law. To suggest that the payment was voluntary is euphemistic at best. Moreover, the money paid under the SEP did not remediate the specific harm or damage caused by the violation even though a nexus may exist between the violation and the program at the community college to train waste water treatment employees. The payment was still punitive in nature. Nor is the nature of the payment by the City of Kinston or any other violator altered by its being made to a third party pursuant to a policy promulgated by DENR in an attempt to circumvent the statutory and constitutional requirement that the clear proceeds of civil penalties be paid to the Civil Penalty and Forfeiture Fund.

In *Shore v. Edmisten* this Court held that neither statutes nor judgments could be effective "to direct payment of a fine anywhere other than to the counties for the use of the public schools." 290 N.C. at 633, 227 S.E.2d at 558. While the Secretary of DENR is authorized to remit civil penalties, *see, e.g.*, N.C.G.S. § 143-215.6A(f), that authority does not override the constitutional requirement in Article IX, Section 7. The payment in this case was triggered by an environmental violation for which the General Assembly authorized DENR to punish the violator. The statutory authorization may not be changed in form by the unilateral action of DENR. Defendants do not dispute that the payment authorized in the statute is punitive in nature. Thus, a payment to fund a SEP remains punitive.

Defendants also argue that the payments which are required to complete SEPs are remedial rather than punitive. The policy memorandum drafted by DENR employees indicates that the SEP payments are not intended to punish the violator but to improve the environment. However, this Court has held that the terms and descriptions DENR and a violator use to refer to a payment are not determinative. *Craven Cty. Bd. of Educ.*, 343 N.C. at 92, 468 S.E.2d at 53. Defendants further contend that the nature of the SEP itself is remedial rather than punitive. In *Craven County* we held that a penalty's nature is not changed merely because the violator paid it pursuant to a settlement agreement. *Id.*

We note that in their brief defendants argue that pursuant to Article IV, Section 3 of the North Carolina Constitution, DENR, acting through its Secretary, has quasi-judicial powers as may be reasonably necessary to accomplish the purposes for which the agency was created and that in exercising the quasi-judicial power to remit a penalty through the use of the SEP, the Secretary was promoting DENR's purpose of protecting the environment by funding a remedial action necessary to prevent additional harm to the environment. Hence, the action was not without statutory or regulatory authority, nor was it an unconstitutional diversion of public school property or revenue. This argument, however, was not raised in the Court of Appeals and cannot be made for the first time in this Court. *See Pue v. Hood*, 222 N.C. 310, 313, 22 S.E.2d 896, 898 (1942) (parties may not " 'change horses in the middle of the stream' " (citations omitted)).

We affirm the holding of the Court of Appeals that monies paid to fund a SEP, including the money paid by the City of Kinston to Lenoir Community College, are subject to Article IX, Section 7.

XI. The Constitutionality of the Civil Penalty Fund and the School Technology Fund

[10] Plaintiffs contend the Court of Appeals erred by holding that the General Assembly's statutory scheme for distribution of monies gathered pursuant to Article IX, Section 7, codified in Article 31A of Chapter 115C (N.C.G.S. §§ 115C-457.1 to -457.3),[4] is constitutional. Plaintiffs argue that the General Assembly is limited in its ability to direct how the funds are collected and distributed to the local public school systems and for what purposes the funds may be used. We disagree.

The General Assembly created the Civil Penalty Fund in N.C.G.S. § 115C-457.1. The statute reads:

> (a) [ ] There is created the Civil Penalty and Forfeiture Fund. The Fund shall consist of the clear proceeds of all civil penalties and civil forfeitures that are collected by a State agency and are payable to the County School Fund pursuant to Article IX, Section 7 of the Constitution.
>
> . . . .
>
> (b) The Fund shall be administered by the Office of State Budget and Management. The Fund and all interest accruing to the Fund shall be faithfully used exclusively for maintaining free public schools.

N.C.G.S. § 115C-457.1 (2003). The legislature further provided:

> Notwithstanding any other law, all funds which are civil penalties or civil forfeitures within the meaning of Article IX, Section 7 of the Constitution shall be deposited in the Civil Penalty and Forfeiture Fund. The clear proceeds of such funds include the full amount of all such penalties and forfeitures collected under authority conferred by the State, diminished only by the actual costs of collection, not to exceed ten percent (10%) of the amount collected.

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4. Pursuant to the constitutional amendment to Article IX, Section 7, effective 1 January 2005, these statutes were similarly amended consistent with the constitutional amendment. The constitutional amendment added subsection (b) which authorizes the General Assembly to place the clear proceeds of all civil penalties, forfeitures, and fines into a state fund. Act of July 18, 2003, ch. 423, sec. 2, 3, 3.2, 2003 N.C. Sess. Laws 1284, 1284-85.

Id. § 115C-457.2 (2003). The General Assembly additionally prescribed how the funds paid into the Civil Penalty Fund were to be disbursed:

> The Office of State Budget and Management shall transfer funds accruing to the Civil Penalty and Forfeiture Fund to the State School Technology Fund. These funds shall be allocated to counties on the basis of average daily membership.

Id. § 115C-457.3 (2003). Pursuant to N.C.G.S. § 115C-102.6D, the State School Technology Fund ("Technology Fund") is allocated to local school administrative units, but must be used by the local school systems "to implement [each system's] local [school system technology] plan or as otherwise specified by the General Assembly." *Id.* § 115C-102.6D(c) (2003).

The statutory scheme described in N.C.G.S. § 115C-457.1 through -457.3 does not violate Article IX, Section 7 of the North Carolina Constitution. This Court has long recognized that some constitutional provisions are self-executing while others require legislative action to implement and enforce the purpose and mandates of the provision. In *Kitchin v. Wood*, 154 N.C. 446, 154 N.C. 565, 70 S.E. 995 (1911), we held that a self-executing provision is "complete in itself, needs no legislation to give it effect and no special means for its enforcement." *Id.* at 448, 154 N.C. at 568, 70 S.E. at 996. Article IX, Section 7 of our state constitution, applicable to this litigation, does not fall into the category of self-executing provisions. This Court has held previously that the provision requires clarification at least as to the issue of what constitutes "clear proceeds" of the relevant penalties. *Cauble*, 314 N.C. at 602-06, 336 S.E.2d at 62-64. As that holding implies, the constitutional provision does not provide on its face a complete road map of how its mandate is to be implemented and enforced.

Since this constitutional provision is not self-executing, the General Assembly's actions in specifying how the provision's goals are to be implemented must be held to be constitutional unless the statutory scheme runs counter to the plain language of or the purpose behind Article IX, Section 7. "[T]his Court gives acts of the General Assembly great deference, and a statute will not be declared unconstitutional under our Constitution unless the Constitution clearly prohibits that statute." *In re Spivey*, 345 N.C. 404, 413, 480 S.E.2d 693, 698 (1997). Moreover, "a constitution should generally be given, not essentially a literal, narrow, or technical interpretation, but

one based upon broad and liberal principles designed to ascertain the purpose and scope of its provisions." *Elliott v. State Bd. of Equalization*, 203 N.C. 749, 753, 166 S.E. 918, 920-21 (1932). Applying these principles, we hold that Article 31A of Chapter 115C merely specifies details which are omitted from the broad language of Article IX, Section 7.

As quoted above, Article IX, Section 7 of the North Carolina Constitution states that "the clear proceeds of all penalties and forfeitures and of all fines collected in the several counties . . . shall belong to and remain in the several counties, and shall be faithfully appropriated and used exclusively for maintaining free public schools." N.C. Const. art. IX, § 7. Plaintiffs assert that the phrase "shall belong to and remain in the several counties" requires that administrative fines within the purview of this provision must remain in the county where they are paid; thus, the funds are not subject to legislative control and local school boards necessarily have discretion as to how to spend these funds. The constitutional provision, however, does not dictate specifically that funds shall remain in the county where collected, but only within the "several counties." Contrary to plaintiffs' contention, the use of the phrase "several counties" suggests that the drafters intended that the funds not stay in one particular county, but rather in the "several counties" of the State of North Carolina. By directing that funds subject to Article IX, Section 7 of the Constitution be remitted to the Civil Penalty Fund and returned to the county school systems, the General Assembly has fully complied with the mandate embodied in the phrase "belong to and remain in the several counties."

Plaintiffs also submit that the General Assembly has violated the Article IX, Section 7 mandate that the funds be "faithfully appropriated and used exclusively for maintaining free public schools" by requiring that the contents of the Civil Penalty Fund be deposited into the Technology Fund for use solely to implement local school systems' technology plans. However, implementation of technology plans in local public school systems is clearly within the purview of the provision's broad mandate. " '[T]he General Assembly . . . is possessed of full legislative powers unless restrained by express constitutional provision or necessary implication therefrom.' " *Gwathmey v. State ex rel. Dep't of Env't, Health, and Natural Res.*, 342 N.C. 287, 303, 464 S.E.2d 674, 683-84 (1995) (quoting *Thomas v. Sandlin*, 173 N.C. 378, 381, 173 N.C. 329, 331, 91 S.E. 1028, 1029 (1917)), *quoted in Martin v. N.C. Hous. Corp.*, 277 N.C. 29, 41, 175 S.E.2d 665, 671

(1970). Given that Article IX, Section 7 does not explicitly stipulate how civil penalties should be used to maintain public schools, the General Assembly's assignment of these funds to public school systems' technology plans is not unconstitutional. The decision of the Court of Appeals upholding the constitutionality of sections 115C-457.1 through -457.3 is affirmed.

XII. Proper Disposition of Civil Penalties Paid by Public School Systems to State Agencies

[11] Plaintiffs last raise the issue of whether the Court of Appeals properly held that civil penalties paid by the State's public school systems should not be paid into the Civil Penalty Fund for distribution back to school systems. Plaintiffs also dispute the Court of Appeals' decision permitting the payment of $11,000.00 by the Edgecombe County Board of Education to DENR to remain with DENR, the collecting agency, rather than to be paid into the Civil Penalty Fund. We agree with plaintiffs and reverse the Court of Appeals' decision on this issue.

In reaching the conclusion that the funds paid by public schools as civil penalties are not subject to Article IX, Section 7, the Court of Appeals bypassed the *Mussallam* analysis as to whether each payment is punitive or remedial. *N.C. Sch. Bds. Ass'n*, 160 N.C. App. at 281, 585 S.E.2d at 436. Instead, the Court of Appeals cited this Court's statement in *Davenport v. Patrick* that " '[p]ublic policy in this jurisdiction . . . will not permit a wrongdoer to enrich himself as a result of his own misconduct.' " *Id.* (quoting *Davenport v. Patrick*, 227 N.C. 686, 689, 44 S.E.2d 203, 205 (1947)). The Court of Appeals reasoned that to follow strictly the mandate of the Constitution and the statutory scheme devised by the General Assembly would allow the violating school to be "unjustly enriched by its own wrongdoing" and so would violate the public policy of the State. *N.C. Sch. Bds. Ass'n*, 160 N.C. App. at 281-82, 585 S.E.2d at 436.

The dissent in the Court of Appeals relied on the same rationale to reach a different conclusion. Accepting the premise that the public policy of the State precludes an offending school system from receiving any of the funds it paid as a penalty, the dissent nonetheless argued that not all public school systems should be punished for one school system's wrongdoing. As the dissenting opinion states, "[P]ublic policy . . . does not mandate that the remaining school systems should be punished for the wrongdoing of another; it simply mandates that the offending school system be removed from the cal-

culation of how to distribute the funds collected from the offending school system among the remaining public school systems." *Id.* at 288, 585 S.E.2d at 440. The dissent endorses an approach under which monies in the Civil Penalty Fund would be distributed to the school systems eligible under the statute while omitting the system which engaged in wrongdoing. *Id.* We disagree with the approaches suggested by both the majority and the dissent.

Under the plain language of Article IX, Section 7 of the North Carolina Constitution and the enabling statutes, N.C.G.S. §§ 115C-457.1 through -457.3, monies paid by local public school systems as civil penalties must be remitted to the Civil Penalty Fund for return to all of the public schools in the manner dictated by N.C.G.S. § 115C-457.3. Neither the State Constitution nor the statutory scheme makes any exception for schools which committed wrongdoing. Despite any misgivings this Court may have about the wisdom of this omission, "[t]he general rule in North Carolina is that absent 'constitutional restraint, questions as to public policy are for legislative determination.' " *State v. Whittle Communications*, 328 N.C. 456, 470, 402 S.E.2d 556, 564 (1991) (quoting *Gardner v. N.C. State Bar*, 316 N.C. 285, 293, 341 S.E.2d 517, 522 (1986)). We are constrained by the General Assembly's choice not to omit from the distribution scheme those school systems which committed wrongdoings. The nature of the party committing the violation of state law which leads to the civil penalty does not change the nature of the civil penalty itself, which we have held to be determinative as to whether the penalty accrues to the Civil Penalty Fund. *See Mussallam*, 321 N.C. at 508-09, 364 S.E.2d at 366-67. Accordingly, we hold that monies received from civil penalties paid by public schools must be deposited into the Civil Penalty Fund, after which the monies will be distributed to all local public school systems statewide as mandated by statute.

For the foregoing reasons, the opinion of the Court of Appeals is affirmed in part and reversed in part, and the case is remanded to that court for remand to the trial court for proceedings not inconsistent with this opinion.

AFFIRMED IN PART; REVERSED IN PART.

Justice NEWBY did not participate in the consideration or decision of this case.

STATE OF NORTH CAROLINA *EX REL.* UTILITIES COMMISSION, PUBLIC STAFF—NORTH CAROLINA UTILITIES COMMISSION, ATTORNEY GENERAL, ROY COOPER, CAROLINA UTILITY CUSTOMERS ASSOCIATION, INC., CAROLINA INDUSTRIAL GROUPS FOR FAIR UTILITY RATES I AND II, VIRGINIA ELECTRIC AND POWER COMPANY D/B/A DOMINION NORTH CAROLINA POWER, NORTH CAROLINA MUNICIPAL POWER AGENCY NUMBER 1, AND NORTH CAROLINA EASTERN MUNICIPAL POWER AGENCY, INC. V. CAROLINA POWER & LIGHT COMPANY, DUKE POWER COMPANY, AND NORTH CAROLINA ELECTRIC MEMBERSHIP CORPORATION

No. 649A03

(Filed 1 July 2005)

Utilities— sales of electricity to wholesale customers—doctrine of preemption

The Court of Appeals erred by concluding that federal law has preempted the authority of the North Carolina Utilities Commission (NCUC) over proposed contracts involving sales of electricity by North Carolina utilities to wholesale customers in interstate commerce and NCUC has authority to conduct a pre-sale review of a utility's proposed grant of native load priority to a wholesale customer that will be supplied from the same generating plants as retail customers, because: (1) while Congress granted the Federal Energy Regulatory Commission (FERC) exclusive jurisdiction over wholesale sale of electricity in interstate commerce, it nevertheless intended that the states and their utilities commissions retain their traditional authority over generating facilities and local supply adequacy and reliability; (2) the review authority that NCUC possesses is necessary to enable it to fulfill its obligation under the North Carolina Public Utilities Act by ensuring that a regulated public utility has sufficient generating resources to provide reliable and adequate service to its captive retail ratepayers; and (3) NCUC's pre-sale review of the proposed grants of native load priority does not make compliance with both federal and state regulations a physically impossibility nor does it stand as an obstacle to the accomplishment and execution of the full purposes and objectives of the Federal Power Act since the scope of NCUC's review does not include the authority to inquire into the prudence and fairness of a proposed contract or the power to overrule FERC.

Justice MARTIN dissenting.

Justice BRADY joining in the dissenting opinion.

Justice NEWBY did not participate in the consideration or decision of this case.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 161 N.C. App. 199, 588 S.E.2d 77 (2003), vacating orders entered 10 July 2002 by the Utilities Commission, Docket No. E-100, Sub 85A, in Raleigh, North Carolina, and dismissing the proceeding with prejudice. Heard in the Supreme Court 11 May 2004.

Roy Cooper, Attorney General, by Leonard G. Green, Assistant Attorney General, for appellant Attorney General.

Robert P. Gruber, Executive Director, and Antoinette R. Wike, Chief Counsel, by Gisele L. Rankin, Staff Attorney, for appellant Public Staff—North Carolina Utilities Commission.

West Law Offices, P.C., by James P. West, for appellant Carolina Utility Customers Association, Inc.

Bailey & Dixon, L.L.P., by Ralph McDonald, for appellant Carolina Industrial Group for Fair Utility Rates II.

Hunton & Williams, by Edward S. Finley, Jr., for appellees Carolina Power & Light Company, Duke Power Company, and intervenor North Carolina Electric Membership Corporation; Len S. Anthony for appellee Progress Energy (formerly, Carolina Power & Light Company); Kodwo Ghartey-Tagoe for appellee Duke Power Company; and Robert B. Schwentker and Thomas K. Austin for intervenor-appellee North Carolina Electric Membership Corporation.

Poyner & Spruill LLP, by Michael S. Colo, Thomas R. West, and Pamela A. Scott, for intervenor-appellees North Carolina Municipal Power Agency Number 1 and North Carolina Eastern Municipal Power Agency, Inc.

Steptoe & Johnson LLP, by Steven J. Ross, on behalf of Edison Electric Institute, amicus curiae.

EDMUNDS, Justice.

In this matter, we consider the extent to which federal law has preempted the authority of the North Carolina Utilities Commission over proposed contracts involving sales of electricity by North Carolina utilities to wholesale customers in interstate commerce.

Because we hold that the power to review such proposed contracts is consistent with the duties imposed upon the Utilities Commission by our General Assembly and is not preempted by federal law, we reverse the holding of the North Carolina Court of Appeals.

On 17 November 1998, Carolina Power & Light Company (CP&L) applied to the North Carolina Utilities Commission (NCUC) for permission to construct additional generating capacity in Rowan and Richmond Counties. The application, filed pursuant to N.C.G.S. § 62-110.1, was given Docket Number E-2, Sub 733. Related documents indicate that CP&L sought to construct new generating plants both because it anticipated increased demand arising from normal load growth and because it intended to enter into contracts to sell electric power to two wholesale customers, the South Carolina Public Service Authority (also known as Santee Cooper) and the North Carolina Electric Membership Corporation (NCEMC), outside the service area in which CP&L sold electricity to retail customers. As a public utility, CP&L is required to secure and maintain adequate resources to meet anticipated demands for electricity in its assigned service area. The contracts provided that CP&L would guarantee service reliability to these new wholesale customers at "native load priority." A grant of native load priority would ensure that the new wholesale customers would receive power at the same level of reliability as CP&L's existing retail customers. Under this proposed arrangement, in the event of a power shortage, CP&L would not interrupt the energy supply to the wholesale customers any sooner than it would interrupt the supply to its retail customers.

Evidence obtained during the Docket No. E-2, Sub 733 proceeding revealed that in 1998, CP&L initially had indicated that it planned to add 1,500 megawatt (MW) capacity to its facilities in the 2002-2007 period. However, CP&L now planned to accelerate the construction and also increase its capacity to 1,600 MW in the 2001-2002 period. Additional evidence indicated that CP&L's demand and energy forecasts showed that, unless the requested 1,600 MW capacity was added to its system, CP&L's capacity margin would fall to a level of negative 1.4 percent by the summer of 2003, thus preventing it from being able to provide reliable service to meet the needs of its customers, including the proposed new wholesale customers. CP&L's reliability analysis showed a target capacity margin of thirteen percent would be appropriate to allow it to have sufficient capacity to meet the needs of all its customers.

On 2 November 1999, NCUC issued an order granting the requested certificates for construction of two new power facilities. The order contained additional provisions that "CP&L shall fully consider the wholesale market for future generation resource additions that will be used in whole or in part to serve retail customers whether by formal RFP [requests for proposals] or other measures that ensure a complete evaluation of the market" and that "CP&L shall ensure that its retail electric customers will not be disadvantaged in any manner, either from a quality of service or rate perspective, as a result of its participation in the wholesale power market."

In response to the issues raised by CP&L's request in Docket No. E-2, Sub 733, and because no Commission rules or guidelines existed to address situations in which "(1) a utility desires to enter into a contract to serve off-system load at native load priority and/or (2) a utility . . . seeks a certificate to construct generation capacity to serve such off-system load[,]" the Public Staff requested that NCUC initiate a generic proceeding to address similar future situations that were likely to arise in the developing wholesale market. Accordingly, NCUC initiated Docket No. E-100, Sub 85 by order dated 17 November 1999. After twelve parties submitted comments, on 26 April 2000 NCUC concluded that the Docket No. E-100, Sub 85 proceeding "should be held in abeyance pending resolution of electric industry restructuring issues by the legislature or until some future event warrant[ed] further consideration of the issues."

On 22 August 2000, NCUC issued an order in Docket No. E-2, Sub 760, a proceeding that concerned a proposed merger of CP&L and Florida Progress Corporation. This order approved the merger and a concomitant issuance of securities but included several conditions. Of these, Regulatory Condition 21 provided

> CP&L shall not enter into contracts for the sale of energy and/or capacity at native load priority and/or under such terms and conditions as to cause the purchasing entity to fall within the definition of "native load" in the Integration Agreement without first giving the NCUC and the Public Staff written notice 20 days in advance of such a contract being executed.

NCUC's justification for imposing this notice obligation was to provide a mechanism through which NCUC meaningfully could enforce the requirement "that CP&L's retail native load customers receive priority with respect to, and the benefits from, CP&L's existing generation and that CP&L's wholesale activities not disadvantage its retail

ratepayers from either a quality of service or rate perspective." Because this proceeding was not generic, the notice provision applied only to CP&L.

CP&L did not resist the imposition of this provision. However, after the order approving the merger of CP&L and Florida Progress Corporation was issued, the Public Staff, CP&L, and NCEMC filed a motion requesting that NCUC amend the order to include Regulatory Condition 20a. This proposed modification provided that if CP&L complied with the twenty-day notice requirement in Regulatory Condition 21 and NCUC did not affirmatively order CP&L not to enter into such wholesale contracts, then "the retail native loads of these wholesale buyers that are served pursuant to said future contracts between those wholesale buyers and CP&L also shall be considered CP&L's retail native load for purposes of Conditions 19 and 20" of the order. NCUC accepted new Condition 20a by order dated 8 November 2000, amending its 22 August 2000 order.

Thereafter, pursuant to Regulatory Condition 21, on 31 January 2002, CP&L filed in Docket No. E-2, Sub 798 a twenty-day notice of intent to enter into two wholesale contracts for the sale of electricity at native load priority. When objections were raised, CP&L argued that while NCUC "retains authority to address retail rates and cost allocation issues, the Federal Power Act authorizes the Federal Energy Regulatory Commission (FERC) to regulate interstate wholesale electric power transactions" and that "FERC's authority over such transactions is exclusive 'and is not shared with state regulatory agencies.' " NCUC authorized CP&L to go ahead with the proposed contracts by order dated 26 February 2002.

The substantive and jurisdictional issues raised in Docket No. E-2, Sub 798 prompted NCUC to initiate on 11 March 2002 a new proceeding, Docket No. E-100, Sub 85A, for the purpose of investigating, *inter alia*, NCUC's jurisdiction with respect to wholesale contracts at native load priority and the extent to which that jurisdiction either complements or conflicts with FERC's jurisdiction in that field; the extent to which NCUC's jurisdiction is preempted once a wholesale contract at native load priority is signed; and what action NCUC could undertake to protect retail ratepayers as to retail rates and reliability. After receiving briefs from interested parties, NCUC concluded in an order entered in Docket No. E-100, Sub 85A dated 10 July 2002 that "it has jurisdiction and authority under State law to review, before they are signed, proposed wholesale contracts by a regulated North Carolina public utility granting native load priority to

be supplied from the same plant as retail ratepayers." NCUC further concluded that it has authority "to take appropriate action if necessary to secure and protect reliable service to retail customers in North Carolina." In addition, NCUC determined that this jurisdiction and authority is not preempted by federal law.

Shortly thereafter, CP&L, Duke Power, and NCEMC filed a motion asking NCUC "to reconsider and clarify the Order, to clearly state that [NCUC] has no jurisdiction to either prohibit a North Carolina utility from entering into a wholesale contract or to delay such utility entering into a wholesale sale contract." NCUC denied the motion, and CP&L, Duke Power, and NCEMC appealed to the North Carolina Court of Appeals. That court found that, under the Federal Power Act (FPA), Congress granted FERC exclusive jurisdiction over the regulation of the wholesale sale of electric energy in interstate commerce. Accordingly, the Court of Appeals vacated the 10 July 2002 order that NCUC had issued in Docket No. E-100, Sub 85A on the grounds that such orders were preempted by the FPA and violated the Supremacy Clause of the United States Constitution. *State ex rel. Utils. Comm'n v. Carolina Power & Light Co.*, 161 N.C. App. 199, 209, 588 S.E.2d 77, 83 (2003). Judge Wynn dissented, contending that no conflict existed between NCUC's order and federal law. *Id.* at 211, 588 S.E.2d at 84-85 (Wynn, J., dissenting). The North Carolina Attorney General, Public Staff—NCUC, Carolina Utility Customers Association, Inc., and Carolina Industrial Group for Fair Utility Rates II appeal on the basis of the dissent. Because this Court denied appellees' petition for discretionary review of additional issues, we consider only the issue raised in Judge Wynn's dissent.

Before we begin our analysis of the issues raised in this appeal, we review the relationship between North Carolina's Public Utilities Act, N.C.G.S. §§ 62-1 to -333 (2003), and the FPA. The General Assembly has determined that "the rates, services and operations of public utilities . . . are affected with the public interest and that the availability of an adequate and reliable supply of electric power . . . to the people, economy and government of North Carolina is a matter of public policy." *Id.* § 62-2(a). Accordingly, our legislature has conferred upon NCUC the authority "to regulate public utilities generally, their rates, services and operations, and their expansion in relation to long-term energy conservation and management policies and statewide development requirements." *Id.* § 62-2(b); *see also id.* § 62-30 (granting NCUC "general power and authority to supervise and control the public utilities of the State"). Thus, NCUC is respon-

sible for ensuring that, in exchange for having a monopoly in its franchise area, *see State ex rel. Utils. Comm'n v. Morgan*, 277 N.C. 255, 263, 177 S.E.2d 405, 410 (1970), a public utility provides adequate and reliable service to North Carolina citizens at reasonable rates. *State ex rel. Utils. Comm'n v. Thornburg*, 314 N.C. 509, 511, 334 S.E.2d 772, 773 (1985); *State ex rel. Utils. Comm'n v. S. Bell Tel. & Tel. Co.*, 307 N.C. 541, 545, 299 S.E.2d 763, 765 (1983); *see also* N.C.G.S. §§ 62-32, -110.1(d).

NCUC is required to "keep informed as to the public utilities, their rates and charges for service, and the service supplied and the purposes for which it is supplied." N.C.G.S. § 62-33. If NCUC finds that a utility's service is "inadequate" or that "any other act is necessary to secure reasonably adequate service or facilities and reasonably and adequately to serve the public convenience and necessity," the Public Utilities Act mandates that NCUC "enter . . . an order directing that such additions, extensions, repairs, improvements, or additional services or changes [to the existing plant or facilities] shall be made or affected within a reasonable time prescribed in the order." *Id.* § 62-42(a); *see also id.* § 62-32(b).

In addition, because public utilities are prohibited from constructing generating facilities without first obtaining a certificate of public convenience and necessity, *id.* § 62-110.1(a), NCUC is obligated to maintain an analysis of long-range needs for expansion of generating facilities, *id.* § 62-110.1(c). This analysis includes NCUC's "estimate of the probable future growth of the use of electricity, the probable needed generating reserves, . . . and arrangements for pooling power to the extent not regulated by the Federal Power Commission and other arrangements with other utilities and energy suppliers to achieve maximum efficiencies for the benefit of the people of North Carolina." *Id.* When a utility petitions to construct any additional facilities for the generation of electricity, NCUC is required to consider the applicant's "arrangements with other electric utilities for [the] interchange of power . . . [or] purchase of power" in acting upon the petition. *Id.* § 62-110.1(d). These sections of the Public Utilities Act indicate that NCUC has a duty to stay apprised of a utility's generating capacity and reserve margins to ensure that North Carolina citizens, including the utility's retail customers, receive adequate and reliable service.

While the North Carolina Public Utilities Act grants NCUC jurisdiction over intrastate sales and interstate retail sales of electric energy, as well as over the quality and reliability of local electric serv-

ice, the Federal Power Act granted the Federal Power Commission (FPC), FERC's predecessor, exclusive jurisdiction over the transmission and wholesale sale[1] of electric energy in interstate commerce. 16 U.S.C. § 824(b)(1) (2000) (originally enacted as Public Utility Act of 1935, ch. 687, § 201(b), 49 Stat. 803, 847-48); *see also New York v. FERC*, 535 U.S. 1, 5-9, 152 L. Ed. 2d 47, 55-57 (2002) (discussing the legislative history of the FPA and jurisdiction of the FPC and FERC); *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 965-66, 90 L. Ed. 2d 943, 954 (1986) (establishing FERC's exclusive jurisdiction over interstate sales by a utility to wholesale customers and over wholesale rates and charges); *FPC v. S. Cal. Edison Co.*, 376 U.S. 205, 210, 11 L. Ed. 2d 638, 643 (1964) (same). However, the FPA expressly preserves NCUC's jurisdiction over utilities' generating plants. Section 824(a) declares that federal regulation is "to extend only to those matters which are not subject to regulation by the States." 16 U.S.C. § 824(a) (2000). While this provision of the FPA has been labeled a "policy declaration" that "cannot nullify a clear and specific grant of jurisdiction," *Conn. Light & Power Co. v. FPC*, 324 U.S. 515, 527, 89 L. Ed. 1150, 1158-59 (1945), nevertheless "such a declaration is relevant and entitled to respect as a guide in resolving any ambiguity or indefiniteness in the specific provisions which purport to carry out its intent . . . [and] cannot be wholly ignored[,]" *id.* at 527, 89 L. Ed. at 1159. Section 824(b)(1) then provides, in part:

> [FERC] shall have jurisdiction over all facilities for such transmission or sale of electric energy, but shall not have jurisdiction, except as specifically provided in this subchapter and subchapter III of this chapter, over facilities used for the generation of electric energy or over facilities used in local distribution or only for the transmission of electric energy in interstate commerce, or over facilities for the transmission of electric energy consumed wholly by the transmitter.

16 U.S.C. § 824(b)(1). The United States Supreme Court has stated that this provision should "be read in harmony with [section 824(a)]." *Conn. Light & Power Co.*, 324 U.S. at 529, 89 L. Ed. at 1160.

Consistent with these provisions of the FPA, when FERC sought to open the wholesale power market to competition, it issued Order No. 888. Order No. 888, 61 Fed. Reg. 21,540 (May 10, 1996)

1. Although the North Carolina Public Utilities Act does not contain a definition of the term "wholesale," the FPA defines "sale of electric energy at wholesale" as "a sale of electric energy to any person for resale." 16 U.S.C. § 824(d) (2000).

("Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities"). This order acknowledged that states would retain significant control over local matters. *Id.* at 21,626 n.543 ("Among other things, Congress left to the States authority to regulate generation and transmission siting."). FERC further declared that Order No. 888 "will not affect or encroach upon state authority in such traditional areas as the authority over local service issues, including reliability of local service . . . [and] utility generation and resource portfolios." *Id.* at 21, 626 n.544, *cited in New York v. FERC*, 535 U.S. at 24, 152 L. Ed. 2d at 66 (citing Order No. 888, FERC Stats. & Regs. at 31,782 n.544); *see also State ex rel. Utils. Comm'n v. Thornburg*, 314 N.C. at 511, 334 S.E.2d at 773 (discussing generally the scope of NCUC's powers and duties under the North Carolina Public Utilities Act).

Thus, we see that while Congress granted FERC exclusive jurisdiction over the wholesale sale of electricity in interstate commerce, it nevertheless intended that the states and their utilities commissions retain their traditional authority over generating facilities and local supply adequacy and reliability. With this background, we now consider the issue of preemption raised in this appeal.

The Court of Appeals concluded that NCUC's 10 July 2002 order was "preempted by the FPA and violate[d] the Supremacy Clause of the Constitution of the United States." 161 N.C. App. at 209, 588 S.E.2d at 83. In response, NCUC argues before this Court that federal law does not preempt its authority to ensure that a regulated public utility has sufficient generating resources reliably and adequately to serve its retail customers. Accordingly, NCUC claims that it may conduct a pre-sale review of a utility's proposed grant of native load priority to a wholesale customer that will be supplied from the same generating plants as the utility's existing retail ratepayers.

The constitutional principle underlying the doctrine of preemption is the avoidance of conflicting regulation of conduct by various official bodies (such as NCUC and FERC), each of which has a degree of authority over the subject matter at issue. *See* John E. Nowak & Ronald D. Rotunda, *Constitutional Law* § 9.1, at 348 (6th ed. 2000). The United States Supreme Court has noted that preemption of state law by federal law can raise two distinct legal questions. *New York v. FERC*, 535 U.S. at 17, 152 L. Ed. 2d at 62. The first, which arises when determining the scope of a federal agency's power conferred upon it by Congress, *id.* at 18, 152 L. Ed. 2d at 62-63 (citing *La.*

Pub. Serv. Comm'n v. FCC, 476 U.S. 355, 374, 90 L. Ed. 2d 369, 385 (1986)), is not a concern in the instant case. Instead, we must address the other legal question that can arise in the context of preemption, that is, "whether a given state authority conflicts with, and thus has been displaced by, the existence of Federal Government authority." *Id.* at 17-18, 152 L. Ed. 2d at 62.

A reviewing court confronting this question begins its analysis with a presumption against federal preemption. *Hillsborough Cty. v. Automated Med. Labs., Inc.*, 471 U.S. 707, 715, 85 L. Ed. 2d 714, 722-23 (1985) ("Where . . . the field that Congress is said to have pre-empted has been traditionally occupied by the States 'we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.' ") (alteration in original) (citations omitted); *see also New York v. FERC*, 535 U.S. at 17-18, 152 L. Ed. 2d at 62. Furthermore, as discussed above, Congress has chosen not to displace entirely state regulation of public utilities. 16 U.S.C. § 824(a), (b)(1). Consequently, NCUC's 10 July 2002 order is not preempted unless it actually conflicts with federal law. *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 204, 75 L. Ed. 2d 752, 765 (1983). "Such a conflict arises when 'compliance with both federal and state regulations is a physical impossibility,' or where state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' " *Id.* (citations omitted); *see also Pearson v. C.P. Buckner Steel Erection Co.*, 348 N.C. 239, 244, 498 S.E.2d 818, 821 (1998).

NCUC and other appellants argue that such a pre-sale review is not a traditional review of the prudence of the business practices of public utilities. *See*, *e.g.*, N.C.G.S. §§ 62-133, -133.2. Instead, NCUC contends that this review power has been granted "for the purpose of enforcing its lawfully imposed merger and certificate conditions and as part of the NCUC's assessment of generating supply adequacy."[2] *See id.* § 62-110.1(a), (c). As described above, in Docket No. E-2, Sub 733, CP&L applied to NCUC for certificates that would permit construction of additional generating capacity in Rowan and Richmond Counties. CP&L's need for these plants was created in part by its proposed contracts to sell power to two new wholesale customers at

2. The only issue raised and argued in the instant appeal addresses NCUC's jurisdiction as related to its responsibility to monitor certain proposed contracts to ensure the availability of adequate and reliable power to a utility's retail customers. Accordingly, we do not address NCUC's authority over mergers and certifications.

native load priority. NCUC granted the requested certificates. However, when it issued the certificates, NCUC also required "[t]hat CP&L shall fully consider the wholesale market for future generation resource additions that will be used in whole or in part to serve retail customers whether by formal RFP or other measures that ensure a complete evaluation of the market" and that "CP&L shall ensure that its retail electric customers will not be disadvantaged in any manner, either from a quality of service or rate perspective, as a result of its participation in the wholesale power market." To ensure CP&L's compliance with these requirements, NCUC's order concerning CP&L's proposed merger with Florida Progress Corporation, Docket No. E-2, Sub 760, contained Regulatory Condition 21 (quoted above), which required a twenty-day notice to NCUC and the Public Staff of any proposed contract for the sale of wholesale power at native load priority.

While the 10 July 2002 order is now at issue rather than the two proceedings described immediately above, those proceedings were the impetus behind NCUC's initiation of Docket No. E-100, Sub 85A that resulted in the 10 July 2002 order. For example, evidence in the No. E-2, Sub 733 certificate proceedings indicated that unless CP&L added the requested megawatt capacity to its system, its capacity margin would fall to negative 1.4 percent, even though reliability analysis showed a target capacity margin of thirteen percent was appropriate for CP&L to meet its customers' requirements. When acting on a utility's petition for construction, NCUC needed this information to fulfill its statutory duties under N.C.G.S. § 62-110.1(c) and (d) to take into account both estimated future electrical energy demands and the petitioning utility's arrangements with other utilities. Furthermore, because the electric power CP&L would be selling at wholesale in an interstate market was to be generated from the same facilities that served its retail customers, knowledge of the proposed wholesale contracts was relevant to NCUC's duties to ensure that utility companies provide adequate and reliable service to the people of North Carolina. *See* N.C.G.S. §§ 62-2, -32, -33, -42; *State ex rel. Utils. Comm'n v. Thornburg*, 314 N.C. at 511, 334 S.E.2d at 773. Accordingly, we believe NCUC's actions in the No. E-2, Sub 733 and Sub 760 proceedings and NCUC's declaration of authority in the 10 July 2002 order were consistent both with the agency's duties and with the powers conferred upon it by the Public Utilities Act.

Moreover, NCUC's power to examine a utility's proposed contract granting native load priority to a wholesale customer does not con-

flict with FERC's authority to make prudence inquiries concerning wholesale rates and charges. Under the FPA, all wholesale rates must be just and reasonable and filed with FERC. 16 U.S.C. § 824d(a), (c) (2000). FERC has the power to review such rates and charges, as well as the contracts that affect them, to ensure they are not "unjust, unreasonable, [or] unduly discriminatory or preferential." *Id.* § 824e(a) (2000). If, after conducting such an inquiry, FERC finds that the rates or charges in question violate these provisions, the agency is then required to "determine the just and reasonable rate, charge, . . . or contract" and fix or enforce "the same by order." *Id.* Moreover, section 824e(d) grants FERC authority to "investigate and determine the cost of the production or transmission of electric energy by means of facilities under the jurisdiction of [FERC] in cases where [FERC] has no authority to establish a rate governing the sale of such energy." *Id.* § 824e(d) (2000).

In contrast, NCUC's review of a proposed grant of native load priority for wholesale customers serves a different purpose. NCUC's review allows it to remain apprised of pertinent matters of local concern, including the adequacy of the state's supply of electricity, North Carolina's public utilities' capacity and reserve margins, and any need for additional generating capacity. As FERC has noted, issues of local energy service, such as generating facilities and reliability of production, traditionally have been left to the states. *See* Order No. 888, 61 Fed. Reg. at 21,626 nn.543-44; *see also* 16 U.S.C. § 824(a), (b)(1). Therefore, while NCUC's review takes into account the intrastate consequences of the proposed contract, it does not duplicate FERC's inquiry into the prudence and fairness of the contract.

The proceedings in Docket No. E-2, Sub 798 further illustrate that NCUC's responsibilities do not clash with those of FERC. In Sub 798, CP&L filed the twenty-day notice mandated by Regulatory Condition 21 of Docket No. E-2, Sub 760, advising of its intent to enter into two wholesale contracts for the sale of power at native load priority. The Public Staff reviewed the contracts and, concluding that the contracts would not disadvantage CP&L's retail customers, raised no objections to CP&L's proposed activities. NCUC's twenty-day requirement did not inhibit CP&L from entering into the contracts or infringe upon the rates, charges, costs or other terms of the proposed sales. Although *amicus* Edison Electric Institute argues that such notice requirements hamper a utility's ability to respond quickly to the demands of a volatile market, we believe that NCUC has the expertise to consider the possible economic impact of such

notice conditions and the authority to impose them under appropriate circumstances.

NCUC's ability to conduct a pre-sale review for the purpose of evaluating the consequences of a proposed wholesale contract, when such review does not include the power to set rates in an interstate wholesale contract for the purported purpose of protecting North Carolina consumers or to conduct a prudence inquiry, distinguishes the instant case from *Appalachian Power Co. v. Public Serv. Comm'n*, 812 F.2d 898 (4th Cir. 1987), and *Utah v. FERC*, 691 F.2d 444 (10th Cir. 1982), both of which are cited in the Court of Appeals majority opinion and in the appellees' briefs to this Court. In *Appalachian Power Co.*, the Public Service Commission of West Virginia, acting pursuant to a state statute, sought to examine the prudence of an agreement between utilities operating in several states. 812 F.2d at 900-01. Under the agreement, the costs of wholesale interstate energy transmission would be allocated among the utilities, all of whom were members of a holding company. *Id.* The Fourth Circuit rejected the West Virginia Commission's assertion of state statutory authority, holding that such authority was preempted by the FPA because FERC "has exclusive jurisdiction to consider the merits of the interstate agreement." *Id.* at 900.

Similarly, in *Utah v. FERC*, the Public Service Commission of Utah issued an order requiring Utah Power, a public utility, "to submit for its approval all contracts for the sale of power to any customer or other utility . . . if the applicant intended to use any facilities over which the [Utah] Commission had jurisdiction." 691 F.2d at 446. Subsequently, the Utah Commission reviewed a wholesale agreement between Utah Power, which provided electric service to retail customers in Utah, Idaho and Wyoming, and Sierra Pacific Power Company, which provided retail electric service in Nevada and California. *Id.* at 445. The Utah Commission found that the agreement was "not in the best interest of" Utah Power's Utah customers and "ordered Utah Power to terminate firm service under the resale electric agreement as of December 31, 1984, unless there could be a renegotiation of the contract providing for rates reflecting incremental costs of supplying such service." *Id.* at 446. The Tenth Circuit rejected the Utah Commission's actions, holding that FERC had "exclusive authority in the area under consideration." *Id.* Examining previous utility cases, the court noted that rates in such wholesale agreements were "not subject to regulation by . . . the . . . states in the guise of protection of their respective local interests." *Id.* at 447.

Here, unlike the West Virginia Commission, NCUC is not claiming through its 10 July 2002 order the authority to overrule or second-guess an agreement filed with or approved by FERC and subject to FERC's jurisdiction. *See Appalachian Power Co.*, 812 F.2d at 900-03, 905. Moreover, in contrast to the Utah Commission's attempted actions, NCUC is not attempting to set rates in a wholesale agreement. *See Utah v. FERC*, 691 F.2d at 446-47. Because the scope of NCUC's review does not include the authority to inquire into the prudence of a proposed contract or the power to overrule FERC, we do not perceive that NCUC's pre-sale review of the proposed grants of native load priority makes " 'compliance with both federal and state regulations . . . a physical impossibility,' or . . . 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of [the FPA].' " *Pac. Gas & Elec. Co.*, 461 U.S at 204, 75 L. Ed. 2d at 765 (citations omitted). Therefore, there is no "actual conflict between the two schemes of regulation that both cannot stand in the same area" and NCUC's actions are not preempted. *Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 141, 10 L. Ed. 2d 248, 256 (1963).

Accordingly, we hold that federal law does not preempt NCUC's authority to conduct a pre-sale review of a utility's proposed grant of native load priority to a wholesale customer that will be supplied from the same generating plants as retail customers. The review authority that NCUC possesses is necessary to enable it to fulfill its obligations under the North Carolina Public Utilities Act by ensuring that a regulated public utility has sufficient generating resources to provide reliable and adequate service to its captive retail ratepayers.

Based on the foregoing, the decision of the Court of Appeals is reversed. The case is remanded to the Court of Appeals for consideration of the remaining issues.

REVERSED AND REMANDED.

Justice NEWBY did not participate in the consideration or decision of this case.

Justice MARTIN dissenting.

In reversing our Court of Appeals and holding that federal law does not preempt the North Carolina Utilities Commission (NCUC) order at issue under the Federal Power Act (FPA), the majority has,

in pursuit of an admittedly worthy objective, obscured the boundaries of clear and unambiguous federal preemption doctrine. At least six times in its opinion, the majority invokes the laudable goal of ensuring a stable supply of electricity for retail customers. NCUC may legitimately pursue this goal by seeking federal review of proposed interstate electricity contracts perceived to be "unjust, unreasonable, unduly discriminatory or preferential," 16 U.S.C. § 824e(a) (2000). NCUC may not, however, permissibly vest itself with jurisdiction to conduct pre-execution review of wholesale interstate electricity contracts. For better or worse, federal law preempts concurrent state regulation of interstate wholesale electricity contracts.

The Federal Energy Regulatory Commission (FERC) is the agency empowered with exclusive authority to pass on the propriety of wholesale electricity contracts. FERC has the authority to determine if wholesale rates and the contracts affecting them are "just and reasonable". 16 U.S.C. §§ 824d(a), 824e(a); *see also Utah v. FERC*, 691 F.2d 444, 448 (10th Cir. 1982) ("[FERC] can modify any rate, charge or classification or any rule, regulation, practice or contract affecting such rate if [FERC] finds it to be unjust, unreasonable, unduly discriminatory or preferential."). In the event that NCUC believes a contract is "unjust, unreasonable, unduly discriminatory or preferential," federal law empowers NCUC to seek FERC review. 16 U.S.C. § 824e(a). But NCUC cannot vest itself, consistent with federal preemption doctrine, with jurisdiction to conduct pre-execution review of wholesale interstate electricity contracts.

It is well settled that federal preemption doctrine arises from the Supremacy Clause of the United States Constitution, which states that the Constitution and Laws of the United States "shall be the supreme Law of the Land." U.S. Const. art. VI, cl. 2. The basic premise of preemption doctrine is that federal law supersedes state laws that "interfere with, or are contrary to" federal law. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 211, 6 L. Ed. 23, 73 (1824). Congress can preempt state law by express terms. *Jones v. Rath Packing Co.*, 430 U.S. 519, 525, 51 L. Ed. 2d 604, 614 (1977). Congress can also preempt state law by enacting a scheme of federal regulation so pervasive in a given field that there is no room for concurrent state regulation. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 91 L. Ed. 1447, 1459 (1947). When Congress has not completely displaced state regulation in a given field, federal law invalidates any conflicting state law. *Hillsborough Cty. v. Automated Med. Labs., Inc.*, 471 U.S. 707, 713, 85 L. Ed. 2d 714, 721 (1985). Conflict can arise when compliance with

both state and federal law is a "physical impossibility." *Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43, 10 L. Ed. 2d 248, 257 (1963). Conflict can also arise when state law either conflicts with or presents "an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 66-67, 85 L. Ed. 581, 586-87 (1941); *see also Owens v. Pepsi Cola Bottling Co.*, 330 N.C. 666, 675, 412 S.E.2d 636, 641 (1992).

I acknowledge that when a case concerns the validity of state regulation in a field traditionally occupied by the states, there is a presumption against federal preemption. *Hillsborough Cty.*, 471 U.S. at 715-16, 85 L. Ed. 2d at 722-23. Moreover, it is undisputed that states do possess authority to regulate many aspects of electricity, such as retail sales. *See Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 970, 90 L. Ed. 2d 943, 956 (1986) (noting that states have "undoubted jurisdiction over retail sales"). The instant case, however, presents a conflict between the NCUC order in question and federal electricity law.

The origins of federal preemption of wholesale electricity sales can be traced to *Public Utilities Commission v. Attleboro Steam & Electric Co.*, 273 U.S. 83, 71 L. Ed. 549 (1927). The plaintiff in *Attleboro* was a Rhode Island utility, which sold power to a Massachusetts utility. *Id.* at 84-85, 71 L. Ed. at 551. After reviewing the contract between the two utilities and finding the contract rate unreasonably low, the Public Utilities Commission of Rhode Island issued an order increasing the rate to be charged for the interstate electricity service at issue. *Id.* at 85-86, 71 L. Ed. at 551-52. The United States Supreme Court noted that nothing would prevent Massachusetts from taking retaliatory action and reducing the rate. *Id.* at 90, 71 L. Ed. at 554. Stating that "the paramount interest in the interstate business carried on between the two companies is not local to either State, but is essentially national in character," the United States Supreme Court held that only Congress could regulate the rate for interstate sales of electricity. *Id.* This case created the "*Attleboro* gap" in utilities regulation, i.e., states could not regulate interstate wholesale sales yet Congress had not stepped in with wholesale regulation of its own. Congress eventually filled this gap with the FPA, which regulated wholesale electricity sales in interstate commerce. 16 U.S.C. § 824. *See generally New York v. FERC*, 535 U.S. 1, 5-7, 152 L. Ed. 2d 47, 55-56 (2002) (tracing the history of the FPA).

The FPA states that federal regulation is necessary for "that part of such business which consists of the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce." 16 U.S.C. § 824(a). Federal regulation is to extend "only to those matters which are not subject to regulation by the States." *Id.* The FPA defines a wholesale sale as "a sale of electric energy to any person for resale." 16 U.S.C. § 824(d).

In discussing the relationship between *Attleboro* and the FPA, the United States Supreme Court has stated that "[*Attleboro*] left no power in the states to regulate licensees' sales for resale in interstate commerce, while the [FPA] established federal jurisdiction over such sales." *United States v. Pub. Utils. Comm'n*, 345 U.S. 295, 311, 97 L. Ed. 1020, 1035 (1953). Since then, United States Supreme Court decisions have made clear that FERC has plenary authority over wholesale sales of electric power. *See Miss. Power & Light Co. v. Miss. ex rel. Moore*, 487 U.S. 354, 374, 101 L. Ed. 2d 322, 340 (1988) ("Congress has drawn a bright line between state and federal authority in the setting of wholesale rates and in the regulation of agreements that affect wholesale rates."); *Nantahala*, 476 U.S. at 966, 90 L. Ed. 2d at 954 ("A State must rather give effect to Congress' desire to give FERC plenary authority over interstate wholesale rates, and to ensure that the States do not interfere with this authority."); *FPC v. S. Cal. Edison Co.*, 376 U.S. 205, 216, 11 L. Ed. 2d 638, 646 (1964) (stating that Congress gave FERC's predecessor, the Federal Power Commission, exclusive jurisdiction over wholesale sales in interstate commerce).

At issue in the present case is an order entered by the NCUC on 10 July 2002 in Docket No. E-100, Sub 85A, which states:

> The Commission concludes that it has jurisdiction and authority under State law to review, before they are signed, proposed *wholesale contracts* by a regulated North Carolina public utility granting native load priority to be supplied from the same plant as retail ratepayers and to take appropriate action if necessary to secure and protect reliable service to retail customers in North Carolina.

(emphasis added). The NCUC order does not delineate what such a pre-contract "review" could entail. A fair reading of NCUC's "appropriate action" language reserves to NCUC the right to modify any part of a contract, including the rate, or to prevent the utility from executing it. This expansive view of NCUC's purported authority was

confirmed at oral argument when, upon questioning by this Court, the proponents of pre-contract review stated that they believe NCUC could in fact prevent a utility from granting native load priority in a wholesale contract.

This order conflicts with federal law. The United States Supreme Court has interpreted the FPA to provide FERC with exclusive, plenary jurisdiction over wholesale contracts. 16 U.S.C. § 824(a); *Miss. Power & Light Co.*, 487 U.S. at 374, 101 L. Ed. 2d at 340. The NCUC order in the instant case purports to give NCUC authority to regulate such contracts through pre-execution review. Thus, NCUC's attempt to regulate contracts in the face of federal jurisdiction over the same subject matter clearly presents "an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," and is, consequently, preempted. *Hines*, 312 U.S. at 67, 85 L. Ed. at 587.

Preemption is mandated in the instant case because of the potential for conflict between the NCUC order and FERC's jurisdiction over wholesale contracts. This conflict could lead to a chaotic situation quite similar to that which led to enactment of the FPA itself. For example, multiple North Carolina utilities under NCUC's jurisdiction are also regulated by the Public Service Commission of South Carolina. If states are not preempted from performing a pre-execution review, South Carolina could perform its own review and impose conditions regarding certain contracts that might conflict with potential North Carolina orders. Like Rhode Island and Massachusetts in *Attleboro*, North Carolina and South Carolina could attempt to impose conflicting orders concerning the same subject matter. *See Attleboro*, 273 U.S. at 90, 71 L. Ed. at 554. This scenario presents the type of conflict contemplated by the United States Supreme Court in *Attleboro* that led to the FPA and federal preemption. *Id.*

Preemption is also mandated by United States Supreme Court decisions regarding FERC jurisdiction. The United States Supreme Court has made clear that the preemptive consequences of FERC jurisdiction over wholesale contracts extend to more than merely rate regulation and include the type of review contemplated by NCUC. In *Nantahala*, the United States Supreme Court held that NCUC could not circumvent FERC by using retail ratemaking power, stating, "When FERC sets a rate between a seller of power and a wholesaler-as-buyer, a State may not exercise its undoubted jurisdiction over retail sales to prevent the wholesaler-as-seller from recovering the costs of paying the FERC-approved rate." *Nantahala*, 476

U.S. at 970, 90 L. Ed. 2d at 956. In the instant case, NCUC is attempting to bypass FERC wholesale jurisdiction by using traditional regulatory authority. FERC's wholesale rate jurisdiction, however, goes beyond the actual rate itself, and NCUC may not use its traditional authority to undermine that jurisdiction. Accordingly, FERC provides the exclusive forum for disputes over wholesale contracts.

Similarly, in *Mississippi Power & Light Co.*, a state regulator attempted to remedy a perceived failing in a FERC-approved transaction. *Mississippi Power & Light Co.* involved a FERC decision to allow a utility to recover a high cost of power in a wholesale agreement. 487 U.S. at 363, 101 L. Ed. 2d at 333. The Mississippi Supreme Court concluded that in order to approve a pass-through of the FERC-approved costs to consumers, the state regulatory agency needed to conduct a prudence review of the wholesale transaction. *Id.* at 367, 101 L. Ed. 2d at 335. The United States Supreme Court reversed, declaring that: "States may not regulate in areas where FERC has properly exercised its jurisdiction to determine just and reasonable wholesale rates or to insure that agreements affecting wholesale rates are reasonable." *Id.* at 374, 101 L. Ed. 2d at 340. *Mississippi Power & Light Co.* reinforces the principle that FERC's wholesale jurisdiction is plenary, i.e., states may not regulate utilities so as to contravene or undermine FERC with respect to wholesale contracts.

To support its legal departure from the moorings of clearly established federal preemption doctrine, the majority references the FPA's saving clause, which states that "such Federal regulation . . . extend[s] only to those matters which are not subject to regulation by the States." 16 U.S.C. § 824(a). This provision, however, does not prevent federal preemption of the instant NCUC order for three reasons. First, as the majority notes, the United States Supreme Court has definitively stated that the FPA's saving clause is a mere "policy declaration" that "cannot nullify a clear and specific grant of jurisdiction." *Conn. Light & Power Co. v. FPC*, 324 U.S. 515, 527, 89 L. Ed. 1150, 1158-59 (1945). And the FPA specifically grants FERC jurisdiction over wholesale electricity sales. 16 U.S.C. § 824(a).

Second, the FPA's saving clause still serves a vital purpose, as states are able to exercise significant regulatory power over utilities despite being preempted from regulating wholesale contracts. For example, as the majority notes, if NCUC finds a utility's service to be "inadequate, insufficient or unreasonably discriminatory," it can

"enter and serve an order directing that such additions, extensions, repairs, improvements, or additional services or changes . . . be made . . . within a reasonable time prescribed." N.C.G.S. § 62-42(a) (2003). NCUC can also require certificates of public convenience and necessity before allowing the construction of generating facilities, N.C.G.S. § 62-110.1(a), and it can take into account the utility's arrangements for the interchange and purchase of power when acting on a petition for construction. N.C.G.S. § 62-110.1(d). But the FPA's saving clause does not permit states to regulate in areas preempted by Congress.

Finally, the FPA's saving clause applies only to areas "which are not subject to regulation by the States." 16 U.S.C. § 824(a). When the FPA was originally enacted in 1935, the wholesale electricity market as it operates today did not exist. In 1996 FERC issued an order to infuse competition into the interstate wholesale electricity market. *See* FERC Order No. 888, 61 Fed. Reg. 21,540 (May 10, 1996) ("Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities"). The FERC order required that utilities controlling transmission facilities file open access non-discriminatory tariffs for the use of the facilities, thus opening up the wholesale power market to competition. *Id.*

In issuing its order, FERC's goal was to "remove impediments to competition in the wholesale bulk power marketplace and to bring more efficient, lower cost power to the Nation's electricity consumers." *Id.* FERC's order, combined with changes in technology, allowed for the emergence of a national wholesale market in electricity. *See generally New York v. FERC*, 535 U.S. at 5-14, 152 L. Ed. 2d at 55-60 (describing the evolution of the wholesale market); William H. Penniman & Paul B. Turner, *A Jurisdictional Clash Over Electricity Transmission:* Northern States Power v. FERC, 20 Energy L.J. 205, 207-10 (1999) (describing the evolution and effects of Order No. 888). Such a market did not exist at the time of the FPA's enactment in 1935, when competition among utilities was the exception. *New York v. FERC*, 535 U.S. at 5, 152 L. Ed. 2d at 55. In other words, NCUC is attempting, in the present case, to regulate contracts in a federally-inspired, rapidly evolving market that did not exist at the time the FPA was enacted. The regulation of modern wholesale contracts in the manner attempted by NCUC, therefore, cannot be said to constitute a power "traditionally" exercised by the states. Rather, Congress has specifically granted FERC authority to regulate this rapidly evolving market. *See* 16 U.S.C. §§ 824(a), 824d(a),

824e(a). Accordingly, to the extent that this market is federally-created regulatory territory, the saving clause in 16 U.S.C. § 824(a) does not reserve the power to states to regulate the wholesale interstate electricity market.

The majority unpersuasively attempts to distinguish the pre-contract review performed by NCUC from FERC's prudence review authority. The majority reasons that since FERC's and NCUC's authorities derive from different sources and apply to different concerns, they do not pose a potential for conflict. In the majority's view, pre-contract review is a legitimate exercise of NCUC's traditional authority to regulate utilities to insure reliability of service for consumers, whereas FERC's prudence review ability is a legitimate exercise of FERC's authority under the FPA to insure that wholesale rates and the contracts affecting them are "just and reasonable". 16 U.S.C. §§ 824d(a), 824e(a). But the concurrent federal and state regulatory inquiries the majority envisions are not necessarily mutually exclusive. Rather, the potential for conflict is clear when a proposed interstate wholesale electricity contract is concurrently reviewed by two separate regulatory authorities to determine whether the contract is "just and reasonable" as well as "fair to consumers."

As an illustration, the majority examines the proceedings in Docket No. E-2, Sub 733 regarding regulatory conditions imposed upon Carolina Power & Light Company (CP&L). Those proceedings are relevant, however, only as background. They do not have any bearing on the order in question, NCUC's 10 July 2002 order from Docket No. E-100, Sub 85A. Regardless of how NCUC actually applied a pre-contract review pertaining to CP&L, the 10 July 2002 order contains language propounded by NCUC that asserts plenary pre-execution authority over wholesale contracts. The United States Supreme Court has stated: "The test of whether both federal and state regulations may operate, or the state regulation must give way, is whether both regulations can be enforced without impairing the federal superintendence of the field." *Fla. Lime & Avocado Growers, Inc.*, 373 U.S. at 142, 10 L. Ed. 2d at 256-57. Here, NCUC is attempting to undermine FERC authority by granting itself regulatory jurisdiction over the same terms of the same contracts that FERC governs pursuant to the FPA. The majority states that "NCUC's twenty-day requirement did not inhibit CP&L from entering into the contracts or infringe upon the rates, charges, costs or other terms of the proposed sales." This may be true, but the majority does not consider that the jurisdiction claimed by NCUC *could* have allowed it to do any of

those things, which would clearly come into conflict with FERC's prudence review of the same contract.

Contrary to the majority's assertion, NCUC's authority to monitor utility service reliability and reserve capacity is not at issue here. As noted above, NCUC has the obligation to monitor long-range electricity supply and demand and has the power to require utilities to submit reports concerning power generation, expected demand, and dealings with other power providers. N.C.G.S. § 62-110.1(c), (d). All of this can be effectuated without impermissibly interfering with wholesale contracts. As a result, NCUC has the authority to keep apprised of the effects of a utility's wholesale contracts after they have taken effect, but NCUC is clearly preempted by federal law from reviewing, modifying, or rejecting such contracts before their execution.

The majority properly observes that NCUC is preempted from conducting a prudence review or overruling FERC, yet allows NCUC to conduct pre-execution review of wholesale interstate electricity contracts. Exactly what regulatory actions NCUC may take pursuant to the majority's newly-created review authority is left unexplained. The majority states that state regulatory review allows NCUC to "remain apprised of pertinent matters of local concern, including the adequacy of the state's supply of electricity, North Carolina's public utilities' capacity and reserve margins, and any need for additional generating capacity." The modal ability to "remain apprised" of the terms of proposed wholesale contracts, however, does not concomitantly vest NCUC with authority to modify the terms of such contracts through the "back door." In short, if NCUC is preempted from conducting a prudence review, as the majority acknowledges, NCUC cannot modify or reform the proposed terms of such contracts. Accordingly, NCUC is preempted from exercising the potentially open-ended authority it purports to exercise in its 10 July 2002 order.

The majority attempts to distinguish two cases which are, in fact, directly on point. Both cases involve attempted review and modification of wholesale agreements by state regulatory agencies. In *Appalachian Power Co. v. Public Service Commission*, the Public Service Commission of West Virginia tried to require a utility to submit a FERC-approved wholesale contract for prudence review. 812 F.2d 898, 899-902 (4th Cir. 1987). The Fourth Circuit found the state's regulatory assertion to be preempted, holding, "Because it

is fundamentally at odds with the scheme Congress has established in the FPA to allow the states to change the arrangements filed with or established by FERC, we find the authority the [Public Service Commission] asserts here violative of the supremacy clause." *Id.* at 905.

Similarly, *Utah v. FERC* involved an attempt by the Utah Public Service Commission to require modification of a FERC-approved wholesale agreement. 691 F.2d at 445-46. The Tenth Circuit held the state's action to be preempted, stating that "once a utility becomes involved in sales of interstate commodities it brings itself under the regulatory authority of the FERC, and its remedy is to obtain review and to appeal ultimately to the Supreme Court." *Id.* at 448. Again, this case demonstrates that a state utility commission is preempted from interfering with FERC-regulated wholesale contracts.

The majority attempts to distinguish these two cases on the ground that they both concerned executed, FERC-filed agreements, while NCUC is purporting to assert pre-execution review authority over wholesale interstate contracts. The preemption holdings of *Appalachian Power* and *Utah*, however, did not hinge on the *timing* of the state's attempted regulation of wholesale contracts, and the majority's reasoning to the contrary is unconvincing. Put simply, if a state is preempted from reviewing, modifying, or rejecting a wholesale agreement after execution, it is obviously preempted from attempting the same action before execution. Congress has determined that FERC is vested with exclusive regulatory authority over wholesale electricity contracts. *See* 16 U.S.C. § 824(a). And it is not within the authority of this Court to revise the FPA.

FERC has asserted its jurisdiction over these contracts in the form of pre-approved terms and conditions for competitive wholesale transactions. Federal preemption bars concurrent state regulation when, as here, NCUC's attempted regulation presents "an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines*, 312 U.S. at 67, 85 L. Ed. at 587. If the majority is correct in its reasoning, however, state regulators could arbitrarily exert power to influence utilities' decisions regarding wholesale contracts before such contracts are executed. For example, in a pre-execution review, NCUC could unilaterally set conditions for a utility attempting to enter into a wholesale agreement that would not affect the contract rate or terms *per se*, but that would effectively prevent the utility from executing the contract. Congress

has provided FERC with exclusive authority over wholesale contracts, and NCUC's asserted pre-execution review authority presents a clear obstacle to this congressional objective in that it allows NCUC to functionally override FERC—simply by regulating first.

It is undisputed that NCUC plays a crucial role in protecting North Carolina's captive retail electricity consumers. NCUC has broad statutory authority to accomplish this important objective. Congress has exclusively entrusted the regulation of wholesale interstate electricity contracts, however, to FERC. Undoubtedly, NCUC has the authority to require notice of the terms of such contracts, but it cannot otherwise regulate them. Although NCUC may seek federal review of a contract perceived to be "unjust, unreasonable, unduly discriminatory or preferential," 16 U.S.C. § 824e(a), it cannot vest itself, consistent with federal preemption doctrine, with jurisdiction to conduct pre-execution review of wholesale interstate electricity contracts.

I would affirm the decision of the Court of Appeals.

Justice BRADY joins in this dissenting opinion.

IN THE MATTER OF R.T.W.

No. 417PA04

(Filed 1 July 2005)

Termination of Parental Rights— prior appeal of DSS custody—jurisdiction

A trial court retains jurisdiction to terminate parental rights during the appeal of a custody order in the same case, and the trial court here acted within its authority when it terminated respondent's parental rights. A termination order rests on its own merits; otherwise, parents could indefinitely evade termination proceedings with repeated appeals of custody orders and children would be entirely denied a stable home life, a result repugnant to their best interests. The legislature has emphasized that the child's best interests should prevail when a parent has forfeited his constitutionally protected status and that interminable custody battles do not serve the child's best interests.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous, unpublished decision of the Court of Appeals, 165 N.C. App. 274, 600 S.E.2d 521 (2004), vacating an order terminating respondent's parental rights filed 29 January 2003 by Judge M. Patricia DeVine in District Court, Orange County. Heard in the Supreme Court 9 February 2005.

Northen Blue, LLP, by Carol J. Holcomb and Samantha H. Cabe, for petitioner-appellant Orange County Department of Social Services.

Terry F. Rose for respondent-appellee.

NEWBY, Justice.

The issue is whether a trial court retains jurisdiction to enter an order terminating parental rights while a custody order in the same case is pending appellate review. We conclude it does and reverse the Court of Appeals.

I. BACKGROUND

In December of 2000, Child Protective Services (CPS) received a report alleging respondent—then age fourteen—had been sexually abused by her twenty-one-year-old half-brother while living with her mother in Hillsborough. An investigation revealed respondent was pregnant with her half-brother's child. Respondent's half-brother was eventually imprisoned for statutory rape.

Respondent gave birth to her son, R.T.W., on 4 May 2001. Thereafter, CPS referred fresh accusations of neglect to petitioner Orange County Department of Social Services (DSS). These allegations raised concerns about the family's housing (a roach-infested residence with lead paint peeling off the walls that lacked electricity and running water and was later condemned), excessive alcohol consumption by respondent's mother, respondent's failure to bond with R.T.W., and inadequate adult supervision of both respondent and her newborn son.

In response to these allegations, DSS obtained a court order on 23 August 2001 granting it custody of fifteen-year-old respondent and three-and-one-half-month-old R.T.W. Respondent was sent to a residential group home for adolescents, and R.T.W. was placed in foster care. The next day, DSS filed a juvenile petition alleging R.T.W. was a neglected and dependent juvenile. At a 4 October 2001 adjudicatory

hearing, the trial court determined R.T.W. to be a dependent juvenile. *See* N.C.G.S. § 7B-101 (2003).

One month later, on 1 November 2001, the court held a combined custody review/permanency planning hearing.[1] It entered an order (hereinafter "custody review order") directing that R.T.W. remain in the custody of DSS and that efforts to reunify respondent and R.T.W. cease. The custody review order also set adoption as the permanent plan for R.T.W. and instructed DSS to file a petition or motion in the cause within sixty days to terminate respondent's parental rights. Respondent appealed the order.

While this appeal was pending, on 20 December 2001, as instructed by the trial court, DSS filed a motion to terminate respondent's parental rights. The trial court held hearings on the matter on four dates in 2002 and 2003. On 29 January 2003, the court entered a termination order. In its findings of fact, the court cited, *inter alia*, respondent's need for years of therapy due to the abuse and neglect she had suffered and the risk of abuse and neglect to R.T.W. if returned to her care. Per N.C.G.S. § 7B-1111, the court concluded that respondent was incapable of properly caring for and supervising R.T.W. and that those circumstances would likely continue for the foreseeable future. Respondent also appealed the termination order.

Soon after R.T.W.'s second birthday, an unpublished Court of Appeals opinion filed on 20 May 2003 remanded the custody review order to the trial court for additional findings of fact. *In re R.T.W.*, 157 N.C. 716, 580 S.E.2d 98, 2003 WL 2115340 (May 20, 2003) (No. COA03-728). Although the trial court entered a revised order with additional findings on 25 July 2003, it opined that its termination order had rendered this aspect of the matter moot.[2]

Nearly one year later, on 6 July 2004, the Court of Appeals vacated the termination order, ruling the trial court lacked jurisdiction to terminate parental rights during the pendency of respondent's appeal of the custody review order. *In re R.T.W.*, 165 N.C. App. 274, 600 S.E.2d 274, 2004 WL 1497710 (July 6, 2004) (No. COA03-728).

1. A trial court may combine the custody review hearing required by N.C.G.S. § 7B-906 with the permanency planning hearing required by N.C.G.S. § 7B-907 "if appropriate." N.C.G.S. § 7B-907(a) (2003).

2. Respondent appealed this second custody review order on 25 July 2003. On 2 February 2004, the Court of Appeals dismissed this appeal. Respondent subsequently filed a petition for writ of certiorari, which this Court allowed on 6 May 2004. Our decision in the instant case renders that petition moot, and we dismiss it in a separate order.

Following *In re Hopkins*, 163 N.C. App. 38, 592 S.E.2d 22 (2004), it based its holding on N.C.G.S. § 7B-1003, which permits trial courts to enter "'*temporary* order[s] affecting . . . custody or placement' " while a custody order is pending appeal. *R.T.W.*, 2004 WL 1497710 at *1 (quoting N.C.G.S. § 7B-1003) (emphasis added). The Court of Appeals found the statute's use of the term "temporary" to be dispositive: "[A termination order] 'is . . . a *permanent* rather than a *temporary* order affecting . . . custody or placement[.]' Therefore, the trial court does not have jurisdiction to terminate parental rights while a[n] appeal from an earlier order is pending." *Id.* (alterations in original).

The court mentioned, but refused to follow, *In re Stratton*, 159 N.C. App. 461, 583 S.E.2d 323 (2003), which held the entry of a termination order rendered a father's pending appeal of an earlier custody order moot.[3] *Hopkins* and *Stratton* have produced two conflicting lines of cases. *See In re V.L.B.*, 164 N.C. App. 743, 745, 596 S.E.2d 896, 897 (2004) (following *Stratton*); *In re J.C.S.*, 164 N.C. App. 96, 101-03, 595 S.E.2d 155, 158-59 (2004) (distinguishing *Hopkins* and *Stratton* but following *Hopkins*); *In re N.B.*, 163 N.C. App. 182, 183-84, 592 S.E.2d 597, 598 (2004) (following *Stratton*). Although the Court of Appeals has attempted to reconcile these cases, it recently conceded they are, in fact, "**irreconcilable**." *V.L.B.*, 164 N.C. App. at 746, 596 S.E.2d at 897.

We allowed DSS's petition for discretionary review to resolve the conflict in our lower court's case law. As neither party has any constitutional claim properly before this Court, we decide this case on purely statutory grounds. We hold the pending appeal of a custody order does not deprive a trial court of jurisdiction over termination proceedings. As explained below, our holding rests on the legislative intent evident in relevant portions of North Carolina's Juvenile Code, Subchapter I (Abuse, Neglect, Dependency). We affirm *Stratton* as correctly implementing the legislature's intent, and we specifically overrule *Hopkins* and *J.C.S.* A summary of parental rights and a review of the relevant aspects of Subchapter I are foundational to our analysis.

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3. The *Hopkins* panel should have followed *Stratton*, which is the older of the two cases. *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 36-37 (1989) ("Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court."). Had it done so, we would not have two conflicting lines of cases to resolve.

II. PARENTAL RIGHTS

Parents have a fundamental right to the custody, care, and control of their children. *David N. v. Jason N.*, 359 N.C. 303, 305, 608 S.E.2d 751, 752-53 (2005) (citing *Petersen v. Rogers*, 337 N.C. 397, 400, 445 S.E.2d 901, 903 (1994)); *In re Montgomery*, 311 N.C. 101, 106, 316 S.E.2d 246, 250 (1984) (citing *Santosky v. Kramer*, 455 U.S. 745, 71 L. Ed. 2d 599 (1982) and *Stanley v. Illinois*, 405 U.S. 645, 31 L. Ed. 2d 551 (1972)); *see also* N.C.G.S. § 7B-3400 (2003) (confirming children under 18 are "subject to the supervision and control of [their] parents"). This right enjoys constitutional protection. *See, e.g.*, *David N.*, 359 N.C. at 305, 608 S.E.2d at 752-53. However, it is not absolute. *Id.*

The law has long viewed parental rights and parental responsibilities as two sides of the same coin. 1 William Blackstone, *Commentaries* **434-40 (observing a father's authority over his children at common law was derived from his duty to maintain, protect, and educate them). In other words, one who refuses to behave like a parent risks losing the rights of a parent. Hence it is possible for mothers and fathers to forfeit parental rights through unfitness or conduct inconsistent with their constitutionally protected status. *David N.*, 359 N.C. at 307, 608 S.E.2d at 753-54 (holding parents may abandon their status through abandonment, abuse, or neglect). When this occurs, the state's interest in the welfare of the child may warrant removing the child from the parent's custody and even—on rare occasions—terminating parental rights. *See Montgomery*, 311 N.C. 101, 316 S.E.2d 246.

III. SUBCHAPTER I OF THE JUVENILE CODE

The principles articulated in Section II permeate Subchapter I of the Juvenile Code, which reflects the need both to respect parental rights and to protect children from unfit, abusive, or neglectful parents. *See* N.C.G.S. §§ 7B-100 to -1414 (2003). As previously noted, our resolution of this case depends upon the legislative intent evident in the subchapter. We concentrate on Article 1, certain sections of Articles 2 through 10, and Article 11. Article 1 contains a declaration of legislative intent applicable to all of Subchapter I. *Id.* § 7B-100. Articles 2 through 10 address child custody and permanency planning matters. *Id.* §§ 7B-200 to -1004. Article 11 establishes the rules governing the termination of parental rights. *Id.* §§ 7B-1100 to -1113.

A. ARTICLE 1—LEGISLATIVE INTENT

Article 1 of Subchapter I directs us to construe the rest of the subchapter in a manner that accomplishes the following purposes and policies:

> (1) To provide procedures for the hearing of juvenile cases that assure fairness and equity and that protect the constitutional rights of juveniles and parents;
>
> (2) To develop a disposition in each juvenile case that reflects consideration of the facts, the needs and limitations of the juvenile, and the strengths and weaknesses of the family[;]
>
> (3) To provide for services for the protection of juveniles by means that respect both the right to family autonomy and the juveniles' needs for safety, continuity, and permanence; []
>
> (4) To provide standards for the removal, when necessary, of juveniles from their homes and for the return of juveniles to their homes consistent with preventing the unnecessary or inappropriate separation of juveniles from their parents[; and]
>
> (5) To provide standards, consistent with the Adoption and Safe Families Act of 1997, P.L. 105-89,[4] for ensuring that the best interests of the juvenile are of paramount consideration by the court and that when it is not in the juvenile's best interest to be returned home, the juvenile will be placed in a safe, permanent home within a reasonable amount of time.

N.C.G.S. § 7B-100.

Section 7B-100 of Article 1 underscores the General Assembly's awareness of the potential tension between parental rights and child welfare. It provides for removing children from their homes, but only "when necessary" and consistent with fairness, equity, and "the constitutional rights of juveniles and parents." *Id.* Our legislature values "family autonomy" and prefers the familial unit as usually being the best means of satisfying a child's need for "safety, continuity, and permanence." *Id.* Even when removal is temporarily necessary, N.C.G.S. § 7B-100 urges returning children to their parents unless doing so would not be in the children's "best interest." *Id.*

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4. The Adoption and Safe Families Act contains assorted permanency planning requirements designed to reduce the time children spend in foster care. *See* 42 U.S.C. § 671-75 (2000).

This last point is crucial. For all the statute's concern with preserving families, subdivision (5) of N.C.G.S. § 7B-100 clearly makes the "best interests of the juvenile" the courts' "paramount consideration" when hearing cases arising under Subchapter I. Moreover, when reunification is against the child's best interest, subdivision (5) favors placing the child "in a safe, permanent home within a reasonable amount of time."

Enacted in 2003, subdivision (5) is the most recent amendment to N.C.G.S. § 7B-100. We presume the General Assembly added it either to change the substance of the law or to clarify its meaning. *See Childers v. Parker's Inc.*, 274 N.C. 256, 260, 162 S.E.2d 481, 483 (1968). Since nothing in subdivision (5) appears inconsistent with the rest of the statute, we divine no intent to alter the substance of the law. Rather, we believe the legislature intended to emphasize that (1) when a parent has forfeited his constitutionally protected status, the child's best interest should prevail in any proceeding under Subchapter I and (2) interminable custody battles do not serve the child's best interest. This expression of legislative priorities informs our analysis.

B. ARTICLES 2 THROUGH 10—CHILD CUSTODY PROCEEDINGS

The General Assembly's explicit desire to preserve parent-child relationships and protect children explains the fluidity of child custody proceedings under Articles 2 through 10 of Subchapter I. These proceedings afford the trial court multiple opportunities to consider and reconsider whether a child is abused, neglected, or dependent, and if so, who should have custody. They also give parents time to correct the deficiencies that led to the child's removal. Essentially, there is no such thing as a "final" custody order, only the most recent one.

Custody proceedings are initially a two-stage process.[5] At the adjudicatory hearing, the trial court makes a threshold determination regarding the state's right to intervene. DSS must prove abuse, neglect, or dependency by clear and convincing evidence, a higher evidentiary standard than that typically applied in civil

5. Child custody proceedings often begin, as they did here, with a DSS request for an emergency custody order based on the extreme circumstances detailed in N.C.G.S. § 7B-503. Even absent such a request, DSS may file a juvenile petition in district court alleging abuse, neglect, or dependency within the meaning of N.C.G.S. § 7B-101. *See* N.C.G.S. §§ 7B-400 to -402.

actions.[6] *Id.* § 7B-805. If the evidence substantiates the allegations, the court enters a written order reflecting its findings and proceeds to stage two, the dispositional hearing. *Id.* § 7B-807. Otherwise, the court dismisses DSS's petition with prejudice and, if the child is in DSS's custody, releases him to his parent. *Id.*

Should a dispositional hearing be necessary, the court receives evidence and makes a discretionary decision concerning custody.[7] N.C.G.S. § 7B-901. Specifically, it enters a written order directing one of the dispositional alternatives available under N.C.G.S. § 7B-903. *Id.* §§ 7B-901, -903 (describing dispositional alternatives that include dismissing the case or granting custody to a parent, relative, or DSS). This decision and any subsequent custody determinations are based on the child's best interest. *Price v. Howard*, 346 N.C. 68, 79, 484 S.E.2d 528, 535 (1997) ("Where [a parent forfeits his constitutionally protected status], custody should be determined by the 'best interest of the child' test mandated by statute.").

A dispositional hearing is hardly the decisive event its name implies. When, as here, the dispositional order removes custody from a parent, the court holds a custody review hearing within ninety days of the dispositional hearing and again within six months.[8] *Id.* § 7B-906(a). Relying on evidence adduced at these hearings, the court enters written custody review orders either continuing the current placement or modifying custodial arrangements. *Id.* § 7B-906(c), (d).

The permanency planning process in Article 9 is meant to bring about a definitive placement plan for the abused, neglected, or dependent child. Within twelve months of its initial custody order removing a child from his parent, the court *must* conduct a permanency planning hearing to "develop a plan to achieve a safe, permanent home for the juvenile within a reasonable period of time." *Id.* § 7B-907(a). The permanent plan may include, *inter alia*, returning the child to his parent, legal guardianship, or adoption. *See* N.C.G.S. § 7B-907. The court enters a written order memorializing the permanent plan and continuing or modifying custodial arrangements

6. Most civil actions are decided using a "preponderance of the evidence" standard. *Montgomery*, 311 N.C. at 109-10, 316 S.E.2d at 252. Having a higher standard in custody cases protects the parent-child relationship from undue interruption.

7. The dispositional hearing may be informal. N.C.G.S. § 7B-901.

8. When the criteria in N.C.G.S. § 7B-906(b) are met, the court may waive custody review hearings in favor of written reports or hold the hearings less frequently than every six months.

accordingly. *Id.* § 7B-907(c). Even the "permanent plan" is not immutable, however. Follow-up hearings every six months enable the court to review progress and, if necessary, formulate a new permanent plan. N.C.G.S. § 7B-907(a).

Nowhere is the flexibility of the custody process more pronounced than in Article 10. In addition to the aforementioned mandatory review hearings, this article endows the trial court with continuing jurisdiction to modify or vacate custody orders "in light of changes in circumstances or the needs of the juvenile." *Id.* § 7B-1000(a).

The interlocutory quality of custody orders would normally preclude their immediate appeal except in conformity with N.C.G.S. § 1-277. *See Travco Hotels, Inc. v. Piedmont Natural Gas Co.*, 332 N.C. 288, 291, 420 S.E.2d 426, 428 (1992). Because of the importance of the interests involved in custody proceedings, however, Article 10 makes many custody orders subject to immediate appeal. N.C.G.S. § 7B-1001. Furthermore, although N.C.G.S. § 1-294 ordinarily divests a trial court of jurisdiction over cases pending appeal, section 7B-1003 of Article 10 allows trial courts to enter "temporary order[s] affecting . . . custody or placement" while a custody order awaits appellate review. *Id.* § 7B-1003.[9]

Obviously, this statutory scheme could result in protracted custody proceedings that leave the legal relationship between parent and child unresolved and the child in legal limbo. Such an outcome would thwart the legislature's wish that children be placed "in . . . safe, permanent home[s] within a reasonable amount of time." *Id.* § 7B-100(5). In order to avoid this, Subchapter I mandates that DSS initiate proceedings to terminate parental rights at certain stages in the custody process. *Id.* § 7B-907(d), (e). Of particular relevance is N.C.G.S. § 7B-907(e), which directs DSS to file a termination petition or motion within sixty days of the permanency planning hearing if termination is necessary to perfect the permanent plan (for example, when adoption is the plan). Additionally, N.C.G.S. § 7B-907(d) requires DSS to request termination of parental rights whenever a child in its custody has been placed outside the home for twelve of the twenty-two most recent months. This leads us to a brief discussion of the grounds and procedures for terminating parental rights found in Article 11 of Subchapter I.

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9. This, of course, is the provision relied on by the Court of Appeals in *Hopkins* and the instant case.

C. ARTICLE 11—TERMINATION OF PARENTAL RIGHTS

Unlike the loss of custody possible under Articles 2-10, the dissolution of parental rights under Article 11 is decisive. Termination orders "completely and permanently terminate[] all rights and obligations of the parent to the juvenile and the juvenile to the parent arising from the parental relationship." N.C.G.S. § 7B-1112.

Aside from its effect, Article 11 differs from Articles 2 through 10 in other important respects. It contains its own provisions regarding legislative intent, jurisdiction, standing, notice, hearing, and appeal. *Id.* §§ 7B-1100 to -1113. The article includes a host of procedural requirements that, "consistent with due process, . . . protect the various interests of the parties involved." *Montgomery*, 311 N.C. at 108, 316 S.E.2d at 251. These provisions encompass notice requirements and the right to counsel, even legal representation at the state's expense for indigent parents. N.C.G.S. §§ 7B-1106.1 , -1109(b).

Section 7B-1111 of Article 11 sets forth nine grounds for terminating parental rights, the sixth of which applies here, namely, a parent's inability to provide for "the proper care and supervision" of a child and the "reasonable probability that such incapability will continue for the foreseeable future." *Id.* § 7B-1111(a)(6). Abuse or neglect constitutes merely the first ground for termination. *Id.* § 7B-1111(a)(1).

As described, Subchapter I requires DSS to seek termination of parental rights in certain instances. Notwithstanding these, DSS has standing to file a petition or motion in the cause to terminate parental rights whenever it has custody of a child from a court order or surrender for adoption. *Id.* § 7B-1103. Among others, judicially appointed guardians and persons who have filed for adoption also have standing to seek termination. *Id.*

Termination proceedings have adjudicatory and dispositional phases analogous to, but independent of, those in custody proceedings.[10] *See* N.C.G.S. §§ 7B-1109 to -1110. During the adjudicatory phase, the court takes evidence, makes findings of fact, and determines the existence or nonexistence of grounds for termination. *Id.* § 7B-1109(e). The burden of proof is on DSS in this phase, and the court's findings must be "based on clear, cogent, and convincing evi-

10. While distinct, both phases may occur at the same hearing. *See In re White*, 81 N.C. App. 82, 85, 344 S.E.2d 36, 38 *cert. denied*, 318 N.C. 283, 347 S.E.2d 470 (1986).

dence."[11] *Id.* § 7B-1109(f). Assuming a judicial finding that a ground for termination exists, the trial court's decision in the dispositional phase is discretionary. *See id.* § 7B-1110. The court need not order termination if it further determines "the best interests of the juvenile require that the parental rights of the parent not be terminated." *Id.* Parties may appeal a termination order pursuant to N.C.G.S. § 7B-1113.

Proceedings to terminate parental rights are considerably more streamlined than custody proceedings. Once a petition or motion to terminate parental rights has been filed, the court must hold a termination hearing within ninety days absent good cause shown. N.C.G.S. § 7B-1109. Should the court order termination, the order must be written, signed, and entered within thirty days of the hearing. *Id.* § 7B-1110. Although trial courts possess some authority to modify termination orders that have been appealed and affirmed, there is no requirement under Article 11 that the courts periodically review them. *Id.* § 7B-1113. Thus, unencumbered by appeals of the sort at issue here, termination proceedings offer speed and finality not found in custody proceedings.

IV. ANALYSIS

The question presented is whether a trial court has jurisdiction to terminate parental rights while a custody order in the same case is pending appeal. Following *Hopkins*, 163 N.C. App. 38, 592 S.E.2d 22, the Court of Appeals held that N.C.G.S. § 7B-1003 divested the trial court of jurisdiction to enter a termination order while respondent's appeal of a prior custody review order was pending. We disagree.

Our resolution of this case turns on legislative intent. *In re Estate of Lunsford*, 359 N.C. 382, 392, 610 S.E.2d 366, 373 (2005) ("The primary rule of statutory construction is to effectuate the intent of the legislature."); *State v. Roache*, 358 N.C. 243, 273, 595 S.E.2d 381, 402 (2004) ("In interpreting a statute, this Court must first discern the legislative intent in passing the statute."). Fortunately, the North Carolina General Assembly took pains to communicate its intent in matters involving the removal of children from their parents and the termination of parental rights. We have previously observed that N.C.G.S. § 7B-100 stresses the paramount importance of the child's best interest and the need to place children in safe, permanent homes within a reasonable time. Whenever possible, we will construe the

11. "Clear and convincing" and "clear, cogent, and convincing" are equivalent evidentiary standards. *Montgomery*, 311 N.C. at 109, 316 S.E.2d at 252 (1984).

provisions in Subchapter I to effectuate this intent. *See Montgomery*, 311 N.C. at 109, 316 S.E.2d at 251 ("[T]he fundamental principle underlying North Carolina's approach to controversies involving child neglect and custody [is] that the best interest of the child is the polar star.")

We first examine N.C.G.S. § 7B-1003. In both *Hopkins* and the instant case, the Court of Appeals assumed this statute applies to termination proceedings. The court interpreted the statute as limiting a trial court's "authority over a juvenile." *In re R.T.W.*, 165 N.C. App. 274, 600 S.E.2d 521, 2004 WL 1497710 at *1 (July 6, 2004) (No. COA03-728). It reasoned that, since a termination order is final rather than temporary, N.C.G.S. § 7B-1003 prohibits the entry of one during the pendency of a custody order appeal. *Id.*

After careful review, we believe our lower court misidentified the relevant law. Section 7B-1003 reads in pertinent part as follows:

> Pending disposition of an appeal, the return of the juvenile to the custody of the parent or guardian of the juvenile, with or without conditions, may issue unless the court orders otherwise. . . . *For compelling reasons which must be stated in writing, the court may enter a temporary order affecting the custody or placement of the juvenile as the court finds to be in the best interests of the juvenile or the State.*

N.C.G.S. § 7B-1003 (emphasis added).

On its face, N.C.G.S. § 7B-1003 nowhere references orders terminating parental rights. In concluding the General Assembly did not intend for it to prohibit termination proceedings under Article 11, we rely upon the legislative purpose behind this particular statute.

The *Hopkins* court wrongly viewed N.C.G.S. § 7B-1003 as a limitation on the authority of trial courts to terminate parental rights; in fact, the statute represents an expansion of their jurisdiction in child custody proceedings. As a general rule, N.C.G.S. § 1-294[12] stays all further proceedings at the trial level once an appeal is perfected except on matters "not affected by the judgment appealed from." This is true unless a specific statute addresses the matter in question. *See*

12. N.C.G.S. § 1-294 provides: "When an appeal is perfected as provided by this Article it stays all further proceedings in the court below upon the judgment appealed from, or upon the matter embraced therein; but the court below may proceed upon any other matter included in the action and not affected by the judgment appealed from."

In re Huber, 57 N.C. App. 453, 459, 291 S.E.2d 916, 920, *disc. rev. denied*, 306 N.C. 557, 294 S.E.2d 223 (1982). Applied to appeals in child custody cases, however, N.C.G.S. § 1-294 would leave trial courts powerless to modify custodial arrangements in response to changed circumstances and the child's best interests. Section 7B-1003 avoids this by permitting trial courts to enter temporary orders affecting custody or placement. *Huber*, 57 N.C. App. at 459, 291 S.E.2d at 920 ("Without authority of the district court to [enter temporary custody orders during a] pending appeal, a recalcitrant party could frustrate the efforts of the court to provide for [the child's] best interests by simply entering notice of appeal.") These orders are necessarily "temporary" because the underlying custody orders are awaiting appellate review. Rightly understood, then, N.C.G.S. § 7B-1003 conserves the ability of trial courts to protect children during the pendency of custody order appeals. The statute is silent on proceedings to terminate parental rights.

Given that N.C.G.S. § 7B-1003 does not address termination proceedings, the question becomes whether the trial court lost jurisdiction under N.C.G.S. § 1-294 to terminate respondent's parental rights. Respondent argues that it did because DSS's standing to request termination was "affected by" the validity of custody review order on appeal. This argument is unpersuasive.

We have already mentioned Article 11's unique jurisdictional and standing provisions. Section 7B-1101 confers "exclusive original jurisdiction" on district courts "to hear and determine" petitions or motions to terminate parental rights "relating to . . . any juvenile . . . in the legal or actual custody of [DSS]." Section 7B-1103 endows DSS with standing when it "has been given [custody of a child] by a court of competent jurisdiction." It is apparent to us the General Assembly intended these provisions to govern when trial courts may conduct proceedings to terminate parental rights. *See In re Peirce*, 53 N.C. App. 373, 380, 281 S.E.2d 198, 202-03 (1981) (opining the comprehensiveness of former Article 24B—predecessor to Article 11—betokened the legislature's intent that it "exclusively control the procedure to be followed in the termination of parental rights"). In the instant case, DSS had custody of R.T.W. pursuant to a court order; it therefore had standing under N.C.G.S. § 7B-1103 to initiate termination proceedings, and the trial court had jurisdiction under N.C.G.S. § 7B-1101 over those proceedings. Accepting respondent's argument would necessitate reading into Article 11 a requirement that DSS's custody be legally unassailable. The legislature chose not

to impose such a requirement, however, and we decline to second-guess its judgment.

Neither respondent's argument nor *Hopkins* can be squared with the statutory timeline for proceedings to terminate parental rights. We have explained that, when a termination order is necessary to perfect the permanent plan, N.C.G.S. § 7B-907(e) obliges DSS to file a termination petition or motion within sixty calendar days of the permanency planning hearing. Moreover, regardless of the permanent plan, N.C.G.S. 7B-907(d) directs DSS to seek termination as soon as a child has been placed outside the home for twelve of the most recent twenty-two months. Once DSS initiates termination proceedings, Article 11 requires the trial court to hold a termination hearing within ninety days absent good cause shown and to write, sign, and enter any termination order not later than thirty days after the hearing. *Id.* §§ 7B-1109 to -1110. By depriving the trial court of jurisdiction over termination proceedings, *Hopkins* would effectively preclude compliance with this timeline whenever a custody order is appealed. In so doing, it would frustrate the legislature's efforts to bring closure to custody disputes arising under Subchapter I.

The potential effect of *Hopkins* goes far beyond mere delay. Taken to an extreme, *Hopkins* reduces Article 11 to a nullity.[13] As summarized above, the custody process established in Subchapter I involves multiple custody orders and opportunities to appeal those orders. Were we to countenance the *Hopkins* construction of N.C.G.S. § 7B-1003, parents could indefinitely evade termination proceedings with repeated appeals of custody orders. In such situations, children would be entirely denied a stable home life, a result completely repugnant to their best interests and consequently to N.C.G.S. § 7B-100. The instant case illustrates the real-world effect of *Hopkins*: R.T.W., three-and-one-half months old when first placed in foster care, is now over four years old.

We hasten to add that our holding does not prejudice the rights of parents. Trial courts may order the termination of parental rights only after conducting termination proceedings with adjudicatory and dispositional phases separate from those held during custody pro-

13. The dissent in *V.L.B.* acknowledged: "*Hopkins* allows a respondent to continuously appeal permanency planning orders every six months, thereby burdening [the Court of Appeals] with unnecessary appeals and suspending the disposition of custody suits." *V.L.B.*, 164 N.C. App. at 748, 596 S.E.2d at 899 (Timmons-Goodson, J., dissenting). "[S]uspending the disposition of custody suits" is precisely one of the evils the legislature has expressed its desire to avoid.

ceedings. Each termination order relies upon an independent finding that clear, cogent, and convincing evidence supports at least one of the grounds for termination under N.C.G.S. § 7B-1111. Section 7B-1113 affords parents the opportunity to challenge termination orders on appeal. Simply put, a termination order rests on its own merits.

It is true that trial courts are permitted to consider previous adjudications of neglect when determining whether grounds for termination exist. *In re Ballard*, 311 N.C. 708, 715, 319 S.E.2d 227, 232 (1984). In *Ballard*, however, we held that a termination order may not be based solely on a prior adjudication of neglect. *Id.* The trial court "*must* also consider any evidence of changed conditions" since then. *Id.* (emphasis added). Despite any prior adjudication, the dispositive factor is "the best interests of the child and the fitness of the parent to care for the child *at the time of the termination proceeding*." *Id.* Of course, a party who believes the trial court improperly relied on a custody order during termination proceedings is free to raise the issue in an appeal of the order terminating parental rights. *See* N.C.G.S. § 7B-1113.

In sum, proceedings to remove children and terminate parental rights under Subchapter I of our Juvenile Code involve interests vital to our society. Parents' fundamental right to control their children at some point gives way to the state's interest in the welfare of the child. In Subchapter I of our Juvenile Code, the General Assembly has established procedures to safeguard parental rights while simultaneously providing for the removal of children and even the termination of parental rights. The *Hopkins* approach upsets the balance struck by our legislature, and we reject it. *See Henry v. Edmisten*, 315 N.C. 474, 491, 340 S.E.2d 720, 731 (1986) ("The role of the legislature is to balance the weight to be afforded to disparate interests and to forge a workable compromise among those interests. The role of the Court is not to sit as a super legislature and second-guess the balance struck by the elected officials.").

V. DISPOSITION

For the foregoing reasons, we hold a trial court retains jurisdiction to terminate parental rights during the pendency of a custody order appeal in the same case. The termination order necessarily renders the pending appeal moot. In the case *sub judice*, the trial court acted within its authority when it entered an order terminating respondent's parental rights. The decision of the Court of Appeals is

reversed and the matter remanded for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

STATE OF NORTH CAROLINA v. ROY EUGENE BRYANT

No. 173PA04

(Filed 1 July 2005)

Sexual Offenses— sex offender registration laws—constitutionality—notice

The Court of Appeals erred by concluding that N.C.G.S. § 14-208.11, which criminalizes a convicted sex offender's failure to register, violates the notice requirement of the Due Process Clause of the United States Constitution either facially or as applied for an out-of-state offender who lacked notice of his duty to register upon moving to North Carolina, and this case is remanded to the Court of Appeals for consideration of the remainder of defendant's assignments of error not previously addressed, because: (1) N.C.G.S. § 14-208.11 is facially constitutional since by the very terms of the statute those individuals released from a North Carolina penal institution and subject to punishment for failure to register pursuant to N.C.G.S. § 14-208.11 are required to have actual notice of their duty to register, and defendant cannot establish that no set of circumstances exists under which the act would be valid; (2) with respect to the application of N.C.G.S. § 14-208.11 in regard to defendant, the sex offender registration statutes enacted in North Carolina and all other states are statewide registration programs directed at a narrow class of defendants who are convicted sex offenders and modern sex offender registration programs are specifically enacted as public safety measures based on legislative determinations that convicted sex offenders pose an unacceptable risk to the general public once released from incarceration; (3) defendant had actual notice of his lifelong duty to register with the State of South Carolina as a sex offender, and this notice was sufficient to put defendant on notice to inquire into the applicable law of the state to which he relocated which in this instance was North

Carolina; and (4) it would be nonsensical to allow sex offenders to escape their duty to register by moving to a state that has not provided them with actual notice of their duty to register and then allow a defendant to claim ignorance of the law.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 163 N.C. App. 478, 594 S.E.2d 202 (2004), reversing a judgment entered 21 February 2002 by Judge William Z. Wood, Jr. in Superior Court, Forsyth County, upon defendant's convictions of failure to register as a sex offender and being an habitual felon. Heard in the Supreme Court 7 December 2004.

Roy Cooper, Attorney General, by John J. Aldridge, III, Special Deputy Attorney General, for the State-appellant.

Staples Hughes, Appellate Defender, by Janet Moore, Assistant Appellate Defender, for defendant-appellee.

Seth H. Jaffe, counsel for American Civil Liberties Union of North Carolina Legal Foundation, amicus curiae.

BRADY, Justice.

Convicted sex offenders " 'are a serious threat in this Nation. [T]he victims of sex assault are most often juveniles,' and '[w]hen convicted sex offenders reenter society, they are much more likely than any other type of offender to be rearrested for a new rape or sexual assault.' " *Conn. Dep't of Pub. Safety v. Doe*, 538 U.S. 1, 4, 155 L. Ed. 2d 98, 103 (2003) (citation omitted) (quoting *McKune v. Lile*, 536 U.S. 24, 32-33, 153 L. Ed. 2d 47, 56 (2002) (plurality opinion)) (alterations in original). Because of this public safety concern North Carolina, like every other state in the nation, enacted a sex offender registration program to protect the public from the unacceptable risk posed by convicted sex offenders. N.C.G.S. §§ 14-208.5 to -208.15 (2003). In the case *sub judice*, this Court must specifically determine whether N.C.G.S. § 14-208.11, which criminalizes a convicted sex offender's failure to register, violates the notice requirement of the Due Process Clause of the United States Constitution, either facially or as applied. Because we find no such constitutional violation, we reverse the Court of Appeals.

FACTUAL AND PROCEDURAL BACKGROUND

On 2 April 2001, defendant was arrested by Deputy Sharon Reid of the Forsyth County Sheriff's Department for failing to register as a

convicted sex offender in North Carolina. On 10 December 2001, defendant was indicted by a Forsyth County Grand Jury for failure to register as a sex offender. On 28 January 2002, a Forsyth County Grand Jury subsequently indicted defendant for attaining habitual felon status. Defendant was tried before the Honorable William Z. Wood, Jr. at the 18 February 2002 Criminal Session of Forsyth County Superior Court.

The evidence adduced at trial established that on 20 March 2000, defendant was serving an active sentence in the custody of the South Carolina Department of Corrections. That day, defendant was notified by prison personnel of his duty to register with the State of South Carolina as a convicted sex offender upon his release from custody. Specifically, defendant was informed that he was required to register as a result of his 20 March 1996 convictions in Pickens County South Carolina for "criminal sexual conduct with a minor first degree and assault with intent to commit criminal sexual conduct." In conjunction with this notification, defendant signed a form entitled "South Carolina Department of Corrections Notice of Sex Offender Registry," acknowledging that he had been notified, orally and in writing, of his lifelong duty to register with the State of South Carolina. This form specifically notified defendant that:

> Pursuant to Section 23-3-430 of Code of Laws of South Carolina, any person who has been convicted, pled guilty or nolo contendere of offenses deemed sexual in nature must register with the Sheriff's Office in their county of residence. All offenses described in Section 23-3-430 *or similar offenses from other jurisdictions* are included, to include both current commitments and prior convictions.
>
> . . . .
>
> *If an inmate who is required to register moves out of the State of South Carolina, s/he is required to provide written notice to the county sheriff where s/he was last registered in South Carolina within 10 days of the change of address to a new state.*
>
> *A person must send written notice of change of address to the county Sheriff's Office in the new county and the county where s/he previously resided within 10 days of moving to a new residence.* Any person required to register under this program shall be required to register annually for life.

(emphasis added). Defendant also indicated, by filling out the appropriate portions of the aforementioned form, that he would be residing in Greenville, South Carolina upon his release.

On 17 August 2000, several months after defendant was released from prison, he completed yet another registration form indicating that he had moved to Pickens County, South Carolina. However, in October 2000 defendant traveled to North Carolina, as a worker with the Dixie Classic Fair. While at the fair in Winston-Salem, North Carolina, defendant met Crystal Sunshine Miller.

At trial, Ms. Miller testified that defendant approached her and one of her daughters while they were waiting in line for an amusement ride. Defendant offered to get Ms. Miller and her daughter on the ride if she let him accompany them. Ms. Miller testified that this encounter "proceeded into me and him talking the rest of the time that the fair was here. [Defendant] decided that he had finally found somewhere and something worth staying for, so he decided to stay." Then, on the night the fair was to leave Winston-Salem, defendant's jaw was broken. The next day defendant called Ms. Miller and she told him to go to the hospital, which he did. Upon his release from the hospital, defendant "went to stay at the soup kitchen downtown."

On or about 1 November 2000, defendant moved in with Ms. Miller, who lived at 4373 Grove Avenue in Winston-Salem, North Carolina. Thus, defendant came to reside in the home that Ms. Miller shared with her two young daughters, who at the time of defendant's trial were five and two years old, respectively, and other members of her family. Over the next few months, defendant cooked, cleaned and stayed at home with Ms. Miller's children while she worked. Then, on 7 December 2000, defendant proposed marriage to Ms. Miller, and she accepted. Throughout the time defendant lived at 4373 Grove Avenue, he received mail addressed to him at Ms. Miller's home, including hospital bills, letters from his mother, and Christmas presents. Defendant continued living at 4373 Grove Avenue until 30 March 2001, when his relationship with Ms. Miller soured. Thus, defendant does not dispute that he was a resident of North Carolina at the time of his arrest.

At defendant's trial, Detective Kelly Wilkinson, of the Winston-Salem Police Department testified that he had occasion to interview defendant on 30 March 2001. Before this interview Detective Wilkinson had performed a "criminal history check" on defendant, which revealed that although defendant had registered as a convicted

sex offender in South Carolina, he had failed to register upon establishing residency in North Carolina. During this interview, defendant indicated to Detective Wilkinson that he had come to North Carolina in October 2000 and that his current residence was 4373 Grove Avenue. We note that there is no indication in the record that, upon establishing a new residence in North Carolina, defendant notified the appropriate South Carolina authorities of his out-of-state move, in spite of his duty to do so. Moreover, during his interview with Detective Wilkinson, defendant acknowledged that he was required to register as a sex offender in South Carolina and admitted that he was also a convicted sex offender in the State of Florida.

Additionally, Deputy Reid, whose duties include maintaining the sex offender registry for Forsyth County, testified that North Carolina has a statutory equivalent to the South Carolina offense of criminal sexual conduct with a minor. Thus, as in South Carolina, defendant was required to register as a sex offender in the state of North Carolina. However, Deputy Reid stated that, as of the date of her testimony, defendant still had not registered as a convicted sex offender in this State.

On 21 February 2002, a Forsyth County jury found defendant guilty of failing to register as a sex offender and having attained the status of habitual felon. The trial judge determined that defendant had a prior record level of IV due in part to his eight prior convictions, four of which were felony convictions for sexual crimes. The trial court then sentenced defendant in the presumptive range for his habitual felon and failure to register as a sex offender convictions to a total minimum term of 133 months and a total maximum term of 169 months imprisonment.

Defendant entered notice of appeal on 22 February 2002, and the Court of Appeals heard oral argument on 3 December 2003. On 6 April 2004, the Court of Appeals held that "North Carolina's sex offender registration statute is unconstitutional as applied to an out-of-state offender who lacked notice of his duty to register upon moving to North Carolina." *Bryant*, 163 N.C. App. at 478, 594 S.E.2d at 203. However, due to the North Carolina Court of Appeals "disposition of this matter," that court did not address the remaining assignments of error raised by defendant on direct appeal. *Id.* at 486, 594 S.E.2d at 207.

On 15 April 2004, the State filed petitions for writ of supersedeas and discretionary review with this Court, which this Court allowed

on 12 August 2004. On 18 October 2004, the American Civil Liberties Union of North Carolina Legal Foundation filed a motion for leave to file amicus curiae brief, which was allowed that day. This Court heard oral argument on 7 December 2004.

THE NORTH CAROLINA SEX OFFENDER REGISTRATION PROGRAM

In 1994, Congress enacted legislation that conditioned continued federal funding of state law enforcement on state adoption of sex offender registration laws and set minimum standards for such state programs. Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act, Pub. L. No. 103-322, 108 Stat. 2038 (1994) (codified as amended at 42 U.S.C. §§ 14071-14072 (2000)). A year later, the North Carolina General Assembly enacted legislation requiring convicted sex offenders to register with local law enforcement agencies in compliance with the Jacob Wetterling Act and in recognition that convicted sex offenders pose an unacceptable risk to the public. Amy Jackson Law, ch. 545, 1995 N.C. Sess. Laws 2046 (effective Jan. 1, 1996) (codified as amended at N.C.G.S. § 14-208.5 to -208.15). And, as the United States Supreme Court recently acknowledged, "[b]y 1996, every State, the District of Columbia, and the Federal Government had enacted some variation of [a sex offender registration and community notification program]." *Smith v. Doe*, 538 U.S. 84, 90, 155 L. Ed. 2d 164, 175 (2003) (holding that Alaska's Sex Offender Registration Act is nonpunitive; thus, its retroactive application does not violate the *Ex Post Facto* Clause of the United States Constitution).[1] Moreover, the Federal Bureau of

1. *See also* Ala. Code § 13A-11-200 (1994); Alaska Stat. § 12.63.010 (Lexis 2004); Ariz. Rev. Stat. Ann. § 13-3821 (West 2001); Ark. Code Ann. § 12-12-901 (Lexis 2003); Cal. Penal Code § 290 (West 1999); Colo. Rev. Stat. Ann. § 16-22-101, 18-3-412.5 (Lexis 2004); Conn. Gen. Stat. Ann. § 54-250 (West Supp. 2005); Del. Code Ann. tit. 11, § 4120 (Supp. 2004); D.C. Code § 22-4001 (2001); Fla. Stat. Ann. § 943.0435 (West Supp. 2005); Ga. Code Ann. § 42-1-12 (Supp. 2004); Haw. Rev. Stat. § 846E-1 (Cumm. Supp. 2004); Idaho Code § 18-8301 (Michie 2004); 730 Ill. Comp. Stat. Ann. 150/1 (West Supp. 2004); Ind. Code Ann. § 5-2-12-3.5 (Lexis Supp. 2004); Iowa Code Ann. § 692A.1 (West 2003); Kan. Stat. Ann. § 22-4901 (1995); Ky. Rev. Stat. Ann. § 17.510 (Banks-Baldwin Supp. 2003); La. Rev. Stat. Ann. § 15:540 (West Supp. 2005); Me. Rev. Stat. Ann. tit. 34-A, § 11201 (West Supp. 2004); Md. Code Ann., Crim. Proc. § 11-704 (Supp. 2004); Mass. Gen. Laws Ann. ch. 22C, § 37 (West 2002); Mich. Comp. Laws Ann. § 28.721 (West 2004); Minn. Stat. Ann. § 243.166 (West Supp. 2005); Miss. Code Ann. § 45-33-25 (2004); Mo. Ann. Stat. § 589.400 (West Supp. 2005); Mont. Code Ann. § 46-23-501 (2003); Neb. Rev. Stat. § 29-4001 (Supp. 2004); Nev. Rev. Stat. 179D.350 (2003); N.H. Rev. Stat. Ann. § 651-B:1 (Supp. 2004); N.J. Stat. Ann. § 2C:7-2 (West Supp. 2004); N.M. Stat. Ann. § 29-11A-1 (2004); N.Y. Correct. Law § 168 (McKinney Supp. 2005); N.C.G.S. § 14-208.5; N.D. Cent. Code § 12.1-32-15 (Supp. 2003); Ohio Rev. Code Ann. § 2950.04 (Lexis 2003);

Prisons is required to inform every sex offender incarcerated in federal penal and correctional institutions that the individual "shall be subject to a registration requirement as a sex offender in any State in which the person resides, is employed, . . . or is a student." 18 U.S.C. § 4042 (3) (2000).

Thus, convicted sex offenders had been subject to registration throughout the fifty states for approximately six years when, in 2001, defendant was arrested for failing to register as a convicted sex offender in North Carolina. It should also be noted that the Commonwealth of Puerto Rico and the United States Virgin Islands enacted similar legislation a year later. 4 P.R. Laws Ann. § 535 (2002); 14 V.I. Code Ann. § 1721 (Supp. 2004). And, such legislation became effective in Guam in 1999. 9 Guam Code Ann. § 89.03 (West, WESTLAW through 2005 P.L. 28-023).

The North Carolina Sex Offender and Public Protection Registration Program is a public safety measure specifically designed "to assist law enforcement agencies' efforts to protect communities." N.C.G.S. § 14-208.5. With the creation of this program, the General Assembly explicitly recognized that "sex offenders often pose a high risk of engaging in sex offenses even after being released from incarceration or commitment and that protection of the public from sex offenders is of paramount governmental interest." *Id.*; *see also* Ch. 545, sec. 1, 1995 N.C. Sess. Laws at 2046. Later amendments to the registration program were adopted, further recognizing that individuals who commit certain types of offenses against minors, "such as kidnapping, pose significant and unacceptable threats to the public safety and welfare of the children in this State and that the protection of those children is of great governmental interest." Act of Aug. 28, 1997, ch. 516, sec. 1, 1997 N.C. Sess. 2276, 2276 (codified at N.C.G.S. § 14-208.5). Thus the twin aims of the North Carolina Sex Offender and Public Protection Registration Program, public safety and protection, are clearly legitimate and of great importance to the State. *Cf. In re Montgomery*, 311 N.C. 101, 115, 316 S.E.2d 246, 255 (1984) (holding that the North Carolina Termination of Parental Rights Act

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Okla. Stat. Ann. tit. 57, § 581 (West 2004); Or. Rev. Stat. § 181.592 (2003); 42 Pa. Cons. Stat. Ann. § 9791 (West Supp. 2004); R.I. Gen. Laws § 11-37.1-1 (Supp. 2004); S.C. Code Ann. § 23-3-400 (Supp. 2004); S.D. Codified Laws § 22-22-31 (Lexis Supp. 2003); Tenn. Code Ann. § 40-39-201 (Supp. 2004); Tex. Code Crim. Proc. Ann. art. 62.01 (Vernon Supp. 2004-2005); Utah Code Ann. § 77-27-21.5 (2003); Vt. Stat. Ann. tit. 13, § 5401 (Supp. 2004); Va. Code Ann. § 9.1-900 (Lexis Supp. 2004); Wash. Rev. Code Ann. § 9A.44.130 (West Supp. 2005); W. Va. Code Ann. § 15-12-1 (Lexis 2004); Wis. Stat. Ann. § 301.45 (West 2005); Wyo. Stat. Ann. § 7-19-301 (Lexis 2003).

is constitutional because "[p]rotecting children from parental neglect is a sufficient reason to warrant State intervention in the traditional rights of parents to the care, custody and control of their children").

To accomplish these goals, the North Carolina Sex Offender and Public Protection Registration Program requires every individual having a reportable conviction as defined by N.C.G.S. § 14-208.6, which includes offenses against minors and "sexually violent offenses," to register as a convicted sex offender with the sheriff of the county in which the person resides. N.C.G.S. § 14-208.7(a). If an individual convicted of such a crime moves to North Carolina "from outside this State, the person shall register within 10 days of establishing residence in this State, or whenever the person has been present in the State for 15 days, whichever comes first." *Id.* Additionally, non-resident workers and students who have reportable convictions or are required to register as sex offenders in their resident state must also register as a convicted sex offender in the county in which they are employed or attend school. N.C.G.S. § 14-208.7(a1).

By statute each sheriff of North Carolina's one hundred counties is required to obtain certain information from registering sex offenders, including the individual's full name, physical description accompanied by a current photograph and fingerprints, driver's license number, home address, and the "type of offense for which the person was convicted, the date of conviction, and the sentence imposed." *Id.* § 14-208.7(b). Much of this information then becomes public record and "shall be available for public inspection." *Id.* § 14-208.10(a). To better serve the public, information regarding sex offenders is now available via the Internet as part of the North Carolina Sex Offender & Public Protection Registry at http://sbi.jus.state.nc.us/DOJHAHT/SOR/. Additionally, "[t]he sheriff shall release any other relevant information that is necessary to protect the public concerning a specific person, but shall not release the identity of the victim of the offense that required registration." *Id.*

To require convicted sex offenders to comply with their duty to register, the General Assembly attached criminal penalties to failing to register with the sheriff of the individual's county of residence. Section 14-208.11 specifically states:

> (a) A person required by this Article to register who does any of the following is guilty of a Class F felony:

(1) Fails to register.

(2) Fails to notify the last registering sheriff of a change of address.

(3) Fails to return a verification notice as required under G.S. 14-208.9A.

(4) Forges or submits under false pretenses the information or verification notices required under this Article.

(5) Fails to inform the registering sheriff of enrollment or termination of enrollment as a student.

(6) Fails to inform the registering sheriff of employment at an institution of higher education or termination of employment at an institution of higher education.

(a1) If a person commits a violation of subsection (a) of this section, the probation officer, parole officer, or any other law enforcement officer who is aware of the violation shall immediately arrest the person in accordance with G.S. 15A-401, or seek an order for the person's arrest in accordance with G.S. 15A-305.

Id. § 14-208.11.

Of particular importance to our analysis is a 1997 amendment to this provision deleting the statutory *mens rea* requirement, which provided that only those offenders "who, knowingly and with the intent to violate" the registration provisions of N.C.G.S. § 14-208.11 were subject to conviction and punishment under the Sex Offender Registration Program. Ch. 516, sec. 1, 1997 N.C. Sess. Laws at 2281-82 (codified as amended at N.C.G.S. § 14-208.11). "In construing a statute with reference to an amendment, the presumption is that the legislature intended to change the law. This is especially so, in our view, when the statutory language is so drastically altered by the amendment." *State ex rel. Utils. Comm'n. v. Pub. Serv. Co. of N.C.*, 307 N.C. 474, 480, 299 S.E.2d 425, 429 (1983) (citation omitted). By deleting the original *mens rea* requirement in N.C.G.S. § 14-208.11, the General Assembly clearly expressed its intent to make failure to register as a sex offender a strict liability offense under North Carolina law. Thus, due to the clear legislative intent and the rule of law that "due process does not require every regulatory provision to contain a state-of-mind element," *Meads v. North Carolina Dep't of Agric.*, 349 N.C. 656, 673-74, 509 S.E.2d 165, 176-77 (1998) (citations

omitted), no showing of knowledge or intent is necessary to establish a violation of N.C.G.S. § 14-208.11.

Accordingly, a defendant who has committed a registerable offense but fails to comply with the registration requirements discussed above is guilty of a Class F felony. Although a defendant's term of imprisonment will necessarily vary under North Carolina's Structured Sentencing Act, *see* N.C.G.S. § 15A-1340.10 to -1340.23 (2003), we note that a defendant convicted of failing to register as a convicted sex offender with a prior record level of I could be subject to a potential minimum presumptive term of 13 to 16 months imprisonment. *See id.* § 15A-1340.17. Here, defendant had a prior record level of IV; thus, the minimum possible presumptive sentence for failing to register as a sex offender carried with it a minimum term of 20 months to a maximum term of 24 months imprisonment. *See id.*

THE CONSTITUTIONALITY OF N.C.G.S. § 14-208.11

This Court must now address whether N.C.G.S. § 14-208.11 violates the Due Process Clause of the United States Constitution. In so doing we are cognizant that the Law of the Land Clause of the North Carolina Constitution, N.C. Const. art. I, § 19, " 'is synonymous with due process of law as found in the Fourteenth Amendment to the Federal Constitution.' " *Rhyne v. K-Mart Corp.*, 358 N.C. 160, 180, 594 S.E.2d 1, 15 (2004) (quoting *In re Moore*, 289 N.C. 95, 98, 221 S.E.2d 307, 309 (1976)) (internal quotation marks ommitted). Although this Court has previously "reserved the right to grant Section 19 relief against unreasonable and arbitrary state statutes in circumstances where relief might not be obtainable under the Fourteenth Amendment to the United States Constitution," *Meads*, 349 N.C. at 671, 509 S.E.2d at 175, we note that defendant does not seek independent relief under the Law of the Land Clause. Therefore, defendant's assertions will be considered solely in light of federal due process jurisprudence.

The Due Process Clause of the Fifth Amendment to the United States Constitution guarantees that "No person shall be . . . deprived of life, liberty, or property without due process of law." A similar requirement, that no "State [shall] deprive any person of life, liberty, or property without due process of law" is also contained in the Fourteenth Amendment to the federal constitution. Due process has come to provide two types of protection for individuals against improper governmental action, substantive and procedural due process. *State v. Thompson*, 349 N.C. 483, 491, 508 S.E.2d 277, 282

(1998). Substantive due process ensures that the government does not engage in conduct that "shocks the conscience," *Rochin v. California*, 342 U.S. 165, 172, 96 L. Ed. 183, 190 (1952), or hinder rights "implicit in the concept of ordered liberty," *Palko v. Connecticut*, 302 U.S. 319, 325, 82 L. Ed. 288, 292 (1937), *overruled on other grounds by Benton v. Maryland*, 395 U.S. 784, 23 L. Ed. 2d 707 (1969). In the event that the legislation in question meets the requirements of substantive due process, procedural due process "ensures that when government action deprive[s] a person of life, liberty, or property . . . that action is implemented in a fair manner." *Thompson*, 349 N.C. at 491, 508 S.E.2d at 282. And it is the latter of the two, procedural due process, that defendant relies upon here. Specifically, defendant seeks to have N.C.G.S. § 14-208.11 declared unconstitutional based on allegedly insufficient notice of the existence of the criminal statute itself.

Defendant, relying almost exclusively on *Lambert v. California*, 355 U.S. 225, 2 L. Ed. 2d 228 (1957), asserts that the State must prove "actual or probable notice of the duty to register in order to satisfy due process." Defendant contends that "[t]he Court of Appeals rightly dismissed the 'osmosis' defense in light of Congress' express requirements that state registration programs incorporate detailed notification procedures." According to defendant, "[t]hose statutes conclusively rebut the notion that states can rely on convicted sex offenders to divine their registration duties through mental telepathy or the exercise of moral imagination." Defendant's arguments reflect a clear misunderstanding of due process jurisprudence.

In addressing the facial validity of N.C.G.S. § 14-208.11, our inquiry is guided by the rule that "[a] facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully." *United States v. Salerno*, 481 U.S. 739, 745, 95 L. Ed. 2d 697, 707 (1987). This is so, because

> "[t]he presumption is that any act passed by the legislature is constitutional, and the court will not strike it down if [it] can be upheld on any reasonable ground." *Ramsey v. N.C. Veterans Comm'n*, 261 N.C. 645, 647, 135 S.E.2d 659, 661 (1964). An individual challenging the facial constitutionality of a legislative act "must establish that no set of circumstances exists under which the [a]ct would be valid." *Salerno*, 481 U.S. at 745, 95 L. Ed. 2d at 707. The fact that a statute "might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid." *Id.*

Thompson, 349 N.C. at 491, 508 S.E.2d at 281-82. Moreover, we emphasize that "[t]he role of the legislature is to balance the weight to be afforded to disparate interests and to forge a workable compromise among those interests. The role of the Court is not to sit as a super legislature and second-guess the balance struck by the elected officials." *Henry v. Edmisten*, 315 N.C. 474, 491, 340 S.E.2d 720, 731 (1986). Rather, this Court must "measure the balance struck by the legislature against the required minimum standards of the constitution." *Id.*

Accordingly, we note that the prerelease notification provision of N.C.G.S. § 14-208.8(a)(1) states that "[a]t least 10 days, but not earlier than 30 days" before the release of a person subject to registration as a sex offender from a penal institution, an official of the penal institution must inform that individual of his duty to register under the Sex Offender and Public Protection Registration Program. The penal institution official must also require the individual to sign a written statement that he or she was so informed. *Id.* Therefore, by the very terms of the statute, those individuals released from a North Carolina penal institution and subject to punishment for failure to register pursuant to N.C.G.S. § 14-208.11, are required to have actual notice of their duty to register, and defendant cannot " 'establish that no set of circumstances exists under which the [a]ct would be valid.' " *Thompson*, 349 N.C. at 491, 508 S.E.2d at 282 (quoting *Salerno*, 481 U.S. at 745, 95 L. Ed. 2d at 707). Accordingly, we find that N.C.G.S. § 14-208.11 is facially constitutional.

With respect to whether N.C.G.S. § 14-208.11 is unconstitutional as applied to defendant, a convicted sex offender in another jurisdiction who subsequently moved to North Carolina, defendant argues that the State must prove actual or probable notice of his duty to register to satisfy the due process notice requirement of *Lambert v. California*, 355 U.S. at 229-30, 2 L. Ed. 2d at 232. Defendant argues that although he registered as a convicted sex offender in South Carolina, "[n]othing in the registration form or the statutes mentioned any duty to register outside of South Carolina." Thus, defendant alleges, due to his lack of actual notice, his convictions for failure to register as a sex offender and for having attained the status of habitual felon were obtained in violation of the Due Process clause of the United States Constitution. We find defendant's arguments wholly unpersuasive.

We first note that the United States Supreme Court has acknowledged:

> The general rule that ignorance of the law or a mistake of law is no defense to criminal prosecution is deeply rooted in the American legal system. *See, e. g.*, *United States v. Smith*, 5 Wheat. 153, 182 (1820) (Livingston, J., dissenting); *Barlow v. United States*, 7 Pet. 404, 411 (1833); *Reynolds v. United States*, 98 U.S. 145, 167, (1879); *Shevlin-Carpenter Co. v. Minnesota*, 218 U.S. 57, 68 (1910); *Lambert v. California*, 355 U.S. 225, 228 (1957); *Liparota v. United States*, 471 U.S. 419, 441 (1985) (White, J., dissenting); O. Holmes, The Common Law 47-48 (1881). Based on the notion that the law is definite and knowable, the common law presumed that every person knew the law. This common-law rule has been applied by the Court in numerous cases construing criminal statutes. *See, e.g.*, *United States v. International Minerals & Chemical Corp.*, 402 U.S. 558 (1971); *Hamling v. United States*, 418 U.S. 87, 119-24 (1974); *Boyce Motor Lines, Inc. v. United States*, 342 U.S. 337 (1952).

Cheek v. United States, 498 U.S. 192, 199, 112 L. Ed. 2d 617, 628 (1991).

However, more than three decades before *Cheek*, the United States Supreme Court created a narrow exception to the general rule that ignorance of the law is no excuse, holding that "actual knowledge of the duty to register or proof of the probability of such knowledge and subsequent failure to comply are necessary" before a conviction under a general criminal registration act can stand. *Lambert*, 355 U.S. at 229, 2 L. Ed. 2d at 232. In *Lambert*, a provision of the City of Los Angeles, California Municipal Code required that all persons convicted of a felony, whether that conviction occurred in California or another state and was punishable as a felony in California, who remained in Los Angeles more than five days register as a felon with the Chief of Police. *Id.* at 226, 2 L. Ed. 2d at 230. The police discovered, upon defendant's arrest for "suspicion of another offense," that defendant, a resident of Los Angeles for more than seven years, had been convicted of a felony but had not registered with the Chief of Police. *Id.* After being convicted for failing to register, defendant appealed to the United States Supreme Court, arguing that the municipal code, as applied, denied her due process of law. *Id.* at 227, 2 L. Ed. 2d at 230-31.

On appeal, the United States Supreme Court held that Lambert's conviction did indeed violate due process because her conduct in failing to register was "wholly passive" and "[a]t most the ordinance is

but a law enforcement technique designed for the convenience of law enforcement agencies." *Id.* at 228-29, 2 L. Ed. 2d at 231-32. However, in so holding, the Supreme Court emphasized that in *Lambert*, "*circumstances which might move one to inquire as to the necessity of registration [were] completely lacking*." *Id.* at 229, 2 L. Ed. 2d at 232 (emphasis added). Of note, however, is the marked difference between the registration ordinance in *Lambert* and modern sex offender registration statutes.

In *Lambert*, the registration requirement was a general municipal ordinance, whereas the sex offender registration statutes enacted in North Carolina and all other states are statewide registration programs. Unlike the registration requirement in *Lambert*, these programs are directed at a narrow class of defendants, convicted sex offenders, rather than all felons. And, perhaps most crucially, rather than serving as a general law enforcement device, as the United States Supreme Court found the city of Los Angeles' felon registration ordinance, modern sex offender registration programs were specifically enacted as public safety measures based on legislative determinations that convicted sex offenders pose an unacceptable risk to the general public once released from incarceration. *See Conn. Dep't of Pub. Safety*, 538 U.S. at 4, 155 L. Ed. 2d at 103 (" 'Sex offenders are a serious threat in this Nation. [T]he victims of sex assault are most often juveniles,' and '[w]hen convicted sex offenders reenter society, they are much more likely than any other type of offender to be rearrested for a new rape or sexual assault.' ") (citation omitted) (quoting *McKune*, 536 U.S. at 32-33, 153 L. Ed. 2d at 56 (plurality opinion)) (alterations in original); N.C.G.S. § 14-208.5.

Moreover, *Lambert's* "application has been limited, lending some credence to Justice Frankfurter's colorful prediction in dissent that the case would stand as 'an isolated deviation from the strong current of precedents—a derelict on the waters of the law.' " *Texaco, Inc. v. Short*, 454 U.S. 516, 537-38 n.33, 70 L. Ed. 2d 738, 756 n.33 (1982) (quoting *Lambert*, 355 U.S. at 232, 2 L. Ed. 2d at 233 (Frankfurter, J., dissenting)); *see also United States v. Freed*, 401 U.S. 601, 609, 28 L. Ed. 2d 356, 362 (1971) (reversing lower court's dismissal of charges against defendant for unlawfully possessing an unregistered destructive device because "one would hardly be surprised to learn that possession of hand grenades is not an innocent act"); *United States v. Mitchell*, 209 F.3d 319, 323 (4th Cir. 2000), *cert. denied*, 531 U.S. 849, 148 L. Ed. 2d 78 (2000) (rejecting application of *Lambert* and affirming conviction of a defendant previously convicted of domestic vio-

lence for subsequent possession of a firearm because defendant's "conduct in assaulting his wife—the act that led to his misdemeanor domestic violence conviction—put [defendant] on sufficient notice" that his continued possession of a firearm was illegal); *United States v. Bostic*, 168 F.3d 718, 722, 724-25 (4th Cir.), *cert. denied*, 527 U.S. 1029, 144 L. Ed. 2d 785 (1999) (affirming defendant's conviction for violating a federal statute prohibiting a person subject to a domestic violence protective order from possessing a firearm, in spite of his lack of notice that such conduct was illegal, because when defendant threatened his estranged wife with a firearm, he violated a court order requiring him to refrain from abusing and harassing his wife, thus was no longer an "ordinary citizen" and "[l]ike a felon a person in [defendant's] position [could not] reasonably expect to be free from regulation when possessing a firearm"). Thus, it is clear that the legal maxim *ignorantia juris non excusat* remains the general rule. Therefore, to be entitled to relief under the decidedly narrow *Lambert* exception, a defendant must establish that his conduct was "wholly passive" such that "*circumstances which might move one to inquire as to the necessity of registration are completely lacking*" and that defendant was ignorant of his duty to register and there was no reasonable probability that defendant knew his conduct was illegal. *Lambert*, 355 U.S. at 228-29, 2 L. Ed. 2d at 231-32 (emphasis added).

We find this case rich with circumstances that would move the reasonable individual to inquire of his duty to register in North Carolina such that defendant's conduct was not wholly passive and *Lambert* is not controlling. First, defendant had actual notice of his *lifelong duty* to register with the State of South Carolina as a convicted sex offender. Second, defendant had actual notice that he must register as a convicted sex offender in South Carolina for "similar offenses from other jurisdictions" and had a duty to inform South Carolina officials of a move out of state "within 10 days of the change of address to a new state," which defendant failed to do. Third, defendant himself informed law enforcement authorities that he had been convicted of a sex offense in Florida. These circumstances coupled with the pervasiveness of sex offender registration programs certainly constitute circumstances which would lead the reasonable individual to inquire of a duty to register in *any* state upon relocation.

Simply put, a convicted sex offender's failure to inquire into a state's laws on registration requirement is neither entirely innocent nor wholly passive, particularly when combined with that sex

offender's violation of his previous resident state's sex offender registration laws. Furthermore, as all fifty states and the District of Columbia had enacted sex offender registration programs in compliance with federal law by 1996, approximately four years before defendant's release from prison, it would be nonsensical to allow sex offenders to escape their duty to register by moving to a state that has not provided them with actual notice of their duty to register, and then claim ignorance of the law. *Cf.* Oliver Wendell Holmes, Jr., *The Common Law* 48 (1923) ("It is no doubt true that there are many cases in which the criminal could not have known that he was breaking the law, but to admit the excuse at all would be to encourage ignorance where the law-maker has determined to make men know and obey, and justice to the individual is rightly outweighed by the larger interests on the other side of the scales.").

We find the case *sub judice* overflowing with circumstances "which might move one to inquire as to the necessity of registration." Accordingly, we hold that defendant's case does not fall within the narrow *Lambert* exception to the general rule that ignorance of the law is no excuse. Thus, because "[g]enerally a legislature need do nothing more than enact and publish the law, and afford the citizenry a reasonable opportunity to familiarize itself with its terms and to comply," *Texaco*, 454 U.S. at 532, 70 L. Ed. 2d at 752, we are bound by the rule that "[a]ll citizens are presumptively charged with knowledge of the law." *Atkins v. Parker*, 472 U.S. 115, 130, 86 L. Ed. 2d 81, 93 (1985); *see also N. Laramie Land Co. v. Hoffman*, 268 U.S. 276, 283, 69 L. Ed. 953, 957 (1925) ("All persons are charged with knowledge of the provisions of statutes and must take note of the procedure adopted by them.").

We conclude that defendant, a convicted sex offender, was provided actual notice by South Carolina of his duty to register as a convicted sex offender. This notice was sufficient to put defendant on notice to inquire into the applicable law of the state to which he relocated, in this instance North Carolina. Therefore, defendant's conviction for failure to register as a sex offender under N.C.G.S. § 14-208.11 does not violate due process.

CONCLUSION

N.C.G.S. § 14-208.11 is constitutional on its face and as applied to defendant, an out-of-state registered sex offender who failed to register in North Carolina. Accordingly, the decision of the Court of Appeals is reversed and this case is remanded to that court for con-

sideration of the remainder of defendant's assignments of error not previously addressed.

REVERSED and REMANDED.

IN THE MATTER OF T.E.F.

No. 608A04

(Filed 1 July 2005)

Juveniles— admission of guilt—failure to conduct six step inquiry

The trial court erred in a juvenile adjudicatory hearing by accepting a juvenile's admission of guilt without conducting the full inquiry required by N.C.G.S. § 7B-2407(a) regarding the juvenile's satisfaction with his representation by counsel, because: (1) the six specific steps under N.C.G.S. § 7B-2407(a) are paramount and necessary in accepting a juvenile's admission as to guilt during an adjudicatory hearing; (2) if the required inquiries and statements do not affirmatively appear in the record of the proceeding, the adjudication of delinquency based on the admission must be set aside; (3) our legislature intended a procedure more protective and careful than that afforded adults to ensure a fully informed choice and voluntary decision by all juveniles; (4) although the trial court in the instant case conducted a detailed and careful examination of the juvenile, the court covered only five of the six specific requirements listed and omitted the question of whether the juvenile was satisfied with his legal representation; and (5) our Supreme Court declines to adopt a totality of the circumstances standard of review for determining whether a juvenile's admission of guilt is a product of an informed choice under N.C.G.S. § 7B-2407.

Justice NEWBY dissenting.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 167 N.C. App. 1, 604 S.E.2d 348 (2004), reversing and remanding a juvenile disposition and commitment order entered 5 May 2003 by Judge John M. Britt in District Court, Edgecombe County. Heard in the Supreme Court 20 April 2005.

Roy Cooper, Attorney General, by Judith Tillman, Assistant Attorney General, for the State-appellant.

Adrian M. Lapas for juvenile-appellee.

LAKE, Chief Justice.

The sole question presented for review is whether the trial court, in conducting a juvenile adjudicatory hearing, committed reversible error by accepting the admission of guilt of the juvenile (T.E.F.) without conducting the full inquiry required under N.C.G.S. § 7B-2407(a).

The Court of Appeals' majority reversed the trial court, holding that because the trial court failed to determine T.E.F.'s satisfaction with his representation by counsel as required by N.C.G.S. § 7B-2407(a), "the trial court's acceptance of the juvenile's admission . . . necessitates setting aside the juvenile's adjudication." *In re T.E.F.*, 167 N.C. App. 1, 8, 604 S.E.2d 348, 352-53 (2004). The Court of Appeals remanded the case to the trial court for a new adjudicatory hearing. *Id.* at 8, 604 S.E.2d at 353. Judge Levinson dissented, contending that a "totality of the circumstances" test surrounding the hearing should be applied in deciding whether a juvenile understood his rights and that failure to specifically ask each of the six questions listed under N.C.G.S. § 7B-2407(a) should not be reversible error as a matter of law. *Id.* at ——, 604 S.E.2d at 354-55. The dissent specifically contended that the eight questions asked of the juvenile by the trial court, in effect, determined and showed that T.E.F. was in fact satisfied with counsel and was fully informed. These questions included:

> Do you understand that you have the right to remain silent and that anything you say may be used against you?
>
> Do you understand that you have the right to deny that you committed the offenses of three counts of armed robbery and one count of assault with a deadly weapon?
>
> Do you understand by admitting that you did this that you give up the constitutional right to confront the witness against you?
>
> Do you understand that by admitting this that you could be sent to training school?
>
> Do you understand what you're charged with?
>
> Do you have any questions for [your attorney] or for me?

Do you have any further questions at all?

Do you understand what's going on?

The State appealed to this Court as of right based on the dissenting opinion of Judge Levinson. After careful review, we affirm the decision of the Court of Appeals reversing the trial court and remanding for a new adjudicatory hearing for T.E.F.

The relevant facts concerning this case show that on 28 March 2003, T.E.F., age fourteen, and an adult companion known as "Powell" approached three boys standing outside the entrance to Park Hill Mall. T.E.F. pushed one of the boys against the wall, pulled out a "hooked" knife and placed it against the left side of the boy's neck, and demanded money. The boy reached into his pocket and removed one dollar and gave it to T.E.F. T.E.F. then reached into the boy's pocket and withdrew more money. While T.E.F. had the first boy against the wall, he demanded money from the other two boys. Both gave T.E.F. the money they had. T.E.F. and Powell then fled, after taking a total of twelve dollars.

Subsequently, the police arrived and obtained descriptions of the two suspects from the three victims. T.E.F. and Powell were located, and T.E.F. was identified as the person who had taken the victims' money. T.E.F. was charged with three counts of robbery with a dangerous weapon, one count of carrying a concealed weapon, and one count of assault with a deadly weapon.

On 22 April 2003, during the Juvenile Delinquency Session of the District Court of Edgecombe County, T.E.F. indicated, through counsel, that he would admit the offenses charged. Upon such admission, the State dismissed the charge of carrying a concealed weapon. The trial court was informed that there were no ongoing plea arrangements or discussions. The State presented a factual basis to support T.E.F.'s admission, and the trial court adjudicated T.E.F. delinquent on the remaining counts. T.E.F. was committed to the Department of Juvenile Justice and Delinquency Prevention for placement in a training school for a minimum of six months and a maximum not to exceed his nineteenth birthday.

T.E.F. appealed to the Court of Appeals, asserting the trial court erred in accepting his admission without conducting the full inquiry required under N.C.G.S. § 7B-2407(a), specifically arguing that the trial court failed to ascertain whether he was fully satisfied with his

legal representation. The Court of Appeals agreed and reversed the decision of the trial court and remanded the case for a new hearing. Judge Levinson dissented, contending that when determining whether the requirements of N.C.G.S. § 7B-2407(a) have been fulfilled, a "totality of the circumstances" standard should be employed rather than holding that failure to strictly follow the statute is reversible error as a matter of law.

N.C.G.S. § 7B-2407(a) states:

> (a) The court may accept an admission from a juvenile *only* after first addressing the juvenile personally *and*:
>
> (1) Informing the juvenile that the juvenile has a right to remain silent and that any statement the juvenile makes may be used against the juvenile;
>
> (2) Determining that the juvenile understands the nature of the charge;
>
> (3) Informing the juvenile that the juvenile has a right to deny the allegations;
>
> (4) Informing the juvenile that by the juvenile's admissions the juvenile waives the juvenile's right to be confronted by the witnesses against the juvenile;
>
> (5) *Determining that the juvenile is satisfied with the juvenile's representation*; and
>
> (6) Informing the juvenile of the most restrictive disposition on the charge.

N.C.G.S. § 7B-2407(a) (2003) (emphasis added). Next, N.C.G.S. § 7B-2407(b) states that the trial court "may accept an admission from a juvenile *only* after determining that the admission is a product of informed choice." (Emphasis added.) Moreover, our courts have held that the purpose and function of N.C.G.S. § 7B-2407(a) is to ensure "the trial court . . . determine[s] that the admission is a product of the juvenile's informed choice" as required by N.C.G.S. § 7B-2407(b), meaning these two sections of N.C.G.S. § 7B-2407 must be read in conjunction in determining whether to accept a juvenile's admission of guilt. *In re Kenyon N.*, 110 N.C. App. 294, 297, 429 S.E.2d 447, 449 (1993) (citing N.C.G.S. § 7A-633 (1989), repealed and recodified as amended at N.C.G.S. § 7B-2407 by Act of Oct. 22, 1998, ch. 202, secs. 5 & 6, 1998 N.C. Sess. Laws 695, 742, 817-18.

The use of the mandatory word "only" together with "and" in N.C.G.S. § 7B-2407(a) undoubtedly means that all of these six specific steps are paramount and necessary in accepting a juvenile's admission as to guilt during an adjudicatory hearing. If our legislature intended for these six steps to be mere suggestions or a general guide for our trial courts, this mandatory language could have easily been omitted. It was not, however, and we must interpret this language precisely as it is written. Therefore, the determination as to whether a juvenile's admission is a product of an informed choice as required by N.C.G.S. § 7B-2407(b), at a very minimum, is predicated upon the six mandatory requirements specifically listed in N.C.G.S. § 7B-2407(a). If the required "inquiries and statements [do not] . . . affirmatively appear in the record of the proceeding, . . . the adjudication of delinquency based on the admission must be set aside." *Kenyon N.*, 110 N.C. App. at 297, 429 S.E.2d at 449 (citation omitted).

N.C.G.S. § 7B-2405 further shows the mandatory nature of the six requirements listed in N.C.G.S. § 7B-2407(a). N.C.G.S. § 7B-2405, titled "Conduct of the adjudicatory hearing," states in part:

> In the adjudicatory hearing, the court *shall* protect the following rights of the juvenile . . . to assure due process of law:
>
> (1) The right to written notice of the facts alleged in the petition;
>
> (2) *The right to counsel*;
>
> (3) The right to confront and cross-examine witnesses;
>
> (4) The privilege against self-incrimination;
>
> (5) The right of discovery; and
>
> (6) *All rights afforded adult offenders except the right to bail, the right of self-representation, and the right of trial by jury.*

N.C.G.S. § 7B-2405 (2003) (emphasis added). By listing the rights that the trial court must protect during juvenile adjudicatory hearings to assure that due process is satisfied, and by subsequently listing the six steps specified in N.C.G.S. § 7B-2407(a) that must be taken before accepting a juvenile's admission of guilt and waiver of these rights, it is clear that our legislature intended a procedure more protective and careful than that afforded adults to ensure a fully informed choice and voluntary decision by all juveniles.

In the case at bar, although the trial court conducted a detailed and careful examination of T.E.F. in asking him the eight questions listed above, this information nevertheless fell short of the specific and mandatory language of N.C.G.S. § 7B-2407(a). The trial court covered only five of the six specific requirements listed. In its examination of T.E.F., the trial court did not specifically question T.E.F. on the fifth listed requirement under the statute, whether the juvenile was satisfied with his legal representation. This omission precluded the trial court from accepting T.E.F.'s admission as being a product of his informed choice. *See Kenyon N.*, 110 N.C. App. at 298, 429 S.E.2d at 449; *see also In re Register*, 84 N.C. App. 336, 348, 352 S.E.2d 889, 895-96 (1987) (holding the trial court was precluded from accepting six juveniles' admissions because the required inquiries under the statute were incomplete). Therefore, we agree with the Court of Appeals' determination that the trial court erred in accepting T.E.F.'s admission and that his adjudication of delinquency must be set aside. *Kenyon N.*, 110 N.C. App. at 297, 429 S.E.2d at 449.

Further, we decline to adopt a "totality of the circumstances" standard of review when determining whether a juvenile's admission of guilt is a product of an informed choice under N.C.G.S. § 7B-2407. While we agree that "an 'admission' in a juvenile hearing is equivalent to a guilty plea in a criminal case," we also recognize the fact that there are significant differences between adult criminal trials and juvenile proceedings. *In re Chavis*, 31 N.C. App. 579, 581, 230 S.E.2d 198, 200 (1976), *cert. denied*, 291 N.C. 711, 232 S.E.2d 203 (1977). Our courts have consistently recognized that "[t]he [S]tate has a *greater* duty to protect the rights of a respondent in a juvenile proceeding than in a criminal prosecution." *State v. Fincher*, 309 N.C. 1, 24, 305 S.E.2d 685, 699 (1983) (Harry Martin, J., concurring) (citing *In re Meyers*, 25 N.C. App. 555, 558, 214 S.E.2d 268, 270 (1975) (holding that in a juvenile proceeding, unlike an ordinary criminal proceeding, the burden upon the State to see that a juvenile's rights are protected is increased rather than decreased). This higher burden placed upon the State to protect juvenile rights would certainly be undermined by ignoring the mandatory language of N.C.G.S. § 7B-2407 and by adopting a less certain and variable "totality of the circumstances" standard when determining whether a juvenile's admission is a product of an informed choice. We do not believe this was the intent of our General Assembly when it enacted N.C.G.S. § 7B-2407, requiring all six areas of inquiry before the juvenile's admission of guilt may be accepted.

Accordingly, we refuse to blur the distinction between juvenile proceedings and adult criminal proceedings, and we reemphasize the fact that increased care must be taken to ensure complete understanding by juveniles regarding the consequences of admitting their guilt. At a very minimum, this requires asking a juvenile each of the six specifically mandated questions listed in N.C.G.S. § 7B-2407(a). We note that the Administrative Office of the Courts has available a standard form incorporating these statutory areas of inquiry.[1]

The decision of the Court of Appeals is affirmed.

AFFIRMED.

Justice NEWBY dissenting.

The juvenile placed a "hooked" knife against the neck of the victim and robbed him and two companions. At his hearing, the juvenile indicated his desire to admit his guilt. (The State agreed to dismiss one charge.) Before accepting the admission, the trial court personally addressed the juvenile and determined the admission was "knowing and voluntary." Only after doing so did the court find the juvenile to be delinquent and enter the disposition as required by law. Now the majority remands this case to an overworked trial court because the trial judge failed to ask one question, namely, whether the juvenile was satisfied with his attorney. It does this despite no allegation of prejudice to the juvenile. I believe neither a plain reading of the statute nor case law supports this decision and respectfully dissent.

I.

In keeping with fundamental concepts of justice and due process, Subchapter II of the Juvenile Code, N.C.G.S. §§ 7B-1500 to -2827, provides for the protection of certain rights of the juvenile during delinquency proceedings. Section 7B-2000 explicitly recognizes a juvenile's right to be represented by counsel, whether appointed or retained. Similarly, N.C.G.S. § 7B-2405 requires the trial court to protect certain rights of the accused juvenile, specifically, the privilege against self-incrimination and the right to counsel, to written notice of the facts alleged, to confront and cross-examine witnesses, to discovery and to certain other rights afforded adult offenders.

When a juvenile wishes to admit allegations of criminal wrongdoing, the court must determine that the admissions are knowing and

1. AOC Form J-410 (Rev. 7/99).

voluntary, "a product of informed choice." N.C.G.S. § 7B-2407(b) (2003). *See*, *e.g.*, *In re W.H.*, 166 N.C. App. 643, 646, 603 S.E.2d 356, 358 (2004). N.C.G.S. § 7B-2407(a) has codified various elements that constitute "informed choice." Thereunder, the trial court must "inform" the juvenile of four basic rights and make "determinations" regarding two others.

N.C.G.S. § 7B-2407(a) states:.

> (a) The court may accept an admission from a juvenile only after first addressing the juvenile personally and:
>
> (1) Informing the juvenile that the juvenile has a right to remain silent and that any statement the juvenile makes may be used against the juvenile;
>
> (2) Determining that the juvenile understands the nature of the charge;
>
> (3) Informing the juvenile that the juvenile has a right to deny the allegations;
>
> (4) Informing the juvenile that by the juvenile's admissions the juvenile waives the juvenile's right to be confronted by the witnesses against the juvenile;
>
> (5) Determining that the juvenile is satisfied with the juvenile's representation; and
>
> (6) Informing the juvenile of the most restrictive disposition on the charge.

N.C.G.S. § 7B-2407(a) (2003).

No doubt the General Assembly chose its language carefully. Whereas subdivisions (a)(1),(3),(4), and (6) specifically instruct the trial court to "inform" the juvenile of certain rights and the consequences of relinquishing those rights; subdivisions (a)(2) and (5) require the court to make "determinations" regarding the juvenile's understanding of the charges and satisfaction with legal representation. Although a court could directly inquire of the juvenile whether he understands the charges and is satisfied with his representation, the answers would not be dispositive. The intent of subdivision (a)(5) is not that the juvenile be subjectively "satisfied" with his counsel, but that the "juvenile's representation" meet an objective minimum standard of competency. The legislature has emphasized the objective nature of the inquiry by use of the term "representation"

instead of attorney. In essence, subdivision (a)(5) is simply designed to insure that the right to counsel as specified in N.C.G.S. § 7B-2405 has been met.

Without analysis, the majority characterizes the six subdivisions of N.C.G.S. § 7B-2407(a) as required "questions to be asked of a juvenile," apparently interpreting "informing" and "determining" to both mean "inquire." The majority further states subsection 2407(a) requires a court to ask a juvenile "each of the six specifically mandated questions listed in [the statute]." The majority, however, never expressly states the "specifically mandated questions" nor addresses the specific statutory language. N.C.G.S. § 7B-2407(a) does not utilize the term "inquiry" or anything comparable.

By ignoring the plain language of the statute, the majority rewrites subdivision (a)(5) to read as follows: "Specifically inquire whether the juvenile is satisfied with counsel." However, the role of the appellate court is not to superimpose its view upon the plain language of the statute. *See Henry v. Edmisten*, 315 N.C. 474, 491, 340 S.E.2d 720, 731 (1986) ("The role of the Court is not to sit as a super legislature and second-guess the balance struck by the elected officials.").

The following statute, referenced by the majority, exemplifies the careful choice of words by the General Assembly.

> By *inquiring* of the prosecutor, the juvenile's attorney, and the juvenile personally, the court shall *determine* whether there were any prior discussions involving admissions, whether the parties have entered into any arrangement with respect to the admissions and the terms thereof, and whether any improper pressure was exerted. The court may accept an admission from a juvenile only after *determining* that the admission is a product of informed choice.

N.C.G.S. § 7B-2407(b) (emphasis added).

This statute specifically directs the trial court to "inquire" into particular matters before making a "determination." In contrast, subdivision 2407(a)(5) simply instructs the court to "determine" whether a juvenile is satisfied with his representation. I do not believe the legislature used the term "determine" to mean "inquire," particularly in view of its having used the two terms to convey two distinct meanings in the very next subsection. The language of subdivision 2407(a)(5) is similar to the last phrase of subsection (b) in which the court must

"determine" that the admission "is a product of informed choice." Does this mean the court simply asks one question of the juvenile, "Is your admission the product of informed choice?"? No, the trial court makes the determination based upon all the available information. Likewise, regarding "satisfaction" with representation, the court is not to inquire as to the juvenile's subjective evaluation, but by considering all of the available information, "determine" if the juvenile's attorney meets a basic standard of competency in his representation of his client.

Directly asking the juvenile if he is satisfied with his representation is not very helpful to the trial court's determination. In Subchapter II of the Juvenile Code, our legislature has recognized the lack of maturity and life experiences of juveniles. In answering whether he is "satisfied" with his legal representation, it is conceivable that a juvenile could express dissatisfaction with an extremely competent counsel. Conversely, a juvenile could express appreciation for a particularly personable counsel who has failed to meet the minimum standards of competency.

The facts of this case establish that the trial court had sufficient bases to determine the competency of the fourteen-year-old juvenile's legal representation without directly asking the juvenile. At his hearing, when the juvenile indicated through counsel his desire to admit the offenses, the trial court personally addressed the juvenile and asked eight questions:

> Do you understand that you have the right to remain silent and that anything you say may be used against you?
>
> Do you understand that you have the right to deny that you committed the offenses of three counts of armed robbery and one count of assault with a deadly weapon?
>
> Do you understand by admitting that you did this that you give up the constitutional right to confront the witness against you?
>
> Do you understand that by admitting this that you could be sent to training school?
>
> Do you understand what you're charged with?
>
> Do you have any questions for [your attorney] or for me?
>
> Do you have any further questions at all?
>
> Do you understand what's going on?

The order and content of these questions reveal that the trial court was familiar with and adhered to the statutory requirements of N.C.G.S. § 7B-2407(a). In particular, the last three questions indicate the trial court's understanding of his need to determine whether the juvenile was objectively satisfied with his representation and that his admission was knowing and voluntary. The trial court properly considered all of the answers provided by the juvenile. The court inquired as to the existence of plea arrangements or discussions. The State presented the factual basis for the juvenile's admission. Thus, it appears the trial court considered all of the factors and determined the juvenile understood the charges and had received satisfactory legal representation. The trial court further determined that the admission was knowing and voluntary and accepted it.

As noted by the majority, the court could have used AOC Form J-410 when conducting its inquiry. Although this form is not mandatory, it supports my analysis. Rather than relying on the majority's "six specifically mandated questions," it includes sixteen questions clearly designed to consider all the circumstances so as to insure that admissions are knowing and voluntary.

The majority admits "the trial court conducted a detailed and careful examination of T.E.F," but states that the examination "fell short of the specific and mandatory language of N.C.G.S. § 7B-2407(a)" by failing to "specifically question . . . whether the juvenile was satisfied with his legal representation." The majority reasons the failure to ask this one specific question "precluded the trial court from accepting T.E.F.'s admission as being a product of his informed choice." By so ruling, the majority superimposes its rigid legalism over the legislative intent as expressed in the plain language of the statute.

II.

Assuming *arguendo* that the trial court was required by the statute to ask the juvenile if he were satisfied with his representation, a mere technical violation should not result in a new hearing. At a minimum, prejudice must be shown by way of harmless-error analysis. Here, there is no suggestion of prejudice.

Our General Assembly has enacted a statutory harmless-error rule.

> A defendant is prejudiced by errors relating to rights arising other than under the Constitution of the United States when there is a

> reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises. The burden of showing such prejudice under this subsection is on the defendant.

N.C.G.S. § 15A-1443(a) (2003). This statute has been applied to numerous situations, including capital litigation. *See*, *e.g.*, *State v. Walters*, 357 N.C. 68, 81, 588 S.E.2d 344, 352, *cert. denied*, 540 U.S. 971, 157 L. Ed. 2d 320 (2003).

Likewise, most violations of federal constitutional rights are subject to harmless error analysis. In that context, if a defendant is represented by counsel, there is a strong presumption that any error is subject to harmless error analysis. *See generally State v. Allen*, ––– N.C.–––, ––– S.E.2d ––– (July 1, 2005) (No. 482PA04) (Martin, J. concurring in part and dissenting in part) (applying federal law).

N.C.G.S. § 7B-2407(a) is virtually identical to the comparable adult provision N.C.G.S. § 15A-1022(a) which provides:

> (a) Except in the case of corporations or in misdemeanor cases in which there is a waiver of appearance under G.S. 15A-1011(a)(3), a superior court judge may not accept a plea of guilty or no contest from the defendant without first addressing him personally and:
>
> (1) Informing him that he has a right to remain silent and that any statement he makes may be used against him;
>
> (2) Determining that he understands the nature of the charge;
>
> (3) Informing him that he has a right to plead not guilty;
>
> (4) Informing him that by his plea he waives his right to trial by jury and his right to be confronted by the witnesses against him;
>
> (5) Determining that the defendant, if represented by counsel, is satisfied with his representation;
>
> (6) Informing him of the maximum possible sentence on the charge for the class of offense for which the defendant is being sentenced, including that possible from consecutive sentences, and of the mandatory minimum sentence, if any, on the charge; and

(7) Informing him that if he is not a citizen of the United States of America, a plea of guilty or no contest may result in deportation, the exclusion from admission to this country, or the denial of naturalization under federal law.

N.C.G.S. § 15A-1022(a) (2003). Except for the phrase "if represented by counsel," subdivision (a)(5) is substantively identical in the two statutes.

Case law is clear that mere non-compliance with this statute applicable to adults does not, absent a showing of prejudice, render the plea or admission invalid or entitle the accused to a new hearing or trial:

> Our courts have rejected a ritualistic or strict approach in applying these standards and determining remedies associated with violations of G.S. § 15A-1022. Even when a violation occurs, there must be prejudice before a plea will be set aside. Moreover, in examining prejudicial error, courts must "look to the totality of the circumstances and determine whether non-compliance with the statute either affected defendant's decision to plead or undermine the plea's validity."

State v. McNeill, 158 N.C. App. 96, 103, 580 S.E.2d 27, 31 (2003) (internal citations omitted). For a juvenile no less than for an adult, the dispositive issue is whether the juvenile's admission was voluntary and knowing. If it is clear that an error had no effect and that the individual would have made the same decision even without the error, then the error is harmless beyond reasonable doubt.

Two of the juvenile cases cited by the majority utilized the totality of the circumstances test to ascertain if a juvenile's decision was voluntary and knowing. *In re Kenyon N.*, 110 N.C. App. 294, 298, 429 S.E.2d 447, 449 (1993); *In re Chavis*, 31 N.C. App. 579, 581, 230 S.E.2d 198, 200 (1976), *disc. rev. denied*, 291 N.C. 711, 232 S.E.2d 203 (1977). I would apply this test to determine if the juvenile would have made the same decision even if the judge had asked him if he were satisfied with his representation.

In this case, the juvenile unambiguously indicated that he understood the charges, that he understood the potential penalties, and that he understood all rights he forfeited by his admission. It is not reasonable to suppose that if the judge had directly inquired into the juvenile's subjective satisfaction with his representation that the

juvenile's decision would have been different. The juvenile's admission was voluntary and knowing and the error, if any, was harmless beyond reasonable doubt.

Certainly I agree with the majority that the State has an enhanced burden to protect the rights of juveniles. However, I do not believe that applying the plain meaning of our statutes "undermine[s]" that goal. Put precisely, a juvenile's right to competent counsel is not "undermined" by a trial court's determination of the adequacy of representation without directly inquiring of the juvenile. Likewise, I believe the majority's criticism of the use of "totality of the circumstances" and harmless-error analysis is unfounded. A juvenile's right to competent legal counsel is not "undermined" by an appellate court's review of all of the circumstances and conclusion that the failure of a trial court to specifically inquire as to the juvenile's satisfaction with representation was not prejudicial beyond a reasonable doubt.

Further, as noted by the Court of Appeals dissent, rote statutory adherence as mandated by the majority undermines the protection of juveniles' rights. The "six mandatory questions" could be properly asked and answered and the admission accepted; whereas a "totality of the circumstances" review could demonstrate the admission was not knowing and voluntary. Unfortunately, this legalistic approach "elevates form over substance." *In re T.E.F.*, 167 N.C. App. 1, 8, 604 S.E.2d 348, 353 (2004) (Levinson, J., dissenting).

For the foregoing reasons, I respectfully dissent.

STATE OF NORTH CAROLINA v. JOHN MARVIN TRENT

No. 520A04

(Filed 1 July 2005)

Evidence; Judgments— pretrial suppression hearing—decision announced out of term—nullity

An armed robbery defendant received a new trial where the court announced its denial of defendant's suppression motions 7 months after the suppression hearing and after a new term had begun. The rule is longstanding: the court was required to enter its ruling during the term when the motions were heard. The

order was a nullity when it was entered, so that defendant's failure to object was not an implied consent, and prejudicial error review is not reached.

Justice NEWBY dissenting.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 166 N.C. App. 76, 601 S.E.2d 281 (2004), reversing a judgment entered on 28 August 2002 by Judge W. Osmond Smith, III in Superior Court, Caswell County, and granting defendant a new trial. Heard in the Supreme Court 14 March 2005.

Roy Cooper, Attorney General, by John G. Barnwell, Assistant Attorney General, for the State-appellant.

Staples Hughes, Appellate Defender, by Matthew D. Wunsche, Assistant Appellate Defender, for defendant-appellee.

LAKE, Chief Justice.

Defendant John Marvin Trent was indicted on 12 June 2001 on one count of robbery with a dangerous weapon. On 14 August 2001, he filed two motions to suppress. The motions sought to suppress the victim's identification of defendant and incriminating statements defendant made to police.

The hearing on defendant's motions to suppress commenced on 11 October 2001. The hearing was continued and resumed on 17 January 2002. After hearing evidence and arguments by counsel, the trial court stated: "Rather than rule on this right now, I'm going to review the evidence presented in greater detail, consider the authority argued and submitted by the parties and give you a ruling subsequently." At the end of these remarks, the trial court stated, "I will try to get you a ruling as soon as I reasonably can after giving it thorough consideration."

On 26 August 2002, seven months after the resumed hearing on the motions to suppress and after a new term had begun, this case came on for trial. At that time, the trial court announced in open court that defendant's motions to suppress were denied. Although the trial court stated that it informed the parties of its decision before announcing it on the opening day of the trial, nothing in the record indicates that this was done in open court during the Spring 2002 Term. Further, the State acknowledges that the written order was not filed with the Caswell County Clerk of Court until 21 August 2003,

which was one year after the announcement in open court and was out of term and out of session, as those categories have been traditionally defined. Following trial, on 28 August 2002, a jury convicted defendant of robbery with a firearm, for which he was sentenced to a term of 108 to 139 months' imprisonment.

In his appeal to the Court of Appeals, defendant successfully argued that the trial court erred by denying his motions to suppress because the order was entered out of term and out of session. We agree with the decision of the Court of Appeals, and likewise conclude that, given the present circumstances, defendant is entitled to a new trial.

This Court has noted that "[t]he use of 'term' has come to refer to the typical six-month assignment of superior court judges, and 'session' to the typical one-week assignments within the term." *Capital Outdoor Adver., Inc. v. City of Raleigh*, 337 N.C. 150, 154 nn.1 & 2, 446 S.E.2d 289, 291 nn.1 & 2 (1994).

Furthermore, this Court has held that "an order of the superior court, in a criminal case, must be entered during the term, during the session, in the county and in the judicial district where the hearing was held." *State v. Boone*, 310 N.C. 284, 287, 311 S.E.2d 552, 555 (1984). Absent consent of the parties, an order entered in violation of these requirements is null and void and without legal effect. *Id.*

This Court has considered the entering of orders out of term and out of session on numerous occasions. In fact, and notably, the case depended upon most highly by defendant, *Boone*, 310 N.C. 284, 311 S.E.2d 552, and one of the cases relied upon by the State, *State v. Horner*, 310 N.C. 274, 311 S.E.2d 281 (1984), were decided in opinions filed on the same day. The difference between the two cases is specifically addressed in *Horner*.

> In *Boone*, the trial judge did not make a ruling on the motion to suppress in open court which was recorded as a part of the proceedings. The trial judge in *Boone* left the district and, after the session expired, wrote, signed, and mailed to the clerk the order denying the motion to suppress. Nothing in the trial transcript or record indicated that the trial judge had made his decision on the motion at any time *in open court during the session*. Here, the trial judge passed on each part of the motion to suppress in open court as it was argued.

310 N.C. at 279, 311 S.E.2d at 285 (emphasis added).

This Court's decision in *State v. Palmer*, 334 N.C. 104, 431 S.E.2d 172 (1993) further clarifies the difference between the decisions in *Boone* and *Horner*. As interpreted by this Court in *Palmer*, *Boone* stands for the proposition that an order is a nullity if "the judge did not make a ruling on the motion in court during the term, but signed the order after the term had expired." *Id.* at 108, 431 S.E.2d at 174. In contrast, the trial court in *Horner* made a ruling on the motion in open court during the term at which the motion was heard. *Id.* Thus, the fact that the written order was filed after the term concluded did not invalidate it. *Id.* at 108-09, 431 S.E.2d at 174.

In the instant case, the trial court was required to enter its ruling on defendant's motions to suppress by announcing its decision in open court or by filing its order with the Caswell County Clerk of Court during the Spring 2002 Term in which the motions were heard. The trial court announced its decision in open court some seven months after the hearing, thus failing to comply with this established precedent.

The State contends that even if the order denying defendant's motions to suppress was entered out of term and out of session, it is not void because defendant impliedly consented to such an entry. To substantiate its claim, the State points to the fact that defendant did not object either when the trial court announced that it would take the motions under advisement, or when the decision was finally announced in open court before the start of the trial. However, contrary to the State's position, the decisions of our appellate courts adequately demonstrate that defendant's failure to object does not affect the nullity of an order entered out of term and out of session. In *State v. Reid*, 76 N.C. App. 668, 334 S.E.2d 235 (1985), the Court of Appeals found that a defendant does not impliedly consent to the entry of an order out of term and out of session by failing to object to a trial court's decision to take the motion under advisement. Furthermore, in *State v. Saults*, 299 N.C. 319, 261 S.E.2d 839 (1980), in which the defendant did not object to the trial court's entering of an order out of term and out of session, just as in the case at bar, this Court in essence held, *ex mero motu*, that a defendant's silence does not constitute implied consent. In *Saults*, this Court held: "[T]he order entered in this case is null and void since it was entered out of term and out of session." *Id.* at 325, 261 S.E.2d at 842. Moreover, this Court has clearly stated that "the consent of parties should always appear certain" to avoid "misapprehension, distrust and confusion." *Bynum v. Powe*, 97 N.C. 374, 378, 2 S.E. 170, 172 (1887).

Contrary to the argument offered by the State and the Court of Appeals' dissent, the presence of overwhelming evidence of defendant's guilt does not require reviewing the record for prejudicial error before a new trial is granted. In *Boone*, once this Court declared the order entered out of term and out of session as "being null and void and of no legal effect," the conclusion naturally follows that "the question of prejudice to the defendant is never reached." *Boone*, 310 N.C. at 289, 311 S.E.2d at 556. In the case at hand, the order announced and subsequently entered some seven months after the motion hearing is "null and void and of no legal effect." *Id.* Thus, there is no need or basis upon which to review the record for prejudicial error.

The Court of Appeals' dissent chastises the majority by saying, "[T]he trial judge was apparently required to forget that he had already heard evidence and arguments on the motion[s] and begin anew." *State v. Trent*, 166 N.C. App. 76, 83, 601 S.E.2d 281, 286 (2004) (Levinson, J., dissenting). However, that comment ignores the fact that the instant case represents the particular circumstance in which the *same judge* presides over the hearing on the motions and the trial, notwithstanding the two being in different terms and sessions. Requiring all judges to enter orders in term and in session, without exception, preserves standards, uniformity, stability, and fairness in criminal prosecution and furthers the policy motivation for the rule.

We do not embrace form over substance in adhering to this long-standing rule. The rule, although phrased in various ways in preceding cases, has invariably been applied to nullify orders which were entered out of term and out of session in both criminal and civil cases. The rationale for adhering to this rule continues to be the same as it was in an early case on this issue. In 1887 this Court, in affirming the then "well-settled" rule, recognized the General Assembly's power to prescribe the exercise of judicial jurisdiction through the use of terms and sessions stating: "This is essential to secure certainty, consistency, order and practical convenience in the due administration of public justice. Without proper regulations in these respects, disorder and confusion must inevitably prevail . . . to the detriment of the public and individuals." *Bynum*, 97 N.C. at 378, 380, 2 S.E. at 172 (judgment of nonsuit granted out of "term time" held to be void).

It is preferable to have trial courts enter orders on the record in the public scrutiny of open court. This is especially true in criminal cases like the one at hand. A trial court's failure to timely enter an

order, even though inadvertent as in the case at bar, not only denies a defendant adequate opportunity to prepare his defense, but creates an unreasonable delay in the administration of justice.

For the foregoing reasons, defendant is entitled to a new trial.

AFFIRMED.

Justice NEWBY dissenting.

A jury convicted defendant of robbery with a dangerous weapon after being presented with overwhelming evidence of his guilt. Although defendant has not alleged, and the record does not suggest, any prejudicial error by the trial court, this Court grants him a new trial based on a legal antique known as the out-of-term, out-of-session rule. I respectfully dissent.

In August 2001, defendant filed two motions to suppress, one regarding the victim's identification of him, the other his self-incriminating statements to police. The court began hearing the motions on 11 October 2001 during the Fall 2001 term and, after ordering a continuance, completed the hearing on 17-18 January 2002 during the Spring 2002 term. Defendant at no time objected to the continuance, nor did he object to the fact that the court did not announce its decision either on 11 October 2001 or 18 January 2002. On 26 August 2002, during the Fall 2002 term, the trial judge announced in open court that he had denied both suppression motions, having previously informed the parties of his decision. Defendant did not renew his motions and, again, raised no objection. The case proceeded to trial where defendant was duly convicted on 28 August 2002.

This Court grants defendant a new trial based on the trial court's failure to comply with the judicially-imposed out-of-term, out-of-session rule. The rule obliges a trial court to decide a motion in a civil or criminal case during the term and session and in the county and judicial district in which the motion was heard.[1] *See, e.g.*, *State v. Boone*, 310 N.C. 284, 311 S.E.2d 552 (1984). According to our precedents, a ruling issued in contravention of the rule is void. *Id.*

The out-of-term, out-of-session rule is now out of date. To begin with, the historical factors that most likely resulted in its adoption no

1. As the majority notes, "term" refers to the six-month assignments of superior court judges to judicial districts, while "session" denotes the one-week assignments within each term.

longer exist.[2] While the exact origins of the rule are unknown, it was almost certainly meant to promote the expeditious administration of justice at a time when judges rode circuit on horseback and visited each locality only a few days per year.[3] If a judge failed to announce a decision during the term and session in which a matter was heard, the parties could wait months before the next judge—possibly a different one—came along. Modern technology, however, has dramatically increased the ease and speed of travel, and communication is virtually instantaneous. Superior court judges no longer spend months riding circuit, and, perhaps most importantly, the superior court remains "open at all times for the transaction of all business . . . ." N.C. Const. art. IV, § 9; *see also* John V. Orth, *The North Carolina State Constitution: A Reference Guide*, 108 (1993) (Article IV, Section 9 "empower[s] superior courts to exercise judicial power, as needed, at any time of the day or night[.]"). In short, the majority retains the out-of-term, out-of-session rule without any of the historical justifications that once made it sensible.

Moreover, the rule completely ignores the way our courts now function. Crowded trial calendars routinely compel trial judges to continue cases from one term or session to the next. Imposing the out-of-term, out-of-session rule on this reality reveals its absurdity in the modern context. This perhaps explains why the majority provides so little guidance regarding its application. As traditionally stated, the rule would have required the trial court to dispose of defendant's motions when they were first heard during the week of 11 October 2001. The court's continuance effectively meant that any order it might enter would be out of term and out of session. Based on our precedents, then, it would seem the court should have obtained the

2. The exact origins of the out-of-term, out-of-session rule are apparently unknown. Well over a century ago, this Court regarded it as so well-established that no rationale was necessary for its application. *See*, *e.g.*, *Henry J. Hervey & Co. v. Edmunds*, 68 N.C. 173, 175-76, 68 N.C. 243, 245-48 (1873) (holding judgment signed out-of-term valid with consent of the parties); *Hardin v. Ray*, 89 N.C. 364, 365 (1883) (holding judgment signed out-of-term not valid); *Shackelford v. Miller*, 91 N.C. 181, 185-86 (1884) (holding decree signed out-of-term and out-of-county is valid with consent of parties or their counsels); *Coates v. Wilkes*, 94 N.C. 168, 171, 94 N.C. 174, 178-79 (1886) (finding because the appellant did not object to the entry of an out-of-term amendment to a previous order, consent will be presumed and the amendment is valid); *Bynum v. Powe*, 97 N.C. 294, 299-300, 97 N.C. 374, 382-83, 2 S.E. 170, 173-74 (1887) (finding judgment of non-suit granted out-of-term without consent void).

3. The 1868 North Carolina Constitution provided that superior court would be held in each county at least twice per year for a two-week session, "unless the business shall be sooner disposed of." N.C. Const. of 1868, art. IV, § 12. Thus, if a court failed to rule on a matter, it could be six months before the court was again in session.

consent of the parties on the record before continuing proceedings. *See, e.g.*, *Bynum v. Powe*, 97 N.C. 374, 2 S.E. 170 (1887). *But see Coates v. Wilkes*, 94 N.C. 168, 171, 94 N.C. 174, 178-79 (1886) (finding because the appellant did not object to the entry of an out-of-term amendment to a previous order, consent will be presumed and the amendment is valid). Of course, given our judicial system's dependence on continuances, such a requirement would put trial courts at the mercy of the parties. On the other hand, if trial courts are permitted to evade the out-of-term, out-of-session rule through continuances, one might rightly question how, exactly, the rule enhances the administration of justice.

Other members of this Court have questioned the manner in which we apply the rule to our present legal system. More than twenty-five years ago, in *State v. Saults*, 299 N.C. 319, 261 S.E.2d 839 (1980), three eminent jurists—Chief Justice Branch, Justice Brock, and Justice Huskins—dissented from this Court's application of the rule in that case. According to the dissenters, it was not unusual for a judge to want to review a transcript of a hearing before entering an order. *Saults*, 299 N.C. at 327, 261 S.E.2d at 843 (Brock, J., dissenting). The widespread availability of transcripts allows today's judges to take a more deliberative approach to decision making, an advantage the out-of-term, out-of-session rule undermines.

In my view, the out-of-term, out-of-session rule concerns matters best left to the General Assembly. Essentially, it amounts to a limitation on the jurisdiction of the superior court. *See* Black's Law Dictionary 855 (7th ed. 1999) (defining jurisdiction as, *inter alia*, "[a] court's power to decide a case or issue a decree"). The North Carolina Constitution, however, specifically confers the authority to limit the "original general jurisdiction" of the superior court on the legislature, and the legislature has repeatedly demonstrated its willingness to exercise this authority. N.C. Const. art. IV, § 12(3); *see, e.g.*, N.C.G.S. § 7A-272 (2003) (giving the district court original jurisdiction over most misdemeanors). Since neither our precedents nor the majority opinion holds the out-of-term, out-of-session rule is constitutionally necessary, we should end this potential interference with the legislative prerogative.

Even were I to agree with the majority's continued adherence to the rule, I would question its application to the facts of the instant case. The majority grants defendant a new trial although he never objected to the trial court's out-of-term ruling on his motions to suppress. Our general rule is that a party must raise an objection and

obtain a ruling thereon at trial to preserve the issue for appellate review. N.C. R. App. P. 10(b)(1). The failure to do so ordinarily waives the issue. *Id.* This requirement affords trial courts the opportunity to correct errors before they reach the appellate level, thereby conserving precious judicial resources. Not applying it to orders entered out of term and out of session encourages parties to remain silent in hopes of obtaining new trials if outcomes are unfavorable.

Interestingly, the *Boone* case, upon which both the majority and the Court of Appeals rely, could be read to require parties to object at trial. In *Boone*, this Court held that, when a trial court does not announce a ruling in open court, the court must sign and file the ruling "with the clerk in the county, in the district and during the session when and where the question is presented." 310 N.C. at 290, 311 S.E.2d at 557. Our Court located support for this holding in Rule 58 of the North Carolina Rules of Civil Procedure, describing it as "sufficiently analogous" to warrant imposing it on criminal proceedings. *Id.* at 290, 311 S.E.2d at 556. Subsequently, the General Assembly amended Rule 58 to include the following language:

> Consent for the signing and entry of a judgment out of term, session, county, and district shall be deemed to have been given *unless an express objection to such action was made on the record prior to the end of the term or session at which the matter was heard.*

N.C.G.S. § 1A-1, Rule 58 (2003) (emphasis added). Thus, in civil cases, a party's failure to object is now regarded as consent to the entry of the judgment (or order) out of term and out of session. *See Boone*, 310 N.C. at 290 n.1, 311 S.E.2d at 556 n.1 (expressing the view that the same rule should apply to judgments and orders). According to our reasoning in *Boone*, we should extend this requirement to criminal proceedings as well.

Boone can also be distinguished from the instant case on other grounds. There the defendant renewed his motion to suppress after a second judge was assigned to the case. 310 N.C. at 290, 311 S.E.2d at 556. The second judge denied his motion without a hearing based on the original judge's out-of-term and out-of-session order. *Id.* Under those circumstances, it made sense for this Court to order a rehearing: the second judge needed more than a void order as the basis for his denial of defendant's suppression motion. Here, however, defendant failed to renew his suppression motions during the Fall 2002 term, and the same judge presided through-

out. No valid legal interest would have been served by having the judge hear the same evidence twice.[4]

Additionally, defendants who allege violations of the out-of-term, out-of-session rule should have to show prejudice. The majority opinion stands for the proposition that a breach of the rule *ipso facto* entitles a defendant to a new trial. As the dissent in the Court of Appeals points out, the mere fact that the order itself was a nullity does not mean the trial was void. *State v. Trent*, 166 N.C. App. 76, 80, 601 S.E.2d 281, 284 (2004) (Levinson, J., dissenting). We typically require defendants to demonstrate prejudice before granting relief for non-constitutional errors. *See* N.C.G.S. § 15A-1443 (2003). There is no good reason why we should not expect this when addressing orders entered out of term and out of session.

I note that even most constitutional errors do not warrant the automatic reversal the majority deems appropriate for violations of the out-of-term, out-of-session rule. Generally "a constitutional error does not automatically require reversal of a conviction [because] most constitutional errors can be harmless." *Arizona v. Fulminante*, 499 U.S. 279, 306, 113 L. Ed. 2d 302, 329 (1991). An error is harmless if it is "clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error." *Neder v. United States*, 527 U.S. 1, 17-18, 144 L. Ed. 2d 35, 52-53 (1999). The harmless-error doctrine acknowledges that " 'the central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence, and [to] promote[] public respect for the criminal process by focusing on the underlying fairness of the trial rather than on the virtually inevitable presence of immaterial error.' " *Fulminante*, 499 U.S. at 308, 113 L. Ed. 2d at 330 (citation omitted).

The record nowhere indicates that the trial court's failure to enter its order in the Spring 2002 term prejudiced defendant. Significantly, defendant does not challenge the order on the merits. The court announced its ruling in advance of trial, and defendant has not alleged that his ability to prepare his defense was impaired. Even the Court of Appeals majority concedes that the evidence against defendant was "overwhelming." *Trent*, 166 N.C. App. at 80, 601 S.E.2d at 284.

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4. In *Saults*, another case on which the majority heavily relies, this Court's characterization of the order at issue as out of term and out of session was clearly *dicta*. There the defendant moved for a new trial based upon newly discovered evidence. 299 N.C. at 322, 261 S.E.2d at 840. This Court ordered a new hearing on the motion after concluding the trial judge's findings of fact did not support his conclusions of law. *Id.* at 325, 261 S.E.2d at 843.

The victim knew both defendant and his partner and recognized them as the men who had robbed him. The police found defendant near the crime scene with a mask in the back of his vehicle. Defendant's own mother led police to the loaded .45 caliber pistol used to commit the robbery. Simply put, a rational jury would have convicted defendant even without the pretrial identification and incriminating statements defendant sought to suppress. Ordering a new trial for a benign violation of an arcane rule serves no rational purpose and taxes already overworked trial courts whose energies would be better spent trying new cases rather than retrying old ones.

The majority claims the out-of-term, out-of-session rule serves the interests of "uniformity, stability and fairness in criminal prosecutions." If so, its virtues as applied to the instant case are difficult to discern. Today this Court grants a new trial to a man convicted of a violent crime in a prior trial free from prejudicial error. This result advances neither the ends of justice nor the public good.

For the foregoing reasons, I respectfully dissent.

JONESBORO UNITED METHODIST CHURCH, AN UNINCORPORATED ASSOCIATION V. MULLINS-SHERMAN ARCHITECTS, L.L.P. AND J.H. BATTEN, INC., A NORTH CAROLINA CORPORATION

No. 170PA04

(Filed 1 July 2005)

Pleadings— compulsory counterclaims—failure to assert bars claims

The trial court erred in a breach of contract, breach of express and implied warranty, and negligence/malpractice action filed in Lee County arising out of the construction of a fellowship hall addition for a church by denying defendant general contractor's motions for judgment on the pleadings, because: (1) a party who does not plead a compulsory counterclaim is, after determination of the action in which it should have been pleaded, forever barred from bringing a later independent action on that claim; (2) plaintiff's pleadings in the Forsyth County action demonstrated that plaintiff was aware of the factual basis for its Lee County claims at the time it filed its responsive pleadings during the Forsyth County litigation; (3) all three of the factors under

Curlings v. Macemore, 57 N.C. App. 200 (1982) suggest that plaintiff's claims against defendant in the Lee County litigation should have been raised as compulsory counterclaims in the Forsyth litigation when defendant's claims in the Forsyth County litigation and plaintiff's claims in the Lee County litigation have the issues of law and fact largely the same in both actions, require substantially the same evidence for their determination, and are logically related; (4) N.C.G.S. § 1A-1, Rule 13(a) does not require that the legal claims be identical, and it is sufficient that the nature of the actions and the remedies sought are logically related in fact and law; and (5) to permit plaintiff to bring its claims in such a manner would subject defendant and our courts to the unnecessary delay and expense of repeated fragmentary litigation and would undermine the salutary principle of judicial economy upon which Rule 13(a) is premised.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous, unpublished decision of the Court of Appeals, 162 N.C. App. 547, 591 S.E.2d 598 (2004), affirming an order denying defendant J.H. Batten, Inc.'s motions for judgment on the pleadings entered 30 August 2002 by Judge Wiley F. Bowen in Superior Court, Lee County. Heard in the Supreme Court 6 December 2004.

Safran Law Offices, by Perry R. Safran and Brian J. Schoolman, for plaintiff-appellee.

Nexsen Pruet Adams Kleemeier, PLLC, by Eric H. Biesecker, for defendant-appellant J.H. Batten, Inc.

MARTIN, Justice.

On 4 October 1999, defendant J.H. Batten, Inc. (Batten) entered into a contract (the construction contract) with plaintiff Jonesboro United Methodist Church (JUMC) whereby Batten agreed to act as general contractor for the construction of a Fellowship Hall addition on real property owned by JUMC in Sanford, North Carolina. According to allegations in JUMC's complaint, JUMC had concerns about Batten's workmanship throughout the construction project. Instances of Batten's allegedly poor workmanship included problems relating to the alignment and ventilation of the roof, the puckering of roof shingles, defects in the mortar joints and masonry work, mislocated purlins, missing insulation, and other matters. During and after construction, disputes arose between JUMC and Batten concerning

both parties' respective performances under the contract. The disputes centered around the balance owed for work performed, the completion of punch list items, and whether Batten was required to perform additional work under the terms of the contract or in satisfaction of warranties. The parties entered mediation in an effort to resolve these disputes.

On 6 August 2001, representatives of JUMC sent Batten a letter by facsimile transmission confirming a prior telephone agreement in which JUMC agreed to pay $101,000.00 to "satisfy the construction relationship" between JUMC and Batten. The letter thanked Batten for its "willingness to help us settle this today" and invited Batten to indicate its approval of the settlement agreement by signing and returning the letter by facsimile transmission. That same day, Batten's managing agent, Harold Batten, signed the letter and returned it as requested to JUMC. At the bottom of the page, Batten wrote, "I agree that this is a complete settlement between [Batten] and [JUMC]."

On 14 August 2001, JUMC sent Batten another letter by facsimile transmission. The second letter stated that upon further review, JUMC "disagree[d] on the amount of payment outstanding." On this basis, the letter purported to "rescind[]" the 6 August 2001 settlement offer.

After JUMC refused to pay the amount specified in the 6 August 2001 letter, Batten filed suit in Forsyth County Superior Court on 16 August 2001, seeking $101,000.00 in damages in satisfaction of the settlement agreement. In the event the trial court determined there was not a binding settlement agreement, Batten sought a declaratory judgment "to declare the relative rights and obligations between the parties pursuant to the Contract." In its answer, JUMC denied that a binding settlement existed and moved to dismiss, to change venue, and to stay the proceeding pending arbitration. JUMC further asserted numerous affirmative defenses, including unclean hands, anticipatory breach, and estoppel based on Batten's alleged failure to perform under the contract. JUMC did not file any counterclaims in the action. After some discovery, Batten filed a motion for summary judgment, which the trial court allowed on 6 February 2002.

JUMC appealed, and the Court of Appeals affirmed in an unpublished opinion filed 17 June 2003. The Court of Appeals concluded that the parties had entered a binding settlement contract and that no genuine issues of material fact remained to be litigated. JUMC filed a

petition for discretionary review, which this Court denied on 21 August 2003. *J.H. Batten, Inc. v. Jonesboro United Methodist Church*, 357 N.C. 460, 585 S.E.2d 765 (2003).

On 23 April 2002, less than three months after the trial court entered summary judgment in Batten's favor in the Forsyth County litigation, JUMC filed a complaint in Lee County. The complaint stated three claims against Batten: breach of contract, breach of express and implied warranty, and "Negligence/Malpractice." Batten filed its answer on 7 June 2002. On 3 July 2002 and 30 July 2002, Batten filed motions for judgment on the pleadings, which asked the trial court to dismiss JUMC's claims against Batten because those claims "ar[o]se from the same transaction or occurrence that was the subject of litigation between the parties in Forsyth County." The trial court denied the motions on 30 August 2002, and Batten appealed. The Court of Appeals affirmed in an unpublished opinion. We reverse.

Rule 13(a) of the North Carolina Rules of Civil Procedure designates certain claims as "compulsory counterclaims" that must be raised in responsive pleadings. Specifically, Rule 13(a) provides that

> [a] pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction.

N.C.G.S. § 1A-1, N.C. R. Civ. P. 13(a) (2003). A claim is not a compulsory counterclaim, however, if

> (1) At the time the action was commenced the claim was the subject of another pending action, or
>
> (2) The opposing party brought suit upon his claim by attachment or other process by which the court did not acquire jurisdiction to render a personal judgment on that claim, and the pleader is not stating any counterclaim under this rule.

Id.; *see also* N.C. R. Civ. P. 13(a) cmt.

As we have previously noted, the ultimate effect of a pleader's failure to assert a compulsory counterclaim is not set forth in the rule itself. *See Gardner v. Gardner*, 294 N.C. 172, 176, 240 S.E.2d 399, 403 (1978). "Courts have, however, consistently held that a party who does not plead a compulsory counterclaim is, after determination of

the action in which it should have been pleaded, forever barred from bringing a later independent action on that claim." *Id.* at 179, 240 S.E.2d at 404. This preclusive effect is necessary to effectuate the purpose of Rule 13(a), which "is to enable one court to resolve 'all related claims in one action, thereby avoiding a wasteful multiplicity of litigation.' " *Id.* at 176-77, 240 S.E.2d at 403 (quoting 6 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1409, at 37 (1971)); *see also Kemp v. Spivey*, 166 N.C. App. 456, 458, 602 S.E.2d 686, 688 (2004); *Winston-Salem Joint Venture v. Cathy's Boutique, Inc.*, 72 N.C. App. 673, 675, 325 S.E.2d 286, 287 (1985); *Twin City Apartments, Inc. v. Landrum*, 45 N.C. App. 490, 494, 263 S.E.2d 323, 325 (1980). To permit a party who failed to assert a compulsory counterclaim to raise that claim in a later action undermines the "salutary procedural principle that litigation once precipitated ought to be concentrated insofar as practicable in one forum," thereby " 'destroy[ing] the effectiveness of Rule 13(a).' " *Gardner*, 294 N.C. at 179-81, 240 S.E.2d at 404-06 (quoting 6 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1417, at 94 (1971)). Accordingly, it is well settled that absent a specific statutory or judicially determined exception, *see id.* at 181, 240 S.E.2d at 406, a party's failure to interpose a compulsory counterclaim in an action that has been fully litigated bars assertion of that claim in any subsequent action. *Id.* at 179, 240 S.E.2d at 404; *see also Wood v. Wood*, 60 N.C. App. 178, 181, 298 S.E.2d 422, 423 (1982); *Hudspeth v. Bunzey*, 35 N.C. App. 231, 233, 241 S.E.2d 119, 121, *cert. denied*, 294 N.C. 736, 244 S.E.2d 154 (1978). *See generally* Restatement (Second) of Judgments § 22, at 185 (1982).

At the outset, we acknowledge that the compulsory counterclaim rule applies only to claims that are mature at the time the responsive pleading is filed. *See* N.C. R. Civ. P. 13(a) (stating that the rule applies to claims a party "has" against an opposing party "at the time of serving the [responsive] pleading"); *see also Country Club of Johnston Cty., Inc. v. United States Fid. & Guar. Co.*, 150 N.C. App. 231, 241, 563 S.E.2d 269, 276 (2002); 3 James W. Moore et. al, *Moore's Federal Practice*, ¶ 13.13, at 13-33 to 13-34 (3d ed. 2004). In the instant case, JUMC's complaint in the Lee County litigation asserted claims against Batten premised on (1) Batten's alleged breach of the construction contract, (2) Batten's alleged breach of express and implied warranties of good workmanship and (3) Batten's alleged negligence in "providing nonconforming and defective work" and failing to "perform [its] duties of construction in accordance with the standard of care for contractors in the community." A review of JUMC's pleadings

and the evidence of record demonstrates that these three claims, all of which are based on Batten's alleged failure to complete the construction project in a satisfactory manner, were available to JUMC at the time it filed its answer in the Forsyth County litigation.

In its answer to Batten's Forsyth County complaint, JUMC admitted Batten's factual allegation that "[c]ertain disputes [had] ar[isen] between Batten and JUMC regarding Batten's and JUMC's performance of the [construction] [c]ontract." In addition, JUMC set forth three affirmative defenses that expressly relied upon Batten's alleged noncompliance with the terms of that contract. Specifically, JUMC alleged that Batten (1) had "unclean hands with regard to its performance under [the construction contract]," (2) was "estopped from seeking damages . . . as [Batten] ha[d] not fully performed under its subcontract with [JUMC]," and (3) was "not entitled to recovery of any amounts owed by [JUMC]" due to "[Batten's] anticipatory breach of the contract." Similarly, in its Brief in Opposition to Plaintiff's Motion for Summary Judgment in the Forsyth County action, JUMC alleged that in addition to the dispute over the balance owed on the construction contract, "there were unresolved issues such as additional items of work to be performed under the [construction] contract, warranty work, and punch lists." Thus, JUMC's pleadings in the Forsyth County action demonstrate that JUMC was aware of the factual basis for its Lee County claims at the time it filed its responsive pleadings during the Forsyth County litigation.

Moreover, in its Lee County complaint, JUMC alleged that as early as 5 December 2000, more than *eight months prior* to the initiation of the Forsyth County action, it provided the architect supervising the construction project with "a copy of a preliminary independent report identifying many non-conforming workmanship issues," including "puckering shingles on many areas of the roof, concerns with the masonry and mortar joints, concerns with the location of the purlins, insulation missing in specified areas, [and] concerns with the elevations of a specified canopy." According to the same complaint, the architect "made recommendations concerning the outstanding punch-list and workmanship items" on or about 9 April 2001, *four months prior* to Batten's filing of its Forsyth County complaint. In addition, the Chair of JUMC's Board of Trustees stated in an affidavit that "JUMC and Batten began to discuss and negotiate disputes as to payment, additional items of work to be performed under the contract, warranty work, and punch lists in July 2001," one month before initiation of the Forsyth County action. Thus, according to its own

factual allegations in both the Forsyth County and Lee County actions and the sworn statement of the Chair of its Board of Trustees, JUMC had actual knowledge of the factual basis for its claims against Batten well before it filed its answer during the Forsyth County litigation. Accordingly, JUMC's claims against Batten were mature at the time JUMC filed that answer, and those claims are potentially subject to the compulsory counterclaim bar.

We next turn to the question of whether JUMC's claims against Batten in the Lee County litigation "arise[] out of the transaction or occurrence that is the subject matter of" Batten's claims against JUMC in the Forsyth County litigation. There is no simple test to determine when a claim "arise[s] out of the transaction or occurrence that is the subject matter of the opposing party's claim" for purposes of Rule 13(a). 1 G. Gray Wilson, *North Carolina Civil Procedure* § 13-3, at 259 (2d ed. 1995). As the United States Supreme Court stated in interpreting a predecessor to the modern federal compulsory counterclaim rule, " '[*t*]*ransaction*' is a word of flexible meaning. It may comprehend a series of many occurrences, depending not so much upon the immediateness of their connection as upon their *logical relationship*." *Moore v. N.Y. Cotton Exchange*, 270 U.S. 593, 610, 70 L. Ed. 750, 757 (1926) (emphases added). North Carolina courts have followed a similar approach in applying Rule 13(a), consistently inquiring whether there is a "logical relationship" between the factual backgrounds and legal natures of the claims under consideration. *See*, *e.g.*, *Kemp*, 166 N.C. App. at 458, 602 S.E.2d at 688; *Winston-Salem Joint Venture*, 72 N.C. App. at 675, 325 S.E.2d at 287; *Twin City Apartments*, *Inc.*, 45 N.C. App. at 494, 263 S.E.2d at 325.

North Carolina's compulsory counterclaim rule is identical to its federal counterpart. *Compare* Fed. R. Civ. P. 13(a) (2005) *with* N.C. R. Civ. P. 13(a). Not surprisingly, therefore, our Court of Appeals has looked to the federal courts for guidance in applying Rule 13(a). In *Curlings v. Macemore*, the Court of Appeals adopted the three-pronged analytical framework employed by the United States Court of Appeals for the Fourth Circuit and other federal courts. 57 N.C. App. 200, 202, 290 S.E.2d 725, 726 (1982); *see also* 6 Charles A. Wright et. al., *Federal Practice and Procedure* § 1410, at 52-58 (2d ed. 1990). Under this analysis, courts examine the following three factors in determining whether two or more claims arose out of the same transaction or occurrence for purposes of the compulsory counterclaim rule: " '[(1)] whether the issues of fact and law raised by the claim and counterclaim are largely the same[; (2)] whether substantially the

same evidence bears on both claims[;] and [(3)] whether any logical relationship exists between the two claims.' " *Curlings*, 57 N.C. App. at 202, 290 S.E.2d at 726 (quoting *Whigham v. Beneficial Fin. Co.*, 599 F.2d 1322, 1323 (4th Cir. 1979)) (alterations in original); *see also Kemp*, 166 N.C. App. at 458, 602 S.E.2d at 688; *Cloer v. Smith*, 132 N.C. App. 569, 574, 512 S.E.2d 779, 782 (1999); *Brooks v. Rogers*, 82 N.C. App. 502, 507-08, 346 S.E.2d 677, 681 (1986). Although application of Rule 13(a) is not reducible to any simple formula, we agree that courts should inquire, at a minimum, into these three factors when deciding if a claim "arises out of the transaction or occurrence that is the subject matter of the opposing party's claim." N.C. R. Civ. P. 13(a). Accordingly, we hereby formally adopt the *Curlings* factors as a part of our compulsory counterclaim jurisprudence.

In the instant case, all three of the *Curlings* factors suggest that JUMC's claims against Batten in the Lee County litigation should have been raised as compulsory counterclaims in the Forsyth County litigation. In its Forsyth County complaint, Batten (1) sought enforcement of the settlement agreement, which resolved "disputes . . . between Batten and JUMC regarding Batten's and JUMC's performance of the [construction] [c]ontract," and (2) moved for a declaratory judgment as to the parties' "relative rights and obligations pursuant to the [construction] [c]ontract." JUMC's complaint in the Lee County litigation, by comparison, asserted claims against Batten based on alleged construction defects and premised on legal theories of (1) breach of contract, (2) breach of warranties, and (3) "Negligence/Malpractice."

Applying the *Curlings* factors, Batten's claims in the Forsyth County litigation and JUMC's claims in the Lee County litigation all raised legal issues arising out of the common factual background of the construction contract and the construction project. Moreover, both sets of claims depended in large part on evidence of the parties' respective conduct throughout the construction relationship. Finally, the claims are "logically related" in that they all concern the parties' respective performances under the construction contract and their corresponding liabilities under the construction and settlement contracts.

JUMC argues, however, that its claims against Batten cannot be compulsory counterclaims with respect to either of the claims asserted in Batten's Forsyth County complaint. First, JUMC contends that Batten's claim seeking enforcement of the settlement agreement

and JUMC's claims for damages based on breach of the construction contract, breach of warranties, and negligent construction "involve consideration of different facts and different legal principles." While there is some truth to this contention, Rule 13(a) "does not require that the legal claims be identical. It is sufficient that the nature of the actions and the remedies sought are logically related in fact and law." *Brooks*, 82 N.C. App. at 509, 346 S.E.2d at 682. Given that the settlement agreement purports to "satisfy the construction relationship" between JUMC and Batten and that Batten's alleged failure to perform under the construction contract was the basis of at least three of JUMC's affirmative defenses in the Forsyth County litigation, it is clear that any claims arising out of the construction contract are "logically related" to claims seeking to enforce the settlement agreement. Indeed, in JUMC's Motion to Stay Pending Arbitration, filed in conjunction with its answer in the Forsyth County litigation, JUMC itself describes the dispute over the settlement agreement as a "conflict[] arising out of or relating to the [construction] contract." We therefore reject JUMC's argument that its claims against Batten are not "logically related" to JUMC's claim seeking enforcement of the settlement agreement.

Second, JUMC argues that its claims against Batten cannot be compulsory counterclaims with respect to Batten's declaratory judgment action because the trial court never reached final judgment on the latter claim. To be sure, a claim cannot be barred by *res judicata* or collateral estoppel unless it was litigated to final judgment in a prior action. *Thomas M. McInnis & Assocs. v. Hall*, 318 N.C. 421, 428, 349 S.E.2d 552, 556 (1986). But as the United States Court of Appeals for the First Circuit explained in *Dindo v. Whitney*, "the fact that there was no final judgment on the merits should be immaterial" for purposes of the compulsory counterclaim bar. 451 F.2d 1, 3 (1st Cir. 1971). Like the First Circuit Court of Appeals, "[w]e are not persuaded that a final judgment is a sine qua non to invocation of the [compulsory counterclaim] bar" because "there is nothing in the rule limning the term 'judgment.' " *Id.* Accordingly, we reject JUMC's contention that its claims arising out of the construction relationship cannot be compulsory counterclaims in Batten's declaratory judgment action.

In conclusion, the construction contract and the parties' performance under that contract constitute a single "transaction or occurrence" that formed the factual basis for the parties' respective claims for relief in both the Forsyth County and Lee County actions.

Although Batten's claims in the Forsyth County litigation and JUMC's claims in the Lee County litigation are not identical, "[t]he issues of law and fact are . . . largely the same in both actions, . . . require substantially the same evidence for their determination, and . . . are logically related." *Cloer*, 132 N.C. App. at 574, 512 S.E.2d at 782. Accordingly, JUMC's claims against Batten were compulsory counterclaims in the Forsyth County action, and JUMC's failure to assert those claims during that action bars their subsequent assertion in any later litigation. Moreover, given that JUMC's claims against Batten could and should have been asserted as counterclaims in the Forsyth County litigation, it is not inequitable to bar JUMC from asserting those claims in a subsequent action. Indeed, to permit JUMC to bring forth its claims in such a manner would subject Batten and our courts to " 'the unnecessary delay and expense of repeated fragmentary' " litigation, *Hicks v. Koutro*, 249 N.C. 61, 64, 105 S.E.2d 196, 200 (1958) (quoting *City of Raleigh v. Edwards*, 234 N.C. 528, 529, 67 S.E.2d 669, 671 (1951)), and undermine the salutary principle of judicial economy upon which Rule 13(a) is premised.

The decision of the Court of Appeals is reversed, and the case is remanded to that court for further remand to the Lee County Superior Court for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

STATE OF NORTH CAROLINA v. TIMMY WAYNE SPEIGHT

No. 491PA04

(Filed 1 July 2005)

Sentencing— *Blakely* error—driving while impaired and manslaughter

Defendant received a new sentencing hearing for involuntary manslaughter and driving while impaired where the judge found an aggravating factor without a jury determination. The rationale of *State v. Allen*, 359 N.C. 425 (2005) (applying *Blakley v. Washington*, —— U.S. ——, to North Carolina) applies to all cases in which a defendant is constitutionally entitled to a jury trial and a trial court has increased a defendant's

sentence beyond the presumptive range without submitting the aggravating factors to a jury. However, aggravating factors need not be alleged in the indictment.

Justice MARTIN dissenting.

Chief Justice LAKE and Justice NEWBY join in the dissenting opinion.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 166 N.C. App. 106, 602 S.E.2d 4 (2004), finding no prejudicial error in trial but remanding for resentencing after consideration of defendant's motion for appropriate relief from judgments entered on 30 August 2002 by Judge W. Russell Duke, Jr. in Superior Court, Pitt County. On 25 January 2005, defendant filed a second motion for appropriate relief in this Court. Heard in the Supreme Court 15 March 2005.

Roy Cooper, Attorney General, by Robert C. Montgomery and Patricia A. Duffy, Assistant Attorneys General, for the State-appellant.

Margaret Creasy Ciardella for defendant-appellee.

WAINWRIGHT, Justice.

Defendant Timmy Wayne Speight's convictions and sentences stem from a car crash which occurred early in the evening of 6 June 2001 in Greenville, North Carolina. Defendant was driving a red Camaro automobile northbound on Highway 11. Several witnesses stated that he was quickly changing lanes and driving erratically. At one point, defendant swerved to the left lane to avoid hitting a car in front of him. As he swerved, he lost control of his car, slid across the northbound left lane, crossed a grass median, hit a pole, and collided with a white Buick automobile which was headed south on the highway. Defendant hit the Buick with such force that the automobile flipped over. When emergency medical service (EMS) technicians arrived, they determined that Lynwood Thomas and Donald Ray Thomas, both people in the Buick, were dead. The EMS technicians found defendant injured and trapped in his Camaro. An EMS technician and an investigating police officer smelled alcohol when they looked in the Camaro. Analysis of defendant's blood samples revealed that his blood alcohol level was .13 at the time of the car crash.

Defendant was arrested on 5 July 2001 and indicted on 18 February 2002 for two counts of second-degree murder and one count of driving while impaired.[1] Defendant was tried before a jury during the 26 August 2002 Criminal Session of Pitt County Superior Court. On 30 August 2002, the jury found defendant guilty of two counts of involuntary manslaughter and one count of driving while impaired.

During the sentencing proceeding, the trial court calculated that defendant had a prior record level I for both manslaughter convictions and found the following statutory aggravating factor for both of those convictions: "The defendant knowingly created a great risk of death to more than one person by means of a weapon or device which would normally be hazardous to the lives of more than one person." The trial court also found that the following non-statutory aggravating factor applied to both manslaughter convictions: the defendant killed another person in the course of his conduct. The trial court found the following mitigating factors for both manslaughter convictions: "The defendant has a support system in the community"; and "The defendant has a positive employment history or is gainfully employed." The trial court determined that defendant should receive a Level Two punishment for the impaired driving offense. Pursuant to N.C.G.S. § 20-179(c), the trial court found the following grossly aggravating factor for that offense: The defendant "caused, by [his] impaired driving at the time of the current offense, serious injury to another person." Additionally, pursuant to N.C.G.S. § 20-179(d), the trial court found that the following factor aggravated the seriousness of the impaired driving offense: "The defendant used a motor vehicle in the commission of a felony that led to the death of two people." The trial court found that the aggravating factors outweighed the mitigating factors for all offenses and imposed consecutive aggravated sentences of twenty to twenty-four months for each involuntary manslaughter conviction and a consecutive aggravated sentence of twelve months for the driving while impaired conviction.

Defendant appealed to the Court of Appeals, arguing that he was entitled to a new trial. Defendant filed his brief with the Court of

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1. On 16 July 2001, defendant was indicted for two counts of attempted murder and one count of driving while impaired. On 20 August 2001, the State obtained correction indictments for these charges. These correction indictments changed the name of one victim from Lynwood Allen Thomas to Lynwood Thomas. On 18 February 2002, the State obtained another indictment correcting the murder offenses charged from attempted murder to second-degree murder.

Appeals in August 2003, before the United States Supreme Court issued *Blakely v. Washington*. —— U.S. ——, 159 L. Ed. 2d 403 (2004) (reversing the trial court's imposition of an aggravated sentence on the criminal defendant because the trial court failed to impose the sentence enhancement solely based on the facts reflected in the jury verdict or admitted by the defendant). Hence, when defendant filed his Court of Appeals brief he was unable to argue that the trial court violated *Blakely* by imposing an aggravated sentence without a jury determination of the existence of the aggravating factors. To preserve this argument, defendant filed a motion for appropriate relief with the Court of Appeals while his appeal was pending. In this motion for appropriate relief, defendant argued that the trial court's imposition of a sentence in the aggravated range violated the Sixth Amendment to the United States Constitution as interpreted by *Blakely v. Washington*.

The Court of Appeals considered defendant's motion for appropriate relief along with his appeal. The Court of Appeals found no prejudicial error in defendant's trial and conviction; however, it granted defendant's motion for appropriate relief and remanded for resentencing, holding that "[a]s the jury did not decide the aggravating factors considered by the trial court, defendant's Sixth Amendment right to a trial by jury was violated." *State v. Speight*, 166 N.C. App. 106, 117, 602 S.E.2d 4, 12 (2004). The court further found that " 'when "the [trial] judge [has] erred in a finding or findings in aggravation and imposed a sentence beyond the presumptive term, the case must be remanded for a new sentencing hearing." ' " *Speight*, 166 N.C. App. at 117-18, 602 S.E.2d at 12 (quoting *State v. Ahearn*, 307 N.C. 584, 602, 300 S.E.2d 689, 701 (1983)) (alterations in original), *quoted in State v. Allen*, 166 N.C. App. 139, 149, 601 S.E.2d 299, 306 (2004).

On 23 September 2004, this Court allowed the State's petition for discretionary review as to the issues of (1) whether the Court of Appeals erred by holding that harmless error analysis could not be applied to a constitutional error under *Blakely*, and (2) if so, whether the error in this case was harmless beyond a reasonable doubt. Additionally, on 10 February 2005, this Court agreed to consider defendant's second motion for appropriate relief on the issue of whether, as a result of *Blakely*, his sentence violated *State v. Lucas*, 353 N.C. 568, 548 S.E.2d 712 (2001), because the aggravating circumstances found by the trial court were not alleged in his indictments.

We now address the issues presented by the State and by defendant. Pursuant to *State v. Allen*, —— N.C. ——, —— S.E.2d —— (2005), we conclude that the trial court committed reversible structural error by finding the aggravating circumstances in this case.

In *Allen*, we held that "*Blakely* errors arising under North Carolina's Structured Sentencing Act are structural and, therefore, reversible *per se*." *Id.* at ——, —— S.E.2d at —— (*Allen* addresses the same issues as the case *sub judice* and is being filed on the same day as the instant case). Therefore, the Court of Appeals properly held that harmless error analysis could not be applied to a constitutional error under *Blakely*, and we need not address the issue of whether the error in this case can be harmless beyond a reasonable doubt.

Although our holding in *Allen* specifically applies only to sentences imposed under North Carolina's Structured Sentencing Act, the rationale in *Allen* applies to all cases in which (1) a defendant is constitutionally entitled to a jury trial, and (2) a trial court has found one or more aggravating factors and increased a defendant's sentence beyond the presumptive range without submitting the aggravating factors to a jury. *See Allen*, —— N.C. at ——, —— S.E.2d at —— ("Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed presumptive range must be submitted to a jury, and proved beyond a reasonable doubt."). Defendant was entitled to a jury trial for his impaired driving offense. Although the offense is a misdemeanor, *see* N.C.G.S. § 20-138.1, it is punishable by more than six months imprisonment.[2] *See Baldwin v. New York*, 399 U.S. 66, 69, 26 L. Ed. 2d 437, 440 (1970) ("[N]o offense can be deemed 'petty' for purposes of the right to trial by jury where imprisonment for more than six months is authorized."). Defendant was also constitutionally entitled to a jury trial for his involuntary manslaughter convictions. *See id.* The trial court improperly found the aggravating circumstances in this case and imposed aggravated sentences for all three convictions. Therefore, the Court of Appeals

2. We note that the instant case does not create original jurisdiction for misdemeanors in superior court, nor does it create a right to a jury trial in district court for misdemeanors. District court generally has original jurisdiction to try misdemeanors, including misdemeanor impaired driving. *See* N.C.G.S. §§ 7A-271, -272 (2003). However, in this case defendant's misdemeanor charge was consolidated with the felony murder charges. Thus, the superior court had exclusive, original jurisdiction over all three charges, and defendant had an immediate right to a jury trial on the impaired driving charge. *See id.* § 7A-271(a)(3). In cases where district court has exclusive original jurisdiction over misdemeanors, defendants do not have a right to a jury trial in district court and can obtain a jury trial only by appealing to superior court for a trial de novo. *Id.* § 7A-271(b).

properly remanded this case to the trial court for resentencing consistent with *Blakely*, and defendant is entitled to resentencing for all his convictions.

Additionally, pursuant to *Allen*, we conclude that aggravating factors need not be alleged in an indictment. —— N.C. at ——, —— S.E.2d at —— (overruling the language in *State v. Lucas* "requiring sentencing factors which might lead to a sentencing enhancement to be alleged in an indictment," finding no error in the State's failure to include aggravating factors in the defendant's indictment, and stating that in *State v. Hunt*, "[T]his Court concluded that 'the Fifth Amendment would not require aggravators, even if they were fundamental equivalents of elements of an offense, to be pled in a state-court indictment.' " (quoting *State v. Hunt*, 357 N.C. 257, 272, 582 S.E.2d 593, 603, *cert. denied*, 539 U.S. 985, 156 L. Ed. 2d 702 (2003)). Therefore, defendant's sentence does not violate *Lucas* and defendant's second motion for appropriate relief is denied.

MODIFIED AND AFFIRMED.

Justice MARTIN dissenting.

For the reasons stated in my concurring and dissenting opinion in *State v. Allen*, —— N.C. ——, —— S.E.2d —— (July 1, 2005) (No. 485PA04), I disagree with the majority's conclusion that *Blakely* errors are categorically excepted from harmless-error review. Indeed, the present case provides a perfect illustration of the majority's well-intentioned, but ultimately misguided, approach to appellate review of *Blakely* errors. Applying the harmless-error standard for federal constitutional errors to the facts presented, as compelled by the United States Supreme Court's decision in *Neder v. United States*, 527 U.S. 1, 144 L. Ed. 2d 35 (1999), it is manifest that the *Blakely* violation in the instant case was harmless beyond a reasonable doubt.

Defendant, whose reckless driving resulted in the deaths of two innocent people, was convicted of two counts of involuntary manslaughter and one count of driving while impaired. The trial court elevated defendant's sentence for the two manslaughter convictions based on its finding of (1) the statutory aggravating factor, "[t]he defendant knowingly created a great risk of death to more than one person by means of a weapon or device which would normally be hazardous to the lives of more than one person," N.C.G.S. § 15A-1340.16(d)(8) (2001), and (2) a non-statutory aggravating

factor, "in the course of conduct, the defendant killed another [person]." Defendant's sentence for driving while impaired was elevated based on the trial court's finding of (1) the grossly aggravating factor, defendant "caused, by [his] impaired driving at the time of the current offense, serious injury to another person," and (2) a non-statutory aggravating factor, "defendant used a motor vehicle in the commission of a felony that led to the death of two people."

I agree that the trial court's failure to submit the challenged aggravating factors to the jury violated defendant's Sixth Amendment right to a jury trial as articulated in *Blakely v. Washington*, —— U.S. ——, ——, 159 L. Ed. 2d 403, 415 (2004). It is difficult to imagine, however, a clearer example of a non-prejudicial trial error. Unlike the situation presented in *State v. Allen*, the evidence presented in support of all four aggravating factors in the instant case was both "uncontroverted" and "overwhelming," such that there can be no reasonable doubt that a rational jury would have found these factors had the *Blakely* error not occurred. *Neder*, 527 U.S. at 16-19, 144 L. Ed. 2d at 52-53.

The uncontroverted evidence presented by the state may be summarized as follows: On the day of the fatal collision, defendant was driving a Camaro sports car on Highway 11 in Pitt County, North Carolina. Several witnesses observed defendant weaving in and out of heavy rush hour traffic at speeds estimated between sixty and eighty miles per hour. As he passed through a traffic light, defendant cut in front of another vehicle and lost control of the Camaro. Defendant skidded across a median, hit a pole, and collided head-on with an automobile traveling in the opposite direction. Defendant struck the oncoming vehicle with such force that it flipped over and landed on its roof, instantly killing the driver, Lynwood Thomas, and his twenty-year-old son, Donald Thomas.

Jeffrey Maye, a member of the EMS unit that arrived on the scene shortly after the collision, testified that he noticed an odor of alcohol in the Camaro as he helped extract defendant from the vehicle. Officer M.L. Montayne of the Greenville Police Department, one of the first responders at the scene, also testified that he detected an odor of alcohol inside the Camaro and, later, on defendant's breath. Based on the odor of alcohol he detected in defendant's vehicle and on defendant's breath, in addition to the severity of the collision and the accounts of four witnesses he interviewed at the scene, Officer Montayne formed the opinion that defendant was appreciably

impaired as a result of alcohol consumption and charged defendant with driving while impaired. An analysis of defendant's blood conducted by the State Bureau of Investigation revealed that defendant had a blood alcohol concentration (BAC) of 0.10 over two hours after his arrest. A retrograde extrapolation of the same blood test results further indicated that defendant's BAC was 0.13 at the time of the fatal collision. In addition, a drug screen revealed the presence of THC, an active chemical compound found in marijuana, in defendant's blood.

In light of this uncontested and overwhelming evidence involving the confluence of excessive speed, reckless driving, and abuse of alcohol and illegal drugs, there can be no reasonable doubt that had the *Blakely* error not occurred, a rational jury would have found all four of the aggravating factors submitted by the prosecution. As to the statutory (d)(8) aggravator, defendant's reckless, drunken driving manifestly "created a great risk of death to more than one person by means of a weapon or device which would normally be hazardous to the lives of more than one person." N.C.G.S. § 15A-1340.16(d)(8). Moreover, because a reasonable person would have known that such wanton disregard for the safety of others poses a "great risk of death to more than one person," defendant created that risk "knowingly" for purposes of the aggravating factor. *See State v. Carver*, 319 N.C. 665, 667, 356 S.E.2d 349, 351 (1987) (stating that "[a]ny reasonable person should know" that firing a gun into a crowd of people creates a great risk of death for two or more people and concluding that "the defendant created this risk knowingly").

As for the remaining aggravating factors—that defendant (1) "in the course of conduct . . . killed another [person]," (2) "caused, by [his] impaired driving at the time of the current offense, serious injury to another person," and (3) "used a motor vehicle in the commission of a felony that led to the death of two people," the deaths of Lynwood and Donald Thomas, along with defendant's two manslaughter convictions, provide tragic and indisputable proof.

Oliver Wendell Holmes famously stated that "[t]he life of the law has not been logic: it has been experience." Oliver Wendell Holmes, Jr., *The Common Law* 1 (1923). In *Neder*, when considering whether the trial court's "failure to instruct on an element of the crime" was a structural defect not amenable to harmless-error analysis, the United States Supreme Court cited Holmes' aphorism, stating that "if the life of the law has not been logic but experience,

we are entitled to stand back and see what would be accomplished" by such a holding. 527 U.S. at 15, 144 L. Ed. 2d at 50-51 (citation omitted). Not surprisingly, the Court concluded that the practical results of "send[ing] the case back for retrial," despite uncontroverted and overwhelming evidence of the defendant's guilt, were unacceptable. *Id.* at 15, 144 L. Ed. 2d at 51.

Upon application of Holmes' common sense principle to the analogous issue presented here, the emptiness of the majority's formalism becomes apparent. Defendant engaged in criminally reckless conduct that resulted in the deaths of two innocent motorists. He was represented by competent legal counsel and convicted by a jury of his peers of two counts of manslaughter and one count of driving while impaired. Although the trial court's failure to submit the aggravating factors at issue for jury determination admittedly violated the subsequently enunciated principles of *Blakely v. Washington*, the evidence in support of those factors was uncontroverted and overwhelming. It is simply inconceivable that a rational jury would fail to find those aggravating factors beyond a reasonable doubt.

If the life of the law has been experience, not logic, this Court is entitled to step back to see what will be accomplished by the disposition of the instant case. The Court today affirms the vacation of defendant's sentence because of an error that caused defendant no actual prejudice and remands for a new sentencing hearing whose outcome is preordained. Following this decision, the case will again be docketed in the Pitt County Superior Court, where prospective jurors will be summoned, *voir dire* will be conducted, and a panel of twelve jurors will be installed, instructed, and asked to deliberate—all to reconfirm a trial judge's factual determinations that (1) a criminal defendant who drove a car erratically and at high speeds during rush hour on a busy highway while intoxicated and under the influence of marijuana created a "great risk of death to more than one person," and (2) that the two people he killed as a result of that conduct are actually dead.

To vacate and remand under such circumstances is contrary to precedent and common sense and tends to "justify the very criticism that spawned the harmless-error doctrine in the first place: 'Reversal for error, regardless of its effect on the judgment, encourages litigants to abuse the judicial process and bestirs the public to ridicule it.' " *Id.* at 18, 144 L. Ed. 2d at 53 (quoting Roger J. Traynor, *The Riddle of Harmless Error* 50 (1970)).

I respectfully dissent.

Chief Justice LAKE and Justice NEWBY join in this dissenting opinion.

STATE OF NORTH CAROLINA v. MELVIN WAYNE BECK

No. 191PA04

(Filed 1 July 2005)

Sentencing— Structured Sentencing Act—aggravating factors—same item of evidence

The trial court erred in a second-degree murder case by concluding that the phrase stating that the "same item of evidence" cannot be used to prove more than one aggravating factor under The North Carolina Structured Sentencing Act of N.C.G.S. § 15A-1340.16(d) refers to a single source document and defendant is entitled to be resentenced, because the phrase restricts the use of the same facts, and not the same source, as the basis of more than one aggravating factor.

Justice BRADY dissenting.

Justice PARKER joins in the dissenting opinion.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 163 N.C. App. 469, 594 S.E.2d 94 (2004), finding no error in defendant's conviction but vacating a judgment imposing a sentence of 313 to 385 months imprisonment entered by Judge William Z. Wood, Jr. on 30 August 2002 in Superior Court, Forsyth County, upon a jury verdict finding defendant guilty of second-degree murder, and remanding for resentencing. On 30 August 2004, defendant filed a Motion for Appropriate Relief, which is still pending. Heard in the Supreme Court 6 December 2004.

Roy Cooper, Attorney General, by Tiare B. Smiley, Special Deputy Attorney General and, Robert Montgomery, Assistant Attorney General for the State-appellant.

Daniel Shatz for defendant-appellee.

NEWBY, Justice.

The North Carolina Structured Sentencing Act provides that the "same item of evidence" cannot be used to prove more than one aggravating factor. N.C.G.S. § 15A-1340.16(d) (2003). The question presented by this case is whether the phrase "same item of evidence," refers to a single source document or a particular fact derived therefrom. We hold the phrase restricts the use of the same facts, not the same source.

On 1 July 2000, defendant Melvin Wayne Beck was indicted for first-degree murder and first-degree burglary. On 30 August 2002, a jury convicted defendant of the lesser-included offense of second degree murder and acquitted him of the burglary. At sentencing, the State presented to the trial court a certified copy of a fugitive warrant from the State of Florida which stated: "Fugitive—FTA [failure to appear]—Burglary." Defendant did not challenge the accuracy or sufficiency of the information contained in the warrant. Based upon information contained in the fugitive warrant, the trial court found two aggravating factors: (1) defendant had committed the offense at issue while on pretrial release on another charge and (2) he was a fugitive from Florida (because of his failure to appear for trial in that state). After reviewing his criminal history and the aggravating and mitigating factors, the trial court sentenced defendant to a term of imprisonment in the aggravated range, between 313-385 months.

On appeal, the Court of Appeals found no error in the conviction for second-degree murder, but remanded for resentencing. The court stated, "While this evidence [the fugitive warrant] is sufficient to establish *one* of these aggravating factors, the trial court erred in relying on the same evidence to find *two* distinct aggravating factors." *State v. Beck*, 163 N.C. App. 469, 477, 594 S.E.2d 94, 99 (2004). It remanded the matter to the trial court "to strike one of the aggravating factors." *Id.*

This Court allowed discretionary review solely to consider whether the Court of Appeals erred in holding that "one document constitutes the 'same item of evidence' and cannot provide separate evidentiary facts which support two separate aggravating factors under the Structured Sentencing Act."[1]

1. During the pendency of the appeal, defendant filed a motion for appropriate relief arising under *Blakely v. Washington*, —— U.S. ——, 159 L. Ed. 2d 403(2004) and its progeny. His motion is addressed by separate order.

The parties agree this matter concerns the construction of N.C.G.S. § 15A-1340.16(d), which provides:

> Evidence necessary to prove an element of the offense shall not be used to prove any factor in aggravation, and the same item of evidence shall not be used to prove more than one factor in aggravation.

N.C.G.S. § 15A-1340.16(d) (2003). Neither party disputes that the first clause prohibits using the same fact to establish both an element of the crime and an aggravating factor. The only issue before us is whether the second clause similarly prohibits the use of the same information to establish more than one aggravating factor, or whether the phrase "same item of evidence" should be read to address the actual method of proof, e.g., a source document.[2]

The State contends the legislature intended the same concept in each clause—the statute is simply intended to prevent the same facts from being used twice in aggravation. It argues the Court of Appeals erred in interpreting the phrase "item of evidence" to mean source of evidence, in this case, a physical piece of paper. Both the plain meaning of the statute and the legislative intent were to prevent double-counting by using the same fact either to prove two distinct aggravators or to prove an element of the crime and an aggravator. Simply put, the statute forbids a person from receiving an enhanced punishment based on using the same fact twice. Thus, the State asserts, one physical document could contain several facts which support distinct aggravators. In this case, the fugitive warrant established facts to support both distinct aggravators.

On the other hand, defendant contends that the Court of Appeals correctly held that the phrase "same item of evidence" has special meaning, arguing that "[t]he legislature must be presumed to have intended something different by its use of different language in the two clauses of the sentence." He argues the Court of Appeals correctly applied the plain language of the statute in holding that the fugitive warrant "clearly constitutes a single 'item of evidence.' " Because the distinct facts utilized to support each of the aggravating conditions were derived from one physical document, only one aggravator can be established. Defendant asserts that the interpretation urged by the State changes the word "item" to "facts." Defendant

2. The parties agree that the two aggravating factors in this case, committing the offense while on pretrial release and being a fugitive, are separate and distinct factors.

submits the Court of Appeals correctly gave "item" its ordinary meaning and held that the fugitive warrant could not be used to establish facts to support two aggravators.[3]

The primary endeavor of courts in construing a statute is to give effect to legislative intent. *Liberty Mut. Ins. Co. v. Pennington*, 356 N.C. 571, 573 S.E.2d 118, 121 (2002); *Stevenson v. City of Durham*, 281 N.C. 300, 303, 188 S.E.2d 281, 283 (1972). This applies as equally to criminal statutes as to any other. *State v. Jones*, 358 N.C. 473, 478, 598 S.E.2d 125, 128 (2004). If the statutory language is clear and unambiguous, the court eschews statutory construction in favor of giving the words their plain and definite meaning. *Fowler v. Valencourt*, 334 N.C. 345, 348, 435 S.E.2d 530, 532 (1993). When, however, "a statute is ambiguous, judicial construction must be used to ascertain the legislative will." *Burgess v. Your House of Raleigh, Inc.*, 326 N.C. 205, 209, 388 S.E.2d 134, 136-37 (1990). Furthermore, " 'where a literal interpretation of the language of a statute will lead to absurd results, or contravene the manifest purpose of the Legislature, as otherwise expressed, the reason and purpose of the law shall control and the strict letter thereof shall be disregarded.' " *Mazda Motors of Am., Inc. v. Southwestern Motors, Inc.*, 296 N.C. 357, 361, 250 S.E.2d 250, 253 (1979) (quoting *State v. Barksdale*, 181 N.C. 621, 625, 107 S.E. 505, 507 (1921)) (*quoted in Frye Reg'l Med. Ctr., Inc. v. Hunt*, 350 N.C. 39, 45, 510 S.E.2d 159, 163 (1999)).

We generally construe criminal statutes against the State. *State v. Hearst*, 356 N.C. 132, 136, 567 S.E.2d 124, 128 (2002). However, this does not require that words be given their narrowest or most strained possible meaning. *Jones*, 358 N.C. at 478, 598 S.E.2d at 128. A criminal statute is still construed utilizing "common sense" and legislative intent. *Id.*

Had the second clause of N.C.G.S. § 15A-1340.16(d) simply omitted the words "item of," there would be no dispute that its meaning was the same as the first clause. The crucial term then is "item." Item

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3. In his brief, defendant further contends that even if the fugitive warrant is not "one item of evidence" under the Structured Sentencing Act, it is still insufficient to support the two aggravating factors. He asserts that a warrant is not proof of anything, only an accusation. Additionally, he contends that because Florida did not move to extradite him, the fugitive warrant had been dismissed. However, we did not allow review of those issues, and they will not be considered. N.C. R. App. P. 19(b)(1); *See, e.g., State v. Dennison*, 359 N.C. 312, 608 S.E.2d 756 (2005).

is defined as "a distinct part in an enumeration."[4] Thus, the plain meaning of the second clause is that the "same 'distinct part' of evidence" shall not be used to prove more than one aggravator. Applying the ordinary meaning and usage, the phrase "same item of evidence" refers to a distinct quantum of evidentiary information, not to a document or object through which the item of evidence is established. Granted, this reading means that the term "evidence" in the first clause and "same item of evidence" in the second have virtually the same meaning. However, this is not a compelling reason to ignore the plain meaning of the language.

Defendant urges that "item of evidence" be literally interpreted to mean the specific thing that is presented as "evidence" during the trial. In other words, "item" could mean a piece of paper, such as a warrant or medical record, or gun or perhaps a single witness. This literal interpretation could lead to absurd results. For example, during oral argument, defense counsel conceded that if the warrant had been torn into two separate pieces of paper, with the fact that defendant was a fugitive on one piece and the fact that he was on pretrial release on the other, it would then constitute two items of evidence. That result would yield an extreme version of form over substance. Similarly, if the phrase is read to mean the method of proof, then the same fact could be counted twice so long as it was established by two distinct documents or other mode of proof.[5]

Even if we assume *arguendo* that the statute is ambiguous and look to the legislative purpose, Beck's claim fares no better. Taken in context, the statute simply prohibits the use of the same information as the basis of two aggravators. The statute is not directed toward the evidentiary mechanism through which the information is introduced, but demands that the same information not be utilized twice.

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4. The definitions of "item" include: "a distinct part in an enumeration, account, or series" and "a separate piece of news or information." *Merriam-Webster's Collegiate Dictionary* 623 (10th ed. 1999). *Webster's Third New International Dictionary* provides a voluminous definition of item. Its many definitions of "item" include: "an individual particular or detail singled out from a group of related particulars or details; "a detail of information: piece of information"; "an individual thing singled out from an aggregate of individual things"; and "something that forms a contributory or component part or section of something specified." *Webster's Third New International Dictionary* 1203 (1961).

5. Arguably, this absurdity would not be limited to documentary evidence but could apply equally to testimonial evidence. If evidentiary facts sufficient to prove two factors in aggravation had been supplied by two different witnesses, both aggravators would apply. However, if by chance one witness had knowledge of and testified to both facts, then only one aggravator could be applied.

Similarly, the logic of our precedents indicates that the statutory prohibition is against using the same item of evidence to support more than one aggravating factor. This Court has previously noted that it is "axiomatic" that the same evidentiary facts cannot support more than one aggravating factor. *State v. Golphin*, 352 N.C. 364, 482, 533 S.E.2d 168, 244 (2000), *cert. denied*, 532 U.S. 931, 149 L. Ed. 2d 305 (2001). "It is error to submit two aggravating circumstances resting on the same evidence." *State v. Rouse*, 339 N.C. 59, 97, 451 S.E.2d 543, 564 (1994), *cert. denied*, 516 U.S. 832, 133 L. Ed. 2d 60 (1995). However, the evidence for two aggravating factors may partially overlap, as long as there is some distinction in the evidence supporting each aggravating factor. "Aggravating circumstances are not considered redundant absent a *complete* overlap in the evidence supporting them." *State v. Moseley*, 338 N.C. 1, 54, 449 S.E.2d 412, 444 (1994), *cert. denied*, 514 U.S. 1091, 131 L. Ed. 2d 738 1815 (1995) (emphasis supplied).

In *State v. McLean*, 74 N.C. App. 224, 328 S.E.2d 451, a case relied upon by both parties, the trial court appears to have used one physical document, McLean's criminal history sheet, to find three separate aggravators: (1) that McLean committed the crime while on probation; (2) that he had previous convictions for offenses punishable by more than 60 days, and (3) that he had a prior record involving the use of violence. *Id.* at 229, 328 S.E.2d at 454. McLean argued on appeal that his criminal history could only support one aggravator. The Court of Appeals held that two aggravators could be proved from the one document. However, because the findings of defendant's previous convictions and of his past record involving the use of violence relied upon the same factual basis, only one could be used in aggravation. *Id.* at 229-30, 328 S.E.2d at 454-55. Contrary to defendant's argument, *McLean* does not focus on the source of the information, but upon whether there were separate facts to support each aggravator. *Id. See also State v. Nicholso*n, 355 N.C. 1, 48-49, 558 S.E.2d 109, 141, *cert. denied*, 537 U.S. 845, 154 L. Ed. 2d 71 (2002) (holding shooting of police officer proved two aggravators: crime against an officer performing his duty and action undertaken to avoid arrest, because the first focused on the action, the second on the subjective motivation); *State v. Brinson*, 337 N.C. 764, 770, 448 S.E.2d 822, 826 (1994) (holding proof of breaking victim's neck could be used to establish element of crime, while the resulting paralysis supported an aggravating factor); *State v. Jones*, 158 N.C. 498, 502-03, 581 S.E.2d 103, 106, *cert. denied*, 357 N.C. 465, 586 S.E.2d 462 (2003) (holding shooting of victim proved an element of the crime, while paralysis

proved an aggravator); *State v. Sellers*, 155 N.C. App. 51, 57, 574 S.E.2d 101, 105 (2002) (holding firing gun proved an element of the offense and an aggravating factor since an additional fact was required to establish the aggravator—endangering more than one person, i.e., that defendant utilized a semi-automatic pistol).

After careful review, we conclude that N.C.G.S. § 15A-1340.16(d) proscribes the use of the same fact in enhancement, not the same source. Accordingly, the decision of the Court of Appeals is affirmed as to the finding of no prejudicial error at trial but reversed as to the determination that defendant should be resentenced.

AFFIRMED IN PART; REVERSED IN PART

Justice BRADY dissenting.

In the instant case, this Court must apply N.C.G.S. § 15A-1340.16(d), which states "*[e]vidence* necessary to prove an element of the offense shall not be used to prove any factor in aggravation, and the *same item of evidence* shall not be used to prove more than one factor in aggravation." N.C.G.S. § 1340.16(d) (2003) (emphasis added). The majority would insert language into this unambiguous provision to hold that "the plain meaning of the second clause is that the 'same "distinct part" of evidence' shall not be used to prove more than one aggravator." Because I would leave amendment of N.C.G.S. § 15A-1340.16(d) to our legislative branch, I cannot join with the majority's reading of this provision.

"It is well settled that the meaning of any legislative enactment is controlled by the intent of the legislature and that legislative purpose is to be firstascertained from the plain language of the statute." *State v. Bates*, 348 N.C. 29, 34, 497 S.E.2d 276, 279 (1998). Moreover, "[i]f the Legislature has used language of clear import, the court should not indulge in speculation or conjecture for its meaning. . . . Courts are not permitted to assume that the lawmaker has used words ignorantly or without meaning, unless compelled to do so to prevent a manifestly absurd result." *Nance v. S. Ry.*, 149 N.C. 267, 271, 149 N.C. 366, 371, 63 S.E. 116, 118 (1908).

Here, the first clause of N.C.G.S. § 15A-1340.16(d) clearly prohibits double-counting of elements and aggravators. The second clause, which contains the phrase "same item of evidence," however, prohibits the use of the same item of evidence to support more than one aggravating factor. This conclusion is necessitated by the plain

language of the phrases employed by the drafters and the basic tenet of statutory construction that "the entire sentence, section or statute must be taken into consideration, and every word must be given its proper effect and weight." *Id.* at 271, 149 N.C. at 371, 63 S.E. at 118.

The majority makes much ado about the "absurd result" the same item of evidence rule might have; I however, see no absurdity in requiring the State to adequately establish the existence of an aggravating factor, particularly in light of this Court's application of *Blakely v. Washington*, 542 U.S. 296, 159 L. Ed. 2d 403 (2004), in *State v. Allen*, 359 N.C. 425, 615 S.E.2d 256 (July 1, 2005) (No. 485PA04). Thus, because I would give "proper effect and weight" to the General Assembly's use of "item of evidence" as opposed to "evidence," I respectfully dissent.

Justice PARKER joins in this dissenting opinion.

STATE OF NORTH CAROLINA v. PRESTON SMITH

No. 407PA04

(Filed 1 July 2005)

Probation and Parole— probation in district court—appeal to superior court—pretrial release—probation violation report

A probation violation report was timely filed where probation for one year was imposed by a district court judge, defendant appealed to superior court but thereafter withdrew the appeal, the matter was remanded to district court for execution of judgment, and the probation violation report was filed within one year of remand to district court but more than one year from the time probation was originally imposed. N.C.G.S. § 15A-1431(e) provides that a defendant appealing a conviction to superior court for a trial de novo is subject to pretrial release; it is a logical impossibility for a defendant to be simultaneously on pretrial release and on probation for the same offense so that his probation did not begin until his case was remanded to the district court for execution of the judgment and did not expire until one year after that date.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 165 N.C. App. 256, 598 S.E.2d 408 (2004), reversing an order entered 13 March 2003 by Judge James U. Downs in Superior Court, Buncombe County. Heard in the Supreme Court 18 April 2005.

Roy Cooper, Attorney General, by Kathleen U. Baldwin, Assistant Attorney General, for the State-appellant.

Staples S. Hughes, Appellate Defender, by Barbara S. Blackman, Assistant Appellate Defender, for defendant-appellee.

EDMUNDS, Justice.

A defendant convicted of a criminal offense in district court may appeal as a matter of right to superior court for a trial *de novo*. *See* N.C.G.S. § 15A-1431(b) (2003). This case presents the issue of whether an unconfined defendant who appeals a conviction in which a sentence of probation was imposed as part of the judgment is on probation during the pendency of the appeal. Because N.C.G.S. § 15A-1431(e) provides that a defendant remains on pretrial release during such an appeal, he or she is not also on probation. Accordingly, we reverse the Court of Appeals holding to the contrary.

Defendant Preston Smith was convicted of misdemeanor assault on a female. On 6 December 2000, the district court entered judgment imposing a sentence of ninety days. Defendant's sentence was suspended and he was placed on supervised probation for a period of twelve months. As one of the conditions of probation, defendant was ordered to pay a fine of $100 and costs of $202, for a total of $302. On or about the same date, defendant entered notice of appeal to the superior court.

On 29 January 2001, defendant in superior court withdrew his notice of appeal pursuant to N.C.G.S. § 15A-1431(h). The superior court judge ordered that defendant's case be remanded to the district court for immediate execution of that court's earlier judgment. The next day, defendant signed a form titled "Acknowledgment and Monetary Conditions" in which he agreed to pay the $302 fine and costs at the rate of $50 per month, starting on 28 February 2001. In this form, defendant also stated that he understood that failure to make the required payments would constitute a violation of his probation.

Although defendant would have paid off the entire amount in approximately six months if he had followed the payment schedule, on 24 January 2002, defendant's probation officer filed a violation report alleging that defendant was in arrears on his payments in the amount of $140. Defendant acknowledged receiving a copy of this report, and the matter was heard in district court on 28 January 2003. The presiding judge determined that defendant's probation expired on 6 December 2001, one year after defendant's sentence was originally imposed in district court. Because the State did not file its probation violation report until 24 January 2002, the judge concluded that the report had not been filed before the expiration of defendant's one year period of probation. Accordingly, the judge dismissed the probation violation.

The State entered notice of appeal to the superior court. Defendant moved to dismiss the appeal on the grounds that the State had no right to appeal under N.C.G.S. § 15A-1432. After the superior court granted defendant's motion to dismiss on 6 March 2003, the State on 7 March 2003 petitioned the superior court for writ of certiorari. The superior court judge conducted a hearing on 10 March 2003, then granted the State's petition and found that defendant's probation commenced on the date his case was remanded to the district court. Because the remand occurred on 29 January 2001, the State's 24 January 2002 probation violation report was timely filed. Defendant entered notice of appeal to the North Carolina Court of Appeals, and the superior court judge certified that the appeal, though interlocutory, was appropriately justiciable in the appellate division.

The Court of Appeals reversed. That court compared N.C.G.S. § 15A-1431, which is contained in Article 90 of Chapter 15A of the General Statutes of North Carolina and deals with appeals from district to superior court, with N.C.G.S. § 15A-1451, which is contained in Article 91 of the General Statutes of North Carolina and relates to appeals to the appellate division. The former states that "[a]ppeal [to superior court from district court] pursuant to this section stays the execution of portions of the judgment relating to fine and costs. Appeal stays portions of the judgment relating to confinement when the defendant has complied with conditions of pretrial release." N.C.G.S. § 15A-1431(f) (2003). This statute makes no reference to probation. By contrast, N.C.G.S. § 15A-1451 states that "[w]hen a defendant has given notice of appeal [to the appellate division]: . . . [p]robation or special probation is stayed." *Id.* § 15A-1451(a) (2003). The

Court of Appeals concluded that because N.C.G.S. § 15A-1451 contains a specific reference to probation, the absence of a corresponding reference to probation in N.C.G.S. § 15A-1431(f) reflected the General Assembly's intent that an appeal of a misdemeanor conviction from district court to superior court would not stay probation. Accordingly, the Court of Appeals held that defendant's year of probation began to run on 6 December 2000 and that the violation report was untimely filed. On 6 October 2004, this Court allowed the State's petitions for writ of supersedeas and for discretionary review.

The Court of Appeals comparison of these two statutes is a time-honored method of analysis. However, we do not believe this process is appropriate in this case because the types of appeals addressed by the statutes are distinct and are designed to protect different interests and achieve different ends. Moreover, we need not refer to Article 91 because the provisions of Article 90 adequately address the situation presented here. Section 15A-1431(e) provides that a defendant appealing a conviction to superior court for a trial *de novo* is subject to the terms of pretrial release. *Id.* § 15A-1431(e) (2003) ("Any order of pretrial release remains in effect pending appeal by the defendant unless the judge modifies the order."). The absence of any reference in this statute or in Article 90 to the effect of an appeal on probation is readily understandable in light of the logical impossibility of a defendant being simultaneously on pretrial release and on probation for the same offense.

Because defendant remained on pretrial release while his case was on appeal to the superior court, his probation did not begin until his case was remanded to the district court for execution of the judgment and did not expire until one year after that date. Therefore, the violation report was timely filed.

REVERSED.

IN RE DAISY

[359 N.C. 622 (2005)]

IN RE: INQUIRY CONCERNING A JUDGE, NO. 04-121 WILLIAM L. DAISY, RESPONDENT

No. 132A05

(Filed 1 July 2005)

Judges— censure—sexual harassment

A district court judge is censured for violations of the Code of Judicial Conduct, conduct prejudicial to the administration of justice that brings the judicial office into disrepute, and conduct in violation of his oath of office based upon his unwanted, uninvited and inappropriate hugging, touching and engaging in physical contact with a judicial assistant and a paralegal.

This matter is before the Court pursuant to N.C.G.S. § 7A-376 upon a recommendation by the Judicial Standards Commission entered 18 February 2005 that respondent William L. Daisy, a Judge of the General Court of Justice, District Court Division, Eighteenth Judicial District of the State of North Carolina, be censured for conduct in violation of Canons 1, 2A., and 3A.(3) of the North Carolina Code of Judicial Conduct, for conduct prejudicial to the administration of justice that brings the judicial office into disrepute in violation of N.C.G.S. § 7A-376, and for conduct in violation of respondent's oath of office. Calendered for argument in the Supreme Court 16 May 2005; determined on the record without briefs or oral argument pursuant to Rule 2(c) of the Rules for Supreme Court Review of Recommendations of the Judicial Standards Commission.

No counsel for Judicial Standards Commission or respondent.

ORDER OF CENSURE

In a letter dated 14 July 2004, the Judicial Standards Commission (Commission) notified Judge William L. Daisy (respondent) that it had ordered a preliminary investigation to determine whether formal proceedings under Commission Rule 9 should be instituted against him. The investigation involved allegations that respondent had sexually harassed a judicial assistant.

On 24 November 2004, Special Counsel for the Commission filed a complaint alleging in pertinent part:

3. The respondent engaged in [the] following inappropriate conduct:

a. The respondent hugged, touched and engaged in physical contact with Stephanie Miller Wallace, judicial assistant to the district judges of the Eighteenth Judicial District, that could reasonably be interpreted, and was considered by Stephanie Miller Wallace[,] to be unwanted, uninvited, and inappropriate conduct.

b. The respondent hugged, touched and engaged in physical contact with Tarah Danielle Mayes, a paralegal, that could reasonably be interpreted, and was considered by Tarah Danielle Mayes, to be unwanted, uninvited, and inappropriate conduct.

4. The actions of the respondent constitute conduct prejudicial to the administration of justice that brings the judicial office into disrepute, in violation of N.C.G.S. § 7A-376, and are in violation of Canons 1, 2A and 3A(3) of the North Carolina Code of Judicial Conduct and the respondent's oath of office.

On 15 December 2004, the Commission served respondent with a notice of formal hearing concerning the alleged charges. The Commission scheduled a hearing for 4 February 2005, at which respondent waived formal hearing and stipulated to the conduct alleged in paragraphs 3.a. and 3.b. of the complaint. Respondent further stipulated that such conduct violated Canons 1, 2A., and 3A.(3) of the North Carolina Code of Judicial Conduct and was prejudicial to the administration of justice.

On 18 February 2005, the Commission issued its recommendation, concluding on the basis of clear and convincing evidence that respondent's conduct constituted:

a. conduct in violation of Canons 1, 2A and 3A(3) of the North Carolina Code of Judicial Conduct;

b. conduct prejudicial to the administration of justice that brings the judicial office into disrepute in violation of N.C.G.S. § 7A-376; [and]

c. conduct in violation of the respondent's oath of office.

The Commission recommended that this Court censure respondent.

In reviewing the Commission's recommendations pursuant to N.C.G.S. §§ 7A-376 and 7A-377, this Court acts as a court of original jurisdiction, rather than in its typical capacity as an appellate court.

See In re Peoples, 296 N.C. 109, 147, 250 S.E.2d 890, 912 (1978), *cert. denied*, 442 U.S. 929, 61 L. Ed. 2d 297 (1979). Furthermore, the Commission's recommendations are not binding on this Court. *In re Nowell*, 293 N.C. 235, 244, 237 S.E.2d 246, 252 (1977).

The quantum of proof in proceedings before the Commission is by clear and convincing evidence. *Id.* at 247, 237 S.E.2d at 254. Such proceedings are not meant "to punish the individual but to maintain the honor and dignity of the judiciary and the proper administration of justice." *Id.* at 241, 237 S.E.2d at 250.

We conclude that respondent's actions constitute conduct in violation of Canons 1, 2A., and 3A.(3) of the North Carolina Code of Judicial Conduct. Therefore, pursuant to N.C.G.S. §§ 7A-376 and 7A-377 and Rule 3 of the Rules for Supreme Court Review of Recommendations of the Judicial Standards Commission, it is ordered that respondent, William L. Daisy, be and he is hereby censured for violations of the Code of Judicial Conduct, for conduct prejudicial to the administration of justice that brings the judicial office into disrepute, and conduct in violation of the respondent's oath of office.

By order of the Court in Conference, this 30th day of June 2005.

Newby, J.
For the Court

WENDY WHITT v. HARRIS TEETER, INC. AND RANDY SHULTZ

No. 416A04

(Filed 1 July 2005)

Employer and Employee— constructive wrongful discharge— sexual harassment—public policy—directed verdict for employer

The decision by the Court of Appeals that the trial court erred by granting a directed verdict for defendant employer on a claim for constructive wrongful discharge in violation of public policy based upon sexual harassment is reversed for the reasons stated in the dissenting opinion that (1) a claim of constructive discharge based upon either a hostile work environment or in retaliation is not authorized under the public policy exception to the employee-at-will doctrine, and (2) even if a constructive discharge claim is so authorized, plaintiff presented insufficient evidence on the element of the claim that defendant employer's handling of plaintiff's complaints of sexual harassment amounted to a deliberate attempted to make her workplace so intolerable that she would resign.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 165 N.C. App. 32, 598 S.E.2d 151 (2004), reversing a judgment entered upon a directed verdict on 2 April 2002 by Judge Sanford L. Steelman, Jr. in Superior Court, Forsyth County. Heard in the Supreme Court 18 May 2005.

Kennedy, Kennedy, Kennedy and Kennedy, L.L.P., by Harvey L. Kennedy, Harold L. Kennedy, III, and Annie Brown Kennedy, for plaintiff-appellee.

Womble Carlyle Sandridge & Rice, by Lucretia D. Guia, and J. Mark Sampson, for defendant-appellant Harris Teeter, Inc.

Patterson Harkavy LLP, by Burton Craige, for North Carolina Association of Women Attorneys, North Carolina Academy of Trial Lawyers, Southern States Police Benevolent Association, Inc., North Carolina Police Benevolent Association, Inc., and North Carolina Association of Educators; Suzanne Reynolds for North Carolina Association of Women Attorneys, and Charles E. Daye for North Carolina Academy of Trial Lawyers, amici curiae.

PER CURIAM.

For the reasons stated in the dissenting opinion, the decision of the Court of Appeals is reversed.

REVERSED.

JENNIFER L. PITTS, ADMINISTRATRIX OF THE ESTATE OF FELICIA HOPE LYNCH v. NASH DAY HOSPITAL, INC., ENGLEWOOD OB-GYN ASSOCIATES, P.A., TOMMY R. HARRIS, AND MOSES E. WILSON

No. 22A05

(Filed 1 July 2005)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 167 N.C. App. 194, 605 S.E.2d 154 (2004), reversing an order allowing defendants' motion for directed verdict entered on 19 December 2002 by Judge Milton F. Fitch, Jr. in Superior Court, Nash County. Heard in the Supreme Court 17 May 2005.

Rountree & Boyette LLP, by Charles S. Rountree, for plaintiff-appellee.

Yates, McLamb & Weyher, L.L.P., by Barry S. Cobb and James T. Newman, Jr., for defendant-appellants Harris, Wilson, and Englewood OB-GYN Associates, P.A.

Roberts & Stevens, P.A., by James W. Williams and Anne W. Ford, for North Carolina Association of Defense Attorneys, amicus curiae.

Faison & Gillespie, by Mark R. McGrath, for North Carolina Academy of Trial Lawyers, amicus curiae.

PER CURIAM.

AFFIRMED.

IN RE N.B.

[359 N.C. 627 (2005)]

IN THE MATTER OF N.B.

No. 168A04

(Filed 1 July 2005)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 163 N.C. App. 182, 592 S.E.2d 597 (2004), dismissing an appeal from an adjudication judgment and dispositional order entered 17 October 2002 by Judge Marvin P. Pope, Jr. in District Court, Buncombe County. Heard in the Supreme Court 9 February 2005.

Renae S. Alt for petitioner-appellee Buncombe County Department of Social Services.

Susan P. Hall for respondent-appellant father.

Judy N. Rudolph for appellee Guardian ad Litem.

PER CURIAM.

Pursuant to this Court's decision in *In re R.T.W.*, ––– N.C. –––, ––– S.E.2d ––– (July 1, 2005) (No. 417PA04), the decision of the Court of Appeals is affirmed.

AFFIRMED.

ALLSTATE INSURANCE COMPANY v. MICHAEL A. LAHOUD, R.L.J., A MINOR, AND S.J. AS GUARDIAN *AD LITEM* FOR R.L.J., A MINOR

No. 14A05

(Filed 1 July 2005)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, —— N.C. App. ——, 605 S.E.2d 180 (2004), affirming an order entered on 31 March 2003 by Judge W. Osmond Smith, III in Superior Court, Wake County. Heard in the Supreme Court 17 May 2005.

Wallace, Morris, Barwick, Landis, Braswell & Stroud, P.A., by P.C. Barwick, Jr. and Kimberly A. Connor, for plaintiff-appellee.

George B. Currin for defendant-appellant Lahoud.

Per Curiam.

AFFIRMED.

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

Ashford v. Wal-Mart Stores Case Below: 169 N.C. App. 255	No.211P05	Plt's Motion for "Appeal Notice of Petition for Rehearing" (COA04-129)	Dismissed 05/04/05
BellSouth Telecomms., Inc. v. City of Laurinburg Case Below: 168 N.C. App. 75	No. 118P05	Plt's PDR Under N.C.G.S. § 7A-31 (COA04-145)	Denied 06/30/05
Boyd v. Robeson Cty. Case Below: 169 N.C. App. 460	No. 221P05	Defs' PDR Under N.C.G.S. § 7A-31 (COA03-1222)	Denied 06/30/05
Bryson v. Cooper Case Below: 166 N.C. App. 759	No. 640P04	Plt's Petition for a Rehearing and En Banc by the Full Supreme Court Justices (COA03-1484)	Dismissed 06/30/05
C.F. Little Dev. Corp. v. N.C. Natural Gas Corp. Case Below: 167 N.C. App. 653	No. 038P05	Def's PDR Under N.C.G.S. § 7A-31 (COA03-1383)	Denied 05/04/05
Clayton v. N.C. State Bar Case Below: 168 N.C. App. 717	No. 224P05	Plt's PWC to Review Decision of COA (COA04-863)	Denied 06/30/05
N.C. Comm'r of Labor v. Weekley Homes, L.P. Case Below: 169 N.C. App. 17	No. 271P05	1. Petitioner's NOA Based upon a Constitutional Question (COA03-1634) 2. Respondent's Motion to Dismiss Appeal 3. Petitioner's PDR Pursuant to N.C.G.S. § 7A-31	1. —- 2. Allowed 06/30/05 3. Denied 06/30/05

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

County of Cabarrus v. Tolson Case Below: 169 N.C. App. 636	No. 329P04-2	1. Plts' NOA Pursuant to N.C.G.S. § 7A-30 (1) and Appellate Rule 14 (COA04-594) 2. Def's Motion to Dismiss Appeal 3. Plts' PDR Pursuant to N.C.G.S. § 7A-31 4. Plts' Alternative PDR of Constitutional Issues 5. Plts' Motion to Amend PDR and Alternative PDR of Constitutional Issues	1. —- 2. Allowed 06/30/05 3. Denied 06/30/05 4. Denied 06/30/05 5. Allowed 06/30/05
Crane v. Berry's Clean-Up & Landscaping, Inc. Case Below: 169 N.C. App. 323	No. 256P05	Def's (N.C. Farm Bureau Mutual Ins. Co.) PDR Under N.C.G.S. § 7A-31 (COA03-1109)	Denied 06/30/05
Davis v. Davis Case Below: 166 N.C. App. 516	No. 571PA04	Def's PDR Under N.C.G.S. § 7A-31 (COA03-1657)	Allowed 06/30/05
Davis v. Great Coastal Express Case Below: 169 N.C. App. 607	No. 238P05	Plt's PDR Under N.C.G.S. § 7A-31 (COA04-439)	Denied 06/30/05
Dean v. City of Charlotte Case Below: 168 N.C. App. 728	No. 144P05	1. Plt's Petition for Writ of Supersedeas (COA04-931) 2. Plt's NOA Based Upon a Constitutional Question 3. Plt's PDR Under N.C.G.S. § 7A-31	1. Denied 06/30/05 2. Dismissed ex mero motu 06/30/05 3. Denied 06/30/05
Dorroh v. Williams Case Below: 168 N.C. App. 239	No. 115P05	Def's PDR Under N.C.G.S. § 7A-31 (COA04-104)	Denied 06/30/05
Dungan & Mitchell, PA v. Dillingham Constr. Co. Case Below: 168 N.C. App. 595	No. 166P05	1. Defs' PDR Under N.C.G.S. § 7A-31 (COA03-1411-2) 2. Plt's Conditional PDR Under N.C.G.S. § 7A-31	1. Denied 06/30/05 2. Dismissed as moot 06/30/05

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

Estate of Apple v. Commercial Courier Express, Inc. Case Below: 168 N.C. App. 175	No. 117P05	1. Plt's PDR Under N.C.G.S. § 7A-31 (COA03-850-2) 2. Defs' Conditional PDR Under N.C.G.S. § 7A-31	1. Denied 05/04/05 2. Dismissed as moot 05/04/05
Francis v. Francis Case Below: 169 N.C. App. 442	No. 250P05	Plt's PDR Under N.C.G.S. § 7A-31 (COA04-765)	Denied 06/30/05
Friend v. State Case Below: 169 N.C. App. 99	No.197P05	Plt's PDR Under N.C.G.S. § 7A-31 (COA04-570)	Denied 05/04/05
Hemric v. Groce Case Below: 169 N.C. App. 69	No. 209P05	1. Def's PDR Under N.C.G.S. § 7A-31 (COA04-92) 2. Def's PWC to review the Decision of the COA	1. Dismissed 06/30/05 2. Denied 06/30/05
Hensley v. Industrial Maint. Overflow Case Below: 166 N.C. App. 413 (15 March 2005)	No. 514P04	1. Def's PDR Under N.C.G.S. § 7A-31 (COA03-1140) 2. Plt's Motion to Dismiss Def's PDR	1. Denied 05/04/05 2. Dismissed as moot 05/04/05
Holroyd v. Montgomery Cty. Case Below: 167 N.C. App. 539	No. 004P05	1. Plt's PDR Under N.C.G.S. § 7A-31(c) (COA03-1472) 2. Plt's Alternative Petition for Writ of Certiorari	1. Denied 05/04/05 2. Denied
Hook v. Hook Case Below: 170 N.C. App. 138	No. 288P05	Plt's PDR Under N.C.G.S. § 7A-31 (COA04-683)	Denied 06/30/05
HSI N.C., LLC v. Diversified Fire Protection Case below: 169 N.C. App. 767	No. 232P05	Defs' (N.C. Monroe Construction Co. and Travelers Casualty & Surety Co. of America) Motion for Temporaty Stay (COA04-678)	Allowed 05/10/05
Hultquist v. Morrow Case Below: 169 N.C. App. 579	No. 215P05	Plts' PDR Under N.C.G.S. § 7A-31 (COA04-561)	Denied 06/30/05

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

In re A.K. Case Below: 168 N.C. App. 595	No. 139PA05	Respondent's (Father) PDR Under N.C.G.S. § 7A-31 (COA04-986)	Allowed 06/30/05
In re A.N.B. Case Below: 165 N.C. App. 705	No. 428PA04	Respondent's Motion to Dismiss Appeal and Motion to Strike Brief and Appendix	Allowed **04/21/05**
In re B.N.H. Case Below: 170 N.C. App. 157	No. 279P05	Respondent's (Mother- Leigh Ann H.) PDR Under N.C.G.S. § 7A-31 (COA04-846)	Denied 06/30/05
In re D.M.H., Jr. Case Below: 163 N.C. App. 38	No. 228P04	Petitioner's PDR Under N.C.G.S. § 7A-31 (COA03-31)	Denied 06/30/05
In re K.B.B. & K.A.B. Case Below: 168 N.C. App. 728	No. 179P05	1. Respondent's (Shannon B.) PDR Under N.C.G.S. § 7A-31 (COA04-179) 2. Petitioner's (Guilford Co. DSS) Motion to Dismiss PDR 3. Respondent's (Mother, Shannon B.) Motion for Temporary Stay 4. Respondent's (Mother, Shannon B.) Petition for Writ of Supersedeas No.	1. Denied 05/04/05 2. Dismissed as moot 05/04/05 3. Denied **04/28/05** 4. Denied 05/04/05
In re L.E.B. & K.T.B. Case Below: 169 N.C. App. 375	No. 218P05	1. Petitioners' (New Hanover County DSS and Guardian Ad Litem) PDR Under N.C.G.S. § 7A-31 (COA04-463) 2. Respondent's (Mother) Motion to Dismiss PDR 3. Guardian Ad Litem's Motion to Dismiss PDR	1. Denied 06/30/05 2. Dismissed as moot 06/30/05 3. Dismissed as moot 06/30/05
In re M.I.V., D.C.B., J.T.B. Case Below: 168 N.C. App. 595	No. 163P05	Respondent's (Tania Valentin) PDR Under N.C.G.S. § 7A-31 (COA04-320)	Denied 05/04/05

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

In re N.A.B. Case Below: 167 N.C. App. 370	No. 037P05	Respondent's PWC to Review the Decision of the COA (COA03-1707)	Denied 05/04/05
In re SDG & TLG Case Below: 168 N.C. App. 728	No. 189P05	Respondent's (Sharon G., Mother) PDR under N.C.G.S. § 7A-31 (COA04-385)	Denied 06/30/05
In re T.B. Case Below: 166 N.C. App. 763	No. 598P04	Petitioner's (Tamieka M.) PDR Under N.C.G.S. § 7A-31 (COA03-1530)	Allowed 05/04/05
In re V.L.B. Case Below: 168 N.C. App. 679	No. 188P05	Respondent's (Father) PDR Under N.C.G.S. § 7A-31 (COA04-219)	Denied 05/04/05
James v. Bartlett Case Below: 359 N.C. 260 359 N.C. 272 359 N.C. 274	No. 602PA04-3	Plt's Petition for Writ of Mandamus	1. Dismissed **04/28/05** **Parker, J. and Edmunds, J. Recused**
James v. Bartlett Case Below: 359 N.C. 260 359 N.C. 272 359 N.C. 274	No. 602PA04-2	1. Plaintiff-Appellants' Motion for Reconsideration of this Court's decision date 4 February 2005 2. Plaintiff-Appellants' Motion to Suspend the Rules to Expand Time to Allow Reconsideration	1. Denied 05/04/05 2. Denied 05/04/05 **Parker, J. and Edmunds, J. Recused**
Jeffers v. D'Alessandro Case Below: 169 N.C. App. 455	No. 252P05	Plt-Appellant's PDR Under N.C.G.S. § 7A-31 (COA04-944)	Denied 06/30/05
Lassiter v. Cohn Case Below: 168 N.C. App. 310	No. 138P05	Plt's PDR Under N.C.G.S. § 7A-31 (COA04-672)	Denied **04/06/05**
Lestep, Inc. v. Smith Case Below: 167 N.C. App. 109	No. 633P04	Defs' PDR Under N.C.G.S. § 7A-31 (COA03-1316)	Denied 05/04/055

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

Lestep, Inc. v. Smith Case Below: 167 N.C. App. 109	No. 633P04	Defs' PDR Under N.C.G.S. § 7A-31 (COA03-1316)	Denied 06/30/05
Loftis v. Little League Baseball, Inc. Case Below: 169 N.C. App. 219	No. 181P05	Plts' PDR Under N.C.G.S. § 7A-31 (COA04-532)	Denied 06/30/05
MCC Outdoor, LCC v. Town of Franklinton Bd. of Comm'rs Case Below: 169 N.C. App. 809	No. 268P05	1. Respondent's PDR Under N.C.G.S. § 7A-31 (COA04-444) 2. Petitioner's Conditional PDR Under N.C.G.S. § 7A-31	1. Denied 06/30/05 2. Dismissed as moot 06/30/05
Miller v. Lillich Case Below: 167 N.C. App. 643	No. 063P05	Defs' PDR Under N.C.G.S. § 7A-31 (COA04-185)	Denied 05/04/05
Miyares v. Forsyth Cty. Dep't of Pub. Health Case Below: 169 N.C. App. 255	No. 176P05	Plt's PDR Under N.C.G.S. § 7A-31 (COA04-249)	Denied 05/04/05
Mooresville Hosp. Mgmt. Assocs. v. N.C. Dep't of Health & Human Servs. Case Below: 169 N.C. App. 641	No. 404A03-2	1. Respondents and Respondent-Intervenors' NOA (Dissent) or, in the Alternative, PDR (COA03-899) 2. Respondents and Respondent-Intervenors' PWC to Review Order of COA. 3. Petitioner's Alternative PDR under N.C.G.S. § 7A-31 4. Petitioner's PDR as to Additional Issues	1. —— 2. Allowed 06/30/05 3. Dismissed as moot 06/30/05 4. Allowed 06/30/05
N.C. Dep't of Transp. v. Williams Case Below: 168 N.C. App. 728	No. 202P05	Defs' (Williams and Riddle) PWC to Review the Decision of the COA (COA03-1446)	Denied 06/30/05

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

Neill Grading & Constr. Co. v. Lingafelt Case Below: 168 N.C. App. 36	No. 112PA05	1. Defs' NOA Based Upon a Constitutional Question (COA04-108) 2. Plt's Motion to Dismiss Appeal 3. Defs' Alternative PDR Under N.C.G.S. § 7A-31	1. —— 2. Allowed 06/30/05 3. Allowed 06/30/05
O & M Indus. v. Smith Eng'g Co. Case Below: 165 N.C. App. 705	No. 502PA04	1. Plt's NOA Based Upon a Constitutional Question (COA03-432) 2. Plt's PDR Under N.C.G.S. § 7A-31 3. Plt's PWC to Review the Decision of the COA 4. Def's (Kurz Transfer Products) Conditional PDR Under N.C.G.S. § 7A-31	1. Dismissed ex mero motu 05/04/05 2. Allowed 05/04/05 3. Dismissed as moot 05/04/05 4. Denied 05/04/05
Page v. Bald Head Ass'n Case Below: 170 N.C. App. 151	No. 304P05	Plts' PDR Under N.C.G.S. § 7A-31 (COA04-649)	Denied 06/30/05
Pritchett & Burch, PLLC v. Boyd Case Below: 169 N.C. App. 118	No. 242P05	Defs' PDR Under N.C.G.S. § 7A-31 (COA04-420)	Dismissed 06/30/05
Ramirez v. Little Case Below: 168 N.C. App. 729	No. 187P05	Plts' PDR Under N.C.G.S. § 7A-31 (COA04-184)	Denied 06/30/05
RSN Props., Inc. v. Jones Case Below: 168 N.C. App. 729	No. 186P05	Defs' (N. Earl Jones, Jr., Specialty Contract Services, LLC, and River Run Investments) and Third-Party Plts' (N. Earl Jones, Jr. and Specialty Contract Services) PDR Under N.C.G.S. § 7A-31 (COA04-100)	Denied 06/30/05
Shoffner v. Wal-Mart Stores, Inc. Case Below: 165 N.C. App. 905	No. 569P04	Defs' PDR Under N.C.G.S. § 7A-31 (COA03-116)	Denied 05/04/05

Southern Equip. Co. v. Laura & Assocs. Case Below: 169 N.C. App. 456	No. 229P05	Def's PDR Under N.C.G.S. § 7A-31 (COA04-747)	Denied 06/30/05
State v. Adams Case Below: 168 N.C. App. 729	No. 196P05	Def's PDR Under N.C.G.S. § 7A-31 (COA04-616)	Denied 05/04/05
State v. Allah Case Below: 168 N.C. App. 190	No. 103P05	Def's PDR Under N.C.G.S. § 7A-31 (COA04-391)	Denied 06/30/05
State v. Bacon Case Below: 168 N.C. App. 408	No. 136P05	Def's PDR Under N.C.G.S. § 7A-31 (COA04-617)	Denied 05/04/05
State v. Bailey Case Below: 169 N.C. App. 456	No. 255P05	Def's PDR Under N.C.G.S. § 7A-31 (COA04-1147)	Denied 06/30/05
State v. Bennett Case Below: 168 N.C. App. 240	No. 101P05	1. Def's NOA Based Upon a Constitutional Question (COA04-214) 2. AG's Motion to Dismiss Appeal 3. Def's PDR Under N.C.G.S. § 7A-31	1. —— 2. Allowed 05/04/05 3. Denied 05/04/05
State v. Bennett Case Below: 157 N.C. App. 717	No. 331P03-2	Def's PWC to Review the Decision of the COA (COA02-572)	Denied 06/30/05
State v. Boyd Case Below: 169 N.C. App. 204	No. 239P05	Def's PWC to Review the Decision of the COA (COA04-216)	Denied 06/30/05
State v. Branch Case Below: 162 N.C. App. 707 359 N.C. 406	No. 095PA04	AG's Motion to Stay Mandate, to Reconsider, or to Remand to Court of Appeals (COA03-350)	Denied **04/26/05**

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

State v. Brown Case Below: 169 N.C. App. 843	No. 276P05	Def's PDR Under G.S. 7A-31 (COA04-384)	Denied 06/30/05
State v. Burns Case Below: 168 N.C. App. 596	No. 160P05	1. Def's NOA Based Upon a Constitutional Question (COA03-1474) 2. AG's Motion to Dismiss Appeal 3. Def's PDR Under N.C.G.S. § 7A-31	1. —— 2. Allowed 05/04/05 3. Denied 05/04/05
State v. Byers Case Below: 166 N.C. App. 760	No. 599P04	Def's PWC to Review Decision of COA (COA04-84)	Denied 05/04/05
State v. Carpenter Case Below: 169 N.C. App. 256	No. 207A05	1. Def's NOA Based Upon a Constitutional Question (COA04-392) 2. AG's Motion to Dismiss Appeal	1. —— 2. Allowed 06/30/05
State v. Chapman Case Below: 359 N.C. 328	No. 146A02	Def's Motion to Dissolve Hold of Decision	Dismissed as moot 05/04/05
State v. Clark Case Below: 166 N.C. App. 760	No. 597P04	Def's PWC to Review Decision of COA (COA03-1678)	Denied 05/04/05
State v. Cole Case Below: Camden County Superior Court	No. 324A94-4	Def's PWC to Review Order of Superior Court	Denied 06/30/05
State v. Crouse Case Below: 169 N.C. App. 382	No. 236P05	Def's PDR Under N.C.G.S. § 7A-31 (COA04-804)	Denied 06/30/05
State v. Cummings Case Below: 169 N.C. App. 249	No. 212A05	1. Def's NOA Based Upon a Constitutional Question (COA04-949) 2. AG's Motion to Dismiss Appeal	1. —— 2. Allowed 06/30/05

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

State v. Ellis Case Below: 167 N.C. App. 276	No. 638PA04	1. AG's Motion for Temporary Stay (COA03-1065) 2. AG's Petition for Writ of Supersedeas 3. AG's PDR Under N.C.G.S. § 7A-31 4. Def's Motion for Extension of Time to Respond to State's PDR	1. Allowed **12/23/04** 2. Allowed 05/04/05 3. Allowed 05/04/05 4. Allowed **01/03/05**
State v. England Case Below: 136 N.C. App. 670	No. 331P05	Def's PWC to Review the Decision of the COA (COA99-47)	Denied 06/30/05
State v. Fennell Case Below: 170 N.C. App. 197	No. 301A05	1. Def's NOA Based Upon Constitutional Question (COA04-898) 2. AG's Motion to Dismiss Appeal	1. —— 2. Allowed 06/30/05
State v. Ferrer Case Below: 170 N.C. App. 131	No. 313P05	1. Surety's (Aegis Security Insurance Co.) Petition for PDR Under N.C.G.S. § 7A-31 (COA04-935) 2. Respondent's (Randolph County Board of Education) Motion to Dismiss Petition	1. Denied 06/30/05 2. Dismissed as moot 06/30/05
State v. Gant Case Below: 169 N.C. App. 457	No. 234P05	Def's PDR Under N.C.G.S. § 7A-31 (COA04-496)	Denied 06/30/05
State v. Gladden Case Below: 168 N.C. App. 548	No. 161P05	1. Def's NOA Based Upon a Constitutional Question (COA03-1581) 2. AG's Motion to Dismiss Appeal 3. Def's Alternative PDR Under N.C.G.S. § 7A-31	1. —— 2. Allowed 05/04/05 3. Denied 05/04/05
State v. Gray Case Below: 169 N.C. App. 457	No. 248P05	Def's PDR Under N.C.G.S. § 7A-31 (COA04-478)	Denied 06/30/05
State v. Hames Case Below: 170 N.C. App. 312	No. 33705	AG's Motion for Temporary Stay (COA04-968)	Allowed 06/30/05

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

State v. Harvin Case Below: 168 N.C. App. 596	No. 157P05	1. Def's NOA Based Upon a Constitutional Question (COA04-226) 2. Def's PDR Under N.C.G.S. § 7A-31	1. Dismissed ex mero motu 05/04/05 2. Denied 05/04/05
State v. Hightower Case Below: 168 N.C. App. 661	No. 178P05	Def's PDR Under N.C.G.S. § & 7A-31 (COA04-324)	Denied 05/04/05
State v. Hobbs Case Below 167 N.C. App. 656	No. 053P05	1. Def's NOA Based Upon a Constitutional Question (COA04-507) 2. AG's Motion to Dismiss Appeal 3. Def's PDR Under N.C.G.S. § 7A-31	1. —— 2. Allowed 05/04/05 3. Denied 05/04/05
State v. Holloway Case Below: 169 N.C. App. 457	No. 233P05	1. Def's NOA Based Upon a Constitutional Question (COA04-287) 2. AG's Motion to Dismiss Appeal 3. Def's PDR Under N.C.G.S. § 7A-31	1. —— 2. Allowed 06/30/05 3. Denied 06/30/05
State v. Houston Case Below: 169 N.C. App. 367	No. 219P05	1. Def's NOA Based Upon a Constitutional Question (COA04-622) 2. AG's Motion to Dismiss Appeal 3. Def's PDR Under N.C.G.S. § 7A-31	1. —— 2. Allowed 06/30/05 3. Denied 06/30/05
State v. Huntley Case Below: 117 N.C. App. 732	No. 294P05	Def's Motion for "Petition for a Review" (COA94-626)	Dismissed 06/30/05 **Martin, J. Recused**
State v. Johnson Case Below: 169 N.C. App. 457	No. 225P05	Def's PDR Under N.C.G.S. § 7A-31 (COA04-626)	Denied 06/30/05
State v. Jones Case Below: 168 N.C. App. 408	No. 130P05	Def's PDR Under N.C.G.S. § 7A-31 (COA04-908)	Denied 05/04/05

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

State v. Lawrence Case Below: 170 N.C. App. 260	No. 293A05	1. AG's Motion for Temporary Stay (COA03-1038) 2. AG's Petition for Writ of Supersedeas	1. Allowed **06/02/05** 2. Allowed **06/02/05**
State v. Leach Case Below: 166 N.C. App. 711	No. 613A04	1. Def's NOA Based Upon a Constitutional Question (COA03-1308) 2. AG's Motion to Dismiss Appeal	1. —— 2. Allowed 05/04/05
State v. Lowry Case Below: 166 N.C. App. 518	No. 039P05	Def's PWC to Review Decision of the COA (COA03-1141)	Denied 06/30/05
State v. Marcus Case Below: 168 N.C. App. 730	No. 177P05	Def's PDR Under N.C.G.S. § 7A-31 (COA04-771)	Denied 06/30/05
State v. Matthews Case Below: 166 N.C. App. 281	No. 538P04	Def's PDR Under N.C.G.S. § 7A-31 (COA03-1354)	Denied 05/04/05
State v. McCollum Case Below: 162 N.C. App. 182	No. 039P04-2	Def's PWC to Review Decision of COA (COA03-63)	Denied 05/04/05
State v. McMillian Case Below: 168 N.C. App. —— (15 March 2005)	No. 205P05	Def's PDR Under N.C.G.S. § 7A-31 or, Alternately, PWC (COA04-375)	Denied 06/30/05
State v. Nettles Case Below: 170 N.C. App. 100	No. 287P05	Def's PDR Under N.C.G.S. § 7A-31 (COA04-583)	Denied 06/30/05
State v. Parrish Case Below: 166 N.C. App. 518	No. 572P04	Def's PDR Under N.C.G.S. § 7A-31 (COA03-1638)	Denied 05/04/05
State v. Paul Case Below: 166 N.C. App. 282	No. 531P04	Def's PDR Under N.C.G.S. § 7A-31 (COA03-1178)	Denied 05/04/05
State v. Pearcy Case Below: 170 N.C. App. 198	No. 284P05	Def's PDR Under N.C.G.S. § 7A-31 (COA04-880)	Denied 06/30/05

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

State v. Ransom Case Below: 169 N.C. App. —— (5 April 2005)	No. 231P05	Def's PDR Under N.C.G.S. § 7A-31 (COA04-448)	Denied 06/30/05
State v. Richmond Case Below: Cumberland County Superior Court	No. 347A95-3	Def's PWC and Application for Stay of Execution	Denied 05/04/05
State v. Rose Case Below: 170 N.C. App. 284	No. 296P05	1. AG's Motion for Temporary Stay (COA04-353) 2. AG's Petition for Writ of Supersedeas 3. AG's NOA Based Upon a Constitutional Question 4. AG's PDR Under N.C.G.S. § 7A-31	1. Denied **06/03/05** 2. Denied 06/30/05 3. Dismissed ex mero motu 06/30/05 4. Denied 06/30/05
State v. Setzer Case Below: 168 N.C. App. —— (1 March 2005)	No. 180P05	Def's PDR Under N.C.G.S. § 7A-31 (COA04-323)	Denied 05/04/05
State v. Smith Case Below: 170 N.C. App. 461	No. 346A05	1. AG's Motion for Temporary Stay (COA04-587) 2. AG's Petition for Writ of Supersedeas 3. AG's NOA (Dissent)	1. Allowed **06/24/05** 2. Allowed **06/24/05** 3. ——
State v. Smith Case Below: 169 N.C. App. 160	No. 167P05	1. Def's NOA Based Upon a Constitutional Question (COA03-1700) 2. AG's Motion to Dismiss Appeal 3. Def's PDR Under N.C.G.S. § 7A-31	1. —— 2. Allowed 05/04/05 3. Denied 05/04/05
State v. Snider Case Below: 168 N.C. App. 701	No. 192A05	1. Def's NOA Based Upon a Constitutional Question (COA04-248) 2. AG's Motion to Dismiss Appeal	1. —— 2. Allowed 06/30/05

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

State v. Stanford Case Below: 169 N.C. App. 214	No. 193P05	1. Def's NOA Based Upon a Constitutional Question (COA04-637) 2. AG's Motion to Dismiss Appeal 3. Def's PDR Under N.C.G.S. § 7A-31	1. —— 2. Allowed 06/30/05 3. Denied 06/30/05
State v. Sutton Case Below: 169 N.C. App. 90	No. 200P05	1. Def's PDR Under N.C.G.S. § 7A-31 (COA04-101) 2. AG's Conditional PDR Under N.C.G.S. § 7A-31	1. Denied 06/30/05 2. Dismissed as moot 06/30/05
State v. Walker Case Below: 167 N.C. App. 110	No. 016P05	1. Def's (Emil E. Browning, Jr.) NOA Based Upon a Constitutional Question (COA03-1426) 2. Def's (Emil E. Browning, Jr.) PDR Under N.C.G.S. § 7A-31	1. Dismissed ex mero motu 05/04/05 2. Denied 05/04/05
State v. Walters Case Below: Robeson County Superior Court	No. 058A02-3	Def's Motion to Vacate Death Sentence	Allowed and the case is remanded to the trial court with instructions to impose a sentence of life imprisonment without parole 05/04/05
State v. Wheeler Case Below: 168 N.C. App. 731	No. 182P05	Def's PDR Under N.C.G.S. § 7A-31 (COA04-65)	Denied 05/04/05
State v. Winslow Case Below: 169 N.C. App. 137	No. 201A05	1. Def's NOA (Dissent) (COA04-647) 2. Def's PDR as to Additional Issues	1. —— 2. Denied 06/30/05
State v. Wood Case Below: 168 N.C. App. 581	No. 165P05	Def's PDR Under N.C.G.S. § 7A-31 (COA04-526)	Denied 05/04/05
Stetser v. TAP Pharm. Prods., Inc. Case Below: 162 N.C. App. 518	No. 142PA04	Plt's Motion to Withdraw Appeal	Allowed 06/30/05

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

Whitt v. Harris Teeter, Inc. Case Below: 165 N.C. App. 32	No. 416A04	1. Def's (Harris Teeter) NOA Based on a Dissent (COA03-335) 2. Def's (Harris Teeter) PDR as to Additional Issues 3. Plt's Motion to Strike Defendant-Appellant's Reply Brief 4. Plt's Motion to Withdraw Plaintiff-Appellee's Motion to Strike Defendant Appellant's Reply Brief	1. —— 2. Denied **10/06/04** 3. —— 4. Allowed 05/04/05
Williams v. N.C. Dep't of Env't & Natural Res. Case Below: 166 N.C. App. 86	No. 519P04	Petitioners' PDR Under N.C.G.S. § 7A-31 (COA03-595)	Denied 05/04/05
Young v. Young Case Below: 169 N.C. App. 31	No. 213A05	1. Def-Appellee's NOA Based on a Dissent (COA04-438) 2. Plt-Appellant's PDR Under N.C.G.S. § 7A-31 3. Defs-Intervenors-Appellees' Motion to Dismiss Plt-Appellant's PDR	1. —— 2. —— 3. Allowed 06/30/05
Zaliagiris v. Zaliagiris Case Below: 164 N.C. App. 602	No. 332A04	1. Plt's NOA Based Upon a Dissent (COA03-649) 2. Plt's PDR as to Additional Issues	1. —— 2. Denied 06/30/05
Zellers v. McNair Case Below: 166 N.C. App. 755	No. 575P04	Plt's PDR Under N.C.G.S. § 7A-31 (COA03-1429)	Denied 05/04/05

PETITION TO REHEAR

Viar v. N.C. Dep't of Transp. Case Below: 359 N.C. 400	No. 109A04	Plt's Petition for Rehearing	Denied 06/30/05

STATE v. CAMPBELL

[359 N.C. 644 (2005)]

STATE OF NORTH CAROLINA v. TERRANCE DURRELL CAMPBELL

No. 366A02

(Filed 19 August 2005)

1. Search and Seizure— investigative stop—motion to suppress evidence—reasonable suspicion of criminal activity

The trial court did not err in a capital first-degree murder case by denying defendant's motion to suppress all evidence discovered after he was stopped by police in Aiken, South Carolina even though defendant contends he was seized within the meaning of the Fourth Amendment before his arrest for operating a motor vehicle while his license was suspended, because: (1) officers do not violate the Fourth Amendment's prohibition of unreasonable seizures merely by approaching individuals on the street or in other public places and putting questions to them if they are willing to listen, and in the instant case the officer had not told defendant that he could not leave when defendant consented to speak with the officer; and (2) at the point where the officer asked defendant to "hold up" while she transmitted information about defendant to the dispatcher, the officer had reasonable articulable suspicion that defendant was involved in criminal activity including where the officer received a complaint from a K-Mart employee about a suspicious person whose car was parked for a lengthy period of time in the parking lot; defendant acknowledged that he had been parked in the lot; defendant said he had completed a job in Columbia, South Carolina, that he was traveling home to North Carolina, and that he had stopped in Aiken to take a nap even though Aiken is forty-five miles west of Columbia, is not on the route to North Carolina, and the K-Mart was more than ten miles from the interstate connecting Columbia and Aiken; and defendant had no driver's license with him and did not know the name of his friend to whom the car belonged.

2. Jury— selection—capital trial—voir dire—stake out questions

The trial court did not err in a capital first-degree murder case by refusing to allow defendant to ask prospective jurors during voir dire whether defendant's election not to testify would adversely influence their decision given the fact that defendant had made a confession, because: (1) parties are not allowed to

stake out a prospective juror's opinion based on specific facts; (2) defendant was allowed to ask prospective jurors whether his decision not to testify would affect their impartiality, and jurors were instructed that defendant had a right not to testify; (3) defendant was able to inquire of prospective jurors whether they would be able to follow the law; (4) defendant had sufficient opportunity to examine prospective jurors on their ability to be fair and impartial in this trial and on their ability to render a decision without regard to defendant's failure to testify; and (5) although defendant now asserts that the ruling violated his federal and state constitutional rights, defendant failed to assert this argument before the trial court and has thus waived it.

3. Jury— selection—capital trial—excusal for cause

The trial court did not abuse its discretion in a capital first-degree murder case by excusing a prospective juror for cause under N.C.G.S. § 15A-1212, because: (1) the prospective juror lived down the road from the victim, had known the victim his entire life, had been in the victim's home, and had attended the victim's funeral; (2) the prospective juror indicated that he would prefer not to look at pictures and asked to be deferred; (3) while the prospective juror stated that he could set aside his personal feelings and be a fair and impartial juror, the trial court was in a unique position to assess the prospective juror's impartiality; and (4) defendant failed to assert any constitutional claims at trial and thus has waived them.

4. Evidence— expert testimony—location of blood spatter—intent

The trial court did not err in a capital first-degree murder case by overruling defendant's objections to portions of the testimony of the State's expert witness about the two locations of blood spatter in the victim's home used to show intent, because: (1) the expert had studied panic disorders, was accepted by the trial court as an expert in forensic psychiatry, and as such was competent to evaluate the evidence to give an opinion as to what defendant's mental state might have been at the time of the crime; and (2) defendant's objection was based on the two locations of assault not being in evidence whereas the expert relied on the SBI report which was admitted into evidence as part of another witness's testimony.

5. Appeal and Error— preservation of issues—failure to object

Although defendant contends the trial court erred in a capital first-degree murder case by allowing the State's expert witness to testify that the existence of two areas of attack was inconsistent with defendant's being panicked, this assignment of error is dismissed because defendant did not object to this testimony at trial and thus did not preserve this issue for appeal under N.C. R. App. P. 10(b)(1).

6. Evidence— expert opinion—specialized knowledge—defendant's state of mind

The trial court did not err in a capital first-degree murder case by allowing the State's expert witness to give his opinion as to defendant's state of mind based on the fact that the victim was lying prone on the floor when at least one blow was dealt because: (1) the expert was trained to recognize links between behavior and a person's state of mind; and (2) the expert had specialized knowledge to assist the trier of fact to understand the evidence or to determine a fact in issue. N.C.G.S. § 8C-1, Rule 702.

7. Appeal and Error— preservation of issues—failure to object

Although defendant contends the trial court erred in a capital first-degree murder case by allowing the State's expert witness to testify regarding the bloody towel and pillowcase, this assignment of error is dismissed because defendant did not object to this exchange at trial and thus did not preserve this issue for appeal under N.C. R. App. P. 10(b)(1).

8. Appeal and Error— preservation of issues—failure to raise constitutional issue at trial

Although defendant contends the trial court violated his federal and state constitutional rights by including portions of testimony from the State's expert witness in a capital first-degree murder case, this assignment of error is dismissed because defendant failed to raise these constitutional issues at trial and thus did not preserve them for appeal.

9. Evidence— exclusion of testimony—prior violent sexual act by victim

The trial court did not err in a capital first-degree murder case by excluding testimony regarding an alleged prior violent sexual act by the victim even though defendant wanted to use it

to show that the victim was the first aggressor in the incident leading up to his death, because: (1) defendant had not offered any evidence of self-defense at the time he attempted to introduce this particular testimony of two witnesses, and thus, the fact that an unidentified man accused the victim of assault several years before the crime for which defendant was charged took place did not make any fact in the case more probable or less probable; and (2) although defendant now contends the testimony was independently admissible to impeach the testimony of another witness who stated that she had never known the victim to be violent, defendant failed to make this argument at trial and cannot now advance a different theory on appeal.

10. Evidence— cross-examination—sexual paraphernalia found in victim's home

The trial court did not abuse its discretion in a capital first-degree murder case by refusing to allow defendant to cross-examine witnesses and by sustaining the State's objection to questions regarding sexual paraphernalia found in the victim's home, because: (1) in regard to the questioning of a witness about sexual paraphernalia, its probative value was substantially outweighed by the danger of unfair prejudice; (2) in regard to the cross-examination of a detective, the identity of the murderer was not at issue and thus the used condom found in a bag in the storage room had no bearing on the fact of the murder itself; (3) in regard to the fact that defendant was not allowed to conduct redirect examination of a doctor regarding the sexual paraphernalia, defendant's attempt to show that the victim was homosexual does not prove that the victim was the first aggressor and the evidence was very inflammatory and unfairly prejudicial; (4) defendant's argument that the State opened the door to the questioning by asking the doctor if he had examined the physical evidence admitted at trial was without merit since questioning about the specific paraphernalia would not have explained or rebutted evidence adduced by the State on cross-examination of the doctor; and (5) defendant's constitutional arguments are not properly before the Supreme Court when defendant did not raise these issues at trial.

11. Criminal Law— prosecutor's argument—"The Last Supper" tapestry

The trial court did not abuse its discretion in a capital first-degree murder case by refusing to restrict how the prosecution

made reference to the victim's tapestry depicting the Biblical scene "The Last Supper" which was hung on the wall over the victim's couch where blood was found spattered on it, because: (1) description of a crime scene, although necessarily prejudicial to a defendant, is not so unfairly prejudicial as to outweigh its probative value in helping jurors and the court understand how and where the crime took place; (2) nothing in the record suggests that the description was used excessively and solely to inflame the passions and prejudices of the jury against defendant; and (3) defendant's constitutional arguments are not properly before the Supreme Court when defendant did not raise these issues at trial.

12. Criminal Law— prosecutor's argument—defendant staking out store to rob it

The trial court did not abuse its discretion in a capital first-degree murder case by failing to intervene ex mero motu during the State's closing argument upon hearing the prosecutor argue that defendant was attempting to rob the K-Mart in Aiken, South Carolina, because: (1) the actions of defendant during the pertinent time period were subject to suspicion and the prosecutor could reasonably argue the inference from the evidence that defendant was staking out the store in order to rob it; (2) contrary to defendant's assertion, defense counsel was not taken by surprise by this argument as the prosecutor had signaled this argument during the charge conference; and (3) defendant's constitutional arguments are not properly before the Supreme Court when defendant did not raise these issues at trial.

13. Criminal Law— prosecutor's argument—payment of defense expert witness—credibility

The trial court did not abuse its discretion in a capital first-degree murder case by failing to intervene ex mero motu during the portion of the State's closing argument that attacked the testimony of defendant's expert witness and that allegedly misstated portions of that expert's testimony, because: (1) the prosecutor's statements about the expert's credibility were not grossly improper, although the statement that the expert was a witness that the defendant could buy verged on being unacceptable, and defense counsel used this same tactic in an attempt to discredit the State's mental health expert; (2) in regard to any alleged misstatements of the expert's testimony, the essence of the prosecutor's argument was that the expert's assessment of defendant's

mental state did not necessarily take into account all of defendant's actions surrounding the murder and even if the comments were improper, the jury instructions informed the jury not to rely on the closing arguments as its guide in evaluating the evidence; and (3) viewed as a whole and in light of the wide latitude afforded the prosecutor in closing argument, the prosecutor's challenged arguments did not so infuse the proceeding with impropriety as to impede defendant's right to a fair trial.

14. Criminal Law— prosecutor's argument—defendant's failure to testify

The trial court did not err in a capital first-degree murder case by overruling defendant's objection to the portion of the prosecutor's closing argument that allegedly alluded to defendant's failure to testify, because: (1) during closing arguments, the prosecutor may properly bring to the jury's attention the failure of a defendant to produce exculpatory evidence or to contradict evidence presented by the State; (2) the prosecutor's statement was not an improper comment on defendant's failure to testify, but instead reminded the jury that defendant's confession was not admitted as substantive evidence and could not be used for that purpose; and (3) defendant's constitutional arguments are not properly before the Supreme Court when defendant did not raise these issues at trial.

15. Homicide— felony murder—motion to dismiss—sufficiency of evidence

The trial court did not err by failing to dismiss the charge of felony murder, nor did it violate defendant's constitutional rights by submitting the N.C.G.S. § 15A-2000(e)(5) aggravating circumstance that the capital felony was committed while defendant was engaged in the commission of robbery, because: (1) although the exact details of the murder and robbery are lacking, the evidence taken in the light most favorable to the State permits a reasonable jury to infer that defendant murdered and robbed the victim without any break in the series of events; and (2) defendant's constitutional argument is not properly before the Supreme Court when defendant did not raise this issue at trial.

16. Sentencing— capital—exclusion of evidence of prior violent sexual act by victim

The trial court did not err during a capital sentencing proceeding by failing to allow two witnesses to testify that a man had

knocked on their doors and claimed that the victim had attempted to rape him, because: (1) although the specific incident was excluded from evidence, defendant was still able to rebut the State's evidence of the victim's nonviolent reputation by introducing evidence of the victim's reputation for making unwanted sexual advances on men; (2) the vagueness of the specific incident, particularly that the man in question was unidentified, undermined the reliability of that evidence; (3) defendant has not demonstrated why exclusion of this evidence was improper; and (4) even if the evidence was improperly excluded, defendant was able to rebut the State's evidence and was not prejudiced as a result.

17. Sentencing— capital—aggravating circumstance—previously convicted of felony involving use or threat of violence

The trial court did not err, abuse its discretion, or commit plain error in a capital sentencing proceeding by admitting evidence of the circumstances surrounding defendant's 1985 conviction for kidnapping including details of rapes, because: (1) the State is allowed to present the circumstances of the prior felony in order to meet its burden to show beyond a reasonable doubt the aggravating circumstance under N.C.G.S. § 15A-2000(e)(1) that defendant had been previously convicted of a felony involving the use or threat of violence; (2) evidence concerning the events that took place during the kidnapping was necessary to show that the victim was terrorized by defendant and that her fear was well founded at the time of the actual kidnapping; and (3) although defendant contends that the trial court should have intervened ex mero motu when the prosecutor argued that at the time of the kidnapping in 1985 the marital rape exemption prevented defendant from being charged with rape, defendant did not object to this argument at trial and the argument did not rise to the level of being so grossly improper as to impede defendant's right to a fair trial.

18. Sentencing— capital—prosecutor's argument—victim killed to eliminate witness

The trial court did not abuse its discretion by failing to intervene ex mero motu in a capital sentencing proceeding when the prosecutor made the statement during closing arguments that the victim was killed for the purpose of witness elimination, because: (1) the remarks were made when discussing the mitigating cir-

cumstance that defendant lacked the capacity to appreciate the criminality of his conduct; and (2) the argument was a reasonable inference given defendant's history of crime.

19. Sentencing— capital—prosecutor's argument—confession after DNA testing of physical evidence

The trial court did not abuse its discretion by failing to intervene ex mero motu in a capital sentencing proceeding when the prosecutor argued that defendant confessed after DNA testing even though defendant contends he wrote the confession on 4 February 2000 and the DNA testing of physical evidence was not done until much later, because the argument was a reasonable inference from the evidence adduced at trial when defendant wrote a confession letter knowing that his clothing had been confiscated and DNA evidence was on his confiscated clothing.

20. Sentencing— capital—prosecutor's argument—defendant stalking his next victim

The trial court did not abuse its discretion by failing to intervene ex mero motu in a capital sentencing proceeding when the prosecutor argued that defendant was stalking his next victim while waiting in the car at the K-Mart parking lot in Aiken, South Carolina, because a reasonable inference could be made from the evidence in the case since defendant previously had committed crimes in which he staked out his victim.

21. Sentencing— capital—prosecutor's argument—number of aggravating circumstances

The trial court did not err in a capital sentencing proceeding by allowing the State to repeatedly refer to five aggravating circumstances during closing argument when in fact only three aggravating circumstances were submitted, because: (1) three convictions were used to support the (e)(3) aggravating circumstance that defendant had previously been convicted of a felony involving violence to the person, and each conviction could have been submitted to the jury as a separate (e)(3) aggravator; (2) the prosecutor also stated that the weighing process does not involve counting the number of mitigators and the number of aggravators to see which side has the largest number, and the trial court reiterated this point to the jury during instructions; (3) the copy of the issues and recommendation as to punishment form given to the jurors listed three possible aggravators; and (4) given that the

convictions could have been listed as separate aggravators and that the jurors were properly instructed as to the law on the subject, the prosecutor's comments could not have impeded defendant's right to a fair trial.

22. Constitutional Law— effective assistance of counsel—dismissal of claims without prejudice to pursue in postconviction motion for appropriate relief

Although defendant contends he received ineffective assistance of counsel in a capital first-degree murder case by his counsel's promising the jury, without delivering, evidence and instructions on self-defense and intoxication based on an erroneous belief that defendant's confession would be admitted as substantive evidence, and by concluding that even if the confession were admitted into evidence the confession alone would be enough to establish self-defense and intoxication, these claims are dismissed without prejudice to defendant to pursue them in a postconviction motion for appropriate relief, because evidentiary issues need to be developed before defendant will be in a position to adequately present his possible ineffective assistance claim on these issues.

23. Constitutional Law— effective assistance of counsel—failure to object to testimony—failure to impeach witness

Defendant did not receive ineffective assistance of counsel in a capital first-degree murder case based on his counsel's failure to object to the testimony of the victim's grandniece who stated that she had never known the victim to be violent toward anyone and by failing to impeach that witness, because: (1) even assuming arguendo that it was improper for the trial court to allow the question when defendant had not introduced evidence of the victim's character, defendant failed to show prejudice or that a reasonable probability existed that the outcome of the trial would have been different; (2) the specific instances of conduct that defendant argues should have been used to impeach the witness were not allowed by the trial court in either the guilt phase or the sentencing proceeding; and (3) sound strategy reasons exist for not attempting to impeach a biased witness when the answer to the question is unknown, and inquiry about her knowledge of the specific incident where the victim allegedly committed a prior violent sexual act against an unidentified male would likely have produced a negative answer.

24. Constitutional Law— effective assistance of counsel— alleged concession of guilt to second-degree murder without defendant's consent

Defense counsel in a first-degree murder case did not admit defendant's guilt of second-degree murder without defendant's consent in violation of defendant's right to the effective assistance of counsel when he stated during closing argument that "the only difference is a second degree murder case lacks that specific intent element, and I submit to you that's where we are," because: (1) defense counsel was pointing out to the jury that specific intent was lacking in this case and that the lack of specific intent was the only difference between second-degree murder and first-degree murder; and (2) defense counsel was arguing to the jury that without specific intent, the most serious crime for which defendant could be convicted would be second-degree murder.

25. Constitutional Law— effective assistance of counsel—failure to request instruction

Defendant did not receive ineffective assistance of counsel in a capital first-degree murder case based on his counsel's failure to request an instruction in the sentencing proceeding that defendant's confession could be considered as substantive evidence in the sentencing proceeding, because: (1) throughout defendant's closing argument in the sentencing proceeding, defendant's counsel, without objection from the prosecutor or intervention by the trial court, argued the substance of defendant's statement; (2) the jurors were afforded the opportunity to consider defendant's character and the circumstances surrounding the crime in weighing whether, in light of the aggravating and mitigating circumstances, defendant deserved a sentence less than death; and (3) defendant failed to show that a reasonable probability exists that a different outcome would have resulted had trial counsel requested an instruction that the statement be considered as substantive evidence.

26. Constitutional Law— effective assistance of counsel—failure to object to closing arguments

Defendant did not receive ineffective assistance of counsel in a capital first-degree murder case based on his counsel's failure to object to allegedly improper closing arguments by the prosecutor in both the guilt phase and the sentencing proceeding including the argument that defendant was intending to rob the

K-Mart, the demeaning reference to the monetary compensation of defendant's expert witness, an alleged misstatement of defendant's expert witness testimony, the argument regarding evidence of alleged rapes previously committed by defendant, the argument that defendant killed the victim for the purpose of eliminating a witness to his actions, the argument implying that defendant did not confess until his DNA was collected, the argument that defendant was stalking his next victim at the Aiken K-Mart, and the references to five aggravators instead of the three that were submitted to the jury, because: (1) none of the arguments was so grossly improper as to render the trial fundamentally unfair; and (2) a reasonable probability does not exist that the outcome of the trial would have been different had defendant objected to them.

27. Constitutional Law— effective assistance of counsel—failure to preserve challenge for cause issues

The trial court did not abuse its discretion in a capital first-degree murder case by denying three of defendant's challenges for cause, and defendant did not receive ineffective assistance of counsel based on his counsel's failure to preserve those three challenge for cause issues for appeal, because: (1) although one prospective juror was initially equivocal about whether he could follow the law on defendant's right not to testify, he stated he could disregard prior knowledge and impressions, follow the trial court's instructions on the law, and render an impartial, independent decision based on the evidence; (2) although a second prospective juror was an acquaintance of a deputy who was a witness in the case, the prospective juror stated that they were not good friends, that he could follow the law, that he knew witnesses could be wrong or mistaken, that he could apply the same test of truthfulness as in everyday interactions, and that he could follow the court's instructions on witness credibility; (3) although the second prospective juror also indicated a possible bias against defendant for failing to testify, he indicated his ability to follow the law as given to him by the trial judge; (4) although a third juror indicated that drinking does not provide any excuse for criminal behavior, that people claim being a victim of a homosexual assault as a "cop-out" for their behavior, that life without parole for first-degree murder is not a sufficiently severe punishment, that death is a more appropriate punishment for first-degree murder, and that life without parole is an unfair pun-

ishment since taxpayers have to pay to keep a person incarcerated when that person has taken the life of another, the juror indicated after being questioned on each issue that she could follow the law, put aside her predispositions, and give fair consideration to all the evidence including evidence of alcohol use and impairment and that she could weigh both life and death as punishments; and (5) assuming arguendo that the trial court ruled improperly in denying any one of these three challenges for cause, defendant has failed to demonstrate he was forced to seat a juror with whom he was dissatisfied.

28 Sentencing— death penalty—proportionate

A sentence of death was proportionate in a first-degree murder case, because: (1) defendant was convicted of first-degree murder on the basis of malice, premeditation and deliberation and under the felony murder rule; (2) the jury found two of the three aggravating circumstances submitting including under N.C.G.S. § 15A-2000(e)(3) that defendant had been previously convicted of a felony involving the use or threat of violence to the person and under N.C.G.S. § 15A-2000(e)(5) that the murder was committed while defendant was engaged in the commission of robbery with a dangerous weapon; and (3) defendant killed the victim in the victim's home.

Justice NEWBY did not participate in the consideration or decision of this case.

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of death entered by Judge Charles H. Henry on 27 March 2002 in Superior Court, Pender County, upon a jury verdict finding defendant guilty of first-degree murder. Heard in the Supreme Court 13 April 2004.

Roy Cooper, Attorney General, by Mary D. Winstead, Assistant Attorney General, for the State.

Staples S. Hughes, Appellate Defender, by Barbara S. Blackman, Assistant Appellate Defender, for defendant-appellant.

PARKER, Justice.

Defendant Terrance Durrell Campbell was indicted on 21 February 2000 for first-degree murder and robbery with a dangerous weapon of "Buddy" William Hall. Defendant was tried capitally and

found guilty of first-degree murder based on malice, premeditation and deliberation and under the felony murder rule, with robbery as the underlying felony. After a capital sentencing hearing, the jury recommended that defendant be sentenced to death; and the trial court entered judgment accordingly.

The State's evidence tended to show that on 3 February 2000 defendant was sitting in a car in a K-Mart parking lot in Aiken, South Carolina. A K-Mart employee, Valerie Green, noticed defendant when she arrived for work at 5:15 p.m. that day. Another K-Mart employee, Gail Wertz, went outside at regular intervals throughout the evening and noticed that defendant was slumped down in the car and that he could see her. Ms. Wertz became concerned that "he was up to no good" and called 911 at approximately 8:45 p.m., fifteen minutes before the store was closing. Employees from the K-Mart tried to get the license plate number, but defendant drove away.

Officer Tracy Saxton of the Department of Public Safety in Aiken, South Carolina, was dispatched to the K-Mart parking lot at approximately 8:50 p.m. A K-Mart employee directed Officer Saxton's attention to defendant's car as defendant was leaving the parking lot. Officer Saxton followed defendant from the K-Mart parking lot to a nearby convenience store and pulled her car in behind him at the gas pumps. Defendant had gotten out of the car and was walking toward the convenience store, counting change from a paper bag in his hand. Officer Saxton asked to speak with defendant, and the two met each other about halfway between her vehicle and the store entrance. Defendant told her he had been in the K-Mart parking lot because he was taking a nap. Defendant told Officer Saxton that he was on his way back to North Carolina from a construction job in Columbia, South Carolina, but that he had stopped in Aiken to rest. Officer Saxton asked defendant for his driver's license, which he could not produce. She then asked him for registration and insurance information on the car, and defendant replied that he did not have it because the car was not his. When pressed for information about the owner of the car, defendant stated that the car belonged to a friend of his who let him borrow the car, but defendant could not remember the friend's name. Defendant gave his name as "Terry Campbell" to Officer Saxton, who radioed to dispatch to do a driver's license check. Officer John Gregory arrived at the scene and remained with defendant while Officer Saxton called in the request. The initial check did not find anything on Terry Campbell, so the two officers asked defendant if he had any paperwork with his name on it. After

defendant retrieved a pay stub from a bag in the car, Officer Saxton radioed the information to dispatch.

While waiting for a response from dispatch, the officers asked defendant if they could search the car, and defendant consented. Among the items found in the car were two men's wallets, neither of which belonged to defendant; a few containers, one of which appeared to contain urine; and a radio. In the trunk officers found a .22 caliber rifle, an axe, and some clothes. The wallets contained identification cards in the names of William Arthur Hall and Guy Miles. The officers asked defendant if the rifle was his. Defendant replied that he did not know it was in the car; but when Officer Gregory picked up the rifle, defendant said, "Watch it, it's loaded." Officer Gregory cleared the rifle for safety purposes by removing the bullets.

Dispatch notified the officers that defendant's driver's license had been suspended in North Carolina. The officers placed defendant under arrest for driving without a South Carolina driver's license. An inventory of the car was taken. The Aiken Department of Public Safety notified the authorities in Pender County, North Carolina, about the wallets found in the car. Pender County law enforcement officers used the information from the identification cards to conduct well-being checks on the two men whose wallets were found.

Pender County Sheriff's Deputy Jody Woodcock was dispatched to William Hall's house. All the doors were locked, but Deputy Woodcock was able to enter through an unlocked kitchen window. The deputy found Mr. Hall dead on the living room floor. Mr. Hall was found on his back with his head partially underneath a small table. Blood was pooled around his head, and cigarette butts and a paper cup were scattered around him. The only clothes on the body were long john bottoms and socks; Mr. Hall's genitalia were exposed. Blood was spattered on the living room ceiling and walls, including on a tapestry depicting the Last Supper that hung over the couch. Blood was also pooled on the couch. A towel lying on a love seat in the living room had blood on it, as did a table near the couch. In the master bedroom blood smears were found on a pillow lying near the foot of a bed, and bloodstains appeared on the floor. Coins and a pair of men's trousers were lying on the floor of the bedroom, and coins and loose coin wrappers were found on the bedroom closet floor. Blood also appeared on the door between the living room and the foyer.

Evidence collected at the crime scene and from defendant's body was sent to the State Bureau of Investigation (SBI) for DNA testing. DNA profiles taken from the cigarette butts collected from around the victim's body were consistent with the victim and defendant. Blood found on defendant's jeans matched the victim's.

An autopsy performed on the victim revealed approximately eleven blunt trauma wounds to the head. The wounds were found on the front, top, and back of the head along with a skull fracture located under the wounds on the left front of the head. According to John Almeida, M.D., the pathologist who performed the autopsy, the injuries resulted in massive cerebral damage and intercerebral hemorrhage. Dr. Almeida testified that the victim died as a result of these trauma wounds, which were most likely caused by a "heavy cutting instrument." Several non-fatal wounds were also found on the victim's left forearm. Dr. Almeida determined that these wounds were defensive in nature. An analysis of the victim's blood showed no alcohol in his system.

During their investigation of the murder, police found video surveillance tapes showing defendant and the victim together at a Wal-Mart store in Wallace, North Carolina, at approximately 5:00 or 5:30 p.m. on 2 February 2000, the night of the murder. The victim and defendant were also seen together in a videotape purchasing a bottle of gin at an ABC store in Wallace that night.

After defendant was arrested, he was taken to the county jail, where his clothes and personal items were collected. On 4 February 2000 defendant wrote a thirteen page statement in which he gave his version of the events surrounding the murder. On 5 February 2000 defendant waived extradition and was transferred from South Carolina to Pender County, North Carolina.

George Corvin, M.D., an expert in forensic psychiatry, was called as a defense witness and testified that defendant did not suffer from any severe psychiatric illness but that defendant suffered from anxiety and had a history of significant problems with alcohol. Dr. Corvin also testified that defendant had extreme beliefs and fears regarding homosexuality. Additionally, Dr. Corvin stated that defendant felt that being touched by another man, however benignly, was "evil" and "unGodly" and that it would "change your manhood."

PRETRIAL ISSUE

[1] Defendant first assigns error to the trial court's denial of his motion to suppress all evidence discovered after he was stopped by

the police in Aiken, South Carolina. This argument is based on defendant's contention that he was illegally seized in violation of his constitutional rights when he was detained by Officer Saxton, that there was no reasonable suspicion for the seizure, and that all evidence obtained as a result of the illegal seizure should have been suppressed. We disagree.

The Fourth Amendment to the United States Constitution protects the "right of the people to be secure . . . against unreasonable searches and seizures." U.S. Const. amend. IV. The Fourth Amendment is applicable to the states through the Due Process Clause of the Fourteenth Amendment. *See State v. Watkins*, 337 N.C. 437, 441, 446 S.E.2d 67, 69 (1994). Article I, Section 20 of the North Carolina Constitution provides similar protection against unreasonable seizures. N.C. Const. art. I, § 20.

The trial court conducted a hearing on defendant's motion to suppress on 25 February 2002. Testimony was taken from Officers Saxton and Gregory, as well as from Chief Investigator Dwayne Courtney. Based on the evidence produced at the hearing, the trial judge denied defendant's motion and later issued a written order with findings of fact and conclusions of law. The trial court made the following findings of fact:

> 1. Aiken, South Carolina, public safety officer Tracy Saxton was dispatched at approximately 8:50 p.m. to the parking lot of K-Mart to respond to a call regarding a suspicious individual. The caller to the police department was an employee of K-Mart who indicated that an individual had parked his vehicle in the parking lot and had been sitting in it for three to four hours, and, during that period, had not gotten out of the vehicle. When Officer Saxton arrived at the store, an employee advised her that the vehicle they had called about at that time was pulling out of the parking lot. The employee pointed out to the officer a Crown Victoria automobile which was leaving the parking lot of the store. Officer Saxton only spent a few seconds with the employee before driving off to follow the identified vehicle.
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> 2. Officer Saxton observed the vehicle leave the parking lot, travel out onto Silver Bluff Road and pull up and stop at a Golden Pantry convenience store. After the Crown Victoria motor vehicle had come to a complete stop, the defendant, who was the driver of the vehicle, got out of the vehicle and started walking in the direction of the store. Officer Saxton pulled up behind the

defendant's vehicle and stopped without activating a siren or blue lights. She radioed to Ayden [sic] Police Department notifying them of her location and that she was out with a "suspicious vehicle." When she finished her transmission, she got out of her vehicle [and] asked the defendant if she could speak to him. At that time the defendant was out of his vehicle and ten feet from the officer. They met to speak at the rear of the defendant's vehicle.

3. Officer Saxton asked the defendant if he had just left the K-Mart parking lot. The defendant indicated that he had and further advised her that he had been sleeping in his vehicle in the parking lot. He told the officer that he had stopped in Aiken to take a nap, and that he was driving home to North Carolina having finished a job in Columbia, South Carolina. Aiken is about forty-five miles west of Columbia. Officer Saxton asked for the defendant's driver's license and motor vehicle registration. The defendant responded that he did not have any identification, but told her that his name was Terry Campbell and gave her his date of birth. He further indicated to the officer that the car did not belong to him, but belonged to a friend. When asked to identify his friend's name, the defendant could not recall the friend's name. By this time about two to three minutes had passed since Officer Saxton initiated the conversation. During this conversation, Aiken public safety officer John Gregory arrived at the location in his police cruiser.

4. As a result of the conversation, Officer Saxton asked the defendant to "hold up and she would be back up with him." Officer Saxton returned to her police vehicle and called her dispatcher to check the North Carolina driver's license status for Terry Campbell with the date of birth given her by the defendant. She was advised that no such individual showed up. She returned to the defendant and asked him if he had anything with his identification on it. He indicated that he had a paycheck stub with his name on it, and Officer Gregory accompanied the defendant to his vehicle where the defendant pointed out a bag in the front seat of his car which contained the pay stub. Officer Gregory reached inside the vehicle to retrieve the bag, first making a cursory look inside the bag to see if it contained any weapons. The defendant did not state or show any objection to Officer Gregory's actions. Once the paystub was retrieved, this additional information was relayed to the dispatcher by Officer Saxton. An

N.C.I.C. search was conducted, and it revealed that the defendant's driver's license in North Carolina had been suspended indefinitely for failing to appear in court. This information was relayed to Officer Saxton.

5. Upon returning to the defendant, Officer Saxton asked him if he had any weapons or contraband in the vehicle. After responding in the negative, the defendant was asked if the officers could have permission to search his automobile. The defendant gave permission to search the vehicle. Officer Gregory discovered two wallets above the visors. Also uncovered was a registration to the vehicle in the name of William Hall. A rifle was found in the trunk of the car. The defendant was asked if he owned the gun, and the defendant indicated that he did not know the gun was inside the vehicle. He did advise, however, that the gun was loaded. Also found in the vehicle [were] a bottle containing urine, a portable radio, and a broken axe handle.

6. The defendant was advised that he was going to be arrested for no operator's license. Prior to his arrest, weapons were not displayed by the officers, and the defendant was not told that he could not leave nor was he restrained in any way by the officers. The defendant did not ask to leave nor did he attempt to leave the presence of the officers. Fifteen to twenty minutes passed from the time Officer Saxton first spoke to the defendant and his later arrest.

Based on these findings, the trial court concluded: (i) "defendant was not seized within the meaning of the Fourth Amendment until his arrest for operating a motor vehicle while his license was suspended"; (ii) "[e]ven if the defendant was detained and entitled to the protection of the Fourth Amendment at any time prior to his arrest, Officer Saxton had reasonable suspicion supported by articulable facts known to her that the defendant was involved in criminal activity and warranted further inquiry and investigation"; (iii) "[i]f the defendant was detained prior to his arrest, the detention was brief and was justified by the circumstances known to the officer"; and (iv) "[t]he initial search of the vehicle driven by the defendant by the Aiken law enforcement officers was with the consent of the defendant given freely and voluntarily, without coercion, duress or fraud."

On a motion to suppress evidence, the trial court's findings of fact are conclusive on appeal if supported by competent evidence. *State v. Braxton*, 344 N.C. 702, 709, 477 S.E.2d 172, 176 (1996).

Defendant has not assigned error to any specific finding of fact. Therefore, the findings of fact are not reviewable, and the only issue before us is whether the conclusions of law are supported by the findings, a question of law fully reviewable on appeal. *See State v. Steen*, 352 N.C. 227, 238, 536 S.E.2d 1, 8 (2000), *cert. denied*, 531 U.S. 1167, 148 L. Ed. 2d 997 (2001); *State v. Hyde*, 352 N.C. 37, 45, 530 S.E.2d 281, 288 (2000), *cert. denied*, 531 U.S. 1144, 148 L. Ed. 2d 775 (2001); *State v. Brooks*, 337 N.C. 132, 140-41, 446 S.E.2d 579, 585 (1994). Defendant specifically contests the trial court's conclusion of law that "defendant was not seized within the meaning of the Fourth Amendment until his arrest for operating a motor vehicle while his license was suspended." Defendant contends that he was seized when Officer Saxton initiated the encounter and that this seizure was not based upon reasonable suspicion as required by the Fourth Amendment.

The United States Supreme Court has long recognized that "[l]aw enforcement officers do not violate the Fourth Amendment's prohibition of unreasonable seizures merely by approaching individuals on the street or in other public places and putting questions to them if they are willing to listen." *United States v. Drayton*, 536 U.S. 194, 200, 153 L. Ed. 2d 242, 251 (2002). As the Supreme Court stated in *Florida v. Bostick*, 501 U.S. 429, 115 L. Ed. 2d 389 (1991):

> Our cases make it clear that a seizure does not occur simply because a police officer approaches an individual and asks a few questions. So long as a reasonable person would feel free "to disregard the police and go about his business," *California v. Hodari D.*, the encounter is consensual and no reasonable suspicion is required. The encounter will not trigger Fourth Amendment scrutiny unless it loses its consensual nature. The Court made precisely this point in *Terry v. Ohio*: "Obviously, not all personal intercourse between policemen and citizens involves 'seizures' of persons. Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a 'seizure' has occurred."

501 U.S. 429, 434, 115 L. Ed. 2d 389, 398 (1991) (citations omitted). Seizure of a person within the meaning of the Fourth Amendment occurs "only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *United States v. Mendenhall*, 446 U.S. 544, 554, 64 L. Ed. 2d 497, 509 (1980) (opinion of the Court by Stewart, J., joined

by Rehnquist, J., Powell, J., Burger, C.J. & Blackmun, J., concurring in the judgment). Thus, "[e]ven when law enforcement officers have no basis for suspecting a particular individual, they may pose questions, ask for identification, and request consent to search luggage—provided they do not induce cooperation by coercive means." *Drayton*, 536 U.S. at 201, 153 L. Ed. 2d at 251. *See also Brooks*, 337 N.C. at 143-44, 446 S.E.2d at 586-87 (holding that no seizure occurred when an officer approached a parked car and initially asked the occupant where his gun was after seeing an empty holster on the seat), *and State v. Farmer*, 333 N.C. 172, 186-88, 424 S.E.2d 120, 128-29 (1993) (holding that the defendant was not seized when two officers approached the defendant on a public street and asked him questions).

Viewed in light of these legal principles, the trial court's findings of fact support the conclusion that defendant was not seized when Officer Saxton first spoke to defendant, as he now contends. After defendant had stopped his car at the convenience store, Officer Saxton pulled in behind him without activating the patrol car's blue light or siren. Defendant was walking toward the store when Officer Saxton exited her car and asked to speak with him. The two were about ten feet apart and met each other halfway between the vehicles and the entrance to the store. The officer asked defendant if he had been in the K-Mart parking lot. Defendant answered in the affirmative and explained that he had been sleeping. He told the officer he had stopped in Aiken to take a nap and that he was driving home to North Carolina after finishing a job. When asked for his driver's license and vehicle registration, defendant indicated that he did not have any identification and that the car belonged to a friend whose name he could not recall. Defendant said his name was Terry Campbell and gave his date of birth.

At this point Officer Saxton had not told defendant he could not leave, and defendant had consented to speak with her. Officer Saxton had not restrained defendant's freedom to walk away. "[T]he encounter [was] consensual and no reasonable suspicion [was] required." *Bostick*, 501 U.S. at 434, 115 L. Ed. 2d at 398. Officer Saxton's actions and questions were well within the perimeters of permissive police questioning without implicating a person's Fourth Amendment protections.

After obtaining defendant's name, Officer Saxton asked him to "hold up" while she transmitted the information to the dispatcher. Assuming *arguendo* that Officer Saxton's telling defendant to "hold

up and she would be back up with him" would have led a reasonable person to believe that under the circumstances he was not free to leave, we conclude that at that point Officer Saxton had a reasonable, articulable suspicion that defendant was engaged in criminal activity warranting further investigation. As this Court stated in *State v. Watkins*:

> Only unreasonable investigatory stops are unconstitutional. *Terry v. Ohio*. An investigatory stop must be justified by "a reasonable suspicion, based on objective facts, that the individual is involved in criminal activity." *Brown v. Texas*.
>
> A court must consider "the totality of the circumstances—the whole picture" in determining whether a reasonable suspicion to make an investigatory stop exists. *U.S. v. Cortez*. The stop must be based on specific and articulable facts, as well as the rational inferences from those facts, as viewed through the eyes of a reasonable, cautious officer, guided by his experience and training. *Terry*; *State v. Thompson* [1979 North Carolina Supreme Court decision]. The only requirement is a minimal level of objective justification, something more than an "unparticularized suspicion or hunch." *U.S. v. Sokolow*.

337 N.C. at 441-42, 446 S.E.2d at 70 (citations omitted).

The facts known to Officer Saxton were that she had received a complaint from a K-Mart employee about a suspicious person whose car was parked for a lengthy period in the parking lot. Defendant acknowledged that he had been parked in the lot. Defendant said he had completed a job in Columbia, South Carolina, that he was traveling home to North Carolina, and that he had stopped in Aiken to take a nap. Aiken is forty-five miles west of Columbia and is not on the route to North Carolina. The K-Mart was more than ten miles from the interstate connecting Columbia and Aiken. Defendant had no driver's license with him and did not know the name of his friend to whom the car belonged. These articulable facts were sufficient to give rise to a reasonable suspicion in the mind of a trained police officer that defendant was involved in criminal activity.

We conclude that defendant was not illegally seized in contravention of his constitutional rights. Therefore, the trial court did not err in denying defendant's motion to suppress. This assignment of error is overruled.

JURY SELECTION

[2] Defendant next contends that the trial court improperly limited defendant's *voir dire* by refusing to allow defendant to ask prospective jurors whether, given that defendant had made a confession, defendant's election not to testify would adversely influence their decision. Defendant argues that by refusing to allow him to ask this question, the trial court deprived him of the right to a trial before a fair and impartial jury. We disagree.

Parties are not allowed to "stake out" a prospective juror's opinion based on specific facts. *State v. Mitchell*, 353 N.C. 309, 319, 543 S.E.2d 830, 837, *cert. denied*, 534 U.S. 1000, 151 L. Ed. 2d 389 (2001). Here, defendant inquired of a prospective juror as follows: "[I]f Mr. Campbell elects not to testify, knowing that fact alone, is that going to affect your decision, at this point?" The State's objection to this question was overruled, but the court then asked defense counsel to rephrase the question. Counsel then asked the prospective juror: "We want you to know that Mr. Campbell has made a statement, as I've already indicated. And the question I'm asking now is, knowing that, then would Mr. Campbell's failure to testify affect your decision making process in this case?" The trial court sustained the State's objection to this question.

In a criminal case a defendant is allowed to ask prospective jurors about their ability to follow the law. *State v. Bates*, 343 N.C. 564, 588, 473 S.E.2d 269, 282 (1996), *cert. denied*, 519 U.S. 1131, 136 L. Ed. 2d 873 (1997). Since a criminal defendant has a right not to testify, a defendant may properly inquire of jurors whether the defendant's decision not to testify would affect their ability to be fair and impartial. *Id.* In the instant case defendant was allowed to ask prospective jurors whether his decision not to testify would affect their impartiality. Jurors were properly instructed that defendant had a right not to testify. Furthermore, defendant was able to inquire of prospective jurors whether they would be able to follow the law. Viewing the *voir dire* in its entirety, we conclude that defendant had sufficient opportunity to examine prospective jurors on their ability to be fair and impartial in this trial and on their ability to render a decision without regard to defendant's failure to testify. The trial court did not err in limiting the question.

Defendant further asserts that the trial court's ruling violated his federal and state constitutional rights. However, defendant failed to assert these constitutional arguments before the trial court. Hence,

these arguments are not properly before this Court for review. N.C. R. App. P. 10(b)(1); *State v. Anderson*, 350 N.C. 152, 175, 513 S.E.2d 296, 310, *cert. denied*, 528 U.S. 973, 145 L. Ed. 2d 326 (1999). This assignment of error is overruled.

[3] Next, defendant contends that the trial court erred in excusing prospective juror John West for cause. We disagree.

The trial court has broad discretion in overseeing *voir dire*, including the decision of whether to grant or deny a challenge for cause. *State v. Abraham*, 338 N.C. 315, 343, 451 S.E.2d 131, 145 (1994); *State v. Quick*, 329 N.C. 1, 17, 405 S.E.2d 179, 189 (1991). The standard of review is whether the trial judge abused his discretion and whether this abuse of discretion prejudiced the defendant. *Abraham*, 338 N.C. at 343-44, 451 S.E.2d at 145-46.

In this case the transcript reveals that Mr. West lived down the road from the victim, had known the victim his entire life, had been in the victim's home, and had attended the victim's funeral. The victim called Mr. West shortly before the murder to request a ride to get his car serviced. In addition Mr. West indicated that he would prefer "not . . . to look at pictures" and asked to be deferred. Under section 15A-1212 of the North Carolina General Statutes, a challenge for cause may be made to a juror if the juror "is unable to render a fair and impartial verdict." N.C.G.S. § 15A-1212(9) (2003). While Mr. West stated that he could set aside his personal feelings and be a fair and impartial juror, the trial judge was in a unique position to assess the prospective juror's impartiality and had ample reason to grant the challenge for cause. *State v. Dickens*, 346 N.C. 26, 42, 484 S.E.2d 553, 561 (1997). On this record defendant has failed to show an abuse of the trial court's discretion in granting the challenge for cause as to prospective juror John West.

Defendant's constitutional claims must also fail. Defendant failed to assert at trial that his constitutional rights were violated. Hence, these arguments are not properly before this Court for review. N.C. R. App. P. 10(b)(1); *Anderson*, 350 N.C. at 175, 513 S.E.2d at 310.

GUILT-INNOCENCE PHASE

[4] In his next assignment of error, defendant contends that the trial court erred by overruling his objections to portions of the testimony of the State's expert witness, Robert Brown, M.D. Dr. Brown was certified by the trial court as an expert in the field of medicine, specifically forensic psychiatry. Defendant complains that Dr. Brown was

allowed to testify over defendant's objections about the meaning of locations of blood spatter in the victim's home. Defendant contends that the doctor was not qualified to interpret bloodstain pattern evidence and that his testimony based on the location of blood spatter in the victim's home was improperly allowed, thereby violating defendant's constitutional rights and requiring a new trial. For the following reasons, we disagree.

Expert testimony is admissible "[i]f scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue." N.C.G.S. § 8C-1, Rule 702(a) (2003). In determining the admissibility of expert opinion, we consider "whether the opinion expressed is really one based on the special expertise of the expert, that is, whether the witness because of his expertise is in a better position to have an opinion on the subject than is the trier of fact." *State v. Wilkerson*, 295 N.C. 559, 568-69, 247 S.E.2d 905, 911 (1978); *see also State v. Gainey*, 355 N.C. 73, 88, 558 S.E.2d 463, 474, *cert. denied*, 537 U.S. 896, 154 L. Ed. 2d 165 (2002). The trial court has broad discretion in determining whether to admit the testimony of an expert. *Gainey*, 355 N.C. at 88, 558 S.E.2d at 474.

Arguing that Dr. Brown was not qualified to testify as an expert in blood spatter interpretation, defendant asserts that Dr. Brown should not have been allowed to testify about the implications of the SBI blood spatter report or of the location of blood spatter and smears at the crime scene. Defendant points to five portions of the doctor's testimony as constituting inadmissible testimony: (i) that the attack on the victim occurred in two different areas of the residence; (ii) that two areas of attack suggested intent on defendant's part; (iii) that two areas of attack were inconsistent with acting in a state of panic; (iv) that the victim's being attacked while lying prone on the floor was consistent with specific intent to kill; and (v) that the location of certain bloodied items in two different rooms of the house demonstrated that defendant had not panicked but had walked through the house after the attack. We address each of these issues in turn.

Defendant first points to the following testimony as being inadmissible:

Q. Are you aware that there was a pool of blood on the couch?

A. Yes.

Q. Were you also aware that there was a pool of blood on the floor?

A. Yes.

Q. Did you read Dennis Honeycutt's report?

A. Yes.

Q. Did you use that to help form your opinions as whether or not there were two areas of attack in this house?

MR. HECKART: Objection, Your Honor.

THE COURT: Overruled.

THE WITNESS: It seemed to me, based upon the report and what I saw with my own eyes, that there were two locations of the attack.

Having been qualified as an expert, Dr. Brown was entitled to testify as to information and data on which he relied to form his expert opinion regarding whether defendant acted in a state of panic. *State v. Jones*, 358 N.C. 330, 348, 595 S.E.2d 124, 136, *cert. denied*, —– U.S. —–, 160 L. Ed. 2d 500 (2004). Shortly before this testimony, Dr. Brown testified that "[i]f the forensic evidence indicates that there was only one location where blows were delivered to the head of the victim, that means one thing; if there were two locations, that tends to mean another thing. Two locations means less chance of panic, at least, in my opinion." Thus, Dr. Brown's testimony, which defendant now argues was inadmissible, showed the basis for Dr. Brown's determination concerning defendant's behavior at the time of the crime. Dr. Brown was not interpreting blood spatter but rather expressing his conclusions as to defendant's mental state based in part on the blood spatter expert's report.

The SBI report was later described in detail by witness Special Agent Dennis Honeycutt. Agent Honeycutt described the same two areas where a large amount of blood was found, the couch and an area on the floor where the victim was found. Agent Honeycutt testified that the amount of blood on the couch suggested that the victim spent some time on the couch before moving to the floor. Therefore, defendant's contention on this issue has no merit.

Defendant also argues error occurred in this exchange:

Q. Is it consistent, the evidence, physical evidence, consistent with the specific intent to kill?

A. Well, it's my testimony that two locations of assault is suggestive more so of intent—

MR. HECKART: I'm going to object Your Honor.

THE WITNESS: —than.

MR. HECKART: I don't think that's in evidence.

THE COURT: Overruled. Continue.

THE WITNESS: Than otherwise.

THE COURT: Overruled.

Defendant argues that Dr. Brown should not have been allowed to testify that two areas of attack suggested intent. Dr. Brown testified that he had studied panic disorders, and he was accepted by the trial court as an expert in forensic psychiatry. As such Dr. Brown was competent to evaluate the evidence and to give an opinion as to what defendant's mental state might have been at the time of the crime. Moreover, defendant's objection was based on the two locations of assault not being in evidence. As noted earlier, Dr. Brown relied on the SBI report, and that report was admitted into evidence as part of Dennis Honeycutt's testimony. We conclude that the testimony was not improperly allowed. Defendant's contention is without merit.

[5] Next, defendant asserts that Dr. Brown should not have been allowed to testify that the existence of two areas of attack was inconsistent with defendant's being panicked:

Q. Is that inconsistent with a panic state?

A. It tends to be somewhat inconsistent with a panic state if, if the goal of the panic is to escape. If the goal of the panic is to escape, then escape becomes paramount.

Defendant did not object to this testimony at trial and, thus, did not preserve this issue for appeal pursuant to N.C. R. App. P. 10(b)(1). Accordingly, this issue is not properly before this Court.

[6] Defendant next complains that Dr. Brown should not have been allowed to give his opinion as to defendant's state of mind based on the fact that the victim was found lying prone on the floor. The prosecutor asked Dr. Brown, "Assuming that the victim, Buddy Hall, is laying [sic] on the floor of his own home for at least one of those blows being dealt, is that also consistent with the specific intent to kill?" Dr. Brown was given a specific fact and asked if it suggested

intent on the part of defendant. As a psychiatrist, Dr. Brown is trained to recognize links between behavior and a person's state of mind. Therefore, Dr. Brown had "specialized knowledge [to] assist the trier of fact to understand the evidence or to determine a fact in issue." N.C.G.S. § 8C-1, Rule 702(a). We hold that this testimony was not improperly allowed.

[7] Finally, defendant points to the following exchange regarding the bloody towel and pillowcase:

> Q. How about with respect to the bloody towel on the love seat and the bloody pillow case in the bedroom, can you please explain why that's significant?
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> A. It speaks less of panic and more of other things.
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> Q. Such as?
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> A. Such as walking around the house.

Defendant did not object to this exchange at trial and, thus, has failed to preserve this issue for appeal. N.C. R. App. P. 10(b)(1). Therefore, this issue is not properly before this Court for review.

[8] Defendant also contends that the inclusion of these portions of the doctor's testimony violated his federal and state constitutional rights. Defendant did not raise these constitutional issues at trial and has, therefore, failed to preserve them on appeal. N.C. R. App. P. 10(b)(1); *State v. Call*, 349 N.C. 382, 410, 508 S.E.2d 496, 514 (1998), *cert. denied*, 534 U.S. 1046, 151 L. Ed. 2d 548 (2001). This assignment of error is overruled.

[9] Defendant next contends that the trial court erred by excluding testimony regarding an alleged prior violent sexual act by the victim. Defendant's argument at trial for allowing this testimony was that it would show that the victim was the first aggressor in the incident leading up to his death. On *voir dire* the defense proffered the testimony of two witnesses, Ramona Gore and Michael Wilson, who testified about an incident that occurred before the murder for which defendant was charged. The witnesses, who lived in the same neighborhood as the victim, testified that an unknown man who knocked on their doors late at night claimed that the victim attempted to rape him.

The trial court ruled that the testimony was not relevant and was, hence, inadmissible until defendant introduced substantive evidence

of self-defense or evidence that the victim was the first aggressor. The trial court left open the possibility of introducing the evidence once relevancy had been shown. Rule 401 of the North Carolina Rules of Evidence defines "relevant evidence" as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C.G.S. § 8C-1, Rule 401 (2003). Defendant had not offered any evidence of self-defense at the time he attempted to introduce this particular testimony of Ramona Gore and Michael Wilson. Thus, that an unidentified man accused the victim of assault several years before the crime for which defendant was charged took place did not make any fact in the case more probable or less probable. The trial court's ruling was not in error.

Defendant now contends that the testimony was independently admissible to impeach the testimony of Deborah McAllister, who stated that she had never known the victim to be violent. However, defendant failed to make this argument at trial and cannot now advance a different theory on appeal. N.C. R. App. P. 10(b)(1); *see State v. Hamilton*, 351 N.C. 14, 22, 519 S.E.2d 514, 519 (1999), *cert. denied*, 529 U.S. 1102, 146 L. Ed. 2d 783 (2000). Since the trial court's ruling was proper under the theory defendant advocated at trial, this assignment of error is overruled.

[10] Next, defendant contends that the trial court erred in refusing to allow defendant to cross-examine witnesses and by sustaining the State's objections to questions regarding sexual paraphernalia found in the victim's home. Defendant argues that the State opened the door to this evidence through witness testimony about other items found in the victim's home. Although not expressly stated, defendant appears to be asserting that the disallowed questions were relevant to determining the thoroughness of the State's investigation of the crime scene. Finally, defendant asserts that he should have been allowed to conduct a redirect examination of Dr. Corvin regarding the items at issue, which, according to defendant, would have bolstered Dr. Corvin's credibility regarding his diagnosis of diminished capacity. Defendant contends that as a result of the trial court's ruling, the defense was unable to respond to the prosecution's attack on Dr. Corvin on cross-examination which belittled him for his failure to examine certain items of physical evidence in the case. Defendant argues that the trial court's errors resulted in the presentation of an inaccurate picture of the victim to the jury. We disagree.

The State elicited testimony from witnesses Deborah McAllister, SBI Agent Hans Miller, and Detective Kevin Kemp regarding various items found in the victim's house and where those items were located. Ms. McAllister testified about the location of the victim's boom box, wallet, rolls of coins, and mallet. Defendant asked the trial judge for permission to ask Ms. McAllister on cross-examination about the presence of certain items in the house, such as douche bottles. The trial court denied the request based on Rule 403 of the Rules of Evidence, but permitted defendant to ask Ms. McAllister about the victim's drinking habits and her knowledge of any pornographic videotapes in the house.

Defendant also asked the trial judge for permission to inquire about sexual paraphernalia after Detective Kemp testified about items he found and seized in the victim's home. Detective Kemp testified about coins, coin wrappers, and a pair of men's trousers. On cross-examination Detective Kemp testified that although he saw a jar of Vaseline and a condom by the bed, he did not initially seize those, as he did not deem them relevant to the investigation. Later Detective Kemp did go back to seize those items. Moreover, a storage room had not been examined carefully in the initial investigation of the house; but police eventually seized items, such as pornographic tapes and ammunition, from that room. Defendant sought to inquire about the seizure of a paper bag found in the storage room which contained a used condom, a douche bottle, lubricant, boxes of condoms, and a towel. Testing of the used condom by the defense revealed that the condom contained the sperm of three different men, although none were a match for defendant. When defendant sought permission to cross-examine Detective Kemp about the paper bag and its contents, the trial judge ruled that the items were irrelevant or highly prejudicial.

The general rule regarding admission of evidence is that "[a]ll relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by the Constitution of North Carolina, by Act of Congress, by Act of the General Assembly, or by [the Rules of Evidence]." N.C.G.S. § 8C-1, Rule 402 (2003). The Rules of Evidence define relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." *Id.*, Rule 401. Further, "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confu-

sion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." *Id.*, Rule 403 (2003). The decision whether to exclude evidence under Rule 403 of the Rules of Evidence is within the discretion of the trial court and will not be overturned absent an abuse of discretion. *See State v. Williams*, 334 N.C. 440, 460, 434 S.E.2d 588, 600 (1993), *judgment vacated on other grounds sub nom. North Carolina v. Bryant*, 511 U.S. 1001, 128 L. Ed. 2d 42 (1994), *and cert. denied*, 516 U.S. 833, 133 L. Ed. 2d 61 (1995); *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988). "Abuse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *Hennis*, 323 N.C. at 285, 372 S.E.2d at 527.

Here, the trial court was acting within its discretion in excluding this evidence as irrelevant. The trial court acted within its discretion in ruling that defendant could not inquire of Ms. McAllister about the sexual paraphernalia in that "its probative value [was] substantially outweighed by the danger of unfair prejudice." N.C.G.S. § 8C-1, Rule 403. As for the cross-examination of Detective Kemp, defense counsel at trial argued that the purpose of the disallowed questions was to impeach Detective Kemp by showing that the investigation was not thorough. However, as the trial judge noted, the identity of the murderer was not at issue, and, thus, the used condom found in a bag in the storage room had no bearing on the fact of the murder itself. Defendant has made no showing of how this evidence was relevant or how the trial court abused its discretion in disallowing cross-examination about these items. The trial court properly concluded that the questions did not have "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." *Id.*, Rule 401.

Defendant also argues that he should have been allowed to conduct redirect examination of Dr. Corvin regarding the sexual paraphernalia because the doctor's credibility hinged on whether his diagnosis was supported by physical evidence. Defendant argues that the admission of evidence about the sexual paraphernalia would lend support to defendant's claim that the victim made a homosexual advance on him. However, defendant's attempt to show that the victim was homosexual does not prove that the victim was the first aggressor. If the evidence had been allowed, "it would have added little to the proof of this fact and could have been very inflammatory

and unfairly prejudicial." *State v. Lovin*, 339 N.C. 695, 706, 454 S.E.2d 229, 236 (1995). Thus, even if relevant, exclusion of the evidence would have been proper pursuant to Rule 403. Similarly, defendant's argument that the State opened the door to this questioning by asking Dr. Corvin if he had examined the physical evidence admitted at trial is without merit. Questioning about the specific sexual paraphernalia would not have explained or rebutted evidence adduced by the State on cross-examination of Dr. Corvin. *See State v. Dale*, 343 N.C. 71, 76, 468 S.E.2d 39, 42 (1996). The trial court did not abuse its discretion in refusing to allow this testimony.

Further, defendant argues that the trial court deprived him of his constitutional rights by refusing to allow cross-examination regarding these items. This constitutional issue was not raised at trial and, therefore, the trial court did not have the opportunity to rule on it. Hence, these arguments are not properly before this Court for review. N.C. R. App. P. 10(b)(1); *Anderson*, 350 N.C. at 175, 513 S.E.2d at 310. This assignment of error is overruled.

[11] Defendant also assigns error to the trial court's refusal to restrict how the prosecution made reference to the victim's tapestry depicting the Biblical scene, "The Last Supper." The tapestry hung on the wall over the victim's couch, and blood was found spattered on it. Defendant argued at trial that witnesses and the prosecution should be required to refer to the tapestry as simply "the tapestry" without naming it as "the Last Supper tapestry." Defendant contends specifically that references to the Last Supper were highly prejudicial in that they had the potential to inflame the jury by referring to the presence of blood on a religious article. The trial court ruled that the tapestry could be referred to as "the Last Supper tapestry."

Evidence that is otherwise relevant "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." N.C.G.S. § 8C-1, Rule 403. "Whether or not to exclude evidence under Rule 403 of the Rules of Evidence is a matter within the sound discretion of the trial court and its decision will not be disturbed on appeal absent a showing of an abuse of discretion." *State v. McCray*, 342 N.C. 123, 131, 463 S.E.2d 176, 181 (1995). "A trial court may be reversed for an abuse of discretion only upon a showing that its ruling was so arbitrary that it could not have been the result of a reasoned decision." *State v. Hayes*, 314 N.C. 460, 471, 334 S.E.2d 741, 747 (1985).

Defendant has not shown that the trial court abused its discretion in this matter. The trial court stated that, "I don't see any way, when

they're trying to describe the scene, how—they've got to be able to describe where the blood ended up." Description of a crime scene, although necessarily prejudicial to a defendant, is not so unfairly prejudicial as to outweigh its probative value in helping jurors and the court understand how and where the crime took place. Therefore, the use of the descriptive term, "the Last Supper tapestry," by witnesses and the prosecution was proper; and the trial court did not abuse its discretion by so ruling. Nothing in the record suggests that the description was used excessively and solely to inflame the passions and prejudices of the jury against defendant. As a result the trial court's ruling was not "so arbitrary that it could not have been the result of a reasoned decision." *Id.*

Defendant also argues that the trial court's ruling deprived him of his constitutional rights. Defendant did not argue the constitutional issue at trial and, thus, has not preserved the arguments for appellate review. N.C. R. App. P. 10(b)(1); *Call*, 349 N.C. at 410, 508 S.E.2d at 514. Defendant's assignment of error is overruled.

[12] Defendant next contends that the trial court erred by failing to intervene *ex mero motu* during the State's closing argument upon hearing the prosecutor argue that defendant was attempting to rob the K-Mart in Aiken, South Carolina. Defendant moved before trial for disclosure of 404(b) "other crimes" evidence that the State planned to offer. The State was unable to respond, and the trial court directed the prosecutor to approach the bench before eliciting 404(b) evidence. Defendant now argues that the prosecutor improperly elicited Rule 404(b) evidence by introducing two witnesses who testified as to defendant's actions in front of the K-Mart store in Aiken, South Carolina. The State argued in closing that defendant was "staking out" the store and that this conduct constituted evidence which could be considered in determining premeditation, deliberation, or intent to rob. The section of the closing about which defendant complains is as follows:

> Let's go after now. Staking out a K-Mart. What was he doing? Is it too far of a leap to say that he was bent on robbing that place when he had $5.31 in a brown bag, and whatever change is in this one? What's he going to do next? What's his next move? Oh, thank goodness, the police? Huh-uh. No way. He's on the run now, and that's going to cost you. Keep in mind, that's a long drive. He is spending Buddy's money along the way and maybe Guy's too, that's why these wallets are empty, but he's getting low on cash now, and he got made 10 minutes before closing, damn stock boy.

We note first that defendant did not object to this argument at trial. Defendant must, therefore, show that the prosecutor's argument was "so grossly improper that the trial court abused its discretion by failing to intervene *ex mero motu*." *State v. Davis*, 349 N.C. 1, 23, 506 S.E.2d 455, 467 (1998), *cert. denied*, 526 U.S. 1161, 144 L. Ed. 2d 219 (1999). To make this showing, defendant must demonstrate "that the prosecutor's comments so infected the trial with unfairness that they rendered the conviction fundamentally unfair." *Id.* (citing *State v. Rose*, 339 N.C. 172, 202, 451 S.E.2d 211, 228-29 (1994), *cert. denied*, 515 U.S. 1135, 132 L. Ed. 2d 818 (1995)). A prosecutor is allowed "to argue all the facts submitted into evidence as well as any reasonable inferences therefrom." *State v. Gregory*, 340 N.C. 365, 424, 459 S.E.2d 638, 672 (1995), *cert. denied*, 517 U.S. 1108, 134 L. Ed. 2d 478 (1996).

The comments by the prosecutor suggesting that defendant intended to rob the K-Mart were not so grossly improper as to require intervention *ex mero motu* by the trial court. The evidence showed that defendant had stolen items from the victim, including the victim's car and wallet containing the victim's identification. Defendant then sat for several hours in the parked car in front of the K-Mart until a few minutes before time for the store to close. Defendant did not leave the car during this time. Defendant also possessed another stolen wallet containing an identification card. The actions of defendant in this time period were certainly subject to suspicion. The prosecutor could, therefore, reasonably argue the inference from this evidence that defendant was staking out the store in order to rob it. Moreover, contrary to defendant's assertion, defense counsel was not taken by surprise with this argument, as the prosecutor had signaled this argument during the charge conference. We conclude that the trial court did not abuse its discretion by not intervening *ex mero motu* when the State made this argument.

Additionally, defendant contends that this error violated his federal and state constitutional rights, but defendant failed to assert these constitutional arguments before the trial court. Hence, these arguments are not properly before this Court for review. N.C. R. App. P. 10(b)(1); *Anderson*, 350 N.C. at 175, 513 S.E.2d at 310. This assignment of error is overruled.

[13] Next, defendant contends that the trial court erred by failing to intervene *ex mero motu* during the portion of the State's closing argument that attacked the expert testimony of defendant's expert wit-

ness, Dr. Corvin. Defendant specifically argues that the prosecutor improperly implied that Dr. Corvin gave answers that would help defendant because he was paid by the defense. Additionally, defendant contends that the prosecutor misstated evidence while attempting to discredit Dr. Corvin in closing argument. We disagree.

Defendant directs our attention to the following portion of the State's closing argument relating to Dr. Corvin's testimony that defendant was unable to form specific intent and to certain language in the Diagnostic and Statistical Manual-IV: "Well, Doctor, don't they say you can't do that? Don't your own colleagues say you can't do that. Yes, but they're not paying my bill. That's what he wanted to say. They are. (Indicating.)" Defendant also challenges this statement: "Enter Dr. Corvin. The best witness—well, I'm not going to say that. A witness that the defendant could buy." Finally, defendant points out this passage, in which the prosecutor argues:

> [As defendant:] Well, Doctor, can't you do something? We're paying good money for this.
>
> [As Dr. Corvin:] Yes. Let me think out of the box. Let me just—all right, I got it, I got it. Go with me now, go with me. I'm a doctor, we all agree, I'm a doctor.
>
> MR. HECKART: Your Honor—
>
> THE COURT: Overruled.
>
> MR. DAVID: Let me repeat that. He's a doctor. He's a doctor. So the first thing is, twinkies defense, hyperthyroidism. That's something, that's medical, they're not going to know what that means. A Pender jury? I'm s[m]arter than them, coming from Raleigh.

The prosecutor continued regarding Dr. Corvin's assessment of defendant's alcohol abuse, stating that whether defendant was in denial "depends [on] if the evidence hurts us or helps us."

We conclude that the prosecutor's statements about Dr. Corvin's credibility were not grossly improper. Generally speaking, "it is not improper for the prosecutor to impeach the credibility of an expert during his closing argument." *State v. Norwood*, 344 N.C. 511, 536, 476 S.E.2d 349, 361 (1996), *cert. denied*, 520 U.S. 1158, 137 L. Ed. 2d 500 (1997). More specifically, though, this Court has recently considered this issue in depth in *State v. Rogers*, 355 N.C. 420, 462-64, 562 S.E.2d 859, 885-86 (2002). We noted there that:

> it is proper for a party to point out potential bias resulting from payment that a witness received or would receive for his or her services. However, where an advocate has gone beyond merely pointing out that the witness' compensation may be a source of bias to insinuate that the witness would perjure himself or herself for pay, we have expressed our unease while showing deference to the trial court.

Id. at 462-63, 562 S.E.2d at 885 (citation omitted). In *Rogers*, we concluded that a statement arguing that the defendant's expert witness would say anything in order to be paid, although improper, was not so grossly improper that the trial court was required to intervene *ex mero motu*. *Id.* at 464, 562 S.E.2d at 886.

Although the comment that Dr. Corvin was "[a] witness that the defendant could buy" verges on being unacceptable, we conclude that the trial court was not required to intervene *ex mero motu* as to any of the statements highlighted by defendant. We note, moreover, that in his closing argument preceding the State's closing argument, defense counsel used this same tactic in an attempt to discredit the State's mental health expert.

Finally, observing that this case was tried before our opinion in *Rogers* was issued, we reemphasize the admonition in *Rogers* that counsel should "refrain from arguing that a witness is lying solely on the basis that the witness has been or will be compensated for his or her services." *Id.*

Defendant also contends that the prosecutor misstated portions of Dr. Corvin's testimony in the following passage:

> *What else do we have? Defendant's actions. Well, in my opinion, words speak louder than actions. I don't see why you need to look at them.* Well, let's look at the defendant's actions before, during and after this murder because, actually, that's what the law is, Doctor. The law on premeditation and deliberation says you are to take into account the defendant's actions before a murder, during a murder, and after a murder. He said, I do find the 48 hours preceding the murder to be relevant.

(Emphasis added.) The cross-examination of Dr. Corvin to which this passage refers was as follows:

> Q. In fact, wouldn't you agree with me, Doctor, that actions speak louder than words?

A. Now, that's a common saying, but I don't think it's always accurate.

Q. You wouldn't agree with that?

A. Actions are important. The facts of what happens are critical, but that, in and of itself, does not define the state of mind.

When viewed in context, this argument is not grossly improper. The essence of the prosecutor's argument was that Dr. Corvin's assessment of defendant's mental state did not necessarily take into account all of defendant's actions surrounding the murder. Moreover, the jury was instructed by the trial court "to rely solely upon your recollection of the evidence in your deliberations." *See Gregory*, 340 N.C. at 408, 459 S.E.2d at 662-63 (holding that jurors were presumed to follow instructions similar to those in the instant case). Thus, even if the comments were improper, the jury instructions informed the jury not to rely on the closing arguments as their guide in evaluating the evidence. Viewed as a whole, and in light of the wide latitude afforded the prosecution in closing argument, the prosecutor's challenged arguments did not so infuse the proceeding with impropriety as to impede defendant's right to a fair trial. *See State v. Harris*, 308 N.C. 159, 169, 301 S.E.2d 91, 98 (1983). This assignment of error is overruled.

[14] In his next assignment of error, defendant contends that the trial court erred in overruling his objection to that portion of the prosecutor's closing argument that alluded to defendant's failure to testify. Defendant asserts the following statements constituted improper comment on his decision not to testify:

We were talking about speculation and conjecture. We kept talking about this defendant's statement at an early stage. Do you realize this isn't even evidence? Evidence comes from the witness stand, ladies and gentlemen. It's when people are under oath and are subject to cross-examination.

[DEFENSE COUNSEL]: Objection, Your Honor.

THE COURT: Overruled.

[PROSECUTOR]: Are you listening to me? Evidence comes from right here. (Indicating.) Isn't that what we talked about, under oath, subject to cross-examination. This is self-serving hearsay, and it can't even be considered as substantive evidence.

Defendant argues that prejudice may be shown by the trial court's failure to give a curative instruction informing the jury that defendant has the right not to testify. Defendant also contends that the prosecutor's comment that the confession "isn't even evidence" ignored the use for which the confession was admitted, that is, to aid the jury in weighing Dr. Corvin's credibility. Defendant contends such errors constituted prejudicial error. We disagree.

A defendant has the right not to testify under the Fifth Amendment to the United States Constitution, as applied to the states by the Fourteenth Amendment, *Griffin v. California*, 380 U.S. 609, 615, 14 L. Ed. 2d 106, 110 (1965), and under Article I, Section 23 of the North Carolina Constitution, *State v. Reid*, 334 N.C. 551, 554, 434 S.E.2d 193, 196 (1993). A defendant's exercise of this right may not be used against him, and any reference by the State to a defendant's failure to testify violates that defendant's constitutional rights. *State v. Miller*, 357 N.C. 583, 589, 588 S.E.2d 857, 862 (2003), *cert. denied*, —– U.S. —–, 159 L. Ed. 2d 819 (2004). A statement that may be interpreted as commenting on a defendant's decision not to testify is improper if " 'the jury would naturally and necessarily take it to be a comment on the failure of the accused to testify.' " *State v. Rouse*, 339 N.C. 59, 95-96, 451 S.E.2d 543, 563 (1994), *cert. denied*, 516 U.S. 832, 133 L. Ed. 2d 60 (1995) (quoting *United States v. Anderson*, 481 F.2d 685, 701 (4th Cir. 1973), *aff'd*, 417 U.S. 211, 41 L. Ed. 2d 20 (1974)). However, in closing argument, the prosecutor "may properly bring to the jury's attention the failure of a defendant to produce exculpatory evidence or to contradict evidence presented by the State." *State v. Parker*, 350 N.C. 411, 431, 516 S.E.2d 106, 120 (1999), *cert. denied*, 528 U.S. 1084, 145 L. Ed. 2d 681 (2000). This Court also held in *State v. Miller*, 357 N.C. at 588-89, 588 S.E.2d at 862, that the prosecutor's statement that the " 'defendant's version of the facts . . . is not in evidence' " was not a comment on the defendant's failure to testify, but rather a comment on "a weakness in defendant's theory of the case."

In the case at bar, the prosecutor's statement was not an improper comment on defendant's failure to testify. The prosecutor was reminding the jury that the confession was not admitted as substantive evidence and could not be used for that purpose. The statement was admitted for the limited purpose of allowing the jury to weigh the credibility of Dr. Corvin's testimony, since Dr. Corvin stated that he based his opinion on, among other things, defendant's thirteen page written confession. The prosecutor was entitled to point out that the statement was not evidence that could be consid-

ered on a par with testimonial evidence given by a witness from the stand. Therefore, we conclude that the prosecutor's comments were not improper and that the trial court did not err in overruling defendant's objection.

Defendant additionally argues that the trial court's failure to sustain the objection violated his constitutional rights. However, defendant failed to assert these constitutional arguments before the trial court. Hence, these arguments are not properly before this Court for review. N.C. R. App. P. 10(b)(1); *Anderson*, 350 N.C. at 175, 513 S.E.2d at 310. This assignment of error is overruled.

[15] Defendant next assigns error to the trial court's failure to dismiss the felony murder charge for lack of sufficient evidence. Defendant argues that since the robbery of the victim and the murder were not one continuous transaction, the robbery could not serve as the underlying felony for the charge of felony murder. Thus, according to defendant, the trial court erred by denying his motion to dismiss and also violated his constitutional rights by submitting the (e)(5) aggravating circumstance that the "capital felony was committed while the defendant was engaged . . . in the commission of . . . robbery." N.C.G.S. § 15A-2000(e)(5) (2003). We disagree.

In *State v. Trull*, discussing the test for deciding a motion to dismiss, this Court stated:

> When determining the sufficiency of the evidence to support a charged offense, we must view the evidence "in the light most favorable to the State, giving the State the benefit of all reasonable inferences." *State v. Benson*, 331 N.C. 537, 544, 417 S.E.2d 756, 761 (1992). A defendant's motion to dismiss must be denied if the evidence considered in the light most favorable to the State permits a rational jury to find beyond a reasonable doubt the existence of each element of the charged crime and that defendant was the perpetrator. *See State v. Williams*, 334 N.C. at 447, 434 S.E.2d at 592.
>
> Whether the evidence presented is direct or circumstantial or both, the test for sufficiency is the same. *State v. Vause*, 328 N.C. 231, 237, 400 S.E.2d 57, 61 (1991); *State v. Bullard*, 312 N.C. 129, 160, 322 S.E.2d 370, 388 (1984). "Circumstantial evidence may withstand a motion to dismiss and support a conviction even when the evidence does not rule out every hypothesis of innocence." *State v. Stone*, 323 N.C. 447, 452, 373 S.E.2d 430, 433

> (1988). If the evidence supports a reasonable inference of defendant's guilt based on the circumstances, then "it is for the [jurors] to decide whether the facts, taken singly or in combination, satisfy them beyond a reasonable doubt that the defendant is actually guilty." *State v. Rowland*, 263 N.C. 353, 358, 139 S.E.2d 661, 665 (1965).

State v. Trull, 349 N.C. 428, 447, 509 S.E.2d 178, 191 (1998), *cert. denied*, 528 U.S. 835, 145 L. Ed. 2d 80 (1999). This Court has also held that "evidence is sufficient to support a charge of felony murder based on the underlying offense of armed robbery where the jury may reasonably infer that the killing and the taking of the victim's property were part of one continuous chain of events" and that "whether the intention to commit the taking of the victim's property was formed before or after the killing" is immaterial. *State v. Handy*, 331 N.C. 515, 529, 419 S.E.2d 545, 552 (1992). The critical factor is that there be "no break in the chain of events between the taking of the victim's property and the force causing the victim's death, so that the taking and the homicide are part of the same series of events, forming one continuous transaction." *Id.* The robbery may take place before or after the murder. *State v. Barden*, 356 N.C. 316, 352-53, 572 S.E.2d 108, 132 (2002), *cert. denied*, 538 U.S. 1040, 155 L. Ed. 2d 1074 (2003). Based on this precedent, the robbery may serve as the underlying felony for felony murder as long as the murder and the robbery form a continuous chain of events.

Applying these principles of law and viewing the evidence in the light most favorable to the State, we hold that the State's evidence was sufficient to support the felony murder charge based on robbery with a dangerous weapon in this case. The State's evidence showed defendant and the victim together on a store surveillance videotape on the night of 2 February 2000. The next evening, 3 February 2000, defendant was in possession of the victim's car, wallet, boom box, and other personal property. The State's evidence also showed that the victim kept his wallet in the pocket of his trousers and his boom box in the house. DNA evidence placed defendant at the victim's home, and the victim's blood was found on defendant's trousers. That the majority of the evidence is circumstantial is not dispositive. *Trull*, 349 N.C. at 447, 509 S.E.2d at 191. Although the exact details of the murder and robbery are lacking, the evidence, taken in the light most favorable to the State, permits a reasonable juror to infer that defendant murdered and robbed the victim without any break in the series of events.

Defendant further argues that the trial court's error violated his constitutional rights. Defendant did not raise this constitutional issue at trial; consequently, the trial court did not have the opportunity to consider or rule on this issue. N.C. R. App. P. 10(b)(1). Defendant has accordingly failed to preserve this assignment of error for appellate review. *See State v. Fullwood*, 343 N.C. 725, 733, 472 S.E.2d 883, 887 (1996), *cert. denied*, 520 U.S. 1122, 137 L. Ed. 2d 339 (1997) (holding that defendant failed to raise a constitutional issue at trial and thus failed to preserve the issue for appellate review). This assignment of error is overruled.

SENTENCING PROCEEDING

[16] Next, defendant contends that the trial court erred by not allowing two witnesses to testify at sentencing regarding a prior violent sexual act by the victim. Although we have considered the exclusion of this evidence in the guilt phase and determined that the trial court's ruling was proper, defendant argues that the Rules of Evidence do not apply in the sentencing hearing. Accordingly, the witnesses should have been allowed to testify about this event. We disagree.

"Admissibility of evidence at a capital sentencing proceeding is not subject to a strict application of the rules of evidence, but depends on the reliability and relevance of the proffered evidence." *State v. Atkins*, 349 N.C. 62, 77, 505 S.E.2d 97, 107 (1998), *cert. denied*, 526 U.S. 1147, 143 L. Ed. 2d 1036 (1999); *see also State v. Strickland*, 346 N.C. 443, 460-61, 488 S.E.2d 194, 205 (1997), *cert. denied*, 522 U.S. 1078, 139 L. Ed. 2d 757 (1998). In the instant case, an analysis of defendant's purpose for offering the evidence, whether that purpose was satisfied, and the reliability of the evidence excluded will determine if the exclusion was proper.

The State introduced witnesses who testified that the victim was not violent and was not known to be violent. Defendant attempted to rebut this evidence with the testimony of witnesses Ramona Gore and Michael Wilson, who would have stated that one night an unknown man knocked on their doors, claiming that the victim attempted to rape him. The trial court conducted a lengthy *voir dire* of these witnesses. Both witnesses testified about the incident, which occurred several years before the murder involved in this case. After hearing the two witnesses, the trial court ruled that the State opened the door for evidence concerning the victim's reputation and character. However, the trial court limited defendant's rebuttal to testimony

regarding the victim's reputation in the community. The trial court held specifically that defendant could not introduce evidence of the incident of the unknown man who knocked on the witnesses' doors late at night claiming an attempted rape.

In the presence of the jury, both witnesses testified as to the victim's reputation in the community for picking up younger men, bringing them back to his house, and attempting to have sex with them against their will. Although the specific incident was excluded from evidence, defendant was still able to rebut the State's evidence by introducing evidence of the victim's reputation for making unwanted sexual advances on men. The vagueness of the specific incident, including particularly that the man in question was unidentified, undermined the reliability of that evidence. Defendant has not demonstrated why exclusion of this evidence was improper. Further, even assuming that the evidence was improperly excluded, defendant was able to rebut the State's evidence and was not prejudiced as a result. This assignment of error is overruled.

[17] Defendant next complains that the trial court erred, abused its discretion, or committed plain error in admitting evidence of the circumstances surrounding defendant's 1985 conviction for kidnapping. The trial court denied defendant's motion *in limine* to exclude the circumstances of the kidnapping—in particular details of rapes allegedly committed by defendant—and allowed the State to introduce the circumstances of the kidnapping in order to prove the (e)(3) aggravating circumstance that defendant was previously convicted of a felony involving the use or threat of violence. Defendant contends that evidence of the alleged rapes should have been excluded and that the prosecutor should not have been allowed to argue that the alleged acts did not constitute rape in 1985 but would be considered so under current law. Defendant claims such evidence and arguments constituted improper evidence of bad character that unfairly prejudiced him and provided the jury with an improper basis for returning a verdict of death. For the following reasons, we disagree.

The State has the burden of proving beyond a reasonable doubt that an aggravating circumstance exists. *See* N.C.G.S. § 15A-2000(c)(1) (2003). Here, the State submitted the aggravating circumstance that defendant "had been previously convicted of a felony involving the use or threat of violence." *Id.* § 15A-2000(e)(3) (2003). This Court has stated that the "preferred method for proving a prior conviction" is to introduce the judgment. *State v. Maynard*, 311 N.C. 1, 26, 316 S.E.2d 197, 211, *cert. denied*, 469 U.S.

963, 83 L. Ed. 2d 299 (1984). However, this Court has also stated that "the State is entitled to present witnesses in the penalty phase of the trial to prove the circumstances of prior convictions and is not limited to the introduction of evidence of the record of conviction." *State v. Roper*, 328 N.C. 337, 365, 402 S.E.2d 600, 616, *cert. denied*, 502 U.S. 902, 116 L. Ed. 2d 232 (1991). Additionally, "[i]f the capital felony of which defendant has previously been convicted was a particularly shocking or heinous crime, the jury should be so informed." *State v. Taylor*, 304 N.C. 249, 279, 283 S.E.2d 761, 780 (1981), *cert. denied*, 463 U.S. 1213, 77 L. Ed. 2d 1398 (1983). The admissibility of evidence regarding the circumstances of a defendant's prior convictions "rests in the sound discretion of the trial court." *State v. Jones*, 339 N.C. 114, 151, 451 S.E.2d 826, 846 (1994), *cert. denied*, 515 U.S. 1169, 132 L. Ed. 2d 873 (1995).

The record in this case reveals that the State sought to prove that defendant had previously been convicted of second-degree kidnapping. Defendant argues that kidnapping is an inherently violent felony and that the introduction of the conviction was sufficient to satisfy the State's burden of proof. However, under this Court's precedent in *Roper*, the State is allowed to present the circumstances of the prior felony in order to meet its burden. The trial court determined that evidence concerning the events that took place during the kidnapping was necessary to show that the victim was terrorized by defendant and "that her fear was well founded at the time of the actual kidnapping." To this end, the trial court allowed testimony of domestic violence that occurred before the kidnapping and allowed evidence from the victim that defendant kidnapped her at gunpoint, made her drive to South Carolina, and raped her. After reviewing the record in this case, we conclude that the trial court did not abuse its discretion in allowing the testimony.

Defendant also contends that the trial court should have intervened *ex mero motu* when the prosecutor argued in his closing that, at the time of the kidnapping in 1985, the marital rape exemption prevented defendant from being charged with rape. Defendant contends that the closing argument improperly introduced bad character evidence into the sentencing hearing. However, defendant did not object to this argument at trial; and we cannot say that the argument rises to the level of being so grossly improper as to "impede the defendant's right to a fair trial" and require a holding that the trial court erred in failing to intervene *ex mero motu*. *State v. Davis*, 305 N.C. 400, 421-22, 290 S.E.2d 574, 587 (1982). This assignment of error is overruled.

[18] In the following four assignments of error, defendant contends that the trial court abused its discretion in allowing the prosecutor to make several improper statements in his closing argument during the penalty proceeding. Defendant first asserts that the prosecutor improperly argued that the victim was killed for the purpose of witness elimination. Defendant contends that since the aggravating circumstance that the murder "was committed for the purpose of avoiding or preventing a lawful arrest" was not before the jury for consideration, N.C.G.S. § 15A-2000(e)(4), this prosecution argument was gross speculation that prejudiced defendant and provided an improper basis for the sentencing recommendation. We disagree. Since defendant did not object to this particular argument at trial, he must show that the argument "stray[ed] so far from the bounds of propriety as to impede the defendant's right to a fair trial," such that "the trial court ha[d] the duty to act *ex mero motu*." *Davis*, 305 N.C. at 422, 290 S.E.2d at 587.

The prosecutor here reviewed previous robberies by defendant and argued, "[T]he defendant is smart and he has learned his lesson. You know what happens when you leave people alive? They come in and testify. He's learned that." The prosecutor continued, "The only way he's going to get away with robbing Mr. Hall of everything that has [] value in that home that he can pick up is to kill him." These remarks were made when discussing the mitigating circumstance that defendant lacked the capacity to appreciate the criminality of his conduct. The State's argument was that defendant had victimized trusting people on previous occasions and that this occasion was no different. A closing argument may include the facts in evidence, as well as any reasonable inferences which arise therefrom. *State v. Parker*, 354 N.C. 268, 291, 553 S.E.2d 885, 901 (2001), *cert. denied*, 535 U.S. 1114, 153 L. Ed. 2d 162 (2002). This argument is a reasonable inference, given defendant's history of crime. Defendant has not shown that these comments were so grossly improper as to require intervention *ex mero motu* by the trial court. We, therefore, overrule this assignment of error.

[19] The second statement in the prosecutor's closing argument to which defendant now objects was what defendant characterizes as a misstatement of evidence regarding defendant's confession and the timing of his confession in relation to the return of the DNA results. Defendant points to the following portion of the prosecutor's closing argument as erroneous: "So when was the jig up? I'll tell you when. When these guys came down with DNA, he was painted into a corner

with the victim's blood. That's when he started fast writing. That's when he started this." Defendant argues that these comments misrepresented the facts, since defendant wrote the confession on 4 February 2000 and the DNA testing of physical evidence was not done until much later. Defendant contends such misrepresentation unfairly prejudiced defendant by influencing the jury's sentencing recommendation. We conclude, however, that defendant has failed to show that these comments were so grossly improper as to require the trial court's intervention.

We first note that defendant did not object to this statement during closing. Thus, defendant must show that the statements were grossly improper. *Gregory*, 340 N.C. at 424, 459 S.E.2d at 672. This argument was a reasonable inference from the evidence introduced at trial. The evidence showed that when defendant was taken to the Aiken County jail, his clothes except for his socks and shoes were taken from him and placed in a jail bin. On 4 February 2000, defendant's clothing was seized from the Aiken County jail by a detective pursuant to a search warrant. The detective also asked defendant to remove his socks and shoes. Defendant wrote his confession later that evening, knowing that his clothing had been confiscated. The DNA analysis of the clothing, conducted some time later, revealed that defendant's jeans had the victim's blood on them.

Given the record, we conclude that the evidence permitted the prosecutor to argue the inference that defendant knew DNA evidence was on his confiscated clothing and that this knowledge prompted the confession. Accordingly, the trial court was not required to intervene *ex mero motu*. This assignment of error is overruled.

[20] Defendant also assigns error to the trial court's failure to intervene *ex mero motu* upon hearing the prosecutor argue that defendant was stalking his next victim while waiting in the car at the K-Mart parking lot in Aiken, South Carolina. The portion of the argument with which defendant takes issue reads:

> He was waiting for the next Buddy Hall . . . as he sat in that car, facing the store, with a loaded gun. He was stalking. He was waiting for his next victim. And when does he strike? Only after cool, calm, deliberation. The very essence of premeditation. Stalking, waiting, laying in wait.

Defendant contends that this argument amounted to unreasonable speculation that unfairly affected the reliability of the sentencing decision. We disagree.

As stated above, a prosecutor "is entitled to argue all the facts submitted into evidence as well as any reasonable inferences therefrom." *Gregory*, 340 N.C. at 424, 459 S.E.2d at 672. Several of defendant's previous victims testified at the sentencing hearing, including a woman who testified that defendant came into the bank where she worked and looked around, then left, and came back later to rob the bank. Since defendant previously had committed crimes in which he staked out his victim, a reasonable inference could be made from the evidence in the case at bar that defendant may have been doing the same thing while sitting in the car in front of the K-Mart. The prosecutor made a reasonable inference from the evidence when he argued that, as defendant waited in the K-Mart parking lot after having stolen a car and other possessions from the victim, he was waiting for yet another victim. Defendant did not object to this argument at trial and has not shown that the comment was grossly improper. This assignment of error is overruled.

[21] Finally, defendant argues that the trial court abused its discretion by allowing the State to refer repeatedly to five aggravating circumstances during closing argument when in fact only three aggravating circumstances were submitted. Defendant claims that this error improperly reduced the consideration of aggravators and mitigators to a "numbers game," with the prosecutor attempting to weight the aggravating circumstances by adding to the actual number. We conclude that the prosecutor's arguments were not grossly improper.

Three separate aggravating circumstances were submitted in this case: (i) that defendant had been previously convicted of a felony involving the threat of violence to a person; (ii) that the murder was committed while the defendant was engaged in the commission of a robbery with a dangerous weapon; and (iii) that the murder was especially heinous, atrocious, or cruel. N.C.G.S. § 15A-2000(e)(3), (5), (9) (2003). Three convictions, two for bank robbery and one for kidnapping, were used to support the (e)(3) aggravating circumstance. Defendant concedes that each conviction could have been submitted to the jury as a separate (e)(3) aggravator. However, defendant points to several passages in the prosecutor's closing argument in which the prosecutor referred to five aggravators. For example, the prosecutor argued, "Any one aggravating factor is enough. Here, we have three and, in one of those, we have three within it. That's like five separate things that call for the death penalty, ladies and gentlemen, and any one by itself, let alone all five, is substantially sufficient to call for the

death penalty." In another instance, the prosecutor argued, "You've heard about the five aggravating factors, those three prior convictions . . . those five which are really three, three under one subset." Regarding whether any of the aggravators were "sufficiently substantial" to support the death penalty, the prosecutor stated, "Any one by itself would be, let alone five."

The prosecutor also stated, however, that the weighing process does not involve counting the number of mitigators and the number of aggravators to see which side has the largest number. The trial judge instructed the jury to consider the three aggravating circumstances, and reiterated to the jury:

> You should not merely add up the number of aggravating circumstances and mitigating circumstances. Rather, you must decide from the evidence what value to give each circumstance, and then weigh the aggravating circumstances, so valued, against the mitigating circumstances, so valued, and finally determine whether the mitigating circumstances are insufficient to outweigh the aggravating circumstances.

The copy of the Issues and Recommendation as to Punishment form given to the jurors listed three possible aggravators, (e)(3), (e)(5), and (e)(9), with three prior conviction subsets under the (e)(3) aggravator. The jurors unanimously found the (e)(3) and (e)(5) aggravators, including each of the subsets under (e)(3). One or more jurors found fourteen of the sixteen mitigating circumstances submitted. We hold that the prosecutor's comments were not so grossly improper as to require the trial judge to intervene *ex mero motu*. Moreover, given that the convictions could have been listed as separate aggravators and that the jurors were properly instructed as to the law on the subject, the prosecutor's comments could not have impeded defendant's right to a fair trial. *See Harris*, 308 N.C. at 169, 301 S.E.2d at 98. We overrule this assignment of error.

INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant contends that his trial counsel provided ineffective assistance in violation of the Sixth Amendment to the United States Constitution at several points throughout the trial. Defendant makes eight distinct claims of ineffective assistance in this case. After considering each in turn, we conclude that for six of these claims defendant has not made the required showing that counsel's performance was constitutionally deficient. The remaining

two claims are dismissed without prejudice for lack of sufficient evidence on the record.

"When a defendant attacks his conviction on the basis that counsel was ineffective, he must show that his counsel's conduct fell below an objective standard of reasonableness." *State v. Braswell*, 312 N.C. 553, 561-62, 324 S.E.2d 241, 248 (1985). In order to meet this burden, a defendant must satisfy a two-part test:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Strickland v. Washington, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 693 (1984). Prejudice is established by showing "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694, 80 L. Ed. 2d at 698. Both prongs of this test must be met to prevail on an ineffective assistance of counsel claim. *Id.* at 687, 80 L. Ed. 2d at 693.

This Court has held that "[c]ounsel is given wide latitude in matters of strategy, and the burden to show that counsel's performance fell short of the required standard is a heavy one for defendant to bear." *State v. Fletcher*, 354 N.C. 455, 482, 555 S.E.2d 534, 551 (2001), *cert. denied*, 537 U.S. 846, 154 L. Ed. 2d 73 (2002); *see also State v. Prevatte*, 356 N.C. 178, 236, 570 S.E.2d 440, 472 (2002), *cert. denied*, 538 U.S. 986, 155 L. Ed. 2d 681 (2003). Moreover, this Court indulges the presumption that trial counsel's representation is within the boundaries of acceptable professional conduct. *State v. Fisher*, 318 N.C. 512, 532, 350 S.E.2d 334, 346 (1986). As the United States Supreme Court has stated:

> A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's

> conduct falls within the wide range of reasonable professional assistance . . . .

Strickland v. Washington, 466 U.S. at 689, 80 L. Ed. 2d at 694.

As to whether an ineffective assistance of counsel claim can be dealt with on appeal, this Court has stated, "[Ineffective assistance of counsel] claims brought on direct review will be decided on the merits when the cold record reveals that no further investigation is required, i.e., claims that may be developed and argued without such ancillary procedures as the appointment of investigators or an evidentiary hearing." *State v. Fair*, 354 N.C. 131, 166, 557 S.E.2d 500, 524 (2001), *cert. denied*, 535 U.S. 1114, 153 L. Ed. 2d 162 (2002) (citations omitted). Therefore, on direct appeal we must determine if these ineffective assistance of counsel claims have been prematurely brought. If so, we must "dismiss those claims without prejudice to the defendant's right to reassert them during a subsequent [motion for appropriate relief] proceeding." *Id.* at 167, 557 S.E.2d at 525.

Defendant lists seven specific areas in which he contends trial counsel was deficient: (i) promising the jury evidence and instructions on self-defense and intoxication based on an erroneous belief that defendant's confession would be admitted as substantive evidence; (ii) concluding that the confession alone would be enough to establish self-defense and intoxication; (iii) failing to object to Deborah McAllister's testimony that she had never known the victim to be violent toward anyone and failing to impeach Ms. McAllister; (iv) conceding defendant's guilt of second-degree murder without his consent; (v) failing to request an instruction in the penalty proceeding that the confession could be considered as substantive evidence; (vi) failing to object to improper prejudicial closing arguments by the prosecutor; and (vii) failing to preserve challenge for cause issues for appeal. Finally, defendant asserts that the cumulative effect of counsel's alleged deficient performance entitles him to a new trial. We now examine each of defendant's ineffective assistance claims.

[22] First, defendant contends that his counsel provided ineffective assistance by representing to the jury in his opening statement that it would hear evidence and instructions on self-defense and intoxication. Defendant argues this declaration constitutes ineffective assistance in that such evidence was never introduced and, thus, the instructions were not given. Counsel failed to deliver on promises made to the jury, thereby reducing his credibility and denying defendant his constitutional right to counsel.

Prior to trial the State appeared prepared to introduce defendant's confession into evidence and even had copies ready for jurors. The State responded to the trial court's question as to whether the confession would be offered into evidence by saying, "That remains to be seen what, exactly, we're going to introduce. We remain open to that possibility, but we haven't said we're definitely going to do that yet." During *voir dire*, the State refrained from mentioning self-defense in its questioning of potential jurors, while defense counsel mentioned the confession to potential jurors and asked if they could consider evidence of self-defense and intoxication. The trial court cautioned defense counsel against "assum[ing] things that we're not sure are going to happen." In opening argument the State did not mention self-defense or the confession. Despite not knowing if the State would indeed introduce the confession, defense counsel argued in his opening statement to the jury that defendant had been forced to defend himself against an attack by the victim and discussed the details of the confession. Defense counsel continued, "The evidence will show that the combination of the alcohol, the fatigue and fear left [defendant] unable to think clearly." Counsel also mentioned self-defense and the State's burden of proof to prove that defendant was not acting in self-defense.

During its case-in-chief, the State later announced outside the presence of the jury that the confession would not be introduced as evidence. The confession was not admitted as substantive evidence in either the guilt phase or penalty proceeding, and no instructions were given on either self-defense or intoxication. The only purpose for which the confession was offered was to assist the jury in weighing the credibility of defendant's expert witness. Defendant did not testify, and defendant presented no substantive evidence of self-defense or intoxication, yet the defense asked the jury in closing argument at the guilt phase to find intoxication and self-defense on the basis of the confession, which was never introduced.

Defendant contends that defense counsel, by repeatedly ignoring the possibility that the State would not introduce the confession as evidence at trial, violated his duty to defendant to be knowledgeable about the law and, in particular, about the Rules of Evidence. Defendant further argues that defense counsel's mistaken belief that the confession could be introduced through other means resulted in counsel's belatedly abandoning the theory of self-defense, when counsel could have changed strategy earlier and prevented making false promises to the jury. Defendant also asserts that the broken

promise made to the jury undermined the credibility of the defense and that this situation was further exacerbated when the prosecution emphasized the lack of evidence of self-defense or voluntary intoxication in its closing argument. Defendant contends these failings on counsel's part prevented the State's case from being subjected to adversarial testing.

Although the State signaled at the beginning of the trial that it might not introduce defendant's confession, defense counsel throughout jury *voir dire* and in opening statement referred to details of defendant's confession. This confession was never introduced as substantive evidence at trial. However, from the record before us, we can only speculate as to why defense counsel chose to argue self-defense. Thus, in this case evidentiary issues need to be developed before defendant will be in a position to adequately present his possible ineffective assistance claim on this issue.

In a related claim defendant contends that his trial counsel was ineffective for concluding that even if defendant's confession were admitted into evidence, the confession would be sufficient standing alone to establish self-defense and intoxication. Defendant further asserts that a competent attorney would have had defendant testify on his own behalf in order to make a prima facie case of self-defense or intoxication. The State, on the other hand, argues that the decision not to have defendant testify is a reasonable trial strategy in that it would keep defendant's violent criminal history from the jury. Defendant asserts, though, that the State had copies of the prior convictions and would have submitted them in the sentencing proceeding if necessary. Defendant argues that admission of the prior violent felony convictions coupled with a self-defense or intoxication argument would put defendant at risk of life without parole; but without either of these claims, defendant risked death.

This ineffective assistance of counsel claim and defendant's previous claim related to representations at opening argument are interdependent and go to the crux of defendant's trial strategy. In that we cannot ascertain from the record the reason for defense counsel's strategy, these issues require further evidentiary development. Accordingly, we dismiss these claims without prejudice to defendant to pursue them in a post-conviction motion for appropriate relief.

[23] In his third ineffective assistance claim, defendant asserts that his trial counsel was deficient in failing to object to the testimony of Deborah McAllister, the victim's grand-niece, who stated that she had

never known the victim to be violent toward anyone. Further, defendant contends that his counsel should have attempted to impeach Ms. McAllister with inquiry about specific instances of the victim's violent conduct. Also, defense counsel was deficient in asking the court for permission to impeach this witness and in failing to obtain a ruling when the court did not rule on the request. Defendant notes that when the prosecutor questioned Ms. McAllister, no evidence of the victim's propensity for violence had yet been introduced. Defendant argues that the question to Ms. McAllister regarding her knowledge of any violent tendencies on the victim's part elicited evidence of the victim's character for peacefulness and was improper under N.C.G.S. § 8C-1, Rule 404(a)(2). Defendant asserts that if his counsel had known the Rules of Evidence, counsel would have known that the question was improper and would have objected.

Even assuming *arguendo* that it was improper for the trial court to allow the question when defendant had not introduced evidence of the victim's character, we find that defendant does not meet the second prong of the *Strickland* test, which requires defendant to show prejudice, that is, but for counsel's failure to object to this question a reasonable probability exists that the outcome of the trial would have been different. *Strickland v. Washington*, 466 U.S. at 687, 694, 80 L. Ed. 2d at 693, 698. The specific instances of conduct that defendant argues should have been used to impeach Ms. McAllister were not allowed by the trial court in either the guilt phase or the sentencing proceeding. We have already considered defendant's assignment of error that this evidence of a prior violent sexual act by the victim against an unidentified male should have been allowed, and we have determined that the evidence was properly excluded. Moreover, sound strategic reasons exist for not attempting to impeach a biased witness when the answer to the question is unknown. Inquiry of Ms. McAllister about her knowledge of the specific incident would likely have produced a negative answer. Thus, we conclude that defendant was not prejudiced by his counsel's actions or inactions regarding this witness. This assignment of error is overruled.

[24] Next, defendant contends that his counsel provided ineffective assistance by conceding guilt of second-degree murder in closing argument to the jury without his consent. The relevant portion of defense counsel's closing argument reads:

> And what I'm telling you folks right now, that right there is enough for you to have reasonable doubt. The fact that you have

> one expert who is saying can't form the specific intent to either rob or kill and the state's own expert comes in and says, I can't rule it out 100 percent, there's your reasonable doubt right there. That's all you need. That's the key to this case. That's all you need. You weigh the evidence out. You make that determination. But right there is all the reasonable doubt you would need in this case.
>
> . . . .
>
> Again, I submit to you, as I think I said earlier, not every homicide is a first degree murder case, and there's plenty of second degree murder cases out there that are a whole lot bloodier and a whole lot more gory and a whole lot more horrific than first degree murder cases. *The only difference is a second degree murder case lacks that specific intent element, and I submit to you that's where we're at in this case, folks*. There is so much going on, there is so much going on in this case. There is plenty of hooks for you to hang your hat on and find reasonable doubt in this case.

Defendant contends that the italicized sentence of this argument is similar to that advanced by trial counsel in *State v. Harbison*, 315 N.C. 175, 337 S.E.2d 504 (1985), *cert. denied*, 476 U.S. 1123, 90 L. Ed. 2d 672 (1986).

In *Harbison* this Court granted the defendant a new trial based on closing arguments by his attorney. *Id.* at 180-81, 337 S.E.2d at 507-08. In that case the defendant maintained throughout his trial that he had acted in self-defense. *Id.* at 177, 337 S.E.2d at 506. Trial counsel adhered to that defense during the presentation of evidence by the State and the defense. *Id.* One of the defendant's attorneys continued to use that theory during his closing argument, but the defendant's other attorney expressed his personal opinion that the defendant should not be acquitted on the theory of self-defense but should be convicted of manslaughter rather than first-degree murder. *Id.* at 177-78, 337 S.E.2d at 506. The defendant expressly alleged that he had not consented to this change in theory. *Id.* at 177, 337 S.E.2d at 505-06. This Court stated in *Harbison* that "when counsel to the surprise of his client admits his client's guilt, the harm is so likely and so apparent that the issue of prejudice need not be addressed." *Id.* at 180, 337 S.E.2d at 507. The Court specifically held that the attorney's concession of guilt without the consent of his client amounted to *per se* ineffective assistance. *Id.* at 180, 337 S.E.2d at 507-08.

The statement in this case about which defendant complains is distinguishable from that made by the *Harbison* attorney and does not amount to ineffective assistance. Trial counsel here was pointing out to the jury that specific intent was lacking in this case and that the lack of specific intent was the only difference between second-degree and first-degree murder. Defense counsel was arguing to the jury that, without specific intent, the most serious crime for which defendant could be convicted would be second-degree murder. This situation differs substantially from *Harbison*, where the attorney argued, " 'I think you should find him guilty of manslaughter and not first degree.' " *Id.* at 178, 337 S.E.2d at 506. *See State v. Harvell*, 334 N.C. 356, 361, 432 S.E.2d 125, 128 (1993) (holding that counsel did not admit the defendant was guilty of a crime when counsel noted that, if the evidence established the commission of any crime, that crime was voluntary manslaughter, not murder). The statement in the present case does not constitute ineffective assistance. This assignment of error is overruled.

[25] Next, defendant contends that his counsel provided ineffective assistance by failing to request an instruction from the trial court that defendant's confession could be considered as substantive evidence in the sentencing proceeding. Defendant's statement was read to the jury by defendant's expert during the guilt phase. At that time the trial court gave a limiting instruction that the statement was to be considered for the sole purpose of determining the weight to be given to the testimony of defendant's expert, who had relied on the statement. The statement was not introduced as substantive evidence at any time in the guilt phase. Defendant argues that the jury would not have had reason to believe that the statement could be considered as substantive evidence given the trial court's guilt phase limiting instruction, the prosecutor's guilt phase closing argument in which he emphasized that defendant's statement was not evidence, and the sentencing proceeding instructions. Defendant now suggests that his trial counsel should have requested an instruction clarifying for the jury that it could consider as substantive any and all evidence submitted in the guilt phase. Counsel's failure to do so, defendant argues, constituted ineffective assistance and deprived defendant of his constitutional rights. This contention has no merit.

Throughout defendant's closing argument in the sentencing proceeding, defendant's counsel, without objection from the prosecutor or intervention by the trial court, argued the substance of defendant's

statement. Counsel stressed that the character witnesses who testified that the victim had a reputation in the community for luring younger men to his home for sexual encounters corroborated defendant's statement and Dr. Corvin's opinion and findings. Counsel also recited the details of the events leading up to the murder as outlined in defendant's statement. Counsel argued that defendant's statement showed he acknowledged wrongdoing and that the murder was the result of an overaction in which defendant just kept hitting the victim, not the result of a plan to kill. Thus, the jurors were afforded the opportunity to consider the defendant's character and the circumstances surrounding the crime in weighing whether, in light of the aggravating and mitigating circumstances, defendant deserved a sentence less than death. *See Lockett v. Ohio*, 438 U.S. 586, 604, 57 L. Ed. 2d 973, 990 (1978). Defendant has failed to show that a reasonable probability exists that the outcome of the trial would have been different had trial counsel requested an instruction that the statement be considered as substantive evidence. Thus, defendant has not satisfied the prejudice prong of *Strickland*; and this assignment of error is overruled.

[26] Defendant also asserts that his counsel was ineffective for failing to object to several portions of the State's closing arguments in both the guilt phase and the sentencing proceeding. Specifically, defendant contends that his trial counsel should have objected to the following: (i) the argument that defendant was intending to rob the K-Mart; (ii) the demeaning reference to the monetary compensation of defendant's expert witness, Dr. Corvin, and a misstatement of Dr. Corvin's testimony; (iii) the argument regarding evidence of alleged rapes previously committed by defendant; (iv) the argument that defendant killed the victim for the purpose of eliminating a witness to his actions; (v) the argument implying that defendant did not confess until his DNA was collected; (vi) the argument that defendant was stalking his next victim at the Aiken K-Mart; and (vii) the references to five aggravators instead of the three that were submitted to the jury.

We have reviewed each of these arguments above for substantive error and have found that none of the arguments was so grossly improper as to render the trial fundamentally unfair. Having concluded that these prosecution arguments did not render defendant's trial fundamentally unfair, we further conclude that a reasonable probability does not exist that the outcome of the trial would have been different had defendant objected to them. Trial counsel was not

deficient for not objecting to each of these arguments. Therefore, this assignment of error is overruled.

[27] Defendant next argues that his counsel's failure to preserve for appeal the trial court's denial of three challenges for cause constituted ineffective assistance. Defendant challenged prospective jurors Ricky Hall, William Ellison, and Heidi Elliott for cause. All three challenges were denied by the trial court, resulting in defendant's use of peremptory challenges to remove the three jurors. Defendant exhausted all of his peremptory challenges, but defense counsel did not request additional peremptory challenges and renew the challenges for cause after exercising the last peremptory challenge. Defendant contends that the failure to renew the challenges constituted ineffective assistance of counsel. We disagree.

To establish ineffective assistance, a "defendant must show that the deficient performance prejudiced the defense." *Strickland v. Washington*, 466 U.S. at 687, 80 L. Ed. 2d at 693. This Court has said that to preserve *voir dire* issues for appeal, a defendant must follow the procedures set out in section 15A-1214(h) of the North Carolina General Statutes. *State v. Hartman*, 344 N.C. 445, 458, 476 S.E.2d 328, 335 (1996), *cert. denied*, 520 U.S. 1201, 137 L. Ed. 2d 708 (1997). The statute requires that

> 'Where the court has refused to stand aside a juror challenged for cause, and the party has then peremptorily challenged him, in order to get the benefit of his exception he must exhaust his remaining peremptory challenges, and then challenge another juror peremptorily to show his dissatisfaction with the jury, and except to the refusal of the court to allow it.'

State v. Watson, 310 N.C. 384, 396, 312 S.E.2d 448, 456 (1984) (citations omitted). The statute also requires that challenges for cause be renewed after the exhaustion of peremptory challenges. N.C.G.S. § 15A-1214(h) (2003).

"The trial judge has broad discretion to regulate jury *voir dire*." *State v. Knight*, 340 N.C. 531, 558, 459 S.E.2d 481, 497 (1995) (citing *State v. Lee*, 335 N.C. 244, 268, 439 S.E.2d 547, 559, *cert. denied*, 513 U.S. 891, 130 L. Ed. 2d 162 (1994)). "The granting of a challenge for cause where the juror's fitness or unfitness is arguable is a matter within the sound discretion of the trial court and will not be disturbed absent a showing of abuse of discretion." *Abraham*, 338 N.C. at 343, 451 S.E.2d at 145. To obtain relief relating to jury *voir dire*, a defendant must show not only an abuse of discretion, but also preju-

dice. *State v. Frye*, 341 N.C. 470, 494, 461 S.E.2d 664, 675 (1995), *cert. denied*, 517 U.S. 1123, 134 L. Ed. 2d 526 (1996). "The purpose for challenging the additional juror is to establish prejudice by showing that appellant was forced to seat a juror whom he did not want because of the exhaustion of his peremptory challenges." *Hartman*, 344 N.C. at 459-60, 476 S.E.2d at 336. Thus, in this case, if the trial court's alleged error had been properly preserved for review on direct appeal, defendant would have had to show that the trial court abused its discretion by refusing to dismiss one or more of the three jurors for cause and that having used his peremptory challenges, defendant was forced to seat a juror whom he did not want.

We now turn to a review of the *voir dire* of each of the three jurors at issue here. First, defendant complains that prospective juror Ricky Hall indicated that he was bothered by the fact that defendant might not testify. Ricky Hall said that he could follow the law, but that he "would like to see that person speak for hisself [sic]." The court then questioned Mr. Hall:

> THE COURT: Can you set aside what you would like to personally see?
>
> [MR. HALL]: Yes, sir.
>
> THE COURT: And apply the law that a defendant's silence is not to influence your decision in any way?
>
> [MR. HALL]: Yes, sir.
>
> THE COURT: In other words, you can't—that's not a proper area of deliberation for the jury.
>
> [MR. HALL]: I understand. Yes, sir, I could.
>
> THE COURT: You could do that?
>
> [MR. HALL]: Yes, sir.

Defense counsel continued his questioning:

> MR. HECKART: Mr. Hall, the judge gave you the instruction and, as I perceived it, you responded that it was still going to cause you concern if he did not testify.
>
> [MR. HALL]: (JUROR NODDED HEAD.)
>
> MR. HECKART: Then the judge asked you if you could disregard that if he told you to, and you indicated that you could.

[MR. HALL]: Yes, sir.

MR. HECKART: I mean, this—

[MR. HALL]: I've got—I know what you're saying.

MR. HECKART: It sounds to me like you're going back and forth.

[MR. HALL]: Yeah, I understand what you're saying. I mean, through everything I've heard, you might have feelings, certain feelings, on certain things, but if that's not the way the law is and you're instructed to do that, like on a job or whatever, that's what we have to go by. That's what I'm getting at. I might have a feeling about it but, if I'm instructed one way—and just like on the job—

MR. HECKART: All right.

[MR. HALL]: —you have to do what you're told. Do you know what I'm saying?

MR. HECKART: Yes, sir, but I guess really getting down to the heart of the matter is, can you honestly do that as an individual, having that belief in the back of your head that you really ought to hear from him, do you feel like, in your mind—

[MR. HALL]: Right.

MR. HECKART: —you ought to hear from him? You feel like he ought to testify or he ought to explain himself? Can you actually do that?

[MR. HALL]: Like I said, the only thing I can honestly say is, I could do the very best that I could do.

MR. HECKART: All right. Thank you, Mr. Hall. I appreciate your time and honesty.

Defendant contends that this exchange is similar to an exchange this Court considered in *State v. Hightower* in which a prospective juror's equivocation about being able to follow the law on a defendant's right not to testify resulted in this Court's finding error. *State v. Hightower*, 331 N.C. 636, 641, 417 S.E.2d 237, 240 (1992). We hold, though, that Mr. Hall's statements are more like the prospective juror's statement in *State v. Jaynes*, 353 N.C. 534, 546, 549 S.E.2d 179, 190 (2001), *cert. denied*, 535 U.S. 934, 152 L. Ed. 2d 220 (2002). In *Jaynes*, when questioned whether knowledge that defendant had

received a death sentence at his first trial would influence her decision at defendant's retrial, a prospective juror replied, she would "do [her] best to base her determination on the evidence presented." *Id.* Where "a prospective juror can disregard prior knowledge and impressions, follow the trial court's instructions on the law, and render an impartial, independent decision based on the evidence, excusal is not mandatory." *State v. Green*, 336 N.C. 142, 167, 443 S.E.2d 14, 29, *cert. denied*, 513 U.S. 1046, 130 L. Ed. 2d 547 (1994). From the *voir dire* examination, the trial court could reasonably conclude that Mr. Hall satisfied these criteria and could set aside his personal feelings. Therefore, the trial court did not abuse its discretion by denying the challenge for cause; and defense counsel was not ineffective for failing to renew this challenge.

Defendant also asserts that prospective juror William Ellison should have been excused on the basis that he was an acquaintance of a witness in the case, Jody Woodcock, a deputy with the Pender County Sheriff's Department. Additionally, defendant contends that Mr. Ellison showed he was unable to follow the law regarding defendant's decision not to testify. After reviewing the record, however, we conclude that the trial court did not abuse its discretion in denying defendant's challenge for cause.

During preliminary *voir dire*, Mr. Ellison told the court that he served with Deputy Woodcock as a volunteer fireman for the Atkinson Fire Department. Defendant contends that Mr. Ellison showed his bias with regard to Deputy Woodcock after being asked if he would automatically believe the deputy's word by stating, "I wouldn't call him a liar because . . . as a volunteer fire fighter, I do trust his—my life is in his hands, at times." Mr. Ellison also said, "I wouldn't sit here and say every word that comes out of his mouth is the honest God truth, but I couldn't call him a liar, neither; I wouldn't." Upon further questioning, Mr. Ellison stated he was taught to believe law enforcement officers and to trust his co-workers, but that he would look at each witness individually as that person testified. In individual *voir dire*, Mr. Ellison revealed to the court that the instant case had been discussed at the firehouse and that he might run into Deputy Woodcock at the firehouse. He said if he had to make a decision whether to believe Deputy Woodcock or another witness, if "he was the last man standing, I would have to take his word." However, he also stated that he and Deputy Woodcock were not good friends but that they did see each other. Mr. Ellison also said that he could follow the law, that he knew witnesses could be wrong or mis-

taken, and that he could apply the same test of truthfulness as in everyday interactions. He further stated that he could follow the court's instructions on witness credibility and that there was no reason he could not follow them.

Mere acquaintance with a witness is not enough to require excusal for cause. *State v. Benson*, 323 N.C. 318, 324, 372 S.E.2d 517, 520 (1988). If a juror knows a witness or witnesses but states that he can follow the trial judge's instructions and can follow the law, that juror is not automatically subject to removal for cause. *Green*, 336 N.C. at 167, 443 S.E.2d at 29. This Court has stated, "We presume that jurors will tell the truth; our court system simply could not function without the ability to rely on such presumptions." *State v. Barnes*, 345 N.C. 184, 207, 481 S.E.2d 44, 56 (1997), *cert. denied*, 523 U.S. 1024, 140 L. Ed. 2d 473 (1998). The trial judge was in the best position to evaluate the credibility of the juror. *Dickens*, 346 N.C. at 42, 484 S.E.2d at 561. We conclude that the denial of defendant's challenge for cause on this basis was not an abuse of discretion.

Defendant also points to statements by prospective juror Ellison that indicated a possible bias against defendant for failing to testify. After being asked if defendant's decision not to testify would affect his decision-making, Mr. Ellison stated that "it would be in my mind, but I don't think it would be effective to my decision" and that "it would not affect my decision but, yes, it would be in my mind." The trial judge later questioned the prospective juror further on this issue:

> THE COURT: Mr. Ellison, you were asked some questions about should the defendant decide not to testify, and I need to instruct you that, in every criminal case, should the defendant choose not to testify, the law of North Carolina gives him that privilege, okay? Do you understand that?
>
> [MR. ELLISON]: Oh, yes, sir.
>
> THE COURT: The same law also assures him that his decision not to testify creates no presumption against him. Do you understand that?
>
> [MR. ELLISON]: Yes, sir.
>
> THE COURT: And the law also says that his silence is not to influence your decision in any way. Do you understand that?
>
> [MR. ELLISON]: Yes, sir.

THE COURT: Is there any reason why you could not follow those instructions?

[MR. ELLISON]: Oh, no, sir . . . .

This exchange illustrates Mr. Ellison's ability to follow the law as given to him by the trial judge. As noted above, the trial court was able to observe the juror and to weigh his credibility as he answered the questions. *Id.* We, thus, conclude that the trial judge did not abuse his discretion in denying defendant's challenge for cause to Mr. Ellison. Therefore, defense counsel's performance was not deficient for failing to renew the challenge for cause.

Finally, defendant complains about several statements by prospective juror Heidi Elliott. Defendant specifically points to Ms. Elliott's beliefs that drinking does not provide any excuse for criminal behavior, that people claim being a victim of a homosexual assault as a "cop-out" for their behavior, that life without parole for first-degree murder is not a sufficiently severe punishment, that death is a more appropriate punishment for first-degree murder, and that life without parole is an unfair punishment because taxpayers have to pay to keep a person incarcerated when that person has taken the life of another. Defendant contends that Ms. Elliott's answers to the court's questions were not credible and that she was parroting the "correct" answers in order to remain on the jury and give defendant a death sentence. We disagree.

After being questioned on each issue, Ms. Elliott was asked whether she could follow the law and put aside her predispositions and give fair consideration to all the evidence, including evidence of alcohol use and impairment, and whether she could weigh both life and death as punishments. Although initially she stated she did not think that life without parole was a severe enough punishment for murder, upon further questioning, she said she could consider it. The court then asked:

THE COURT: . . . So I need to ask you straight up if you would automatically impose the death penalty, no matter what the facts or circumstances may be in this case.

[MS. ELLIOTT]: I would weigh both decisions. I would give them equal weight.

THE COURT: So you could fairly consider the punishment of life in prison without parole and the death penalty for someone who has been convicted of first degree murder?

[MS. ELLIOTT]: I could.

THE COURT: Okay. You talked—you had some predispositions one way or the other. I need to ask you if you can honestly set aside those predispositions that you may have and fairly consider both possible punishments.

[MS. ELLIOTT]: Yes, sir.

THE COURT: And can you [set] aside those predispositions that you may have and follow the instructions of the court—

[MS. ELLIOTT]: Yes, sir.

THE COURT: —in arriving at a just verdict?

[MS. ELLIOTT]: Yes, sir.

THE COURT: And an appropriate punishment, no matter what that punishment may be?

[MS. ELLIOTT]: Yes, sir.

In determining whether a prospective juror's views on capital punishment warrant exclusion for cause, the "standard is whether the juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.' " *Wainwright v. Witt*, 469 U.S. 412, 424, 83 L. Ed. 2d 841, 851-52 (1985) (quoting *Adams v. Texas*, 448 U.S. 38, 45, 65 L. Ed. 2d 581, 589 (1980)). *See Morgan v. Illinois*, 504 U.S. 719, 732-33, 119 L. Ed. 2d 492, 502 (1992). In this case Ms. Elliott's unequivocal statements that she could set aside her predispositions and follow the law show her excusal was not mandatory. *Green*, 336 N.C. at 167, 443 S.E.2d at 29. Once again, the trial judge was able to observe Ms. Elliott as she answered the questions. *Dickens*, 346 N.C. at 42, 484 S.E.2d at 561. Given our presumption that jurors tell the truth, *Barnes*, 345 N.C. at 207, 481 S.E.2d at 56, we have no reason to hold that the trial court abused its discretion by denying defendant's challenge for cause. Therefore, defense counsel was not deficient for failing to renew this challenge for purposes of appellate review.

Moreover, assuming *arguendo* that the trial court ruled improperly in denying any one of these three challenges for cause, defendant has failed to demonstrate he was forced to seat a juror with whom he was dissatisfied. The record reflects that after defendant exercised his fourteenth and final peremptory challenge to remove

Ms. Elliott, two jurors in the panel of twelve remained to be seated. Defendant did not challenge either of these jurors for cause or attempt to remove them with a peremptory challenge to signify dissatisfaction. One of these two jurors who was initially seated, Mr. Allocco, was dismissed from the jury and replaced by an alternate during the guilt phase of the trial. In asserting the ineffective assistance claim on appeal, defendant has not directed the Court's attention to any basis for defendant's dissatisfaction with the remaining juror, Ms. Thorpe. Moreover, selection of the alternate jurors is not an issue since defendant did not exhaust his three alternate peremptory challenges. Thus, defendant has failed to show that trial counsel's alleged deficient performance in not renewing the challenges for cause as to Hall, Ellison, and Elliott prejudiced defendant. Defendant has not satisfied the *Strickland* test for ineffective assistance of counsel with regard to these challenges for cause. This assignment of error is overruled.

Finally, defendant contends that the cumulative effect of his counsel's constitutionally deficient performance requires reversal of his conviction. However, in view of our resolution of defendant's ineffective assistance of counsel claims, defendant has shown no basis for reversal on direct appeal of his first-degree murder conviction or his death sentence for ineffective assistance of counsel. As noted earlier, two of defendant's ineffective assistance claims have been dismissed without prejudice to defendant's right to reassert them in a post-conviction motion for appropriate relief. Therefore, this assignment of error is overruled.

PRESERVATION ISSUES

Defendant raises four additional issues that this Court has previously decided contrary to his position: (i) whether the death sentence imposed in this case violates the International Covenant on Civil and Political Rights to which the United States is a party; (ii) whether the trial court lacked jurisdiction to enter a death sentence for the reason that the indictment failed to include the aggravating circumstances relied on by the State; (iii) whether the trial court lacked jurisdiction to enter a death sentence due to the short-form indictment's failure to allege premeditation and deliberation or that the killing was committed in the course of the crime of robbery with a dangerous weapon; and (iv) whether defendant was deprived of his constitutional right to counsel by his counsel's failure to file a motion to dismiss the indictment for failing to allege all elements of first-degree murder.

Defendant raises these issues to urge this Court to reexamine its prior holdings. We have considered defendant's arguments on these issues and conclude defendant has shown no compelling reason to depart from our previous holdings. These assignments of error are overruled.

PROPORTIONALITY

[28] Finally, this Court has the exclusive statutory duty in capital cases pursuant to N.C.G.S. § 15A-2000(d)(2), to review the record and determine: (i) whether the record supports the jury's findings of any aggravating circumstances upon which the court based its death sentence; (ii) whether the sentence was imposed under the influence of passion, prejudice, or any other arbitrary consideration; and (iii) whether the death sentence is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. *State v. McCollum*, 334 N.C. 208, 239, 433 S.E.2d 144, 161 (1993), *cert. denied*, 512 U.S. 1254, 129 L. Ed. 2d 895 (1994).

After a thorough review of the transcript, record on appeal, briefs, and oral arguments of counsel, we conclude that the jury's finding of the two distinct aggravating circumstances submitted was supported by the evidence. We also conclude that nothing in the record suggests defendant's death sentence was imposed under the influence of passion, prejudice, or any other arbitrary factor.

Finally, we must consider whether the imposition of the death penalty in defendant's case is proportionate to other cases in which the death penalty has been affirmed, considering both the crime and the defendant. *State v. Robinson*, 336 N.C. 78, 132-33, 443 S.E.2d 306, 334 (1994), *cert. denied*, 513 U.S. 1089, 130 L. Ed. 2d 650 (1995). The purpose of proportionality review is "to eliminate the possibility that a person will be sentenced to die by the action of an aberrant jury." *State v. Holden*, 321 N.C. 125, 164-65, 362 S.E.2d 513, 537 (1987), *cert. denied*, 486 U.S. 1061, 100 L. Ed. 2d 935 (1988). Proportionality review also acts "[a]s a check against the capricious or random imposition of the death penalty." *State v. Barfield*, 298 N.C. 306, 354, 259 S.E.2d 510, 544 (1979), *cert. denied*, 448 U.S. 907, 65 L. Ed. 2d 1137 (1980), *overruled in part on other grounds by State v. Johnson*, 317 N.C. 193, 203-04, 344 S.E.2d 775, 782 (1986). Our consideration is limited to those cases that are roughly similar as to the crime and the defendant, but we are not bound to cite every case used for comparison. *State v. Syriani*, 333 N.C. 350, 400, 428 S.E.2d 118, 146, *cert. denied*, 510 U.S. 948, 126 L. Ed. 2d 341 (1993). Whether the death

penalty is disproportionate "ultimately rest[s] upon the 'experienced judgments' of the members of this Court." *Green*, 336 N.C. at 198, 443 S.E.2d at 47 (quoting *State v. Williams*, 308 N.C. 47, 81, 301 S.E.2d 335, 356, *cert. denied*, 464 U.S. 865, 78 L. Ed. 2d 177 (1983)).

In the case at bar, defendant was convicted of first-degree murder on the bases of malice, premeditation and deliberation and under the felony murder rule. The jury found two of the three aggravating circumstances submitted: (i) that the defendant had been previously convicted of a felony involving the use or threat of violence to the person, N.C.G.S. § 15A-2000(e)(3), and (ii) that the murder was committed while the defendant was engaged in the commission of robbery with a dangerous weapon, *id.* § 15A-2000(e)(5). A third aggravating circumstance was submitted but not found by the jury: that the murder was especially heinous, atrocious, or cruel, *id.* § 15A-2000(e)(9).

The trial court submitted three statutory mitigating circumstances for the jury's consideration, namely: (i) the capital felonies were committed while defendant was under the influence of mental or emotional disturbance, *id.* § 15A-2000(f)(2); (ii) defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired, *id.* § 15A-2000(f)(6); and (iii) the catchall mitigating circumstance that there existed any other circumstance arising from the evidence which the jury deemed to have mitigating value, *id.* § 15A-2000(f)(9). The jury found the (f)(2) and (f)(6) mitigating circumstances to exist. The trial court also submitted thirteen nonstatutory mitigating circumstances; the jury found twelve of these circumstances to exist.

In our proportionality analysis we compare this case to those cases in which this Court has determined the sentence of death to be disproportionate. This Court has determined the death sentence to be disproportionate on eight occasions. *State v. Kemmerlin*, 356 N.C. 446, 573 S.E.2d 870 (2002); *State v. Benson*, 323 N.C. 318, 372 S.E.2d 517 (1988); *State v. Stokes*, 319 N.C. 1, 352 S.E.2d 653 (1987); *State v. Rogers*, 316 N.C. 203, 341 S.E.2d 713 (1986), *overruled in part on other grounds by State v. Gaines*, 345 N.C. 647, 483 S.E.2d 396, *cert. denied*, 522 U.S. 900, 139 L. Ed. 2d 177 (1997), *and by State v. Vandiver*, 321 N.C. 570, 364 S.E.2d 373 (1988); *State v. Young*, 312 N.C. 669, 325 S.E.2d 181 (1985); *State v. Hill*, 311 N.C. 465, 319 S.E.2d 163 (1984); *State v. Bondurant*, 309 N.C. 674, 309 S.E.2d 170 (1983); *State v. Jackson*, 309 N.C. 26, 305 S.E.2d 703 (1983). This case is not

substantially similar to any of the cases in which this Court has found that the death sentence was disproportionate.

We also consider cases in which this Court has found the death penalty to be proportionate. In this case defendant killed the victim in the victim's home. "A murder in the home 'shocks the conscience, not only because a life was senselessly taken, but because it was taken [at] an especially private place, one [where] a person has a right to feel secure.' " *State v. Adams*, 347 N.C. 48, 77, 490 S.E.2d 220, 236 (1997) (quoting *State v. Brown*, 320 N.C. 179, 231, 358 S.E.2d 1, 34, *cert. denied*, 484 U.S. 970, 98 L. Ed. 2d 406 (1987)) (alterations in original), *cert. denied*, 522 U.S. 1096, 139 L. Ed. 2d 878 (1998); *accord State v. Nicholson*, 355 N.C. 1, 72, 558 S.E.2d 109, 155, *cert. denied*, 537 U.S. 845, 154 L. Ed. 2d 71 (2002). Defendant was convicted based on premeditation and deliberation and under the felony murder rule. "The finding of premeditation and deliberation indicates a more cold-blooded and calculated crime." *State v. Artis*, 325 N.C. 278, 341, 384 S.E.2d 470, 506 (1989), *judgment vacated on other grounds*, 494 U.S. 1023, 108 L. Ed. 2d 604 (1990). Also, the jury in this case found the (e)(3) and (e)(5) aggravating circumstances. This Court has deemed either the (e)(3) or (e)(5) aggravating circumstance, standing alone, sufficient to sustain a sentence of death. *State v. Bacon*, 337 N.C. 66, 110 n.8, 446 S.E.2d 542, 566 n.8 (1994), *cert. denied*, 513 U.S. 1159, 130 L. Ed. 2d 1083 (1995). Viewed in this light, the present case is more analogous to cases in which we have found the death sentence proportionate than to those cases in which we have found the sentence disproportionate or to those cases in which juries have consistently returned recommendations of life imprisonment.

Defendant received a fair trial and capital sentencing proceeding, free from prejudicial error; and the death sentence in this case is not disproportionate. Accordingly, the judgment of the trial court is left undisturbed.

NO ERROR.

Justice NEWBY did not participate in the consideration or decision of this case.

STATE OF NORTH CAROLINA v. QUINTEL AUGUSTINE

No. 130A03

(Filed 19 August 2005)

1. Jury— selection—*Batson* challenge—prima facie showing

The trial court did not err by ruling that a first-degree murder defendant had not made a prima facie showing of racial discrimination in a *Batson* challenge to the State's peremptory challenge of a prospective juror. Numerous factors support the trial court's ruling.

2. Evidence— incidents of prior misconduct—no prejudice

There was no plain error in a first-degree murder prosecution where the court allowed the prosecutor to cross-examine defendant about twenty-two alleged incidents of prior misconduct, consisting of nineteen alleged incidents involving law enforcement and corrections officers and three alleged assaults against civilians. It cannot be said that the cross-examination amounted to a miscarriage of justice or denied defendant a fundamental right.

3. Constitutional Law— effective assistance of counsel—failure to object—no prejudice

Defendant had effective assistance of counsel even though his attorney did not object to questions about defendant's twenty-two alleged prior instances of wrongdoing or request a limiting instruction. In light of compelling evidence of defendant's guilt, including the testimony of three eyewitnesses identifying defendant, there is no reasonable probability that defense counsel's failure to object to the alleged errors and to request a limiting instruction deprived defendant of a fair trial with a reliable result. The assignment of error is overruled and defendant's MAR on appeal is denied.

4. Evidence— events after shooting—defendant's violent character—explanation of conduct

The trial court did not err in a first-degree murder prosecution by admitting testimony about events after the shooting which defendant contended portrayed him as a violent and dangerous man. Even assuming that defendant did not waive his objection, the evidence was relevant to show that the witness fled after the shooting to assist his frightened girlfriend and chil-

dren, rather than because the witness was guilty as defendant suggested.

5. Criminal Law— prosecutor's closing arguments—defendant's ill will toward law enforcement

The trial court did not err by failing to intervene ex mero motu during the prosecutor's closing arguments in a first-degree murder trial where the State's arguments were based on the evidence of defendant's ill will toward law enforcement and appropriate inferences from that evidence and were relevant to defendant's motive for shooting an officer.

6. Criminal Law— prosecutor's argument—credibility of defense witness

The trial court did not err by not intervening ex mero motu in a first-degree murder prosecution where the State argued that a defense witness was not credible. The witness's credibility was fair game because he implicated someone other than defendant as the shooter and the prosecutor's closing arguments highlighted facts in evidence and reasonable inferences therefrom. Moreover, defendant failed to demonstrate prejudice.

7. Constitutional Law— effective assistance of counsel—decisions not grossly improper

Defendant did not demonstrate that his counsel's failure to object to certain closing arguments by the prosecution fell below an objective standard of reasonableness, or that a reasonable probability exists of a different result, where the arguments were not so grossly improper as to require intervention by the trial court ex mero motu.

8. Criminal Law— request for instruction—not submitted in writing—given in substance

The trial court did not err by denying a first-degree murder defendant's oral request for a special jury instruction on the credibility of a prosecution witness where defendant did not submit a pertinent proposed written instruction. Moreover, the transcript indicates that defense counsel's real interest was that the jury should have the opportunity to determine whether the witness's desire to avoid prosecution as a habitual felon motivated him to testify for the State. This concern was captured in the pattern jury interested witness instruction given by the court.

9. Evidence— capital sentencing—incident in jail—cumulative—not prejudicial in light of other evidence

The trial court did not err by admitting during the sentencing phase of a capital trial evidence of an incident that occurred in the Cumberland County Jail while defendant was awaiting trial where defendant argues that the evidence was cumulative and used to "pad" the State's case to assuage any lingering concerns about defendant's culpability. In light of the other evidence presented in this case, there is no likelihood that the jury would have reached a different conclusion if it had not heard this evidence.

10. Constitutional Law— effective assistance of counsel—statement during sentencing—trial strategy

A first-degree murder defendant was not deprived of effective assistance of counsel where one of his attorneys made a statement during the sentencing proceeding closing arguments that defendant would feel no pain during an execution but that the pain would be felt by his family. The argument responded to the prosecution's victim-impact evidence and continued the theme that there had been enough suffering and defendant failed to establish that the challenged remark exceeded the wide latitude granted trial counsel in matters of strategy and closing argument.

11. Criminal Law— prosecutor's argument—defendant's courtroom demeanor

There was no abuse of discretion in a capital sentencing proceeding where the prosecutor's challenged remark that "there has been a total lack of remorse" was part of an argument that urged the jury to use its "common sense" in evaluating defendant's courtroom demeanor throughout the trial. Comments by the State concerning a defendant's courtroom conduct are permissible because the defendant's demeanor is before the jury at all times.

12. Criminal Law— prosecutor's argument—despicable person

Although ad hominem attacks on a witness or litigant are disapproved, the trial court did not err by failing to intervene ex mero motu in a capital sentencing proceeding when the prosecutor argued that the act in question was committed by a despicable human being.

13. Sentencing— capital—death penalty proportionate

A death sentence for the murder of a law enforcement officer was not disproportionate.

Justices BRADY and NEWBY did not participate in the consideration or decision of this case.

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of death entered by Judge Jack A. Thompson on 22 October 2002 in Superior Court, Brunswick County, upon a jury verdict finding defendant guilty of first-degree murder. Heard in the Supreme Court 9 November 2004.

Roy Cooper, *Attorney General*, *by G. Patrick Murphy*, *Special Deputy Attorney General*, *for the State.*

Staples S. Hughes, *Appellate Defender*, *by Benjamin Dowling-Sendor*, *Assistant Appellate Defender*, *for defendant-appellant.*

EDMUNDS, Justice.

Defendant Quintel Augustine was indicted on 25 February 2002 for the killing of Fayetteville Police Officer Roy Gene Turner, Jr. Defendant was found guilty of first-degree murder on the basis of malice, premeditation and deliberation. Following a capital sentencing proceeding, the jury found that the mitigating circumstances were insufficient to outweigh the aggravating circumstance and recommended a sentence of death. The trial court entered judgment on 22 October 2002.

On 29 November 2001, Officer Roy Turner was assigned to patrol the Jasper Street area as a member of the Neighborhood Improvement Team (NIT). On the NIT with Officer Turner that night were Officer Stephen Tredwell and the supervisor, Sergeant Shanon Brewer.

Sergeant Brewer radioed Officers Tredwell and Turner and instructed them to meet him at a church on Amy Street. Officer Tredwell arrived at the church where he found Sergeant Brewer but not Officer Turner. After waiting approximately ten minutes, Sergeant Brewer again radioed Officer Turner, who responded that he was headed in that direction. When Officer Turner still did not appear, Officer Tredwell made two unsuccessful attempts to reach him by radio. Three minutes later, Sergeant Brewer and Officer Tredwell heard a dispatch that a Fayetteville police officer had been shot in

the vicinity of Moore and Hillsboro Streets, an area associated with drug activity, alcohol consumption, and domestic disputes.

Sergeant Brewer and Officer Tredwell immediately proceeded to the scene. There they saw Officer Turner's patrol car parked at an angle near the light pole at Moore and Hillsboro Streets. The headlights were on and the engine was still running, but the blue lights had not been activated. Officer Turner was lying on the ground as other officers administered CPR. His weapon was strapped in its holster on the right side of his body. He had suffered a bullet wound to the right side of the head and the autopsy revealed that he had also been shot in the right front shoulder. Officer Turner was taken by ambulance to Cape Fear Valley Hospital where he was pronounced dead about an hour and a half later.

The State presented evidence that, at the time of the offense, four people, including defendant, were standing near a pay telephone booth at the intersection of Moore and Hillsboro Streets. Three of these individuals, Deldrick Devone Autry (Autry), James "Little D" Carlysle (Carlysle), and Lisa Merrick (Merrick), testified that the fourth, defendant Quintel Augustine, shot Officer Turner. According to this testimony, earlier in the evening of 29 November, defendant, Autry, Carlysle, and Merrick were hanging out with several others in the yard of a Ms. Swinson, who resided on Moore Street. They had been drinking alcohol and smoking marijuana for approximately an hour to an hour and a half when Ms. Swinson returned home from work and chased everyone away. The group crossed the street, where defendant told Autry that he was angry because his brother had "[gotten] some time" and that he wanted to shoot a police officer. As the group slowly began to break up, defendant and Autry walked up Moore Street to a telephone booth. According to Autry, this telephone booth was the site of frequent drug sales. Carlysle and Merrick joined them about twenty minutes later.

Shortly thereafter, Officer Turner's marked police car approached from Ramsey Street and stopped where Moore intersected with Hillsboro Street. Officer Turner looked at the group briefly, then drove on across Hillsboro Street. However, when Merrick yelled an obscenity, Officer Turner turned his cruiser around, recrossed Hillsboro, and parked in front of the telephone booth. Officer Turner then exited the vehicle and began to approach the telephone booth. Autry first saw defendant fumbling with something in the waist of his pants, then heard a gunshot. As Officer Turner began to reach for his own weapon, Autry saw defendant shoot Officer Turner over the tele-

phone booth "a couple more times." Carlysle similarly testified that he saw defendant take a black pistol out of his pocket and cock it while the officer was still in his car. As Officer Turner emerged from his vehicle, defendant raised himself up on the telephone booth and fired three or four rounds at close range, causing the officer to fall to his knees. Merrick also testified that she saw defendant pull out a pistol, heard some shots, and saw defendant shoot the officer. Although the murder weapon was never found, three expended shell casings were recovered at the crime scene. Forensic examination indicated that all three had been fired in the same .380 caliber firearm. Additional examination established that two bullet fragments removed from Officer Turner's head and chest had been fired from a Hi-Point Firearms .380 caliber automatic handgun.

Defendant testified that he did not shoot Officer Turner. According to defendant, he never spoke to Autry about his brother being in prison or of having a desire to kill a police officer. Furthermore, Autry, not he, had been carrying a handgun earlier that evening. Defendant claimed to the investigating officers that the three witnesses implicated him because he "wasn't from that neighborhood" and they were trying to put the murder "off on [him]."

Additional facts will be set forth as necessary for the discussion of various issues.

JURY SELECTION

[1] We first consider defendant's assignment of error pertaining to jury selection. Defendant contends that the trial court erred by ruling that he had not made a prima facie showing of racial discrimination at the time he objected to the State's peremptory challenge of prospective juror Ernestine Bryant. Ms. Bryant was the only African American in the first panel of twelve prospective jurors. When the State peremptorily challenged her, defendant raised an objection pursuant to *Batson v. Kentucky*, 476 U.S. 79, 90 L. Ed. 2d 69 (1986), arguing that Ms. Bryant was the first African-American prospective juror to be considered, that the number of African Americans who had been summoned for the jury pool in this case was small, and that Ms. Bryant had indicated during *voir dire* that she could consider both the death penalty and life imprisonment without parole as potential punishments in this case. The trial court confirmed that this peremptory challenge was the first exercised for a black female, then overruled the objection on the ground that defendant had made no prima facie showing of discrimination.

The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution forbids the State from using peremptory challenges for racially discriminatory reasons, *Batson*, 476 U.S. at 89, 90 L. Ed. 2d at 83, as does Article I, Section 26 of the North Carolina Constitution, *State v. Nicholson*, 355 N.C. 1, 21, 558 S.E.2d 109, 124 (citing *State v. Fletcher*, 348 N.C. 292, 312, 500 S.E.2d 668, 680 (1998), *cert. denied*, 525 U.S. 1180, 143 L. Ed. 2d 113 (1999)), *cert. denied*, 537 U.S. 845, 154 L. Ed. 2d 71 (2002). In analyzing a claim that the State impermissibly excluded jurors on the basis of race, the United States Supreme Court established a three-part test in *Batson*, 476 U.S. at 96-98, 90 L. Ed. 2d at 87-89, that has been adopted by this Court, *State v. Barden*, 356 N.C. 316, 342, 572 S.E.2d 108, 126 (2002) (citing *State v. Lawrence*, 352 N.C. 1, 13-14, 530 S.E.2d 807, 815-16 (2000), *cert. denied*, 531 U.S. 1083, 148 L. Ed. 2d 684 (2001)), *cert. denied*, 538 U.S. 1040, 155 L. Ed. 2d 1074 (2003). First, the defendant must establish a prima facie case that the State exercised a race-based peremptory challenge. *Batson*, 476 U.S. at 96-97, 90 L. Ed. 2d at 87-88. If the defendant makes the requisite showing, the burden then shifts to the State to demonstrate a facially valid and race-neutral explanation for the peremptory challenge. *Id.* at 97-98, 90 L. Ed. 2d at 88. Finally, the trial court must determine whether the defendant has satisfied his burden and proved purposeful discrimination. *Id.* at 98, 90 L. Ed. 2d at 88-89.

Defendant's objection here implicates only the first prong of the test. "Generally, when a trial court rules that the defendant has failed to establish a *prima facie* case of discrimination, this Court's review is limited to a determination of whether the trial court erred in this respect." *State v. Bell*, 359 N.C. 1, 12, 603 S.E.2d 93, 102 (2004), *cert. denied*, —— U.S. ——, 161 L. Ed. 2d 1094 (2005). The trial court's ruling is accorded deference on review and will not be disturbed unless it is clearly erroneous. *Nicholson*, 355 N.C. at 21-22, 558 S.E.2d at 125.

This Court has utilized several factors in determining whether a defendant has made a prima facie showing that race played an impermissible part in the State's exercise of a peremptory challenge. Although the following list is not exhaustive, such factors and circumstances to be considered include: whether the State exercised a disproportionate number of peremptory challenges to strike African Americans in a single case; the races of the defendant, the victim, and the State's key witnesses; whether the prosecutor's own statements or questions posed to African-American prospective jurors appear

racially motivated and therefore raise an inference of discrimination; and the acceptance rate of African-American prospective jurors by the prosecution. *See, e.g.*, *Barden*, 356 N.C. at 343, 572 S.E.2d at 127 (citing *State v. Quick*, 341 N.C. 141, 145, 462 S.E.2d 186, 189 (1995)); *Nicholson*, 355 N.C. at 22, 558 S.E.2d at 125; *State v. Smith*, 351 N.C. 251, 262-63, 524 S.E.2d 28, 37-38, *cert. denied*, 531 U.S. 862, 148 L. Ed. 2d 100 (2000); *State v. Gregory*, 340 N.C. 365, 397-98, 459 S.E.2d 638, 656-57 (1995), *cert. denied*, 517 U.S. 1108, 134 L. Ed. 2d 478 (1996).

When the State peremptorily challenged prospective juror Bryant, the trial court said to the prosecutor: "My recollection, that is the first peremptory challenge exercised for a black female, is that correct?" Defendant argues this question indicated that the court denied his objection only because Bryant was the first African American to be challenged. However, the record demonstrates that numerous factors support the trial court's ruling. This case, where defendant, the victim, and the State's three critical witnesses were all African American, was not particularly susceptible to racial discrimination. *See, e.g.*, *Smith*, 351 N.C. at 263, 524 S.E.2d at 37. The State neither made any racially motivated statements nor asked any racially motivated questions of prospective juror Bryant. *Id.*; *Gregory*, 340 N.C. at 398, 459 S.E.2d at 657. When the State exercised a peremptory challenge against Bryant, it also peremptorily challenged prospective juror Carolyn Lambert, a Caucasian. In addition, the record shows that prospective juror Bryant's son was of comparable age to defendant and was serving a federal sentence in Kentucky for a drug offense. The trial court observed Bryant's answers concerning her son, and such responses from prospective jurors are pertinent to a determination of whether defendant has met his burden. *Nicholson*, 355 N.C. at 23, 558 S.E.2d at 126.

Upon consideration of all these factors, we conclude that defendant failed to make a prima facie showing of racial discrimination in the State's peremptory challenge of prospective juror Bryant and that the trial court did not err in overruling defendant's *Batson* objection. This assignment of error is overruled.

GUILT-INNOCENCE PHASE

[2] Defendant argues that the trial court erred when it allowed the prosecutor to cross-examine him about twenty-two alleged incidents of prior misconduct, consisting of nineteen alleged incidents involving law enforcement and corrections officers and three alleged

assaults against civilians. Defendant contends that this cross-examination was not admissible under N.C.G.S. § 8C-1, Rule 404(b), but instead was offered to portray defendant as a violent man who harbored ill will toward police. Defendant also argues that this line of questioning exceeded the scope of N.C.G.S. § 8C-1, Rule 608(b), because the inquiry regarding the specific instances of conduct was not probative of truthfulness.

Rule 10(b)(1) of the North Carolina Rules of Appellate Procedure states, in part, that "[i]n order to preserve a question for appellate review, a party must have presented to the trial court a timely request, objection or motion." N.C. R. App. P. 10(b)(1). Because defendant concedes that he did not object to this cross-examination, our review of this issue is limited to plain error. *See id.* 10(c)(4); *see also State v. Cummings*, 346 N.C. 291, 313-14, 488 S.E.2d 550, 563 (1997), *cert. denied*, 522 U.S. 1092, 139 L. Ed. 2d 873 (1998). Plain error is applied cautiously and only in exceptional cases when

> after reviewing the entire record, it can be said the claimed error is a "*fundamental* error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done," or "where [the error] is grave error which amounts to a denial of a fundamental right of the accused," or the error has " 'resulted in a miscarriage of justice or in the denial to appellant of a fair trial' " or where the error is such as to "seriously affect the fairness, integrity or public reputation of judicial proceedings."

State v. Odom, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (quoting *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir.) (footnotes omitted), *cert. denied*, 459 U.S. 1018, 74 L. Ed. 2d 513 (1982)) (alteration in original). Under this standard, a "defendant is entitled to a new trial only if the error was so fundamental that, absent the error, the jury probably would have reached a different result." *State v. Jones*, 355 N.C. 117, 125, 558 S.E.2d 97, 103 (2002).

Our review of the record and transcripts satisfies us that this case does not meet the test for finding plain error. The State presented strong evidence of defendant's guilt through the testimony of three eyewitnesses who were present at the corner of Moore and Hillsboro Streets when Officer Turner was shot. All three gave consistent testimony identifying defendant as the shooter. One of those witnesses, Autry, also testified that earlier in the evening defendant expressed anger about his brother's incarceration and that he "wanted to shoot a police [officer]." Moreover, defendant himself indicated several

times on direct examination that he does not like to be troubled by police. When asked by defense counsel about spending time at the telephone booth on the corner of Moore and Hillsboro Streets, defendant stated that he would "go up there and see what's going on" and "dress[] a certain way . . . [to] fit in with the—with the drunks and homeless people, so you won't get harassed by the police." Defendant later stated that when Officer Turner approached the telephone booth on the night of the murder, he wanted to get away because he "knew that [Officer Turner] was gonna harass somebody, ask questions, and try to search people." Furthermore, defendant admitted to the jury that he is a crack cocaine dealer who sometimes worked the Moore Street area and that on the day Officer Turner was murdered, he went to Moore Street to "make some money" and "socialize." He possessed approximately twenty "rocks" and made one sale. *See State v. Lyons*, 340 N.C. 646, 668-69, 459 S.E.2d 770, 782-83 (1995) (noting that evidence of drug-dealing activities was admissible under Rule 404(b) to show motive to kill a law enforcement officer).

In light of the eyewitnesses' testimony and defendant's own concessions on the stand, we cannot say that the cross-examination amounted to a miscarriage of justice or denied defendant a fundamental right. Because we find no plain error, this assignment of error is overruled.

[3] Defendant next makes the related argument that his trial counsel provided ineffective assistance by failing to object to the questioning about the twenty-two alleged prior instances of wrongdoing and to request a limiting instruction, in violation of the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 19 and 23 of the North Carolina Constitution. Defendant has supplemented his brief by filing a motion for appropriate relief (MAR) with this Court, arguing that trial counsel did not have any strategic or tactical reason for not objecting to this cross-examination or requesting a limiting instruction.

"When a defendant attacks his conviction on the basis that counsel was ineffective, he must show that his counsel's conduct fell below an objective standard of reasonableness." *State v. Braswell*, 312 N.C. 553, 561-62, 324 S.E.2d 241, 248 (1985). To meet this burden, the defendant must satisfy the two-pronged test promulgated by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668, 80 L. Ed. 2d 674 (1984), and expressly adopted by this Court in *Braswell*. First, the defendant must demonstrate a deficiency in coun-

sel's performance by showing " 'errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment.' " *Braswell*, 312 N.C. at 562, 324 S.E.2d at 248 (quoting *Strickland*, 466 U.S. at 687, 80 L. Ed. 2d at 693). Second, the defendant must also show prejudice by establishing that "the error committed was so serious that a reasonable probability exists that the trial result would have been different" absent the error. *State v. Gainey*, 355 N.C. 73, 112, 558 S.E.2d 463, 488, *cert. denied*, 537 U.S. 896, 154 L. Ed. 2d 165 (2002). Thus, the error must be "so grave that it deprived [the defendant] of a fair trial because the result itself is considered unreliable." *State v. Lee*, 348 N.C. 474, 491, 501 S.E.2d 334, 345 (1998).

In reviewing defendant's claim in his brief that his trial counsel's representation was objectively unreasonable and his claim in his MAR that trial counsel had no strategic reason for not objecting to the State's cross-examination as to the prior acts of misconduct, we must strive to "eliminate the distorting effects of hindsight." *Strickland*, 466 U.S. at 689, 80 L. Ed. 2d at 694. Thus, were we to address the issue of whether trial counsel's performance was deficient, we would be in the difficult position of balancing counsel's failure to object to allegedly improper cross-examination against counsel's successful efforts thereafter to block the prosecutor's attempts to introduce extrinsic evidence of those prior acts of misconduct. However, when this Court is able to determine that defendant has not been prejudiced by any alleged ineffectiveness of counsel, we need not consider whether counsel's performance was deficient. *Id.* at 697, 80 L. Ed. 2d at 699; *Braswell*, 312 N.C. at 563, 324 S.E.2d at 248-49. In light of the compelling evidence of defendant's guilt discussed above, including the testimony of three eyewitnesses identifying defendant as Officer Turner's assailant, we perceive no reasonable probability that defense counsel's failure to object to the alleged errors and to request a limiting instruction deprived defendant of a fair trial whose result is reliable. This assignment of error is overruled and defendant's MAR is denied.

[4] Defendant also contends that the trial court erred when it admitted certain testimony from Autry over defendant's objection. On direct examination, Autry testified about events that occurred after the shooting of Officer Turner, including the reason why Autry's aunt took his girlfriend Kajeana and his children to a motel. Defendant assigns error to the following exchange:

Q. Now, why did Kajeana want to take the children and go to a motel to spend the night that night?

[DEFENSE COUNSEL]: Objection. That's speculation on why Kajeana wanted to go to the motel for a night.

THE COURT: Overruled. If he knows.

. . . .

Q. Do you know why she needed to go?

A. She was scared that the defendant, you know what I'm sayin', [would] try to come back and get me or—

. . . .

[DEFENSE COUNSEL]: Motion to strike, your Honor.

A. —the kids.

THE COURT: Denied.

Defendant argues that this testimony was irrelevant and improper character evidence that portrayed defendant as a violent and dangerous man. However, " '[i]t is well established that the admission of evidence without objection waives prior or subsequent objection to the admission of evidence of a similar character.' " *State v. Nobles*, 350 N.C. 483, 501, 515 S.E.2d 885, 896 (1999) (quoting *State v. Campbell*, 296 N.C. 394, 399, 250 S.E.2d 228, 231 (1979)). Earlier in his direct testimony, when Autry was asked what happened after defendant shot Officer Turner, the following exchange took place:

Q. All right. Now, did you then remain there at the apartment with your girlfriend or did you leave?

A. Um, I left, you know what I'm sayin', shortly after that.

Q. And where did you go?

A. I went to, um, the Economy Inn.

Q. Okay. And why did you go to the Economy Inn?

A. Um, I went there to, um, use this guy's car. I was coming back to get my girlfriend, the kids, because they were scared that [defendant] might do something or, you know—and they didn't want to stay in the house, so I was going to take 'em to a hotel.

This prior testimony from Autry describing the fear of defendant felt by his girlfriend and children was admitted without objection. Accordingly, defendant's subsequent objection was waived. *See Nobles*, 350 N.C. at 501, 515 S.E.2d at 896; *see also State v. Valentine*, 357 N.C. 512, 525, 591 S.E.2d 846, 857 (2003).

In addition, we note that at trial defendant objected to this evidence on the ground that it was speculative, while on appeal he argues that Autry's testimony violated N.C.G.S. § 8C-1, Rules 404(a) and 405, pertaining to character evidence. "This Court has long held that where a theory argued on appeal was not raised before the trial court, 'the law does not permit parties to swap horses between courts in order to get a better mount in the Supreme Court.' " *State v. Sharpe*, 344 N.C. 190, 194, 473 S.E.2d 3, 5 (1996) (quoting *Weil v. Herring*, 207 N.C. 6, 10, 175 S.E. 836, 838 (1934)); *see also State v. Hamilton*, 351 N.C. 14, 22, 519 S.E.2d 514, 519 (1999) (the defendant precluded on appeal from arguing admissibility of evidence for impeachment purposes when at trial he sought admission of the evidence under Rule 404(b)), *cert. denied*, 529 U.S. 1102, 146 L. Ed. 2d 783 (2000). Therefore, defendant's claim is also waived for this reason.

Moreover, even assuming that defendant did not waive his objection to Autry's testimony, the evidence was properly admitted. Generally, "[a]ll relevant evidence is admissible." N.C.G.S. § 8C-1, Rule 402 (2003). "Relevant evidence" is evidence that has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." *Id.*, Rule 401 (2003). In a criminal case, "every circumstance calculated to throw any light upon the supposed crime is admissible and permissible." *State v. Collins*, 335 N.C. 729, 735, 440 S.E.2d 559, 562 (1994). Defendant has consistently maintained that he did not kill Officer Turner and that the killer was one of three others at the telephone booth that night. Specifically, defendant sought to pin responsibility on Autry. Defense counsel observed in opening statement that Autry "had the most to gain from the death of . . . Officer Roy Turner." Defense counsel's cross-examination of Autry concerning his actions after the shooting further exemplifies defendant's strategy of suggesting that Autry was guilty. Accordingly, Autry's direct testimony was relevant to show that he did not flee to a motel after Officer Turner was shot because he was guilty, as argued by defendant, but rather to assist his frightened girlfriend and children. Thus, Autry's testimony was admissible to shed light on cir-

cumstances surrounding the crime and its aftermath. This assignment of error is overruled.

[5] Defendant next argues that the trial court erred by failing to intervene *ex mero motu* during different portions of the prosecution's closing arguments in the guilt-innocence phase of the trial. The first argument in question addressed defendant's alleged history of disrespect toward law enforcement and corrections officers. One of the prosecutors made the following argument:

> If there's an overall theme with respect to this case, I think it is that this defendant does not like to be harassed by cops. Now, what does that mean? He said he didn't want people trying to make him do things that he didn't want to do. Really what it boils down to, folks, is he doesn't want, doesn't like police officers doing their job. It's just that simple. Harassment. He doesn't like to be harassed.
>
> . . . .
>
> Now, what this defendant is telling you is that he does not want a cop doing his job and involving him. And there was example after example after example replete with his arrogance, his defiance, his combativeness, his total disregard for authority. That's what this case comes down to. . . .
>
> . . . .
>
> . . . You learned things about his attitude, about his demeanor, about his views on people of authority doing their job. "They're always harassing me." A common theme throughout everything he told you about with respect to his contact with law enforcement officers, from the Laundromat at College Lakes—(pause)—to the breaking and entering and larceny that gave rise to the first prison sentence.

Pursuing this theme, another prosecutor argued:

> We have the same situation in this situation where Officer Turner is killed that you've seen in the testimony of every single incident of this defendant having trouble with law enforcement officers. He has a total disregard for society. And it came to a head whenever he laughed at snuffing out the life of this officer.

Defendant maintains that these arguments improperly appealed to the jury's emotions, encouraging the jurors to convict defendant

because of his alleged lack of respect for and hostility toward law enforcement and corrections officers. In addition, defendant contends that this line of argument, focusing on defendant's contrary character to reinforce the State's theory that defendant shot Officer Turner, was not based on inferences fairly drawn from the trial evidence. Defendant did not object to these arguments. Accordingly, we must determine whether " 'the remarks were so grossly improper that the trial court committed reversible error by failing to intervene *ex mero motu*.' " *State v. Jones*, 358 N.C. 330, 349-50, 595 S.E.2d 124, 137 (quoting *Jones*, 355 N.C. at 133, 558 S.E.2d at 107), *cert. denied*, —— U.S. ——, 160 L. Ed. 2d 500 (2004). Under this standard,

> the reviewing court must determine whether the argument in question strayed far enough from the parameters of propriety that the trial court, in order to protect the rights of the parties and the sanctity of the proceedings, should have intervened on its own accord and: (1) precluded other similar remarks from the offending attorney; and/or (2) instructed the jury to disregard the improper comments already made.

Jones, 355 N.C. at 133, 558 S.E.2d at 107.

In a capital case, prosecutors are granted wide latitude in their closing arguments and have a duty to argue all the facts in evidence and all reasonable inferences that can be drawn therefrom. *State v. Smith*, 359 N.C. 199, 210, 607 S.E.2d 607, 616-17 (2005). Nevertheless, such "latitude" is not limitless, *see Jones*, 355 N.C. at 129, 558 S.E.2d at 105, and counsel may not place " 'before the jury incompetent and prejudicial matters by injecting his own knowledge, beliefs and personal opinions not supported by the evidence,' " *Jones*, 358 N.C. at 350, 595 S.E.2d at 137 (quoting *State v. Locklear*, 294 N.C. 210, 217, 241 S.E.2d 65, 69 (1978)); *see also* N.C.G.S. § 15A-1230(a) (2003).

Here, the State's argument was based on the evidence and appropriate inferences from that evidence. The State's theory that defendant shot Officer Turner was supported by substantial evidence that defendant harbored ill will toward law enforcement personnel. For example, not only did Autry testify that defendant was upset with police because of his brother's incarceration, defendant himself twice referred to police "harassment" during his direct examination. First, defendant testified that he sometimes dressed a certain way when hanging around the telephone booth with the drunks and the homeless "so you won't get harassed by the police." Later, defendant stated that when Officer Turner approached the telephone booth, he "knew

that [Officer Turner] was gonna harass somebody" and that he wanted "to get away from him so [he] wouldn't get harassed." On cross-examination, when asked if he did not like being harassed by law enforcement officers, defendant responded that he did not "like to be harassed by anyone." Defendant also grumbled to investigating officers about being harassed. In addition, defendant discussed his prior convictions on direct examination and admitted on cross-examination to hitting a uniformed law enforcement officer outside the College Lakes Laundromat. In light of this record, it is apparent that the prosecutors' arguments were based on facts in evidence and were relevant to the issue of defendant's motive for shooting Officer Turner. *State v. Mason*, 337 N.C. 165, 175, 446 S.E.2d 58, 63 (1994) ("[E]vidence of motive . . . ' "is not only competent, but often very important, in strengthening the evidence for the prosecution." ' ") (citations omitted). The cited arguments of counsel were not grossly improper and the trial court did not err by failing to intervene *ex mero motu*.

[6] Defendant also argues that another portion of the State's closing argument during the guilt-innocence phase was improper. The pertinent portions of the prosecutor's arguments related to Jerome Farmer, a witness for defendant who testified that he saw the group standing around the telephone booth shortly before the shooting and that Carlysle was "acting fidgety" and appeared to have a pistol in his pocket. Farmer further testified that later that night, another individual whom he knew as Andre or Adrian Crump (Crump's true name is Adrian Sturdivant) came to the house where Farmer was living and told Farmer that Carlysle was "crazy" and "stupid" and had shot the officer. During closing argument, the State addressed this testimony by contending:

> Talk about inconsistencies and contradictions, let's talk about Jerome Farmer, one of the most incredible witnesses you'll ever see in any courtroom in this country. That hulk of a man sitting there in the horizontal black and white stripes, head down, mumbling, couldn't even be heard, wouldn't even answer the defense attorneys' questions, the side that called him. Had to be asked at least five times to tell his incredible story before we finally got it out. Just like pulling teeth.
>
> . . . .
>
> And then [witness Farmer] says, in that same exhibit, speaking to [Assistant District Attorney] Ms. Kelley, "Tell my lawyer to

> come and see me." And here's the kicker, "And you tell him what you want me to know about the case." He's trying to sell his testimony, folks. He's trying to sell the state a bill of goods. And Elaine Kelley would have nothing to do with it. She didn't go see him. She didn't correspond with him. And he didn't get this deal with his conditions. And what happens? He's going federal. And he's gonna do a long, long time. And why is he going federal, and why is he gonna do a long, long time? Because the state didn't buy his junk. Because the state didn't meet his conditions. Because the state didn't go over and tell him what [sh]e wanted him to know about the case so that he could come in here and regurgitate it all over you.
>
> Not only did his demeanor tell you that he was totally incredible, these letters tell you that he's totally incredible. Apparently he forgot to tell his lawyer and the defense what he was saying to Ms. Kelley.
>
> There are other letters. You've had the opportunity to hear them and read them. He teased her, telling her that he knew something about, quote-unquote, "the cop murder," but she didn't fall for it. The state didn't go for it. And you shouldn't go for one word that he said from that stand.

Defendant maintains that the prosecutor's arguments impermissibly stated his personal opinion about Farmer's credibility, distorted the record, and were abusive. Defendant did not raise a contemporaneous objection, so we must determine whether the trial court should have intervened *ex mero motu*. *Jones*, 358 N.C. at 349-50, 595 S.E.2d at 137.

Although defendant correctly observes that attorneys may not express their personal opinions during closing arguments, *see id.* at 350, 595 S.E.2d at 137, we have held that prosecutors are allowed to argue that the State's witnesses are credible. *See*, *e.g.*, *State v. Wiley*, 355 N.C. 592, 621-22, 565 S.E.2d 22, 43-44 (2002) (noting the difference between improperly vouching for a State witness and giving the jury reasons to believe the State's evidence), *cert. denied*, 537 U.S. 1117, 154 L. Ed. 2d 795 (2003). Similarly, a lawyer " ' "can argue to the jury that they should not believe a witness." ' " *State v. Golphin*, 352 N.C. 364, 455, 533 S.E.2d 168, 227 (2000) (citations omitted), *cert. denied*, 532 U.S. 931, 149 L. Ed. 2d 305 (2001). Additionally, a prosecutor's statements during closing argument should not be viewed in isolation but must be considered in " 'the context in which the

remarks were made and the overall factual circumstances to which they referred.' " *State v. Jaynes*, 353 N.C. 534, 559, 549 S.E.2d 179, 198 (2001) (quoting *State v. Green*, 336 N.C. 142, 188, 443 S.E.2d 14, 41, *cert. denied*, 513 U.S. 1046, 130 L. Ed. 2d 547 (1994)), *cert. denied*, 535 U.S. 934, 152 L. Ed. 2d 220 (2002).

Applying these principles to the case at bar, we conclude that the statements contested by defendant did not stray outside the bounds of proper argument. The defense called Farmer to impeach the testimony of Adrian Sturdivant/Andre Crump. During the State's case-in-chief, Sturdivant testified that after the murder, he ran to the house of Lillie Ann Hawkins and William Jones and said that "Q [defendant] shot the rollers." Testifying as a rebuttal witness for defendant, Farmer indicated that Sturdivant had said instead that Carlysle, not defendant, had done something "stupid" and "crazy."

Q. Did Adrian Crump [Adrian Sturdivant] say anything else when he came into the house?

A. Yeah.

Q. What did he say?

(Pause.)

THE COURT: Mr. Farmer.

A. The way he was saying, like Little D [Carlysle] did it.

Q. Please keep your voice up and repeat that.

A. The way he was saying to me, like Little D did it.

Q. Did what?

A. Shoot the police officer.

Q. Mr. Farmer, is that, in fact, what you heard that night Adrian Crump say?

A. Yes, sir.

Farmer also testified that Carlysle later said "The gun is sleeping with the fishes."

Because Farmer implicated someone other than defendant as the shooter, his credibility was fair game. The prosecutor's closing arguments highlighted facts in evidence and reasonable inferences drawn

from those facts. The prosecutor's comment about Farmer's dress was preceded by defense counsel's eliciting on direct examination that Farmer was wearing a "black and white striped outfit" because he was incarcerated in the Brunswick County jail. Defense counsel repeatedly asked Farmer to speak up, and the trial court on numerous occasions had to instruct Farmer to answer the questions asked. Farmer acknowledged on cross-examination that state charges against him had been dropped and that he was going to be indicted under federal charges. He also admitted writing nine letters to Assistant District Attorney Kelley. These letters, which were read aloud and introduced into evidence, create a reasonable inference that Farmer had been hoping to receive favorable treatment from the State in exchange for his testimony in the present case.

Thus, it is apparent that the prosecutor's argument appropriately focused on reasons the jury should not believe Farmer. *See Golphin*, 352 N.C. at 455, 533 S.E.2d at 227. After advising the jury that he was going to talk about the "inconsistencies and contradictions" in Farmer's testimony, the prosecutor recounted the witness' testimony and demeanor but stopped short of calling the witness a liar or otherwise injecting his personal opinion. *Id.* (stating that it is acceptable for the prosecutor to argue why a witness should not be believed but impermissible to assert his opinion that a witness is lying); *see also State v. Flippen*, 349 N.C. 264, 276, 506 S.E.2d 702, 710 (1998) (holding that the prosecutor's characterization of a defendant's courtroom conduct was permissible because the defendant's demeanor is " 'before the jury at all times' " (quoting *State v. Myers*, 299 N.C. 671, 680, 263 S.E.2d 768, 774 (1980))), *cert. denied*, 526 U.S. 1135, 143 L. Ed. 2d 1015 (1999). Finally, while the single reference to Farmer as a "hulk of a man" was gratuitous and unnecessary, it was not so improper as to require action by the trial court in the absence of an objection. *See State v. Braxton*, 352 N.C. 158, 204, 531 S.E.2d 428, 455 (2000) (holding that prosecutor's one-time description of the defendant as "that thing" not so disparaging as to demand the trial court's intervention *ex mero motu*), *cert. denied*, 531 U.S. 1130, 148 L. Ed. 2d 797 (2001). Accordingly, the trial court was not required to intervene *ex mero motu*.

Even if we were to assume that the arguments about defendant's motive and about Farmer's credibility were improper, defendant has failed to demonstrate prejudice by showing how these comments, either alone or together, "infected the trial with unfairness and thus rendered the conviction fundamentally unfair." *State v. Carroll*, 356

N.C. 526, 537, 573 S.E.2d 899, 907 (2002), *cert. denied*, 539 U.S. 949, 156 L. Ed. 2d 640 (2003).

These assignments of error are overruled.

[7] Defendant again makes the related contention that his trial counsel's failure to object to these closing arguments deprived him of effective assistance of counsel. We determined above that the arguments were not so grossly improper as to require intervention by the trial court *ex mero motu*. This analysis also satisfies us that defendant has failed to demonstrate that his counsel's conduct fell below an objective standard of reasonableness, *Braswell*, 312 N.C. at 562, 324 S.E.2d at 248, or that a reasonable probability exists that the trial result would have been different if counsel had objected, *Gainey*, 355 N.C. at 112-13, 558 S.E.2d at 488. This assignment of error is overruled.

[8] Defendant next contends that the trial court erred in denying his oral request for a special jury instruction concerning the testimony and credibility of prosecution witness Autry. During the charge conference, defendant requested the trial court to instruct the jury that at the time of the trial, Autry could be facing habitual felon status if he were convicted of a pending felony cocaine charge. Although Autry had not been indicted as an habitual felon, defendant argued to the trial court that the jury should be instructed on his potential status so it could determine "whether that has an impact on his testimony in that case, whether it makes him interested or not."

During this charge conference, defendant's counsel stated that it would present to the court and the prosecution a proposed instruction when the court reconvened. The trial judge denied the oral request for the special instruction but agreed to allow defense counsel "to tender an instruction for the record" the next court day. However, when court opened the following Monday, defendant did not submit a pertinent proposed written instruction. Accordingly, the trial judge gave the jury the pattern instructions relating to interested witnesses:

> You may find that a witness is interested in the outcome of this trial. In deciding whether or not to believe such a witness, you may take his interest into account. If, after doing so, you believe his testimony in whole or in part, you should treat what you believe the same as any other believable evidence.

1 N.C.P.I.—Crim. 104.20 (1970). Defendant complains that this general instruction failed to address Autry's potential special interest in testifying against him in order to avoid being prosecuted as an habitual felon.

"At the close of the evidence . . . , any party may tender written instructions[,]" N.C.G.S. § 15A-1231(a) (2003), and "where 'a specifically requested jury instruction is proper and supported by the evidence, the trial court must give the instruction, at least in substance,' " *State v. Jones*, 337 N.C. 198, 206, 446 S.E.2d 32, 36 (1994) (quoting *State v. Ford*, 314 N.C. 498, 506, 334 S.E.2d 765, 770 (1985)). However, such requested special instructions "should be submitted in writing to the trial judge at or before the jury instruction conference." Gen. R. Pract. Super. and Dist. Ct. 21, para. 1, 2005 Ann. R. N.C. 18. Accordingly, this Court has held that a trial court did not err where it declined to give requested instructions that had not been submitted in writing. *See State v. McNeill*, 346 N.C. 233, 240, 485 S.E.2d 284, 288 (1997), *cert. denied*, 522 U.S. 1053, 139 L. Ed. 2d 647 (1998); *State v. Martin*, 322 N.C. 229, 237, 367 S.E.2d 618, 623 (1988).

Here, defendant's request during the charge conference was made orally. In denying the request, the trial court gave defendant the opportunity to tender a written instruction for the record when court next convened. Despite this accommodation, defendant made no such tender. Accordingly, we find no error in the trial court's denial of defendant's oral request.

Moreover, even had defendant provided a written proposed instruction, we are satisfied that the instruction given by the trial court covered the essence of defendant's request. As long as the trial court provides the substance of a requested proper instruction, it need not use the specific language proposed by a party. *Nicholson*, 355 N.C. at 67, 558 S.E.2d at 152. At the charge conference here, counsel for defendant asked that the court give a portion of the "instruction from [N.C.P.I.—Crim.] 203.10 regarding [Autry's] prior convictions" on the grounds that those convictions could qualify Autry for habitual felon status if he were convicted of the charge pending against him. However, because instruction 203.10 is the substantive instruction to be used at an habitual felon *trial*, defense counsel correctly conceded that this instruction was not directly applicable and that Autry did not have an interest in the outcome of defendant's trial. The transcript indicates that defense counsel's real interest was that the jury should know of Autry's status and have the opportunity to determine whether his desire to avoid prosecution as a habitual felon

motivated him to testify for the State. This concern was captured in the pattern jury instruction relating to interested witness testimony that the court provided during the guilt-innocence phase of the trial. *See State v. Watson*, 294 N.C. 159, 167-68, 169-70, 240 S.E.2d 440, 446-47 (1978) (interested witness instruction adequate where trial court did not provide the name of the purportedly interested witness). Because the instructions substantively reflected "the concept defendant wished to convey to the jury," *McNeill*, 346 N.C. at 239, 485 S.E.2d at 288, defendant has failed to demonstrate that the instruction was deficient, *State v. Rhinehart*, 324 N.C. 310, 315-16, 377 S.E.2d 746, 749 (1989). This assignment of error is overruled.

SENTENCING PROCEEDING

[9] As to sentencing, defendant argues that the trial court erred by admitting evidence of an incident that occurred in the Cumberland County Jail while he was awaiting trial. Cumberland County Sheriff's Deputy Melody Clark testified that while she was working as a jailer on 19 March 2002, she received an intercom call from defendant claiming that there was a problem in his cell block. Deputy Clark alerted Corporal Jennifer Harris, her supervisor, and Corporal Harris and two other deputies went to defendant's cell block to investigate. Corporal Harris testified that, upon her arrival, the inmates seemed "rowdy" and "excited," so she decided to remove defendant for his own protection and for the protection of others. According to Corporal Harris, defendant was upset and asked where he was being taken. When Corporal Harris informed defendant that he was going to be locked in a single cell, defendant responded that when he was unlocked, "he was going to . . . get anybody that he could. Whether it be an officer or an inmate, it didn't matter. He didn't care." Defendant also told Corporal Harris: "I'm going to get whoever I can when I'm unlocked. You can read my file. It doesn't matter. I don't care what happens to me." Defendant made this threat approximately three times while he was being taken to the single cell.

Before Deputy Clark and Corporal Harris testified, defense counsel orally objected to the evidence outside the presence of the jury. The State contended that the evidence was relevant for two reasons: (1) as a tacit admission of defendant's involvement in the murder of Officer Turner, and (2) to support the finding of the N.C.G.S. § 15A-2000(e)(8) aggravating circumstance that the capital felony was committed against a law enforcement officer engaged in the performance of official duties. The trial court overruled defend-

ant's objection. After these witnesses testified, defendant's motion to strike their testimony was denied.

Defendant claims that this evidence was irrelevant and prejudicial and that he is therefore entitled to a new sentencing proceeding.[1] At the time this case was tried, we had interpreted Rule 10(b)(1) of the North Carolina Rules of Appellate Procedure to require that an attorney make a contemporaneous objection to a trial court's decision to admit evidence, even if the attorney had previously obtained a ruling on the basis of a motion *in limine*. *State v. Thibodeaux*, 352 N.C. 570, 581-82, 532 S.E.2d 797, 806 (2000), *cert. denied*, 531 U.S. 1155, 148 L. Ed. 2d 976 (2001). Defendant failed to object to the trial court's ruling in the presence of the jury as required by *Thibodeaux* and thus did not preserve this issue. However, on 21 May 2003, the General Assembly amended N.C. Rule of Evidence 103(a) to provide that once the trial court makes "a definitive ruling on the record admitting or excluding evidence, either at or before trial, a party need not renew an objection or offer of proof to preserve a claim of error for appeal." Act of May 21, 2003, ch. 101, 2003 N.C. Sess. Laws 127, 127 (conforming N.C. R. Evid. 103 to corresponding federal rule). Although application of this amendment was prospective from its effective date of 1 October 2003, in light of the gravity of defendant's capital sentence, we will review the admissibility of this evidence pursuant to Rule 2 of the North Carolina Rules of Appellate Procedure to assure that defendant does not suffer a manifest injustice. N.C. R. App. P. 2.

The rules of evidence do not apply in sentencing proceedings, N.C.G.S. § 8C-1, Rule 1101(b)(3) (2003), and any competent evidence which the court deems to have probative value may be received, *id.* § 15A-2000(a)(3) (2003). Accordingly, the parties may present a wide array of evidence at a sentencing proceeding. *See State v. White*, 355 N.C. 696, 704-05, 565 S.E.2d 55, 61 (2002), *cert. denied*, 537 U.S. 1163, 154 L. Ed. 2d 900 (2003). Even assuming the evidence of defendant's remarks on 19 March 2002 was improperly admitted under these less restrictive standards, defendant is not entitled to a new sentencing proceeding unless he can establish prejudice, that is, a reasonable possibility that a different result would have been reached had the evidence been excluded. N.C.G.S. § 15A-1443(a) (2003). Here, the evi-

1. Defendant's brief also contains a statement that the erroneous admission of this evidence violated his rights under the United States Constitution. Because defendant presents no support for this contention, we deem his constitutional claim to be abandoned. N.C. R. App. P. 28(a), (b)(6).

dence was offered by the State on the grounds that defendant's statements were a tacit admission that he killed Officer Turner and also to support the submission of the N.C.G.S. § 15A-2000(e)(8) aggravator. Acknowledging in his brief that the jury had already found in the guilt-innocence phase that defendant had murdered Officer Turner, defendant argues that this evidence was cumulative, used to "pad" the State's case and assuage any lingering concerns the jurors may have harbored about defendant's culpability. Defendant also argues that the evidence was not relevant to establish that Officer Turner was carrying out his official duties when shot. However, in light of the other evidence presented in this case, we do not perceive any likelihood that the jury would have reached a different conclusion if it had not heard this evidence. Because we have considered defendant's substantive argument, we need not consider his contention that defense counsel's failure to make a contemporaneous objection constituted ineffective assistance of counsel.

These assignments of error are overruled.

[10] Defendant next argues that one of his defense attorneys made a statement during the sentencing proceeding closing arguments that was contrary to defendant's interests and deprived him of effective assistance of counsel. Defense counsel argued that:

> [The prosecutor] came before you and she held up two photographs. And basically what she was saying to you was "before Quintel Augustine" and "after Quintel Augustine." Folks, I'll hold up a picture. It's a picture of Quintel praying. A life has value.
>
> In my other hand, I hold up a blank piece of paper, because this picture is going to be decided by you. Is this picture going to show Quintel Augustine spending the rest of his natural life in the Department of Corrections of North Carolina? Or is it gonna show him strapped to a gurney after he's received a lethal injection?
>
> *Now, he will feel no pain*. The pain will be felt by his family—the very, very pain that Mr. Turner told you that no family should ever have to endure.

(Emphasis added.) Defendant contends his counsel's remark that he would "feel no pain" from execution by lethal injection has no factual basis and sought to minimize the jury's legal, moral and emotional responsibility as it considered the death penalty.

In reviewing an ineffective assistance claim, we resist the urge to second-guess trial counsel's actions. *See Gainey*, 355 N.C. at 113, 558 S.E.2d at 488. Because "[c]ounsel is given wide latitude in matters of strategy," *State v. Fletcher*, 354 N.C. 455, 482, 555 S.E.2d 534, 551 (2001), *cert. denied*, 537 U.S. 846, 154 L. Ed. 2d 73 (2002), "defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy,' " *Strickland*, 466 U.S. at 689, 80 L. Ed. 2d at 694-95 (quoting *Michel v. Louisiana*, 350 U.S. 91, 101, 100 L. Ed. 83, 93 (1955)). Our review of the record reveals that this argument was consistent with such a trial strategy.

The prosecution offered emotional victim-impact evidence through the testimony of Officer Turner's parents at the sentencing proceeding. Recounting his experience in the hospital the night his son was shot, Mr. Turner said: "I've never seen him down. . . . It was hard for me to go in there and see that. And when I . . . did get enough nerve to go in, . . . I hope no parent have to go in and see they—they child in that type of situation." Mr. Turner later told the jury that his "whole world [has] changed" and he "lost a part of [himself]" since his son's death. Similarly, Mrs. Turner told the jury that "there's no way . . . a person can understand what I'm going through" and that "[i]t's heartbreaking. It's—it's a tremendous loss. I feel helpless. I feel—not angry, but I just feel like something has been torn away from me. There's an emptiness here that will never be replaced by anything." In advocating for the death penalty, the prosecutor incorporated this evidence into her closing argument when she stated that "[t]he bullet—the bullets may have killed Roy Turner instantly, meaning taken away his brain functions, but the pain here . . . will last forever. The pain of the mom. You heard from her. It's very real. . . . The pain will last forever for dad . . . ."

In arguing that his counsel's response to this victim-impact evidence was improper, we believe defendant both takes his counsel's comment out of context and construes it too literally. *See State v. Hinson*, 341 N.C. 66, 78, 459 S.E.2d 261, 268 (1995). The record demonstrates that defense counsel was building on the testimony of Officer Turner's family for the purpose of evoking similar sympathy for defendant's family. The focus of counsel's argument was not that defendant would not feel pain if he were executed, but that defendant's parents, like Officer Turner's, would continue to experience the pain of losing a child long after defendant's death. Defense co-counsel's closing argument continued this theme that there had

been enough suffering when he also referred to the testimony of Officer Turner's parents, then asked the jury to not "let two families leave this courtroom with holes that large and deep that never heal." Accordingly, defendant has failed to establish that the challenged remark exceeded the wide latitude granted trial counsel in matters of strategy and closing argument. *See Fletcher*, 354 N.C. at 482, 555 S.E.2d at 551 (strategy); *Jones*, 355 N.C. at 128, 558 S.E.2d at 105 (closing argument). This assignment of error is overruled.

[11] Defendant next contends that the prosecutor's following argument improperly distorted the record and expressed the prosecutor's personal opinion: "Use your common sense, folks, is what I will next ask you to do. The defendant—have you seen displays of remorse? There has been a total lack of remorse on his part."

Because defense counsel timely objected to the closing argument, we must determine "whether the trial court abused its discretion by failing to sustain the objection." *Jones*, 355 N.C. at 131, 558 S.E.2d at 106. Under this test, we reverse a trial court "only upon a showing that its ruling could not have been the result of a reasoned decision." *State v. Burrus*, 344 N.C. 79, 90, 472 S.E.2d 867, 875 (1996). When applying this standard to closing arguments,

> this Court first determines if the remarks were improper. . . . [I]mproper remarks include statements of personal opinion, personal conclusions, name-calling, and references to events and circumstances outside the evidence . . . . Next, we determine if the remarks were of such a magnitude that their inclusion prejudiced defendant, and thus should have been excluded by the trial court.

Jones, 355 N.C. at 131, 558 S.E.2d at 106.

Here, defendant argues the prosecutor's statement that "[t]here has been a total lack of remorse" was improper because it ignored evidence in the record that defendant had expressed sympathy for Officer Turner's family. However, an examination of the transcript reveals no impropriety. The challenged remarks were part of an argument that urged the jury to use its "common sense" in evaluating defendant's courtroom demeanor throughout the trial. This Court has held that comments by the State concerning a defendant's courtroom conduct are permissible because the defendant's demeanor is " ' "before the jury at all times." ' " *Nicholson*, 355 N.C. at 42-43, 558 S.E.2d at 137-38 (citations omitted). More specifically, we have considered and found proper arguments addressing a defendant's appar-

ent lack of remorse during trial. *See, e.g.*, *State v. McNatt*, 342 N.C. 173, 175-76, 463 S.E.2d 76, 77-78 (1995) (prosecutor's argument about the defendant's courtroom demeanor proper); *State v. Brown*, 320 N.C. 179, 199, 358 S.E.2d 1, 15 ("Urging the jurors to observe defendant's demeanor for themselves does not inject the prosecutor's own opinions into his argument, but calls to the jurors' attention the fact that evidence is not only what they hear on the stand but what they witness in the courtroom."), *cert. denied*, 484 U.S. 970, 98 L. Ed. 2d 406 (1987). In light of these holdings, the trial court did not abuse its discretion in overruling defendant's objection. This assignment of error is overruled.

[12] In his final assignment of error arising out of the sentencing proceeding, defendant argues that a different portion of the prosecutor's closing argument was grossly improper. The prosecutor argued:

> I know you're not supposed to do it, but I can't help myself. This act was committed by a despicable human being. I know you and I both saw his family come up here last week and talk about him as a child. I cannot argue with them about their recollections of him as a child. I only know the adult.

Defendant maintains that the prosecutor impermissibly and abusively expressed personal opinion through these remarks and that they were designed to appeal to the passions of the jury. Acknowledging that counsel did not object to this argument, defendant contends that the trial court erred by failing to intervene *ex mero motu*.

Defendant can demonstrate that this closing argument amounted to gross impropriety warranting such trial court intervention by showing " 'that the prosecutor's comments so infected the trial with unfairness that they rendered the conviction fundamentally unfair.' " *State v. Anthony*, 354 N.C. 372, 427-28, 555 S.E.2d 557, 592 (2001) (quoting *State v. Davis*, 349 N.C. 1, 23, 506 S.E.2d 455, 467 (1998), *cert. denied*, 526 U.S. 1161, 144 L. Ed. 2d 219 (1999)), *cert. denied*, 536 U.S. 930, 153 L. Ed. 2d 791 (2002). We have acknowledged the tension between the wide latitude granted counsel generally during closing arguments, *Smith*, 359 N.C. at 210, 607 S.E.2d at 616-17, the prosecutor's duty zealously to advocate the appropriateness of the death penalty to the jury under the facts presented, *State v. Strickland*, 346 N.C. 443, 467, 488 S.E.2d 194, 208 (1997), *cert. denied*, 522 U.S. 1078, 139 L. Ed. 2d 757 (1998), and the need to regulate the acceptable bounds of closing argument and preserve professionalism, *Jones*, 355 N.C. at 135, 558 S.E.2d at 108.

We have found no prejudice under similar circumstances. In *State v. Frazier*, 121 N.C. App. 1, 464 S.E.2d 490 (1995), *aff'd*, 344 N.C. 611, 476 S.E.2d 297 (1996), the defendant was charged with indecent liberties and rape. The prosecutor argued to the jury that the defendant and another were "[j]ust as evil and just as sorry and just as mean as two despicable people could ever be on this earth." *Id.* at 16, 464 S.E.2d at 498 (alteration in original). The trial court apparently sustained the defendant's objection, but the defendant did not move to strike. A majority of the Court of Appeals panel determined that the prosecutor's comments, though inappropriate, did not warrant a new trial. *Id.* at 16, 464 S.E.2d at 498-99. On appeal to this Court, the defendant again contended that the prosecutor's argument was improper. Without quoting the prosecutor's specific language, we found no reasonable possibility that the outcome of the trial would have been any different in the absence of the error in the argument. *Frazier*, 344 N.C. at 616-17, 476 S.E.2d at 300-01; *see also State v. Guevara*, 349 N.C. 243, 258, 506 S.E.2d 711, 721 (1998) (the prosecutor's argument in sentencing proceeding of a capital case describing the actions of the defendant as "despicable" did not deny the defendant fundamental fairness), *cert. denied*, 526 U.S. 1133, 143 L. Ed. 2d 1013 (1999).

Here, unlike *Frazier*, defendant did not object to the characterization, so defendant must meet a more demanding standard to establish error. Moreover, the prosecutor's reference to defendant as "a despicable human being" was a passing comment made in a lengthy argument. *Barden*, 356 N.C. at 365, 572 S.E.2d at 139. Although we specifically disapprove of such *ad hominem* attacks on a witness or litigant, *see State v. Rogers*, 355 N.C. 420, 464, 562 S.E.2d 859, 886 (2002), in light of our holding in *Frazier*, we conclude that the trial court did not err by failing to intervene *ex mero motu*. This assignment of error is overruled.

PRESERVATION ISSUES

Defendant raises several additional issues that he concedes have been decided against him by this Court. Defendant contends that the trial court lacked jurisdiction to try him and enter judgment against him for first-degree murder because the short-form murder indictment alleged the elements of second-degree murder only, making the indictment facially invalid. Defendant also argues that the use of the short-form indictment violated various rights guaranteed to him under the United States and North Carolina Constitutions. However, this Court consistently has held that the short-form indictment is

sufficient to charge a defendant with first-degree murder. *See*, *e.g.*, *State v. Hunt*, 357 N.C. 257, 274-75, 582 S.E.2d 593, 604-05, *cert. denied*, 539 U.S. 985, 156 L. Ed. 2d 702 (2003); *State v. Wallace*, 351 N.C. 481, 508, 528 S.E.2d 326, 343, *cert. denied*, 531 U.S. 1018, 148 L. Ed. 2d 498 (2000). In a related claim, defendant argues that the trial court erred by denying his motion to dismiss on the grounds that the verdicts and judgments entered varied fatally from the indictments. We have held in similar cases that no variance exists between the charges in the indictments and the judgments entered. *State v. Squires*, 357 N.C. 529, 537, 591 S.E.2d 837, 842-43 (2003), *cert. denied*, 541 U.S. 1088, 159 L. Ed. 2d 252 (2004).

Defendant next maintains that the trial court committed plain error by instructing the jury on Issue Three in a manner that allowed the jury to impose a death sentence after finding that the aggravating and mitigating circumstances were of equal weight. This Court has rejected this argument. *State v. King*, 353 N.C. 457, 491, 546 S.E.2d 575, 599 (2001), *cert. denied*, 534 U.S. 1147, 151 L. Ed. 2d 1002 (2002); *State v. Keel*, 337 N.C. 469, 493-94, 447 S.E.2d 748, 761-62 (1994), *cert. denied*, 513 U.S. 1198, 131 L. Ed. 2d 147 (1995). Defendant argues that the failure to allege aggravating circumstances in the short-form indictment is a jurisdictional defect under North Carolina law that precludes the trial court from imposing the death penalty. Our holdings have been contrary to defendant's position. *Squires*, 357 N.C. at 538-39, 591 S.E.2d at 843; *Hunt*, 357 N.C. at 277-78, 582 S.E.2d at 606-07. Similarly, defendant contends that the trial court violated his rights under the Eighth and Fourteenth Amendments to the United States Constitution because the short-form murder indictment did not allege at least one aggravating circumstance necessary to increase the maximum punishment from life without parole to death. We have upheld the constitutionality of this procedure. *See*, *e.g.*, *Hunt*, 357 N.C. at 275-77, 582 S.E.2d at 605-06; *Braxton*, 352 N.C. at 174-75, 531 S.E.2d at 437-38.

In addition, defendant assigns as plain error the trial court's instructions to the jury that defendant had the burden to *satisfy* it of the existence of mitigating circumstances. These instructions have been found proper. *State v. Payne*, 337 N.C. 505, 531-33, 448 S.E.2d 93, 108-09 (1994), *cert. denied*, 514 U.S. 1038, 131 L. Ed. 2d 292 (1995). Defendant further argues that the trial court erred by allowing the jury to refuse to give effect to nonstatutory mitigating evidence if the jury deemed the evidence not to have mitigating value. We have rejected this argument. *Id.* at 533, 448 S.E.2d at 109-10; *State v. Lee*,

335 N.C. 244, 292, 439 S.E.2d 547, 572, *cert. denied*, 513 U.S. 891, 130 L. Ed. 2d 162 (1994). Defendant contends that the trial court committed error when it instructed the jury that in considering Issues Three and Four, the jurors *may*, rather than *must*, consider mitigating circumstances found in Issue Two of the "Issues and Recommendation as to Punishment" form. We have approved this instruction as meeting the requirements of the statute. *Gregory*, 340 N.C. at 417-19, 459 S.E.2d at 668-69; *State v. Skipper*, 337 N.C. 1, 51-52, 446 S.E.2d 252, 280 (1994), *cert. denied*, 513 U.S. 1134, 130 L. Ed. 2d 895 (1995).

Finally, defendant contends that the death penalty is cruel and unusual punishment in violation of the North Carolina and United State Constitutions; that North Carolina's capital sentencing scheme, N.C.G.S. § 15A-2000 (2003), is vague and overbroad; that N.C.G.S. § 15A-2000 permits juries to make excessively subjective sentencing determinations; and that the statute is applied arbitrarily and pursuant to a pattern of discrimination based on the race and sex of defendants and victims and on defendants' poverty. Defendant also states that the District Attorney for the district of trial does not have written guidelines to determine which murder cases shall be tried capitally. Because defendant presents no argument and cites no authority in support of these contentions, they are deemed abandoned. *See* N.C. R. App. P. 28(b)(6). Assuming *arguendo* that defendant's claims were not abandoned, similar arguments have been rejected by this Court as the North Carolina capital sentencing scheme consistently has been held constitutional. *See State v. Powell*, 340 N.C. 674, 695, 459 S.E.2d 219, 230 (1995), *cert. denied*, 516 U.S. 1060, 133 L. Ed. 2d 688 (1996); *State v. Garner*, 340 N.C. 573, 605, 459 S.E.2d 718, 735 (1995), *cert. denied*, 516 U.S. 1129, 133 L. Ed. 2d 872 (1996).

Defendant raises these issues for the purposes of urging this Court to reconsider its prior decisions and preserving his right to argue these issues on federal review. We have considered defendant's arguments on these additional issues and find no compelling reason to depart from our previous holdings.

These assignments of error are overruled.

PROPORTIONALITY REVIEW

[13] We next consider: (1) whether the aggravating circumstance is supported by the record in this case; (2) whether the jury recommended the death sentence under the influence of passion, preju-

dice, or any other arbitrary factor; and (3) whether the death sentence is "excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." N.C.G.S. § 15A-2000(d)(2).

The jury found the aggravating circumstance that defendant committed murder "against a law-enforcement officer . . . while engaged in the performance of his official duties." *Id.* § 15A-2000(e)(8). The evidence discussed earlier in this opinion fully supports the aggravating circumstance. In addition, nothing in the record suggests the death sentence was imposed under the influence of passion, prejudice, or any other arbitrary factor.

Finally, we must determine whether the death sentence was excessive or disproportionate by comparing the present case with other cases in which we have found the death sentence to be disproportionate. *Smith*, 359 N.C. at 223, 607 S.E.2d at 624 (citing *State v. McCollum*, 334 N.C. 208, 240, 433 S.E.2d 144, 162 (1993), *cert. denied*, 512 U.S. 1254, 129 L. Ed. 2d 895 (1994)). This Court has found the death sentence disproportionate on eight occasions. *State v. Kemmerlin*, 356 N.C. 446, 573 S.E.2d 870 (2002); *State v. Benson*, 323 N.C. 318, 372 S.E.2d 517 (1988); *State v. Stokes*, 319 N.C. 1, 352 S.E.2d 653 (1987); *State v. Rogers*, 316 N.C. 203, 341 S.E.2d 713 (1986), *overruled in part on other grounds by State v. Gaines*, 345 N.C. 647, 483 S.E.2d 396, *cert. denied*, 522 U.S. 900, 139 L. Ed. 2d 177 (1997), *and by State v. Vandiver*, 321 N.C. 570, 364 S.E.2d 373 (1988); *State v. Young*, 312 N.C. 669, 325 S.E.2d 181 (1985); *State v. Hill*, 311 N.C. 465, 319 S.E.2d 163 (1984); *State v. Bondurant*, 309 N.C. 674, 309 S.E.2d 170 (1983); *State v. Jackson*, 309 N.C. 26, 305 S.E.2d 703 (1983). We conclude that defendant's case is not substantially similar to any of these.

Several factors support the determination that the imposition of the death penalty in the present case was neither excessive nor disproportionate. The evidence indicated that defendant had stated shortly before the killing that he wanted to shoot a police officer, that defendant shot Officer Turner, that Officer Turner's weapon was secured in its holster when he was shot, and that defendant fled the scene without offering assistance to the fallen officer. The jury found that the murder was committed against a law enforcement officer while he was engaged in the performance of his official duties, N.C.G.S. § 15A-2000(e)(8), and we have observed that this aggravating circumstance reflects "the General Assembly's recognition that 'the collective conscience requires the most severe penalty for those

who flout our system of law enforcement.' " *Golphin*, 352 N.C. at 487, 533 S.E.2d at 247 (quoting *Brown*, 320 N.C. at 230, 358 S.E.2d at 33).

> The murder of a law enforcement officer *engaged in the performance of his official duties* differs in kind and not merely in degree from other murders. When in the performance of his duties, a law enforcement officer is the representative of the public and a symbol of the rule of law. The murder of a law enforcement officer engaged in the performance of his duties in the truest sense strikes a blow at the entire public—the body politic—and is a direct attack upon the rule of law which must prevail if our society as we know it is to survive.

Hill, 311 N.C. at 488, 319 S.E.2d at 177 (Mitchell, J., concurring in part and dissenting in part), *quoted with approval in Guevara*, 349 N.C. at 261, 506 S.E.2d at 723. In addition, the jury found defendant guilty of first-degree murder on the basis of malice, premeditation and deliberation, and we have stated repeatedly that the "finding of premeditation and deliberation indicates a more cold-blooded and calculated crime." *State v. Artis*, 325 N.C. 278, 341, 384 S.E.2d 470, 506 (1989), *judgment vacated on other grounds*, 494 U.S. 1023, 108 L. Ed. 2d 604 (1990).

Our proportionality review also requires that we compare the case *sub judice* with the cases in which this Court has found the death penalty to be proportionate. *State v. Williams*, 308 N.C. 47, 79, 301 S.E.2d 335, 355, *cert. denied*, 464 U.S. 865, 78 L. Ed. 2d 177 (1983). Such review entails an examination of all cases in the pool of "similar cases," but "we will not undertake to discuss or cite all of those cases each time we carry out that duty." *McCollum*, 334 N.C. at 244, 433 S.E.2d at 164; *accord Golphin*, 352 N.C. at 489, 533 S.E.2d at 248. After carefully considering the circumstances surrounding the murder and the fact that the victim was a law enforcement officer engaged in the performance of his official duties, we believe this case is more similar to cases in which we have found the sentence of death proportionate.

Based upon the foregoing, we conclude that defendant received a fair trial and capital sentencing proceeding, free from prejudicial error.

NO ERROR.

Justices BRADY and NEWBY did not participate in the consideration or decision of this case.

STATE OF NORTH CAROLINA v. JATHIYAH A. AL-BAYYINAH

No. 550A03

(Filed 19 August 2005)

1. Appeal and Error— preservation of issues—constitutional question—not raised at trial

A constitutional issue not raised at trial was not preserved for appellate review.

2. Confessions and Incriminating Statements— statements by defendant just after arrest—admissible

The trial court did not abuse its discretion in a prosecution for first-degree murder and attempted robbery by admitting statements made by defendant to an officer just after his arrest that he couldn't understand being released from prison without a job and being expected to make a living, that he committed the robbery with an accomplice, that he wanted to go back to the correctional facility, and that he didn't belong in society. These statements were probative of defendant's motive and intent.

3. Criminal Law— limiting instruction—objected to by defendant—not required—admissions of party opponent

A limiting instruction was not required in a prosecution for first-degree murder and attempted armed robbery where the court admitted incriminating statements made by defendant shortly after his arrest. Defendant's counsel objected to such a proposed instruction during the charge conference, defendant did not argue on appeal that his representation was insufficient, and no instruction was required in any case because the statements were properly admitted as admissions of a party opponent.

4. Evidence— impeachment—prior convictions—not applicable

The trial court did not err in a prosecution for first-degree murder and attempted armed robbery by deciding that N.C.G.S. § 8C-1, Rule 609 (the use of prior convictions to impeach a testifying witness) was inapplicable to defendant's statements because defendant did not testify and the statement was not used to impeach him.

5. Confessions and Incriminating Statements— *Miranda* warnings—public safety exception

The trial court did not err in a prosecution for first-degree murder and attempted armed robbery by admitting a statement made without *Miranda* warnings where defendant was pursued into a wooded thicket by an unarmed officer with a tracking dog, the officer asked defendant where the knife was, and defendant said that he did not have a knife. One of the *Miranda* exceptions is for public safety. Under the circumstances in this case, the question was necessary to secure the officer's safety.

6. Constitutional Law— effective assistance of counsel— record inadequate to determine claim

Defendant's claim of ineffective assistance of counsel under the Sixth Amendment based on his counsel's failure to present available exculpatory and impeaching evidence could not be decided on the record before the Supreme Court and was dismissed without prejudice to defendant's right to raise the claim in a post-conviction motion for appropriate relief.

7. Appeal and Error— preservation of issues—prohibited arguments

Defendant did not preserve for appellate review the court's sustaining of an objection to his argument on residual doubt. The State had made a motion *in limine* to prohibit certain arguments, including residual doubt, defense counsel agreed that such arguments were impermissible and that he did not intend to make that argument, and the court had granted the motion. Having violated the trial court's order restricting certain statements and arguments at trial, defendant cannot now use that violation to bring the issue on appeal.

8. Constitutional Law— effective assistance of counsel— statements and arguments

Defendant did not receive ineffective assistance of counsel in a capital sentencing proceeding where he argued that his counsel conceded prior crimes without his consent, made inappropriate statements, and did not adequately test the State's case. Defense counsel made the tactical decision to try to lessen the impact of defendant's prior convictions and gain credibility by discussing the convictions openly; he attempted to have the jury understand his role as advocate; and he attempted to appeal to the jury's empathy for a living being.

9. Constitutional Law— effective assistance of counsel—not requesting mitigating circumstance

Defendant did not receive ineffective assistance of counsel in a capital sentencing hearing where defense counsel told the jury that defendant did not request submission of the mitigating circumstance of being an accomplice to the crime. The jury had already found defendant guilty and counsel wished to retain credibility with the jury, which found several other mitigating factors.

10. Constitutional Law— effective assistance of counsel—testing of prosecution's case

Defense counsel engaged in sufficient adversarial testing of the prosecution's case that defendant's Sixth Amendment right to counsel was not violated.

11. Sentencing— death—proportionate

A sentence of death was not disproportionate where defendant had a history of violent crime, committed this murder during an attempted armed robbery, and was convicted based on premeditation and deliberation and felony murder.

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of death entered by Judge Jerry Cash Martin on 13 June 2003 in Superior Court, Davie County, upon a jury verdict finding defendant guilty of first-degree murder. Heard in the Supreme Court 19 April 2005.

Roy Cooper, Attorney General, by Joan M. Cunningham and Amy C. Kunstling, Assistant Attorneys General, for the State.

Staples S. Hughes, Appellate Defender, by Janet Moore, Assistant Appellate Defender, for defendant-appellant.

PARKER, Justice.

Defendant was indicted on 26 May 1998 for the murder and attempted robbery with a deadly weapon of Simon Wilford Brown, Jr. Defendant was first tried capitally at the 1 November 1999 Criminal Session of Davie County Superior Court. The jury found defendant guilty of both charges, basing first-degree murder on the theory of felony murder. Following a capital sentencing proceeding, the jury recommended that defendant be sentenced to death. The trial court entered judgment accordingly. On appeal this Court granted defendant a new trial on the basis that evidence of other crimes allegedly

committed by defendant was improperly admitted at trial. *State v. al-Bayyinah*, 356 N.C. 150, 567 S.E.2d 120 (2002).

Defendant was retried capitally for first-degree murder at the 12 May 2003 Special Criminal Session of Davie County Superior Court. The jury found defendant guilty of first-degree murder on the bases of premeditation and deliberation and felony murder. At the capital sentencing proceeding, the jury recommended that defendant be sentenced to death, and judgment was entered accordingly.

The State's evidence tended to show that the victim, seventy-one-year-old Simon Wilford Brown, Jr., owned a wholesale grocery called S.W. Brown & Son in Mocksville, North Carolina. His wife Rebecca, son Charles, and daughter-in-law Nanette were employees at the business. On 6 March 1998, Charles arrived at the business around 7:30 a.m. The door remained locked after Charles used his key and went inside. Charles attended to orders and used the bathroom before he heard his father enter the store. Charles then heard a loud noise, which sounded like "the office door slamming up against the file cabinet," and his father calling out for him. Charles ran to the office and saw his father between the office and the front door. Charles remembered that "he said the man stabbed me, and he was pointing towards the door." After telling his father to call 911, Charles ran outside to his truck parked at the side of the building. He retrieved his pistol, drove his truck to the loading dock entrance, and ran along the side of the building. Charles heard a siren and ran back inside to his father.

Mr. Brown called 911 at approximately 8:15 a.m. He reported that "he had been a victim of a robbery, and he had been injured in the course of the robbery." He reported that the robber was a black man wearing dark clothing who had come up behind him. He also stated that he thought the man had been in the store the previous day and that he had cashed a check for the man. He further reported that he had blood on his sweater. The call lasted just under three minutes.

When Charles came back inside, he saw his father standing in the office and talking on the telephone with 911 dispatch. Charles saw blood immediately below his father's neck, and he heard his father tell the 911 operator that "he had [seen] the man the previous day and cashed his check." Charles asked his father to sit down, hung up the phone, and attended to the wound. Charles recounted, "He kept repeating that he had seen the man the day before and cashed his check." When the EMTs arrived, Mr. Brown became semi-conscious and non-verbal.

Mr. Brown was taken by ambulance to the emergency room and then airlifted to another hospital. Mr. Brown never regained consciousness, and he died on 15 March 1998 after being removed from life support. His death was caused by a stab wound to the right side of his chest, approximately one-half inch long and almost three-eighths of an inch wide. The wound was about two inches deep and caused a pneumothorax around Mr. Brown's right lung, eventually causing heart, kidney, and liver failure, and finally pneumonia.

At the scene of the crime, Mr. Brown's office was in disarray. Money and papers were scattered on the floor; a desk drawer was pulled open; and a bulletin board had fallen to the floor. Mr. Brown's wallet was found in the office.

Law enforcement officers responding to the call began searching the area around the store for suspects matching the description given by the victim of a black man wearing dark clothing. Deputy Sheriff Joey Reynolds spotted defendant, who was wearing dark clothing, and radioed in that he had a possible suspect. When Deputy Reynolds made eye contact with defendant, defendant began to run; Deputy Reynolds left his car to chase defendant. Defendant entered a thicket of dense woods. Officers secured the perimeter of the thicket, and defendant was apprehended after about an hour of searching. Lieutenant James Phipps of the Sheriff's Department found a knife under some leaves near where defendant was found. The knife blade was later determined to be consistent with the wound suffered by the victim.

Two witnesses reported seeing a man, wearing dark clothing, near the grocery business at around 7:30 a.m. One of the witnesses identified the man as defendant. The other witness, who could not identify the man, also reported seeing him running from the building a short time later, just before Charles ran from the building to his truck.

Rebecca Brown and Nanette Brown both remembered seeing defendant in the store on previous occasions, and they especially remembered his unusual name. Defendant would cash his checks there and purchase cigarettes. Nanette testified that on the morning of 5 March 1998, the day before the stabbing, defendant came into the store to get some matches or cigarettes. He asked Nanette if she was alone, to which she replied in the negative, even though Mr. Brown was out of the building at the time. Defendant left after hearing a noise outside.

Records at the store indicated that two payroll checks were cashed the day before the stabbing, one for defendant and the other for Earnest Cain. Evidence submitted by the State revealed that Earnest Cain was a regular customer at the store; that Mr. Brown knew him well enough to call him by his first name; and that Mr. Cain was clocked in at work during the time of the stabbing. Neither Nanette nor Rebecca remembered cashing defendant's check. Defendant contended at trial that an acquaintance of his cashed his check and, thus, was the person who stabbed Mr. Brown and whom Mr. Brown remembered seeing the previous day.

GUILT-INNOCENCE PHASE

Defendant first contends that the trial court erred by denying his motion to suppress statements he made to a law enforcement officer after his arrest. Sergeant Harry Rawlings testified that after defendant was arrested and placed in a patrol car for transport to the police station, defendant stated that he "couldn't understand being released . . . from prison, how they could send him out here with no job and expect him to make a living." Defendant also stated that he did the robbery with an accomplice and that "he wanted to go back to the correctional facility. He didn't belong out here," meaning "in society."

Defendant first moved to suppress his post-arrest statements before his first trial. After a hearing his motion was denied. Before the second trial, defendant submitted an amended motion to suppress based on Rules of Evidence 404(b) and 609. Defendant's amended motion was also denied. The trial court determined that defendant's statements were relevant under Rule 401 and admissible as admissions of a party-opponent under Rule 801(d)(A). The trial court addressed defendant's 404(b) argument and decided that the statements were being offered to show motive and intent, not defendant's proclivity to commit similar bad acts. Additionally, the trial court ruled that Rule 609 was inapplicable to the statements and that under Rule 403, the probative value of the statements outweighed any unfair prejudice to defendant.

Defendant further argues that the trial court erred in overruling defendant's objections and by failing to provide limiting instructions with regard to "other crimes" evidence. Defendant argues that inadmissible other crimes evidence was presented to the jury and created impressions about defendant that effectively stripped him of his presumption of innocence. Finally, defendant contends that his constitu-

tional rights were violated in that he was denied his due process right to a fair trial and that he was prevented from arguing that he was free from culpability for the prior bad acts. Thus, defendant contends, the statements should not have been admitted into evidence at his second trial. We disagree.

[1] We first note that defendant's constitutional argument has not been properly preserved for appellate review as he did not raise this issue at trial. *State v. Call*, 349 N.C. 382, 410, 508 S.E.2d 496, 514 (1998); *see* N.C. R. App. P. 10(b)(1).

[2] Regarding defendant's evidentiary argument, Rule 404(b) provides in pertinent part:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident.

N.C.G.S. § 8C-1, Rule 404(b) (2003).

This Rule provides a "general rule of *inclusion* of relevant evidence of other crimes, wrongs or acts by a defendant, subject to but *one exception* requiring its exclusion if its *only* probative value is to show that the defendant has the propensity or disposition to commit an offense of the nature of the crime charged." *State v. Coffey*, 326 N.C. 268, 278-79, 389 S.E.2d 48, 54 (1990).

Relevant evidence, that evidence "having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence," is generally admissible. N.C.G.S. § 8C-1, Rules 401, 402 (2003). Relevant evidence may, however, be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury . . . or [by] needless presentation of cumulative evidence." *Id.*, Rule 403 (2003). Whether to exclude evidence is a decision within the trial court's discretion. *Coffey*, 326 N.C. at 281, 389 S.E.2d at 56.

Defendant argues that motive to commit robbery was shown by other evidence, that the statements at issue had no logical connection to the crime for which he was tried in the instant case, and that the mention of defendant's having been in prison was unduly prejudicial.

Defendant's statement that he was expected to make a living outside prison clearly shows a motive for the robbery of the grocery business. Defendant implied that he was unable to work or make a living and that he had no money. Also, his statement that he wanted to go back to prison demonstrates a possible motive to commit a crime in order to accomplish that objective. These statements were made by defendant himself shortly after the crime and were, thus, distinguishable from other evidence. As such the statements were substantially probative of defendant's motive and intent. Furthermore, the statements do not mention that defendant had committed felonies or other crimes, just that he "wanted to go back to" prison. Considering these factors, the trial court did not abuse its discretion in ruling that the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice. *See State v. Lambert*, 341 N.C. 36, 50, 460 S.E.2d 123, 131 (1995) (stating that "the fact that [evidence] is also very prejudicial does not make it unfairly so").

[3] Finally, defendant argues that the trial judge should have given a limiting instruction that the statements were to be considered only to show defendant's motive or intent and not as substantive evidence. However, during the charge conference defendant's trial counsel objected to such a proposed instruction; and on appeal defendant has not alleged that his counsel was deficient for doing so. Moreover, no limiting instruction was required, as defendant's statements were properly admitted as admissions of a party opponent under Rule 801(d)(A). Therefore, defendant's argument has no merit.

Rule 801(d)(A) provides that an admission by a party-opponent is admissible against the party. N.C.G.S. § 8C-1, Rule 801(d)(A) (2003). " 'An admission is a statement of pertinent facts which, in light of other evidence, is incriminating.' " *Lambert*, 341 N.C. at 50, 460 S.E.2d at 131 (quoting *State v. Trexler*, 316 N.C. 528, 531, 342 S.E.2d 878, 879-80 (1986)). In this case the challenged statements made by defendant, when considered in light of other evidence, constitute an admission by a party-opponent and were thus admissible against him.

[4] The trial court also did not err in deciding that Rule 609 was inapplicable. The rule addresses the use of evidence of prior convictions to impeach a testifying witness. N.C.G.S. § 8C-1, Rule 609 (2003). In this case defendant did not testify; thus, his statement was not used to impeach him. Therefore, this argument is without merit. These assignments of error are overruled.

[5] Next, defendant contends that the trial court erred by refusing to allow defendant's motion to suppress statements he made to Officer Dean Myers in the wooded thicket on 6 March 1998. Defendant made his motion before his first trial; the motion was denied on the basis that the statement fell within the public safety exception to *Miranda v. Arizona*, 384 U.S. 436, 16 L. Ed. 2d 694 (1966). Before the second trial, the trial court left the ruling undisturbed. Defendant also argues that the trial court erred by overruling his objection to the testimony during his second trial. On 6 March 1998 Officer Myers was the first person to find defendant in the woods during the manhunt. At the time Officer Myers was using his tracking dog, an AKC-registered bloodhound, which was on a leash. The officer asked defendant where the knife was, and defendant responded that he did not have a knife. After defendant was arrested, a knife was found near the site along with some other small items. Defendant argues that his statement to Officer Myers that he did not have a knife was made before he received warnings required by *Miranda* and that the trial court erred in determining that the statements fell within the public safety exception to *Miranda*.

Miranda warnings protect a defendant from coercive custodial interrogation by informing the defendant of his or her rights. *State v. Hyatt*, 355 N.C. 642, 653-54, 566 S.E.2d 61, 69 (2002), *cert. denied*, 537 U.S. 1133, 154 L. Ed. 2d 823 (2003). However, in *New York v. Quarles*, the United States Supreme Court recognized certain exceptions to *Miranda* warnings. 467 U.S. 649, 81 L. Ed. 2d 550 (1984). One of those exceptions is the public safety exception, which provides that "questions asked by law enforcement officers to secure their own safety or the safety of the public and limited to information necessary for that purpose are excepted from the *Miranda* rule." *State v. Brooks*, 337 N.C. 132, 144, 446 S.E.2d 579, 587 (1994).

Defendant argues that the facts of the instant case differ substantially from the facts of *Quarles*, in which the United States Supreme Court found that a defendant's statements made to a police officer in a supermarket about the location of a gun used by the defendant to commit a crime just minutes before could be admitted as evidence, notwithstanding that *Miranda* warnings had not been given at the time. *Quarles*, 467 U.S. at 655-60, 81 L. Ed. 2d at 557-59. Defendant notes that in the instant case, police took forty-five minutes to track him within a thick wooded area. The perimeter of the area was secured by police officers as other officers took a tracking dog into the woods to search for defendant. Defendant argues that he was sur-

rounded, had no chance of getting away, and was lying flat on the ground. Further, the weapon being searched for was a knife, not a gun, and no members of the public were in the area as had been the case in *Quarles*. Defendant contends that he was helpless and was being threatened by a vicious dog and that Officer Myers' safety was guaranteed by the close proximity of other armed law enforcement officers. However, defendant ignores other evidence that supports the trial court's ruling.

Officer Myers testified that he was on the tracking team and was the officer handling the tracking dog on the morning of 6 March 1998. Officer Myers began the search with his dog and two other officers; however, by the time he reached defendant, the other officers were about fifteen yards behind, caught in briars. Officer Myers was not armed and, thus, kept a close eye on defendant. Knowing that the crime was a stabbing, Officer Myers asked defendant where the knife was. Detective Robert Trotter also testified about the events that morning. He stated that he was the second officer to arrive at defendant's location and that he pulled his gun and ordered defendant not to move because he knew Officer Myers was unarmed and that a weapon had been used in the robbery.

Officer Myers was alone and unarmed when he discovered defendant. He knew the crime was a stabbing and that defendant could have a knife in his possession. His question to defendant was limited to determining the location of the knife. Under the circumstances this question was necessary to secure Officer Myers' own safety, a purpose that falls within the public safety exception to *Miranda*. Therefore, the trial court properly concluded that the public safety exception applied to defendant's statement. This assignment of error is overruled.

[6] In his next assignment of error, defendant contends that his trial counsel failed to provide effective assistance as required by the Sixth Amendment. Defendant argues that his counsel failed to present available exculpatory and impeaching evidence. Defendant notes numerous instances in the second trial where witnesses' testimony contradicted or differed from that given by the same witnesses in defendant's first trial. Defendant further notes that evidence was not presented as to certain facts or statements that were introduced in his first trial. Defendant argues that such evidence would have shed light on the identity of the victim's attacker and would have undermined the credibility of the State's witnesses and that his counsel's

performance was deficient for failing to introduce the exculpatory and impeaching evidence.

"When a defendant attacks his conviction on the basis that counsel was ineffective, he must show that his counsel's conduct fell below an objective standard of reasonableness." *State v. Braswell*, 312 N.C. 553, 561-62, 324 S.E.2d 241, 248 (1985) (citing *Strickland v. Washington*, 466 U.S. 668, 687-88, 80 L. Ed. 2d 674, 693 (1984)). In order to do so, a defendant must satisfy a two-part test:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Strickland v. Washington, 466 U.S. at 687, 80 L. Ed. 2d at 693. Both prongs of this test must be satisfied in order to establish ineffective assistance of counsel. *Id.* To demonstrate prejudice, a "defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694, 80 L. Ed. 2d at 698.

Defendant claims that his counsel was ineffective for failure to impeach the State's witness, Nanette Brown, with her testimony from defendant's first trial. Defendant claims that Ms. Brown made numerous contradictory statements that defense counsel should have brought to the jury's attention by confronting the witness with her prior testimony. For example, defendant argues that Ms. Brown's testimony in the first trial actually identified Brian Wilson, not defendant, as the person who cashed defendant's check the day before the stabbing based on the different types of necklaces the two men wore. This evidence was not presented in the second trial. Defendant also argues that evidence that Ms. Brown mistakenly identified black males from mug shot books should have been introduced at the second trial. Ms. Brown selected a picture of someone who she believed was in the store the day before the stabbing; however, that man was never in the store and had an alibi. Defendant contends that this information would have cast doubt on the ability of Ms. Brown and other eyewitnesses to correctly recall details surrounding the inci-

dents that occurred on the day before the stabbing. Defendant argues that counsel's failure to present the impeaching evidence constitutes ineffective assistance and that absent this mistake, the result of his trial would have been different.

This Court has stated that "[c]ounsel is given wide latitude in matters of strategy, and the burden to show that counsel's performance fell short of the required standard is a heavy one for defendant to bear." *State v. Fletcher*, 354 N.C. 455, 482, 555 S.E.2d 534, 551 (2001), *cert. denied*, 537 U.S. 846, 154 L. Ed. 2d 73 (2002); *see also State v. Prevatte*, 356 N.C. 178, 235-36, 570 S.E.2d 440, 471-72 (2002), *cert. denied*, 538 U.S. 986, 155 L. Ed. 2d 681 (2003). Moreover, this Court indulges a strong presumption that trial counsel's representation is within the boundaries of acceptable professional conduct. *State v. Fisher*, 318 N.C. 512, 532, 350 S.E.2d 334, 346 (1986). As the United States Supreme Court has stated:

> A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance . . . .

Strickland v. Washington, 466 U.S. at 689, 80 L. Ed. 2d at 694.

As to whether an ineffective assistance of counsel claim can be resolved on direct appeal, this Court has stated: "[Ineffective assistance of counsel] claims brought on direct review will be decided on the merits when the cold record reveals that no further investigation is required, i.e., claims that may be developed and argued without such ancillary procedures as the appointment of investigators or an evidentiary hearing." *State v. Fair*, 354 N.C. 131, 166, 557 S.E.2d 500, 524 (2001), *cert. denied*, 535 U.S. 1114, 153 L. Ed. 2d 162 (2002) (citations omitted). Therefore, on direct appeal we must determine if these ineffective assistance of counsel claims have been prematurely brought. If so, we must "dismiss those claims without prejudice to the defendant's right to reassert them during a subsequent [motion for appropriate relief] proceeding." *Id.* at 167, 557 S.E.2d at 525.

After reviewing the record, we conclude, as the State argues, that this claim of ineffective assistance cannot properly be decided on the

merits based on the record before us. Trial counsel's strategy and the reasons therefor are not readily apparent from the record, and more information must be developed to determine if defendant's claim satisfies the *Strickland* test. Therefore, this issue is dismissed without prejudice to defendant's right to raise this claim in a post-conviction motion for appropriate relief.

SENTENCING PROCEEDING

[7] Defendant next argues that the trial court erred by sustaining the State's objection to defendant's "residual doubt" argument during his closing argument in the sentencing proceeding. Defense counsel argued:

> And I recognize the awful job of deciding which punishment to inflict falls to you; and I would point out to you in the past when we killed people by firing squad, there was one gun that had blanks in it. So that if it were learned later that there had been some mistake made, that the wrong person had been—

The court then sustained an objection by the prosecutor. Before trial the State filed a motion *in limine* to prevent certain arguments by the defense, including "residual doubt" arguments. At that time defense counsel agreed that residual doubt arguments were impermissible and stated that defense counsel did not intend to make a residual doubt argument. The trial court granted the State's motion. Defendant now argues that since he attempted to make a residual doubt argument in closing during the sentencing proceeding and that since the State's objection was sustained, defendant has preserved this issue for appellate review. We disagree.

Having violated the trial court's order restricting certain statements and arguments at trial, defendant cannot now use this violation to his benefit to bring the residual doubt issue before this Court. Accordingly, this assignment of error is overruled.

[8] Next, defendant contends that his counsel provided ineffective assistance during the sentencing proceeding. Defendant argues that his counsel conceded prior crimes without defendant's consent and made inappropriate statements that neither constituted effective assistance nor adequately tested the State's case.

Defendant first argues that counsel improperly conceded that defendant committed three prior violent crimes. The State submitted four aggravating factors to the jury, three of which were prior

felonies submitted under N.C.G.S. § 15A-2000(e)(3). Defendant admits he gave counsel consent to concede that the State had the necessary documents to show that defendant had been convicted of three prior crimes, but says he never gave permission for his attorneys to admit his guilt of those crimes. In particular, defendant points to this statement by his counsel:

> Those are terrible, terrible acts that he committed. He was punished for them. But that's not enough. That's not enough, and maybe it isn't enough. And that's okay, because the only two options you have is life in prison without parole or the death penalty. So one way or the other, you're going to get to punish him again for all of those things.
>
> The State has their aggravators, and there's no doubt about that.

Counsel further argued, "You know he's committed seriously violent crimes, and you know he spent much of his adult life in prison, and we're not contesting any of that." The trial judge stopped to ask defendant if he approved of trial counsel's admitting that the aggravators were proven beyond a reasonable doubt. Defendant told the court that he did not admit to anything, that he was not remorseful, that he had pleaded no contest to the crimes rather than pleading guilty, and that he continued to maintain his innocence. Defendant acknowledged, "I mean it's on the record, yeah, that they got—what they call a conviction." The following exchange then took place:

> THE COURT: If I understand what you're indicating then, just let me see. You're agreeing or of the mind that your attorney may argue and admit that the convictions are there, but you do not admit the acts underlying—
>
> THE DEFENDANT: Right.
>
> THE COURT: —those convictions. Now, are you also indicating that you don't want your attorney to indicate they have been proven beyond a reasonable doubt? That is, conviction or can they—
>
> THE DEFENDANT: They're welcome—I consented to them, because like I say, I told you the other day fighting against a losing hand.
>
> THE COURT: All right. You don't want your attorney to admit—

THE DEFENDANT: Not—

THE COURT: —conviction's been proven or you don't want your attorney to admit that they've been established beyond a reasonable doubt?

THE DEFENDANT: Not on my behalf. I mean maybe the State feel they have been established beyond a reasonable doubt, but not by me. It's nothing. Never proven anything. That's my main concern. I'm not admitting to anything. Maintain my innocence until I die.

Soon thereafter, defendant conceded that counsel could admit to the convictions themselves but not to the underlying acts, except for the shooting of Georgia Matthews Turner, for which defendant was convicted and the conviction for which served as one of the felonies for the aggravator at issue here. Trial counsel explained that she assumed she was only admitting to the aggravators, not to the facts underlying them. When arguments resumed, however, counsel argued, "You can look at the convictions and conclude that he's done bad acts from those convictions."

Defendant also argues that counsel was deficient for arguing to the jury that it was counsel's "job" to prove that defendant's life had value and by implying that it was hard to come up with a reason to spare defendant's life by saying, "hours went by, and I had the yellow pad, and I had the pen, and there wasn't anything down there." Defendant also claims that the following statement was improper: "And if you vote to kill him, you vote to kill him because you want to and not because you have to." Defendant argues that these statements gave strength to the State's presentation of aggravating factors by acknowledging that defendant is a bad person and by appealing to jurors' subjective passions in asking for their mercy.

In addition, defendant claims counsel also improperly compared defendant to a subhuman life form by arguing:

> And you may say [to me], aren't you ashamed . . . . Aren't you embarrassed to be asking for the life, to be pleading to save the life of this terrible person who has caused pain and suffering and God knows there has been pain and suffering, and we do not deny that. . . .
>
> [W]hen we're driving down the road, if we see an animal dart out onto the pavement, we'll swerve to miss it. Because we value life,

> and we value it in the lowest life forms we have. And I'm not going to apologize, and I'm not going to be ashamed or embarrassed about any efforts I might make to save another human being's life.

Defendant contends that comparing a defendant to an animal is reversible error when done by the State and that defense lawyers should be held to the same standard.

Finally, defendant points to his counsel's statement to the jury that the defense had not asked to submit the "minor participant" statutory mitigating circumstance pursuant to N.C.G.S. § 15A-2000(f)(4). Counsel told the jury to make a note of the fact that the mitigating circumstance was submitted "only because it's required by law." Defendant notes that no juror found this mitigating circumstance to exist.

Defendant cites to *United States v. Cronic*, 466 U.S. 648, 80 L. Ed. 2d 657 (1984), in arguing that his counsel's performance was deficient for switching theories of the case between the guilt phase and the sentencing proceeding. Defendant contends that defense counsel provided ineffective assistance by abandoning the guilt-phase denial of culpability and by embracing a plea for mercy in the sentencing proceeding. Defendant appears to contend that by doing so, defense counsel failed to properly test the prosecution's case.

The United States Supreme Court stated in *Cronic*, "The right to the effective assistance of counsel is thus the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing. When a true adversarial criminal trial has been conducted—even if defense counsel may have made demonstrable errors—the kind of testing envisioned by the Sixth Amendment has occurred." 466 U.S. at 656, 80 L. Ed. 2d at 666 (footnote omitted). Moreover, as stated above, this Court gives counsel "wide latitude in matters of strategy," *Fletcher*, 354 N.C. at 482, 555 S.E.2d at 551, and we presume that trial counsel's representation is within the boundaries of acceptable professional conduct. *Fisher*, 318 N.C. at 532, 350 S.E.2d at 346.

In this case, after reviewing trial counsel's arguments in context and as a whole, we conclude that: (i) applying the *Fair* standard stated above, this Court can resolve defendant's claims on the record before us on direct appeal; and (ii) defendant has not satisfied the *Strickland* test by his failure to show that trial counsel's per-

formance was deficient or that it prejudiced defendant such that he was deprived of a fair trial whose result was reliable. *Strickland v. Washington*, 466 U.S. at 687, 80 L. Ed. 2d at 693. Defendant has taken counsel's comments out of context and misconstrued their meaning in order to claim ineffective assistance.

Although defense counsel made statements against defendant's wishes that appear to concede that defendant committed the crimes for which he was previously convicted, defendant has failed to show that such arguments prejudiced his defense. Defense counsel made the tactical decision to try to lessen the negative impact of those convictions and to gain credibility with the jury by discussing the convictions openly. As defendant himself acknowledged, the State had the necessary proof of these convictions to support the aggravating circumstances; thus, no prejudice could result from admitting that the aggravators existed. The United States Supreme Court has found that whether or not a defendant expressly consented to counsel's argument was not dispositive in finding ineffective assistance. *Florida v. Nixon*, ––– U.S. –––, –––, 160 L. Ed. 2d 565, 581 (2004). Moreover, this Court has held that the rule in *State v. Harbison*, 315 N.C. 175, 180, 337 S.E.2d 504, 507-08 (1985), *cert. denied*, 476 U.S. 1123, 90 L. Ed. 2d 672 (1986), precluding defense counsel from admitting a defendant's guilt to the jury without the defendant's consent does not apply to sentencing proceedings. *State v. Walls*, 342 N.C. 1, 57, 463 S.E.2d 738, 768 (1995), *cert. denied*, 517 U.S. 1197, 134 L. Ed. 2d 794 (1996). Here, while defendant did not want his counsel to admit that he committed the underlying acts, he did consent to the overall strategy of admitting the convictions themselves. Although counsel may have inadvertently suggested that defendant committed the underlying acts, that the convictions existed was established, and without any evidence to the contrary, the jury undoubtedly would have found the aggravators to exist regardless of the content of counsel's argument.

Defendant's complaint regarding counsel's references to his legal representation of defendant as a "job," and to his difficulty in finding a reason to spare defendant's life, likewise has no merit. Counsel did not suggest that he was reluctantly representing defendant as in *King v. Strickland*, 714 F.2d 1481, 1491 (11th Cir. 1983), *aff'd on remand*, 748 F.2d 1462 (11th Cir. 1984), cited by defendant. Counsel was referring to his duty as defendant's lawyer. Nor was counsel, as defendant suggests, telling the jury that he could not come up with a reason to give defendant life rather than death. Rather, counsel was acknowl-

edging the inherent difficulty of anticipating how a jury would weigh mitigators against aggravators. Counsel attempted to convey to the jury that, although preparing for the sentencing hearing was difficult, he wanted to do the best he could for defendant after getting to know him as a client and that he had given much thought to his closing argument. This strategy was not unreasonable considering that the jury had already found defendant guilty of first-degree murder; counsel was merely attempting to have the jury understand his role as defendant's advocate and to view the case from his perspective.

Defense counsel's plea to the jury, "And if you vote to kill him, you vote to kill him because you want to and not because you have to," also does not fall below the standard of a reasonable trial strategy. Counsel first noted the prosecution's argument that the only way to protect society from defendant was to put defendant to death. Counsel reminded the jury that defendant's expert had testified that defendant was unlikely to pose a threat of future dangerousness in prison and urged the jury that it did not have to sentence defendant to death to protect society. Counsel then argued that life imprisonment is just as effective and that life imprisonment is sufficient punishment for murder. Counsel did not, as defendant argues, "invite jurors to kill defendant." Counsel appealed to the jurors' respect for life by showing them a reasonable basis for a life sentence as the alternative to a death sentence. Defense counsel ended her argument by telling the jury, "This is not a time to kill." Viewed in its entirety, this argument did not constitute ineffective assistance of counsel.

Defendant also misconstrues his counsel's statement regarding "lowest life forms." Defendant's argument that counsel compared defendant to a subhuman life form is misplaced. Although defendant cites to *State v. Jones*, 355 N.C. 117, 558 S.E.2d 97 (2002), for support, in that case it was the prosecutor's pejorative characterization of the defendant as "lower than the dirt on a snake's belly" that this Court found to be objectionable and not any statement by the defense counsel. 355 N.C. at 134, 558 S.E.2d at 108. In this case, defense counsel's statement did not sink to the level of name-calling or suggest an improper comparison of defendant to a lower life form, as was the case in *Jones*. Rather, counsel attempted to appeal to the jury's empathy for living beings by reminding them that all life has value. Such an argument on behalf of defendant's life does not constitute ineffective assistance.

[9] Defendant's contention that defense counsel should not have told the jury to disregard the mitigating circumstance regarding an accom-

plice to the crime is also without merit. In the charge conference, defense counsel argued to the trial court that the (f)(4) mitigator, that defendant was an "accomplice in or accessory to the capital felony committed by another person and his participation was relatively minor," should not be submitted to the jury in that the jury had already found defendant guilty of first-degree murder. Since the jury did not believe defendant's version of events that an accomplice or acquaintance committed the crime, defense counsel reasoned that introducing the mitigator might provoke the jury and prejudice defendant. The trial court submitted the mitigator on the basis that sufficient evidence had been presented to support the mitigator. Defense counsel also requested the trial court to give an instruction that defendant did not request the (f)(4) mitigating circumstance, and the trial court so instructed the jury. *See State v. Walker*, 343 N.C. 216, 222-24, 469 S.E.2d 919, 922-23 (directing that the trial court should instruct that defendant did not request the (f)(1) mitigator if given over defendant's objection), *cert. denied*, 519 U.S. 901, 136 L. Ed. 2d 180 (1996). Thus, defense counsel felt the need to apprise the jury that defendant did not request submission of that mitigator as a way of acknowledging the jury's findings in the guilt-innocence phase. Through this strategy defense counsel was endeavoring to retain credibility with the jury. Defendant asserts that by making this concession, counsel abandoned any basis for residual doubt. We have previously addressed defendant's residual doubt argument. We also note that while the jury did not find the (f)(4) mitigator, it did find the catchall mitigator pursuant to N.C.G.S. § 15A-2000(f)(9), as well as twelve of nineteen nonstatutory mitigators submitted. Defendant has failed to show that, but for this concession, a reasonable probability exists that the outcome would have been different. *Strickland v. Washington*, 466 U.S. at 694, 80 L. Ed. 2d at 698.

[10] Upon reaching our conclusion that defendant's claim of ineffective assistance based upon his trial counsel's statements in the sentencing proceeding are without merit, we also reject defendant's claim that *Cronic* analysis applies. In the sentencing proceeding, defense counsel engaged in sufficient adversarial testing of the prosecution's case such that defendant's Sixth Amendment right to counsel was not violated. Defendant's assignment of error is overruled.

PRESERVATION ISSUES

Defendant raises two additional issues that this Court has previously decided contrary to his position: (i) whether North Carolina's

capital sentencing scheme is unconstitutional for being vague, overbroad, and applied in an arbitrary manner; and (ii) whether the death penalty is an inherently cruel and unusual punishment which violates the United States Constitution as well as international law.

Defendant raises these issues to urge this Court to reexamine its prior holdings. We have considered defendant's arguments on these issues and conclude that there is no compelling reason to depart from our prior holdings. These assignments of error are overruled.

PROPORTIONALITY

[11] Finally, this Court has the exclusive statutory duty in capital cases pursuant to N.C.G.S. § 15A-2000(d)(2), to review the record and determine: (i) whether the record supports the jury's findings of any aggravating circumstances upon which the court based its death sentence; (ii) whether the sentence was imposed under the influence of passion, prejudice, or any other arbitrary factor; and (iii) whether the death sentence is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. *State v. McCollum*, 334 N.C. 208, 239, 433 S.E.2d 144, 161 (1993), *cert. denied*, 512 U.S. 1254, 129 L. Ed. 2d 895 (1994).

After a thorough review of the transcript, record on appeal, briefs, and oral arguments of counsel, we conclude that the jury's finding of the four aggravating circumstances submitted was supported by the evidence. We also conclude that nothing in the record suggests that defendant's death sentence was imposed under the influence of passion, prejudice, or any other arbitrary factor.

Finally, we must consider whether the imposition of the death penalty in defendant's case is proportionate to other cases in which the death penalty has been affirmed, considering both the crime and the defendant. *State v. Robinson*, 336 N.C. 78, 132-33, 443 S.E.2d 306, 334 (1994), *cert. denied*, 513 U.S. 1089, 130 L. Ed. 2d 650 (1995). The purpose of proportionality review is "to eliminate the possibility that a person will be sentenced to die by the action of an aberrant jury." *State v. Holden*, 321 N.C. 125, 164-65, 362 S.E.2d 513, 537 (1987), *cert. denied*, 486 U.S. 1061, 100 L. Ed. 2d 935 (1988). Proportionality review also acts "[a]s a check against the capricious or random imposition of the death penalty." *State v. Barfield*, 298 N.C. 306, 354, 259 S.E.2d 510, 544 (1979), *cert. denied*, 448 U.S. 907, 65 L. Ed. 2d 1137 (1980), *overruled in part on other grounds by State v. Johnson*, 317

N.C. 193, 203-04, 344 S.E.2d 775, 782 (1986). Our consideration is limited to those cases that are roughly similar as to the crime and the defendant, but we are not bound to cite every case used for comparison. *State v. Syriani*, 333 N.C. 350, 400, 428 S.E.2d 118, 146, *cert. denied*, 510 U.S. 948, 126 L. Ed. 2d 341 (1993). Whether the death penalty is disproportionate "ultimately rest[s] upon the 'experienced judgments' of the members of this Court." *State v. Green*, 336 N.C. 142, 198, 443 S.E.2d 14, 47 (citing *State v. Williams*, 308 N.C. 47, 81, 301 S.E.2d 335, 356, *cert. denied*, 464 U.S. 865, 78 L. Ed. 2d 177 (1983)), *cert. denied*, 513 U.S. 1046, 130 L. Ed. 2d 547 (1994).

In the case at bar, defendant was convicted of first-degree murder on the bases of premeditation and deliberation, as well as under the felony murder rule. The jury found all four of the aggravating circumstances submitted, three of which related to defendant's having been previously convicted of a felony involving the use or threat of violence to the person, specifically: (i) assault with a deadly weapon inflicting serious injury against Georgia Matthews Turner, N.C.G.S. § 15A-2000(e)(3) (2003); (ii) assault with a deadly weapon with intent to kill inflicting serious injury and armed robbery against James McCorkle, *id.*; (iii) voluntary manslaughter against Talmadge Pass, *id.*; and (iv) the murder was committed while the defendant was engaged in the commission of robbery with a dangerous weapon, *id.* § 15A-2000(e)(5) (2003).

The trial court submitted two statutory mitigating circumstances for the jury's consideration, namely: (i) the murder was committed by another person and defendant was an accomplice whose participation was relatively minor, *id.*, § 15A-2000(f)(4) (2003), and (ii) the catchall that there existed any other circumstance arising from the evidence which the jury deemed to have mitigating value, *id.*, § 15A-2000(f)(9) (2003). The jury did not find the (f)(4) mitigating circumstance to exist. The trial court also submitted nineteen nonstatutory mitigating circumstances; the jury found twelve of these circumstances to exist and to have mitigating value.

In our proportionality analysis we compare this case to those cases in which this Court has determined the sentence of death to be disproportionate. This Court has determined the death sentence to be disproportionate on eight occasions. *State v. Kemmerlin*, 356 N.C. 446, 573 S.E.2d 870 (2002); *State v. Benson*, 323 N.C. 318, 372 S.E.2d 517 (1988); *State v. Stokes*, 319 N.C. 1, 352 S.E.2d 653 (1987); *State v. Rogers*, 316 N.C. 203, 341 S.E.2d 713 (1986), *overruled in part on*

other grounds by State v. Gaines, 345 N.C. 647, 483 S.E.2d 396, *cert. denied*, 522 U.S. 900, 139 L. Ed. 2d 177 (1997), *and by State v. Vandiver*, 321 N.C. 570, 364 S.E.2d 373 (1988); *State v. Young*, 312 N.C. 669, 325 S.E.2d 181 (1985); *State v. Hill*, 311 N.C. 465, 319 S.E.2d 163 (1984); *State v. Bondurant*, 309 N.C. 674, 309 S.E.2d 170 (1983); *State v. Jackson*, 309 N.C. 26, 305 S.E.2d 703 (1983). This case is not substantially similar to any of the cases in which this Court has found that the death sentence was disproportionate.

We also consider cases in which this Court has found the death penalty to be proportionate. Defendant was convicted based on premeditation and deliberation and under the felony murder rule. "The finding of premeditation and deliberation indicates a more cold-blooded and calculated crime." *State v. Artis*, 325 N.C. 278, 341, 384 S.E.2d 470, 506 (1989), *judgment vacated on other grounds*, 494 U.S. 1023, 108 L. Ed. 2d 604 (1990). Defendant also has a history of prior convictions for violent crimes, including one manslaughter, one assault with a deadly weapon with intent to kill which left the victim seriously disabled, and one assault with a deadly weapon inflicting serious injury on his child's grandmother whom he shot attempting to shoot the child's mother. This Court has deemed the (e)(3) aggravating circumstance, standing alone, to be sufficient to sustain a sentence of death. *State v. Bacon*, 337 N.C. 66, 110 n.8, 446 S.E.2d 542, 566 n.8 (1994), *cert. denied*, 513 U.S. 1159, 130 L. Ed. 2d 1083 (1995). The present case is more analogous to cases in which we have found the sentence of death proportionate than to those cases in which we have found the sentence disproportionate or to those cases in which juries have consistently returned recommendations of life imprisonment.

Defendant received a fair trial and capital sentencing proceeding, free from prejudicial error; and the death sentence in this case is not disproportionate. Accordingly, the judgment of the trial court is left undisturbed.

NO ERROR.

STATE OF NORTH CAROLINA v. PHILIP MORRIS USA INC., F/K/A PHILIP MORRIS INCORPORATED; R.J. REYNOLDS TOBACCO COMPANY, INDIVIDUALLY AND AS SUCCESSOR TO R.J. REYNOLDS TOBACCO COMPANY AND BROWN & WILLIAMSON TOBACCO CORPORATION; AND LORILLARD TOBACCO COMPANY

No. 2PA05

(Filed 19 August 2005)

Contracts; Taxation— Fair and Equitable Tobacco Reform Act of 2004—tax offset adjustment

The trial court erred by holding that enactment of the Fair and Equitable Tobacco Reform Act of 2004 (FETRA) entitled defendant tobacco companies to a tax offset adjustment for 2004 that relieved them of their obligations under the National Tobacco Grower Settlement Trust for 2004, because: (1) the pertinent tax offset provision in Schedule A of the trust agreement provides that a tax offset adjustment occurs when defendants have actually paid a governmental obligation; (2) the agreement authorizes a tax offset adjustment only once an assessment against defendants is used to aid tobacco farmers, and tobacco farmers received neither trust distributions nor FETRA payments in calendar year 2004; (3) pages A-5 to A-6 of the trust do not show that the parties intended a qualifying change of law to be the sole prerequisite for a tax offset adjustment; (4) the annual payment scheme of the trust indicates the parties' intent to limit tax offset adjustments to years in which assessments are made, and the U.S. Secretary of Agriculture made no FETRA assessments during calendar year 2004; (5) there was no congressional desire expressed in FETRA to give defendants a tax offset adjustment for 2004, and Congress could have, but did not, signal such intent by explicitly directing the Secretary of Agriculture to collect the first FETRA assessment before 31 December 2004; (6) the Secretary of Agriculture interpreted FETRA to mean that Congress intended the first FETRA assessment to be due on 31 March 2005; and (7) defendants must actually assume the burden of FETRA before being relieved of their obligations to the Phase II trust.

Justice WAINWRIGHT did not participate in the consideration or decision of this case.

On discretionary review pursuant to N.C.G.S. § 7A-31, prior to a determination by the Court of Appeals, of an order and opinion

entered on 23 December 2004 by Judge Ben F. Tennille in Superior Court, Wake County. Heard in the Supreme Court 16 May 2005.

Ellis & Winters LLP, by Richard W. Ellis and Thomas D. Blue, Jr., for petitioner-appellants JPMorgan Chase Bank, N.A., as Trustee, and the North Carolina Phase II Tobacco Certification Entity, Inc.

Brooks, Pierce, McLendon, Humphrey & Leonard, LLP, by Jim W. Phillips, Jr., for respondent-appellees Philip Morris USA Inc., R.J. Reynolds Tobacco Company, and Lorillard Tobacco Company; and Smith Moore LLP, by Larry B. Sitton, Gregory G. Holland, and Angela L. Little, for respondent-appellee Philip Morris USA Inc.

Shanahan Law Group, by Kieran J. Shanahan and Reef C. Ivey, II, for North Carolina Phase II Beneficiaries, amici curiae.[1]

H. Julian Philpott, Jr., General Counsel, and Stephen A. Woodson, Associate General Counsel, North Carolina Farm Bureau Federation, Inc., for North Carolina Farm Bureau Federation, Inc., American Farm Bureau Federation, Florida Farm Bureau Federation, Georgia Farm Bureau Federation, Kentucky Farm Bureau Federation, Maryland Farm Bureau, Inc., Missouri Farm Bureau Federation, Ohio Farm Bureau Federation, South Carolina Farm Bureau Federation, Virginia Farm Bureau Federation, Tennessee Farm Bureau Federation, and Indiana Farm Bureau Federation, amici curiae.

NEWBY, Justice.

In this case we construe the language of the National Tobacco Grower Settlement Trust to determine whether enactment of the Fair and Equitable Tobacco Reform Act of 2004 relieved defendant tobacco companies of their obligations to the Trust for 2004. We hold it did not and reverse the trial court.

I. BACKGROUND

In 1938 the federal government began implementing price supports and marketing quotas for U.S. tobacco in an effort to stabilize

1. This group consists of twenty-three named individuals, all of whom are North Carolina tobacco growers and members of the North Carolina Tobacco Growers Association, an advocacy group representing the interests of approximately 3000 tobacco growers and quota holders in this State.

the domestic tobacco market. Quotas limited production and confined the cultivation of tobacco to specific tracts of land. While the federal government adjusted quota levels annually based on tobacco companies' demand, federal price supports kept tobacco prices elevated. In recent years, tobacco quotas and price supports often worked at cross-purposes. Artificially high prices dampened demand for domestic tobacco and led to reduced quotas. Along with many other factors, this contributed to a worsening financial situation among the members of the tobacco farming community.

During the 1990s, all fifty states and six other American jurisdictions filed suit against defendant tobacco companies ("Settlors") to recover healthcare costs associated with smoking-related illnesses. On 16 November 1998, forty-six states, the District of Columbia, the Commonwealth of Puerto Rico, and four other American territories agreed to settle their claims. The resultant Master Settlement Agreement ("MSA") was the object of consent decrees and final judgments in each complaining jurisdiction.[2] Settlors immediately raised prices to cover the future costs of payments due under the MSA.

The parties anticipated this rise in prices would curtail tobacco consumption; indeed, reduced consumption was one of the aims of the MSA.[3] They also understood decreased demand for tobacco products could cause tobacco growers and quota holders ("tobacco farmers") significant economic hardship.[4] The MSA therefore required that Settlors meet with the political leadership of the fourteen tobacco growing states ("Grower States") to devise a plan for mitigating the MSA's potentially negative economic consequences.[5] These meetings produced the National Tobacco Grower Settlement Trust ("the Phase II Trust" or "the Trust"). By agreeing to the Phase II Trust, Settlors pledged to spend approximately $5.15 billion on economic assistance to tobacco farmers in Grower States.

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2. The other four states, Florida, Minnesota, Mississippi, and Texas, concluded separate settlement agreements with Settlors before execution of the MSA, although Florida is part of the National Tobacco Settlement Trust because of its status as a Grower State.

3. The MSA also required Settlors to fund and conduct anti-smoking campaigns designed to reduce and discourage smoking by youth, further reducing tobacco consumption.

4. There are approximately 80,000 tobacco growers and over 300,000 tobacco quota holders.

5. The Grower States are Alabama, Florida, Georgia, Indiana, Kentucky, Maryland, Missouri, North Carolina, Ohio, Pennsylvania, South Carolina, Tennessee, Virginia, and West Virginia.

Despite its cost, the Trust appealed to Settlors for financial reasons. Funding the Trust satisfied the requirement of the MSA "to address the economic concerns of the Grower States." In other words, Settlors agreed to the Trust because doing so was a condition of the settlement that had relieved them of potentially bankrupting liability for smoking-related healthcare costs.[6] Additionally, the Trust shields Settlors from claims the Grower States might otherwise bring for economic damages suffered as a result of the MSA. National Tobacco Grower Settlement Trust at ¶4.05 (July 19, 1999) [hereinafter Trust Agreement] ("The Grower States confirm that the releases they have given to the Settlors cover, and thus bar, any claims for damages allegedly incurred by the Grower States as a result of adverse economic consequences suffered by the tobacco grower communities in the respective Grower States.").[7]

The preamble announces the purpose of the Trust: "[T]o provide aid to Tobacco Growers and Tobacco Quota Owners and thereby to ameliorate potential adverse economic consequences to the Grower States." The Trust accomplishes this objective through annual distributions to the beneficiaries. *Id.* at ¶1.02. These distributions supplement the declining incomes of tobacco farmers as they adapt to an economy in which the MSA has dulled the appetite for tobacco.

The Phase II Trust operates on a calendar year basis. Settlors fund the Trust through "Annual Payment[s]" divided into four equal installments due on March 31, June 30, September 30 and December 15, respectively.[8] *Id.* at A-1 to A-2. An Independent Accountant chosen by the Settlors sets the amount of each Annual Payment by March 1 of each year. *Id.* at A-14 to A-15. Certification entities in each of the Grower States communicate annually to the Trustee the names and addresses of tobacco farmers who qualify to participate in the Trust. *Id.* at ¶1.02. Distributions to eligible tobacco farmers take place once

6. "Each Settlor has entered into this Trust Agreement solely to satisfy the Grower State Obligation." Trust Agreement at ¶4.03. Under the Trust, a Grower State must show it has achieved "State-Specific Finality" before its tobacco farmers may receive distributions from the Phase II Trust. *Id.* at ¶1.02. The MSA defines State-Specific Finality as the end of legal proceedings against Settlors and a dismissal with prejudice of the state's claims. Master Settlement Agreement at 11-12.

7. Quite understandably, Settlors also negotiated with an eye toward potential tax deductions. *See* Trust Agreement at ¶4.06 ("The Trust . . . is intended . . . to be a qualified settlement fund for federal tax purposes as described in Treas. Reg. § 1.468B-1. The Trustee shall comply with all requirements applicable to qualified settlement funds . . . [and] any comparable provisions of state or local tax laws[.])"

8. The portion of the assessment for which a particular Settlor is liable depends upon that Settlor's "Relative Market Share" of cigarettes. *Id.* at A-3.

each year by December 31. *Id.* The Trustee ordinarily disburses all funds it has received during the calendar year, and, once disbursed, funds may not be recovered. *Id.*

Schedule A of the Trust Agreement establishes the formulae used to calculate Settlors' Annual Payments. Simply put, the assessment for a given calendar year is determined by taking the specified base payment for that year and applying certain adjustments.[9] Trust Agreement at A-1 to A-16. These include an "Inflation Adjustment," which increases the base payment in response to changes in the Consumer Price Index during the previous calendar year, and a "Volume Adjustment," which either increases or decreases the base payment depending on the number of cigarettes shipped during the preceding calendar year. *Id.* at A-4 to A-5.

Another adjustment to Annual Payments is the Tax Offset Adjustment. The parties drafted the Trust Agreement knowing federal and state governments might take additional measures to aid tobacco farmers. They realized such measures would probably entail additional assessments against Settlors. The Tax Offset Adjustment entitles Settlors to reduce their Annual Payment in response to the imposition of a "Governmental Obligation," which is a new or increased cigarette tax used in whole or in part for the benefit of tobacco farmers.[10] Trust Agreement at A-5 to A-8. Schedule A de-fines Governmental Obligation broadly enough to encompass everything from an individual state's excise taxes on cigarettes to the massive assessments necessary to fund a federal tobacco buyout. *Id.*

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9. Schedule A establishes the following base payments for calendar years 1999 to 2010.

1999—$380,000,000
2000—$280,000,000
2001—$400,000,000
2002—$500,000,000
2003—$500,000,000
2004—$500,000,000
2005—$500,000,000
2006—$500,000,000
2007—$500,000,000
2008—$500,000,000
2009—$295,000,000
2010—$295,000,000

10. The Tax Offset Adjustment for any given year is calculated by multiplying the amount of Governmental Obligation paid times the ratio of the Grower Governmental Obligation (the amount of Governmental Obligation used to benefit tobacco farmers) divided by the amount of the Governmental Obligation. *Id.* at A-5 to A-7.

Likewise, a Governmental Obligation includes the cost to Settlors of complying with laws or regulations that require them to purchase minimum quantities or percentages of domestic tobacco. Trust Agreement at A-8 to A-9. Whereas the Inflation and Volume Adjustments are allocated evenly across quarterly installments, the Tax Offset Adjustment may be "allocated in full to the first payment due after the Adjustment is applied (and to subsequent payments as necessary to ensure full credit)." *Id.* at A-1.

From 1999 to 2003, the Phase II Trust functioned without significant controversy. Settlors paid their quarterly installments, and the Trustee made annual distributions to tobacco farmers. In 2003, however, the parties disagreed over whether a tobacco buyout bill pending in the United States Senate (the Tobacco Market Transition Act of 2003) constituted a Governmental Obligation. Some Settlors withheld their payments to the Phase II Trust arguing the proposed legislation would earn them a Tax Offset Adjustment for 2003. The Trustee moved for specific performance. During the ensuing mediation, the Trustee and Settlors negotiated Amendment One to the Trust Agreement. National Tobacco Grower Settlement Trust Agreement Amendment Number One (effective Mar. 30, 2004) [hereinafter Amendment One].

Amendment One prohibits Settlors from claiming a Tax Offset Adjustment "based upon proposed changes in laws." Amendment One at 2. It also refines the rules regarding refunds of Trust assets to Settlors. Arguably, prior to Amendment One such refunds were not permitted. Trust Agreement at 4.15. Settlors could apply Tax Offset Adjustments to future payments only. Under Amendment One, Settlors may receive refunds of quarterly payments during the calendar year in which a Tax Offset Adjustment "first became effective," but only to the extent the adjustment exceeds their remaining obligations to the Trust.[11] Significantly, the amendment stipulates it cannot be considered when determining when a Tax Offset Adjustment occurs:

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11. Refunds are available only prior to distribution. Trust funds may not be recovered once disbursed to tobacco farmers.

The refund provision of Amendment One sets forth the following instructions for calculating whether a refund is due Settlors:

> A Settlor that has become entitled to a Tax Offset Adjustment under this Schedule A by reason of a Governmental Obligation shall make reasonable estimates of (x) the aggregate amount of Tax Offset Adjustments attributable to that Governmental Obligation to which it expects to become entitled from the year in which the Tax Offset Adjustment is first effective through 2010, (y) the Settlor's share of the remaining Annual Payment to be made in the year in which the Tax

> No Resolution of Tax Offset Adjustment Effective Date Dispute: The Settlors and the Trustee have different interpretations of the language in the original Agreement concerning the date on or from which any Settlor shall be entitled to a reduction arising from a Tax Offset Adjustment. It is agreed and acknowledged that Amendment Number One does not address or resolve this issue, *and nothing in Amendment Number One shall be used or construed to have any bearing on the resolution of such issue.*

Amendment One at 4 (emphasis added).

Problems with the tobacco industry prompted members of Congress to introduce more than twenty tobacco buyout bills from 1997 through 2004. The parties to the Phase II Trust understood they had much to gain from legislation ending quotas and price controls. The Grower States recognized a federal buyout program would almost certainly offer larger payments to tobacco farmers than those available under the Trust. Settlors believed the price of U.S. tobacco leaf would drop precipitously once the tobacco market became a free market.

Finally, on 22 October 2004, President Bush signed the Fair and Equitable Tobacco Reform Act. America Jobs Creation Act of 200, Pub. L. No. 108-357, §§ 601-643, —— Stat. —— (2004) [hereinafter FETRA]. The Act terminated the price control/quota system for U.S. tobacco beginning with the 2005 tobacco crop. As the parties had anticipated, FETRA affords "enormous benefits" to both sides. *State v. Philip Morris USA Inc.*, 2004 WL 2966013, at *9 (Wake County Super.Ct. Dec. 23, 2004) (No. 98-CVS-14377) (Tennille, J.). FETRA payments to tobacco farmers between 2005 and 2014 will approach $9.6 billion. And Settlors stand to profit handsomely from the abolition of market controls and a concomitant drop in tobacco prices. *See id.* at *9 n.14 ("The cost of leaf is the largest single cost of production. By obtaining a free market the Tobacco Companies obtain the opportunity to control the largest component of produc-

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> Offset Adjustment first becomes effective, and (z) the Settlor's share of all remaining Annual Payments for all years subsequent to the year in which the Tax Offset Adjustment first becomes effective. If the Settlor reasonably estimates that clause (x) . . . exceeds the sum of clauses (y) and (z), then such Settlor shall be entitled to a refund, up to the amount of that excess, of its share of the Annual Payment it made during the calendar year in which the Tax Offset Adjustment first became effective . . . .

Amendment One at 2-3.

tion cost, thus permitting them to hold down price increases or reduce wholesale prices.")

FETRA directs the U.S. Secretary of Agriculture to offer tobacco farmers annual payments during each of fiscal years 2005 through 2014 in exchange for ending marketing quotas and related price supports. FETRA §§ 622 to 623. Tobacco farmers who wish to receive FETRA payments must enter into contracts with the Secretary to that effect. *Id*. Quarterly assessments against tobacco manufacturers and importers provide the necessary funding for payments. The confusing manner in which FETRA's provisions alternate between calendar and fiscal years makes it difficult to discern precisely when the first FETRA assessments were to occur. Section 625(b)(1) instructs the Secretary to "impose quarterly assessments during each of fiscal years 2005 through 2014." But section 625(d)(3)(A) specifies: "Assessments shall be collected at the end of each calendar year quarter." Section 625(b)(2) further muddles things with its requirement that "assessment payments over each four-calendar quarter period shall be sufficient to cover [] the contract payments made during that period." Regardless of when FETRA assessments should have commenced, Settlors expect to spend some $8 billion on FETRA between 2005 and 2014, $5.1 billion of which will come due by 2010. In contrast, their remaining obligation to the Phase II Trust for 2005 to 2010 would have totaled approximately $2.4 billion.

By the date of FETRA's enactment, Settlors had paid three of their four installments to the Trust for 2004, a total of $318 million. Their fourth installment was estimated at $106 million. Settlors' immediate response to FETRA was to claim a Tax Offset Adjustment and withhold their fourth installment. Settlors asserted their first FETRA assessment would come due before 31 December 2004 and would exceed their 2004 obligation to the Trust. According to them, the Trust Agreement entitled Settlors to a refund of the amount they had already paid during calendar year 2004 and relieved them of their last quarterly installment. The Trustee once again moved for specific performance.

On 23 December 2004, the trial court issued an opinion and order ruling in Settlors' favor. It identified the dispositive issue as follows:

> Does the Trust Agreement provide that the Tobacco Companies' obligations to fund the Phase II Trust cease upon passage of buyout legislation that creates a financial obligation greater than the remaining financial obligation under the Phase II Trust, or

> does the obligation to fund the Phase II Trust continue until there is an actual payment by the Tobacco Companies under the buy-out program?

2004 WL 2966013 at *24.[12]

The court held the Trust Agreement does not make Tax Offset Adjustments contingent upon actual payment of a Governmental Obligation. *Id.* at *25-26. Instead, the court read pages A-5 to A-6 of Schedule A to say that a "change in [] law" which imposes future financial obligations on Settlors for tobacco farmers' benefit is sufficient to trigger a Tax Offset Adjustment. *Id.* It concluded a qualifying change of law took place on 22 October 2004, the date of FETRA's enactment. 2004 WL 2966013 at *26-27.

Next the court addressed whether the Tax Offset Adjustment for FETRA should be applied to Settlors' 2004 Phase II Annual Payment. Concluding that FETRA had imposed Governmental Obligations on Settlors for 2004, the court held the 2004 Annual Payment was subject to adjustment. *Id.* at *27. The Governmental Obligations in question consisted of "an assessment period which includes the last quarter of calendar year 2004 [and assessments during] fiscal years 2005 and 2006 . . . based upon cigarettes manufactured in calendar year 2004." *Id.* Moreover, the trial court construed FETRA as authorizing the Secretary of Agriculture to impose *and require payment* of the initial FETRA assessment in December 2004. 2004 WL 2966013 at *13.

Having held that Settlors rated a Tax Offset Adjustment for 2004, the trial court proceeded to apply it. According to the court, "the amount of Tax Offsets available . . . for cigarettes manufactured in 2004 exceeds $106 million, the amount due by Settlors under the Phase II Trust for the fourth quarter of calendar year 2004. Therefore no payment is due for the December quarter." *Id.* at *27. The court further determined the $5.1 billion Settlors expected to pay in FETRA assessments between 2005 to 2010 "exceed[ed] the combination of $106 million and $2.4 billion owed for the balance of 2004 and the remainder of the life of the Trust." *Id.* Given those findings, it concluded Amendment One entitled Settlors "to a refund of the amounts previously paid for 2004." *Id.*

The perception that Congress intended FETRA to spare Settlors their 2004 Annual Payment heavily influenced the trial court's

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12. The Trust Agreement vests the Superior Court of Wake County with jurisdiction over disputes arising from the Phase II Trust. Trust Agreement at ¶¶4.14-4.15.

decision. Said the court: "It is abundantly clear that Congress was keenly aware of the impact of FETRA on the Phase II payments." 2004 WL 2966013 at *12. The court scanned a meager legislative record for hints of congressional design. A conference committee report provided evidence that FETRA became effective on the date of its enactment in 2004. *Id.* at *11. In the court's opinion, this report demonstrated the Act was meant to be a "change in [] law" within the meaning of the Trust Agreement. *Id.* at *26-27. The fact that FETRA seemed to impose an assessment for the last calendar quarter of 2004 cinched the matter. *Id.* at *13 ("The Court believes that Congress provided the Tobacco Companies with the opportunity to avoid the 2004 Trust payment by (1) making the effective date of FETRA 2004 and (2) providing that the Tobacco Companies would be assessed for the fourth calendar quarter of 2004.")

The trial court acknowledged its decision would leave tobacco farmers with neither a Trust distribution nor a FETRA payment for 2004. *Id.* at *23. Conceding this " 'gap' in the receipt of money" would "cause some temporary hardship[,]" the court reasoned the delay between Phase II checks and FETRA payments "shouldn't be long, and . . . should be worth the wait." *Id.* It pointed out Congress could have avoided the problem "by passing FETRA earlier in the year" and urged the Secretary of Agriculture to ameliorate the impact of its decision "by swift completion of the contracting process." 2004 WL 2966013 at *29.

We allowed the petition filed by the Trustee and Certification Entities for discretionary review before determination by the Court of Appeals.[13]

II. ANALYSIS

We note at the outset several points upon which the parties agree. The U.S. Secretary of Agriculture made no FETRA assessments during calendar year 2004. Subsequent regulations from the Department of Agriculture established FETRA assessments would begin on 31 March 2005. Tobacco Transition Assessments, 70 Fed. Reg. 7007, 7009, 7012 (Feb. 10, 2005) (to be codified at 7 C.F.R. pt. 1463). Tobacco farmers received neither Trust distributions nor FETRA payments in calendar year 2004.

The parties likewise agree this case obliges this Court to interpret the terms of the Phase II Trust in order to discern whether FETRA's

13. For brevity's sake, this opinion will refer to petitioners as "the Trustee."

enactment on 22 October 2004 triggered a Tax Offset Adjustment for calendar year 2004 notwithstanding the lack of assessments in 2004. The trial court detailed with admirable lucidity the complex economic and historical factors resulting in the creation of the Phase II Trust. At bottom, however, this case is one of contract interpretation, and we review the trial court's conclusions of law *de novo*. *See Register v. White*, 358 N.C. 691, 693, 599 S.E.2d 549, 552 (2004).

Interpreting a contract requires the court to examine the language of the contract itself for indications of the parties' intent at the moment of execution. *Lane v. Scarborough*, 284 N.C. 407, 409-10, 200 S.E.2d 622, 624 (1973). "If the plain language of a contract is clear, the intention of the parties is inferred from the words of the contract." *Walton v. City of Raleigh*, 342 N.C. 879, 881, 467 S.E.2d 410, 411 (1996) ("A consent judgment is a court-approved contract subject to the rules of contract interpretation."). Intent is derived not from a particular contractual term but from the contract as a whole. *Jones v. Casstevens*, 222 N.C. 411, 413-14, 23 S.E.2d 303, 305 (1942) (" 'Since the object of construction is to ascertain the intent of the parties, the contract must be considered as an entirety. The problem is not what the separate parts mean, but what the contract means when considered as a whole.' ") (citation omitted).[14]

Consistent with the aforesaid principles, we must carefully inspect the provisions of the Phase II Trust to ascertain the parties' intention at the time it was executed. Before proceeding, we pause to observe that Amendment One has no effect on our inquiry. Amendment One at 4. ("[N]othing in Amendment Number One shall be used or construed to have any bearing on the resolution of [when a Tax Offset Adjustment is warranted].").

At issue is the meaning of the Tax Offset Adjustment provision in Schedule A of the Trust Agreement. Specifically, the dispute centers on the following language from pages A-5 to A-7:

> **(A-5)** Tax Offset Adjustment. Except as expressly provided below, the amounts to be paid by the Settlors in each of the years 1999 through and including 2010 shall also be reduced upon the occurrence of any change in a law or regulation or other govern-

14. Another "fundamental" rule of contract interpretation is that a written contract is construed against the party who drafted it. *See, e.g.*, *Chavis v. S. Life Ins. Co.*, 318 N.C. 259, 262, 347 S.E.2d 425, 427 (1986). In this case, the Trust Agreement expressly states that neither party shall be considered the drafter, making the rule inapplicable.

mental provision that leads to a new, or an increase in an existing, federal or state excise tax on Cigarettes, or any other tax, fee, assessment, or financial obligation of any kind . . .

(A-6) imposed on the purchase of tobacco or any tobacco products or on production of Cigarettes or use of tobacco in the manufacture of Cigarettes at any stage of production or distribution or that is imposed on the Settlors, to the extent that all or any portion of such Governmental Obligation is used to provide:

(i) direct payments to [tobacco farmers];

(ii) direct or indirect payments, grants or loans under any program designed in whole or in part for the benefit of [tobacco farmers];

(iii) payments, grants or loans to Grower States to administer programs designed in whole or in part to benefit [tobacco farmers]; or

(iv) payments, grants or loans to any individual, organization, or Grower State for use in activities which are designed in whole or in part to obtain commitments from, or provide compensation to [tobacco farmers] to eliminate tobacco production.

The amount of the Governmental Obligation used for any of the purposes set forth above shall be the "Grower Governmental Obligation."

(A-7) In the event of such a Governmental Obligation, the amount otherwise required to be paid by each Settlor each year (after taking account of all adjustments or reductions hereunder) shall be reduced by an amount equal to the product of the amount of such Governmental Obligation paid in connection with Cigarettes manufactured by the Settlor (or tobacco or tobacco products used by the Settlor to manufacture Cigarettes) for the same year multiplied by the ratio of the Grower Governmental Obligation divided by the amount of the Governmental Obligation, which reduction amount may be carried forward to subsequent years as necessary to ensure full credit to the Settlor. If the Governmental Obligation results from a law or regulation or other governmental provision adopted by a Grower State, or by a political subdivision within such Grower State, the amount that a Settlor may reduce its payment to the Trust in any one year

> shall not exceed the product of the amount the Settlor otherwise would have paid to the Trust in that year in the absence of the Tax Offset Adjustment multiplied by the allocation percentage for the pertinent Grower State set forth in Section 1.03. The Settlor may reduce its annual payment by a reasonable estimate of any such reduction and adjust its payment after the actual amount is finally determined.

The parties propose alternative ways of reading this provision. Settlors maintain the initial language on pages A-5 to A-6 establishes when a Tax Offset Adjustment occurs; they consider page A-7 merely an explanation of the method employed to calculate the adjustment. Settlors contend a change in law imposing a financial obligation on them for tobacco farmers' benefit triggers a Tax Offset Adjustment, regardless of when the obligation is actually paid. The trial court adopted this view.

The Trustee asserts pages A-5 to A-6 define the terms "Governmental Obligation" and "Grower Governmental Obligation," while page A-7 controls when and how a Tax Offset Adjustment applies. The Trustee argues the Tax Offset Adjustment provision requires a "cascade of events" before an adjustment is warranted and that these events include 1) a change in the law leading to an assessment against Settlors, 2) payment of the assessment by Settlors, and 3) the use of the assessment to aid tobacco farmers.

As noted above, we look first to the plain language of the Tax Offset Adjustment provision to discern the intent of the parties. Settlors concede the Trust Agreement is a "detailed and precisely drafted instrument reflecting the agreement reached in 1999 by the [parties,]" and they consider the Tax Offset Adjustment provision "[t]he most detailed provision in Schedule A." Given the degree of lawyerly scrutiny each word of the Trust Agreement doubtless underwent, we are not inclined to interpret the terms of Schedule A in a fashion that deviates from the meaning commonly ascribed to them.

We believe the Trustee's proposed construction accords with the ordinary meaning of the terms of the Trust Agreement. A closer look at the language on page A-7 of Schedule A confirms this.

> In the event of such a Governmental Obligation, the amount otherwise required ***to be paid*** by each Settlor ***each year*** . . . shall be reduced by an amount equal to the product of the amount

> of such Governmental Obligation ***paid*** in connection with Cigarettes manufactured by the Settlor . . . ***for the same year*** multiplied by the ratio of the Grower Governmental Obligation, which reduction amount may be carried forward to subsequent years as necessary to ensure full credit to the Settlor.

(Emphasis added.)

We construe this language to mean a Tax Offset Adjustment occurs when Settlors have actually paid a Governmental Obligation. The parties' inclusion of "to be paid" in the same sentence as "paid" illustrates their ability to navigate the nuances of language. If the parties had not intended to make payment of a Governmental Obligation a prerequisite for a Tax Offset Adjustment, they could have readily declared this intention by replacing "paid" with "to be paid" or similar wording. Their deliberate selection of "paid" demonstrates their desire to allow Tax Offset Adjustments only during calendar years in which Governmental Obligations have actually been satisfied.

Settlors argue the inclusion of the phrase "in connection with Cigarettes manufactured by the Settlor" after "paid" and before "for the same year" suggests "paid" was not intended as a temporal precondition for a Tax Offset Adjustment. The trial court agreed. 2004 WL 2966013 at *26 (Th[e] phrase ["in connection with"] indicates that the reference is to the obligation, not a temporal precondition.")[15] Since FETRA's initial assessment relies on cigarette manufacturing data from 2004 (was imposed "in connection with" cigarettes manufactured in 2004), Settlors contend the Act entitled them to a Tax Offset Adjustment for 2004.

We disagree. It appears to us that "in connection with Cigarettes manufactured by the Settlor" represents the parties' wish to limit those payments that may serve as the basis for a Tax Offset Adjustment. The phrase was inserted to ensure Settlors do not receive offsets for assessments not directly tied to cigarette production. In other words, "for the same year" and "in connection with" both modify "paid;" the former indicates when an obligation must be satisfied, while the latter describes the obligation itself.

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15. It seems to us the language on page A-7 is a temporal precondition of some sort. The Trustee makes payment of a Governmental Obligation the condition precedent for a Tax Offset Adjustment. The trial court requires a financial obligation for cigarettes manufactured during the year in which the Tax Offset Adjustment is claimed. Thus, under the trial court's interpretation, had the first FETRA assessment been based on 2005 cigarette manufacturing data, Settlors would not have rated a Tax Offset Adjustment for 2004.

Having adopted Settlors' approach, the trial court focused on the initial portion of the Tax Offset Adjustment provision.

> Except as expressly provided below, the amounts to be paid by the Settlors in each of the years 1999 through and including 2010 shall . . . be reduced ***upon the occurrence of any change in a law*** . . . ***that leads to a new*** . . . ***financial obligation*** of any kind . . . ***imposed by any governmental authority*** ("Governmental Obligation") that is ***based on . . . Cigarettes*** . . . or ***that is imposed on the Settlors***, ***to the extent that all or any portion of such Governmental Obligation is used*** [to benefit tobacco farmers].

Trust Agreement at A-5 to A-6 (emphasis added).

Relying on this language, the court accepted Settlors' claim that a Tax Offset Adjustment is triggered whenever a change in law includes a financial obligation on Settlors earmarked to aid tobacco farmers. The qualifying change of law is itself the condition precedent to an offset.

This interpretation does not give full effect to the ordinary meaning of several words in the passage. As written, pages A-5 to A-6 seem to authorize a Tax Offset Adjustment only once an assessment against Settlors "is used" to aid tobacco farmers. *See also* Trust Agreement at A-6 (defining Grower Governmental Obligation as the "amount of the Governmental Obligation used [to benefit tobacco farmers]"). Had the parties intended a qualifying change of law to be the only triggering event for a Tax Offset Adjustment, they could have easily indicated this by substituting "will lead to" for "leads to" and "will be used" for "is used."

Furthermore, we very much doubt the trial court's construction of the wording on pages A-5 to A-6 reflects the original understanding of the parties. The court would allow a Tax Offset Adjustment even if the government never collects the assessments due under a qualifying change of law and hence never spends them for the benefit of tobacco farmers. Under those circumstances, tobacco farmers would receive reduced distributions (or no distributions) from the Phase II Trust and nothing from the government. The negative financial implications of this scenario for tobacco farmers are obvious. In short, pages A-5 to A-6 do not persuade us the parties intended a qualifying change of law to be the sole prerequisite for a Tax Offset Adjustment.

The trial court relied partly on the "Reasonable Estimate" provision found on page A-7 of the Trust Agreement when it held in Settlors' favor:

> The Settlor may reduce its annual payment by a reasonable estimate of [a] reduction [for an expected Tax Offset Adjustment] and adjust its payment after the actual amount is finally determined.

We do not read this sentence to authorize Tax Offset Adjustments during years in which Governmental Obligations are not actually paid. Rather, we believe it indicates the parties' awareness that a Governmental Obligation could come due in a given year after Settlors had already made one or more of their quarterly payments. The Reasonable Estimate provision would allow Settlors to allocate an anticipated Tax Offset Adjustment across remaining quarterly payments even though the Governmental Obligation would not be paid until sometime later in the calendar year. This flexibility was particularly important before Amendment One, when refunds to Settlors were prohibited even in cases of overpayment.

Our interpretation of the Tax Offset Adjustment provision is confirmed when considered—as it must be—in the context of the entire Trust Agreement. *See Jones*, 222 N.C. at 413-14, 23 S.E.2d at 305. To begin with, permitting Tax Offset Adjustments absent the actual payment of a Governmental Obligation seems at odds with other language in Schedule A. At the beginning of Schedule A, the parties agreed that "[a] Tax Offset Adjustment . . . may be allocated in full to the first payment due after the Adjustment is applied (and to subsequent payments as necessary to ensure full credit)." Trust Agreement at A-1. We fail to see how a Tax Offset Adjustment can be applied "in full" before the exact amount of the Governmental Obligation is known. Such knowledge comes only from receipt of an actual bill for payment. That Settlors received no FETRA assessments last year suggests they did not rate a Tax Offset Adjustment for their final 2004 payment.

Moreover, the annual payment scheme of the Trust indicates the parties' intent to limit Tax Offset Adjustments to years in which assessments are made. We have already noted that Settlors make their Annual Payment to the Trust in quarterly installments. Under Schedule A, the Independent Accountant calculates the amount of each quarterly installment and communicates this information to Settlors at least thirty days prior to the due-date. Trust Agreement at

A-14. The Independent Accountant's statement must include estimates of any remaining quarterly payments for the year. *Id.* It is only with the fourth and final installment that Settlors' liability for the calendar year is definitively established. *See* Trust Agreement at A-15. Permitting Tax Offset Adjustments when assessments have not been levied would render it impossible to do more than estimate Settlors' annual obligation to the Phase II Trust.

The annual accounting requirements of the Trust Agreement also favor demanding actual assessments before Settlors may claim Tax Offset Adjustments. Paragraph 2.09 directs the Trustee to prepare an annual account of its transactions. The "Trust account" comprises, *inter alia*, a record of funds received and distributed and the amount of Settlors' payments during the period. *Id.* Paragraph 2.10 obliges the Trustee to submit its accounts and the Trust's books to an annual independent audit. Allowing Tax Offset Adjustments during years in which no assessments occur undermines this regime because it prevents the Trustee or the Independent Accountant from being able to determine precisely what the amount of Settlors' Annual Payments should have been.

Certainly the most compelling reason for rejecting the trial court's holding is that, taken to its logical extreme, it could defeat the express purpose of the Phase II Trust. As previously explained, the Trust was crafted to protect tobacco farmers from economic harm caused by the MSA. The Trust achieved this goal through annual distributions to the beneficiaries. These distributions were scheduled to furnish tobacco farmers a steady stream of supplemental income until at least 2010.

The trial court would give Settlors a Tax Offset Adjustment for 2004 regardless of when FETRA assessments are actually paid. Thus, had FETRA assessments been delayed until 2010, tobacco farmers would have been forced to endure the adverse economic consequences of the MSA for six years without the regular financial support the Phase II Trust was designed to supply. The court admitted this outcome was possible under its construction of the Trust Agreement but remained unmoved. 2004 WL 2966013 at *25 ("[The Trustee and Certification Entities] argue it would not be fair to interpret the agreement in such a way that a statute which did not require any payment under a buyout for years would relieve the Tobacco Companies of their current annual payment obligations under the Trust. Obviously they are correct.") Instead, the court emphasized "it is equally true that the agreement should not be in-

terpreted in a way that would require annual payments through the end of the trust period even though Congress passed buyout legislation now requiring a payout larger than the Trust obligations commencing in 2011." *Id.*

Of course, Settlors entered into the Trust Agreement knowing a tobacco buyout program might not materialize until long after their obligation to the Trust had been discharged. (As the trial court pointed out, seven years of failed buyout proposals preceded FETRA. 2004 WL 2966013 at *9.) Settlors apparently decided the legal protections of the MSA and the Trust Agreement outweighed the risk of having to fund both the Trust and a buyout program in succession. On the other hand, the Grower States entered into the Trust Agreement to obtain a regular source of supplemental income for tobacco farmers hurt by the economic repercussions of the MSA. Interpreting the Trust Agreement in a manner that could leave those individuals without this extra income for years runs squarely counter to the express purpose of the Trust.

Finally, we note the trial court's admirable attempt to discern legislative intent from the scant legislative record. We cannot agree, however, with its conclusion. The court held that Congress made FETRA effective in 2004 to save Settlors from their 2004 Phase II Annual Payment. Good reason exists to doubt this conclusion. First, the court assumed Congress construed the Tax Offset Adjustment provision in the same way as the court, that is, the mere enactment of a law imposing some future obligation tied to 2004 cigarette manufacturing would be sufficient to trigger a Tax Offset Adjustment for 2004. Given our holding, we do not think Congress necessarily viewed the provision in such a light.

Second, it is not at all apparent that Congress intended FETRA to become effective upon enactment. Generally, a law takes effect on the date of its enactment "absent [] clear direction by Congress to the contrary." *Gozlon-Peretz v. United States*, 498 U.S. 395, 404, 112 L. Ed. 2d 919, 930 (1991). Yet Congress went to the trouble of inserting an "Effective Date" section in FETRA. Section 643 of the Act states: "This title and the amendments made by this title shall apply to the 2005 and subsequent crops of each kind of tobacco." One could plausibly argue section 643 was drafted to prevent a Tax Offset Adjustment in 2004. True, the FETRA conference report stipulates that "the conference agreement is effective on the date of enactment." H.R. Rep. No. 108-755, at 218 (2004) (Conf. Rep.). The best evi-

dence of legislative intent is not conference reports, however, but statutes. *United States v. Gonzales*, 520 U.S. 1, 4, 137 L. Ed. 2d 132, 138 (1997) (noting judicial analysis of a statute always begins with "the statutory text"); *Knicklebine v. Pensacola*, 1988 U.S. Dist. LEXIS 18473 ("The most persuasive indicator of legislative intent, and the place of first resort, is the language of the statute.") On balance, we do not perceive in FETRA a congressional desire to give Settlors a Tax Offset Adjustment for 2004. Had it wished, Congress could have signaled such intent by explicitly directing the Secretary of Agriculture to collect the first FETRA assessment before 31 December 2004. It chose not to do so.

Recent federal regulations suggest the Secretary disagrees at least partially with the trial court's construction of FETRA. The trial court reasoned the Secretary could require payment of the initial FETRA assessment in December 2004, in which case "Amendment One . . . would control." 2004 WL 2966013 at *13. The U.S. Department of Agriculture's final rule on Tobacco Transition Assessments interprets FETRA's "contradictory" provisions to mean Congress intended the first FETRA assessment to be due on 31 March 2005. Tobacco Transition Assessments, 70 Fed. Reg. at 7009. A close reading of sections 625(b)(1) and 625(d)(3)(A) of the Act supports the Secretary's interpretation. Section 625(b)(1) calls for the imposition of quarterly assessments during fiscal years 2005 to 2014, but section 625(d)(3)(A) unambiguously directs collection of those assessments at the end of each calendar year quarter. Assuming the Secretary is correct, it is even less likely FETRA was a "change in[] law" for 2004 within the meaning of Schedule A.

The trial court was assuredly correct when it concluded the Tax Offset Adjustment provision was written to keep Settlors from having to fund two payment streams to the same tobacco farmers at the same time. Our decision does nothing to thwart this intent. Rather, we hold that Settlors must actually assume the burden of FETRA before being relieved of their obligations to the Phase II Trust. In so doing, we adhere to the plain language of the Tax Offset Adjustment provision and the express purpose of the Trust.

III. DISPOSITION

The trial court erroneously held the enactment of FETRA entitled Settlors to a Tax Offset Adjustment for 2004. The decision of that court is therefore reversed, and this case is hereby remanded for additional proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.

Justice WAINWRIGHT did not participate in the consideration or decision of this case.

REGINALD NEWBERNE v. DEPARTMENT OF CRIME CONTROL AND PUBLIC SAFETY, AN AGENCY OF THE STATE OF NORTH CAROLINA, DIVISION OF STATE HIGHWAY PATROL, A PRINCIPAL SUBUNIT OF AN AGENCY OF THE STATE OF NORTH CAROLINA, BRYAN E. BEATTY, IN HIS OFFICIAL CAPACITY AS SECRETARY OF THE DEPARTMENT OF CRIME CONTROL AND PUBLIC SAFETY, RICHARD W. HOLDEN, IN HIS OFFICIAL CAPACITY AS COMMANDING OFFICER OF THE DIVISION OF STATE HIGHWAY PATROL, C.E. MOODY, IN HIS OFFICIAL CAPACITY AS DIRECTOR OF INTERNAL AFFAIRS FOR THE DIVISION OF STATE HIGHWAY PATROL, AND A.C. COMBS, IN HIS INDIVIDUAL AND OFFICIAL CAPACITY AS FIRST SERGEANT WITH THE DIVISION OF STATE HIGHWAY PATROL

No. 75A05

(Filed 19 August 2005)

1. Public Officers and Employees— Whistleblower Act—elements and procedure

The North Carolina Whistleblower Act requires plaintiffs to prove, by a preponderance of the evidence, that the plaintiff engaged in a protected activity, that the defendant took adverse action against the plaintiff in his or her employment, and that there is a causal connection between the protected activity and the adverse action taken against the plaintiff. Procedurally, the plaintiff first tries to establish a prima facie case of retaliation under the statute, the defendant then presents its case, including its evidence as to legitimate reasons for the employment decision, and the court determines the framework to apply to the evidence before it.

2. Public Officers and Employees— whistleblowing claim—sufficiency of allegations

A trial judge ruling on a Rule 12(b)(6) motion to dismiss a whistleblowing claim should look at the face of the complaint to determine whether the factual allegations, if true, would sustain a claim for relief under any viable theory of causation. A whistleblowing case need not be correctly labeled for "pretext" or "mixed motive" analysis from the beginning; rather, the trial judge should make this determination after evaluating the evidence.

3. Public Officers and Employees— whistleblower—highway patrol trooper

A highway patrol trooper stated a claim for relief under N.C.G.S. § 126-84(a)(1) and (5), and the Court of Appeals erred in affirming the dismissal of plaintiff's whistleblower claim, where the trooper initially omitted from a report another trooper's statement about using undue force, subsequently filed an amended report including the statement, and was discharged for untruthfulness. Nothing in the language or legislative history of the Whistleblower Act suggests that the General Assembly intended to render the Act inapplicable when an employee's whistleblowing allegation appears in a supplemental or amended report, rather than an initial report.

4. Public Officers and Employees— whistleblower—superior court claim—administrative exhaustion

The doctrine of administrative exhaustion did not prevent a highway patrol trooper from filing a whistleblower claim in superior court even though he had previously filed a petition for a contested case hearing in the Office of Administrative Hearings. Although the allegations in plaintiff's petition were not inconsistent with the factual allegations in his complaint, the language in his petition in no way states a claim under the Whistleblower Act. The Whistleblower Act and the State Personnel Commission provide alternative means for an aggrieved party to seek relief.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 168 N.C. App. 87, 606 S.E.2d 742 (2005), affirming an order entered on 29 January 2003 by Judge Henry W. Hight, Jr. in Superior Court, Wake County. Heard in the Supreme Court 18 May 2005.

Allen and Pinnix, P.A., by J. Heydt Philbeck, for plaintiff-appellant.

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MARTIN, Justice.

On 9 April 2002, plaintiff Trooper Reginald Newberne filed suit against the named institutional and individual defendants, alleging that he was wrongfully terminated from his employment as a law enforcement officer with the State Highway Patrol in violation of the North Carolina Whistleblower Act, N.C.G.S. § 126-84 to -88. Defendants filed a motion to dismiss pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure, which the trial court allowed in an order filed 29 January 2003. A divided panel of the Court of Appeals affirmed, *Newberne v. Dep't of Crime Control*, 168 N.C. App. 87, 606 S.E.2d 742 (2005), and plaintiff appealed as a matter of right. *See* N.C.G.S. § 7A-30(2) (2003). We reverse.

A motion to dismiss under N.C. R. Civ. P. 12(b)(6) "is the usual and proper method of testing the legal sufficiency of the complaint." *Sutton v. Duke*, 277 N.C. 94, 98, 176 S.E.2d 161, 163 (1970). In reviewing a trial court's Rule 12(b)(6) dismissal, the appellate court must inquire " 'whether, as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory.' " *Meyer v. Walls*, 347 N.C. 97, 111, 489 S.E.2d 880, 888 (1997) (citations omitted); *see also Isenhour v. Hutto*, 350 N.C. 601, 604-05, 517 S.E.2d 121, 124 (1999). "Rule 12(b)(6) 'generally precludes dismissal except in those instances where the face of the complaint discloses some insurmountable bar to recovery.' " *Energy Investors Fund, L.P. v. Metric Constructors, Inc.*, 351 N.C. 331, 337, 525 S.E.2d 441, 445 (2000) (quoting *Sutton*, 277 N.C. at 102, 176 S.E.2d at 166 (citation omitted)); *cf. Conley v. Gibson*, 355 U.S. 41, 45-46, 2 L. Ed. 2d 80, 84 (1957). Dismissal is proper, however, "when one of the following three conditions is satisfied: (1) the complaint on its face reveals that no law supports the plaintiff's claim; (2) the complaint on its face reveals the absence of facts sufficient to make a good claim; or (3) the complaint discloses some fact that necessarily defeats the plaintiff's claim." *Wood v. Guilford Cty.*, 355 N.C. 161, 166, 558 S.E.2d 490, 494 (2002)

(citing *Oates v. JAG, Inc.*, 314 N.C. 276, 278, 333 S.E.2d 222, 224 (1985)); *see also McAllister v. Khie Sem Ha*, 347 N.C. 638, 641-42, 496 S.E.2d 577, 580-81 (1998) (citing *Burgess v. Your House of Raleigh, Inc.*, 326 N.C. 205, 209, 388 S.E.2d 134, 136 (1990)).

In applying this standard of review, we treat the allegations in plaintiff's complaint as true: From November 1989 until his termination on 10 April 2001, the North Carolina Department of Crime Control and Public Safety (the Department) employed plaintiff as a sworn law enforcement officer in the State Highway Patrol (SHP). On 14 May 2000 at approximately 12:30 a.m., plaintiff arrived at a crime scene shortly after the arrest of Owen Jackson Nichols on suspicion of driving while impaired. Plaintiff did not directly participate in or witness Nichols's apprehension or arrest, which was effectuated by SHP Troopers B.O. Johnson, P.A. Collins, and J.R. Edwards.

While speaking with another trooper at the scene, plaintiff was approached by Trooper P.A. Collins. Plaintiff noticed that Trooper Collins was rubbing his hand and asked whether he had been injured. Trooper Collins replied that he had jammed his hand after hitting Owen Nichols and that Trooper Edwards had "pulled it back in place." When plaintiff advised Trooper Collins to seek medical treatment, Trooper Collins responded that he "wouldn't know what to tell the sergeant" and added that he could tell the sergeant he broke his hand during a fall. After stating once again that Trooper Collins should seek medical attention, plaintiff departed the crime scene.

Later that day, Andy Nichols, the father of Owen Nichols, filed a complaint with the Internal Affairs Section of the SHP, alleging that Troopers Johnson, Collins, and Edwards had used excessive force in the apprehension and arrest of his son. Nearly a month later, on 13 June 2000, plaintiff's supervisor, First Sergeant A.C. Combs, asked plaintiff if he had been involved in the apprehension and arrest of Owen Nichols or if he had witnessed anyone using force on Owen Nichols. Plaintiff responded that he arrived on the scene only after Nichols had been placed under arrest and that he did not witness anyone using force on Nichols. Plaintiff also reported that Trooper Collins had apparently injured his hand during the incident. At the conclusion of this conversation, First Sergeant Combs instructed plaintiff to "write what he saw" in a statement and to submit that statement before the end of plaintiff's shift.

Plaintiff became apprehensive about preparing the statement, fearing that "breaking the code of silence" and disclosing facts con-

cerning a potential abuse of authority by another officer might subject him to retaliation by First Sergeant Combs and others within the Department and the SHP. Plaintiff therefore complied with First Sergeant Combs's request by preparing a statement, incorporated by reference in plaintiff's complaint, limited to what he literally "saw" on the night in question. Plaintiff wrote in his statement that Trooper Collins had apparently injured his hand, but did not include Trooper Collins's oral comments concerning *how* he had incurred that injury.

Despite having strictly followed First Sergeant Combs's instructions to write what he "saw," plaintiff remained troubled about whether he should also have included Trooper Collins's admission that he had struck Owen Nichols, notwithstanding plaintiff's fear of retaliation and reprisal. Accordingly, plaintiff sought the counsel of another trooper with the SHP, Sergeant Montgomery, in whom plaintiff confided both his fear of retaliation and his desire to "do the right thing." Shortly after soliciting and receiving Sergeant Montgomery's advice, plaintiff approached First Sergeant Combs on 20 June 2000 and told him there were "things he didn't know" about the events of 14 May 2000. First Sergeant Combs directed plaintiff to prepare an amended statement including everything he knew about the incident, and plaintiff prepared and submitted his amended statement later that day. In the amended report, which is incorporated by reference in plaintiff's complaint, plaintiff disclosed the details of his conversation with Trooper Collins at the crime scene, including Trooper Collins's alleged statements, "I hit the subject and jammed my hand" and "It just happened, I should know better."

On 15 September 2000, defendant Captain C.E. Moody, SHP Director of Internal Affairs, filed a personnel complaint against plaintiff based on information provided to him by First Sergeant Combs. The personnel complaint alleged that plaintiff had engaged in a "Serious Personal Conduct Violation" of the SHP Policy Manual's Directive No. H.1 Section VI, the so-called "Truthfulness Directive." On 10 April 2001, plaintiff was terminated from his employment with the Department and the SHP, ostensibly based on his violation of the Truthfulness Directive. Although at least some of the troopers directly involved in Owen Nichols's detention and arrest were disciplined for misconduct following an investigation into the 14 May 2000 incident, plaintiff was the only trooper whose employment was terminated.

Based on the factual allegations summarized above, plaintiff asserted a claim for damages under the North Carolina Whistleblower

Act, N.C.G.S. § 126-84 to -88. In stating his claim for relief, plaintiff expressly contended that defendants "discharged [p]laintiff because [p]laintiff reported to his superiors, both verbally and in writing, information in the Amended Statement that supports a contention that the Troopers violated State or federal law, rule or regulation and exercised gross abuse of authority in the apprehension and arrest of Owen Nichols." Plaintiff further asserted that defendants "discriminated against [p]laintiff for submitting the Amended Statement" in that plaintiff's dismissal was "grossly inequitable in comparison with the treatment and/or sanctions received by [the] other Troopers who were disciplined for the same and/or more severe misconduct but were not terminated." Plaintiff also contended that his termination "was pretextual in the perceived need to protect the Department and Division from a potential civil law suit by Owen Nichols for the use of excessive force."

I.

[1] In 1989, the General Assembly amended Chapter 126 of the North Carolina General Statutes, the State Personnel Act (SPA), by enacting Senate Bill 125, entitled "An Act to Encourage Reporting of Fraud, Waste, and Abuse in State Government and Endangerment to the Public Health and Safety, and to Protect Informant State Employees from Retaliation," and popularly known as the "Whistleblower Act." *Caudill v. Dellinger*, 129 N.C. App. 649, 653, 501 S.E.2d 99, 102, *disc. rev. denied*, 349 N.C. 353, 517 S.E.2d 887 (1998), *aff'd in part and disc. rev. improvidently allowed*, 350 N.C. 89, 511 S.E.2d 304 (1999) (per curiam). Now codified as Article 14 of Chapter 126, the Whistleblower Act declares that

> [i]t is the policy of this State that State employees shall be encouraged to report verbally or in writing to their supervisor, department head, or other appropriate authority, evidence of activity by a State agency or State employee constituting:
>
> (1) A violation of State or federal law, rule or regulation;
>
> (2) Fraud;
>
> (3) Misappropriation of State resources;
>
> (4) Substantial and specific danger to the public health and safety; or
>
> (5) Gross mismanagement, a gross waste of monies, or gross abuse of authority.

N.C.G.S. § 126-84(a) (2003). The Whistleblower Act further provides, in pertinent part, that

> [n]o head of any State department, agency or institution or other State employee exercising supervisory authority shall discharge, threaten or otherwise discriminate against a State employee regarding the State employee's compensation, terms, conditions, location, or privileges of employment because the State employee, or a person acting on behalf of the employee, reports or is about to report, verbally or in writing, any activity described in G.S. 126-84, unless the State employee knows or has reason to believe that the report is inaccurate.

N.C.G.S. § 126-85(a) (2003).

This Court has not previously had occasion to review claims brought under the Whistleblower Act. Based on our careful reading of the statute, however, we hold that the Act requires plaintiffs to prove, by a preponderance of the evidence, the following three essential elements: (1) that the plaintiff engaged in a protected activity, (2) that the defendant took adverse action against the plaintiff in his or her employment, and (3) that there is a causal connection between the protected activity and the adverse action taken against the plaintiff. This parsing of the statute is consistent with numerous state and federal court decisions identifying the essential elements of comparable whistleblower provisions in various state and federal statutes. *See*, *e.g.*, *Moon v. Transp. Drivers, Inc.*, 836 F.2d 226, 229 (6th Cir. 1987) (stating the elements of a retaliatory discharge claim under section 405(a) of 49 U.S.C. § 2305(a) (1982)); *Ross v. Commc'ns Satellite Corp.*, 759 F.2d 355, 365-66 (4th Cir. 1985) (stating the elements of a retaliation claim under 42 U.S.C. § 2000e-3 (1982)); *Goff v. Cont'l Oil Co.*, 678 F.2d 593, 599 (5th Cir. 1982) (stating the elements of a retaliation claim under 42 U.S.C. § 1981)[1]; *Eaton v. Kindred Nursing Ctrs. W., LLC*, 2005 U.S. Dist. LEXIS 9545, at *25 (D. Me. May 19, 2005) (recommended decision of magistrate judge) (stating the elements of a claim brought under Maine Whistleblower Protection Act), *aff'd*, 2005 U.S. Dist. LEXIS 12622 (D. Me. June 24, 2005) (No.

1. We note that the United States Court of Appeals for the Fifth Circuit overruled *Goff* in *Carter v. South Central Bell*, 912 F.2d 832, 840-41 (5th Cir. 1990) (holding that retaliation claims are not cognizable under 42 U.S.C. § 1981), *cert. denied*, 501 U.S. 1260, 115 L. Ed. 2d 1079 (1991). As noted by the District Court for the Eastern District of Louisiana, however, *Carter* itself was superceded by statute when Congress amended section 1981 by enacting the Civil Rights Act of 1991. *Wilson v. Shell Oil Co.*, 1995 U.S. Dist. LEXIS 7305, at *15 (E.D. La. May 18, 1995) (magistrate judge).

Civ. 04-131-B-W); *Hubbard v. UPI*, 330 N.W.2d 428, 444 (Minn. 1983) (stating the elements of a retaliatory discharge claim brought under the Minnesota Human Rights Act). *See generally* Michael Delikat et al., *Retaliation and Whistleblower Claims*, in Employment Law Yearbook, § 14:3, at 806-07 (Timothy J. Long, ed., 2005) (discussing the elements of retaliation claims under the whistleblower provisions of several federal statutes, including Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act, the Americans with Disabilities Act, and the Equal Pay Act) [hereinafter Delikat, *Retaliation and Whistleblower Claims*].

We note that in the first North Carolina appellate decision to address the Whistleblower Act, the Court of Appeals articulated the third element differently, stating that a plaintiff must show that " 'the protected conduct was a substantial or motivating factor in the adverse action.' " *Kennedy v. Guilford Technical Cmty. Coll.*, 115 N.C. App. 581, 584, 448 S.E.2d 280, 282 (1994) (quoting *McCauley v. Greensboro City Bd. of Educ.*, 714 F. Supp. 146, 151 (M.D.N.C. 1987)); *see also Caudill*, 129 N.C. App. at 655, 501 S.E.2d at 103 (quoting *Kennedy* in stating the elements of a whistleblower claim); *Hanton v. Gilbert*, 126 N.C. App. 561, 571, 486 S.E.2d 432, 439 (1997) (same). In support of this formulation of the causation element, the Court of Appeals relied on a federal case arising from a retaliation claim brought under 42 U.S.C. § 1983 for alleged violations of the plaintiff's constitutional rights under the First and Fourteenth Amendments. *Kennedy*, 115 N.C. App. at 584, 448 S.E.2d at 282 (citing *McCauley*, 714 F. Supp. at 151). Citing another federal case arising in a different context, the Court of Appeals then described a burden-shifting proof scheme for the causation element. The Court stated that upon the plaintiff's "presentation of a *prima facie* case of retaliation . . . 'the burden of production shifts to the defendant to articulate a legitimate, non-discriminatory reason for the adverse [employment] action.' " *Id.* at 584-85, 448 S.E.2d at 282 (quoting *Melchi v. Burns Int'l Sec. Servs., Inc.*, 597 F. Supp. 575, 582 (E.D. Mich. 1984)). The Court further stated that "if the defendant-employer meets its burden, the plaintiff must then come forward with evidence to show 'that the legitimate reason was a mere pretext for the retaliatory action.' " *Id.* at 585, 448 S.E.2d at 282 (quoting *Melchi*, 597 F. Supp. at 582). Thus, the Court of Appeals concluded, " '[the] plaintiff retains the ultimate burden of proving that the [adverse employment action] would not have occurred had there been no protected activity' engaged in by the plaintiff." *Id.* (quoting *Melchi*, 597 F. Supp. at 583).

Although the Court of Appeals was correct to hold that courts should generally apply a burden-shifting approach when analyzing the causation element of a whistleblower claim, the analysis set forth in *Kennedy* conflates two distinct proof schemes which apply under different factual circumstances. Moreover, for the reasons detailed below, the *Kennedy* formulation of the causation element applies only when the plaintiff presents *direct evidence* of the defendant's retaliatory animus. We therefore decline to follow *Kennedy's* articulation of the elements of a whistleblower claim. We also take this opportunity to clarify the proof schemes that may apply to claims under the Whistleblower Act and to offer guidance to our trial courts in analyzing the causation element.

There are at least three distinct ways for a plaintiff to establish a causal connection between the protected activity and the adverse employment action under the Whistleblower Act. First, a plaintiff may rely on the employer's "admi[ssion] that it took adverse action against [the plaintiff] [solely] because of the [plaintiff's] protected activity." Delikat, *Retaliation and Whistleblower Claims*, § 14:6, at 838. Such "smoking gun" evidence is rare, *Thomas v. Eastman Kodak Co.*, 183 F.3d 38, 58 n.12 (1st Cir. 1999), *cert. denied*, 528 U.S. 1161, 145 L. Ed. 2d 1082 (2000), as "few employers openly state that they are terminating employees [solely] because of their whistleblowing activities." Daniel P. Westman & Nancy M. Modesitt, *Whistleblowing: The Law of Retaliatory Discharge* Ch. 9 § III.A-4, at 232 (2d ed. 2004) [hereinafter Westman & Modesitt, *Whistleblowing*].

Second, a plaintiff may seek to establish by circumstantial evidence that the adverse employment action was retaliatory and that the employer's proffered explanation for the action was pretextual. *See* Delikat, *Retaliation and Whistleblower Claims*, §§ 14:6, 14:6.2, at 838-55. Cases in this category are commonly referred to as "pretext" cases. *Id.* § 14:6.2, at 839. They are governed by the burden-shifting proof scheme developed by the United States Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 36 L. Ed. 2d 668 (1973) and *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 67 L. Ed. 2d 207 (1981). *See*, *e.g.*, *Ross*, 759 F.2d at 365-66 (applying this burden-shifting analysis to a claim of retaliatory harassment and discharge brought under 42 U.S.C. § 2000e-3(a)); *Tex. Dep't of Human Servs. v. Hinds*, 904 S.W.2d 629, 636 (Tex. 1995) (applying this burden-shifting analysis to a claim brought under a state statutory whistleblower provision).[2]

2. In a case of first impression brought under N.C.G.S. § 126-36, which prohibits retaliation against state employees for their opposition to certain forms of discrimina-

Under the *McDonnell Douglas/Burdine* proof scheme, once a plaintiff establishes a prima facie case of unlawful retaliation, the burden shifts to the defendant to articulate a lawful reason for the employment action at issue. *See Burdine*, 450 U.S. at 252-53, 67 L. Ed. 2d at 215 (citing *McDonnell Douglas*, 411 U.S. at 802, 36 L. Ed. 2d at 677-78). If the defendant meets this burden of production, the burden shifts back to the plaintiff to demonstrate that the defendant's proffered explanation is pretextual. *Id.* (citing *McDonnell Douglas*, 411 U.S. at 804, 36 L. Ed. 2d at 679). The ultimate burden of persuasion rests at all times with the plaintiff. *Id.*

Third, when "the employer claims to have had a good reason for taking the adverse action but the employee has direct evidence of a retaliatory motive," a plaintiff may seek to prove that, even if a legitimate basis for discipline existed, unlawful retaliation was nonetheless a substantial causative factor for the adverse action taken. Delikat, *Retaliation and Whistleblower Claims*, §§ 14:6, 14:6.1, at 838-39. Cases in this category are commonly referred to as " 'mixed motive' " cases. *Id.* (citations omitted); *see also* Westman & Modesitt, *Whistleblowing* Ch. 9 § IV.A, at 234-35. Such cases are governed by the proof scheme endorsed by the United States Supreme Court in *Mt. Healthy City Board of Education v. Doyle*, 429 U.S. 274, 50 L. Ed. 2d 471 (1977), *superceded by statute on other grounds as stated in Rivera v. United States*, 924 F.2d 948, 954 n.7 (9th Cir. 1991), and extended to Title VII actions in *Price Waterhouse v. Hopkins*, 490 U.S. 228, 104 L. Ed. 2d 268 (1989). Delikat, *Retaliation and Whistleblower Claims*, § 14:6.1, at 838-39; *cf. Lenzer v. Flaherty*, 106 N.C. App. 496, 509, 418 S.E.2d 276, 284 (1992) (applying *Mt. Healthy* to a claim of civil conspiracy to discharge the plaintiff in retaliation for her exercise of free speech rights), *disc. rev. denied*, 332 N.C. 345, 421 S.E.2d 348 (1992).

Under the *Mt. Healthy/Price Waterhouse* analysis, once a plaintiff has carried his or her burden to show that protected conduct was a " 'substantial' " or " 'motivating' " factor for the adverse employment action, the defendant must prove "by a preponderance of the evidence that it would have reached the same decision as to [the employment action at issue] even in the absence of the protected

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tion, this Court "look[ed] to federal decisions for guidance in establishing evidentiary standards and principles of law to be applied in discrimination cases." *N.C. Dep't of Corr. v. Gibson*, 308 N.C. 131, 136, 301 S.E.2d 78, 82 (1983). Like *Gibson*, the instant "case is one of first impression in this jurisdiction[,] and we [therefore] look to federal decisions for guidance in establishing evidentiary standards and principles of law to be applied." *Id.*

conduct." *Mt. Healthy*, 429 U.S. at 287, 50 L. Ed. 2d at 484 (citation omitted); *see also Price Waterhouse*, 490 U.S. at 258, 104 L. Ed. 2d at 293 (plurality opinion). In contrast to the "pretext" analysis described in *McDonnell Douglas* and *Burdine*, the ultimate burden of persuasion in a "mixed motive" case may be allocated to the defendant once a plaintiff has established a prima facie case. *Price Waterhouse*, 490 U.S. at 258, 104 L. Ed. 2d at 293 (plurality opinion); *id.* at 276, 104 L. Ed. 2d at 304-05 (O'Connor, J., concurring in the judgment). In order to shift the burden to the defendant, however, the plaintiff must first demonstrate "by *direct evidence* that an illegitimate criterion was a substantial factor in the decision." 490 U.S. at 276, 104 L. Ed. 2d at 304 (O'Connor, J., concurring in the judgment) (emphasis added);[3] *see also TWA v. Thurston*, 469 U.S. 111, 121, 83 L. Ed. 2d 523, 533 (1985) (stating that "the *McDonnell Douglas* test is inapplicable where the plaintiff presents direct evidence of discrimination"); *Fuller v. Phipps*, 67 F.3d 1137, 1142 (4th Cir. 1995) (stating that plaintiffs must present " 'direct evidence that decisionmakers placed substantial negative reliance on an illegitimate criterion' " in order "[t]o earn a mixed-motive instruction") (citation omitted), *overruled in part by Desert Palace, Inc. v. Costa*, 539 U.S. 90, 156 L. Ed. 2d 84 (2003); *Eaton*, 2005 U.S. Dist. LEXIS 9545 at *24-25 (applying the *McDonnell Douglas* proof scheme to a whistleblower claim in the absence of direct evidence of retaliation); *Miko v. Comm'n on Human Rights & Opportunities*, 220 Conn. 192, 204, 596 A.2d 396, 403 (1991) (holding that "[w]hen the plaintiff presents direct evidence of discrimination," *Price Waterhouse* applies rather than *McDonnell Douglas*). "Direct evidence" has been defined as "evidence of conduct or statements that both reflect directly the alleged [retaliatory] attitude and that bear directly on the contested employment decision." *Fuller*, 67 F.3d at 1142. In the context of the *Price Waterhouse* proof scheme, direct evidence does not include "stray remarks in the workplace, ... statements by nondecisionmakers, or statements by decisionmakers unrelated to the decisional process itself." *Price Waterhouse*, 490 U.S. at 277, 104 L. Ed. 2d at 305 (O'Connor, J., concurring in the judgment). Once the plaintiff establishes a prima facie

3. Because there was no majority opinion in *Price Waterhouse*, Justice O'Connor's concurring opinion, which represented the narrowest ground for decision, constitutes the holding of that case. *See Price Waterhouse*, 490 U.S. at 280, 104 L. Ed. 2d at 307 (Kennedy, J., dissenting) (citing Justice O'Connor's concurring opinion for the proposition that the "actual holding of today's decision" is that "[t]he shift in the burden of persuasion occurs only where a plaintiff proves by *direct evidence* that an unlawful motive was a substantial factor actually relied upon in making the decision" (emphasis added)).

case including "direct evidence" on the causation element, the *defendant* carries the burden to "show that its legitimate reason, standing alone, would have induced it to make the same decision." *Id.* at 252, 104 L. Ed. 2d at 289 (plurality opinion).

We agree with the United States Supreme Court that the essential differences between "pretext" and "mixed-motive" cases necessitate application of different proof schemes, and therefore follow *Price Waterhouse* in holding that claims under the North Carolina Whistleblower Act may be subject to either form of analysis, depending on the evidence presented in each individual case. As the *Price Waterhouse* plurality noted, "[t]he very premise of a mixed-motives case" is that the defendant possessed both legitimate *and* unlawful motives for the adverse employment action taken. *Id.* at 252, 104 L. Ed. 2d at 289. "Where a decision was the product of a mixture of legitimate and illegitimate motives, . . . it simply makes no sense to ask whether the legitimate reason was '*the* "true reason" ' for the decision—which is the question asked by *Burdine*." *Id.* at 247, 104 L. Ed. 2d at 285 (citation omitted). Thus, rather than require a plaintiff to "squeeze [his or] her proof into *Burdine's* framework," it is appropriate, once a plaintiff has established that an unlawful motive was present, to require the *defendant* to prove by a preponderance of the evidence that the unlawful motive was not a but-for cause of the adverse employment action. *Id.* at 247, 252, 104 L. Ed. 2d at 285, 289. Shifting the burden of persuasion to the defendant is justified only when the plaintiff presents *direct evidence* of an impermissible motive, however, because (1) the defendant is not "entitled to . . . [a] presumption of good faith where there is direct evidence that it has placed substantial reliance on factors whose consideration is [statutorily] forbidden," and (2) "[a]s an evidentiary matter, where a plaintiff has made this type of strong showing of illicit motivation, the factfinder is entitled to presume that the employer's [retaliatory] animus made a difference to the outcome, absent proof to the contrary from the employer." *Id.* at 271-76, 104 L. Ed. 2d at 301-04 (O'Connor, J., concurring in the judgment). Thus, only when such "direct evidence" is presented do plaintiffs "qualify for the more advantageous standards of liability applicable in mixed-motive cases." *Fuller*, 67 F.3d at 1141.[4]

4. We acknowledge that, subsequent to the United States Supreme Court's decision in *Price Waterhouse*, "Congress codified a new evidentiary rule for mixed-motive cases arising under Title VII" of the Civil Rights Act of 1964 that abrogates Justice O'Connor's direct evidence requirement and permits plaintiffs to avail themselves of the mixed-motive standard in Title VII actions without direct evidence of unlawful dis-

Therefore, claims brought under the Whistleblower Act should be adjudicated according to the following procedures. First, the plaintiff must endeavor to establish a prima facie case of retaliation under the statute. *Cf. Price Waterhouse*, 490 U.S. at 278, 104 L. Ed. 2d at 306 (O'Connor, J., concurring in the judgment). The plaintiff should include any available "direct evidence" that the adverse employment action was retaliatory along with circumstantial evidence to that effect. *Cf. id.* Second, "[t]he defendant should . . . present its case, including its evidence as to legitimate . . . reasons for the employment decision." *Id.* Third, "[o]nce all the evidence has been received, the court should determine whether the *McDonnell Douglas* or *Price Waterhouse* framework properly applies to the evidence before it." *Id.* If the plaintiff has demonstrated that he or she engaged in a protected activity and the defendant took adverse action against the plaintiff in his or her employment, and if the plaintiff has further established by *direct evidence* that " 'the protected conduct was a substantial or motivating factor in the adverse [employment] action,' " *Kennedy*, 115 N.C. App. at 584, 448 S.E.2d at 282 (citation omitted), then the defendant bears the burden to "show that its legitimate reason, standing alone, would have induced it to make the same decision." *Price Waterhouse*, 490 U.S. at 252, 104 L. Ed. 2d at 289 (plurality opinion). If, however, "the plaintiff has failed to satisfy the *Price Waterhouse* threshold, the case should be decided under the principles enunciated in *McDonnell Douglas* and *Burdine*, with the plaintiff bearing the burden of persuasion on the ultimate issue whether the employment action was taken [for retaliatory purposes]." *Id.* at 278-79, 104 L. Ed. 2d at 306 (O'Connor, J., concurring in the judgment).

[2] Applying this analytical framework to the allegations in the instant complaint, we conclude that it is premature to determine whether the instant case should be analyzed according to the "pretext" model of *McDonnell Douglas* and *Burdine* or the "mixed-motive" analysis of *Mt. Healthy* and *Price Waterhouse*. As the trial court's choice between these two analytical models depends on the nature of both the plaintiff's and the defendants' evidence, a trial court may not make a final determination as to which of these two proof schemes applies until "all the evidence has been received." *Id.* at 278, 104 L. Ed. 2d at 306. Indeed, because "[d]iscovery often will be necessary before the plaintiff can know whether both legitimate

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crimination. *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 102 156 L. Ed. 2d 84, 96 (2003) (O'Connor, J., concurring). This statutory amendment, however, applies only to claims brought under Title VII of the Civil Rights Act of 1964. *Id.*

and illegitimate considerations played a part in the [adverse employment] decision," *id.* at 247 n.12, 104 L. Ed. 2d at 285 n.12, a plaintiff may not be in a position to specify whether the claim is based on the "mixed motive" or "pretext" theory of causation when drafting a complaint. We therefore echo the words of the *Price Waterhouse* plurality in saying that "[n]othing in this opinion should be taken to suggest that a case must be correctly labeled as either a 'pretext' case or a 'mixed-motives' case from the beginning." *Id.*; *see also Fuller*, 67 F.3d at 1142 n.2 (stating that "a plaintiff need not decide at the outset whether to classify his case as a 'pretext' or a 'mixed-motive' case" and that the trial court judge should "make[] this determination after evaluating the evidence"). Accordingly, a trial court ruling on a Rule 12(b)(6) motion to dismiss a whistleblowing claim should look at the face of the complaint to determine whether the factual allegations, if true, would sustain a claim for relief under *any* viable theory of causation. *See, e.g.*, *Lynn v. Overlook Dev.*, 328 N.C. 689, 692, 403 S.E.2d 469, 471 (1991).

II.

[3] We next address defendants' argument that plaintiff's claim is subject to dismissal because it "does not contain facts sufficient to show that [plaintiff] was engaged in [a] 'protected activity,' " the first element of a whistleblower claim. Emphasizing plaintiff's omission of the details of his conversation with Trooper Collins in his initial report, defendants assert that "[p]laintiff's lying and misleading inaccuracies were the reason he was disciplined." Defendants further contend that "[l]ying to a supervisor is not [w]histle-blowing and is certainly not a 'protected activity' " under the Whistleblowing Act. Finally, defendants contend that "[p]laintiff's [c]omplaint d[oes] not contain facts sufficient to show that his dismissal was for any reason other than his own untruthfulness" in his initial report. We disagree.

As an initial matter, even assuming plaintiff's initial report contained "misleading inaccuracies,"[5] we do not agree with defendants' contention that any "admission of untruthfulness" on the part of the plaintiff necessarily constitutes "a complete bar to recovery" under

5. Plaintiff concedes in his complaint that he did not disclose the details of his conversation with Trooper Collins in his initial statement, but nonetheless maintains that his initial statement was "truthful and complied with the instruction of [First Sergeant] Combs that [he] memorialize what [he] saw at the [i]ncident." Because it is not necessary to our disposition of this case, we do not address whether plaintiff's initial report is best characterized as "misleading" and "inaccurate" or "truthful" in light of First Sergeant Combs's alleged instructions.

the Whistleblower Act. The Whistleblower Act prohibits employment retaliation against a state employee who files a report alleging certain categories of misconduct or mismanagement by other state employees or agencies "unless the State employee knows or has reason to believe that the report is inaccurate." N.C.G.S. § 126-85(a). The plain meaning of this proviso is that the Act does not apply to employees who make allegations of mismanagement or wrongdoing which they know or should know to be false. In other words, the Act does not protect *false whistleblowing allegations*, unless the plaintiff had no reason to know of their falsehood. *Cf.* Westman & Modesitt, *Whistleblowing* Ch. 2 § II.E.2, at 52 (noting that "false [whistleblowing] allegations serve no public interest"); Lois A. Lofgren, *Whistleblower Protection: Should Legislatures and the Courts Provide a Shelter to Public and Private Sector Employees Who Disclose the Wrongdoing of Employers?*, 38 S.D. L. Rev. 316, 326 (1993) (stating that a "common thread between the various state [whistleblower] laws is the requirement that an employee's complaint be made in good faith"). Nothing in the language or legislative history of the Act suggests that the General Assembly intended to render the Act inapplicable when an employee's whistleblowing allegation appears in a supplemental or amended report, rather than an initial report. Indeed, such a construction would undermine the legislatively declared policy of this state that the reporting of various forms of governmental mismanagement and wrongdoing shall be "encouraged." N.C.G.S. § 126-84(a). Moreover, as a simple matter of logic, the failure to make an allegation of wrongdoing in an *initial repor*t does not render an *amended or supplemental report* which contains such an allegation "inaccurate" under N.C.G.S. § 126-85(a).

More importantly, defendants' assertion that the "lying and misleading inaccuracies" in plaintiff's initial report were the true reason for plaintiff's dismissal is merely a *factual allegation*—one that is directly contradicted by the factual allegations in plaintiff's complaint. In ruling on a motion to dismiss pursuant to Rule 12(b)(6), a trial court must "take all allegations of fact in the complaint as true." *Cage v. Colonial Bldg. Co.*, 337 N.C. 682, 683, 448 S.E.2d 115, 116 (1994). Although plaintiff acknowledged in his complaint that the *professed* reason for his dismissal was his purported violation of the Truthfulness Directive, he also expressly alleged that the *actual* reason for his termination was his disclosure of a possible abuse of authority in his *amended* statement. Specifically, plaintiff alleged that "[d]efendants discharged [p]laintiff because [p]laintiff reported to his

superiors, both verbally and in writing, information in the *Amended Statement* that supports a contention that the [t]roopers violated State or federal law, rule or regulation and exercised gross abuse of authority in the apprehension and arrest of Owen Nichols." (Emphasis added.) Accordingly, plaintiff has stated a claim for relief under N.C.G.S. § 126-84(a)(1) and (5), and the Court of Appeals erred in affirming the dismissal of plaintiff's whistleblower claim.

III.

[4] Finally, we address defendants' argument that dismissal was proper because plaintiff failed to exhaust his administrative remedies in the Office of Administrative Hearings (OAH) before filing his complaint in the trial court. Defendants contend that plaintiff's petition for a contested case hearing, which was filed in the OAH prior to the initiation of the instant lawsuit, "was a [w]histleblower action." Defendants further assert that plaintiff failed to exhaust his administrative remedies before filing the instant complaint. Based on these contentions, defendants argue that plaintiff's claim is barred by the doctrine of administrative exhaustion. We disagree.

As the Court of Appeals has correctly noted, "[t]wo statutes provide avenues to redress violations of the Whistleblower statute." *Swain v. Elfland*, 145 N.C. App. 383, 389, 550 S.E.2d 530, 535, *cert. denied*, 354 N.C. 228, 554 S.E.2d 832 (2001). First, the Whistleblower Act expressly provides that "any State employee injured by a violation of G.S. 126-85 may maintain an action in superior court." N.C.G.S. § 126-86 (2003). Second, the SPA provides that state employees may file a petition for a contested case hearing in the OAH for "[a]ny retaliatory personnel action that violates G.S. 126-85," N.C.G.S. § 126-34.1(a)(7) (2003). Viewing these two statutes *in pari materia*, we agree with the Court of Appeals that they "are not irreconcilable," but "create alternative means for an aggrieved party to seek relief." *Wells v. N.C. Dep't of Corr.*, 152 N.C. App. 307, 313, 567 S.E.2d 803, 808-09 (2002). In other words, a "state employee may choose to pursue a [w]histleblower claim in either [a judicial or an administrative] forum, but not both." *Swain*, 145 N.C. App. at 389, 550 S.E.2d at 535.

We agree with defendants that, as a general proposition, if a state employee chooses to forego the judicial forum and initiates a whistleblower claim in the OAH, the employee's only recourse to superior court is to petition for judicial review of the final agency

decision of the State Personnel Commission (SPC) pursuant to N.C.G.S. § 150B-43 (2003). As the Court of Appeals reasoned, to allow a plaintiff to "maintain an administrative action and an action in superior court simultaneously . . . . would allow plaintiff two bites of the apple, could lead to the possibility that different forums would reach opposite decisions, [and could] engender needless litigation in violation of the principles of collateral estoppel." *Swain*, 145 N.C. App. at 389, 550 S.E.2d at 535. In addition, the General Assembly has prescribed specific procedures for the adjudication and appeal of administrative complaints filed under the SPA and the North Carolina Administrative Procedure Act (APA). *See generally N.C. Dep't of Env't & Natural Res. v. Carroll*, 358 N.C. 649, 657-58, 599 S.E.2d 888, 893-94 (2004). Specifically, an employee who opts to file a retaliation claim as an administrative action with the OAH has a right to appeal an adverse decision to the SPC. N.C.G.S. § 126-36(b) (2003). The final agency decision of the SPC is subject to judicial review upon petition of either party in the Superior Court of Wake County or the county where the petitioner resides. N.C.G.S. §§ 126-37(b2), 150B-45 (2003). As we have previously stated, "[t]he avoidance of untimely intervention in the administrative process is a long recognized policy of judicial restraint." *Presnell v. Pell*, 298 N.C. 715, 722, 260 S.E.2d 611, 615 (1979). Moreover, "[t]his policy acquires the status of a jurisdictional prerequisite when the legislature has explicitly provided the means by which a party may seek effective judicial review of particular administrative action." *Id.* Thus, when an employee opts to avail himself or herself of the administrative procedures for adjudicating whistleblower claims as set forth in the SPA and APA, such procedures are normally " 'the exclusive means for obtaining . . . judicial review.' " *Id.* (quoting *Snow v. N.C. Bd. of Architecture*, 273 N.C. 559, 570-71, 160 S.E.2d 719, 727 (1968)).

We disagree, however, with the factual predicate of defendants' argument—that plaintiff "raised a [w]histleblower claim at the OAH." The only evidence of record concerning plaintiff's administrative action is a copy of his petition for a contested case hearing, a standard form document.[6] In that petition, plaintiff indicated two distinct grounds for his request for an administrative hearing by checking the appropriate choices printed on the form. First, plaintiff indicated that he was "discharge[d] without just cause." Second, plaintiff indicated that he was terminated due to "discrimina-

6. Neither the record on appeal nor the allegations in plaintiff's complaint reveal anything about the procedural history of plaintiff's administrative action other than the fact that a petition for contested case hearing was filed.

tion and/or retaliation for opposition to alleged discrimination," and that "the type of discrimination" was "[r]ace." In his only textual elaboration of the basis for his petition, plaintiff simply stated, "I was dismissed as a Highway Patrolman without just cause based upon a complete misinterpretation of my actions and statements re: a case of excessive force."

Nowhere in his petition did plaintiff reference the Whistleblower Act or allege that his employment was terminated in retaliation for his reporting a potential abuse of authority by other officers in the SHP. Although plaintiff's allegation that he was dismissed "without just cause based upon a complete misinterpretation of [his] actions and statements" is not inconsistent with the factual allegations in his subsequently filed whistleblower claim, the language in his petition in no way states a claim under the Whistleblower Act. Indeed, of the eleven specific statutory grounds for filing a contested case under the SPA, *see* N.C.G.S. § 126-34.1 (2003), plaintiff's petition states only two: (1) that he was terminated without "just cause" in violation of N.C.G.S. § 126-35, and (2) that he was terminated because of his race in violation of Chapter 168A. *See* N.C.G.S. § 126-34.1(a)(1), (2). Conspicuously absent from plaintiff's petition is any allegation that his dismissal constituted a "retaliatory personnel action that violates [the Whistleblower Act]," an entirely separate statutory ground for seeking an administrative hearing in the OAH. *See* N.C.G.S. § 126-34.1(a)(7). Accordingly, the doctrine of administrative exhaustion does not prevent plaintiff from filing a whistleblower claim in superior court.[7]

In conclusion, plaintiff's allegations are sufficient to overcome defendants' Rule 12(b)(6) motion to dismiss. Moreover, plaintiff is not barred from bringing his claim by the doctrine of administrative

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7. In holding that the doctrine barred plaintiff's action, the Court of Appeals noted that "[p]laintiff admits in his complaint that he 'did not exhaust his potential administrative remedies.' " *Newberne*, 168 N.C. App. at ——, 606 S.E.2d at 746. Taken in context, however, this statement in plaintiff's complaint strongly supports his assertion that he did *not* allege a violation of the Whistleblower Act in his administrative action. Plaintiff stated that he "did not exhaust his *potential* administrative remedies for his claim of retaliation in that the same would have been futile and inadequate" because "*[h]ad plaintiff filed a petition for Contested Case Hearing for retaliation*," he would have been (1) "deprived of his right to a trial by jury," (2) "deprived of his right to sue any defendant individually," and (3) "deprived of his right to be awarded treble damages against individuals found to be in willful violation." (Emphasis added.) Thus, plaintiff's complaint is entirely consistent with his contention on appeal that his petition for a contested case hearing did *not* state a claim of retaliation under the Whistleblower Act, in addition to explaining his reasons for not doing so.

exhaustion. The decision of the Court of Appeals is therefore reversed, and the case is remanded to that Court for consideration of plaintiff's remaining assignment of error.

REVERSED AND REMANDED.

STATE OF NORTH CAROLINA v. FRANKLIN LEE McNEIL

No. 437A04

(Filed 19 August 2005)

Drugs— constructive possession of cocaine—sufficiency of evidence

There was substantial evidence that defendant constructively possessed cocaine and the trial court correctly denied defendant's motions to dismiss a charge of possession with intent to sell and deliver. A broad range of incriminating circumstances have been considered in concluding that an inference of constructive possession is appropriate where the defendant does not have exclusive possession of the place where the narcotics are found. In this case, an officer responding to a report of drug sales stopped defendant and another man, noted nervousness in the other man and frisked him, defendant fled, the officer pursued defendant into a house where an altercation ensued, defendant repeatedly went "over the top" of a chair with his arm, defendant was subdued, officers found crack behind the chair and a bag of powdered cocaine at the site of the original stop, and defendant admitted that the crack was his but denied the cocaine on the ground belonged to him. The evidence was sufficient to support a finding of actual possession, which may be proven by circumstantial evidence, as well as constructive possession.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 165 N.C. App. 777, 600 S.E.2d 31 (2004), affirming a judgment entered 21 November 2002 by Judge Orlando F. Hudson, Jr. in Superior Court, Durham County, upon a jury verdict finding defendant guilty of possession with intent to sell or deliver cocaine and guilty of habitual felon status. Heard in the Supreme Court 7 February 2005.

Roy Cooper, Attorney General, by Thomas J. Pitman, Special Deputy Attorney General, for the State.

Sofie W. Hosford for defendant-appellant.

BRADY, Justice.

The sole issue before the Court is whether the State presented sufficient evidence that defendant, Franklin Lee McNeil, possessed 5.5 grams of crack cocaine, such that the trial court properly denied defendant's motions to dismiss the charge of possession with intent to sell or deliver cocaine. We determine that the evidence presented by the State during defendant's trial, considered as a whole and taken in the light most favorable to the State, was sufficient for the trial court to deny defendant's motion to dismiss the charge. Accordingly, we affirm the Court of Appeals.

PROCEDURAL AND FACTUAL BACKGROUND

On 4 March 2002, defendant was indicted by a Durham County Grand Jury for possession with intent to sell and deliver cocaine and having attained habitual felon status. Defendant made two separate pre-trial motions to suppress evidence; one to suppress "tangible evidence," which was made on 11 March 2002, and a separate motion made on 21 November 2002 to suppress defendant's statements to Officer Broadwell. Judge Hudson denied both motions in a written order dated 21 November 2002. Defendant's case was then tried at the 21 November 2002 Criminal Session of Durham County Superior Court before Judge Hudson.

The evidence presented by the State at trial established that on the afternoon of 31 August 2001, Officer J.R. Broadwell of the City of Durham Police Department responded to a complaint that drug sales were occurring on the street in front of 1108 Fargo Street in Durham, North Carolina. As Officer Broadwell turned onto Fargo Street, he saw defendant and a companion standing in front of 1108 Fargo Street. According to Officer Broadwell, upon noticing him turn onto Fargo Street both men "immediately started to try to walk away on Fargo Street toward Umstead." However, Officer Broadwell drove his patrol car farther down the street, exited the vehicle, and then asked the men if he could talk with them. The men stopped, and Officer Broadwell began questioning them by asking them where they lived. Officer Broadwell noted that at first, both men "acted nervous" and "really wouldn't answer the questions. They paused, they looked at

each other and it was almost like they didn't know what to say like they were confused." However, both men eventually indicated that they lived "on Fargo [S]treet."

Officer Broadwell also observed that defendant's companion "was trying to light a cigarette and he was shaking, visibly shaking so bad that he couldn't even hold his cigarette or the lighter near his mouth long enough to light it." At this point, Officer Broadwell began a weapons frisk of defendant's companion. As he did so, Officer Broadwell saw defendant "immediately shove[] his right hand into his right front pocket." Officer Broadwell "advised [defendant] to take his hands out of his pockets," at which time defendant fled the scene. Officer Broadwell pursued defendant, ordering him to stop several times. However, defendant continued to run until he reached a house at 1201 Fargo Street, an address that did not match the address defendant had provided Officer Broadwell in response to the officer's question regarding defendant's home. The door to the house was "just barely cracked open and [defendant] just threw it open and ran into the house."

Officer Broadwell testified that he chased defendant into a room in the "very back of the house," where defendant "went over the top of the chair with his arm at which time [Officer Broadwell] caught up to him" and attempted to place defendant in custody. Defendant "threw" Officer Broadwell off of him and began to run back through the house. Officer Broadwell "got back up off the floor, grabbed [defendant] and [they] wrestled and fought through several rooms of the house" until they reached the kitchen area, where Officer Broadwell was able to handcuff defendant and place him in custody.

Other officers arrived on the scene and Officer Broadwell "immediately went back to the back room and looked behind the chair" and retrieved twenty-two rocks of crack cocaine, individually wrapped in corners of plastic bags. Once this evidence was collected, Officer Broadwell escorted defendant to his patrol car, which he had left in the area where he originally started chasing defendant. While there, Officer Broadwell found "three more smaller bags with a powdered substance in them laying on the ground." Officer Broadwell picked the bags up and said, "[O]h, look what we have here," to which defendant responded that the crack found in the house was his, but the three bags found on the ground were not.

At the close of the State's evidence, defendant moved to dismiss the charges, which the trial court denied. Defendant then testified

that he and his companion had been on Fargo Street to cut two lawns. According to defendant, when Officer Broadwell approached them, they were taking a break after completing half of the second lawn. Defendant further testified that he ran from Officer Broadwell because he was not sure if his wife had "taken a warrant out" on him as a result of a domestic dispute. Lastly, defendant denied ever having made any statements to Officer Broadwell after being handcuffed. Defendant specifically testified that after Officer Broadwell had led defendant to the car and searched defendant, he put defendant in the car and then entered the vehicle as well. According to defendant, when Officer Broadwell entered the car "he had a bag of something in his hand. And he said oh, this is yours too and I said no. And he said oh, okay, these are not yours but the other is yours." Defendant testified that he simply did not respond to Officer Broadwell's last statement.

At the close of all evidence, defendant renewed his motion to dismiss the charges against him; however, the trial court denied the motion and a Durham County jury found defendant guilty of possession with intent to sell or deliver cocaine and having attained habitual felon status. Judge Hudson then sentenced defendant in the presumptive range to a minimum term of 133 months imprisonment to a maximum term of 169 months.

Defendant gave notice of appeal, and on 17 August 2004, the Court of Appeals found no error in defendant's trial, Judge Elmore dissenting. 165 N.C. App. at 785, 600 S.E.2d at 37. In his dissent, Judge Elmore concluded that there was insufficient evidence that defendant possessed the cocaine because defendant did not have exclusive possession of the house at 1201 Fargo Street and "[w]hile there was some evidence of other incriminating circumstances, that evidence was not substantial." *Id.* at 789, 600 S.E.2d at 39. Defendant entered notice of appeal based on Judge Elmore's dissent, and this Court heard oral arguments from both parties on 7 February 2005.

ANALYSIS

In addressing defendant's appeal from his conviction for possession with intent to sell or distribute cocaine, we note that "[w]hen a defendant moves to dismiss a charge against him on the ground of insufficiency of the evidence, the trial court must determine 'whether there is substantial evidence of each essential element of the offense charged and of the defendant being the perpetrator of the offense.' " *State v. Garcia*, 358 N.C. 382, 412, 597 S.E.2d 724, 746 (2004) (quot-

ing *State v. Crawford*, 344 N.C. 65, 73, 472 S.E.2d 920, 925 (1996)), *cert. denied*, —— U.S.——, 161 L. Ed. 2d 122 (2005); *see also State v. Morgan*, 359 N.C. 131, 161, 604 S.E.2d 886, 904 (2004); *State v. Butler*, 356 N.C. 141, 145, 567 S.E.2d 137, 139 (2002).

" 'Substantial evidence' is relevant evidence that a reasonable person might accept as adequate, or would consider necessary to support a particular conclusion." *Garcia*, 358 N.C. at 412, 597 S.E.2d at 746 (citations omitted); *see also State v. Williams*, 355 N.C. 501, 578-79, 565 S.E.2d 609, 654 (2002) (quoting *State v. Vick*, 341 N.C. 569, 583-84, 461 S.E.2d 655, 663 (1995)), *cert. denied*, 537 U.S. 1125, 154 L. Ed. 2d 808 (2003), *quoted in State v. Armstrong*, 345 N.C. 161, 164-65, 478 S.E.2d 194, 196 (1996). Moreover,

> [a] "substantial evidence" inquiry examines the sufficiency of the evidence presented but not its weight. The reviewing court considers all evidence in the light most favorable to the State, and the State receives the benefit of every reasonable inference supported by that evidence. Evidentiary "[c]ontradictions and discrepancies are for the jury to resolve and do not warrant dismissal."

Garcia, 358 N.C. at 412-13, 597 S.E.2d at 746 (citations omitted) (quoting *State v. Gibson*, 342 N.C. 142, 150, 463 S.E.2d 193, 199 (1995)) (alteration in original). Additionally, " '[i]f there is substantial evidence—whether direct, circumstantial, or both—to support a finding that the offense charged has been committed and that the defendant committed it, the case is for the jury and the motion to dismiss should be denied.' " *Butler*, 356 N.C. at 145, 567 S.E.2d at 140 (alteration in original) (quoting *State v. Locklear*, 322 N.C. 349, 358, 368 S.E.2d 377, 383 (1988)).

In the instant case, in order to establish that defendant possessed crack cocaine with intent to sell or deliver, the State was required to prove that (1) defendant possessed the crack cocaine and that (2) defendant intended to sell or deliver the narcotics to others. N.C.G.S. § 90-95(a)(1) (2003); *State v. Thorpe*, 326 N.C. 451, 454, 390 S.E.2d 311, 313 (1990). On appeal, defendant asserts that the State failed to prove that defendant constructively possessed the crack cocaine found by Officer Broadwell, as defendant "had neither a proprietary interest in the house at 1201 Fargo Street nor exclusive control of the area where the drugs were found." We conclude, however, that ample evidence was presented to establish that defendant constructively possessed the cocaine in question. Our decision is

based upon the historical evolution of the concept of criminal possession, beginning with Prohibition, as well as more recent precedent from this Court.

The prohibition era began with the ratification of the Eighteenth Amendment to the United States Constitution in 1919 and resulted in increased use of the constructive possession doctrine in criminal cases. The Eighteenth Amendment specifically prohibited the "manufacture, sale, or transportation of intoxicating liquors" within the country, as well as the importation or exportation of such liquors, beginning one year after ratification passage of the amendment. Shortly after the Eighteenth Amendment was ratified, the National Prohibition Act was passed to further regulate intoxicating liquors, to "prohibit intoxicating beverages, and to regulate the manufacture, production, use, and sale of high-proof spirits for other than beverage purposes, and to insure an ample supply of alcohol and promote its use in scientific research and in the development of fuel, dye, and other lawful industries." National Prohibition Act, ch. 85, 41 Stat. 305, 305 (1919) (repealed 1933); *Dillon v. Gloss*, 256 U.S. 368, 376-77, 65 L. Ed. 994, 997 (1921) (finding that ratification of the Eighteenth Amendment occurred on 16 January 1919; thus, the amendment and the National Prohibition Act were effective on 16 January 1920); *see also* William J. McFadden, *The Law of Prohibition: Volstead Act Annotated* 3 (1925).

Four years later our General Assembly enacted legislation, commonly referred to as the Turlington Act, to harmonize North Carolina law with the new federal Act. Act of Mar. 1, 1923, ch. 1, 1923 N.C. Sess. Laws 55 (an act to make the state law conform to the national law in relation to intoxicating liquors). This new statute made it a crime to "manufacture, sell, barter, transport, import, export, deliver, furnish, purchase, or possess any intoxicating liquor except as authorized" by the Act itself. Ch. 1, sec. 2, 1923 N.C. Sess. Laws at 55. Interestingly, under the Turlington Act, possession for "personal consumption" of an intoxicating liquor within "one's private dwelling" was not criminalized. Ch. 1, sec. 10, 1923 N.C. Sess. Laws at 58. Otherwise, mere possession of an intoxicating liquor was illegal and served as prima facie evidence of a violation of the Act. *Id.*; *see also State v. Norris*, 206 N.C. 191, 173 S.E. 14 (1934) (discussing prohibition under North Carolina law); Daniel Jay Whitener, *Prohibition in North Carolina, 1715-1945* 182-83 (1945).

Thus, in *State v. Meyers*, this Court was faced with the issue of what constituted "possession" under the Turlington Act. 190 N.C. 239,

242-43, 129 S.E. 600, 601 (1925). In *Meyers*, defendant's property was searched three times for contraband liquor. *Id.* at 240, 129 S.E.2d at 600. The first search found nothing. *Id.* The second time law enforcement authorities searched the defendant's property, although no liquor was found, an impression "like that of a jug" was found on the ground fifteen "steps" behind defendant's barn. *Id.* During the third search, "the defendant was present and [law enforcement authorities] found no evidence of liquor in his dwelling or outbuildings, but did find a track leading from the barn . . . to his hog lot in a mulberry orchard down beside the public road in the corner of his field." *Id.* The officers ultimately followed this track to "a three-gallon jug" containing about two gallons of whiskey. *Id.* "The ditch and the jug were about 150 yards from defendant's dwelling on the lands that he had rented . . . ." *Id.*

The defendant was indicted and ultimately convicted for possession of liquor and unlawful transportation of intoxicating liquors. *Id.* at 240, 242, 129 S.E. at 600, 601. The defendant appealed, and this Court found that the defendant's motion to dismiss was properly denied because possession of contraband can be either actual or constructive; thus, "[i]f the liquor was within the power of the defendant, in such a sense that he could and did command its use, the possession was as complete within the meaning of the statute as if his possession had been actual." *Id.* at 242-43, 129 S.E. at 601-02.

A few years later, this Court applied *Meyers* to affirm a defendant's 1932 conviction for unlawfully purchasing, possessing, selling, and transporting intoxicating liquors or possessing equipment or ingredients for manufacture thereof, based on the conclusion that the defendant constructively possessed the alcohol. *Norris*, 206 N.C. at 192-93, 196-97, 173 S.E. at 14-15, 17. In *Norris*, when authorities appeared to search the defendant's property pursuant to a warrant, the defendant "immediately went to feed some hogs" while the defendant's "wife ran out of the house with three pints of liquor in her lap and some in a fruit jar and hid it near the house under some pea vines." *Id.* at 196, 173 S.E. at 17. Shortly thereafter, the defendant's son "ran across the branch, pouring out the liquor which he had in half-gallon jars, as he ran" and the defendant's "daughter took some sacks and threw them over a 30-gallon drum." *Id.* Additionally, "[t]wo cases of home brew were found in the chicken coop, 3 dozen bottles in the case," and the authorities located "two 50-gallon barrels containing 'mash.' " *Id.* at 196-97, 173 S.E. at 17. Thus, relying on *Meyers*, this Court found that although the defendant's family was seen dis-

posing of the liquor, the defendant was properly convicted of unlawfully possessing the liquor based on an inference of constructive possession. *Id.* at 197, 173 S.E. at 17.

In 1933, prohibition drew to an abrupt halt with the ratification of the Twenty-first Amendment, which repealed the Eighteenth Amendment. *See United States v. Chambers*, 291 U.S. 217, 222-23, 78 L. Ed. 763, 765 (1934) (taking "judicial notice of the fact that the ratification of the Twenty-first Amendment of the Constitution of the United States . . . was consummated on December 5, 1933"; thus, prosecutions under the National Prohibition Act, including proceedings on appeal, pending on or begun after the date of repeal had to be dismissed for lack of jurisdiction) (footnote omitted).

However, the inference of constructive possession continued to play an integral part in the prosecution of possessory crimes, particularly with respect to the "War on Drugs." This struggle, which continues today, began in earnest with the enactment of the federal Comprehensive Drug Abuse Prevention and Control Act of 1970, which criminalized the possession of controlled substances. Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, 84 Stat. 1236 (1970) (amending the Public Health Service Act and other laws to provide increased research into, and prevention of, drug abuse and drug dependence; to provide for treatment and rehabilitation of drug abusers and drug dependent persons; and to strengthen existing law enforcement authority in the field of drug abuse) (codified as amended at 21 U.S.C. §§ 801-971 (2000 & Supp. II 2002)). A year later the General Assembly enacted the North Carolina Controlled Substances Act "to revise the laws concerning drugs, the various illegal and dangerous drugs and drug substances, and to provide law enforcement authorities with additional powers of detection of drug traffic." Act of July 19, 1971, ch. 919, 1971 N.C. Sess. Laws 1477 (codified as amended at N.C.G.S. §§ 90-86 to -113.8 (2003)); *see also State v. Jones*, 358 N.C. 473, 479-80, 598 S.E.2d 125, 129-30 (2004) (discussing the legislative history of the Controlled Substances Act and subsequent amendments to the Act). Today the Controlled Substances Act makes it unlawful to possess a controlled substance or to "manufacture, sell or deliver, or possess with intent to manufacture, sell or deliver, a controlled substance," including cocaine, a Schedule II controlled substance. N.C.G.S. §§ 90-95(a)(1), (3), -90(1)d.

"[I]n common speech and in legal terminology, there is no word more ambiguous in its meaning than [p]ossession. It is interchange-

ably used to describe actual possession and constructive possession which often so shade into one another that it is difficult to say where one ends and the other begins." *Nat'l Safe Deposit Co. v. Stead*, 232 U.S. 58, 67, 58 L. Ed. 504, 509-10 (1914); *see also* 1 Wayne R. LaFave, *Substantive Criminal Law* § 6.1(e), at 432 (2d ed. 2003) (Possession is a nebulous term, "often used in the criminal law without definition," largely because "it is a 'common term used in everyday conversation.' ") (footnote and citation omitted). However, the increase of possessory crimes has led to a broad application of the term "possession" to situations in which actual physical control could not be directly proved.

In fact, this Court extended the application of constructive possession to a case involving prosecution for possession with intent to distribute marijuana in *State v. Baxter*, 285 N.C. 735, 736-37, 208 S.E.2d 696, 697 (1974). In *Baxter*, pursuant to a valid search warrant, police officers searched an apartment the defendant shared with his wife. *Id.* at 736, 208 S.E.2d at 697. The search resulted in the seizure of approximately 219 grams of marijuana divided into 16 small envelopes, and the defendant and his wife were ultimately indicted for possession with intent to distribute the marijuana. *Id.* This Court noted that the uncontroverted evidence at trial established that the defendant and his wife were the only occupants of the apartment, that the marijuana in question had been found under male and female undergarments in a dresser, and "that a man's coat with an envelope containing marijuana in its pocket was found in the closet of the bedroom and that no one other than the defendant's wife was in the apartment at the time of the search." *Id.* at 736-37, 208 S.E.2d at 697.

This Court held that, just as the inference of constructive possession was appropriate during the prohibition era, so too was such an inference appropriate in a prosecution under the Controlled Substances Act. *Id.* at 737-38, 208 S.E.2d at 698. In so holding, the Court reasoned that:

> As is true with reference to the possession of intoxicating liquor, an accused has possession of marijuana within the meaning of the Controlled Substances Act, G.S. Chapter 90, Art. V, when he has both the power and the intent to control its disposition or use, which power may be in him alone or in combination with another. Constructive possession is sufficient. Nothing else appearing, a man residing with his wife in an apartment, no one else residing or being present therein, may be deemed in con-

> structive possession of marijuana located therein, notwithstanding the fact that he is temporarily absent from the apartment and his wife is present therein.

Id. (citations omitted).

With the increase in drug-related crime, this Court has repeatedly been faced with whether constructive possession has been established in prosecutions for possession of controlled substances and has consistently stated:

> "[I]n a prosecution for possession of contraband materials, the prosecution is not required to prove actual physical possession of the materials." *State v. Perry*, 316 N.C. 87, 96, 340 S.E.2d 450, 456 (1986). Proof of *nonexclusive*, constructive possession is sufficient. *Id.* Constructive possession exists when the defendant, "while not having actual possession, . . . has the intent and capability to maintain control and dominion over" the narcotics. *State v. Beaver*, 317 N.C. 643, 648, 346 S.E.2d 476, 480 (1986).

State v. Matias, 354 N.C. 549, 552, 556 S.E.2d 269, 270-71 (2001), *quoted in Butler*, 356 N.C. at 145-46, 567 S.E.2d at 140 (emphasis added); *see also State v. Spencer*, 281 N.C. 121, 129-30, 187 S.E.2d 779, 784 (1972) (affirming defendant's conviction for possession of marijuana because the evidence, that the defendant had been seen several times in and around a pig shed where marijuana was found approximately twenty yards from his residence, and that marijuana seeds were found in the defendant's bedroom, was sufficient for the jury to consider the charge based on constructive possession); *State v. Allen*, 279 N.C. 406, 412, 183 S.E.2d 680, 684-85 (1971) (holding that evidence that the utilities at a residence where heroin was sold were listed in defendant's name, that an army identification card bearing the defendant's name and other papers belonging to the defendant were located in the same bedroom where heroin was found, and that a sixteen-year old obtained heroin from the house and sold it at defendant's direction was sufficient to have the jury consider whether the defendant possessed the heroin under a theory of constructive possession).

" 'Where [contraband is] found on the premises under the control of an accused, this fact, in and of itself, gives rise to an inference of knowledge and possession which may be sufficient to carry the case to the jury on a charge of unlawful possession.' " *Butler*, 356 N.C. at 146, 567 S.E.2d at 140 (quoting *State v. Harvey*, 281 N.C. 1, 12, 187

S.E.2d 706, 714 (1972)). "However, unless the person has exclusive possession of the place where the narcotics are found, the State must show *other incriminating circumstances* before constructive possession may be inferred." *State v. Davis*, 325 N.C. 693, 697, 386 S.E.2d 187, 190 (1989) (emphasis added).

In *Davis*, this Court specifically addressed the existence of other incriminating circumstances in the context of the defendant's nonexclusive possession of a mobile home. *Id.* at 697-99, 386 S.E.2d at 190-91. During the defendant's trial for trafficking in controlled substances and possession of a controlled substance, the State presented evidence that, upon entering a mobile home to execute a valid search warrant, law enforcement authorities found the mobile home occupied by seven adults, including the defendant. *Id.* at 693-95, 386 S.E.2d at 188. As the authorities entered the mobile home, one of the adults ran down the hall into a bathroom and flushed the toilet; however, a pursuing officer reached into the flushing toilet and retrieved several plastic bags, containing what was later determined to be cocaine. *Id.* at 695, 386 S.E.2d at 188. Various other controlled substances were found throughout the mobile home, as well as a "sales contract" indicating that the defendant had purchased the mobile home. *Id.* at 695, 386 S.E.2d at 188-89. The defendant was then searched resulting in the seizure of several "white tablets" found in the defendant's "pants pockets and between his legs in the seat of [his] chair." *Id.* at 695, 386 S.E.2d at 189.

After being convicted of both possession of controlled substances and trafficking in a controlled substance, the defendant appealed, claiming insufficient evidence was presented at trial. *Id.* at 694, 696, 386 S.E.2d at 188-89. This Court, however, affirmed his convictions after finding that "the evidence was sufficient to go to the jury on the issue of defendant's constructive possession of the narcotics found in the mobile home." *Id.* at 697, 386 S.E.2d at 190.

Similarly, in *State v. Matias*, this Court determined that the State provided sufficient evidence to establish that defendant constructively possessed cocaine found in a vehicle occupied by defendant and three other individuals. 354 N.C. at 551-53, 556 S.E.2d at 270-71. In that case, defendant was a passenger in a vehicle stopped by law enforcement authorities after they detected the odor of marijuana. *Id.* at 550-51, 556 S.E.2d at 270. After ordering the occupants of the vehicle to leave the car, the officers searched it and found a plastic bag containing marijuana and a small " 'balled up' " piece of tin foil that was later determined to contain cocaine "located between the

seat pad and back pad in the back right seat where defendant had been sitting." *Id.* at 551, 556 S.E.2d at 270. The officers also located marijuana seeds, rolling papers, an unopened beer can, and a cigar inside the vehicle. *Id.* On appeal, this Court held that there was sufficient evidence of "other incriminating circumstances" to support the charge of possession and affirmed the defendant's conviction. *Id.* at 552-53, 556 S.E.2d at 271.

More recently in *State v. Butler*, this Court broadened the scope of constructive possession to affirm the defendant's convictions for two counts of trafficking in cocaine. 356 N.C. at 142, 148, 567 S.E.2d at 138, 141. At the defendant's trial, the State presented evidence that officers assigned to the Interdiction Unit of the Drug Task Force of the Raleigh Police Department were observing a Greyhound Bus terminal when the defendant left a bus bound from New York City to Miami Beach, Florida, both of which are considered "source" cities for illegal drugs. *Id.* at 143, 567 S.E.2d at 138. The officers observed the defendant leave the bus carrying only a small duffel bag and proceed to the terminal entrance. *Id.* Once there the defendant stopped, turned around, looked at the officers, paused, and then quickly walked through the terminal. *Id.* The officers followed the defendant, noting that he looked back several times before "hopp[ing]" into a cab, seating himself directly behind the driver, slamming the door, and yelling " 'let's go, let's go, let's go.' " *Id.*

However, before the cab driver began driving, the officers emerged from the terminal and signaled him not to leave. *Id.* The officers approached the vehicle and instructed the defendant to get out of the vehicle with his bag, noting that he was " 'very nervous' " and " 'fidgety.' " *Id.* As the defendant left the vehicle, he "bent down and reached toward the driver's seat prior to opening the door" such that the officers were able to " 'see just barely the top of his head and part of his shoulder"; however, they could not see his hands. *Id.* at 143, 567 S.E.2d at 139. According to the cab driver, "he felt [the] defendant 'struggling' behind him and 'pushing the back of the front seat' before opening the door." *Id.* at 143-44, 567 S.E.2d at 139. The officers also noted that the defendant then walked toward the front doors of the terminal without being instructed to do so, thus leading them away from the vehicle. *Id.* at 144, 567 S.E.2d at 139. They then briefly questioned the defendant and asked him to accompany them to a private room inside the terminal where, with the defendant's permission, they conducted a pat down search of the defendant and searched his duffel bag. *Id.* The officers found no contraband and

told the defendant he was free to go, which he did, leaving the terminal by foot in spite of his previous urgency to depart by cab. *Id.*

According to the cab driver, after defendant departed his vehicle, he drove another fare. *Id.* The passenger entered the cab through the rear door and sat in the rear passenger seat throughout the six to seven block trip. *Id.* Then the cab driver returned directly to the bus station. *Id.* The cab driver testified that "at no time during the ride did he observe or otherwise detect the man make any movements toward the driver's side of the cab." *Id.* Upon the cab's return to the bus terminal, the police officers asked to search the vehicle. *Id.* The cab driver consented, and the officers found "a package under the driver's seat, wrapped in a white napkin and secured with Scotch tape" containing a white powdery substance later determined to be cocaine. *Id.* The cab driver was questioned and indicated that he had last cleaned the vehicle before beginning his shift. *Id.* The defendant was the driver's first fare, and according to the driver, the cocaine had not been under the driver's seat when the defendant entered the vehicle. *Id.* Shortly thereafter, the defendant was located ten to twelve blocks from the bus terminal, where he was placed under arrest and searched, resulting in the discovery of "a small sum of money, a pager, and a cell phone." *Id.* at 145, 567 S.E.2d at 139.

The defendant was tried and convicted of two counts of trafficking in cocaine. He appealed to this Court, claiming the Court of Appeals erred in affirming the trial court's denial of his motion to dismiss the charges due to insufficient evidence of possession, constructive or actual, of the cocaine. *Id.* In affirming the defendant's convictions, this Court considered all of the above facts to be "additional incriminating circumstances" indicating the appropriateness of the inferring constructive possession. *Id.* at 147-48, 567 S.E.2d at 141.

Thus, in *Davis*, *Matias*, and *Butler*, this Court considered a broad range of other incriminating circumstances, concluding in each instance that an inference of constructive possession was appropriate although the defendant did not have exclusive possession of the respective mobile home, car, or taxi he was occupying at or near the time the contraband was seized by law enforcement authorities. We find this trio of cases instructive, and, as in these cases, we affirm defendant's convictions.

In the case *sub judice*, additional incriminating circumstances tending to establish defendant's constructive possession of the cocaine abound. Taken in the light most favorable to the State,

and drawing all reasonable inferences in favor of the State, the evidence showed that Officer Broadwell responded to a report of drug sales at 1108 Fargo Street. Officer Broadwell stopped defendant and another man to question them about drug sales in the area, noting that the other man was visibly nervous and was physically unable to light his cigarette.

As Officer Broadwell performed a weapons frisk of this individual, defendant fled the scene. Officer Broadwell pursued defendant into a residence, where defendant physically resisted arrest. As Officer Broadwell attempted to restrain defendant, Officer Broadwell observed defendant repeatedly go "over the top of [a] chair with his arm" in the room. Defendant continued to resist Officer Broadwell's attempt to arrest him, ultimately continuing the fight into another room. After struggling with defendant for several minutes, Officer Broadwell was eventually able to subdue him. Shortly after handcuffing defendant, Officer Broadwell returned to the room in which he observed defendant's arm "go" over the armchair, where he found twenty-two individually wrapped rocks of crack cocaine. Later, as Officer Broadwell returned with defendant to his patrol car, he noted a bag lying on the ground in the area where he had initially stopped defendant. Believing the bag to contain powder cocaine, Officer Broadwell picked it up, saying "[L]ook at what we have here," to which defendant responded that "the crack was his but the bags on the ground were not." We find that, considering the evidence in the light most favorable to the State, these other circumstances clearly incriminate defendant and that an inference of constructive possession was appropriate in this case; however, we note that the evidence is also sufficient to support a jury finding of actual possession.

As stated above, actual and constructive possession "often so shade into one another that it is difficult to say where one ends and the other begins." *Nat'l Safe Deposit Co. v. Stead*, 232 U.S. 58, 67, 58 L. Ed. 504, 509-10 (1914) (citing *Union Trust Co. v. Wilson*, 198 U.S. 530, 537, 49 L. Ed. 1154, 1156 (1905)). This ambiguity is likely attributable to the fact that both actual and constructive possession will support a finding of "possession" within the meaning of our statutes, making it unnecessary to distinguish between the two in many instances. Nonetheless, it is important analytically to appreciate that actual possession may be proven by circumstantial evidence and that, given the abundant circumstantial evidence presented at defendant's trial, reasonable jurors could have found as a fact that defendant had actually possessed the cocaine found behind the chair. Although the

Court of Appeals affirmed defendant's conviction based upon a finding of constructive possession and thus, the differentiation is not critical to the case before us today, it could be important in future cases and we leave further discussion of this distinction for another day.

CONCLUSION

For the reasons stated above, we determine that the State presented substantial evidence that defendant constructively possessed the cocaine in question. Accordingly, the trial court properly denied defendant's motions to dismiss the charge of possession with intent to sell and deliver cocaine. Thus, we affirm the majority decision of the Court of Appeals.

AFFIRMED.

STATE OF NORTH CAROLINA v. TIMOTHY EARL BLACKWELL

No. 490PA04

(Filed 19 August 2005)

1. **Appeal and Error— general supervisory authority— Supreme Court's authority to review Court of Appeals determination of motion for appropriate relief**

Although defendant contends our Supreme Court lacks jurisdiction to review the Court of Appeals determination of his motion for appropriate relief he filed in that court where he successfully argued that his aggravated sentence was imposed in violation of the United States Constitution based on the fact that N.C.G.S. § 15A-1422(f) provides that decisions of the Court of Appeals on motions for appropriate relief that embrace matters set forth in N.C.G.S. § 15A-1415(b) are final and not subject to further review by appeal, certification, writ, motion, or otherwise, our Supreme Court's general supervisory authority under Article IV, Section 12, Clause 1 of the North Carolina Constitution permits review of this matter because a prompt and definitive resolution of this issue is necessary to ensure the continued fair and effective administration of North Carolina's criminal courts.

2. Sentencing— aggravating factors—unilateral finding by trial court—structural error

The trial court committed structural error in a second-degree murder, habitual impaired driving, and felonious assault with a deadly weapon inflicting serious injury case by finding the aggravating factor under N.C.G.S. § 15A-1340.16(d)(12) that defendant committed the offense while on pretrial release on another charge even though aggravating factors need not be alleged in an indictment, and the case is remanded for resentencing, because: (1) the trial court violated *Blakely*, 542 U.S. 296 (2004), by imposing an aggravated sentence that exceeded the statutory maximum after making a unilateral finding that defendant was on pretrial release for another charge; and (2) although the State contends the sentence should be upheld under a harmless error analysis, *Blakely* errors arising under North Carolina's Structured Sentencing Act are structural and therefore reversible per se.

Justice MARTIN dissenting.

Chief Justice LAKE and Justice NEWBY joining in the dissenting opinion.

On discretionary review pursuant to N.C.G.S. § 7A-31 of an unpublished decision of the Court of Appeals (Wynn, J., with Hunter, J., concurring, and Tyson, J., concurring in the result), 166 N.C. App. 280, 603 S.E.2d 168 (2004), finding no prejudicial error in defendant's trial but remanding for resentencing after consideration of defendant's motion for appropriate relief from judgments entered on 13 November 2002 by Judge Orlando F. Hudson, Jr. in Superior Court, Durham County. On 10 February 2005, defendant filed a motion for appropriate relief in this Court. Heard in the Supreme Court 15 March 2005.

Roy Cooper, Attorney General, by Robert C. Montgomery and Patricia A. Duffy, Assistant Attorneys General, for the State-appellant.

Staples S. Hughes, Appellate Defender, by Benjamin Dowling-Sendor, Assistant Appellate Defender; and Marilyn G. Ozer for defendant-appellee.

EDMUNDS, Justice.

In this case, we must determine whether the trial court improperly imposed an aggravated sentence on defendant in violation of the

United States Supreme Court decision in *Blakely v. Washington*, 542 U.S. 296, 159 L. Ed. 2d 403 (2004). Because we conclude that the trial court committed structural error by finding the aggravating factor, we affirm the decision of the Court of Appeals and remand defendant's case for resentencing.

On 27 February 1997, Sherry and Greg Dail made plans to run errands together in Durham with their three young children: Megan, age four; Austin, age two; and Joshua, age one. Because Sherry had to go to work later that afternoon, they drove separate vehicles. Sherry led the way in a 1992 Mercury Sable and Greg followed with the children in a 1989 Dodge Caravan.

The Dails drove south on Guess Road. As the two vehicles crossed the Eno River Bridge and approached the intersection of Guess Road and Rose of Sharon Road, defendant Timothy Earl Blackwell, traveling north on Guess Road, crossed the center line, sideswiped Sherry's car, and collided with Greg's van. Megan Dail was killed as a result of the collision and the other members of the family all suffered severe injuries.

Defendant's erratic and dangerous driving was observed by several witnesses in the moments leading up to the accident. At approximately 11:00 that morning, defendant was seen driving north on Guess Road in his red pickup truck at speeds estimated by an observer to be as high as seventy-five miles per hour. After running a red light and swerving back and forth across the road, defendant's truck jumped a curb, knocked over several trash cans and a mailbox, then crossed several lanes and headed directly into oncoming traffic. After managing to get back into a northbound lane, defendant repeatedly crossed the center line again, forcing several cars off the road. Defendant hit the Dails' oncoming vehicles as he approached Rose of Sharon Road.

Defendant admitted that he had consumed both cocaine and heroin the night before and that he had drunk beer between 9:00 and 10:30 that morning. At the time of the accident, defendant's blood alcohol content was 0.130 grams of alcohol per one hundred milliliters of whole blood and his blood tested positive for cocaine metabolites and opiates. Police officers found hypodermic needles and beer cans in defendant's truck.

Defendant was indicted for first-degree murder, four counts of assault with a deadly weapon inflicting serious injury, habitual

impaired driving, driving while license revoked, driving left of center, possession of drug paraphernalia, and possession of an open container. Defendant pleaded not guilty to the murder and assault charges and guilty to the rest. The jury convicted defendant of first-degree murder under the felony murder rule, one count of assault with a deadly weapon inflicting serious injury, and three counts of assault with a deadly weapon. The Court of Appeals ordered a new trial. *State v. Blackwell*, 135 N.C. App. 729, 522 S.E.2d 313 (1999). The State appealed and this Court remanded the case to the Court of Appeals on the basis of our holding in *State v. Jones*, 353 N.C. 159, 538 S.E.2d 917 (2000). *State v. Blackwell*, 353 N.C. 259, 538 S.E.2d 929 (2000) (per curiam). The Court of Appeals then remanded the case to the trial court. *State v. Blackwell*, 142 N.C. App. 388, 542 S.E.2d 675 (2001).

Defendant was retried and convicted of second-degree murder, habitual impaired driving, and felonious assault with a deadly weapon inflicting serious injury, along with several misdemeanors not pertinent to this appeal. As to each of these felony convictions, the trial court found the single statutory aggravating factor that "defendant committed the offense while on pretrial release on another charge." N.C.G.S. § 15A-1340.16(d)(12) (2003). The trial court also found as to each conviction the statutory mitigating factors that defendant entered or completed a drug treatment program, *id.* § 15A-1340.16(e)(16) (2003), that defendant supports his family, *id.* § 1340.16(e)(17) (2003), and that defendant has a community support system, *id.* § 1340.16(e)(18) (2003). In addition, the trial court found three nonstatutory mitigating factors, including that defendant has been a model prisoner while in custody, received his GED, and is remorseful. After determining that the aggravating factor outweighed the mitigating factors, the trial court entered separate judgments for each offense and sentenced defendant to consecutive aggravated terms of 353 to 461 months for the second-degree murder conviction, 26 to 32 months for the habitual impaired driving conviction, and 66 to 89 months for the assault with a deadly weapon inflicting serious injury conviction.

Defendant again appealed to the Court of Appeals. While the case was pending on appeal, defendant filed a motion for appropriate relief (MAR) in that court contending that the trial court's imposition of an aggravated sentence violated the United States Supreme Court holding in *Blakely*. Under *Blakely*, any factors used to aggravate a sentence must be found by a jury beyond a reasonable doubt or

admitted by the defendant. 542 U.S. at ——, 159 L. Ed. 2d at 413-14. The Court of Appeals found no prejudicial error in defendant's trial, but granted defendant's MAR and remanded his case for resentencing consistent with *Blakely*. *State v. Blackwell*, 166 N.C. App. 280, 603 S.E.2d 168, 2004 N.C. App. LEXIS 1618 (Sept. 7, 2004) (No. COA03-793) (unpublished).

On 2 December 2004, this Court allowed the State's petitions for writ of supersedeas and for discretionary review of the Court of Appeals decision, but denied defendant's petition for discretionary review. On 10 February 2005, defendant filed a MAR with this Court alleging that the trial court could not impose an aggravated sentence because the aggravating factor was not alleged in the indictments. We ordered that this MAR be considered along with the other issues on appeal.

[1] As a preliminary matter, we consider defendant's contention that this Court lacks jurisdiction to review the Court of Appeals determination of the MAR he filed in that court. In that MAR, defendant successfully argued pursuant to N.C.G.S. § 15A-1415(b)(4) that his aggravated sentence was imposed in violation of the United States Constitution. As defendant correctly points out, N.C.G.S. § 15A-1422(f) provides that "[d]ecisions of the Court of Appeals on motions for appropriate relief that embrace matter set forth in G.S. 15A-1415(b) are final and not subject to further review by appeal, certification, writ, motion, or otherwise." N.C.G.S. § 15A-1422(f) (2003). However, we have resolved this issue in our opinion in *State v. Allen*, 359 N.C. 425, 615 S.E.2d 256 (2005).

> Because a prompt and definitive resolution of this issue is necessary to ensure the continued fair and effective administration of North Carolina's criminal courts, we exercise the supervisory authority of this Court, which is embodied in Article IV, Section 12, Clause 1 of the North Carolina Constitution, and review the opinion of the Court of Appeals. In so doing, we note that N.C.G.S. § 15A-1422(f) cannot restrict this Court's constitutionally granted power to "issue any remedial writs necessary to give it general supervision and control over the proceedings of the other courts."

Allen, 359 N.C. at 429, 615 S.E.2d at 260, (quoting N.C. Const. art. IV, § 12, cl. 1). The case at bar, much like *Allen* and *State v. Speight*, 359 N.C. 602, 614 S.E.2d 262 (2005), addresses immediately important aspects of *Blakely's* application to North Carolina sentencing law.

Accordingly, we conclude that our general supervisory authority permits our review of this matter.

[2] We now consider whether the imposition of an aggravated sentence violated defendant's Sixth Amendment right to a trial by jury as interpreted by the United States Supreme Court in *Blakely*. In *Blakely*, the Supreme Court held that the Sixth Amendment prohibits the trial court from finding aggravating factors unilaterally and using them to impose a sentence in excess of the "statutory maximum." 542 U.S. at ––, 159 L. Ed. 2d at 413-14. The "statutory maximum" is "the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*." *Id*. at ––, 159 L. Ed. 2d at 413. Accordingly, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed presumptive range must be submitted to a jury and proved beyond a reasonable doubt." *Allen*, 359 N.C. at 437, 615 S.E.2d at 265, (citing *Blakely*, 542 U.S. at ––, 159 L. Ed. 2d at 412-14; *Apprendi v. New Jersey*, 530 U.S. 466, 490, 147 L. Ed. 2d 435, 455 (2000)). That holding applies to defendant's case, which was on direct appeal when *Blakely* was issued. *Griffith v. Kentucky*, 479 U.S. 314, 322-23, 93 L. Ed. 2d 649, 658 (1987).

The record reveals that the trial court violated *Blakely* by imposing an aggravated sentence that exceeded the statutory maximum after making a unilateral finding that defendant was on pretrial release for another charge when he committed the instant offense. N.C.G.S. § 15A-1340.16(d)(12). Although the State argues that defendant's sentence should nevertheless be upheld under a harmless error analysis, we held in *Allen* that "*Blakely* errors arising under North Carolina's Structured Sentencing Act are structural and, therefore, reversible *per se*." *Allen*, 359 N.C. at 444, 615 S.E.2d at 269. Consequently, defendant's case must be remanded to the trial court for resentencing consistent with *Blakely* and *Allen*.

Finally, defendant contends that the trial court lacked jurisdiction to sentence him beyond the statutory maximum because the indictments failed to allege the aggravating factor that defendant was on pretrial release for another charge at the time of the offense. Pursuant to this Court's opinion in *Allen*, and consistent with our holding in this case, we conclude that aggravating factors need not be alleged in an indictment. *Id.* at 438, 615 S.E.2d at 265. "[T]his Court [previously has] concluded that 'the Fifth Amendment [does] not require aggravators, even if they were fundamental equivalents of elements of an offense, to be pled in a state-court indictment.' " *Id.*

(quoting *State v. Hunt*, 357 N.C. 257, 272, 582 S.E.2d 593, 603, *cert. denied*, 539 U.S. 985, 156 L. Ed. 2d 702 (2003)). Defendant's motion for appropriate relief is denied.

MODIFIED AND AFFIRMED.

Justice MARTIN dissenting.

In *State v. Allen*, issued last month, this Court held that "*Blakely* errors arising under North Carolina's Structured Sentencing Act are structural and, therefore, reversible *per se*." 359 N.C. 425, 615 S.E.2d 256, —— (July 1, 2005) (No. 485PA04). Three justices dissented, reasoning that controlling precedents of the United States Supreme Court compel the conclusion that *Blakely* errors, like the vast majority of both constitutional and non-constitutional errors, are subject to harmless-error analysis. *See id.* at 452, 615 S.E.2d at —— (Martin, J., concurring in part and dissenting in part). A week later, the Arizona Supreme Court, examining the same body of law that we analyzed in *Allen*, unanimously held that *Blakely* errors are not structural errors subject to *per se* reversal. *State v. Henderson*, —— Ariz. ——, —— P.3d —— (No. CR-04-0442-PR) (July 8, 2005). In issuing this opinion, the Arizona Supreme Court joined the growing chorus of state and federal courts to conclude that *Blakely* errors are subject to harmless-error review. *See Allen*, 359 N.C. at 467 n.13, 615 S.E.2d at —— n.13 (Martin, J., concurring in part and dissenting in part) (citing numerous cases); *see also Milligrock v. Alaska*, —— P.3d ——, —— (No. 1999) (Alaska Ct. App., July 29, 2005), *available at* http://www.state.ak.us/courts/ops/ap-1999.pdf.

Like *State v. Speight*, 359 N.C. 602, 614 S.E.2d 262 (July 1, 2005) (No. 491PA04), the instant case perfectly illustrates the deleterious consequences of the majority's categorical approach to *Blakely* errors. The sole aggravating factor in the instant case was the statutory (d)(12) aggravator, "defendant committed the offense while on pretrial release on another charge." N.C.G.S. § 15A-1340.16(d)(12) (2004). He did.

At no stage of these proceedings has there been any dispute over this simple, incontrovertible fact. At trial, former State Trooper S.D. Davis testified that he arrested defendant on 4 May 1996 in Pender County and charged him with driving while impaired (DWI) and driving while license revoked. On direct examination, the District Attorney elicited the following testimony from Trooper Davis:

Q: Looking at the front of the citation. Do you see a judgment in the area designated for judgment.

A: No, I do not.

Q: And that with respect to the driving while impaired charge, isn't it?

A: Yes.

Q: With respect to the driving while license revoked charge, do you see a judgment?

A: No, I do not.

Q: If there is no judgment would it then have been pending at the time of February 27 of 1997?

A: Yes, sir.

The state then entered into evidence the citation completed by Trooper Davis. It is readily apparent from Trooper Davis's testimony and the physical evidence of the citation itself that defendant's charges for DWI and driving while license revoked were pending at the time of the fatal collision that gave rise to the instant charges. Defendant failed to object to the colloquy set out above and failed to present any evidence or argument to rebut Trooper Davis's testimony that defendant was on pretrial release at the time he committed the present offenses.

Moreover, when asked by the trial court whether he "wish[ed] to be heard as to sentencing," the District Attorney responded as follows:

> Yes, sir. I think that with respect to this single aggravating factor, the defendant committed the offense while on pretrial release for another charge, that being another DWI in Pender County as described by Trooper Davis, if the Court looks at this defendant's history, that's a pretty typical pattern over the last twenty-five years that this defendant has been involved with driving offenses and other violations.

Neither during this colloquy nor at any point during sentencing did defendant object to the District Attorney's assertion that defendant was on pretrial release at the time of the instant offenses. Nor did defendant present any contrary evidence or argue that the (d)(12) aggravator should not be found or that it lacked aggravating value.

Indeed, defendant's only arguments at sentencing related to the presence of various statutory and non-statutory *mitigating* factors, all of which the trial court found to exist.

Taken together, Trooper Davis's testimony, the 4 May 1996 citation, defendant's failure to object, and defendant's failure to present any arguments or evidence contesting the sole aggravating factor constitute uncontroverted and overwhelming evidence that defendant committed the crime while on pretrial release for another offense. In addition, the date of defendant's pretrial release for charges then pending in Pender County is a matter of *public record*.[1] There can be no serious question that if the instant case were remanded to the trial court for a jury determination of the sole aggravating factor presented, the state would again offer evidence in support of that aggravator in the form of official state documents and the testimony of state record-keepers.

Defendant received a fair trial at which a jury of his peers determined beyond a reasonable doubt that he was guilty of habitual impaired driving, driving while license revoked, possession of drug paraphernalia, transporting an open container, driving left of center, driving while impaired, felonious assault with a deadly weapon inflicting serious injury, misdemeanor assault with a deadly weapon, and second-degree murder for recklessly causing the death of a four-year-old girl. All of the facts essential to defendant's punishment—save one—were submitted to a jury and found beyond a reasonable doubt. The only essential fact *not* found by the jury was the sole aggravating factor, that defendant committed the offense while on pretrial release for another crime, a matter of public record that was found by a judge based on uncontroverted and overwhelming evidence.

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1. Parenthetically, the dates surrounding defendant's periods of pretrial release are precisely the type of fact of which courts may take judicial notice. Rule 201 of the North Carolina Rules of Evidence permits courts to take judicial notice of facts that are "not subject to reasonable dispute in that [they] [are] . . . capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." N.C. R. Evid. 201(b). As a matter of public record, the dates of defendant's pretrial release are "not subject to reasonable dispute." *Id.* I acknowledge that in criminal cases a jury must be instructed "that it may, but is not required to, accept as conclusive any fact judicially noticed." N.C. R. Evid. 201(g). I also acknowledge that our rules of evidence do not trump the requirements of the Sixth Amendment as articulated in *Blakely*. Nonetheless, it is noteworthy that the aggravating factor at issue here—whether defendant was on pretrial release at the time of the instant offenses—is not the sort of factual determination that has traditionally been reserved exclusively for jury determination.

While the judicial fact-finding in the instant case undeniably violated the Sixth Amendment rule subsequently established by *Blakely v. Washington*, it is equally obvious that this particular constitutional error had no effect on the sentence defendant actually received. A central purpose of the harmless-error doctrine is to "block setting aside convictions for small errors or defects that have little, if any, likelihood of having changed the result of the trial." *Chapman v. California*, 386 U.S. 18, 22, 17 L. Ed. 2d 705, 709 (1967). To remand for resentencing so that a jury may go through the motions of reconfirming a simple and uncontroverted matter of public record "accomplishes nothing from a practical perspective, elevates form over substance, and unnecessarily undermines the salutary objectives that are undeniably effectuated by application of harmless-error review." *Allen*, 359 N.C. at 473, 615 S.E.2d at —— (Martin, J., concurring in part and dissenting in part).

I respectfully dissent.

Chief Justice LAKE and Justice NEWBY join in this dissenting opinion.

STATE)
)
v.)
)
TIMOTHY BLACKWELL)

ORDER

The following order has been entered on the motion filed on the 2nd day of September 2005 by Attorney General to Stay Issuance of Mandate:

"Motion allowed by order of the Court in conference this the 6th day of September 2005.

s/Newby, J.
For the Court"

STATE OF NORTH CAROLINA v. JAMES DONNELL ALEXANDER

No. 622A04

(Filed 19 August 2005)

Sentencing— calculation of prior record level—method

Defendant's prior record level was properly calculated during sentencing for assault where the court relied on defense counsel's statements regarding defendant's prior record level, defense counsel's invitation to the court to consult defendant's prior record level worksheet, and the trial judge's knowledge of the plea agreement between defendant and the State. While a worksheet standing alone is not sufficient to establish a defendant's prior record level, a defendant need not make an affirmative statement to stipulate to his or her prior record level or to the State's summation of the facts, particularly if defense counsel had an opportunity to object to the stipulation in question but failed to do so. The trial judge here used a reliable method to calculate defendant's prior record level. N.C.G.S. § 15A-1340.14(f)(4).

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 167 N.C. App. 79, 604 S.E.2d 361 (2004), finding error in the judgment and commitment entered 8 September 2003 by Judge Jerry R. Tillett in Superior Court, Pasquotank County and ordering a new sentencing hearing. Heard in the Supreme Court 17 May 2005.

Roy Cooper, *Attorney General*, *by Christopher W. Brooks*, *Assistant Attorney General*, *for the State-appellant.*

Staples S. Hughes, *Appellate Defender*, *by Kelly D. Miller*, *Assistant Appellate Defender*, *for defendant-appellee.*

BRADY, Justice.

The sole issue before this Court is whether the trial court properly calculated defendant James Donnell Alexander's prior record level in sentencing defendant to a minimum term of imprisonment of 80 months to a maximum term of 105 months. We find that, pursuant to N.C.G.S. § 15A-1340.13(b) and 15A-1340.14(f), defendant stipulated to his prior record level and that the trial judge used a reliable method to calculate defendant's prior record level. Therefore,

defendant's case is remanded to the North Carolina Court of Appeals for consideration of the remaining assignments of error.

FACTUAL AND PROCEDURAL BACKGROUND

On 5 February 2003, defendant was arrested, pursuant to an arrest warrant, by officers with the Elizabeth City Police Department on the charge of assault with a deadly weapon with intent to kill inflicting serious injury, a Class C felony committed on 28 January 2003. This matter was later heard before Judge Jerry R. Tillett at the 8 September 2003 Criminal Session of Pasquotank County Superior Court. Defendant entered a plea of guilty to the assault charge as part of a plea arrangement with the State. As a result, the following exchange occurred between defendant and the trial court:

> The Court: I understand you have a plea bargain, the terms and conditions of which are that you will plead guilty to this charge and the State will agree that you will be sentenced to the minimum sentence of—minimum of 80 months and a maximum of 105 months?
>
> The Defendant: Yes.
>
> The Court: Is this correct as being your full plea?
>
> The Defendant: Yes, sir.
>
> The Court: Do you now personally accept this arrangement?
>
> The Defendant: Yes.
>
> The Court: Other than the plea arrangement between you and the prosecutor has anyone made you any promises or threatened you in any way to cause you to enter this plea against your wishes?
>
> The Defendant: No.
>
> The Court: Do you enter this plea of your own free will, fully understanding what you are doing?
>
> The Defendant: Yes, sir.
>
> The Court: Do you have any questions?
>
> The Defendant: No, sir.

After this colloquoy, defendant stipulated to a factual basis for the plea, in which the State summarized the evidence it would have

presented had the case proceeded to trial. The trial court then asked defendant's attorney whether he had anything "to say" with respect to sentencing. Defendant's attorney related a brief background of defendant, concluding by remarking that defendant "is a single man and up until this particular case he had no felony convictions, as you can see from his worksheet."

The worksheet referenced by defendant's attorney was entitled "Worksheet Prior Record Level for Felony Sentencing and Prior Conviction Level for Misdemeanor Sentencing (Structured Sentencing)," AOC-CR-600, Rev. 7/01. This worksheet itemized five prior misdemeanor convictions: three Class 2 misdemeanors, one Class 3 misdemeanor, and one Class A1 misdemeanor, the only misdemeanor carrying with it any implications for the calculation of defendant's prior record level. Under the portion of the worksheet titled "Scoring Prior Record/Felony Sentencing," a number one was placed next to "Prior Class Al or 1 Misdemeanor Conviction," which carried with it a single "point." This single point reflected defendant's "Prior Record Level" of II. We note that defendant does not challenge the accuracy of the information contained in this worksheet.

After calculating defendant's prior record level at II, the trial judge, consistent with the plea arrangement between the State and defendant, sentenced defendant to a minimum term of imprisonment of 80 months and a maximum term of 105 months. In so doing, the trial judge stated, "The sentence is imposed also pursuant to a plea arrangement as to sentencing and the sentence is within the presumptive range." Moreover, in completing the "Judgment and Commitment Active Punishment Felony" form, AOC-CR-601, Rev. 3/02, the trial judge marked the box indicating that "The Court . . . makes no written findings because the prison term imposed is . . . within the presumptive range of sentences under G.S. 15A-1340.17(c)."

After indicating that the sentence was being imposed pursuant to a plea arrangement and that the sentence was "within the presumptive range," the trial judge asked defense counsel if he had seen the "restitution worksheet." Defense counsel said, "No, Your Honor, I haven't." The trial court, however, then asked defense counsel whether he would "[s]tipulate to the worksheet" to which defense counsel responded "Yes, sir." The trial judge recommended that defendant pay the restitution and court-appointed attorney's fees "shown on the worksheet which has been stipulated and agreed to by the defendant as [a] condition of post-release supervision."

Defendant appealed, claiming *inter alia*, that the trial court erred in calculating his prior record level and sentencing him accordingly "because the [S]tate failed to prove his prior conviction." A majority of the Court of Appeals granted defendant a new sentencing hearing, finding that defense counsel's statement did not constitute a stipulation with respect to defendant's prior record level and "defendant's stipulation to an 80-105 month sentence, standing alone, does not render the issue of whether the State proved defendant's prior conviction moot." *State v. Alexander*, 167 N.C. App. at 84, 604 S.E.2d at 364. Due to the majority's resolution of the issue of defendant's prior record level, the Court of Appeals did not reach defendant's remaining issues on appeal. However, Judge Timmons-Goodson dissented, concluding that "defendant stipulated to his prior record level . . . [thus] the trial court did not err in sentencing defendant." *Id. at* 85, 604 S.E.2d at 365. The State entered notice of appeal with this Court, and oral arguments were heard on 17 May 2005.

ANALYSIS

Under the Structured Sentencing Act, before imposing a felony sentence, the sentencing judge must determine a defendant's prior record level pursuant to N.C.G.S. § 15A-1340.14. N.C.G.S. § 15A-1340.13(b) (2003). A prior conviction, in turn, can be proved by any of the following methods:

(1) Stipulation of the parties.

(2) An original or copy of the court record of the prior conviction.

(3) A copy of records maintained by the Division of Criminal Information, the Division of Motor Vehicles, or of the Administrative Office of the Courts.

(4) Any other method found by the Court to be reliable.

Id. § 15A-1340.14(f) (2003). "The State bears the burden of proving, by a preponderance of the evidence, that a prior conviction exists." *Id.* Defendant argues that the State failed to carry this burden because "the [S]tate offered no court records or other official records in support of its assertion that defendant had one prior Class A1 misdemeanor conviction. In fact, the only document presented at sentencing was the prior record level worksheet."

There is no doubt that a mere worksheet, standing alone, is insufficient to adequately establish a defendant's prior record level. On appeal, the State, however, argues that the aforementioned exchange

between the trial judge and defense counsel constituted a stipulation; thus, defendant is not entitled to a new sentencing hearing. We agree that defendant stipulated to his prior record level pursuant to N.C.G.S. § 15A-1340.14(f)(1) and also find that the trial court calculated defendant's prior record level based upon a reliable method, as authorized by N.C.G.S. § 15A-1340.14(f)(4).

" 'While a stipulation need not follow any particular form, its terms must be definite and certain in order to afford a basis for judicial decision, and it is essential that they be assented to by the parties or those representing them. Silence, under some circumstances, may be deemed assent . . . .' " *State v. Powell*, 254 N.C. 231, 234, 118 S.E.2d 617, 619 (1961) (citation omitted), *superseded by statute*, Safe Roads Act of 1983, ch. 435, sec. 29, 1983 N.C. Sess. Laws 332, 354-60 (codified as amended at N.C.G.S. § 20-179(a) (2003)) (requiring the prosecutor to "make all feasible efforts to secure the defendant's full record of traffic convictions, and . . . present to the judge that record for consideration in the [sentencing] hearing"), *as recognized in State v. Denning*, 316 N.C. 523, 342 S.E.2d 855 (1986).

In *State v. Albert*, this Court further refined the parameters of a stipulation, finding that the prosecution's statement to the trial court constituted a stipulation to defendant's lack of a prior criminal record. 312 N.C. 567, 579-80, 324 S.E.2d 233, 241 (1985). In *Albert*, the defendant and two co-defendants were tried and convicted of second-degree murder. *Id.* at 569, 324 S.E.2d at 235. During sentencing, the trial court asked the prosecution, " '[D]o any of them have a prior criminal record?' " The prosecutor responded, " '[O]nly Mr. Dearen. . . .' " *Id.* at 579, 324 S.E.2d at 241. Relying on *State v. Jones*, 309 N.C. 214, 306 S.E.2d 451 (1983), this Court stated in *Albert* that "evidence is credible as a matter of law when the 'non-movant establishes proponent's case by admitting the truth of the basic facts upon which the claim of the proponent rests.' " *Albert*, 312 N.C. at 579, 324 S.E.2d at 241 (quoting *Jones*, 309 N.C. at 220, 306 S.E.2d at 455) (alteration in original). The Court held that the trial court improperly failed to find this factor in mitigation with respect to the defendant because the prosecution had stipulated that of the three co-defendants, only defendant Dearen had a criminal record. *Id.* at 579-80, 324 S.E.2d at 241.

More recently, this Court affirmed a defendant's sentence, concluding that "the record shows the defendant stipulated that the prosecuting attorney could state the evidence." *State v. Mullican*, 329

N.C. 683, 685, 406 S.E.2d 854, 855 (1991). In *Mullican*, as part of a plea agreement, the defendant entered a plea of guilty to attempted first-degree sexual offense in exchange for the State's dismissal of a charge of taking indecent liberties with a child. *Id.* at 684, 406 S.E.2d at 854. The trial court found two aggravating factors and three mitigating factors, but found that the aggravating factors outweighed the mitigating factors and sentenced defendant to fourteen years imprisonment, which was in the aggravated range. *Id.* at 684-85, 406 S.E.2d at 855. The defendant appealed to the Court of Appeals claiming that there was insufficient evidence to support the finding of the aggravating factors. *Id.* at 685, 406 S.E.2d at 855. However, a majority of the Court of Appeals affirmed the defendant's conviction. *Id.*

The defendant appealed and this Court affirmed the defendant's conviction, finding that during sentencing, the defendant stipulated to the prosecuting attorney's statement of what the evidence would show. *Id.* In so holding, this Court reasoned that:

> When the prosecuting attorney said he would summarize the State's evidence with the permission of the defendant, this was an invitation to the defendant to object if he had not consented. He did not do so. The defendant then said he too would like to present his evidence with the consent of the State. We can infer from this that the defendant had consented to the prosecuting attorney's making the statement. The defendant's attorney then made a statement which was consistent with the statement of the prosecuting attorney and concluded it by saying, "[o]f course that is not any excuse for his doing this." This is very nearly an admission of what the State was attempting to prove. We hold that the statement of the prosecuting attorney considered with the statement of the defendant's attorney shows that there was a stipulation that the prosecuting attorney could state what the evidence would show.

Id. at 686, 406 S.E.2d at 855-56.

Both *Albert* and *Mullican* establish that, during sentencing, a defendant need not make an affirmative statement to stipulate to his or her prior record level or to the State's summation of the facts, particularly if defense counsel had an opportunity to object to the stipulation in question but failed to do so. Because we find this case sufficiently similar to both *Albert* and *Mullican*, we reverse the Court of Appeals.

Here, defense counsel did not expressly state that he had seen the prior record level worksheet; however, we find it telling that he specifically directed the trial court to refer to the worksheet to establish that defendant had no prior felony convictions. Defense counsel specifically stated that "up until this particular case he had no felony convictions, as you can see from his worksheet." This statement indicates not only that defense counsel was cognizant of the contents of the worksheet, but also that he had no objections to it.

Defendant, by arguing that his trial counsel did not stipulate to his previous misdemeanor conviction, simply seeks to have his cake and eat it too. If defense counsel's affirmative statement with respect to defendant's lack of previous felony convictions was proper, then so too was the implicit statement that defendant's previous misdemeanor convictions were properly reflected on the worksheet in question. Moreover, this Court's previous decisions make it clear that counsel need not affirmatively state what a defendant's prior record level is for a stipulation with respect to that defendant's prior record level to occur. *See Albert*, 312 N.C. at 579-80, 324 S.E.2d at 241. Therefore, we find that, under these circumstances, defense counsel's statement to the trial court constituted a stipulation of defendant's prior record level pursuant to N.C.G.S. § 15A-1340.14(f)(1). Thus, defendant's sentence was imposed based upon a proper finding of defendant's prior record level.

Moreover, as noted above, a defendant's prior record level can also be established by "[a]ny other method found by the Court to be reliable." N.C.G.S. § 15A-1340.14(f)(4). In the instant case, defense counsel specifically directed the trial judge to rely on the prior record level worksheet in question. The trial court not only considered defense counsel's statement that "up until this particular case [defendant] had no felony convictions, as you can see from his worksheet," but as a result of defense counsel's representation, also considered defendant's prior record level worksheet.

Additionally, defendant entered into a plea arrangement with the State to plead guilty in exchange for a sentence of 80 to 105 months imprisonment, which constituted the minimum and maximum term of imprisonment in the presumptive range for a defendant with a prior record level of II being sentenced for a Class C felony. Generally, a plea arrangement or bargain is "[a] negotiated agreement between a prosecutor and a criminal defendant whereby the defendant pleads guilty to a lesser offense or to one of multiple charges in exchange for some concession by the prosecutor, usu[ally] a more lenient sentence

or a dismissal of the other charges." *Black's Law Dictionary* 1173 (7th ed. 1999); *see generally Santobello v. New York*, 404 U.S. 257, 260-61, 30 L. Ed. 2d 427, 432 (1971); *State v. Collins*, 300 N.C. 142, 265 S.E.2d 172 (1980).

Plea agreements or plea bargains are an integral part of the criminal justice system in North Carolina; during the 2002-03 fiscal year, out of 72,536 criminal matters that survived dismissal, only 2,887 criminal cases went to trial. N.C. Administrative Office of the Courts, *North Carolina Courts FY 2002-2003*, *Statistical and Operational Summary of the Judicial Branch of Government* 46. This means that the remaining 69,649 criminal cases ended in a plea bargain, representing over 96% of the criminal cases that survived dismissal during that particular year. *Id.* As the United States Supreme Court has stated:

> [D]isposition of charges after plea discussions is not only an essential part of the process but a highly desirable part for many reasons. It leads to prompt and largely final disposition of most criminal cases; it avoids much of the corrosive impact of enforced idleness during pretrial confinement for those who are denied release pending trial; it protects the public from those accused persons who are prone to continue criminal conduct even while on pretrial release; and, by shortening the time between charge and disposition, it enhances whatever may be the rehabilitative prospects of the guilty when they are ultimately imprisoned.

Santobello, 404 U.S. at 261, 30 L. Ed. 2d at 432. The economically sound and expeditious practice of plea bargaining should be encouraged, with both sides receiving the benefit of that bargain. In this case, the defendant "bargained" for the State's recommendation of a lesser term of imprisonment, a minimum of 80 months to a maximum of 105 months, as opposed to an aggravated term of imprisonment.

Before accepting defendant's plea of guilty, the trial judge asked defendant whether he understood that he was "pleading guilty to the felony offense of assault with a deadly weapon with intent to kill inflicting serious injury for which [he] could be imprisoned up to 261 months with the exception of limitation to that sentence required by our law and any plea bargain?" to which defendant replied, "Yes, sir." Thus, the trial court was aware that defendant had "bargained" for the State's recommendation of a lesser term of imprisonment, a min-

imum of 80 months to a maximum of 105 months, as opposed to an aggravated term of imprisonment.

Therefore, the trial court's methodology included relying on defense counsel's statements regarding defendant's prior record level, defense counsel's invitation to consult defendant's prior record level worksheet, and the trial judge's knowledge of the plea agreement between defendant and the State. Accordingly, we find that the trial court's calculation of defendant's prior record level was based upon a method "found by the court to be reliable." We cannot find that defendant's prior record level was improperly calculated by the trial court.

CONCLUSION

For the foregoing reasons, we hold that the State established defendant's prior record level by a preponderance of the evidence; thus, the trial court properly sentenced defendant. Accordingly, the decision of the Court of Appeals is reversed and this case is remanded to that court for consideration of the remainder of defendant's assignments of error not previously addressed.

REVERSED and REMANDED.

STATE OF NORTH CAROLINA v. CHRISTOPHER NATHANIEL JONES

No. 389PA04

(Filed 19 August 2005)

1. Homicide— attempted common law murder—short-form indictment

The Court of Appeals erred by concluding that the short-form indictment in this case charged defendant with the offense of attempted common law murder which is an offense not recognized by our General Statutes because a reasonable implication of the indictment is that when it alleged that defendant "did attempt to murder," it could only have meant attempted first-degree murder since North Carolina does not recognize a criminal offense denominated as attempted second-degree murder.

2. Homicide— attempted first-degree murder—short-form indictment

N.C.G.S. § 15-144, when construed alongside N.C.G.S. § 15-170, implicitly authorizes the use of a short-form indictment to charge attempted first-degree murder. When drafting such an indictment, it is sufficient for statutory purposes for the State to allege "that the accused person feloniously, willfully, and of his malice aforethought, did [attempt to] kill and murder" the named victim.

3. Homicide— attempted first-degree murder—short-form indictment—constitutionality

The short-form indictment used to charge defendant with attempted first-degree murder was constitutional.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 165 N.C. App. 540, 598 S.E.2d 694 (2004), vacating a judgment entered on 8 August 2001 by Judge Forrest D. Bridges in Superior Court, Mecklenburg County. On 6 October 2004, the Supreme Court allowed defendant's conditional petition for discretionary review as to additional issues. Heard in the Supreme Court 14 March 2005.

Roy Cooper, Attorney General, by Daniel P. O'Brien, Assistant Attorney General, for the State-appellant/appellee.

Paul Pooley for defendant appellee/appellant.

MARTIN, Justice.

This appeal presents the issue of whether N.C.G.S. § 15-144 authorizes the use of a short-form indictment to charge attempted first-degree murder.

Evidence presented at trial tended to show that on 30 June 2000, defendant Christopher Nathaniel Jones had an argument with his coworker, Romario Robinson, at their Pineville, North Carolina workplace, Buffalo Tire. After an angry exchange of words, Robinson grabbed a baseball bat, raised it into the air, and directed it towards defendant. Jonathan Lucas, a manager at Buffalo Tire, overheard the argument and arrived just in time to intercept and grab the baseball bat as Robinson swung it downward. Defendant then left the building, retrieved a firearm from his car, reentered the building, chased down Robinson, and shot him twice.

On 17 July 2000, a Mecklenburg County grand jury indicted defendant for assault by pointing a gun and assault with a deadly weapon with intent to kill inflicting serious injury. The grand jury also indicted defendant for attempted murder, the indictment stating that defendant "did unlawfully, wilfully, and feloniously and of malice aforethought attempt to kill and murder Romario Robinson." On 8 August 2001, the jury found defendant guilty of all three offenses, and the trial court entered judgments accordingly. Defendant gave notice of appeal in open court.

In the Court of Appeals, defendant argued that N.C.G.S. § 15-144, which authorizes use of the short-form murder indictment, did not support defendant's conviction for *attempted* murder. The Court of Appeals rejected defendant's argument, explaining that "[b]ecause the indictment is constitutional and sufficient for murder, it will support a conviction for attempted murder." *State v. Jones*, 165 N.C. App. 540, 541, 598 S.E.2d 694, 695 (2004). Nonetheless, the Court vacated defendant's conviction, reasoning that the indictment charged the offense of "attempted common law murder," which is "not recognized by our General Statutes." *Id.*

In 1887, the General Assembly enacted N.C.G.S. § 15-144, which authorizes the use of a short-form indictment for homicide crimes. N.C.G.S. § 15-144 (2003). *See generally State v. Hunt*, 357 N.C. 257, 268-70, 582 S.E.2d 593, 600-02 (2003) (tracing the legislative history of the short-form indictment), *cert. denied*, 539 U.S. 985, 156 L. Ed. 2d 702 (2003). We have previously upheld the use of the short-form murder indictment in the face of both constitutional and statutory challenges. *See*, *e.g.*, *id.* at 274, 582 S.E.2d at 604-05 (noting that "this Court has consistently and unequivocally upheld short-form murder indictments as valid under both the United States and the North Carolina Constitutions"); *State v. King*, 311 N.C. 603, 609-10, 320 S.E.2d 1, 6 (1984) (stating that "an indictment drawn in conformity with section 15-144 . . . is sufficient in law to charge first degree murder and all lesser included offenses").

[1] Defendant raises two challenges to the indictment at issue. First, defendant contends that this indictment is statutorily defective. Defendant notes that N.C.G.S. § 15-144 does not include specific language authorizing a short-form indictment for attempted murder. Defendant compares this statute to the statutes authorizing short-form indictments for rape and sex offenses, which do include language expressly authorizing such indictments to support verdicts of "attempted rape" and "attempt to commit a sex offense." N.C.G.S.

§ 15-144.1 (2003); N.C.G.S. § 15-144.2 (2003). Defendant contends that under the canon of construction "*expressio unius est exclusio alterius*," it logically follows that the General Assembly did not intend for the short-form indictment for murder to support a charge of *attempted* murder. We disagree.

In *State v. Coble*, a jury found the defendant guilty of attempted second-degree murder. 351 N.C. 448, 448, 527 S.E.2d 45, 46 (2000). This Court in *Coble* explained that "second-degree murder" is a general intent crime requiring intent to commit the act resulting in death, whereas the crime of "attempt" is a specific intent crime requiring intent to commit the underlying offense. *Id.* at 449-50, 527 S.E.2d at 46-47. "Because specific intent to kill is not an element of second-degree murder," we concluded that "the crime of attempted second-degree murder is a logical impossibility under North Carolina law." *Id.* at 451, 527 S.E.2d at 48.One reasonable implication of *Coble* is that, when the short-form indictment in the instant case alleged that defendant "did . . . attempt to . . . murder," the indictment could only have meant attempted first-degree murder because North Carolina does not recognize a criminal offense denominated as attempted second-degree murder. *Id.* Accordingly, we reject the Court of Appeals' conclusion that the instant indictment charged the offense of "attempted common law murder," an offense not recognized by our General Statutes.

[2] We next address whether N.C.G.S. § 15-144, which authorizes the use of the short-form indictment to charge murder and manslaughter, also authorizes the use of the short-form indictment for *attempted* first-degree murder. Although a question of first impression for this Court, the Court of Appeals has sustained this use of the short-form indictment on at least three occasions. *See*, *e.g.*, *State v. Andrews*, 154 N.C. App. 553, 559-60, 572 S.E.2d 798, 803 (2002), *cert. denied*, 358 N.C. 156, 592 S.E.2d 696 (2004); *State v. Trull*, 153 N.C. App. 630, 640, 571 S.E.2d 592, 599 (2002); *appeal dismissed*, 356 N.C. 691, 578 S.E.2d 596 (2003), *disc. rev. denied*, 356 N.C. 691, 578 S.E.2d 597 (2003); *State v. Choppy*, 141 N.C. App. 32, 41, 539 S.E.2d 44, 50-51 (2000) (upholding indictment alleging "defendant . . . unlawfully, willfully and feloniously and of malice aforethought did attempt to kill and murder [the victim]"), *appeal dismissed and disc. rev. denied*, 353 N.C. 384, 547 S.E.2d 817 (2001).

The cardinal principle of statutory construction is to discern the intent of the legislature. *N.C. Sch. Bds. Ass'n v. Moore*, —— N.C. ——, ——, 614 S.E.2d 504, 512 (2005); *Burgess v. Your House of Raleigh*,

Inc., 326 N.C. 205, 209, 388 S.E.2d 134, 137 (1990). In discerning the intent of the General Assembly, statutes *in pari materia* should be construed together and harmonized whenever possible. *Williams v. Williams*, 299 N.C. 174, 180-81, 261 S.E.2d 849, 854 (1980). In light of these canons of construction, we construe N.C.G.S. § 15-144 alongside N.C.G.S. § 15-170, another statutory provision in Chapter 15 related to the sufficiency of indictments. N.C.G.S. § 15-170 provides that "[u]pon the trial of any indictment the prisoner may be convicted of the crime charged therein or of a less degree of the same crime, *or of an attempt to commit the crime so charged*, or of an attempt to commit a less degree of the same crime." N.C.G.S. § 15-170 (2003) (emphasis added). This statute, which was enacted in 1891, permits an indictment for first-degree murder to sustain a conviction for *attempted* first-degree murder. *See id.*

Defendant contends that N.C.G.S. § 15-170 is inapposite for two reasons. First, defendant argues that section 15-170 is applicable only when there is evidence tending to show that the defendant may be guilty of a *lesser-included offense*. In support of this contention, defendant relies on *State v. Jones*, in which we stated that "G.S. 15-169 and G.S. 15-170 are applicable *only when there is evidence* tending to show that the defendant may be guilty of a lesser offense." 249 N.C. 134, 139, 105 S.E.2d 513, 516 (1958). But the issue presented in *Jones* and in the cases cited therein was whether the trial court's failure to instruct the jury as to a lesser-included offense constituted reversible error. *Id.* With respect to this issue, we concluded that " '[t]he necessity for instructing the jury as to an included crime of lesser degree than that charged arises when and only when there is evidence from which the jury could find that such included crime of lesser degree was committed.' " *Id.* (quoting *State v. Hicks*, 241 N.C. 156, 159, 84 S.E.2d 545, 547 (1954)). In the present case, by contrast, we consider the express provision in N.C.G.S. § 15-170 that an indictment will support a conviction "of an *attempt* to commit the crime so charged." N.C.G.S. § 15-170 (emphasis added). It is implausible to suggest that N.C.G.S. § 15-170 permits an indictment to support a conviction for *attempt* only when the evidence supports the defendant's conviction for a *lesser-included* offense. Because *Jones* did not address the language in N.C.G.S. § 15-170 concerning *attempt*, it does not foreclose our consideration of the statute in the instant case.

Second, defendant argues that because he was charged with *attempted* murder, not murder, the statute has no application to the

instant case. Defendant emphasizes that N.C.G.S. § 15-170 permits an indictment to support a conviction for attempt to commit *the crime charged* and that the instant indictment expressly charged defendant with *attempted* murder. As defendant puts it, whether he "could be convicted of . . . 'attempted' attempted murder is not at issue" in this case.

We agree with defendant that N.C.G.S. § 15-170 does not, in and of itself, authorize the use of the short-form indictment to allege attempted first-degree murder. Indeed, the question presented is whether the instant indictment is valid under N.C.G.S. § 15-144, not N.C.G.S. § 15-170. Nonetheless, N.C.G.S. § 15-170 is relevant to our inquiry in that it reflects the General Assembly's judgment that, for purposes of the indictment requirement, attempt is generally treated as a subset of the completed offense. This general principle is further reflected in other provisions in Chapter 15 and in our case law arising under that Chapter. *See*, *e.g.*, N.C.G.S. § 15-144.1(a) (providing that a short-form indictment for rape will support a conviction for attempted rape); N.C.G.S. § 15-144.2(a) (providing that a short-form indictment for sex offense will support a conviction for attempted sex offense); *State v. Surles*, 230 N.C. 272, 52 S.E.2d 880 (1949) (upholding the defendant's conviction for *attempted* second-degree burglary in a prosecution for burglary).

Moreover, construing N.C.G.S. § 15-144 to permit the use of the short-form indictment for attempted first-degree murder in no way undermines the purposes of the indictment requirement. We have previously stated that the chief policies underlying the indictment requirement are (1) "to give the defendant notice of the charge against him to the end that he may prepare a defense and be in a position to plead double jeopardy if he is again brought to trial for the same offense" and (2) "to enable the court to know what judgment to pronounce in case of conviction." *State v. Sills*, 311 N.C. 370, 375-76, 317 S.E.2d 379, 382 (1984). In the instant case, the addition of the word "attempt" to the indictment at issue could only have *bolstered* these salutary principles by narrowing the focus of the trial and restricting the range of possible convictions beyond those authorized by an unmodified short-form murder indictment.

It is well settled that "[i]n construing statutes courts normally adopt an interpretation which will avoid absurd or bizarre consequences, the presumption being that the legislature acted in accordance with reason and common sense and did not intend untoward results." *State ex rel. Comm'r of Ins. v. N.C. Auto. Rate Admin.*

Office, 294 N.C. 60, 68, 241 S.E.2d 324, 329 (1978). Applying this principle, there is no question that a short-form indictment for first-degree murder *would* support a conviction for attempted first-degree murder. *See* N.C.G.S. § 15-170; *see also Hunt*, 357 N.C. 257, 582 S.E.2d 593 (upholding an indictment virtually identical to that in the instant case, with the exception of the "attempt to" language). Yet on defendant's construction of the applicable statutes, the insertion of the words "attempt to" in the instant indictment would render the indictment invalid and unable to support a conviction for the crime charged. In other words, the state would be penalized for amending the indictment in a manner that better reflects the state's theory of the case and *limits* the range of possible convictions to one particular offense—attempted first-degree murder. We will not countenance a construction of N.C.G.S. § 15-144 that would operate in such a manner. Accordingly, we hold that N.C.G.S. § 15-144, when construed alongside N.C.G.S. § 15-170, implicitly authorizes the state to utilize a short-form indictment to charge attempted first-degree murder. We further hold that when drafting such a indictment, it is sufficient for statutory purposes for the state to allege "that the accused person feloniously, willfully, and of his malice aforethought, did [attempt to] kill and murder" the named victim.

[3] Defendant next argues that the instant indictment violates the United States and North Carolina Constitutions. Defendant argues that since the indictment fails to allege specific intent, premeditation, and deliberation, it is unconstitutional. In *State v. Hunt*, this Court thoroughly addressed the issue of whether short-form indictments pursuant to N.C.G.S. § 15-144 are constitutional in light of the United States Supreme Court decisions in *Ring v. Arizona*, 536 U.S. 584, 153 L. Ed. 2d 556 (2002), *Apprendi v. New Jersey*, 530 U.S. 466, 147 L. Ed. 2d 435 (2000), and *Jones v. United States*, 526 U.S. 227, 143 L. Ed. 2d 311 (1999), and held that the short-form indictment for first-degree murder fully comports with the United States Constitution. 357 N.C. at 265-78, 582 S.E.2d at 599-607. Indeed, multiple decisions of this Court have upheld the constitutionality of N.C.G.S. § 15-144 under both the federal and state constitutions. *See State v. Braxton*, 352 N.C. 158, 173-75, 531 S.E.2d 428, 436-38 (2000) (federal and state constitutions), *cert. denied*, 531 U.S. 1130, 148 L. Ed. 2d 797 (2001); *State v. Wallace*, 351 N.C. 481, 508, 528 S.E.2d 326, 343 (federal constitution), *cert. denied*, 531 U.S. 1018, 148 L. Ed. 2d 498 (2000); *State v. Kilpatrick*, 343 N.C. 466, 472, 471 S.E.2d 624, 628 (1996) (federal constitution); *State v. Avery*, 315 N.C. 1, 12-14, 337 S.E.2d 786, 792-93

(1985) (state constitution). Defendant contends that *Hunt* does not control in the instant case because *Hunt* concerned a short-form indictment and attempted first-degree murder cannot validly be charged by a short-form indictment. As discussed above, however, the short-form indictment in the instant case is statutorily sufficient. Therefore, *Hunt* applies, and the indictment in the present case is constitutionally valid.

Similarly, defendant's reliance on *State v. Lucas*, 353 N.C. 568, 597-98, 548 S.E.2d 712, 731 (2001) (holding that the state must allege a firearm enhancement in an indictment), is misplaced. *Hunt* makes clear that "the principles of *Lucas* do not otherwise apply to short-form indictments." *Hunt*, 357 N.C. at 273, 582 S.E.2d at 603. Consequently, the indictment in the instant case comports with both statutory and constitutional requirements.

As a practical matter, the record reflects that there was no doubt at any stage of the proceedings that defendant was being tried for attempted first-degree murder. There were several indications throughout the trial that defendant had proper notice of the attempted murder charge. For instance, defense counsel requested that the trial court instruct on the "element instructions on attempted murder." Without objection, the trial court instructed the jury as follows: "As I said, the Defendant has been charged, first of all, with attempted murder, which in North Carolina means attempted first degree murder." We therefore believe that the indictment gave defendant adequate notice of the alleged criminal offense under North Carolina law and that defendant was in no way prejudiced by the use of the short-form indictment.

Accordingly, we reverse the decision of the Court of Appeals and remand to that Court for further remand to the Superior Court of Mecklenburg County for entry of judgment consistent with this opinion.

REVERSED.

STATE OF NORTH CAROLINA v. DAVID FRANKLIN HURT

No. 192A04

(Filed 19 August 2005)

1. Sentencing— nonstatutory aggravating factor—joint criminal action with one other person

The Court of Appeals erred in a second-degree murder case by vacating defendant's sentence based on its determination that a defendant's joint criminal action with one other person is insufficient to support the finding of a nonstatutory aggravating factor under N.C.G.S. § 15A-1340.16(d)(20), because: (1) factors that may diminish or increase the offender's culpability are reasonably related to the purposes of sentencing and will support a finding of a nonstatutory aggravating factor under N.C.G.S. § 15A-1340.16(d)(20); and (2) accomplishment of a robbery and murder by uniting with one other individual is a factor that may increase the offender's culpability and is thus reasonably related to the purposes of sentencing.

2. Sentencing— aggravated sentence based upon judicial findings of fact—*Blakely* error

Defendant's motion for appropriate relief in a second-degree murder case is allowed because the trial court violated defendant's Sixth Amendment right to a jury trial in a second-degree murder case by imposing an aggravated sentence based upon judicial findings of aggravating factors, and the case is remanded to superior court for resentencing consistent with *State v. Allen*, 359 N.C. 425 (2005).

Justice MARTIN concurring in part and dissenting in part.

Chief Justice LAKE and Justice NEWBY joining in concurring and dissenting opinion.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 163 N.C. App. 429, 594 S.E.2d 51 (2004), reversing a judgment entered 26 August 2002 by Judge Claude S. Sitton in Superior Court, Caldwell County, in which defendant was sentenced to a minimum prison term of 276 months and a maximum term of 341 months. On 25 June 2004, defendant filed a motion for appropriate relief. By an order issued 4 March 2005, this Court permitted both parties to submit briefs and make oral argu-

ment on the motion for appropriate relief at the same time the direct appeal was heard. Heard in the Supreme Court 17 May 2005.

Roy Cooper, Attorney General, by Lisa Bradley Dawson and Robert C. Montgomery, Assistant Attorneys General, for the State-appellant.

Staples S. Hughes, Appellate Defender, by Barbara S. Blackman, Assistant Appellate Defender, for defendant-appellee.

BRADY, Justice.

This matter is before the Court on (1) the State's direct appeal of the decision of the Court of Appeals vacating defendant's sentence and remanding defendant's case to the trial court for resentencing, and (2) defendant's motion for appropriate relief filed in this Court on 25 June 2004, during the pendency of the State's appeal. Regarding the State's direct appeal, this Court must determine whether the fact that a criminal "defendant joined with one other person in committing the offense and was not charged with committing a conspiracy for robbery of [the] victim" is a proper nonstatutory aggravating factor to be considered during sentencing. Regarding defendant's motion for appropriate relief, this Court must determine whether the trial court violated defendant's Sixth Amendment right to jury trial by imposing an aggravated sentence based upon judicial findings of fact.

We conclude that the fact that a criminal defendant joined with one other person in the commission of an offense and was not charged with committing a conspiracy for robbery of the victim is "reasonably related to the purposes of sentencing" set forth in N.C.G.S. § 15A-1340.12; thus, the fact is a proper nonstatutory aggravating factor and may be considered during sentencing pursuant to N.C.G.S. § 15A-1340.16(d)(20). However, we further conclude that the trial court committed structural error in imposing an aggravated sentence based upon judicial findings of fact. Accordingly, we reverse the decision of the Court of Appeals and remand defendant's case to Caldwell County Superior Court for resentencing consistent with *State v. Allen*, 359 N.C. 425, —— S.E.2d ——, 2005 N.C. LEXIS 695 (July 1, 2005) (No. 485PA04) and *Blakely v. Washington*, 542 U.S. 296, 159 L. Ed. 2d 403 (2004).

BACKGROUND

On 26 August 2002 defendant pleaded guilty to the second-degree murder of Howard Nelson Cook in Caldwell County Superior Court.

During sentencing, the trial judge found that defendant had a prior record level of III and also found the existence of three aggravating and five mitigating factors by a preponderance of the evidence. Determining that the factors in aggravation outweighed the factors in mitigation, the judge sentenced defendant in the aggravated range of 276 months minimum to 341 months maximum imprisonment.

In so doing, the trial judge altered the "Felony Judgment Findings of Aggravating and Mitigating Factors (Structured Sentencing)"[1] worksheet by crossing out part of the section 15A-1340.16(d)(2) aggravating factor listed therein. Specifically, the judge crossed out the words "more than" in the phrase "more than one other person." He also added the words "for robbery of victim" to the end of the listed aggravator. The resulting aggravating factor, "The defendant joined with *one* other person in committing the offense and was not charged with committing a conspiracy *for robbery of victim*," differs significantly from the statutory aggravating factor set forth in section 15A-1340.16(d)(2), which states, "The defendant joined with *more than* one other person in committing the offense and was not charged with committing a conspiracy." (Emphasis added.)

Defendant appealed his sentence to the North Carolina Court of Appeals, arguing that the above-described aggravating factor found by the trial judge was improper. Defendant contended, and a majority of the Court of Appeals agreed, that because the General Assembly has already determined that increased culpability stems from a defendant's participation with *more than one* other person in committing an offense, a defendant's joint criminal action with *one* other person is insufficient to support the finding of a nonstatutory aggravating factor pursuant to N.C.G.S. § 15A-1340.16(d)(20). Accordingly, the Court of Appeals vacated defendant's sentence and remanded the case for a new sentencing proceeding. *State v. Hurt*, 163 N.C. App. 429, 435, 594 S.E.2d 51, 56 (2004).

Because the fact that defendant united with another individual to accomplish the robbery and murder of Mr. Cook increases his culpability for the crime, we hold that this fact may properly be considered as a nonstatutory aggravating factor which is reasonably related to the purposes of sentencing pursuant to N.C.G.S. § 15A-1340.16(b)(2). Thus, we reverse the decision of the Court of Appeals, but remand defendant's case to Caldwell County Superior Court on the alternative ground raised by defendant in his motion for appropriate relief

1. AOC-CR-605, Rev. 11/97.

pursuant to *Allen*, 359 N.C. 425, —— S.E.2d ——, 2005 N.C. LEXIS 695 and *Blakely v. Washington*, —— U.S. ——, 159 L. Ed. 2d 403.

ANALYSIS

[1] The Structured Sentencing Act divides aggravating factors into two classes, statutory and nonstatutory. Statutory aggravating factors are enumerated in N.C.G.S. § 15A-1340.16(d)(1)-(19). One such statutory aggravating factor set forth in section 15A-1340.16(d)(2) may be proved by evidence that "[t]he defendant joined with *more than one* other person in committing the offense and was not charged with committing a conspiracy." N.C.G.S. § 15A-1340.16(d)(2) (2003) (emphasis added). The plain language of section 15A-1340.16(d)(2) requires that the defendant have joined with at least two other individuals in the commission of a crime. *See State v. Bates*, 348 N.C. 29, 34, 497 S.E.2d 276, 279 (1998) ("It is well settled that the meaning of any legislative enactment is controlled by the intent of the legislature and that legislative purpose is to be first ascertained from the plain language of the statute."). Here, the factor actually found by the judge provides that defendant joined with *one* other individual in the murder of Mr. Cook; thus, the factor differs significantly from section 15A-1340.16(d)(2) and cannot properly be classified as a "statutory" aggravating factor.

However, N.C.G.S. § 15A-1340.16(d)(20) permits a fact finder to consider "[a]ny other aggravating factor *reasonably related to the purposes of sentencing*." N.C.G.S. § 15A-1340.16(d)(20) (2003) (emphasis added). Such "other" factors found to be "reasonably related to the purposes of sentencing" are commonly known as nonstatutory aggravating factors.

The "purposes of sentencing" are explicitly set forth in N.C.G.S. § 15A-1340.12:

> The primary purposes of sentencing a person convicted of a crime are to impose a punishment commensurate with the injury the offense has caused, *taking into account factors that may diminish or increase the offender's culpability*; to protect the public by restraining offenders; to assist the offender toward rehabilitation and restoration to the community as a lawful citizen; and to provide a general deterrent to criminal behavior.

N.C.G.S. § 15A-1340.12 (2003) (emphasis added). We conclude from section 15A-1340.12 that "factors that may diminish or increase the

offender's culpability" are "reasonably related to the purposes of sentencing" and will support a finding of a nonstatutory aggravating factor under section 15A-1340.16(d)(20).

In *State v. Manning*, this Court held that evidence which would not support a statutory aggravating factor may be sufficient to support a nonstatutory aggravating factor if it is " 'reasonably related to the purposes of sentencing.' " *State v. Manning*, 327 N.C. 608, 613-14, 398 S.E.2d 319, 322 (1990) (quoting *State v. Moore*, 317 N.C. 275, 279, 345 S.E.2d 217, 220 (1986)). The sole issue considered by this Court in *Manning* was "whether pecuniary gain may be used as a nonstatutory aggravating factor in the absence of any evidence that defendant was hired or paid to commit an offense." 327 N.C. at 612, 398 S.E.2d at 321. At the outset, the Court noted its prior holdings that " 'in order to find [the statutory factor that the offense was committed for hire or pecuniary gain] in aggravation, there must be evidence that the defendant was paid or hired to commit the offense.' " *Id.* at 613, 398 S.E.2d at 322 (citation omitted). However, this Court concluded, "[s]ince pecuniary gain as an incentive to commit a crime is reasonably related to the purposes of sentencing, it can be a nonstatutory aggravating factor unless there is something to preclude its use." *Id.* at 614, 398 S.E.2d at 322. Accordingly, we reversed the opinion of the Court of Appeals in which that court had stated: "A trial court should not be allowed to assign in aggravation a factor as nonstatutory where the statute clearly prohibits its use as a statutory aggravating factor." *State v. Manning*, 96 N.C. App. 502, 505, 386 S.E.2d 96, 97 (1989), *rev'd*, 327 N.C. at 615, 398 S.E.2d at 323.

Similarly, there is insufficient evidence to support the section 15A-1340.16(d)(2) aggravating factor in the case *sub judice*. Section 15A-1340.16(d)(2) cannot apply to aggravate a defendant's sentence unless the State proves that "[t]he defendant joined with *more than one* other person in committing the offense and was not charged with committing a conspiracy." However, we conclude that accomplishment of a robbery and murder by uniting with *one* other individual is a factor that may "increase the offender's culpability" and, therefore, is "reasonably related to the purposes of sentencing." The perpetrator of such a crime is more culpable by reason of his method, in which two aggressors work violence against a single victim. As in *Manning*, "a sentence greater than the presumptive is warranted for purposes of deterrence as well as protection of the unsuspecting public." 327 N.C. at 615, 398 S.E.2d at 323. For this reason, we reverse the decision of the Court of Appeals which vacated defendant's sentence

and granted a new sentencing hearing based upon that court's finding of an improper aggravating factor.

[2] We now consider whether the imposition of an aggravated sentence violated defendant's Sixth Amendment right to jury trial as interpreted by the United States Supreme Court in *Blakely*, 542 U.S. 296, 159 L. Ed. 2d 403. In *Blakely*, the Court reaffirmed its previous holding that the right to jury trial requires jurors to find sentencing facts which increase the penalty for a crime "beyond the prescribed statutory maximum." *Apprendi v. New Jersey*, 530 U.S. 466, 490, 147 L. Ed. 2d 435, 455 (2000); *see also Blakely*, 542 U.S. at ——, 159 L. Ed. 2d at 413-14. The "statutory maximum" is "the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*." *Blakely*, 542 U.S at ——, 159 L. Ed. 2d at 413. Accordingly, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed presumptive range must be submitted to a jury and proved beyond a reasonable doubt." *Allen*, 359 N.C. at 437, —— S.E.2d at ——, 2005 N.C. LEXIS 695, at *26 (citing *Blakely*, 542 U.S. at ——, 159 L. Ed. 2d at 412 and *Apprendi*, 530 U.S. at 490, 147 L. Ed. 2d at 455). Because defendant's case was on direct appeal when *Blakely* was issued, this rule governs the question *sub judice*. *Griffith v. Kentucky*, 479 U.S. 314, 322-23, 93 L. Ed. 2d 649, 658 (1987).

Here, the trial court found the existence of three aggravating factors by a preponderance of the evidence: (1) "The offense was especially heinous, atrocious or cruel," (2) "The defendant joined with one other person in committing the offense and was not charged with committing a conspiracy for robbery of [the] victim," and (3) defendant "took property, to wit, $4.00 by force and placed victim with threats of bodily harm." Based upon these findings, the trial court sentenced defendant to an aggravated sentence of 276 months minimum and 341 months maximum imprisonment. Because defendant's sentence exceeds the "statutory maximum" and the increased penalty is supported only by the judicial findings of fact listed above, defendant's sentence violates *Blakely*. In *Allen*, this Court held that "*Blakely* errors arising under North Carolina's Structured Sentencing Act are structural and, therefore, reversible *per se*." *Allen*, 359 N.C. at ——, 444 S.E.2d at ——, 2005 N.C. LEXIS 695, at *42. Accordingly, we allow defendant's motion for appropriate relief.

For the reasons stated above, we reverse the decision of the Court of Appeals, but remand this case to Caldwell County Superior Court for resentencing pursuant to *Allen*, 359 N.C. 425, —— S.E.2d

——, 2005 N.C. LEXIS 695 and *Blakely*, 542 U.S. 296, 159 L. Ed. 2d 403. During resentencing, it is appropriate to consider whether "defendant joined with one other person in committing the offense and was not charged with committing a conspiracy for robbery of [the] victim" as an aggravating factor.

REVERSED AND REMANDED.

Justice MARTIN, concurring in part and dissenting in part.

I concur in the majority's holding that the nonstatutory aggravating factor at issue is "reasonably related to the purposes of sentencing" and thus valid under North Carolina law. N.C.G.S. § 15A-1340.16(d)(20) (2003).

For the reasons stated in my separate opinion in *State v. Allen*, however, I disagree with the majority's conclusion that *Blakely* errors are not amenable to harmless-error review. *State v. Allen*, 359 N.C. 444, 615 S.E.2d 256, —— (July 1, 2005) (No. 485PA04) (Martin, J., concurring in part and dissenting in part). Accordingly, I dissent from the majority's decision to allow defendant's motion for appropriate relief without considering whether the instant *Blakely* violation was harmless beyond a reasonable doubt.

Chief Justice LAKE and Justice NEWBY join in this concurring and dissenting opinion.

STATE)
)
v.)
)
DAVID FRANKLIN HURT)

ORDER

The following order has been entered on the motion filed on the 2nd day of September 2005 by Attorney General to Stay Issuance of Mandate:

"Motion allowed by order of the Court in conference this the 2nd day of September 2005.

s/Edmunds, J.
For the Court"

ELLIOTT v. COUNTY OF HALIFAX

[359 N.C. 847 (2005)]

BRADLEY A. ELLIOTT AND WIFE, DIANE T. ELLIOTT, AND ARTHUR E. ELLIOTT AND WIFE, MARGARET E. ELLIOTT v. THE COUNTY OF HALIFAX

No. 590PA04

(Filed 19 August 2005)

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous, unpublished decision of the Court of Appeals, 166 N.C. App. 279, 603 S.E.2d 168 (2004), affirming an order entered 14 March 2003 by Judge Dwight L. Cranford in Superior Court, Halifax County. On 6 April 2005, the Supreme Court allowed defendant's motion to consolidate this case with *Manning v. County of Halifax*, 166 N.C. App. 279, 603 S.E.2d 168 (2004) for hearing. Heard in the Supreme Court 18 May 2005.

Bradley A. Elliott for plaintiff-appellees.

Womble Carlyle Sandridge & Rice, PLLC, by Christopher W. Jones, for defendant-appellant.

James B. Blackburn, General Counsel, for North Carolina Association of County Commissioners, amicus curiae.

PER CURIAM.

DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

MANNING v. COUNTY OF HALIFAX

[359 N.C. 848 (2005)]

J. RIVES MANNING, JR. AND WIFE, JUDY S. MANNING, RACHEL W. MATKINS TRUST, SHIELDS FERTILIZER COMPANY, CHARLES J. SHIELDS AND WIFE, ANN J. SHIELDS, DOROTHY H. SHIELDS, FRANK SHIELDS, J.E. KERR TIMBER COMPANY, JAMES E. KERR, II AND WIFE, JOAN B. KERR, ROY G. DIXON AND WIFE, JANET R. DIXON, CHESTER L. HENDERSON AND WIFE, CAROLYN M. HENDERSON, J.C. PODRUCHNY, DOUGLAS TEMPLE, III, MARY JO TEMPLE, AUGUSTA E. ROOK AND HUSBAND, FORREST ROOK, JAMES A. WILSON, SR., JAMES A. WILSON, JR., WILLIAM R. WILSON, WILSON FARMS, INC., KAY MANN ANTHONY, J. ALTON WHITEHURST, JR., VERNON T. BRADLEY v. THE COUNTY OF HALIFAX

No. 589PA04

(Filed 19 August 2005)

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous, unpublished decision of the Court of Appeals, 166 N.C. App. 279, 603 S.E.2d 168 (2004), affirming a judgment entered 28 February 2003 by Judge Dwight L. Cranford in Superior Court, Halifax County. On 6 April 2005, the Supreme Court allowed defendant's motion to consolidate this case with *Elliott v. County of Halifax*, 166 N.C. App. 279, 603 S.E.2d 168 (2004) for hearing. Heard in the Supreme Court 18 May 2005.

Janet B. Dudley for plaintiff-appellees.

Womble Carlyle Sandridge & Rice, PLLC, by Christopher W. Jones, for defendant-appellant.

James B. Blackburn, General Counsel, for North Carolina Association of County Commissioners, amicus curiae.

PER CURIAM.

DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

STATE v. WALTERS

[359 N.C. 849 (2005)]

STATE	)
	)
v.	)
	)
TRAVIS L. WALTERS	)

No. 58A02-4

ORDER

Upon consideration of defendant's Motion to Consolidate Appeals, the Court concludes that, defendant's death sentence having been vacated and defendant having been resentenced to life in prison without parole, jurisdiction of defendant's direct appeal lies in the Court of Appeals, N.C.G.S. 7A-27 (2003); therefore, defendant's Motion to Consolidate Appeals is dismissed without prejudice to defendant's right to pursue his direct appeal in the Court of Appeals once the matters pending before the Superior Court, Robeson County, pursuant to this Court's 11 June Order are resolved. This Court's file will be certified to the Court of Appeals.

By order of the Court in Conference, this 18th day of August, 2005.

s/Newby, J.
For the Court

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

Armstrong v. Barnes Case Below: 171 N.C. App. 287	No. 390P05	1. Def's (James A. Barnes, Jr., M.D.) Motion for Temporary Stay (COA04-300) 2. Def's (James A. Barnes, Jr., M.D.) Petition for Writ of Supersedeas	1. Denied **07/28/05** 2. Denied **07/28/05**
Brown v. Kroger Co. Case Below: 169 N.C. App. 312	No. 257A05	1. Def's NOA Based Upon a Constitutional Question (COA04-577) 2. Plt's Motion to Dismiss Appeal	1. —— 2. Allowed 08/18/05
Bryson v. Cooper Case Below: 166 N.C. App. 759	No. 640P04-2	1. Plts' Motion for "Petition for Ruling on Discretionary Review or Rule to Show Cause Why Not and Motion to Compel" (COA03-1484) 2. Plt's Motion to Restrain and to Compel in the Above Styled Case	1. Dismissed 08/18/05 2. Dismissed 08/18/05
Cabaniss v. Deutsche Bank Secs., Inc. Case Below: 170 N.C. App. 180	No. 369P05	Plts' PDR Under N.C.G.S. § 7A-31 (COA04-530)	Denied 08/18/05
Cook v. Loggerhead, Inc. Case Below: 170 N.C. App. 697	No. 344P05	Defs' (Loggerhead, Inc. and Interstate Insurance Service Group) PDR Under N.C.G.S. § 7A-31 (COA04-910)	Denied 08/18/05
Cunningham v. Riley Case Below: 169 N.C. App. 600	No. 246P05	1. Plt's NOA Based Upon a Constitutional Question (COA04-806) 2. Def's Motion to Dismiss Appeal 3. Plt's PDR Under N.C.G.S. § 7A-31	1. —— 2. Allowed 08/18/05 3. Denied 08/18/05
Department of Transp. v. Haywood Cty. Case Below: 167 N.C. App. 55	No. 628PA04	Plt's PDR Under N.C.G.S. § 7A-31 (COA03-1479)	Allowed 08/18/05

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

Gates Four Homeowners Ass'n v. City of Fayetteville Case Below: 170 N.C. App. 688	No. 361P05	1. Proposed Intervenor Petitioners' PDR Under N.C.G.S. § 7A-31 (COA04-1202) 2. Respondent's Conditional PDR Under N.C.G.S. § 7A-31	1. Denied 08/18/05 2. Dismissed as moot 08/18/05 **Brady, J. Recused**
Gay-Hayes v. Tractor Supply Co. 170 N.C. App. 405	No. 315P05	Plts' PDR Under N.C.G.S. § 7A-31 (COA04-553)	Denied 08/18/05
Gutierrez v. GDX Auto. 169 N.C. App. 173	No. 240P05	Plt's PDR Under N.C.G.S. § 7A-31 (COA04-415)	Denied 08/18/05
Holden v. Holden 168 N.C. App. 595	No. 195P05	Plt's PDR Under N.C.G.S. § 7A-31 (COA04-146)	Denied 08/18/05
Home Builders Ass'n of Fayetteville, N.C., Inc. v. City of Fayetteville 170 N.C. App. 625	No. 366P05	1. Plts' PDR (COA04-1108) 2. Def's (City of Fayetteville) Conditional PDR Under N.C.G.S. § 7A-31	1. Denied 08/18/05 2. Dismissed as moot 08/18/05 **Brady, J. Recused**
HSI N.C., LLC v. Diversified Fire Protection of Wilmington, Inc. 169 N.C. App. 767	No. 232P05	1. Defs' (N.C. Monroe Construction Co. and Travelers Casualty & Surety Company of America) Motion for Temporary Stay (COA04-678) 2. Defs' (N.C. Monroe Construction Co. and Travelers Casualty & Surety Co. of America) Petition for Writ of Supersedeas 3. Defs' (NC Monroe Construction Co. and Travelers Casualty and Surety Co.) PDR	1. Allowed **05/10/05 359 N.C. 631** Stay Dissolved 08/18/05 2. Denied 08/18/05 3. Denied 08/18/05
Hyman v. Efficiency, Inc. 167 N.C. App. 134	No. 007P05	1. Plt's Motion for Temporary Stay (COA04-246) 2. Plt's PDR Under N.C.G.S. § 7A-31	1. Denied 07/29/05 2. Denied 07/29/05

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

In re A.D.L., J.S.L. & C.L.L. 169 N.C. App. 701	No. 330P05	Respondent's (Mother) PDR Under N.C.G.S. § 7A-31 (COA03-1333)	Denied 08/18/05
In re B.D. 169 N.C. App. 803	No. 317P05	1. Petitioner's (Buncombe County DSS) PDR Under N.C.G.S. § 7A-31 (COA03-1599) 2. Respondents' (Parents) Motion to Dismiss PDR	1. Allowed for purpose of remanding to COA for reconsideration in light of In re R.T.W., 359 N.C. 539, 614 S.E.2d 489 (2005). 08/18/05 2. Dismissed as moot 08/18/05
In re D.M.H., Jr. 163 N.C. App. 38	No. 228P04	1. Petitioner's PDR (COA03-31) 2. Respondent's Motion to Dismiss PDR	1. Allowed for purpose of remanding to COA for reconsideration in light of *In re R.T.W.*, 359 N.C. 539, 614 S.E.2d 489 (2005) 08/18/05 2. Dismissed as moot 08/18/05
Kegley v. City of Fayetteville 170 N.C. App. 656	No. 342P04-2	1. Petitioners' PDR Under N.C.G.S. § 7A-31 (COA04-1123) 2. Respondent's Conditional PDR Under N.C.G.S. § 7A-31	1. Denied 08/18/05 2. Dismissed as moot 08/18/05 **Brady, J. Recused**
Myers v. McGrady 170 N.C. App. 501	No. 391A04-2	1. Third-Party Def's NOA (Dissent) (COA04-973) 2. Third-Party Def's (N.C. Division of Forest Resources) PDR as to Additional Issues	1. —— 2. Allowed 08/18/05
Page v. Bald Head Ass'n 170 N.C. App. 151	No. 304P05	Plts' PDR Under N.C.G.S. § 7A-31 (COA04-649)	Denied 08/18/05

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

Piper v. AMP, Inc. 169 N.C. App. 456	No. 258P05	1. Plt's PDR Under N.C.G.S. § 7A-31 (COA04-217) 2. Defs' Conditional PDR Under N.C.G.S. § 7A-31	1. Denied 08/18/05 2. Dismissed as moot 08/18/05
Reeves v. Yellow Transp., Inc. 170 N.C. App. 610	No. 373P05	Plt's PDR Under N.C.G.S. § 7A-31 (COA04-1140)	Denied 08/18/05
Skinner v. Furman 169 N.C. App. 456	No. 235P05	Plts' PDR Under N.C.G.S. § 7A-31 (COA04-236)	Denied 08/18/05
Smith v. Barbour 170 N.C. App. 436	No. 339P05	1. Def's (Staci Day Barbour) NOA Based Upon A Constitutional Question (COA04-792 & COA04-1144) 2. Def's (Staci Day Barbour) PDR Under N.C.G.S. § 7A-31	1. Dismissed ex mero motu 08/18/05 2. Denied 08/18/05
State v. al-Bayyinah Case Below: Davie County Superior Court	No. 550A03	Def's Motion to Stay Decision Pending the U.S. Supreme Court's Decision in *Oregon v. Guzek* (Davie County Superior Court)	Denied 08/18/05
State v. Andrews 170 N.C. App. 68	No. 303P05	Def's PDR Under N.C.G.S. § 7A-31 (COA02-691)	Denied 08/18/05
State v. Augustine Case Below: Cumberland County Superior Court	No. 130A03	1. Def's Motion to Hold Decision Pending U.S. Supreme Court's Decision in Kansas v. Marsh (Cumberland County Superior Court) 2. Def's Motion for Appropriate Relief	1. Denied 08/18/05 2. Denied 08/18/05
State v. Banuelos 169 N.C. App. 456	No. 254P05	1. Petitioner's (Aegis Security Ins. Co.) PDR Under N.C.G.S. § 7A-31 (COA04-748) 2. Respondent's (Guilford County Board of Education) Motion to Deny PDR	1. Denied 08/18/05 2. Dismissed as moot 08/18/05
State v. Battle 172 N.C. App. 335	No. 422P05	AG's Motion for Temporary Stay (COA03-484)	Allowed 08/11/05
State v. Boyd 169 N.C. App. 204	No. 239P05-2	Def's PWC to Review the Decision of the COA (COA04-216)	1. Denied 08/18/05

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

State v. Brown 172 N.C. App. 171	No. 413P05	AG's Motion for Temporary Stay (COA04-737)	Allowed pending determination of State's PDR 08/9/05
State v. Bullock 171 N.C. App. 763	No. 445P02-3	AG's Motion for Temporary Stay (COA04-665)	Allowed 08/3/05
State v. Caple 172 N.C. App. 172	No. 437P05	AG's Motion for Temporary Stay (COA04-860)	Allowed 08/17/05
State v. Caudle 172 N.C. App. 261	No. 433P05	AG's Motion for Temporary Stay (COA03-1576)	Allowed 08/16/05
State v. Cheek 170 N.C. App. 437	No. 299P05	Def's PDR Under N.C.G.S. § 7A-31 (COA04-998)	Denied 08/18/05
State v. Cobb 172 N.C. App. 172	No. 447P05	AG's Motion for Temporary Stay (COA04-508)	Allowed 08/18/05
State v. Coffin 171 N.C. App. 515	No. 405P05	AG's Motion for Temporary Stay (COA04-425)	Allowed 08/4/05
State v. Duff 171 N.C. App. 662	No. 407P05	1. AG's Motion for Temporary Stay (COA04-1241) 2. AG's Petition for Writ of Supersedeas 3. AG's PDR Under N.C.G.S. § 7A-31	1. Denied **(08/09/05)** 2. Denied 08/18/05 3. Denied 08/18/05
State v. Edwards 170 N.C. App. 381	No. 332P05	Def's PDR Under N.C.G.S. § 7A-31 (COA04-668)	Denied 08/18/05
State v. Goforth 170 N.C. App. 584	No. 389P05	Def's PWC to Review the Decision of the COA (COA04-608)	Denied 08/18/05
State v. Holman Case Below: Wake County Superior Court	No. 200A99-2	Def's PWC to Review the Order of the Superior Court (Wake County Superior Court)	Denied 08/18/05

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

State v. Johnson 169 N.C. App. 301	No. 243P05	1. Def's NOA Upon a Constitutional Question (COA03-1123) 2. AG's Motion to Dismiss Appeal 3. Def's PDR Under N.C.G.S. § 7A-31	1. —— 2. Allowed 08/18/05 3. Denied 08/18/05
State v. Jones 172 N.C. App. 161	No. 435P05	AG's Motion for Temporary Stay (COA04-967)	Allowed 08/15/05
State v. Lawrence 163 N.C. App. 205	No. 122P04-2	Def's Motion for "Petition for Discretionary Review Under N.C.G.S. § 7A-31(c)" (COA03-386)	Dismissed 08/18/05
State v. Little 163 N.C. App. 235	No. 183A04	1. Def's Second Motion for Appropriate Relief (COA03-38) 2. Def's NOA Based Upon a Dissent	1. Allowed 08/18/05 2. Dismissed as moot 08/18/05
State v. Lopez 169 N.C. App. 816	No. 324P05	Surety's (Aegis Security Insurance Co.) PDR Under N.C.G.S. § 7A-31 (COA04-565)	Denied 08/18/05
State v. Mickens 171 N.C. App. 364	No. 378P05	1. Def's PDR Under N.C.G.S. § 7A-31 (COA04-960) 2. Def's Alternative PWC to Review the Decision of the COA	1. Denied 08/18/05 2. Denied 08/18/05
State v. Moore 169 N.C. App. 458	No. 260P05	Def's Petition for "Further Review of the Opinion" of the COA (COA04-562)	Denied 08/18/05
State v. Murchison 168 N.C. App. 242	No. 107P05	Def's PDR Under N.C.G.S. § 7A-31 (COA03-1650)	Denied 08/18/05
State v. Nguyen 171 N.C. App. 364	No. 392P05	Def's PDR Under N.C.G.S. § 7A-31 (COA04-538)	Denied 08/18/05
State v. Nicholson Case Below: Wilson County Superior Court	No. 564A99-2	1. Def's PWC to Review Order of Superior Court (Wilson County Superior Court) 2. Def's Motion to Cease Appeals	1. Denied 08/18/05 2. Denied 08/18/05
State v. Ochoa 170 N.C. App. 198	No. 312P05	1. Surety's (Aegis Security Ins. Co.) PDR Under N.C.G.S. § 7A-31 (COA04-939) 2. Respondent's (Randolph County Board of Education) Motion to Deny Petition	1. Denied 08/18/05 2. Dismissed as moot 08/18/05

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

State v. Paulino 169 N.C. App. 458	No. 253P05	1. Surety's (Aegis Security Ins. Co.) PDR Under N.C.G.S. § 7A-31 (COA04-749) 2. Respondent's (Guilford County Board of Education) Motion to Deny PDR	1. Denied 08/18/05 2. Dismissed as moot 08/18/05
State v. Rascoe 170 N.C. App. 198	No. 286P05	Def's PDR Under N.C.G.S. § 7A-31 (COA04-1318)	Denied 08/18/05
State v. Rodriguez 169 N.C. App. 844	No. 325P05	Surety's (Aegis Security Insurance Co.) PDR Under N.C.G.S. § 7A-31 (COA04-566)	Denied 08/18/05
State v. Rogers 156 N.C. App. 119	No. 165A84-5	1. Def's Petition for Writ of Habeas Corpus (COA02-149) 2. Def's Motion to Dismiss	1. Denied **08/05/05** 2. Denied **08/05/05**
State v. Sanders 171 N.C. App. —— (21 June 2005)	No. 362P05	AG's Motion for Temporary Stay (COA04-943)	Allowed 07/11/05
State v. Trusell 170 N.C. App. 33	No. 278P05	Def's PDR Under N.C.G.S. § 7A-31 (COA04-704)	Denied 08/18/05
State v. Walker 170 N.C. App. 632	No. 094P05-2	Def's PDR Under N.C.G.S. § 7A-31 (COA04-978)	Denied 08/18/05
U.S. Cold Storage, Inc. v. City of Lumberton 170 N.C. App. 411	No. 328P05	Plt's PDR Under N.C.G.S. § 7A-31 (COA04-857)	Denied 08/18/05
Whitehead v. Sparrow Enter., Inc. 167 N.C. App. 178	No. 005P05	1. Plt's Motion for Temporary Stay (COA04-208) 2. Plt's PDR Under N.C.G.S. § 7A-31	1. Denied 08/18/05 2. Denied 08/18/05
Young v. Prancing Horse, Inc. 170 N.C. App. 699	No. 329PA05	Plt's PDR Under N.C.G.S. § 7A-31 (COA04-727)	Allowed 08/18/05

Zbytniuk v. ABF Freight Systems, Inc. 168 N.C. App. 597	No. 162P05	Def's PDR Under N.C.G.S. § 7A-31 (COA04-118)	Allowed for purpose of remand to COA for reconsideration in light of *Edmonds v. Fresenius Medical Care*, 165 N.C. App. 811, *rev'd per curiam*, 359 N.C. 313 (2005) **05/04/05**

APPENDIXES

PRESENTATION OF
ASSOCIATE JUSTICE THOMAS RUFFIN
PORTRAIT

AMENDMENTS TO NORTH CAROLINA
SUPREME COURT LIBRARY RULES

ORDER ADOPTING STANDARDS
OF PROFESSIONAL CONDUCT
FOR MEDIATORS

ORDER ADOPTING AMENDMENT
TO THE RULES FOR COURT-
ORDERED ARBITRATION IN
NORTH CAROLINA

ORDER ADOPTING AMENDMENTS
TO THE NORTH CAROLINA
RULES OF APPELLATE PROCEDURE

Presentation of the Portrait

of

THOMAS RUFFIN, JR.

Associate Justice
Supreme Court of North Carolina
1881-1883

November 17, 2005

OPENING REMARKS

and

RECOGNITION OF FORMER JUSTICE FRANKLIN FREEMAN

by

CHIEF JUSTICE I. BEVERLY LAKE, JR.

The Chief Justice welcomed the guests with the following remarks:

It is my distinct pleasure to welcome each of you on behalf of the Court to this special ceremony honoring Associate Justice Thomas Ruffin, Jr. Due to the efforts of the Supreme Court Historical Society, the presentation of Justice Ruffin's portrait today makes a significant contribution to our fine collection and closes a significant gap in our portrait collection.

This ceremony today connects us with an important part of the history of the Court. On March 6, 1888, the portrait of Chief Justice Thomas Ruffin was presented to and accepted by the Court. Chief Justice Ruffin was the father of Thomas Ruffin, Jr., whom we honor today. How appropriate it is that we have returned to the Capitol, the former home of the Supreme Court where Chief Justice Ruffin presided, to accept the portrait of his son Justice Thomas Ruffin, Jr. This Capitol building was also the home of the Court during the time Thomas Ruffin, Jr. served on the Court, so in a real sense Justice Ruffin has come home.

I am now very pleased to recognize Associate Justice Franklin Freeman, President of the Supreme Court Historical Society, to present the portrait to the Court.

PRESENTATION ADDRESS

BY

THE HONORABLE FRANKLIN FREEMAN, FORMER JUSTICE,

SUPREME COURT OF NORTH CAROLINA

May it please the Court:

On behalf of the North Carolina Supreme Court Historical Society, I am honored to be here today and to represent the Society on this historical occasion.

The tradition of presenting portraits of former justices to the Court began on March 5, 1888. The occasion was the formal opening of the new Supreme Court and Library Building which is now the Labor Building. At 10:00 A.M. Governor Alfred Scales presented the building to a Court composed of Chief Justice William Smith and Justices Augustus Merrimon and Joseph Davis. Following acceptance of the building by the Chief Justice, three portraits of former members of the Court were formally presented: the life size portrait of Chief Justice Thomas Ruffin and portraits of Justice Edwin Reade and Justice Thomas Ashe. For one hundred seventeen years since, this practice has continued, and today we reach a milestone with this portrait presentation: all of the justices who served on the Court during the nineteenth century will be represented in the portrait collection of the Court.

The name of Ruffin has been connected to the Supreme Court for one hundred eighty-five years; primarily that of the eminent jurist, Chief Justice Thomas Ruffin. However, there was another Ruffin by the same name who served on the Court, Thomas Ruffin, Jr., the fourth son born to the great Chief Justice Thomas Ruffin and his wife Anne Kirkland Ruffin. Today we seek to remove Justice Thomas Ruffin, Jr. from the shadow of his illustrious father.

Raleigh artist, Mike Pullium, created the portrait to be presented today. Because of an imperfection of one eye, Associate Justice Ruffin never sat for a photograph or a portrait. The only image of Justice Ruffin that could be found was a postmortem photograph which posed a challenge to the artist in capturing a "lifelike" image.

Thomas Ruffin, Jr. was born at Ruffin Hall in Hillsborough on September 21, 1824, into one of the most prominent families in the state. His father was at the height of his legal career, as well as

being a extremely successful planter and agriculturalist. Ruffin's paternal great grandfather was Chief Justice Spencer Roane of the Supreme Court of Virginia. His maternal grandfather was William Kirkland, the leading merchant in Hillsborough. William Kirkland resided at *Arymont*, which still stands today as a prominent landmark in Hillsborough. Young Ruffin enjoyed his young years with the comforts that being the son of a successful planter could supply. After attending the highly regarded Samuel Smith Academy in Rockingham County and receiving instruction from private tutors, Ruffin entered the University of North Carolina in 1840 at the age of sixteen.

At the age of eighteen, as most college students are apt to do, Thomas Ruffin was questioning his plight in life. What would his profession be? Although his father was Chief Justice of the state Supreme Court, his brother William was one of the leading attorneys in the state, and his brother John a leading physician, Thomas seemed unclear as to direction. In writing to his father in February of 1842, he stated that he wished to "lay open" his plans for his future. He asked his father's permission to "quit college and go to sea," explaining that this desire was more than "a mere fancy, boyish and childish, for I assure you I have thought over it often." He continued by saying, "It is my opinion that I cannot succeed at the Bar or in the practice of medicine, and I distain[sic] to become a pety [sic] politician, who can alter his sentiments according to popular caprice." However, in September of the following year, young Ruffin seemed to have matured somewhat and wrote again to his father from Chapel Hill:

> "The time has now arrived when I begin to appreciate your kindness, in offering an education, and the benefits to be derived from one. Indeed I may say that a complete change has been wrought in my ideas of what is right and what is wrong. I have determined to be something and not to leave this world, to be remembered as one, who came into it, merely to enjoy its sweets and to submit to its misfortunes, and then to leave it, without one deed, which may have had a happy influence on some fellow being."

He continued in the same letter by saying, "When I shall glide from the quiet labors of a college life, into the bustle and confusion of the world, and I begin to consider what shall be my occupation in future life, however, I have resolved to leave this point to be settled by a kind parent, who is so much better acquainted with the world and its ways and to whom I know my interest is such care."

In January of 1844, just months before he graduated from college, Ruffin again wrote his father and asked what profession his father had chosen for him. He said he was ready to leave college as a man and would dedicate himself to whatever occupation his father chose whether it be "cornfield or the highest profession." After his graduation from the university, Ruffin managed part of his father's extensive land holdings in Alamance county and began his legal studies under the tutelege of his bother, William, and, when not in Raleigh for court, his father, the Chief Justice. His frequent letters to his father gave accountings of the activities on the farm as well as kept his father updated on his studies. In one report he stated he had read the second volume of *Blackstone's Commentaries* ten times and had asked his brother William for an examination, "thinking I would make a great display of my legal acquirements." Before too many questions were asked by his brother, young Ruffin realized he had made "small progress." His studies next included the third volume of *Blackstone*, and *Coke Upon Littleton*. These treatises were required reading by the Supreme Court before one could "stand for the bar." At the time those words were literal: when an applicant took the bar exam, he stood before the Supreme Court in the courtroom and the justices asked questions from the bar exam, which of course the applicant was required to answer orally. His brother, William, by all accounts was an excellent instructor, as well as one of the leading attorneys in the state. Young Ruffin passed the bar and received his license to practice in the inferior courts in 1845 and in the superior courts in 1846.

After receiving his license from the Court which he would join some thirty-five years later, Ruffin began his practive in Yanceyville, the Caswell County seat. In 1848 he moved to the Rockingham County seat, Wentworth, and began a practice with John H. Dilliard, thereby forming a partnership and friendship. The friendship would be lasting. Due to the attention paid to their clients, the Dilliard-Ruffin practice flourished. John Dilliard, along with Judge Robert Dick, conducted the famous Dick-Dilliard Law School in Greensboro. John Dilliard was elected to the Court in 1878, and, when Dilliard resigned in 1881, Thomas Ruffin was appointed to take his seat.

In 1850 Ruffin was elected to the North Carolina House of Commons to represent Rockingham county. During Ruffin's single term in the House of Commons, bills were introduced to call a constitutional convention. One of the amendments proposed would change the method of selecting Supreme Court justices, who were then elected by the General Assembly for terms of "good behavior," amounting to

life terms on the Court. The proposed amendment would place justices' elections in the hands of qualified voters and would replace life terms with a "term of years." These provisions would be extended to the superior court judges, the attorney general, solicitors, the secretary of state, and the state treasurer.

During the debate on these amendments, Ruffin wrote his father asking his opinion on the proposed changes. Although we do not know the response of the Chief Justice, it is believed he advised Ruffin, Jr. against supporting the amendment because when the amendment came to the House for a vote, the amendment failed by a vote of thirty-eight yeas and sixty-six nays, Representative Ruffin voting in the negative. Ruffin introduced two bills while a member of the House: one created the town of Madison, and the other declared the "Dan River from Madison, to the Stokes County line a deep water course and sufficient instead of a fence." His neighbors did not want to erect a fence to enclose their fields, which was required by law. For his service in the House, he was paid the handsome sum of $237.00.

Apparently political life was not to his liking, and he did not seek re-election. However, two years later in 1854 Ruffin was elected solicitor of the fourth judicial circuit. The vote for Ruffin was thirty-four in favor and thirteen against in the Senate and fifty-three for and fifty-one against in the House. I might add that during this period, all statewide officers were elected by the General Assembly rather than by popular vote. By all accounts of the period, Ruffin became an absolute master of the criminal law, was attentive to his duties, and apparently was without peer as solicitor. He was again elected solicitor in 1858, this time by wide margins in both the House of Commons and the Senate, and he served as solicitor until he resigned in March 1860. In 1858 he married his first cousin, Miss Mary Cain of Hillsborough, and moved from Rockingham County to the Alamance County seat of Graham. Four children were born to the couple: Thomas III; William; James; and Mary.

At the start of the Civil War, Ruffin heard the call of battle and joined a group of his neighbors as a private to form the Alamance Company of the Thirteenth Regiment of North Carolina Troops. At the first election of officers on May 3, 1861, he was elected captain of his company. In October of 1861, upon the death of superior court Judge Robert P. Dick, Governor Clark offered the position to Ruffin and Ruffin accepted. Ruffin resigned his position as captain of Company E, North Carolina's Thirteenth Regiment on October 20, 1861 and conducted court during the fall term. However, on April 16, 1862,

he was elected lieutenant colonel of the Thirteenth Regiment and from the battlefield in July of 1862 sent his resignation as superior court judge to the Governor.

In the summer of 1862, Colonel Ruffin lead the Thirteenth in the battles of Second Manassas, Sharpsburg, and South Mountain. On September 13, 1862, during the Battle of South Mountain, the regiment became separated from the remainder of the brigade and soon found itself completely surrounded by federal troops. Neither desiring to surrender nor to see his men killed by the circle of gunfire, Colonel Ruffin ordered a frontal attack on the federal army and drove them back, then rapidly turned his men around, charged the federal troops to the rear and drove them back also. The federal troops were so astonished by this maneuver, which was accompanied by a deafening rebel yell, that they were routed and withdrew in confusion. Although severely wounded with a musket ball to his hip, Colonel Ruffin and the Thirteenth held the field and returned to their brigade. While General Garland and Ruffin were mounted and discussing a replacement for the injured Ruffin, Garland received a gunshot wound from retreating federal troops and fell from his horse mortally wounded. He died a few minutes later.

Throughout his entire military career, as shown through statements made by his men and his superiors, Ruffin displayed an extraordinary concern for his troops. During battles he would constantly encourage his men to take advantage of rocks and trees as cover and would refuse to let the troops take undue risks. In February of 1863, due to injuries he received at South Mountain, Ruffin resigned his commission and was appointed judge of the military court of the Trans-Mississippi Department, General Kirby Smith's Corps.

While in the Confederate Army, Ruffin, Jr. would not hesitate to call on his father for political help. From Camp Garysburg he asked Chief Justice Ruffin to speak to Governor Ellis to arrange to have Ruffin assigned to the same company as some of his cronies.

After Ruffin's troops had lost their supplies Ruffin wrote the Chief Justice and asked what food was available that might be sent to the battlefield. He also asked for the ladies to make shirts and asked for materials to make uniforms.

While on the battlefield Ruffin learned of the birth of his first son and stated that if the son were to be named Thomas, it would be in honor of the Chief Justice instead of himself.

After the war Ruffin returned to Alamance County to continue his practice. However, in 1868 Ruffin moved to Greensboro and formed a partnership with his old friends, John H. Dilliard and John Gilmer. In 1870 his health declined, causing him to abandon his practice. For a while he ran an insurance agency, but soon moved back to Hillsborough. By 1874 his health had improved, and he ran as an independent for the superior court seat against Judge John H. Kerr who had replaced Ruffin on the superior court when Ruffin resigned in 1862. It was a particularly bitter contest with Ruffin losing by just four hundred votes, judges now being elected by the people.

After losing the election, he began a practice with Major John W. Graham in 1875. This partnership would last the rest of Ruffin's life, with the exception of the time he was on the Court. As to his skill as a lawyer, one attorney who knew him personally and by reputation said: "He went into the trial of no important case without having full and complete knowledge of the witnesses and of their testimony and of the law applicable thereto. When this full preparation is imposed upon quickness of intellect, adroitness and common sense, a great trial lawyer is the result, and by almost universal testimony Colonel Ruffin was the greatest of his section. Colonel T. C. Fuller, himself at the head of the Bar, and having, perhaps, a more extensive acquaintance with the lawyers of the State then any other person in it, said he had never met his equal as a lawyer, and Attorney General Davison said of him that 'he stood first rank.' At the time of his death he was universally regarded as the leader of the Bar in North Carolina—a preeminence accorded to him without question and without envy."

Thomas Ruffin the younger was appointed to the Supreme Court by Governor Thomas Jarvis on February 11, 1881, following the resignation of his friend and former law partner, Justice John H. Dilliard. Ruffin joined Chief Justice William N. H. Smith of Wake and Associate Justice Thomas S. Ashe of Anson. While a member of the Court, Justice Ruffin wrote two hundred twenty majority opinions and five dissenting opinions, an average of seven and one-half opinions per month. These appear in volumes 84 through 88 of the North Carolina Reports. Perhaps of necessity, most of his opinions were short and to the point, and like his father's opinions, made little use of citations from other cases. However, a selected reading of the opinions reveals a jurist with a powerful intellect, an innate understanding of constitutional principles, and a keen sense of justice. In *State ex rel. King v. McLure*, 84 N.C. 153 (1881), an action in quo warranto trying the title to the office of constable in Mecklenburg

County, the Court was called upon on appeal to interpret the amended state consitution of 1875. Ruffin wrote:

> "Keeping in view the rule, which is a cardinal one, that in giving a construction to the constitution the spirit and intent of its framers is the safest guide, and that in order to ascertain this intent, especially in the case of an amended constitution which is supposed to be changed because of newly discovered or newly arisen exigencies the mischief intended to be remedied is the surest test, we have felt constrained to give to the clauses under consideration an interpretation differing from that insisted on by the relator."

Justice Ruffin's reverence for the proper administration of justice and the absolute necessity for its proper conduct was reflected in a number of his opinons. In *State v. Noland*, 85 N.C. 576 (1881), a rape case involving the berating and intimidation of several jurors during the trial by the state's attorneys, Ruffin, in writing for the Court's award of a new trial, stated:

> "To secure for the administration of the law that general respect and confidence, which it is of the highest public interest it should enjoy, it is absolutely essential that the business of the courts should be conducted with becoming gravity and dignity; that their judgments should be seen to be temperately considered and impartially delivered; and above all, that the verdict of the juries concerned should be known to be the result of serious convictions after dispassionate and free deliberations."

In *State v. McDaniel*, 84 N.C. 803 (1881), a case involving the slander of a woman, he stated: "This presumption [of innocence] in favor of defendants on trial is too important, and has been found too useful in the protection of innocence to be sacrificed to a mere sentiment . . . ."

While he was on the Court, Ruffin's health continued to fail, and on September 17, 1883 he resigned from the Court and returned to the practice of law in Hillsborough with his friend, Major John W. Graham. He practiced on a limited basis until he passed away on May 23, 1889 at the age of sixty-five. Thomas Ruffin, Jr. was laid to rest very near his father and mother and is now surrounded by the graves of other kinsmen in the burial ground of St. Matthews Church in Hillsborough.

Following Ruffin's death, Chief Justice Smith observed of him: "He was not a member of this court at the time of his death, but he

had been, and served with great satisfaction to the court and with distinguished ability. His associates were greatly attached to, and highly appreciated him as a judge, and for his great personal worth. He was a learned lawyer and a very able judge. He possessed a powerful intellect, well trained by study and application. He was full of energy, had a strong will and a keen sense of justice. In his appearance, habits, opinions and mental characteristics he was strikingly like his distinguished father."

Today, as the subject of the last portrait of a nineteenth century Justice to be presented, the distinguished Ruffin the younger joins his eminent father, Chief Justice Thomas Ruffin, whose portrait was the first of the nineteenth century justices to be presented. To this there is both symbolism and symmetry.

ACCEPTANCE OF JUSTICE RUFFINS'S PORTRAIT

BY

CHIEF JUSTICE LAKE

Thank you, Justice Freeman. I will now call upon Justice Willis Whichard, Chairman of the Supreme Court Historical Society's Board of Trustees, to unveil the portrait of Justice Ruffin.

On behalf of the Supreme Court, it is with pleasure that I accept the portrait of Justice Ruffin as a part of our collection. We are delighted to have this work of art, and we sincerely appreciate the efforts of all who helped to make this a reality.

Thank you for being with us today.

AMENDMENT TO NORTH CAROLINA SUPREME COURT LIBRARY RULES

Pursuant to Section 7A-13(d) of the General Statutes of North Carolina, the following amendment to the NORTH CAROLINA SUPREME COURT LIBRARY RULES has been approved by the Library Committee and is hereby promulgated:

Section 1. Rule 11, entitled "Copy service, fees, and certification," is amended to read as follows:

Rule 11. Copy service.

(a) All copies made by members and employees of the Supreme Court and the Court of Appeals shall be furnished without charge.

(b) Provided that the number of copies made in any one month does not exceed three hundred (300) pages, or with the permission of the Librarian regardless of the number of pages, such copies as made by persons holding positions listed in the Official Register if used in the discharge of their official duties shall be made without charge.

(c) Except as provided for in sections (a) and (b) of this Rule, patrons may make photocopies for ten cents ($.10) per page.

Section 2. This amendment shall become effective November 2, 2004.

This the 15th day of November, 2004.

Thomas P. Davis
Librarian

Approved:
Associate Justice Robert H. Edmunds, Jr.
Chairman, For the Library Committee

AMENDMENTS TO
NORTH CAROLINA SUPREME COURT
LIBRARY RULES

As directed by the Supreme Court, and by authority of N.C. GEN. STAT. § 7A-13(d) (2003), the NORTH CAROLINA SUPREME COURT LIBRARY RULES are hereby amended:

Section 1. Rule 2 is amended to add the following definitions:

Rule 2. Definitions.

(a1) "user" means:

i. justice, judge, employee, or volunteer of the Appellate Division of the General Court of Justice;

ii. employee of the State of North Carolina in the discharge of official duties; and

iii. practicing attorney licensed in the State of North Carolina.

(a2) "authorized visitor" means:

i. employee of a user possessing permission on standard form issued by a member of the Library staff to visit the facility; and

ii. person possessing permission on standard form issued by the Librarian to visit the facility.

Section 2. Rule 3 is amended to read as follows:

Rule 3. Hours.

Except on State Holidays or when the Library Committee authorizes that it be closed, the Library shall be open to users and authorized visitors on Monday through Friday from eight-thirty o'clock in the morning until four-thirty o'clock in the afternoon.

Section 3. Rule 4 is amended to read as follows:

Rule 4. Use During Regular Hours.

Any user or authorized visitor who ~~conducts himself~~ acts in a quiet, orderly, and lawful manner and who abides by the Rules and the reasonable requests of the staff may visit the Library and reasonably use its material to such extent, in such manner, and for such duration as in the discretion of the Librarian ~~or Assistant~~

~~Librarian~~ reasonably does not or will not interfere with the performance of the Library's primary function of serving the Appellate Division of the General Court of Justice.

Section 4. These amendments shall become effective March 1, 2005.

Adopted by the Court in Conference, this the 16th day of December, 2004. These amendments shall be promulgated by publication in the Advance Sheets of the Supreme Court. These amendments shall also be published as quickly as practicable on the North Carolina Judicial Branch of Government Internet Home Page (http://www.nccourts.org).

(s) Newby, J.
For the Court

ORDER ADOPTING STANDARDS OF PROFESSIONAL CONDUCT FOR MEDIATORS

WHEREAS, section 7A-38.2 of the North Carolina General Statutes establishes the Dispute Resolution Commission under the Judicial Department and charges it with the administration of mediator certification and regulation of mediator conduct and decertification, and

WHEREAS, N.C.G.S. § 7A-38.2(a) provides for this Court to adopt standards for the conduct of mediators and of mediator training programs participating in the mediated settlement conference program established pursuant to N.C.G.S. § 7A-38.1,

WHEREAS, N.C.G.S. § 7A-38.3(e) provides for this Court to adopt standards for the conduct of mediators and of mediator training programs participating in the prelitigation farm nuisance mediation program established pursuant to N.C.G.S. § 7A-38.3, and

WHEREAS, N.C.G.S. § 7A-38.4(1) provides for this Court to adopt standards for the conduct of mediators and of mediators training programs participating in the program for settlement of equitable distribution and other family financial matters established pursuant to N.C.G.S. § 7A-38.4.

NOW, THEREFORE, pursuant to N.C.G.S. § 7A-38.2(a), N.C.G.S. § 7A-38.3(e), and N.C.G.S. § 7A-38.4(1), Standards of Professional Conduct For Mediators are hereby adopted to read as in the following pages. These Standards shall be effective on the 20th day of October, 2004. Until that date, the Standards adopted by this court on the 16th day of August, 2001, shall remain in effect.

Adopted by the Court in conference the 6th day of October, 2004. The Appellate Division Reporter shall promulgate by publication as soon as practicable the Standards of Professional Conduct for Mediators in their entirety, as amended through this action, in the advance sheets of the Supreme Court and the Court of Appeals.

s/Brady, J.
For the Court

STANDARDS OF PROFESSIONAL CONDUCT FOR MEDIATORS

PREAMBLE

These standards are intended to instill and promote public confidence in the mediation process and to be a guide to mediator conduct. As with other forms of dispute resolution, mediation must be built on public understanding and confidence. Persons serving as mediators are responsible to the parties, the public, and the courts to conduct themselves in a manner which will merit that confidence. These standards apply to all mediators ~~who~~ participat~~e~~ing in mediated settlement conferences in the State of North Carolina pursuant to NCGS 7A-38.1, NCGS 7A-38.3, ~~or~~ NCGS 7A-38.4A or who are certified to do so. These Standards, however, shall not apply in instances where a mediator is participating in a mediation program or process which is governed by other statutes, program rules, and/or Standards of Conduct and there is a conflict between these Standards and the statutes, rules, or Standards governing the other program. In such instance, the mediator's conduct shall be governed by the conflicting statutory provision, rule, or Standard applicable to the program or process in which the mediator is participating.

Mediation is a process in which an impartial person, a mediator, works with disputing parties to help them explore settlement, reconciliation, and understanding among them. In mediation, the primary responsibility for the resolution of a dispute rests with the parties.

The mediator's role is to facilitate communication and recognition among the parties and to encourage and assist the parties in deciding how and on what terms to resolve the issues in dispute. Among other things, a mediator assists the parties in identifying issues, reducing obstacles to communication, and maximizing the exploration of alternatives. A mediator does not render decisions on the issues in dispute.

I. Competency: A mediator shall maintain professional competency in mediation skills and, where the mediator lacks the skills necessary for a particular case, shall decline to serve or withdraw from serving.

A. A mediator's most important qualification is the mediator's competence in procedural aspects of facilitating the resolution of disputes rather than the mediator's familiarity with technical knowledge relating to the subject of the dispute. Therefore a mediator shall obtain necessary skills and substantive training appropriate to the mediator's areas of practice and upgrade those skills on an ongoing basis.

B. If a mediator determines that a lack of technical knowledge impairs or is likely to impair the mediator's effectiveness, the mediator shall notify the parties and withdraw if requested by any party.

C. Beyond disclosure under the preceding paragraph, a mediator is obligated to exercise his/her judgment as to whether his/her skills or expertise are sufficient to the demands of the case and, if they are not, to decline from serving or to withdraw.

II. Impartiality: A mediator shall, in word and action, maintain impartiality toward the parties and on the issues in dispute.

A. Impartiality means absence of prejudice or bias in word and action. In addition, it means a commitment to aid all parties, as opposed to a single party, in exploring the possibilities for resolution.

B. As early as practical and no later than the beginning of the first session, the mediator shall make full disclosure of any known relationships with the parties or their counsel that may affect or give the appearance of affecting the mediator's impartiality.

C. The mediator shall decline to serve or shall withdraw from serving if:

(1) a party objects to his/her serving on grounds of lack of impartiality or

(2) the mediator determines he/she cannot serve impartially.

III. Confidentiality: A mediator shall, subject to exceptions set forth below, maintain the confidentiality of all information obtained within the mediation process.

A. A mediator shall not disclose, directly or indirectly, to any nonparty, any information communicated to the mediator by a party within the mediation process.

B. A mediator shall not disclose, directly or indirectly, to any party to the mediation, information communicated to the mediator in confidence by any other party, unless that party gives permission to do so. A mediator may encourage a party to permit disclosure, but absent such permission, the mediator shall not disclose.

C. The confidentiality provisions set forth in A. and B. above notwithstanding, a mediator has discretion to report otherwise confidential ~~information~~ conduct or statements made in preparation for, during, or as a follow-up to a mediated settlement conference to a

party, non-party, or law enforcement personnel or to give an affidavit or to testify about such conduct or statements in the following circumstances:

(1) ~~the mediator is under a statutory duty to report the confidential information, see, for example, N.C. Gen. Stat. §7A-38.1 and §7A-38.4 which provide for an exception to confidentiality when the mediator has reason to believe that a child or elder has been or may be abused.~~

(1) A statute requires or permits a mediator to testify or give an affidavit; or

(2) public safety is an issue:

~~(2)~~(i) a party to the mediation has communicated to the mediator a threat of serious bodily harm or death to be inflicted on any person, and the mediator has reason to believe the party has the intent and ability to act on the threat~~.~~; or

~~(3)~~(ii) a party to the mediation has communicated to the mediator a threat of significant damage to real or personal property and the mediator has reason to believe the party has the intent and ability to act on the threat~~.~~; or

~~(4)~~(iii) a party's conduct during the mediation results in direct bodily injury or death to a person.

D. Nothing in this Standard prohibits the use of information obtained in a mediation for instructional purposes, or for the purpose of evaluating or monitoring the performance of a mediator, mediation organization, or dispute resolution program, so long as the parties or the specific circumstances of the parties' controversy are not identified or identifiable.

IV. Consent: A mediator shall make reasonable efforts to ensure that each party understands the mediation process, the role of the mediator, and the party's options within the process.

A. A mediator shall discuss with the participants the rules and procedures pertaining to the mediation process and shall inform the parties of such matters as applicable rules require. A mediator shall also inform the parties of the following:

(1) that mediation is private;

(2) that mediation is informal;

(3) that mediation is confidential to the extent provided by law;

(4) that mediation is voluntary, meaning that the parties do not have to negotiate during the process nor make or accept any offer at any time;

(5) the mediator's role; and

(6) what fees, if any, will be charged by the mediator for his/her services.

B. A mediator shall not exert undue pressure on a participant, whether to participate in mediation or to accept a settlement; nevertheless, a mediator may and shall encourage parties to consider both the benefits of participation and settlement and the costs of withdrawal and impasse.

C. Where a party appears to be acting under undue influence, or without fully comprehending the process, issues, or options for settlement, a mediator shall explore these matters with the party and assist the party in making freely chosen and informed decisions.

D. If after exploration the mediator concludes that a party is acting under undue influence or is unable to fully comprehend the process, issues or options for settlement, the mediator shall discontinue the mediation.

E. In appropriate circumstances, a mediator shall encourage the parties to seek legal, financial, tax or other professional advice before, during or after the mediation process. A mediator shall explain generally to *pro se* parties that there may be risks in proceeding without independent counsel or other professional advisors.

V. Self Determination: A mediator shall respect and encourage self-determination by the parties in their decision whether, and on what terms, to resolve their dispute, and shall refrain from being directive and judgmental regarding the issues in dispute and options for settlement.

A. A mediator is obligated to leave to the parties full responsibility for deciding whether and on what terms to resolve their dispute. He/She may assist them in making informed and thoughtful decisions, but shall not impose his/her judgment or opinions for ~~that~~ those of the parties concerning any aspect of the mediation.

B. ~~Subject to Section A. above and Standard VI. below, a~~ A mediator may raise questions for the ~~parties~~ participants to consider regarding their perceptions of the dispute as well as the acceptability~~, sufficiency, and feasibility, for all sides,~~ of proposed options for settlement and ~~— including~~ their impact on third parties. Furthermore, a mediator may ~~make suggestions~~ suggest for ~~the parties'~~ consideration options for settlement in addition to those conceived of by the parties themselves. ~~However at no time shall a mediator make a decision for the parties, or express an opinion about or advise for or against any proposal under consideration.~~

C. ~~Subject to Standard IV. E. above, if a party to a mediation declines to consult an independent counsel or expert after the mediator has raised this option, the mediator shall permit the mediation to go forward according to the parties' wishes~~. A mediator shall not impose his/her opinion about the merits of the dispute or about the acceptability of any proposed option for settlement. A mediator should resist giving his/her opinions about the dispute and options for settlement even when he/she is requested to do so by a party or attorney. Instead, a mediator should help that party utilize his/her own resources to evaluate the dispute and the options for settlement.

This section prohibits imposing one's opinions, advice and/or counsel upon a party or attorney. It does not prohibit the mediator's expression of an opinion as a last resort to a party or attorney who requests it and the mediator has already helped that party utilize his/her own resources to evaluate the dispute and options.

D. Subject to Standard IV. E. above, if a party to a mediation declines to consult an independent counsel or expert after the mediator has raised this option, the mediator shall permit the mediation to go forward according to the parties' wishes.

~~D~~.E. If, in the mediator's judgment, the integrity of the process has been compromised by, for example, the inability or unwillingness of a party to participate meaningfully, ~~gross~~ inequality of bargaining power or ability, ~~gross~~ unfairness resulting from nondisclosure or fraud by a participant, or other circumstance likely to lead to a grossly unjust result, the mediator shall inform the parties. The mediator may choose to discontinue the mediation in such circumstances but shall not violate the obligation of confidentiality.

VI. Separation of Mediation from Legal and Other Professional Advice: A mediator shall limit himself or herself solely to the role of mediator, and shall not give legal or other professional advice during the mediation.

A mediator may, in areas where he/she is qualified by training and experience, raise questions regarding the information presented by the parties in the mediation session. However, the mediator shall not provide legal or other professional advice. Mediators may respond to a party's request for an opinion on the merits of the case or suitability of settlement proposals only in accordance with Section V.C. above. ~~whether in response to statements or questions by the parties or otherwise.~~

VII. Conflicts of Interest: A mediator shall not allow any personal interest to interfere with the primary obligation to impartially serve the parties to the dispute.

A. The mediator shall place the interests of the parties above the interests of any court or agency which has referred the case, if such interests are in conflict.

B. Where a party is represented or advised by a professional advocate or counselor, the mediator shall place the interests of the party over his/her own interest in maintaining cordial relations with the professional, if such interests are in conflict.

C. A mediator who is a lawyer or other professional shall not advise or represent ~~either~~ any of the parties in future matters concerning the subject of the dispute, an action closely related to the dispute, or an out growth of the dispute.

D. A mediator shall not charge a contingent fee or a fee based on the outcome of the mediation.

E. A mediator shall not use information obtained during a mediation for personal gain or advantage.

F. A mediator shall not knowingly contract for mediation services which cannot be delivered or completed as directed by a court or in a timely manner.

G. A mediator shall not prolong a mediation for the purpose of charging a higher fee.

H. A mediator shall not give or receive any commission, rebate, or other monetary or non-monetary form of consideration from a party or representative of a party in return for referral of clients for mediation services.

VIII. Protecting the Integrity of the Mediation Process. A mediator shall encourage mutual respect between the parties, and shall take reasonable steps, subject to the principle of self-determination, to limit abuses of the mediation process.

A. A mediator shall make reasonable efforts to ensure a balanced discussion and to prevent manipulation or intimidation by either party and to ensure that each party understands and respects the concerns and position of the other even if they cannot agree.

B. When a mediator discovers an intentional abuse of the process, such as nondisclosure of material information or fraud, the mediator shall encourage the abusing party to alter the conduct in question. The mediator is not obligated to reveal the conduct to the other party, (and subject to Standard V. D. above) nor to discontinue the mediation, but may discontinue without violating the obligation of confidentiality.

IN THE SUPREME COURT OF NORTH CAROLINA

Order Adopting Amendment to the Rules for Court-Ordered Arbitration in North Carolina

WHEREAS, Section 7A-37.1 of the North Carolina General Statutes authorized statewide court-ordered, non-binding arbitration in certain civil actions, and further authorized the Supreme Court of North Carolina to adopt rules governing this procedure and to supervise its implementation and operation through the Administrative Office of the Courts; and

WHEREAS, it has been determined that the Rules for Court-Ordered Arbitration should be amended to increase the fee from $75 to $100.

NOW, THEREFORE, Rule 2(c) of the Rules for Court-Ordered Arbitration is amended and adopted to read as follows:

(c) **Fees and Expenses.** Arbitrators shall be paid a $100 fee by the Court for each arbitration hearing when they file their awards with the Court. An arbitrator may be reimbursed for expenses actually and necessarily incurred in connection with an arbitration hearing and paid a reasonable fee not exceeding $100 for work on a case not resulting in a hearing upon the arbitrator's written application to and approval by the Chief Judge of the District Court.

This rule, as amended, shall be promulgated by publication in the advance sheets of the Supreme Court and the Court of Appeals. This amendment shall also be published as quickly as practical on the North Carolina Judicial Branch of Government Internet Home Page(http://www.nccourts.org). It shall be effective on the 1st day of January, 2005, for arbitration hearings conducted on or after the 1st day of January, 2005.

Adopted by the Court in Conference this the 16th day of December, 2004

Newby, J.
For the Court

Order Adopting Amendments to the
North Carolina Rules of Appellate Procedure

I. Rules 13, 14, 15, 28, and 30 of the North Carolina Rules of Appellate Procedure are amended as described below:

Rule 13(a) is amended to read:

(a) Time for Filing and Service of Briefs.

(1) *Cases Other Than Death Penalty Cases.* Within 30 days after the clerk of the appellate court has mailed the printed record to the parties, the appellant shall file his brief in the office of the clerk of the appellate court, and serve copies thereof upon all other parties separately represented. The mailing of the printed record is not service for purposes of Rule 27(b); therefore the provision of that rule allowing an additional three days after service by mail does not extend the period for the filing of an appellant's brief. Within 30 days after appellant's brief has been served on an appellee, the appellee shall similarly file and serve copies of his brief. If permitted by Rule 28(h), the appellant may serve and file a reply brief ~~within 14 days after service of the brief of the appellee~~ as provided in that rule.

(2) *Death Penalty Cases.* Within 60 days after the Clerk of the Supreme Court has mailed the printed record to the parties, the defendant-appellant, in a criminal appeal which includes a sentence of death, shall file his brief in the office of the Clerk and serve copies thereof upon all other parties separately represented. The mailing of the printed record is not service for purposes of Rule 27(b); therefore the provision of that rule allowing an additional three days after service by mail does not extend the period for the filing of a defendant-appellant's brief. Within 60 days after appellant's brief has been served, the State-appellee shall similarly file and serve copies of its brief. If permitted by Rule 28(h), the appellant may serve and file a reply brief as provided in that rule, except that reply briefs filed pursuant to Rule 28(h)(2) or (3) shall be filed and served within 21 days after service of the brief of the State-appellee.

The first paragraph of Rule 14(d) is amended to read:

(1) *Filing and Service; Copies.* Within 30 days after filing notice of appeal in the Supreme Court, the appellant shall file with the Clerk of the Supreme Court and serve upon all other par-

ties copies of a new brief prepared in conformity with Rule 28, presenting only those questions upon which review by the Supreme Court is sought; provided, however, that when the appeal is based upon the existence of a substantial constitutional question or when the appellant has filed a petition for discretionary review for issues in addition to those set out as the basis of a dissent in the Court of Appeals, the appellant shall file and serve a new brief within 30 days after entry of the order of the Supreme Court which determines for the purpose of retaining the appeal on the docket that a substantial constitutional question does exist or allows or denies the petition for discretionary review in an appeal based on a dissent. Within 30 days after service of the appellant's brief on him, the appellee shall similarly file and serve copies of a new brief. If permitted by Rule 28(h), the appellant may serve and file a reply brief ~~within 14 days after service of the brief of the appellee~~ as provided in that rule.

Rule 15(g)(2) is amended to read:

(2) *Cases Certified for Review of Court of Appeals Determinations.* When a case is certified for review by the Supreme Court of a determination made by the Court of Appeals, the appellant shall file a new brief prepared in conformity with Rule 28 in the Supreme Court and serve copies upon all other parties within 30 days after the case is docketed in the Supreme Court by entry of its order of certification. The appellee shall file a new brief in the Supreme Court and serve copies upon all other parties within 30 days after a copy of appellant's brief is served upon him. If permitted by Rule 28(h), the appellant may serve and file a reply brief ~~within 14 days after service of the brief of the appellee~~ as provided in that rule.

Rule 28 is amended as follows:

Rule 28(b)(6) is amended to read:

(6) An argument, to contain the contentions of the appellant with respect to each question presented. Each question shall be separately stated. Immediately following each question shall be a reference to the assignments of error pertinent to the question, identified by their numbers and by the pages at which they appear in the printed record on appeal. Assignments of error not set out in the appellant's brief, or in support of which no reason or argument is stated or authority cited, will be taken as abandoned.

The argument shall contain a concise statement of the applicable standard(s) of review for each question presented, which shall appear either at the beginning of the discussion of each

question presented or under a separate heading placed before the beginning of the discussion of all the questions presented.

The body of the argument and the statement of applicable standard(s) of review shall contain citations of the authorities upon which the appellant relies. Evidence or other proceedings material to the question presented may be narrated or quoted in the body of the argument, with appropriate reference to the record on appeal or the transcript of proceedings, or the exhibits.

Rule 28(c) is amended to read:

(c) Content of Appellee's Brief; Presentation of Additional Questions. An appellee's brief in any appeal shall contain a subject index and table of authorities as required by Rule 26(g), an argument, a conclusion, identification of counsel and proof of service in the form provided in Rule 28(b) for an appellant's brief, and any appendix as may be required by Rule 28(d). It need contain no statement of the questions presented, statement of the procedural history of the case, statement of the grounds for appellate review, ~~or~~ statement of the facts, or statement of the standard(s) of review, unless the appellee disagrees with the appellant's statements and desires to make a restatement or unless the appellee desires to present questions in addition to those stated by the appellant.

Without having taken appeal, an appellee may present for review, by stating them in his brief, any questions raised by cross-assignments of error under Rule 10(d). Without having taken appeal or made cross-assignments of error, an appellee may present the question, by statement and argument in his brief, whether a new trial should be granted to the appellee rather than a judgment n.o.v. awarded to the appellant when the latter relief is sought on appeal by the appellant.

If the appellee is entitled to present questions in addition to those stated by the appellant, the appellee's brief must contain a full, non-argumentative summary of all material facts necessary to understand the new questions supported by references to pages in the record on appeal, the transcript of proceedings, or the appendixes, as appropriate, as well as a statement of the applicable standard(s) of review for those additional questions.

Rule 28(h)(4) is amended to read:

(4) If the parties are notified that the case has been scheduled for oral argument, an appellant may ~~file with the Court~~,

within 14 days after ~~the notice~~service of ~~argument is mailed,~~such notification, file and serve a motion for leave to file a reply brief. The motion shall state concisely the reasons why a reply brief is believed to be desirable or necessary and the issues to be addressed in the reply brief. The proposed reply brief may be submitted with the motion for leave and shall be limited to a concise rebuttal to arguments set out in the brief of the appellee which were not addressed in the appellant's principal brief. Unless otherwise ordered by the Court, the motion for leave will be determined solely upon the motion and without response thereto or oral argument. The clerk of the appellate court will notify the parties of the Court's action upon the motion, and if the motion is granted, the appellant shall file and serve the reply brief within ten days of such notice.

The titles of Rule 30 and Rule 30(e) are amended to read:

RULE 30. ORAL ARGUMENT AND UNPUBLISHED OPINIONS.

(e) ~~Decision of Appeal Without Publication of an Opinion~~ Unpublished Opinions.

II. Appendixes A, B, and E of the North Carolina Rules of Appellate Procedure are amended as described below:

Appendix A is amended as follows:

TIMETABLE OF APPEALS FROM TRIAL DIVISION UNDER ARTICLE II OF THE RULES OF APPELLATE PROCEDURE

Action	*Time (Days)*	*From date of*	*Rule Ref.*
* * *			
Serving proposed record on appeal		notice of appeal (no transcript) or reporter's certificate of delivery of transcript	11(b)
(civil, non-capital criminal)	35		
(agency)	35		18(d)
Serving proposed record on appeal (capital)	70	reporter's certificate of delivery	11(b)
Serving objections or proposed alternative record on appeal		service of proposed record	11(c)
(civil, non-capital criminal)	~~21~~ 30		
(capital criminal)	35		
(agency)	30	service of proposed record	18(d)(2)
* * *			

Appendix B is amended by deleting the parenthetical shown with a strikeout and by adding the words shown in brackets:

* * *

TABLE OF CASES AND AUTHORITIES

Immediately following the index and before the inside caption, all briefs, petitions, and motions greater than five pages in length shall contain a table of cases and authorities. Cases should be arranged alphabetically, followed by constitutional provisions, statutes, regulations, and other textbooks and authorities. The format should be similar to that of the index. Citations should be made according to [the most recent edition of] A Uniform System of Citation ~~(14th ed.)~~. [Citations shall include parallel citations to official state reporters.]

* * *

Appendix E is amended as follows:

* * *

ARGUMENT

Each question will be set forth in upper case type as the party's contention, followed by the assignments of error pertinent to the question, identified by their numbers and by the pages in the printed record on appeal or in the transcript at which they appear, and separate arguments pertaining to and supporting that contention, e.g.,

I. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN DENYING THE DEFENDANT'S MOTION TO SUPPRESS HIS INCULPATORY STATEMENT BECAUSE THAT STATEMENT WAS THE PRODUCT OF AN ILLEGAL DETENTION.

ASSIGNMENT OF ERROR NO. 2

(T. p. 45, lines 20-23)

The standard of review for each question presented shall be set out in accordance with Appellate Rule 28(b)(6).

Parties should feel free to summarize, quote from, or cite to the record or transcript during the presentation of argument. If the transcript option is selected under Appellate Rule 9(c), the Appendix to the Brief becomes a consideration, as described in Appellate Rule 28 and below.

Where statutory or regulatory materials are cited, the relevant portions should be quoted in the body of the argument or placed in the appendix to the brief. Appellate Rule 28(d)(1)c.

* * *

These amendments to the North Carolina Rules of Appellate Procedure shall be effective on the 1st day of September, 2005.

Adopted by the Court in Conference this the 18th day of August, 2005. These amendments shall be promulgated by publication in the Advance Sheets of the Supreme Court and the Court of Appeals. These amendments shall also be published as quickly as practical on the North Carolina Judicial Branch of Government Internet Home Page (http://www.nccourts.org).

Edmunds, J.
For the Court

HEADNOTE INDEX

WORD AND PHRASE INDEX

HEADNOTE INDEX

TOPICS COVERED IN THIS INDEX

APPEAL AND ERROR—Continued

expert witness to testify regarding the bloody towel and pillowcase, this assignment of error is dismissed because defendant did not object to this exchange at trial. **State v. Campbell, 644.**

Preservation of issues—failure to object—failure to assert plain error—Although defendant contends the trial court erred by allowing a prior statement of a witness into evidence for the purpose of corroborating his trial testimony, this assignment of error is dismissed because defendant failed to object or to assert plain error. **State v. Bell, 1.**

Preservation of issues—failure to object—failure to assert plain error—Defendant waived his right to appellate review of the admission of evidence of defendant's prior acts of violence because he failed to object when the witness testified and failed specifically and distinctly to allege plain error. **State v. Dennison, 312.**

Preservation of issues—failure to object—failure to assign error—Although defendant contends the trial court violated double jeopardy principles by submitting the charges of first-degree murder and first-degree kidnapping based on the victim having been seriously injured, this assignment of error is dismissed because defendant failed to object and to raise the issue of double jeopardy in his assignments of error. **State v. Bell, 1.**

Preservation of issues—failure to raise constitutional issues at trial—Although defendant contends the trial court violated his Fifth, Sixth, Eighth, and Fourteenth Amendment rights in a capital first-degree murder, attempted first-degree murder, and discharging a firearm into occupied property case by admitting a detective's testimony that defendant surrendered to law enforcement officers in the presence of his family and his attorney, and that after taking defendant into custody the detective did not conduct an interview with defendant, this assignment of error is overruled because constitutional error will not be considered for the first time on appeal. **State v. Chapman, 328.**

Preservation of issues—failure to raise constitutional issues at trial—Although defendant contends the trial court violated his federal and state constitutional rights by including portions of testimony from the State's expert witness in a capital first-degree murder case, this assignment of error is dismissed because defendant failed to raise these constitutional issues at trial. **State v. Campbell, 644.**

Preservation of issues—motion for appropriate relief—ineffective assistance of counsel claims—Defendant in a capital first-degree murder case is entitled to assert in a subsequent motion for appropriate relief any ineffective assistance of counsel claims not apparent from the record. **State v. Morgan, 131.**

Preservation of issues—prohibited arguments—Defendant did not preserve for appellate review the court's sustaining of an objection to his argument on residual doubt. The State had made a motion in limine to prohibit certain arguments, including residual doubt, defense counsel agreed that such arguments were impermissible and that he did not intend to make that argument, and the court had granted the motion. Having violated the trial court's order restricting certain statements and arguments at trial, defendant cannot now use that violation to bring the issue on appeal. **State v. al-Bayyinah, 741.**

CRIMINAL LAW—Continued

prospective juror to speak audibly in order for the court reporter to record her responses, and when explaining the importance of court reporters in honor of National Court Reporter Day during a break in the trial will not be reviewed on appeal because defendant did not object to the statements at the time they were made, and the statements did not constitute jury instructions and thus do not fall within the purview of plain error. **State v. Bell, 1.**

First-degree murder—instruction—consideration of evidence—unanimity—The trial court's instruction in a first-degree murder case that the jurors should "decide for yourselves collectively and unanimously what you're going to see fit to believe to the extent of beyond a reasonable doubt in accordance with what the State must prove" did not erroneously require the jurors unanimously to decide what evidence to believe beyond a reasonable doubt, because: (1) the pertinent instruction did not suggest that individual jurors should surrender their own convictions; (2) the instruction restated both that the State bore the burden of proving every element of the offense beyond a reasonable doubt and that the jury must believe beyond a reasonable doubt that each element had been proven before it could convict; and (3) even assuming arguendo that the pertinent portion of the instructions was improper, the jury would not have reached a different result given the compelling evidence of defendant's guilt. **State v. Morgan, 131.**

First-degree murder—instruction—importance of evidenc—burden of proof—The trial court's instruction to the jury in a first-degree murder case on deciding the importance of evidence did not impermissibly shift the burden of proof to defendant and was not plain error, because: (1) although the pertinent portion of the instruction is awkwardly phrased, it advises the jury that the State has the burden of proving its evidence beyond a reasonable doubt; (2) the trial court unquestionably instructed the jury correctly elsewhere as to the burden of proof; (3) after giving the instruction to which defendant objects, the trial court on several other occasions instructed the jury that the State bore the burden of proving its case beyond a reasonable doubt; and (4) even assuming arguendo that the pertinent portion of the instructions was improper, the jury would not have reached a different result given the compelling evidence of defendant's guilt. **State v. Morgan, 131.**

First-degree murder—instruction—simply satisfied with evidence—The trial court did not commit plain error in a capital first-degree murder case by its instruction to the jury that allegedly stated the jury must be simply satisfied with defendant's evidence in order for it to be believed because the trial court advised the jury that defendant had no burden to prove his innocence and repeatedly instructed that the State bore the burden of proof. **State v. Morgan, 131.**

Joinder—trials—motion to sever—The trial court did not violate defendant's rights to a fair trial and due process of law in a first-degree murder, first-degree kidnapping, and burning of personal property case by joining the trials of defendant and a codefendant and by denying defendant's motion to sever the trials. **State v. Bell, 1.**

Limiting instruction—objected to by defendant—not required—admissions of party opponent—A limiting instruction was not required in a prosecution for first-degree murder and attempted armed robbery where the court admitted incriminating statements made by defendant shortly after his arrest.

CRIMINAL LAW—Continued

CRIMINAL LAW—Continued

EVIDENCE—Continued

Exclusion of testimony—prior violent sexual act by victim—The trial court did not err in a capital first-degree murder case by excluding testimony regarding an alleged prior violent sexual act by the victim even though defendant wanted to use it to show that the victim was the first aggressor in the incident leading up to his death because defendant had not offered any evidence of self-defense. **State v. Campbell, 644.**

Expert opinion—exclusion of basis of testimony—The basis of an expert's opinion is not automatically admissible. Here, the exclusion of the basis for a psychiatrist's opinion that a first-degree murder suspect was cocaine dependent with impaired thinking ability was excluded because it was based in part on self-serving statements defendant made to her and to his family about his drug use on the day of the murder. The trial court properly applied N.C.G.S. § 8C-1, Rule 403 to find that the probative value of the statements was outweighed by the danger of unfair prejudice. **State v. Smith, 199.**

Expert opinion—specialized knowledge—defendant's state of mind—The trial court did not err in a capital first-degree murder case by allowing the State's expert witness to give his opinion as to defendant's state of mind based on the fact that the victim was found lying prone on the floor when at least one blow was dealt. **State v. Campbell, 644.**

Expert testimony—location of blood spatter—intent—The trial court did not err in a capital first-degree murder case by overruling defendant's objections to portions of the testimony of the State's expert witness about the two locations of blood spatter in the victim's home used to show intent. **State v. Campbell, 644.**

Hearsay—caught in lie—not offered for truth of matter asserted—The trial court did not err in a capital first-degree murder, attempted first-degree murder, and discharging a firearm into occupied property case by admitting three statements made by a detective on direct examination about his interview with defendant's coparticipant concerning officers checking out the coparticipant's story about staying with two ladies and finding the statement to be true, that there were statements made at the ladies' apartment that the coparticipant was aware of the pertinent shooting, and that officers had information that the coparticipant stayed the night with the two ladies. **State v. Chapman, 328.**

Hearsay—not offered for truth of matter asserted—course of conduct—The trial court did not err in a capital first-degree murder, attempted first-degree murder, and discharging a firearm into occupied property case by admitting alleged hearsay evidence during the direct examination of a detective who testified from his notes concerning his interview with defendant because defendant's statement to the detective was admissible as admissions of a party opponent and to explain defendant's course of conduct. **State v. Chapman, 328.**

Hearsay—unavailable witness-present sense impression—right of confrontation—The trial court did not err in a capital first-degree murder case by admitting three of a witness's out-of-court statements even though the witness died prior to trial because one statement was admissible as a present sense impression, the second statement was elicited by defense counsel, and although the third statement made to an officer was admitted in violation of defendant's Sixth Amendment right to confront his accuser, it was harmless error in light of other overwhelming evidence of defendant's guilt of first-degree murder. **State v. Morgan, 131.**

EVIDENCE—Continued

EVIDENCE—Continued

to be unavailable and had never been subjected to cross-examination by defendant, this error was harmless beyond a reasonable doubt because defendant's guilty plea to common law robbery was an admission of the commission of a felony involving the use or threat of violence even without the erroneous admission of the victim's statement. **State v. Bell, 1.**

Testimony—witness testified truthfully—testimony of witness's attorney—The trial court did not err or commit plain error in a capital first-degree murder, attempted first-degree murder, and discharging a firearm into occupied property case by admitting the statements of defendant's coparticipant that he testified truthfully during direct and redirect examinations after his credibility was attacked, by admitting the coparticipant's testimony that he was represented and advised by counsel during the formalization of a plea agreement related to the victim's death, and by admitting the testimony of the coparticipant's attorney that the coparticipant was represented by counsel during plea negotiations on charges related to the victim's death. **State v. Chapman, 328.**

HOMICIDE

Attempted common law murder—short-form indictment—The Court of Appeals erred by concluding that the short-form indictment in this case charged defendant with the offense of attempted common law murder which is an offense not recognized by our General Statutes. **State v. Jones, 832.**

Attempted first-degree murder—first-degree murder—motion to dismiss—sufficiency of evidence—The trial court did not err by denying defendant's motion to dismiss the attempted first-degree murder and first-degree murder charges at the close of all the evidence. **State v. Chapman, 328.**

Attempted first-degree murder—short-form indictment—N.C.G.S. § 15-144, when construed alongside N.C.G.S. § 15-170, implicitly authorizes the use of a short-form indictment to charge attempted first-degree murder.. **State v. Jones, 832.**

Attempted first-degree murder—short-form indictment—constitutionality—The short-form indictment used to charge defendant with attempted first-degree murder was constitutional. **State v. Jones, 832.**

Felony murder—discharging firearm into occupied vehicle—motion to dismiss—sufficiency of evidence—The trial court did not err by denying defendant's motion to dismiss the charge of first-degree felony murder based upon the felony of discharging a firearm into an occupied vehicle. **State v. Chapman, 328.**

Felony murder—motion to dismiss—sufficiency of evidence—The trial court did not err by failing to dismiss the charge of felony murder, nor did it violate defendant's constitutional rights by submitting the N.C.G.S. § 15A-2000(e)(5) aggravating circumstance that the capital felony was committed while defendant was engaged in the commission of robbery, because the evidence permits a reasonable jury to infer that defendant murdered and robbed the victim without any break in the series of events. **State v. Campbell, 644.**

First-degree murder—deliberation—sufficiency of evidence—The State's evidence in a first-degree murder case was sufficient to show that defendant

PENALTIES, FINES, AND FORFEITURES—Continued

civil penalties under N.C.G.S. § 20-309(e) by the Department of Transportation for lapses in insurance coverage are subject to Article IX, Section 7 of the North Carolina Constitution and belong to the public schools. **N.C. School Bds. Ass'n v. Moore, 474.**

Monies collected by Employment Security Commission—overdue employer contributions, late reports, and returned checks—The Court of Appeals erred by reversing the trial court's judgment that monies collected by the Employment Security Commission under Chapter 96 of the General Statutes (Employment Security Act) for overdue employer contributions, late reports, and returned checks were subject to Article IX, Section 7 of the North Carolina Constitution. **N.C. School Bds. Ass'n v. Moore, 474.**

Monies collected by State agencies and licensing boards—late renewal of licenses or late payment of license fees—The Court of Appeals did not err by holding that payments collected by state agencies and licensing boards for the late renewal of licenses or the late payment of licensing fees are not subject to Article IX, Section 7 of the North Carolina Constitution. **N.C. School Bds. Ass'n v. Moore, 474.**

Monies collected for unauthorized substances tax—The Court of Appeals did not err by holding that monies collected pursuant to Article 2D of Chapter 105, entitled "Unauthorized Substances Taxes," were not required to be paid to public schools under Article IX, Section 7 of the North Carolina Constitution. **N.C. School Bds. Ass'n v. Moore, 474.**

Payment by environmental violator to fund supplemental environmental project—The Court of Appeals did not err by affirming the trial court's ruling that payments by an environmental offender to fund a Supplemental Environmental Project (SEP) in lieu of paying a portion of a civil penalty assessed by DENR, including the money paid by the City of Kinston to Lenoir Community College, are subject to Article IX, Section 7 of the North Carolina Constitution. **N.C. School Bds. Ass'n v. Moore, 474.**

Payments collected at University campuses—loss, damage, or late return of materials from campus libraries—The Court of Appeals did not err by holding that payments collected by the trustees of each University of North Carolina campus for loss, damage, or late return of materials borrowed from campus libraries are not subject to Article IX, Section 7 of the North Carolina Constitution. **N.C. School Bds. Ass'n v. Moore, 474.**

Payments for late filings, underpayments, and failure to comply with Revenue Act—The Court of Appeals erred by holding that payments collected by the Department of Revenue under N.C.G.S. §§ 105-113.89, -163.8, -163.15, -163.41, and -236 for late filings, underpayments, and failure to comply with various provisions of the North Carolina Revenue Act were not subject to Article IX, Section 7 of the North Carolina Constitution. **N.C. School Bds. Ass'n v. Moore, 474.**

Proceeds collected by Department of Transportation—overweight vehicles—The Court of Appeals did not err by concluding that proceeds of payments collected by the North Carolina Department of Transportation pursuant to N.C.G.S. § 20-118(e) are subject to Article IX, Section 7 of the North Carolina Constitution and belong to the public schools based on the fact that penalties assessed against owners of overweight vehicles are reimbursement for damages or are a tax. **N.C. School Bds. Ass'n v. Moore, 474.**

SENTENCING—Continued

SENTENCING—Continued

SENTENCING—Continued

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